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

BRIEF FOR APPELLANTS AND APPENDIX, VOL. I

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Is the new rule in *Miller v. Alabama* barred from retroactive application on federal habeas review by *Teague v. Lane*?

(Answered in the negative by the District Court).

STATEMENT OF THE CASE

A federal district court granted relief under *Miller v. Alabama* despite the fact that the petitioner's state criminal judgment had become final before *Miller* was decided. Because a retrospective *Miller* claim is barred from federal habeas review by *Teague v. Lane*, the district court erred and should be reversed.

Anjo Pryce was murdered by Kempis Songster and Dameon Brome, cocaine dealers for whom he worked, because the drug dealers had a bad day. They ran their drug trafficking business from a fortified residential abandoned house at 1435 Race Street in Philadelphia. One evening, September 17, 1987, after Songster and Brome had been hard at work all day selling cocaine, Anjo was late delivering their dinner, so Songster and Brome decided to kill him.

Brome choked Anjo, while Songster stabbed him in the back and chest with a knife. After rewarding themselves with the cash from Anjo's dead body, the two friends carried the corpse to the second floor, and then went to a local convenience store for cleaning supplies and plastic trash bags. Songster and Brome cleaned up the fluids that had spilled from Anjo's corpse and, wrapping his remains in trash bags, drove to another location and dumped the body (N.T. 12/8/88, passim).

Songster was 15 years old at the time. After he and Brome were charged with criminal conspiracy, murder, robbery, and possession of an instrument of crime, he moved to have his case transferred to the juvenile court system. A court considering such a request considers a number of criteria, including the juvenile's age, mental capacity, maturity, degree of criminal sophistication, and prospects for rehabilitation.

Among other things offered in support of his transfer motion Songster introduced his own confession to the murder. This included details of his stabbing and choking of Anjo, his cleaning of the murder scene of Anjo's blood and gore, and his disposal of Anjo's body. It also detailed his participation in a sophisticated drug operation that sold approximately $1500 worth of cocaine. Songster's school records showed that he is highly intelligent. He was academically successful until he decided to devote his attention to crime, after which he twice ran away from a stable home and dropped out of school. He joined the "Shower Posse" gang, operated a sophisticated drug trafficking operation, participated in a brutal assault upon (in his words) a "crackhead," gave an alias upon his arrest, and twice attempted to escape from a juvenile facility. The Honorable Charles L. Durham concluded that Songster was not amenable to juvenile court rehabilitation and denied his transfer motion.

Following trial, a jury before the Honorable George Ivins found Songster guilty of first degree murder and all other charges. The state Superior Court affirmed Songster's judgments of sentence in December 1990, and the judgments became final in October 1991 when the state Supreme Court denied further review. (Brome's identical convictions were affirmed on direct appeal in 1990).

On March 16, 1993, Songster filed the first of several petitions for state collateral review under the PCRA. The petition was denied by the Honorable Genece E. Brinkley on January 29, 1997, the denial was affirmed by the state Superior Court on March 30, 1998, and further review was denied by the state Supreme Court on August 12, 1998. Songster filed a second petition for state collateral review on

January 9, 2002. Following evidentiary hearings the court dismissed this second petition as barred by the jurisdictional timeliness provisions of the state collateral review act on June 26, 2003. That disposition was affirmed on appeal on April 13, 2004, and the state Supreme Court denied further review on August 27, 2004.

More than 14 years after his state criminal conviction became final, Songster filed a federal habeas petition or about December 20, 2004. On February 28, 2006, Magistrate Judge Carol Sandra Moore Wells issued a Report and Recommendation that the federal habeas petition be dismissed as untimely.

On March 2, 2006, the district court ordered, inter alia, that objections to the Magistrate's Report and Recommendation be deferred pending issuance of a Supplemental Report and Recommendation.

On March 7, 2006, Songster filed an amendment raising a new claim based on *Roper v. Simmons*. (*Roper* held that a death sentence may not be imposed on offenders who were under 18 at the time of the offense). On March 11, 2008, the Magistrate Judge issues a Supplemental Report and Recommendation, again concluding that the federal habeas petition should be dismissed. Songster filed objections to the Supplemental Report and Recommendation on June 4, 2008.

On June 25, 2012, the United States Supreme Court held in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), that automatic imposition of a sentence of life without parole is impermissible for offenders who were under 18 at the time of the offense. The Court ruled that in such cases a sentence of life without parole may be imposed only upon considering the offender's "youth and attendant characteristics."

