NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RANDOLPH LEE CREIGHTON, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 654 WDA 2010

Appeal from the PCRA Order March 31, 2010
In the Court of Common Pleas of Allegheny County
Criminal Division at No(s): CC200410924, CP-02-CR-0010924-2004, CP-02-CR-0014917-2004

BEFORE: BENDER, P.J., FORD ELLIOTT, P.J.E., BOWES, GANTMAN, DONOHUE, ALLEN, LAZARUS, OTT, and WECHT, JJ.

MEMORANDUM BY BOWES, J.: **FILED MAY 01, 2014**

Randolph Lee Creighton appeals from the March 31, 2010 order denying his petition filed pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541-9546. We affirm.

On May 11, 2006, Appellant was convicted by a jury of second degree murder, robbery, aggravated assault, and conspiracy based upon the following evidence produced by the Commonwealth. On July 28, 2004, Appellant and an accomplice ordered pizza for delivery to 511 Armendale Street, Pittsburgh, Pennsylvania. Carol Terle drove with Frank Christopher, her passenger, in a delivery van to fill the order, but no one answered when Mr. Christopher knocked on the door. After Mr. Christopher re-entered the vehicle, Appellant, who was seventeen years old at the time, approached

the vehicle's passenger side, placed a gun to Mr. Christopher's temple, and demanded money. The victims replied that they did not have money, and Mr. Christopher ducked and tried to close the window. Appellant deliberately fired his gun twice into the van, striking Mr. Christopher in the back and Ms. Terle in the jaw. Ms. Terle immediately drove to a nearby hospital where Mr. Christopher was pronounced dead of his wounds. The bullet that struck Ms. Terle traveled through her jaw and neck and lodged in her shoulder.

Police received information that Appellant was involved in the crime. A photographic array that included Appellant's picture was compiled and shown to Ms. Terle, who positively identified Appellant as the man who shot her and Mr. Christopher. Appellant was arrested, removed to a police station, and informed that he was being charged with homicide. Police called Appellant's mother and told her that Appellant was being held for the shooting of Mr. Christopher, and she responded that she did not want to come to the police station and that police were free to question Appellant. Police then informed Appellant of his constitutional rights, which he waived in writing. Appellant told police that he and a friend had ordered the pizza in order to rob the delivery person, and that the two victims were shot during the course of that attempted robbery. Appellant stated that he did not intend to kill the victim and that he only wanted money.

Appellant was charged as an adult and, after his decertification request was denied, proceeded to a jury trial where he was convicted of the above-described crimes. On July 6, 2006, Appellant was sentenced to life imprisonment without parole. On appeal, Appellant was represented by different counsel. We affirmed the judgment of sentence and rejected Appellant's claims that his decertification request was improperly denied and that his confession should have been suppressed. ***Commonwealth v. Creighton***, 943 A.2d 310 (Pa.Super. 2007) (unpublished memorandum), *appeal denied*, 946 A.2d 684 (Pa. 2008), *cert. denied*, 77 USLW 3201 (2008).

Appellant filed a timely PCRA petition and counsel, who was appointed to represent him, filed an amended petition. After an evidentiary hearing, the court denied post-conviction relief. This appeal followed. The PCRA court directed Appellant to comply with Pa.R.A.P. 1925(b), which he did. The court authored its Pa.R.A.P. 1925(a) opinion.

This Court *sua sponte* granted *en banc* review in this matter on the issue of whether ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), applies retroactively to cases on state collateral review. Following briefing and prior to oral arguments, the Pennsylvania Supreme Court, in a divided four-to-three decision, decided ***Commonwealth v. Cunningham***, 81 A.3d 1 (Pa. 2013). That decision held that ***Miller*** does not apply retroactively as a substantive constitutional rule under the ***Teague v. Lane***, 489 U.S. 288

(1989) (plurality), retroactivity test.[1] After the decision in ***Cunningham***, counsel submitted a brief post-submission communication requesting relief

[1] ***Teague v. Lane***, 489 U.S. 288 (1989) (plurality), has been accepted by a majority of the United States Supreme Court for purposes of federal *habeas* review. ***See Commonwealth v. Lesko***, 15 A.3d 345, 363 (Pa. 2011) (citing ***Butler v. McKellar***, 494 U.S. 407 (1990)). Chief Justice Castille in his ***Cunningham*** concurrence, though setting forth that novel Article I, § 13 claims may not be cognizable under the PCRA, recognized that the High Court had frequently interpreted that statute to avoid creating bifurcated review. ***See Commonwealth v. Haun***, 32 A.3d 697, 702–05 (Pa. 2011) (broadly interpreting PCRA statute and eschewing creation of bifurcated review). In this regard, requiring litigation under state *habeas* would result in bifurcated review for Article I, § 13 cruel punishment issues that are derivative of new Eighth Amendment cruel and unusual punishment claims. This would permit defendants, without time constraints, to continually raise novel Eighth Amendment and derivative Article I, § 13 challenges. Such scenarios do not appear to fit within the legislative intent behind the PCRA statute.

