IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3941

KEMPIS SONGSTER

V.

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; DAVID DiGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION GRATERFORD; R. SETH WILLIAMS, DISTRICT ATTORNEY OF PHILADELPHIA, PENNSYLVANIA; KATHLEEN KANE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA – Appellants

REPLY BRIEF FOR APPELLANTS

Appeal from the September 6, 2012 final order of the United States District Court for the Eastern District of Pennsylvania at 2:04-cv-5916.

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SUMMARY OF ARGUMENT

The *Miller* claim is barred from federal habeas review by *Teague*.

The fact that *Miller* involved a case on state collateral review is meaningless. The *Teague* bar to retroactive application concerns only federal courts applying the federal habeas statute. Thus, no *Teague* retroactivity exception can be inferred from the fact that *Miller* decided a case on state collateral review. Songster's effort to discern a message from the Supreme Court's selection of a state case has the message backwards. Selecting state cases eliminated any possibility that *Miller* contains an implicit federal retroactivity exception.

The *Teague* exception for substantive rules is not met because the rule in *Miller* is procedural by definition. Aside from the fact that *Miller* described its own ruling as imposing "only ... process," the Supreme Court itself distinguished its decision from cases that "categorically ban a penalty," and explained that its new rule is instead like its capital cases. Those cases, like *Miller*, do not ban a penalty but require a deliberative process instead of mandatory imposition. The capital cases are procedural and so is *Miller*. To claim otherwise is to insist that the Supreme Court's explanation of its own ruling in *Miller* means just the opposite of what it plainly says.

The order of the district court should be reversed.

ARGUMENT

The *Miller* claim is barred from federal habeas review.

Miller v. Alabama, 132 S. Ct. 2455 (2012), is barred from retroactive application on federal habeas review by *Teague v. Lane*, 489 U.S. 288 (1989). The District Court said otherwise, for two reasons, both erroneous. Songster's arguments fail to justify these errors.

1. State collateral review is irrelevant.

Because the companion case to *Miller*, *Jackson*, was on state collateral review and not federal habeas, the disposition of Jackson's case in *Miller* says nothing about *Teague*.

The *Teague* bar is a "an exercise of [the Supreme Court's] power to interpret the federal habeas statute" and is "grounded in this authority." *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008). The *Teague* bar is "tailored to the unique context of federal habeas" and has "no bearing" on the power of the states to grant relief. *Id.* "It was intended to limit the authority of federal courts to overturn state convictions—not to limit a state court's authority[.]" *Id.* at 280. The *Teague* rule is "a standard limiting only the scope of *federal* habeas relief[.]" *Id.* at 281 (original emphasis). It is "a limitation on the power of *federal* courts to grant habeas corpus relief." *Beard v. Banks*, 542 U.S. 406, 412 (2004) (emphasis added, citation and internal quotation marks omitted); *Stringer v. Black*, 503 U.S. 222, 227 (1992) (*Teague* applies "[w]hen a petitioner seeks federal habeas relief based upon a principle announced after a final judgment").

Because *Teague* "extends only to federal courts applying a federal statute," *Danforth* at 279-280, it is incoherent to posit, as does Songster, that the Supreme Court in *Miller* was implicitly declaring its new rule to be retroactive in federal habeas by deciding a *state* case on "collateral review."

Songster cites *Tyler v. Cain*, 533 U.S. 656 (2001) for the proposition that "[o]nly" the Supreme Court can hold a rule to be retroactive on collateral review (brief for appellee, 16). But such a holding, if it existed, would have to actually state that a *Teague* exception applies:

> According to Tyler, the reasoning of *Sullivan* demonstrates that the *Cage* rule satisfies both prongs of [a] *Teague* exception. ... Tyler's arguments fail to persuade, however. The most he can claim is that, based on the principles outlined in *Teague*, this Court *should* make *Cage* retroactive to cases on collateral review. What is clear, however, is that we have not "made" *Cage* retroactive to cases on collateral review.

Tyler v. Cain, 533 U.S. at 665-666 (emphasis original, footnote omitted).