On August 30, 2012 – i.e., over 7 years after filing his federal habeas petition – Songster filed another amendment, raising a *Miller* claim. The Commonwealth filed a memorandum of law contending that the *Miller* claim was barred from federal habeas review under *Teague v. Lane*.

On September 6, 2012, the Honorable Timothy J. Savage partially granted the writ on the basis of *Miller*. The Commonwealth appealed. The district court filed an opinion regarding its decision on July 29, 2014.

STANDARD OF REVIEW

Review of the District Court's legal conclusions is plenary. *Lambert v. Blackwell*, 387 F.3d 210, 231 (3d Cir. 2004). "[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis[.]" *Horn v. Banks*, 536 U.S. 266, 272 (2002)(per curiam).

SUMMARY OF ARGUMENT

Teague bars retroactive *Miller* claims from federal habeas review.

No *Teague* exception applies. *Miller* itself explains that its new rule is unlike ones that "categorically ban a penalty." *Miller* bans only automatic imposition of a penalty in favor of "a certain process." *Miller* does not ban the penalty of life without parole for youthful killers.

Miller underscores its procedural nature by explaining that its new rule is akin to capital cases that require individualized sentencing instead of automatic imposition of death. Like *Miller*, those cases do not ban the penalty outright, but require a process for imposing it. Because such new rules are procedural, they are subject to being barred by *Teague*.

Miller further underscores its procedural nature by contrasting cases like *Roper* and *Graham*, which categorically proscribe a penalty and not a process for imposing that penalty. The manner of imposition of a penalty is a procedure and not a penalty. One serving life without parole serves precisely the same sentence whether it was imposed automatically or by discretion.

Miller itself thus plainly identifies its new rule as procedural. To conclude otherwise is to claim that the Supreme Court's explanation of its own decision is not merely inaccurate, but wholly opposite to reality.

Miller is not a "watershed" rule. The United States Supreme Court has explained that watershed rules are effectively nonexistent. *Miller* is not within the "small core" of "bedrock" principles "implicit in the concept of ordered liberty."

Instead it modifies the sentencing procedure in certain cases but continues to allow the penalty of life without parole in those cases. Modifying a sentencing procedure in some cases is not "implicit in the concept of ordered liberty."

Contrary to the district court's view, the fact that the companion case to *Miller*, *Jackson v. Hobbs*, was on "collateral review" in *state* court implies no holding under *Teague*. *Teague* is irrelevant and inapplicable on state collateral review; it is not a rule of constitutional law, but a procedural defense against *federal* collateral review. Because neither case in *Miller* was on federal habeas review, it was impossible for *Miller* to state or imply any holding under *Teague*. Federal courts are not permitted to issue advisory rulings.

The *Miller* claim was barred from federal habeas review by *Teague*. The order of the district court should be reversed.

ARGUMENT

MILLER IS NOT RETROACTIVE UNDER *TEAGUE*.

Miller v. Alabama, 132 S. Ct. 2455 (2012), is barred from retroactive application in federal collateral review.

Under *Teague v. Lane*, 489 U.S. 288 (1989),[1] a federal habeas court may not apply a new rule (it is undisputed that the rule in *Miller* is new) unless an exception applies. There are only two – "substantive" rules and "watershed" rules – and these exceptions are "narrow," "limited," and "circumscribed." *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997) (citations omitted). Neither applies to the new rule in *Miller*.

Substantive rules are excepted from the *Teague* bar 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).

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[1] *Teague* was a plurality decision, but the *Teague* rule was applied in a majority decision, *Penry v. Lynaugh*, 492 U.S. 302 (1989), shortly after it was announced.

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 *Miller* itself clearly said 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. The Supreme Court has repeatedly enforced the *Teague* bar for procedural rules on federal habeas review, even in capital cases. *E.g. Beard v. Banks*, 542 U.S. 406 (2004) (holding that ruling preventing instructions that might allow some jurors to prevent others from considering mitigating evidence in a capital case was 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 the rule requiring this was barred by *Teague*); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (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*).

Nor does *Miller* present a "watershed" rule. 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. at 478. 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).

Apart from the guarantee of counsel in criminal proceedings recognized in *Giden 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"). As *Schriro* explained, moreover, the watershed class of rules is "extremely narrow." The new rule must meet two requirements: first, its infringement "must seriously diminish the likelihood of obtaining an accurate conviction[.]" Second, "the rule must alter understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (original emphasis, citations and internal quotation marks omitted). "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." *Schriro*, 542 U.S. at 352 (citation omitted, original emphasis).

