

No. 13-1264

Supreme Court, U.S.
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In The
Supreme Court of the United States

— ♦ —
ZACHARY WITMAN

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

Respondent

— ♦ —
**On Petition For Writ Of Certiorari
To The Superior Court Of Pennsylvania**

— ♦ —
RESPONDENT'S BRIEF IN OPPOSITION

— ♦ —
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**COUNTERSTATEMENT OF THE
QUESTION PRESENTED**

Did the Pennsylvania Supreme Court properly apply United States Supreme Court precedent when determining that the United States Supreme Court's holding in *Miller v. Alabama*, which forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, did not apply retroactively to Petitioner's 2003 judgment of sentence, which became final in 2005?

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COUNTERSTATEMENT OF THE CASE

On October 2, 1998, at approximately 3:05 p.m., Gregory Witman was dropped off by his school bus near his home in New Freedom, York County. Gregory entered his home through the front door, which he unlocked with a key left in the doorknob by his brother, the Petitioner. The Petitioner was home when Gregory arrived, as the Petitioner stayed home with a stomachache. The Petitioner was the only other member of his family that was home at that time. None of the Petitioner's neighbors noticed anything unusual at the Witman residence at or around that time, nor did they see any unfamiliar people in the neighborhood. However, at 3:17 p.m., the Petitioner called 911 and reported that his brother Gregory was brutally stabbed and nearly decapitated.

An autopsy performed on Gregory by forensic pathologist Dr. Saralee Funke revealed 65 stab wounds to Gregory, including a gaping wound across Gregory's neck that sliced through his right external and internal jugular veins, the right carotid artery, the trachea, the esophagus, and the left external and internal jugular veins.

When police and emergency personnel first encountered the Petitioner at his home after the murder, June Weigle noticed that the Petitioner had a fresh cut on the inside of his left ring finger. The Petitioner initially stated that he had cut his finger the day before. When Weigle stated that it was a fresh cut, however, the Petitioner changed his story

and claimed that he hit something sharp when he rolled Gregory over, which was also part of the Petitioner's story to explain the significant amount of Gregory's blood on his clothing. At the York Hospital, the Petitioner changed his story yet again when he told Dr. Scott McCurley that he sustained the cut while playing with his dogs.

During the crime scene processing of the Petitioner's house, the police discovered a set of footprints leading from the family room of the Witman residence to a patch of disturbed soil under a tree in the backyard. The police found sports gloves caked with blood and dirt, as well as a knife with a blade matching the size of the one used to kill Gregory. The footprints then led back into the residence.

The knife in the backyard used to murder Gregory possessed a yellow handle with a NAPA City Motor Parts logo. The handle also had a Baltimore, Maryland address and phone number inscribed on it. This knife was similar to those found in the Petitioner's knife collection in his bedroom. In particular, the Petitioner owned a knife with a red handle and an AP Long-lasting Mufflers logo. This is significant because Ronald Witman, the Petitioner's father, once owned The Pit Stop, an auto parts store located in Baltimore, Maryland. Auto parts distributors frequently gave promotional items, such as penknives (similar to the murder weapon), to such stores.

With the assistance of a serologist and blood stain pattern evidence, the Commonwealth was able

to establish that the Petitioner initially began stabbing Gregory from behind in the hallway next to the foyer at the front door. After this first attack in the hallway, Gregory went into the foyer. Gregory then headed through the adjoining room towards the laundry room. In the laundry room, Gregory grabbed the handle to the door that led outside the house. Gregory did not escape, however, and he sustained his killing blows on the laundry room floor.

Moreover, an analysis of the bloodstain patterns of Gregory's blood on the Petitioner's sweatshirt contained a transfer pattern of bloody fingers, consistent with the injuries on Gregory's hands, which indicated Gregory's finger movement in a left to right fashion. Second, the sweatshirt possessed hair swipes on the mid-chest and abdominal areas, as well as a cast-off finger pattern on the front, which are consistent with being caused by Gregory's body.

The Petitioner's sweatshirt contained impact spatter on the chest and abdominal areas on the front of the sleeves. This impact spatter in the torso area was larger than the spatter found on the ends of the sleeves. The front left shoulder area, however, was free of bloodstains, which would have been caused by the Petitioner holding Gregory while stabbing him. The most significant bloodstain was on the left arm of the Petitioner's sweatshirt - the pattern was consistent with arterial spurting from Gregory's carotid artery.

As a result of the analysis performed by the serologist and bloodstain pattern analyst, they were

able to conclude that the Petitioner was in close proximity to Gregory while the Petitioner inflicted the fatal injuries. In particular, the Petitioner's left arm would have necessarily been close to the injury site in order to receive the arterial pulse that left this trademark stain.

The results of the forensic autopsy conducted by Dr. Funke on Gregory supported the conclusion that the Petitioner was in very close proximity to Gregory when the Petitioner severed Gregory's right carotid artery. Because the Petitioner severed one main artery in Gregory, pulsatile bleeding occurred. Due to the rapid loss of blood pressure that occurred, Dr. Funke concluded that Gregory, due to the severity of his injuries, bled out extremely quickly.