Here as in *Tyler*, the Supreme Court has not "made" *Miller* retroactive on federal habeas review, because *Miller* did not announce a *Teague* exception holding. Indeed it could not have, as no *Teague* defense was raised (and doing so would have been pointless, since there was no federal habeas proceeding to bar) for the Court to rule upon.

Songster emphasizes that *Tyler* suggests an exception may be recognized "over the course of" cases through "the right combination of holdings" (brief for appellee, 16-17). But he would not need a "combination" of holdings if, as he and the District Court contend, *Miller* already stated the necessary holding. Further, no case

establishes a *Teague* exception in combination with *Miller*, and no such combination is possible. First, under *Tyler* – the case on which Songster relies – the supposed combination must reveal a Supreme Court *holding* that a *Teague* exception applies. 533 U.S. at 664 ("made" means "held"). But the rule in *Miller* is new; there are no other cases that can be read in combination to demonstrate a *Teague* holding with respect to this new rule. Second, nothing in *Miller* itself implies the existence of any exception: on the contrary, the Court itself explained that *Miller* is *unlike* cases announcing new substantive rules. *Miller*, 132 S. Ct. at 2471 (distinguishing cases that "categorically ban a penalty for a class of offenders or type of crime" from *Miller*, which "mandates only that a sentencer follow a certain process").

As for the principle established in *Danforth* and other cases – that *Teague* applies only to federal habeas (and so *Miller* could not have implicitly held its new rule to be retroactive by deciding a state case) – Songster ignores it.[1] His discussion of Jackson's case assumes, without explanation, that for *Teague* purposes federal habeas and state collateral review are both "collateral review." As shown above, this flatly contradicts well settled law.

That *Teague* is inapplicable to state collateral review is further confirmed by

[1] Songster does take a stab at distinguishing *Danforth*, but in doing so he simply announces that *Danforth* "does not speak to the issue" (brief for appellee, 21 n.7). But of course it does – it merely speaks to the issue he wants to ignore. *Danforth* and its progeny establish that the central premise of Songster's argument – that *Miller* must have found a *Teague* exception in a state case – is not merely wrong, but could not possibly be right.

Padilla v. Kentucky, 559 U.S. 356 (2010) (new rule announced on state collateral review) and *Chaidez v. United States*, 133 S. Ct. 1103 (2013) (same new rule barred by *Teague* on federal habeas). Songster says that *Padilla* and *Chaidez* do not count because Chaidez "never argued" that *Padilla* "fell within the first *Teague* exception" (brief for appellee, 21). But this sidesteps his own position, which is that the Supreme Court "logically dictates" and "makes" a new rule retroactive by announcing it on state "collateral review" (brief for appellee, 16-17). The new rule announced on state review in *Padilla* was nevertheless barred by *Teague* from federal habeas review in *Chaidez*. Yet the whole point of Songster's argument is that, because state and federal collateral review are supposedly identical, he and Chaidez have no need to meet a *Teague* exception. That argument is simply wrong.

Songster nevertheless looks for portents in the fact that Jackson's case was on state "collateral review" in *Miller* and insists that this did not occur "by happenstance," implying that the Court must have meant to announce a *Teague* retroactivity ruling by selecting a state case (brief for appellee, 17). But once it is understood that no such ruling can possibly be inferred from a state case, it becomes clear that the real message is that *Miller* may *not* be read to find *Teague* retroactivity.

Songster quotes Justice Alito's dissent in *Miller* describing the cases there as "carefully selected" (*id.*). But the part of the quote Songster omits says that the point of the selection was to feature "very young defendants" in order to provoke

"sympathy." Miller, 132 S. Ct.at 2489.[2] And in any event, carefully selecting only *state* cases reveals a design to *preclude* any implicit *Teague* exception finding. Had the Court *intended* to pronounce a *Teague* exception, surely at least one federal habeas matter involving the same issue was available somewhere in the United States. Instead, in addition to choosing only state cases, to which *Teague* could *not* apply, the Court specified that the new rule in *Miller* requires "only ... a certain process," a clear indication that the new rule is procedural. As far as signals concerning *Teague* are concerned, the message in *Miller* is just the opposite of what Songster claims.

