No. 13-1038

In the Supreme Court of the United States

IAN CUNNINGHAM,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

RESPONDENT'S BRIEF

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Questions presented

1. Is a federal question raised by a claim that a state collateral review court erroneously failed to find a *Teague* exception?

2. Does *Miller v. Alabama*, which "does not categorically bar a penalty" but instead "mandates only ... a certain process" state a "substantive" or "watershed" rule under *Teague*?

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Jurisdiction

Pennsylvania follows *Teague v. Lane*, 489 U.S. 288 (1989), when deciding whether new decisions of this Court are retroactively effective on state collateral review. *Commonwealth v. Bracey*, 986 A.2d 128, 143-44 (Pa. 2009). In this case the Pennsylvania Supreme Court held that the new rule in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), does not meet a *Teague* exception.

This Court has not held that *Teague* exceptions are binding on state collateral review. Petitioner has not addressed this threshold question, and the reasoning of *Danforth v. Minnesota*, 552 U.S. 264 (2008), can be read to imply that a state court's failure to apply a *Teague* exception on state collateral review does not raise a federal question.

The Commonwealth would argue, however, that a new rule that meets a *Teague* exception must be applied by a state in its conduct of collateral review, in the same manner in which new rules must be applied on direct review. It respectfully submits that certiorari should be granted to address this question, which follows from the one identified by petitioner.

Statement of the case

Petitioner fatally shot a man in the chest in 1999. He now asks this Court to review the decision of the Supreme Court of Pennsylvania that, on state collateral review, his claim for relief from his life sentence for murder under *Miller v. Alabama* failed because no *Teague* exception applies.

Pennsylvania submits that this Court should grant review, for two reasons. First, as a matter of jurisdiction, this case presents the question left open in *Danforth v. Minnesota*: whether *Teague* exceptions are binding on state collateral review. Second, federal and state courts across the nation have split on the question of whether the new rule in *Miller* meets a *Teague* exception. These questions are interrelated. A clear holding by this Court is warranted on both.

On September 10, 1999, murder victim Daniel Delarge Jr. was driving with two passengers, his father Daniel Delarge Sr. and his father's friend Robert Carter, to various locations in Philadelphia seeking buyers for a handgun the father wanted to sell. At approximately 7 p.m. they stopped at Sharpnack Street near Chew Avenue to talk to a neighboorhood resident. As they did this, petitioner's accomplice Terrance Davis approached the passenger side of the car and said he was interested in buying the gun. Another unidentified man also appeared and asked about the price. Davis suddenly produced two handguns of his own, pointed them at the victims, and demanded "everything you have."

Petitioner Ian Cunningham, then age 17, also armed with a handgun, ran up to the driver's side of the car with another unidentified accomplice, and pointed his gun at the driver, Daniel Delarge Jr. The conspirators searched the occupants of the car and robbed them. Mr. Delarge Sr. begged the gunmen to let them leave, but Davis threatened to shoot if they tried to drive away. Mr. Delarge Sr. nevertheless told Daniel to start the car. When he did, Davis said to petitioner, "pop him." Petitioner shoved the muzzle of his gun to the victim's chest and shot him. The passengers managed to steer the still-moving car from the scene and then drove to Germantown Hospital, where doctors pronounced Daniel Delarge Jr. dead.

A jury found petitioner guilty of murder of the second degree, two counts of robbery as a first degree felony, weapons offenses, and criminal conspiracy. The court sentenced him to a legally mandated term of life imprisonment without possibility of parole, and aggregate consecutive sentences of seven and one-half to fifteen years.

Following an unsuccessful direct appeal in which he did not challenge his sentence, petitioner filed for state collateral review under the Post Conviction Relief Act (PCRA). There, he argued that because he had been under the age of 18 at the time he committed the murder, his sentence of life imprisonment was unconstitutional. The common pleas court denied the petition, and on appeal the Pennsylvania Superior Court affirmed.

Petitioner sought a discretionary appeal to the Pennsylvania Supreme Court. On June 25, 2012, while

that application was pending, this Court ruled in *Miller v. Alabama* "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.'" The Pennsylvania Supreme Court accepted the appeal to consider whether *Miller* is retroactive under the *Teague* framework, which Pennsylvania follows on collateral review.