Hence, it is a reasonable interpretation of the PCRA statute that our legislature intended to allow defendants to pursue PCRA relief by arguing that their sentences were cruel when imposed under a Pennsylvania evolving standards of decency test, rather than to cause such issues to be forwarded under the common law or statutory writ of *habeas corpus*. Necessarily, such arguments can involve advocating for derivative "new" constitutional rules in the "cruel punishment" context, especially in light of the fact that Pennsylvania's constitution must at a minimum protect federal constitutional rights and the United States Supreme Court's Eighth Amendment jurisprudence is premised on evolving standards. ***See also Commonwealth v. Zettlemoyer***, 454 A.2d 937, 967-968 (Pa. 1982), *abrogated on other grounds by* ***Commonwealth v. Freeman***, 827 A.2d 385 (Pa. 2003) ("We accept the principle enunciated by the United States Supreme Court that the intention of the framers is not the end point of our analysis, for the Pennsylvania prohibition against 'cruel punishment', like its federal counterpart against 'cruel and unusual punishment', is not a 'static concept.'").

under Pennsylvania's "cruel punishment" clause, Article I, § 13.[2] The matter is now ready for our review.

Appellant asserts the following issues.

> 1. Did the trial court err in imposing a mandatory sentence of life imprisonment without the possibility of parole for then seventeen year old Appellant since, pursuant to ***Miller v. Alabama***, 567 U.S. __, 132 S.Ct. 2455 (2012), the Eighth Amendment to the United States Constitution forbids such a sentence, Appellant has timely raised this claim and Miller is to be retroactively applied?
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> 2. Did the trial court err in denying Appellant's PCRA petition since trial counsel was ineffective for advising/coercing Appellant not to testify at his jury trial?
>
> 3. Did the trial court err in denying Appellant's PCRA petition since trial counsel Foreman was ineffective for failing to cross-examine victim Carol Terle in order to show that the shooting of Frank Christopher and Ms. Terle were accidental and not part of the abandoned robbery attempt?
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> 4. Did the trial court err in denying Appellant's PCRA petition since trial counsel was ineffective for failing to raise a weight of the evidence claim regarding second degree murder in post sentencing motions, and a motion for judgment of acquittal at trial and a sufficiency of the evidence claim regarding second degree murder in post sentencing motions, and appellate counsel was ineffective for failing to raise a sufficiency of the evidence claim regarding defendant's felony murder conviction, on direct appeal?

Appellant's brief at 3-4.

As Appellant's final three issues pertain to the guilt phase of his trial and any relief thereon would render his sentencing issue moot, we discuss those claims at the outset. Initially, we note that on appeal from the denial

[2] Pa. Const. art. I, § 13 reads, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

of PCRA relief, our standard of review is "whether the findings of the PCRA court are supported by the record and free of legal error." ***Commonwealth v. Martin***, 5 A.3d 177, 182 (Pa. 2010). We view an order dismissing a petition in the light most favorable to the party that prevailed before the PCRA court. ***Commonwealth v. Ford***, 44 A.3d 1190, 1194 (Pa.Super. 2012). In addition, great deference is afforded to the factual findings of the PCRA court and we do not disturb those findings unless there is no support in the record. ***Id***. Where the issue is a question of law, however, our standard of review is *de novo* and our scope of review is plenary. ***Id***.

As to claims of ineffective assistance, "[i]t is well-established that counsel is presumed effective, and the defendant bears the burden of proving ineffectiveness." ***Martin***, ***supra*** at 183. "To plead and prove ineffective assistance of counsel a petitioner must establish: (1) that the underlying issue has arguable merit; (2) counsel's actions lacked an objective reasonable basis; and (3) actual prejudice resulted from counsel's act or failure to act." ***Commonwealth v. Chmiel***, 30 A.3d 1111, 1127 (Pa. 2011). Failure to meet any of the prongs of the ineffectiveness test will result in denial of the claim. ***Martin***, ***supra*** at 183.

