

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ROBERTO GONZALEZ, JR.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 744 MDA 2012

Appeal from the Order Entered March 27, 2012  
In the Court of Common Pleas of Berks County  
Criminal Division at No(s): CP-06-CR-0003107-1989

BEFORE: MUSMANNO, J., BENDER, J., and COLVILLE, J.\*

CONCURRING MEMORANDUM BY BENDER, J. **FILED DECEMBER 13, 2013**

I agree that Appellant is not entitled to relief due to our Supreme Court's recent holding in ***Commonwealth v. Cunningham***, No. 38 EAP 2012 (Pa. filed October 30, 2013). I write separately to note my belief that ***Cunningham*** does not completely foreclose the possible retroactive application of ***Miller v. Alabama***, 132 S.Ct. 2455 (2012), to Appellant and those similarly situated, as may be otherwise suggested by the Majority's statement that ***Cunningham*** held that "***Miller*** does not apply retroactively to defendants whose judgments of sentence were final at the time of ***Miller's*** announcement." Majority Memorandum at 4.

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\* Retired Senior Judge assigned to the Superior Court.

In **Cunningham**, our Supreme Court addressed whether the **Miller** rule, which banned the mandatory imposition of life sentences on juvenile defendants, should be retroactively applied pursuant to one of two exceptions to the general rule of non-retroactivity established in **Teague v. Lane**, 489 U.S. 288 (1989) (plurality). The **Cunningham** Court considered whether the **Miller** rule fit the first **Teague** exception, which applies to rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. The **Cunningham** Court did not reach the question of whether the **Miller** rule fit within the second **Teague** exception, which applies to watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, because the appellant in **Cunningham** failed to develop any argument to that effect. Thus, whether the **Miller** rule is a watershed procedural rule requiring retroactive application pursuant to **Teague** remains an open question. Furthermore, as discussed by Chief Justice Castille in his Concurring Opinion, and briefly noted by the **Cunningham** Majority itself, the failure to establish retroactive application of a new constitutional rule under one of the two **Teague** exceptions does not limit the ability of state courts to provide a remedy under state law for violations of such rules.

Here, however, Appellant only claimed that the **Miller** rule should be retroactively applied pursuant to the first **Teague** exception. **Cunningham** squarely held that the **Miller** rule did not fit within that exception and, thus, Appellant is not entitled to relief. Accordingly, I concur in the result reached by the Majority.