The state court held in a 4-3 decision that the new rule in *Miller* is procedural and not substantive under *Teague*, and so not retroactively effective on collateral review. Justice Saylor's majority opinion deemed the question "fairly straightforward," noting that "by its own terms, the *Miller* holding does not categorically bar a penalty for a class of offenders." *Commonwealth v. Cunningham*, 81 A.3d 1, 10 (Pa. 2013) (citations and internal quotation marks omitted). Justice Baer's dissenting opinion argued that the new rule has substantive "attributes" since it categorically prohibits "mandatory" life without parole for juvenile offenders. *Id.* at 20. Also, because Kuntrell Jackson's companion case to *Miller* had been on appeal from state collateral review, the dissent inferred that this Court must have "intended" *Miller* to apply retroactively, noting that "other courts around the nation" have so held. *Id.* at 22.

Petitioner now seeks certiorari, contending that because "[t]rue justice should not depend on a particular date on a calendar," this Court should "extend[ ] *Miller's* rationale" to "those who were not fortunate enough to be sentenced later" (petition, 6-7).

The Commonwealth submits that certiorari should be granted. It is an open question whether a *Teague* exception is binding on states conducting collateral review, and the division of lower courts on the question of whether a *Teague* exception applies to *Miller* can be resolved only by this Court.

Argument

1. Review is warranted to confirm that a *Teague* exception is binding on state collateral review.

Petitioner argues that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), should retroactively apply on state collateral review, because, in his view, the new rule in that case meets an exception to *Teague v. Lane*, 489 U.S. 288 (1989). Before the merits of that question may be reached, it is a jurisdictional necessity to decide if it is a *federal* question.[1]

A state's failure to apply a new rule on direct review "violates basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987). *Teague* nevertheless "prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994).

Teague has no such preventive effect in a state proceeding. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), this Court held that *Teague* does not bar a state

[1] It is undisputed that the rule in *Miller* is "new."

court, unlike a federal court, from granting relief under a new federal rule when no *Teague* exception applies. *Danforth* expressly left open, however, the question of whether a new rule that *meets* a *Teague* exception would *compel* a state court to grant relief on collateral review, 552 U.S. at 269 n.4.

It is true, as *Danforth* stressed, that *"Teague* speaks only to the context of federal habeas." 552 U.S. at 281. This focus follows from the fact that *Teague* addressed concerns central to the federal habeas process, including that general federal imposition of new constitutional rules on the states after direct review was complete would "seriously undermine[ ] the principle of finality which is essential to the criminal justice system." The harm to society from rendering each criminal conviction tentative and constantly subject to fresh litigation would outweigh any benefit. 489 U.S. at 309. And as a matter of comity, states should not be continually forced by federal courts to muster resources to defend judgments that conformed to then-extant federal law, nor asked to anticipate future rules in an attempt to comply with them. *Id.* at 310. It is therefore undeniable that *Teague* affords a procedural defense to states in federal habeas actions. *E.g., Beard v. Banks*, 542 U.S. 406, 412 (2004) (explaining that *Teague* is "a limitation on the power of federal courts").

By the same token, however, even entirely new constitutional rules may have binding effect on federal collateral review if no *Teague* defense is raised. *Goeke v. Branch*, 514 U.S. 115, 117 (1995) ("a court need not entertain the [*Teague*] defense if the State has not raised it"); *Collins v. Youngblood*, 497 U.S. 37, 41

(1990) (*Teague* has no effect if the state elects not to assert it). It is likewise clear that state collateral review must honor a federal constitutional rule that is *not* new – i.e., that preceded the final judgment – where the state court addresses the merits. *Yates v. Aiken*, 484 U.S. 211, 217-218 (1988) (explaining that the case in issue "did not announce a new rule").