An issue has arguable merit where the factual averments, if accurate, could establish cause for relief. ***Commonwealth v. Stewart***, 84 A.3d 701, 707 (Pa.Super. 2013) (citing ***Commonwealth v. Jones***, 876 A.2d 380, 385 (Pa. 2005)) ("if a petitioner raises allegations, which, even if accepted

as true, do not establish the underlying claim . . ., he or she will have failed to establish the arguable merit prong related to the claim"). "Whether the 'facts rise to the level of arguable merit is a legal determination.'" ***Id***. (quoting ***Commonwealth v. Saranchak***, 866 A.2d 292, 304 n.14 (Pa. 2005)).

The test in determining whether counsel had a reasonable basis for his actions is whether no competent counsel would have chosen that action or inaction, or, the alternative, not chosen, offered a significantly greater potential chance of success. ***Commonwealth v. Colavita***, 993 A.2d 874, 887 (Pa. 2010). To satisfy the prejudice aspect of the test, the defendant "must show that there is a 'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Commonwealth v. Reed***, 42 A.3d 314, 319 (Pa.Super. 2012) (partially quoting ***Commonwealth v. Kimball,*** 724 A.2d 326, 331 (Pa. 1999) and ***Strickland v. Washington,*** 466 U.S. 668, 694 (1984)). The definition of a reasonable probability is "a probability sufficient to undermine confidence in the outcome." ***Reed***, ***supra*** at 319 (quoting ***Kimball***, ***supra*** at 331 and ***Strickland***, ***supra*** at 694)).

Appellant in his second issue asserts that trial counsel rendered ineffective assistance because counsel prevented Appellant from testifying. He proffers that he wanted to tell the jury that he accidentally discharged the gun when he was removing his arm from the van. According to

Appellant, this testimony would have supported a conviction of involuntary manslaughter, as opposed to murder, and was critical in light of the jury's request to be re-charged on the elements of the grades of homicide herein. Appellant continues that he originally indicated that he was going to testify, ***see*** N.T. Trial, 5/9-11/06, at 169, but claims that he was coerced into abandoning that desire after improperly being advised not to do so.

Ineffectiveness issues based on assertions that trial counsel interfered with his client's right to testify require the defendant to establish that "counsel interfered with his right to testify, or that counsel gave specific advice so unreasonable as to vitiate a knowing and intelligent decision to testify on his own behalf." ***Commonwealth v. Nieves***, 746 A.2d 1102, 1104 (Pa. 2000). In the present case, the record belies Appellant's position that counsel interfered with his desire to take the stand:

> THE COURT: [Defense counsel] indicated to me today it is your decision not to testify, sir. Is that correct?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Have you had enough time to discuss that with [defense counsel]?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: You understand you have a constitutional right to testify or not to testify, whatever you choose?
>
> [APPELLANT]: Yes, sir.
>
> THE COURT: Has anybody promised you anything, threatened you or coerced you in any manner?

[APPELLANT]: No, sir.

THE COURT: Are you doing it of your own free will?

[APPELLANT]: Yes.

N.T. Trial, 5/9-11/06, at 169-70. At the PCRA hearing, Appellant and counsel both confirmed that counsel did not pressure him into not testifying, but merely advised him not to take that action. N.T. PCRA Hearing, 2/4/10, at 18, 37. Thus, the record does not permit a finding that counsel prevented Appellant from taking the witness stand.

We now determine whether counsel gave unreasonable advice which vitiated Appellant's decision not to testify. As noted in his statements to police and the nurse, Appellant indicated that the shooting was accidental. At the PCRA hearing, trial counsel explained that he had concluded that the "only appellate issue of arguable merit that [he] perceived at that time, anyway, was a question relating to suppression of [Appellant's] statement to the police." ***Id***. at 33. Counsel advised Appellant not to testify because, if he had, it would have adversely impacted Appellant's chance of prevailing on that issue on appeal, and "the testimony of the officer who took [Appellant's] statement was substantially identical" to what Appellant would have related to the jury. ***Id***. at 33, 36-37. Counsel was therefore able to argue to the jury that the weapon discharged inadvertently based on the evidence presented by the Commonwealth and, by advising Appellant not to take the

stand, counsel preserved for appeal the allegation that Appellant's inculpatory statement was infirm.