The Petitioner was convicted of Murder of the First Degree on May 21, 2003. On July 8, 2003, the trial court sentenced the Petitioner to a mandatory term of life imprisonment without the possibility of parole. The Petitioner then filed post-sentence motions, which were denied on November 3, 2003.

Following a timely direct appeal, the Pennsylvania Superior Court affirmed the judgment of sentence on January 11, 2005. The Pennsylvania Supreme Court denied the Petitioner's Petition for Allowance of Appeal on May 12, 2005. On December 12, 2005, this Honorable Court denied the Petitioner's Petition for Writ of Certiorari.

On November 22, 2006, the Petitioner filed a petition for Post Conviction Relief pursuant to the

Post Conviction Relief Act (PCRA). The PCRA Court granted the Petitioner a new trial based upon trial counsel's stipulation to introduce the Petitioner's socks. However, the PCRA Court denied the petition to have the case dismissed pursuant to Rule 600 of the Pennsylvania Rules of Criminal Procedure. Finally, the PCRA Court refused to rule on the five remaining claims of ineffective assistance of counsel.

The Commonwealth filed an appeal to the Pennsylvania Superior Court on December 27, 2007, which was denied. On March 16, 2009, the Pennsylvania Superior Court reversed the PCRA Court's order granting the Petitioner a new trial. In addition, the Superior Court remanded the case to the PCRA Court ordering the PCRA Court to render a decision on the Petitioner's outstanding issues. The Petitioner filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

On remand, the PCRA Court issued an opinion denying all of the Petitioner's outstanding PCRA claims on April 26, 2010. The Petitioner filed another appeal to the Pennsylvania Superior Court on May 10, 2010. The Pennsylvania Superior Court affirmed on December 9, 2011. The Petitioner filed a Petition for Allowance of Appeal on January 5, 2012.

While the Petition for Allowance of Appeal was pending in the Pennsylvania Supreme Court, the Petitioner filed another PCRA petition on August 16, 2012. The PCRA Court reserved its decision pending

the Pennsylvania Supreme Court's resolution of the Petitioner's appeal on September 4, 2012.

The Pennsylvania Supreme Court, on October 30, 2013, held that this Honorable Court's holding in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) did not apply retroactively in *Commonwealth v. Cunningham*, 81 A.3d 1 (Pa. 2013). As a result thereof, the Commonwealth filed a motion to dismiss the Petitioner's PCRA petition on November 13, 2013. On December 10, 2013, as a result of the Commonwealth's motion to dismiss the pending PCRA petition, the PCRA Court entered a second order staying further proceedings until the Pennsylvania Supreme Court resolved the pending appeal. However, the Petitioner filed a motion to amend the Petition for Habeas Corpus Relief and Post Conviction Relief, an Amended Petition for Habeas Corpus Relief and Post Conviction Relief, and an Answer to the Commonwealth's Motion to Dismiss on December 16, 2013. The PCRA Court again entered an order staying the petition on December 27, 2013.

On February 18, 2014, the Pennsylvania Supreme Court denied the Petitioner's Petition for Allowance of Appeal. As a result thereof, the PCRA Court granted the Commonwealth's motion to dismiss on February 28, 2014. This appeal followed.

REASONS FOR OPPOSING THE WRIT OF CERTIORARI

The Pennsylvania Supreme Court properly applied existing United States Supreme Court precedent when the Pennsylvania Supreme Court found that this Honorable Court's holding in *Miller v. Alabama* did not apply retroactively. *Commonwealth v. Cunningham*, 81 A.3d 1, 11 (Pa. 2013). In *Miller*, this Honorable Court announced that mandatory life-without-parole sentences, as applied to those under the age of eighteen, offended the Eighth Amendment by preventing sentencing authorities from considering juveniles' "diminished culpability and heightened capacity for change." *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012). As such, this Honorable Court held that the mandatory imposition of life-without-parole sentences on juvenile offenders was cruel and unusual punishment and violated the Eighth Amendment of the United States Constitution. *Id.* Applying this Court's rulings in *Teague v. Lane*, 489 U.S. 288 (1989) and more recently, *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Pennsylvania Supreme Court properly held that *Miller's* proscription of the imposition of mandatory life-without-parole sentences upon offenders under the age of eighteen at the time their crimes were committed did not extend to those whose judgments of sentence were final as of the time of *Miller's* announcement. *Cunningham*, 81 A.3d 1, 11 (Pa. 2013).

What is most notable about this Honorable Court's holding in *Miller* is that the rule announced by this Honorable Court does not categorically ban

the imposition of a life sentence without the possibility of parole on juvenile offenders. *See Miller*. The sentence is still available to the sentencing judge, if at the time the sentence is imposed, the sentencing judge takes into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison. *Id. Miller*, 132 S. Ct. at 2469. Accordingly, there is only one aspect that is changing, and that change is to the procedure the sentencing court must undergo before the sentencing court can sentence a juvenile offender to life in prison without the possibility of parole, without violating the juvenile offender's constitutional rights.