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[2] Justice Alito's dissent actually stated:

> The two (carefully selected) cases before us concern very young defendants, and despite the brutality and evident depravity exhibited by at least one of the petitioners, it is hard not to feel sympathy for a 14–year–old sentenced to life without the possibility of release. But no one should be confused by the particulars of the two cases before us. The category of murderers that the Court delicately calls "children" (murderers under the age of 18) consists overwhelmingly of young men who are fast approaching the legal age of adulthood. Evan Miller and Kuntrell Jackson are anomalies; much more typical are murderers like Donald Roper, who committed a brutal thrill-killing just nine months shy of his 18th birthday.

Id. Speaking of sympathy, Songster's brief quotes a news article asserting that he and his accomplice in the murder of Anjo Pryce suffered "desperation and virtual captivity" working in the illegal drug business and were "driven" to "kill their way out" (brief for appellee, 6 n.3). That is a novel way of describing stabbing someone to death because they were late bringing dinner, especially since Anjo was never identified as anyone's captor. While Songster complains of the Commonwealth's "slanted characterization" of the record (*id.* n.4), it is his *argumentum ad passiones* that is both irrelevant and inappropriate.

That there is no implicit *Teague* exception holding in *Miller* is reinforced by the fact that *Miller* did not order resentencing but only "further proceedings not inconsistent with this opinion." Doing so allowed the state court to consider possible state procedural bars for new rules on state collateral review. In claiming that this argument "defies logic" Songster says that the Court "could not more clearly have held" that Jackson was entitled to resentencing (brief for appellee, 18 n.6). But the Court obviously could have "more clearly" held that Jackson was entitled to resentencing by simply *ordering resentencing*. That is precisely what it did *not* do, since as a consequence of state law Jackson ultimately might *not* have been entitled to resentencing.[3]

2. *Miller* is procedural by definition.

In alternately contending that the new rule in *Miller* is substantive, Songster repeats the error of the District Court in treating "mandatoriness" as a "substantive element" of the penalty. This is sophistry. Life imprisonment is the penalty, and *Miller*, in its own words, requires "only ... a certain process" for imposing it. The penalty is identical whether imposed automatically or by discretion. An offender spends no less time in prison depending on whether his penalty was the product of

[3] That the state instead later conceded Jackson's case (*id.*) is, of course, completely irrelevant. The Court did not know what the state was going to do after the case was remanded. It is equally irrelevant that in other cases the department of justice has conceded the *Teague* issue (brief for appellee, 19). That department is not a party in this case, and it has no ability to decide legal issues for federal courts.

deliberation.

The two *Teague* exceptions are "narrow," "limited," and "circumscribed." *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997) (citations omitted). That for "watershed rules" is not in issue as Songster does not assert it. The remaining one requires a new "substantive" and not "procedural" rule.

The *Miller* rule is procedural. It "did not alter the range of conduct [Pennsylvania] law subjected to [life without parole]" and it "has nothing to do with the range of conduct a State may criminalize. Instead, [it] altered the range of permissible methods for determining whether a defendant's conduct is punishable by [life without parole]." This is a "prototypical" procedural rule. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004). This, the very definition of a procedural sentencing rule for *Teague* purposes, is perfectly clear, and it clearly describes the rule in *Miller*.

Contrary to Songster's unavailing reliance on *Alleyne v. United States*, 133 S. Ct. 2151 (2013), due process requirements govern facts that trigger a mandatory minimum sentence because procedurally raising the minimum term "aggravate[s] the punishment." 133 S. Ct. at 2158, 2161 (emphasis omitted). *Alleyne* does not imply, as Songster insists, that the penalty and the process are the same thing. On the contrary – it states that *what* punishment is available and *how* the punishment is set are "two different things." 133 S. Ct. at 2163 (citation omitted). Because *Alleyne* alters only the process for setting the penalty without making any penalty unavailable, its new rule is barred by *Teague* on federal habeas review. *E.g., United States v. Winkleman*, 746 F.3d 134 (3rd Cir. 2014) (*Teague* exceptions exist for

watershed and substantive rules, but *Allyene* "does not fit into either category") (citation omitted); *United States v. Reyes*, 755 F.3d 210, 212 (3rd Cir. 2014) ("*Alleyne* announced a procedural, rather than substantive rule").