In this case, counsel was correct in his assessment that if Appellant had testified, he would not have been able to challenge the constitutionality of his confession. ***See***, ***e.g., Commonwealth v. Rice***, 383 A.2d 903, 906 (Pa. 1978) ("This court has consistently held that when a defendant takes the stand and reiterates the factual narrative contained in a confession claimed to be invalid . . . for constitutional infirmities[,] the admission into evidence of the alleged illegal formal confession, if error at all, is harmless error beyond a reasonable doubt.") (citing ***Commonwealth v. Saunders***, 331 A.2d 193 (Pa. 1975)). Furthermore, the defense that the shooting was accidental was presented to the jury by alternative means: the confession, the nurse's testimony, and the fact that the vehicle's window was being closed when the shooting occurred. Hence, we cannot conclude that counsel's advice in this respect was so infirm as to vitiate Appellant's own decision not to testify in further support of a defense already available to him through other evidence.

Appellant next argues that trial counsel was ineffective for failing to vigorously cross-examine Ms. Terle in order to establish that he inadvertently fired the gun while attempting to extricate his arm from the closing window. Trial counsel offered a cogent and compelling reason for failing to conduct the suggested questioning:

> A. [Defense Counsel]: Carol Terle was absolutely antagonistic towards us. Because of the facts of this case I had approached the DA regarding some kind of disposition of the charges without trial. I was told there was no such disposition available, primarily because Carol Terle objected to it. With consent of a prosecutor I spoke with Carol Terle. I related to Carol Terle my position requesting some showing of compassion for Mr. Creighton and his situation. Got nowhere with that. In fact, Carol Terle returned to the prosecutor and reported the nature of my conversation hoping to get a tactical advantage. I had nothing with which to conduct an effective cross-examination of Carol Terle. No prior inconsistent statements the witness gave to the police at the scene, and after the event were pretty consistent with trial testimony. And I believe that repeating the same questions, or going into greater detail, would only have provided the witness with an opportunity to restate the witness's testimony and possibly reinforce that before the jury.
>
> And that is why it's a tactical decision I did not engage in extensive cross-examination of Carol Terle. That was a decision I made.
>
> Q. It wouldn't have helped to at least ask if it did appear he was trying to pull his arm out of the car once that window started to go up?
>
> A. [Defense Counsel]: Carol Terle did not see it that way. We had discussed the events, and there was nothing I could say that was going to change that witness's mind. The perceptions were wrong. That is why I took that approach.

N.T. PCRA Hearing, 2/4/10, at 38-39.

Instantly, prior to trial, counsel tried to guide Ms. Terle in a direction that would have supported a theory that the shooting was unintentional, but encountered total hostility. Fearing that the witness would re-affirm before the jury that Appellant deliberately took aim while the helpless, crouching victim attempted to close the window, counsel chose not to attempt to

compel the witness to admit that the gun could have discharged accidentally. Clearly, trial counsel's course of action was not so lacking in reason that no competent attorney would have chosen it. Hence, we affirm the PCRA court's conclusion that Appellant did not receive ineffective assistance of counsel in this respect.

Appellant's final guilt phase position is that prior counsel were ineffective for failing to litigate claims that his conviction of second degree murder rested on insufficient evidence and was against the weight of the evidence. In deciding a sufficiency challenge, "we must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt." ***Commonwealth v. Brown***, 52 A.3d 320, 323 (Pa.Super. 2012). The Commonwealth can meet its burden "by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances." ***Id***. This Court cannot "re-weigh the evidence and substitute our judgment for that of the fact-finder." ***Id***. Additionally, "the entire record must be evaluated and all evidence actually received must be considered." ***Id***.

Further, we must draw all reasonable inferences from the evidence in favor of the Commonwealth as the verdict-winner. ***Commonwealth v.***

Hopkins, 67 A.3d 817, 820 (Pa.Super. 2013). "Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail." ***Brown***, ***supra*** at 323. "[T]he evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented." ***Id***.

"A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." ***Commonwealth v. Montalvo***, 956 A.2d 926, 934 (Pa. 2008) (quoting 18 Pa.C.S. § 2502(b)). Perpetration of a felony is defined in relevant part as, "The act of the defendant in engaging in . . . an attempt to commit . . . robbery[.]" 18 Pa.C.S. § 2502(d). "A person is guilty of robbery if, in the course of committing a theft, he . . . threatens another with or intentionally puts him in fear of immediate serious bodily injury; . . . [or] inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury[.]" 18 Pa.C.S. § 3701(a)(1).