What remains to be decided is whether a new rule subject to a *Teague* exception is binding on states conducting collateral review. In this regard, *Teague* makes clear that the comity and federalism concerns at the heart of its analysis fall away when an exception applies. In such a case the new rule will necessarily and inevitably apply in subsequent federal collateral review. Where the new rule must be applied despite comity and federalism concerns, the principle stressed by the dissent in *Danforth* – that "the retroactivity of new federal rules is a question of federal law binding on States," 552 U.S. at 293 (Roberts, C.J., and Kennedy, J., dissenting) – comes to the fore. To bar a new rule that is excepted from *Teague* could readily be said to "violate[ ] basic norms of constitutional adjudication." *Griffith v. Kentucky*, 479 U.S. at 322.

Teague does not establish only a general defense against new rules in federal habeas review; it also establishes that some new rules may be so exceptional that they cannot be barred. *Teague* exceptions characterize rules that are so compelling that even fundamental concerns of comity and federalism must give way. That which makes a new rule exceptional as a matter of federal constitutional law – i.e., it is essential to a valid criminal conviction, or places persons or conduct beyond the state's proscriptive

power – must oblige a state to apply that new rule in its own collateral review process.

It follows that, where a *Teague* exception is claimed on state collateral review, this Court has jurisdiction to decide whether or not the exception applies.

2. *Miller v. Alabama* is barred on collateral review under *Teague v. Lane*.

If indeed states must apply on collateral review a new rule that meets a *Teague* exception, that would not change the nature of the *Teague* analysis. The concerns for finality and comity at the heart of that case would remain in full force, and exceptions should continue to be strictly construed.

Such concerns are acute in homicide cases because the deceased is never the sole victim. Newly imposing a parole process on families who had been led to believe the case was completed would exacerbate the costs of retroactivity:

> Each parole proceeding inflicts on them the mental and physical anguish of replaying the murder in their mind's eye as they prepare for and attend parole hearings. Worse still, they must repeat this process over and over each time the killer becomes eligible for parole. And throughout this process, they live in constant fear that the killer will be set loose on society. For these reasons, a life-*with*-parole sentence has been likened to

> "sentencing the victim and the victim's family, as well." ... To create a rule prohibiting life-without-parole sentences for all teen-aged killers would thus impose real and immeasurable harm on their victims.

(*Miller*, brief of amicus, *National Organization of Victims of Juvenile Lifers In Support of Respondents*, 21-22).

Thus, contrary to what petitioner implies, *Teague* should not be given a lax or broad construction in order to serve his personal interest in what he considers "[t]rue justice" (petition at 6). For good reason, the *Teague* exceptions are "narrow," "limited," and "circumscribed," *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997) (citations omitted), and they should remain so.

Review is nevertheless warranted in light of the conflict in the decisions of lower courts. *Compare, e.g., State v. Ragland*, 836 N.W.2d 107, 115 (Iowa 2013) (finding retroactive effect compelled because "*Miller* does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law") *with State v. Tate*, 130 So.3d 829, 838 (La. 2013) (finding no retroactive effect because "the *Miller* Court, like the Court in *Summerlin,* merely altered the permissible methods by which the State could exercise its continuing power") (emphasis omitted); *In Re Morgan*, 713 F.3d 1365 (11th Cir. 2013) (same, concluding that *Miller* "declined to consider a categorical bar on life without parole for juveniles").

On the merits the analysis is straightforward, as the Pennsylvania Supreme Court majority concluded. No *Teague* exception applies to *Miller*, and the arguments petitioner offers for finding one fail.

A. *Miller* is procedural.

Miller establishes a procedural rule. Substantive rules constitute a *Teague* exception because they "place particular conduct or persons ... beyond the State's power to punish." In the sentencing context they apply retroactively because they define "a punishment that the law cannot impose." A substantive rule "alters the range of conduct or the class of persons that the law punishes." In contrast, a procedural rule regulates "only the *manner of determining* the defendant's culpability[.]" Rules that do not "alter the range of conduct ... subjected to" a particular penalty, but only "alter the range of permissible methods for determining whether a defendant's conduct is punishable by" that penalty are "prototypical procedural rules." *Schriro v. Summerlin*, 542 U.S. 348, 351-353 (2004) (emphasis original).