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. *Gideon* recognized this principle as virtually timeless, having been recognized at the foundation of the republic. The Court explained that enforcing this right did not break new ground, but rather represented "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 an amicus, 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. Its holding, the product of a narrow 5-4 majority, involved the Eighth Amendment concept of proportionate sentencing, the content of which must be discerned through a "prism" of "evolving standards of decency." 132 S. Ct. at 2463. This does not involve reliance on timeless constitutional principles, but

rather 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. The majority 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.

In further contrast to *Gideon*, the *Miller* majority expressly rejected state law as an objective expression of national consensus, and indeed acknowledged that it was acting in direct opposition to the consensus of the states. *Id.* at 2471-2472 ("By our count, 29 jurisdictions ... make a life-without-parole term mandatory for some juveniles convicted of murder ... 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).

In *Miller* there were four dissenting votes – in contrast to the unanimity of *Gideon* – by three Justices and the Chief Justice. This dissenting view 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 in praise of of the new procedure required by *Miller*, it follows from no "bedrock" principle, and is certainly no more of a "bedrock" nature than similar rules that enhance the accuracy of capital sentencing, yet are barred by *Teague* from being retroactively applied on federal habeas review. Indeed, *Miller* only modifies the sentencing procedure in certain cases involving life without parole, and continues to allow that penalty to be imposed in those cases. Modifying sentencing procedures is not "implicit in the concept of ordered liberty." *Miller* does not have "the primacy and centrality of the rule adopted in *Gideon*." *Beard v. Banks*, 542 U.S. at 420 (citation omitted).

1. *Miller* did not apply *Teague* in *Jackson v. Hobbs*.

The district court asserts that, although the Supreme Court in *Miller* did not mention *Teague*, its decision "made" *Miller* retroactive under *Teague* because it applied its holding in the companion case of *Jackson v. Hobbs*, a case that, according

to the district court, was "on collateral review" (district court opinion, 4-5).

This is simply incorrect – *Jackson* was not on "collateral review" within the meaning of *Teague*, because it was not a federal habeas case. Jackson's case was on *state* collateral review, not habeas review in federal court. The district court's analysis misunderstands *Teague*, conflates state review with federal habeas review, and represents an erroneous apprehension of federal jurisdiction.

The district court's view that Jackson's case implicitly applied *Teague* "represents a fundamental misunderstanding of *Teague*," because *Teague* "is a limitation of the power of *federal* courts to grant *habeas* relief to state prisoners." *Beard v. Banks*, 542 U.S. at 412 (internal quotation marks, citation, ellipsis, and brackets omitted, emphasis added). *Teague* is a procedural defense, against collateral review conducted by *federal* courts. It applies when "a petitioner seeks *federal habeas relief* based upon a principle announced after a final judgment." *Stringer v. Black*, 503 U.S. 222, 227 (1992) (emphasis added). *Teague* itself explained that its ruling arises from the need to protect the reasonable judgments of state courts and the state's interest in finality from federal collateral review. Such review, if unchecked, could "continually force[ ] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310; *Beard v. Banks*, 542 U.S. at 413.

In *Danforth v. Minnesota*, 552 U.S. 264, 281 (2008), the Supreme Court explained that *Teague* raises no bar on *state* collateral review because "*Teague* arose on federal habeas," and "this procedural posture was not merely a background fact[.]"

Rather, "the *Teague* opinion makes clear that the rule it established was tailored to *the unique context of federal habeas*." 552 U.S. at 277 (emphasis added).

"*Teague* speaks only to the context of federal habeas." *Danforth,* 552 U.S. at 281. Every reference in *Teague* to "collateral review" or "habeas corpus" concerns *federal* habeas, and *only* federal habeas. *Id.* at 277-278 ("not a word in Justice O'Connor's discussion ... intimates that her definition of the class eligible for relief under a new rule should inhibit the authority of any state agency or state court to extend the benefit of a new rule to a broader class than she defined"); 278-279 ("*Teague's* general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute ... *Teague* is based on statutory authority that extends only to federal courts applying a federal statute"); 279 ("the rule was meant to apply only to federal courts considering habeas corpus petitions challenging state-court criminal convictions. ... [Justice O'Connor] justified [it] ... in part by reference to comity and respect for the finality of state convictions. Federalism and comity considerations are unique to *federal* habeas review of state convictions) (citation omitted, original emphasis); 281 ("Our subsequent cases, which characterize the *Teague* rule as a standard *limiting only the scope of federal habeas relief*, confirm that *Teague* speaks only to the context of federal habeas") (emphasis added).