Appellant admitted to police that he and a friend ordered a pizza in order to commit an armed robbery of the delivery person. Ms. Terle confirmed that Appellant placed a gun against Mr. Christopher's head and demanded money from the man. According to Ms. Terle's testimony, Appellant then deliberately shot Mr. Christopher during the course of

attempting to rob Mr. Christopher and Ms. Terle. Hence, the evidence established that Appellant killed a person during the course of an attempted robbery of that victim, whom he put in mortal fear by placing a loaded weapon against his head. Appellant's conviction therefore rested on sufficient evidence, and counsel was not ineffective for failing to assert such a claim.

As to Appellant's weight argument, "[a]ppellate review of a weight claim *is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence.*" ***Commonwealth v. Clay***, 64 A.3d 1049, 1055 (Pa. 2013) (italics in original). Accordingly, "[o]ne of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice." ***Id***.

A trial judge should not grant a new trial due to "a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion." ***Id***. Instead, the trial court must examine whether "notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice." ***Id***. Only where the jury verdict "is so contrary to the evidence as to shock one's sense of justice" should a trial court afford a defendant a new trial. ***Id***.

In the present case, the jury was free to believe Ms. Terle's statement that the shooting was intentional and reject evidence that it was accidental. ***Commonwealth v. Jackson***, 955 A.2d 441, 444 (Pa.Super. 2008) ("It is within the province of the fact finder to determine the weight to be accorded each witness's testimony and to believe all, part, or none of the evidence introduced at trial."); ***Commonwealth v. Kerrigan***, 920 A.2d 190, 198 (Pa.Super. 2007) ("It is a basic tenet of our judicial system that issues of credibility are left solely to the jury for resolution, and the jury is free to believe all, part, or none of the testimony presented."). The verdict in question does not shock one's sense of justice. Consequently, trial and appellate counsel were not ineffective for failing to advance this claim. The PCRA court properly denied relief on this basis as well.

Appellant also argues that his sentence of life imprisonment without parole constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments as well as Article I, § 13 of the Pennsylvania Constitution because he was a juvenile when he committed the offense of second degree murder. He originally relied upon the United States Supreme Court's decisions in ***Roper v. Simmons***, 543 U.S. 551 (2005), and ***Graham v. Florida***, 560 U.S. 48 (2010), and now bases his argument on ***Miller***, ***supra***.

In ***Roper***, a seventeen-year-old defendant planned and committed a joy-killing and was sentenced to death. After the Supreme Court concluded

that the United States Constitution prevented execution of the mentally disabled in ***Atkins v. Virginia***, 536 U.S. 304 (2002), the defendant in ***Roper*** petitioned for collateral relief in state court and claimed that the reasoning in ***Atkins*** applied to juveniles. The Missouri Supreme Court agreed, commuted the defendant's death sentence, and resentenced him to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor." ***Id***. at 560.

The United States Supreme Court granted review to determine if the state court correctly concluded that a death sentence could not constitutionally be imposed on a juvenile. The Supreme Court affirmed, holding that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who was less than eighteen years old when he committed the crime. The Court observed that the death penalty is limited to a very small category of crimes committed by the most serious offenders, and opined that juveniles do not fall within the definition of the most serious criminals due to their emotional immaturity, impulsivity, susceptibility to negative influences, and inability to fully comprehend the consequences of their actions.

The issue in ***Graham***, ***supra***, was the constitutionality of a juvenile being sentenced to life imprisonment without parole for a non-homicide offense. Therein, the Supreme Court stressed that the case did not involve a homicide; that fact provided the primary foundation for the result. The

Graham Court took particular care in distinguishing between crimes where a death occurred and one where death had not. It applied its holding solely in the latter instance, recognizing that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment[.]" ***Graham***, ***supra*** at 2027. Using as-applied figures, the Court concluded that the vast majority of States did not impose life imprisonment without parole on juvenile non-homicide offenders and categorically struck down the sentence therein as cruel and unusual.