Examples of substantive rules are found in *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that an offender who was a minor at the time of a non-homicide offense may never be sentenced to life without parole), and *Roper v. Simmons*, 543 U.S. 551 (2005) (barring death sentence for offenders who were under 18 at the time of the crime). One need not long ponder whether the rule in *Miller* is of the substantive kind, because in *Miller* itself this Court clearly stated that it is not:

> Our decision does not categorically ban 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.

Miller does not exclude life without parole as a punishment for any offender or class of offenders. It does not define any "punishment that the law cannot impose." *Schriro*, 542 U.S. at 352. A rule that "mandates only that a sentencer follow a certain process" is obviously procedural.

In arguing otherwise petitioner conflates process and penalty, deeming "mandatory life without parole" to be the "punishment" that "the law can no longer impose on him" (petition at 10). This is sophistry. The punishment and its manner of imposition are different things; the process is not the penalty. A killer serving life without parole by discretion serves exactly the same sentence as one whose sentence was automatic. *Miller* only removed "mandatory" from "mandatory life without parole." Because it did not exclude any punishment, but only imposed a process, *Miller* is procedural.

Petitioner cites *Alleyne v. United States*, 133 S. Ct. 2151 (2013), in support of his contention that the word "mandatory" connotes a substantively "harsher" punishment (petition at 13). But *Allene* merely applied

the procedural rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to mandatory minimum sentences. It said nothing to suggest that a mandatory minimum term is somehow "harsher" for being mandatory than the same term imposed by discretion. To the contrary, *Alleyne* observed that "[e]stablishing what punishment is available by law and setting a specific punishment within the bounds of that law" are "two different things." *Id.*, 2163 (citation omitted). *Alleyne* imposed a procedural rule, as did *Miller*.[2]

B. *Miller*'s derivation is irrelevant.

Petitioner argues that the new rule in *Miller* must be "substantive" because it "involves" a "substantive" analysis of evolving Eighth Amendment standards (petition, 14). This is more sophistry. However weighty the constitutional concerns that lead to a new procedural rule, the rule is no less procedural. Even new rules in capital cases, derived from Eighth Amendment concerns of the highest "substantive" import, are barred by *Teague* if the rules themselves are procedural. *E.g., Beard v. Banks, supra* (new rule to ensure that capital sentencing jurors are not prevented from giving effect to mitigating evidence not found unanimously was procedural and barred by *Teague*); *Graham v. Collins*, 506 U.S. 461 (1993) (new rule to ensure that capital sentencing jurors could give effect to evidence of mental retardation and abused

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[2] *See Sepulveda v. United States*, 330 F.3d 55, 62-63 (1st Cir. 2003) ("The *Apprendi* decision is about criminal procedure, pure and simple. ... [T]he procedure required by *Apprendi* has the capacity to improve substance – but it is not substance in and of itself").

childhood not encompassed by state law was procedural and barred by *Teague*); *Sawyer v. Smith*, 497 U.S. 227 (1990) (new rule preventing misleading of capital sentencing jurors by suggesting that ultimate responsibility for imposing sentence lay elsewhere was procedural and barred by *Teague*). Nothing in *Teague* suggests the existence of a previously-unknown exception based on the "substantiveness" of the constitutional analysis that results in a new procedural rule.[3]

C. *Miller* is not a "watershed rule."

Petitioner argues that *Miller* meets the exception for "watershed rules" (petition at 17). It does not.

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[3] Petitioner cites *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality), as a case "repeatedly relied upon by the *Miller* court" (petition at 15). But *Miller* did not cite *Woodson* (and similar cases) for the proposition that its new rule was substantive. *Woodson* was cited as an example of a case in which a mandatory punishment was prohibited in favor of requiring consideration of the "characteristics of the defendant and the details of his offense before sentencing him to death." 132 S. Ct. at 2463-2464. Thus *Woodson*, like *Miller*, did not preclude a penalty but only required "a certain procedure" for its imposition. *Id.* at 2471. Petitioner also relies on pre-*Teague* decisions – one Circuit Court decision, one state court decision, and one District Court decision – in order to contend that Eighth Amendment procedural rules in capital cases "have been held retroactive" (petition at 16, citing *Songer v. Wainwright*, 769 F.2d 1488 (11th Cir. 1985) (en banc); *Harvard v. State*, 486 So.2d 537 (Fla. 1986); *Shuman v. Wolff*, 571 F. Supp. 213 (D. Nev. 1983)). Since all of these cases predate *Teague*, of course none discusses, much less finds, any *Teague* exception. They offer no support for petitioner's argument.