Under *Danforth,* because *Teague* is a procedural defense only to federal habeas proceedings, a state court is free to apply a new federal constitutional rule in its own collateral review proceedings, even if *Teague* would bar the same rule in a federal habeas proceeding. But the converse, of course, is not true – the fact that a state court

is free to consider and apply a new rule on state collateral review without considering *Teague* does not mean that a federal court can do so.

In *Miller*, Jackson's case was on *state* collateral review, not federal habeas review. This means that the state in Jackson's case was free to consider and apply the new rule announced in *Miller*. *Teague* could not prevent that because it did not apply in Jackson's case.[2] For the same reason, *Miller* could not constitute a silent *Teague* holding. The one and only question *Teague* answers is whether a new rule is barred on *federal* habeas review. Because *Teague* does not prevent a *state* court from giving effect to a new constitutional rule on *state* collateral review, *Miller* could not have announced any holding concerning *Teague*. A *Teague* holding was not merely unlikely, but impossible. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them").

Thus, that relief was granted by the United States Supreme Court in a case on

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[2] Notably, *Miller* did not order resentencing but remanded "for further proceedings not inconsistent with this opinion." 132 S. Ct. at 2475. This allowed the state court to apply the new rule, but also allowed the state the option of asserting any applicable retroactivity bar or other state-law defense in the state proceeding, and of raising a *Teague* bar to any subsequent federal habeas petition.

It is irrelevant that some states, including Pennsylvania, have voluntarily adopted the *Teague* framework in deciding whether claims should be given retroactive effect on state collateral review. *E.g.*, *Commonwealth v. Bracey*, 986 A.2d 128, 143-44 (Pa. 2009). This is an exercise of state law by state courts, and obviously cannot alter United State Supreme Court precedent holding that the *Teague* bar prevents only federal habeas review.

state collateral review is not an implicit holding under *Teague*. This is demonstrated by *Chaidez v. United States*, 133 S. Ct. 1103 (2013). In *Padilla v. Kentucky*, 599 U.S. 356 (2010), the Supreme Court ruled in Padilla's favor in a case that was on state collateral review. Under the reasoning of the district court in this case, this supposedly amounted to an implicit holding that the ruling in *Padilla* applies on federal habeas review notwithstanding *Teague*. But in *Chaidez*, a subsequent case on collateral review in *federal* court,[3] the Supreme Court held that the new rule stated in *Padilla* was barred because it did not meet a *Teague* exception. The same result applies here.

The district court therefore erred in inferring from the remand in Jackson's case that *Miller* constituted a *Teague* ruling because his case was on "collateral review." The only form of collateral review to which *Teague* applies is federal habeas. The district court's conclusion that it is "fundamentally unfair" for Jackson to have been permitted to seek *Miller* relief in state court, on state collateral review, "while others similarly situated will not," erroneously treats state collateral review and federal habeas as identical when in fact they are fundamentally different. Under *Danforth*, *Teague* cannot bar a state court from disturbing *its own* criminal judgments on state collateral review; but *Teague* can (as here it does) bar a *federal* court from subjecting a state criminal judgment to *federal* collateral review.

Also contrary to the district court's analysis, it is irrelevant that the holding in *Roper* was applied on state "collateral review." Because *Roper* affirmed a state court

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[3] Chaidez filed a petition for coram nobis, which the Court treated as identical to a federal habeas petition for *Teague* purposes. 133 S. Ct. at 1106 n.1

ruling that overturned the state's own judgment, the procedural posture of the case could not have implied any holding under *Teague*. That which *was* relevant in *Roper* to a *Teague* analysis, moreover, was that the new rule in *Roper* was clearly substantive by definition – in stark contrast to the rule in *Miller*, which is clearly procedural by definition. It is ironic that, in searching for hints about *Teague* in the state-review procedural context of Jackson's case in *Miller* – a context in which *Teague* could not even be applied because *Teague* concerns only federal habeas – the district court completely overlooked the one and only aspect of *Miller* that is relevant to a *Teague* analysis. *Miller* itself explained, in *distinguishing* the *Roper* decision, that the new rule in *Roper* categorically precluded a form of punishment for a class of persons, and that it is precisely this that makes the *Roper* ruling *unlike* the procedural rule in *Miller*. 132 S. Ct. at 2471.