In ***Miller***, ***supra***, the High Court extended the rationale of ***Graham*** to juveniles who were sentenced to mandatory sentences of life imprisonment without parole based on the commission of a homicide. The United States Supreme Court decision in ***Miller*** was consolidated with a second case, ***Jackson v. Hobbs***, 132 S.Ct. 2455 (2012). In ***Jackson***, the fourteen year-old juvenile agreed to rob a video store with two other youths. While traveling to the store, one of the juveniles revealed that he was carrying a sawed off shotgun. Jackson initially remained outside of the store before entering; from that vantage point he could see one of his compatriots using a weapon to threaten the store clerk. When the clerk indicated that she was going to telephone the police, Jackson's shotgun-wielding friend shot and killed the clerk.

Thereafter, Jackson was convicted of felony murder and aggravated robbery. The trial court sentenced him to a mandatory sentence of life

imprisonment without parole. Jackson did not challenge the sentence on direct appeal, but filed a state *habeas* petition after the United States Supreme Court decision in ***Roper***, ***supra***, was filed. While Jackson's appeal from the denial of his collateral attack was pending, the Supreme Court decided ***Graham***, ***supra***. After briefing on that decision, the Arkansas Supreme Court affirmed the denial of relief. The United States Supreme Court granted *certiorari*.

In the other case, fourteen-year-old Miller, and a friend, smoked marijuana, drank alcohol with an adult neighbor, and then decided to steal money from the unconscious neighbor's wallet. After removing $300, Miller attempted to return the wallet to the neighbor's pocket, but the neighbor awoke and began to choke Miller. Miller seized a baseball bat and repeatedly delivered blows to the neighbor, at one point stating, "I am God, I've come to take your life[.]" ***Miller***, ***supra*** at 2462. Following the severe beating, Miller and his friend left, but returned to burn down the neighbor's residence while he lay inside. The victim died and a jury convicted Miller of murder in the course of an arson. He then received a mandatory sentence of life imprisonment without parole.

The United States Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishment.'" ***Id***. at

2460. In doing so, the ***Miller*** Court relied on two separate lines of precedent. The Court reasoned,

> The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. ***See Graham,*** 560 U.S., at ––––, 130 S.Ct., at 2022–2023 (listing cases). So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the Eighth Amendment. ***See Kennedy v. Louisiana,*** 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); ***Atkins v. Virginia,*** 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, ***Roper*** held that the Eighth Amendment bars capital punishment for children, and ***Graham*** concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. ***Graham*** further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those 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. ***See Woodson v. North Carolina,*** 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion); ***Lockett v. Ohio,*** 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.

Id. at 2463-2464.

The Court reiterated its ***Roper*** and ***Graham*** observations that juveniles are emotionally and mentally different from adults in key respects, rendering them more amenable to rehabilitation. It then stated that the ***Graham*** rationale "implicates any life-without-parole sentence imposed on a juvenile[.]" ***Id***. at 2477. It further compared mandatory life without parole

sentences for juveniles to the death penalty and considered them closely analogous. The majority noted, however, that its holding did "not categorically bar a penalty for a class of offenders or type of crime[.]" ***Id***. at 2471. Rather, the Court maintained that its decision "flows straightforwardly from our precedents[,]" ***id***., and was "breaking no new ground[.]" ***Id***. at 2472. In conclusion, the majority stated, "***Graham***, ***Roper***, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." ***Id***. at 2475.

In two companion cases involving twin brothers, this Court applied ***Miller*** on direct appeal and reversed mandatory life imprisonment without parole sentences for juveniles convicted of felony murder. ***See Commonwealth v. Jovon Knox,*** 50 A.3d 749 (Pa.Super. 2012), *appeal granted on other ground*, 68 A.3d 323 (Pa. 2013); ***Commonwealth v. Devon Knox,*** 50 A.3d 732 (Pa.Super. 2012); ***see also Commonwealth v. Brown***, 71 A.3d 1009 (Pa.Super. 2013); ***Commonwealth v. Lofton***, 57 A.3d 1270 (Pa.Super. 2012). Similarly, the Pennsylvania Supreme Court applied ***Miller*** to cases pending on direct appeal. ***Commonwealth v. Batts***, 66 A.3d 286 (Pa. 2013).

Appellant's case, however, involves a collateral attack. Therefore, the preliminary issue is whether ***Miller*** announced a new constitutional rule that applies retroactively to defendants in Pennsylvania sentenced to life

imprisonment without parole based on the commission of first-degree or felony murder while juveniles. This question was raised and rejected in ***Cunningham***, ***supra***.