Similarly, in apparent reliance on *Alleyne* Songster proclaims that *Miller* "unquestionably *broadened* the range of permissible sentencing outcomes" (brief for appellee, 24, original emphasis), as if this suggested a *Teague* exception. But a substantive rule would categorically *narrow* the persons or conduct subject to a penalty by banning that penalty. A rule that, like *Alleyne*, "broadens" the range by allowing lesser penalties, but not precluding any penalty based on categories of person or type of crime, is – like *Alleyne – procedural*. If, as Songster himself argues, *Miller* is like *Alleyne*, the rule in *Miller* is procedural.

It is puzzling for Songster to claim that "the Commonwealth ignores the Supreme Court's ruling in *Miller*" (brief for appellee, 23), while he disregards what the Court actually said in that case. *Miller* explicitly distinguished its new rule from substantive decisions, such as *Graham v. Florida*, 130 S. Ct. 2011 (2010) (offender who was a minor at the time of a non-homicide may never be sentenced to life without parole), and *Roper v. Simmons*, 543 U.S. 551 (2005) (barring death sentence for offenders under 18 at the time of the crime):

> 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.

Songster announces that *Miller* is "analogous to" *Roper* and *Graham* (brief for appellee, 27). But the Supreme Court said just the opposite, explaining in *Miller* itself why that case is unlike *Roper* and *Graham*. As the Court itself said, *Miller* states a rule that "does not categorically ban a penalty" ("as ... in *Roper* or *Graham*") but requires "only that a sentencer follow a certain process." Such a rule is obviously procedural. It is incoherent to argue, as Songster does, that the Supreme Court's explanation of its own rule must mean exactly the opposite of what the Court itself said.

Songster likewise ignores the Supreme Court's explicit identification of *Miller* with its capital jurisprudence. He says the capital cases differ because they "considered only how mitigating factors should be considered, without expanding the possible sentences that could be imposed," while *Miller* decided "whether mandatory sentences of life in prison ... could be imposed under any circumstances" (brief for appellee, 25). But the Supreme Court itself asserted that *Miller* is *similar to* its capital cases, precisely because they, like *Miller*, do not ban a penalty but only require a deliberative process instead of mandatory imposition. *Miller*, 132 S. Ct. at 2463-2464 (identifying new rule in *Miller* with capital cases in which "we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death"). Such rules are *procedural* under *Teague*. *E.g., Beard v. Banks, supra* (new rule governing capital deliberations barred in federal habeas). The

Supreme Court's own explanation of its own decisions is controlling.[4]

In nevertheless trying to conflate procedure and substance, Songster says that *Miller* "completely removes" the "sentencing option" of "mandatory life in prison without parole ... *regardless* of the procedures followed" (brief for appellee, 24, original emphasis). In reality, of course, the *penalty* of life without parole is not barred but only the mandatory *procedure* for its imposition. Because *mandatory* is the *procedure* and *imprisonment* is the *penalty*, what Songster is actually arguing is that *Miller* "removes a *procedure* regardless of the procedures followed." In the same manner he announces that "mandatory" life without parole is "substantively different and substantively harsher than" discretionary life without parole (brief for appellee, 25). But "mandatory" life without parole results in exactly the same sentence as "discretionary" life without parole. Thus Songster's actual argument is, "life without parole is different from life without parole" and "life without parole is harsher than

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[4] These same capital cases likewise contradict Songster's argument (wherein he cites no authority on point) that an Eighth Amendment ruling "must apply retroactively" (brief for appellee, 30). That is plainly wrong, since new rules stated in the Supreme Court's capital cases, all of which are *decided under the Eighth Amendment*, are procedural and have repeatedly been barred by *Teague* on federal habeas review. *E.g., Beard v. Banks, supra* (new rule requiring jurors to individually decide mitigating circumstances barred by *Teague*); *Graham v. Collins*, 506 U.S. 461, 463 (1993) (declining to "decide whether the [capital sentencing] jury ... was able to give effect ... to mitigating evidence" because new rule requiring this was barred by *Teague*); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (new rule that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere" barred by *Teague*).

itself."