The term "watershed" is "meant to apply only to a small core of rules requiring observance of those procedures that ... are implicit in the concept of ordered liberty." *O'Dell v. Netherland*, 521 U.S. at 157, *citing Graham v. Collins*, 506 U.S. 461, 478 (1993). A watershed rule "alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311 (original emphasis, citation omitted). As *Schriro* explained, this class of rules is "extremely narrow." "That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished." 542 U.S. at 352 (citation omitted, original emphasis).

Indeed, apart from the guarantee of counsel in criminal proceedings imposed in *Gideon v. Wainwright*, 372 U.S. 335 (1963), "watershed" rules are so extremely rare as to be virtually nonexistent. *Schriro* at 352 ("unlikely" that any new watershed rules will emerge) (citations omitted); *Whorton v. Bockting*, 549 U.S. 406, 417-418 (2007) ("in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status") (collecting cases); *Beard v. Banks*, 542 U.S. at 417 ("it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception").

Gideon being the benchmark, a comparison with *Miller* is instructive. *Gideon* dealt with the right to counsel in a criminal case, a right acknowledged as "fundamental and essential to a fair trial." 372 U.S. at 340. Indeed, the word "fundamental" occurs repeatedly throughout the opinion. *Gideon* recognized, moreover,

that this principle was virtually timeless, having been recognized at the foundation of the republic; the Court explained that in enforcing this right it was not breaking new ground, but rather was "returning to ... old precedents, sounder we believe than the new," in order to "restore constitutional principles established to achieve a fair system of justice." There was also a clear national consensus. Although not every state was heard from as amici, only 3 opposed relief, while 22 denounced the contrary rule as an "anachronism." *Id.* at 344-345. There was no dissent, and the concurring Justices made clear that they embraced the right to counsel as a bedrock principle. *Id.*, 348 (Clark, J., concurring) ("The Court's decision ... does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority"); 352 (Harlan, J., concurring) ("the right to counsel in a case such as this should now be expressly recognized as a fundamental right").

Miller is very different. The holding of the narrow 5-4 majority in that case involved a right to proportionate sentencing, the content of which must be discerned through a "prism" of "evolving standards of decency." 132 S. Ct. at 2463. The reasoning of the majority relied on parental "common sense," along with "science and social science," or "psychology and brain science" and "neurological development," to arrive at a sense of the relative "moral culpability" of offenders under the age of 18. *Id.* at 2464-2465. This analysis led to the conclusion that a life-without-parole sentence for an underage offender in a murder case "may" violate the Eighth Amendment, and that age "can" render such a sentence disproportionate. *Id.* at 2465-2466. The majority expressly rejected state law as an objective

expression of national consensus. *Id.* at 2471-2472 ("In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. That is 10 *more* than impose life without parole on juveniles on a mandatory basis") (original emphasis, citation and footnote omitted).

The *Miller* dissent by three Justices and the Chief Justice criticized the majority decision as being bereft of any objective principle that would distinguish its Eighth Amendment analysis from an application of "subjective values or beliefs." It questioned whether the majority analysis conflated decency and leniency, as well as the apparent conclusion by the majority "that progress toward greater decency can move only in the direction of easing sanctions on the guilty." *Id.* at 2478. In addition, the dissent opined that the *Miller* decision did not follow from the precedent cited to support it. *Id.* at 2481 ("*Graham* stated that [t]here is a line between homicide and other serious violent offenses ... A case that expressly puts an issue in a different category from its own subject, draws a line between the two, and states that the two should not be compared, cannot fairly be said to control that issue ... *Roper* reasoned that the death penalty was not needed to deter juvenile murderers in part because life imprisonment without the possibility of parole was available. ... the Court now tells state legislatures that – *Roper*'s promise notwithstanding – they do not have power to guarantee that once someone commits a heinous murder, he will never do so again") (citations and internal quotation marks omitted).