In ***Cunningham***, after the then-seventeen-year-old Cunningham shot and killed the victim during the course of a robbery, he was sentenced to life imprisonment without parole in 2002. His judgment of sentence became final for PCRA purposes in 2005, and he timely filed a PCRA petition. Therein, he argued that his sentence violated his Eighth Amendment rights made applicable to the states via the Fourteenth Amendment. He relied on ***Roper***, ***supra***, which, as noted, held the death penalty unconstitutional for juveniles. The PCRA court denied relief without a hearing, and this Court affirmed in 2009. The Pennsylvania Supreme Court held Cunningham's petition for allowance of appeal pending its later decision in ***Batts***, ***supra***. ***Batts*** was subsequently held in abeyance pending the decision in ***Graham*** and ***Miller***.

After the decision in ***Miller***, the Pennsylvania Supreme Court granted allowance of appeal. Cunningham argued for the first time, since he filed his petition and appeal before ***Miller*** had been decided, that the ***Miller*** decision was a new constitutional rule made retroactive by the United States Supreme Court. Cunningham's argument was that the rule announced in ***Miller*** was a substantive rule and that the High Court's decision to afford relief in the ***Miller*** companion case, ***Jackson***, a state collateral review

matter, resulted in ***Miller*** being applied retroactively. In discussing retroactivity, Cunningham argued the applicability of the ***Teague*** test. Importantly, Cunningham made no argument for a broader state retroactive finding, nor did he contend that ***Miller*** announced a watershed procedural rule.

In ***Cunningham***, the Supreme Court utilized ***Teague***. ***Id***. at 8. "Under the ***Teague*** framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. A new rule applies retroactively in a [federal] collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." ***Whorton v. Bockting***, 549 U.S. 406, 416 (2007) (internal citations omitted).[3]

In ***Teague***, the Supreme Court *sua sponte* addressed the issue of retroactivity during federal *habeas* review and stated, "Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." ***Teague***, ***supra*** at 300-301. The Court continued,

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[3] In ***Danforth v. Minnesota***, 552 U.S. 264 (2008), the Supreme Court expressly did not decide "whether States are required to apply 'watershed' rules in state post-conviction proceedings[.]" ***Danforth***, ***supra*** at 269 n.4. The dissent, however, opined, "a state court considering a federal constitutional claim on collateral review should follow the federal rule on whether new or old law applies." ***Id***. at 307 n.3 (Roberts, C.J. dissenting).

> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. ***See, e.g., Rock v. Arkansas,*** 483 U.S. 44, 62, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf); ***Ford v. Wainwright,*** 477 U.S. 399, 410, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (emphasis in original); ***see also Commonwealth v. Hughes***, 865 A.2d 761, 780 (Pa. 2004).

The ***Teague*** Court explained that new constitutional rules "generally should not be applied retroactively to cases on collateral review." ***Teague***, ***supra*** at 305-06. In ***Penry v. Lynaugh***, 492 U.S. 302 (1989), *abrogated on other grounds by* ***Atkins***, ***supra***, the Supreme Court more fully delineated the law governing retroactivity.

> In ***Teague,*** we concluded that a new rule will not be applied retroactively to defendants on collateral review unless it falls within one of two exceptions. Under the first exception articulated by Justice Harlan, a new rule will be retroactive if it places "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" ***Teague, supra,*** at 307, 109 S.Ct., at 1073 (quoting ***Mackey,*** 401 U.S., at 692, 91 S.Ct., at 1179 (Harlan, J., concurring in judgments in part and dissenting in part)). Although ***Teague*** read this exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, Justice Harlan did speak in terms of substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed. This Court subsequently held that

> the Eighth Amendment, as a substantive matter, prohibits imposing the death penalty on a certain class of defendants because of their status, ***Ford v. Wainwright***, ***supra***, 477 U.S., at 410, 106 S.Ct., at 2602 (insanity), or because of the nature of their offense, ***Coker v. Georgia***, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (rape) (plurality opinion). In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty.

Penry, ***supra*** at 329-30; ***see also Schriro v. Summerlin***, 542 U.S. 348, 352 n.4 (2004).

As noted, the United States Supreme Court has utilized a "substantive" and "procedural" rule dichotomy in analyzing retroactivity. Substantive rules are those that decriminalize conduct or prohibit punishment against a class of persons. ***See Hughes***, ***supra*** at 781. Concomitantly, the Supreme Court has made clear that "rules that regulate only the **manner of determining** the defendant's culpability are procedural." ***Schriro***, ***supra*** at 353 (citation omitted) (emphasis in original). A constitutional criminal procedural rule will not apply retroactively unless it is a watershed rule that implicates the fundamental fairness and accuracy of the criminal proceeding.