Such label-switching is as close as Songster comes to addressing the merits of the only relevant *Teague* exception. His other arguments amount to non-sequiturs.

Songster deems it "instructive" that Pennsylvania and Nebraska altered their sentencing statutes (Pennsylvania set high minimum terms to prevent early parole for juvenile murderers) in light of *Miller* (brief for appellee, 26). This is irrelevant. Nothing any state did after *Miller* was decided can define what *Miller* held.

Likewise irrelevant is Songster's view that it would somehow denigrate *Miller* to comply with *Teague* and bar his claim, as this supposedly would amount to concluding that *Miller* "represents a mere procedural speed-bump ... and nothing more" (*id.*, 27). *Miller*, however, cannot be creatively read to mean "more" out of some misplaced desire to venerate it, nor are "mere" procedural rulings unimportant, as they may mean the difference in some cases between life imprisonment or death. Procedural rules are important, but new ones do not apply retroactively in a federal habeas proceeding.

Songster's effort to invoke "underlying policy arguments" (*id.*, 29) confuses his personal interests with real policies, adopted by Congress and recognized by the Supreme Court, that have the force of United States law.[5] "It is fully consistent with

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[5] The costs imposed upon the States by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application. In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States

a government of laws to recognize that the finality of a judgment may bar relief." *Danforth*, 522 U.S. at 290-291.

Songster's *Miller* claim is barred.

> to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac,* state courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a habeas proceeding, new constitutional commands.

Teague v. Lane, 489 U.S. at 310 (original emphasis; citations, brackets, and internal quotation marks omitted).

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

/s/*Hugh J. Burns, Jr.*
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CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(c)

I, HUGH J. BURNS, JR., counsel for the Commonwealth, hereby certify that the Brief for Respondents numbers 14 pages and contains 4,011 words, by word count of the word processing system used to prepare the brief.

/s/ Hugh J. Burns, Jr.

Hugh J. Burns, Jr.

CERTIFICATE OF COMPLIANCE PURSUANT TO THIRD CIRCUIT LAR 31.1(c)

Pursuant to Third Circuit Rule 31.1(c), I, HUGH J. BURNS, JR., counsel for the Commonwealth, hereby certify that the text in the electronic copy of the Brief For Appellants is identical to the text in the paper copies. I further certify that the electronic copy of the Brief for Appellants was scanned for viruses by McAfee Virus Scan (r) Enterprise version 8.8.0.975, and no viruses were detected.

/s/ Hugh J. Burns, Jr.

Hugh J. Burns, Jr.

STATEMENT OF RELATED CASES PURSUANT TO L.A.R. 28.1

The Commonwealth is not aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this Court or any other court or agency, state or federal, other than the decisions of other jurisdictions cited in the opinion of the district court, which are related in the sense of concerning similar issues. The Commonwealth is not aware of any previous or pending appeal before this Court arising out of the same cases or proceedings.

/s/ Hugh J. Burns, Jr.

Hugh J. Burns, Jr.

CERTIFICATE OF MEMBERSHIP IN THE BAR OF THIS COURT

I, HUGH J. BURNS, JR., counsel for the Commonwealth, hereby certify that I am member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Hugh J. Burns, Jr.

Hugh J. Burns, Jr.

CERTIFICATE OF SERVICE

I, HUGH J. BURNS, JR., counsel for the Commonwealth, hereby certify that on September 4, 2014, a copy of the Brief For Appellants and Appendix, Vol. I, will be served by ECF; a copy of the brief will be placed the next day, first class postage prepaid, in the United States Mail addressed to:

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