Thus, whatever may be said of the virtues of the new procedure required by *Miller*, it is not of a more "bedrock" nature than similar rules that enhance the accuracy of capital sentencing, yet are barred by *Teague*. It does not have "the primacy and centrality of the rule adopted in *Gideon*." *Beard v. Banks*, 542 U.S. at 420 (citation omitted).[4]

D. That *Miller*'s companion case was on state collateral review is not a *Teague* exception.

Finally, petitioner contends that *Miller* is retroactive "because Kuntrell Jackson [the offender in the companion case to *Miller*, *Jackson v. Hobbs*] received the same relief" (petition at 19).

This Court's ruling in Kuntrell Jackson's case, however, could have implied nothing about *Teague*. Indeed, contrary to petitioner's understanding, this Court did not order any "relief" for Jackson (or Miller), but only "further proceedings not inconsistent with this opinion." *Miller*, 132 S. Ct. at 2475. Because Jackson was on *state* collateral review, and under *Danforth* a

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[4] In support of his argument petitioner cites *Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968), as an instance of a rule that was applied retroactively because it went to the integrity of the capital sentencing process (petition at 18). But *Witherspoon* was decided two decades prior to *Teague*, and so this Court did not discuss any *Teague* exceptions in that case; nor has it ever concluded that the new rule announced in *Witherspoon* was a "watershed" rule. To the contrary, *Teague* itself rejected retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986), which, like *Witherspoon*, stated a new jury selection rule.

state is permitted to apply new rules that would be barred in federal court by *Teague*, remanding in Jackson's case did not oblige the state to apply *Miller*. It only afforded an *opportunity* to do so subject to any collateral review retroactivity bar the state might raise. And, since *Teague* is not a bar to claims in state courts, this Court in *Miller* not only did not, but *could not*, reach the question of a *Teague* exception, both because no *Teague* defense was asserted, and because had it been asserted, it would have been irrelevant. Any holding (or allegedly implied holding) in *Miller* concerning *Teague* would have been an impermissible dictum. *See Tyler v. Cain*, 533 U.S. at 667-668 (refusing to address retroactivity claim that, if decided, could have no effect in the case at hand and would amount to dictum).

Moreover, petitioner relies on language from *Teague* that he takes out of context to mean the opposite of what it says. There, in a case on federal habeas review, this Court refused to address an open question raised by Teague (whether the fair cross section of the Sixth Amendment should be extended to petit juries), because such a ruling would either be dictum or would benefit Teague but not others similarly situated. *Teague* therefore held that:

> [I]mplicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have

> articulated. Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.

489 U.S. at 315-316 (emphasis original).

Teague thus explained that a new rule should not be addressed on collateral review unless it would meet a *Teague* exception. Petitioner reads this passage to mean that if a new rule is stated in a case on collateral review, the rule must be treated *as if it met* a *Teague* exception. Thus, the argument goes, since in *Miller* this Court supposedly "granted relief to Jackson on collateral review," it is now obliged to do the same for offenders "similarly situated nationwide" (petition at 19).

Petitioner has it backwards. *Teague* said that because new rules are *not* retroactive they would not be announced on collateral review, not that new rules announced on collateral review are retroactive. If a new rule *were* announced in a case on collateral review, that act would not *make* the rule retroactive to other cases on collateral review where no exception applied. To so conclude would contradict *Teague* itself. Further, while it is preferable to avoid stating a new rule on collateral review, it is not always apparent what is "new" under *Teague*; and because some types of claim appear nowhere else, some new rules can be announced only on collateral review.

Thus, in *Padilla v. Kentucky*, 599 U.S. 356 (2010), this Court ruled in Padilla's favor on state collateral review. Under petitioner's logic, this act supposedly proved that the ruling in that case was retroactive on collateral review. But in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), this Court held that the rule stated in *Padilla* was new, did not meet a *Teague* exception, and was *not* retroactive. The same is true here.

Conclusion

For the foregoing reasons, the Commonwealth respectfully submits that the petition should be granted.

Respectfully submitted,

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