A procedural rule is considered watershed if it is necessary to prevent an impermissibly large risk of an inaccurate conviction, or in this case, sentence, and alters the understanding of the bedrock procedural elements essential to the fairness of a proceeding. ***See Whorton***, ***supra*** at 418. The only rule explicitly recognized by the United States Supreme Court as a

watershed criminal procedural rule was announced in ***Gideon v. Wainwright***, 372 U.S. 335 (1963),[4] *i.e.*, the right to counsel during a felony criminal prosecution. ***Id***. at 419.

The ***Miller*** majority took great care to indicate that it was mandating "only that a sentencer follow a certain process," ***Miller***, ***supra*** at 2471, which can be construed as announcing a rule that was procedural in nature. It added that its holding did "not categorically bar a penalty for a class of offenders or type of crime[.]" ***Id***. at 2471. Hence, the court spoke to the manner of determining a sentence.

Herein, the arguments leveled by Appellant in his briefs are almost identical to those made in ***Cunningham***. Indeed, both parties' positions in this case mirror those set forth in ***Cunningham***. The ***Cunningham*** Court rejected Cunningham's position that ***Miller*** was a substantive ruling since the United States Supreme Court explicitly stated that it did not categorically bar a penalty for a class of offenders.

The Pennsylvania Supreme Court, while noting that no argument was made relative to ***Miller*** being a watershed procedural rule, expressed doubt that a majority of United States Supreme Court justices would so find. Addressing the ***Jackson*** issue, the Pennsylvania High Court concluded that it was not clear that retroactivity was placed before the United States Supreme Court, and opined that ***Teague*** "determinations are not inherently implicit in

[4] ***Gideon v. Wainwright***, 372 U.S. 335 (1963), involved a case arising from Florida *habeas* review.

all new constitutional rulings[.]" ***Cunningham***, ***supra*** at 9; ***but see Commonwealth v. Chester***, 733 A.2d 1242, 1256 (Pa. 1999), a*brogated on other grounds*, ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002). ("***Teague*** sets a threshold that must be established before a [federal] *habeas* petitioner can qualify for relief.").[5]

The majority did acknowledge that litigants seeking broader retroactive effect of a new federal constitutional rule should present arguments as to why a new rule is "resonate with Pennsylvania norms *and* that there are good grounds" to apply a broader retroactivity doctrine during PCRA review. ***Id***. at 9 (italics in original).

As noted, Appellant forwarded to this Court an abbreviated Article 1, § 13 constitutional argument after the filing of the ***Cunningham*** decision. However, we need not address this issue since it was not adequately briefed. Furthermore, Appellant has not developed the underlying state constitutional claim under the ***Commonwealth v. Edmunds***, 586 A.2d 887, 895 (Pa. 1991), test.[6] Hence, we would be unable to reach the merits of his

[5] As discussed, Jackson was not proceeding on federal *habeas* review.

[6] "In ***Edmunds,*** [the Pennsylvania Supreme Court] indicated that, in considering whether the Pennsylvania Constitution should be interpreted more expansively than the United States Constitution, the Court may consider: the text of the Constitution; the provision's history including relevant decisional law; related case law from other states; and policy considerations unique to Pennsylvania." ***Commonwealth v. Batts***, 66 A.3d 286, 298 (Pa. 2013).

argument. ***Compare Batts***, ***supra*** at 297 (despite Batts not presenting an ***Edmunds*** analysis he referred to an *amici* brief discussing ***Edmunds***).

In light of the limited arguments forwarded herein, we save for another day any detailed discussion on whether an Article I, § 13 claim would afford broader retroactive protections under the PCRA or state *habeas* review. ***Commonwealth v. Briggs***, 12 A.3d 291, 344 (Pa. 2011) (declining to review Eighth Amendment and Article I, § 13 claims due to inadequate briefing); ***Commonwealth v. Belak***, 825 A.2d 1252, 1256 n.10 (Pa. 2003) (declining to reach ***Apprendi*** illegal sentencing issue where the claim was not raised in the petitioner's petition for allowance of appeal or initial brief). In sum, since Appellant has advanced the same positions that were rejected in ***Cunningham***, that decision controls.

Order affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/1/2014