In *Schriro v. Summerlin*, this Honorable Court held that new rules that are announced by this Honorable Court will apply to criminal convictions that are already final in very limited circumstances. *Schriro v. Summerlin*, 542 U.S. 348, 350 (2004). If the rule is considered substantive, the new rule will generally apply retroactively. *Id.* A rule is substantive rather than procedural if the rule alters the range of conduct or the class of persons the law punished. *Id.* at 352; citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998) (holding that a statute does not reach certain conduct or make conduct criminal); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (rule decriminalizes a class of conduct or prohibits the imposition of punishment on a particular class of persons).

On the other hand, new rules of procedure do not apply retroactively. *Schriro*, 542 U.S. at 352. Procedural rules do not apply retroactively because "[t]hey

do not produce conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* Therefore, "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" are given retroactive effect. *Id.*

When analyzing the issue before the Court, the Pennsylvania Supreme Court relied heavily upon this Honorable Court's ruling in *Teague*. In *Teague*, this Honorable Court ruled that new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced, unless it falls under one of two exceptions. *Id.* at 310-11. First, new rules should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 311; citing *Mackey v. United States*, 401 U.S. 667, 692 (1971). Second, new rules should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.* As stated and relied upon by the Pennsylvania Supreme Court, the construct, as stated above, was solidified by the majority in *Penry v. Lynaugh*, 492 U.S. 302, 329-30 (1989). As noted in *Penry*, the exceptions extend to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Cunningham*, 81 A.3d 1, 4; quoting *Penry*, 492 U.S. at 330, and "watershed rules of criminal procedure implicating

the fundamental fairness and accuracy of the criminal proceedings.” *Id.*; quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

In applying the first exception of the *Teague* rule to *Miller*, the Pennsylvania Supreme Court notes that the first exception does not apply because the *Miller* holding does not categorically bar a penalty for a class of offenders. *Id. Cunningham*, 81 A.3d at 9; citing *Miller*, 132 S. Ct. at 2471 (stating “[o]ur decision does not categorically bar a penalty from a class of offenders or type of crime . . . Instead, it mandates only that a sentence follow a certain process – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.”). Furthermore, the first exception under *Teague* does not apply to *Miller* because “it does not place any conduct beyond the State’s power to punish at all.” See *Cunningham*, 81 A.3d at 9 n. 6; citing *Penry*, 492 U.S. at 330. Therefore, the Pennsylvania Supreme Court found that the rule announced in *Miller* was procedural and not substantive for purposes of *Teague*. *Id. Cunningham*, 81 A.3d at 9.

In applying the second *Teague* exception, not only did the Pennsylvania Supreme Court find that the appellants in *Cunningham* failed to develop an argument regarding the applicability of the second *Teague* exception, but also stated that this Honorable Court’s holdings in prior cases suggest that the retroactive application of new rules is limited to those cases that are considered “sweeping” or watershed. See *id.* at 10; citing *Craig v. Cain*, No. 12-30035, 2013

U.S. App. Lexis 431, 2013 WL 69128, at *2 (depicting *Miller* as “an outgrowth of the Court’s prior decisions that pertain to individualized-sentencing determinations,” rather than a watershed rule broadly impacting fundamental fairness and accuracy in proceedings). See also, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that all indigent defendants charged with felonies are entitled to appointed counsel). Modifications of a less broad scale, as the court explained, while they may be very important, do not require retroactive application under the second *Teague* exception. *Id.* *Cunningham*, 81 A.3d at 9; citing *Whorton v. Bockting*, 549 U.S. 406, 421 (2007).

In the case at bar, the Pennsylvania Supreme Court properly denied the Petitioner’s Petition for Allowance of Appeal. The Petitioner, like the appellant in *Cunningham*, argues that the rule of law as announced by this Honorable Court is a substantive rule of law, and as a result thereof, should be applied retroactively. However, in applying the rules of law and the exceptions as outlined in *Teague* and *Schriro*, like the Pennsylvania Supreme Court did in *Cunningham*, the Petitioner’s argument fails. First, imposing a sentence of life in prison without the possibility of parole is not categorically banned and *Miller*’s holding does not prohibit the imposition of punishment on a particular class of people. Secondly, *Miller*’s holding has not been held by this Honorable Court to be a “watershed rule of criminal procedure.” In fact, this classification is one that this Honorable

Court has considered to be highly limited. Accordingly, *Miller* does not have retroactive effect. As a result thereof, the Petitioner's claim must be decided under the law as it stood at the time when his judgment of sentence became final in 2005.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The Pennsylvania Supreme Court properly applied the laws of the United States Supreme Court when it determined that the rule of law announced in *Miller* is procedural and should not be applied retroactively.

Respectfully submitted,

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