2. The district court's analysis misapplies *Teague*.

The district court nevertheless concludes that the rule in *Miller* is substantive. It reasons as follows:

> As the Court did when it categorically banned the death penalty for juvenile offenders in *Roper* and life imprisonment without the possibility of parole for non-homicide offenders in *Graham* [*v. Florida*], the *Miller* Court categorically banned a sentencing practice or scheme as applied to juveniles. In essence, the substance of the *Miller* rule is no different than the rules established in *Roper* or *Graham*, which were applied retroactively.

District court opinion, 8. But it is instructive to compare the district court's analysis with what *Miller* actually said about *Roper* and *Graham*:

> 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.

What the *Miller* Court actually said was that *Roper* and *Graham* were different, not the same, because those cases "categorically ban[ned] a penalty for a class of offenders," in contrast to *Miller*, which "mandates only ... a certain process." Indeed, considering the above statement in context, the *Miller* Court was explaining that it was acceptable to overrule state laws without having "tallied legislative enactments" (28 states made life without parole mandatory for juvenile murderers), precisely because it was not categorically banning any penalty but only imposing a procedure.

The Supreme Court's own explanation of its own decision in *Miller* is in sharp contrast with how the district court describes *Miller*. *Miller* plainly states that it does not categorically ban a penalty for a class of offenders, as did *Roper* and *Graham*, and explains that, for this reason, *Miller* is materially different from *Roper* and *Graham*. Yet the district court says that *Miller* "categorically banned a sentencing practice or scheme" and that this proves *Miller* is essentially identical to *Roper* and *Graham*. The district court's analysis could only be plausible if the Supreme Court's words meant exactly the opposite of what they actually say.

To assert, as the district court does, that *Miller* banned a "practice or scheme" obfuscates what *Miller* held. A "practice" or "scheme" might include both the penalty and whatever procedure was used to impose it, but *Miller* banned only the latter.

Banning a procedure does not ban a penalty. *Miller* makes that distinction unmistakably clear – it "mandates only that a sentencer follow a certain process" before imposing "a particular penalty." No *penalty* is banned. A *procedure* is banned – not a "practice" or "scheme." Rules that do not "alter the range of conduct ... subjected to" a particular penalty but "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. at 351-353.

Miller reinforced this point by aligning its new rule to the Court's capital sentencing jurisprudence, which requires "individualized sentencing" when "meeting out the law's most serious punishments." The Court explained that in such cases "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." *Miller*, 132 S. Ct. at 2463-2464. The capital cases imposing a requirement of individualized rather than automatic sentencing are procedural in nature, just as the rule in *Miller* is procedural. New rules that prevent automatic imposition of the death penalty but do not bar it, instead mandating a procedure for imposing it, are barred by *Teague – e.g., Beard v. Banks; Graham v. Collins*; *Sawyer v. Smith*. Likewise, the new rule in *Miller*, which prevents automatic imposition of life without parole but does not bar it, instead mandating a procedure for imposing it, is likewise procedural and so barred by *Teague*.

The district court contends that the rule in Miller has a "substantive element[]" because it "bans mandatory life without parole" (district court opinion, 7). This is

sophistry. *Miller* does not ban the penalty of life without parole, but only a procedure for imposing it. In the phrase "mandatory life without parole," life without parole is the penalty and mandatory imposition is a process. Rhetorically conflating penalty and process cannot obscure the fact that a killer sentenced to life without parole by discretion is subject to *precisely the same penalty* as one whose sentence was automatic. *Miller* only removed "mandatory" from "mandatory life without parole." The conclusion of the district court that *Miller* "categorically banned a punishment" (district court opinion, 9) is contradicted by *Miller* itself, which expressly distinguished its new rule from cases that "categorically ban a penalty." 132 S. Ct. at 2471. As the Court recently observed in *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013) (citation omitted), "[e]stablishing what punishment is available by law and setting a specific punishment within the bounds of that law" are "two different things."

Miller did not ban any penalty. It *allows* states to impose a penalty of life without parole where the necessary process is applied. *Miller* is procedural. It has no substantive "element."

Because the new rule in *Miller* does not define "a punishment that the law cannot impose," *Schriro*, 542 U.S. at 352, but rather bars a process for imposing it, Songster's *Miller* claim is barred from review by a federal habeas court.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

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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 51 pages and contains 5,914 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 8.7i, 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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/s/ Hugh J. Burns, Jr.

Hugh J. Burns, Jr.