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Alleyne v. United States, Age as an Element, and the Retroactivity of *Miller v. Alabama*

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ABSTRACT

The U.S. Supreme Court announced in *Miller v. Alabama* that the mandatory imposition of life in prison without the possibility of parole against juveniles was cruel and unusual punishment in violation of the Eighth Amendment. The million-dollar question was whether it would do any good for the over 2000 juveniles who had previously been so sentenced. The touchstone of *Miller*'s retroactivity hinges on the question of whether the rule it announced is substantive—and therefore retroactive—or procedural.

The quasi-substantive/quasi-procedural nature of the *Miller* opinion created a conundrum for lower courts, which have split on the retroactivity question, with several additional jurisdictions yet to decide. As detailed in this Essay, the answer to this puzzle comes from an unlikely source: the Court's Sixth Amendment jury-trial jurisprudence, and particularly its June 2013 interpretation of that right in *Alleyne v. United States*. Though unrelated to both juvenile sentencing and retroactivity, the *Alleyne* Court determined that where the existence of a fact dictates whether a mandatory minimum applies, the fact acts as an element of the underlying offense. This Essay extrapolates from the *Alleyne* holding and argues that *Miller*'s requirement that sentencers consider age and its attendant consequences in cases involving juveniles—making age at the time of the offense a fact that triggers whether the mandatory minimum sentence of life without parole applies—converts age to an element of the underlying offense, rendering *Miller* a substantive rule that must be applied retroactively.

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INTRODUCTION

The U.S. Supreme Court announced in *Miller v. Alabama* that the mandatory imposition of life in prison without the possibility of parole against juveniles is cruel and unusual punishment in violation of the Eighth Amendment.[1] The million-dollar question is whether it would do any good for the over 2000[2] juveniles who had previously been so sentenced. For those jurisdictions that follow or rely heavily on the dictates of retroactivity set out by the Supreme Court in *Teague v. Lane*,[3] the touchstone of *Miller*'s retroactivity hinges on whether the rule it announced is substantive—and therefore retroactive—or procedural.[4]

The *Miller* opinion provides no clear guidance. On the one hand, the opinion sounded in procedure, with the Court requiring "that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[5] On the other hand, the opinion sounded in substantive law, in that it required fundamental changes in criminal laws that mandate the imposition of life without parole in homicide cases where the crime was committed before the defendant's eighteenth birthday. Prior to *Miller*, states and the federal government could require that a court impose a sentence of life without parole on a juvenile without consideration of the defendant's youth. But the *Miller* Court rejected such mandatory sentencing, reasoning that "age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," a juvenile's history of abuse, the role the juvenile played in the homicide, the existence of peer pressure, the difficulties juveniles have navigating the legal system, and juveniles' unique capacity for rehabilitation

1. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).
2. *See id.* at 2477 (Roberts, C.J., dissenting).
3. 489 U.S. 288 (1989) (plurality opinion).
4. Under *Teague*, substantive rules are always retroactive, whereas procedural rules are only retroactive when they are deemed to be "watershed" rules of criminal procedure; however, the watershed exception is rarely applied. *See* Saffle v. Parks, 494 U.S. 484, 495 (1990). For a discussion of *Miller*'s retroactivity under the watershed exception, see Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller *and* Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 386–87 (2013). *See also* People v. Williams, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012).
5. *Miller*, 132 S. Ct. at 2471.

are all constitutionally relevant and therefore a sentencer must have an opportunity to consider such facts at sentencing.[6]

The quasi-substantive/quasi-procedural nature of the opinion created a conundrum for lower courts assessing the retroactivity of the decision.[7] The answer to this puzzle may come from an unlikely source: the Court's Sixth Amendment jury trial jurisprudence, and particularly its June 2013 interpretation of that right in *Alleyne v. United States*.[8] Though unrelated to both juvenile sentencing and the question of retroactivity, the *Alleyne* Court did determine that where the existence of a fact dictates whether a mandatory minimum applies, the fact is, in effect, an element of the underlying offense.[9] This Essay extrapolates from the *Alleyne* holding to argue that *Miller*'s requirement that sentencers consider age and its attendant consequences in cases involving juveniles—making age at the time of the offense a fact that triggers whether the mandatory minimum sentence of life without parole applies—converts age to an element of the underlying offense, rendering *Miller* a substantive rule that must be applied retroactively.

I. RETROACTIVITY: SUBSTANTIVE VERSUS PROCEDURAL RULES

Even where, as was the case with *Miller*, the Supreme Court announces a new rule of constitutional interpretation, defendants whose convictions were final on the date of that decision are not guaranteed relief. The question of whether a new rule applies retroactively is guided by the Supreme Court's 1988 plurality opinion in *Teague v. Lane*,[10] which sets out the standard for access to the federal courts on collateral review. While state courts assessing the retroactivity of a given decision are not bound to *Teague*'s strict requirements and may interpret retroactivity more broadly than *Teague* would require,[11] the majority of states either have adopted *Teague* as their exclusive test for determining retroactivity or

6. *Id.* at 2468.
7. *See In re* Morgan, 713 F.3d 1365, 1368–69 (11th Cir. 2013) (Wilson, J., concurring) (noting that *Miller* created a "quasi-substantive rule" but concurring with the determination that the rule should not be applied retroactively "for the time being . . . at least until the Supreme Court or this court sitting en banc directs us otherwise"); Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255 at 13–17, Johnson v. United States, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744) (noting *Miller* has both procedural and substantive aspects but conceding it is more properly characterized as substantive).
8. 133 S. Ct. 2151 (2013).
9. *Id.* at 2160–63.
10. 489 U.S. 288 (1989) (plurality opinion).
11. *See* Danforth v. Minnesota, 552 U.S. 264, 287–88 (2008).

rely on it heavily in their own analyses.[12] For the remaining states that do not rely directly on *Teague*, the retroactivity standards must allow the same or greater access to the courts than *Teague* on matters of federal constitutional law.[13] As such, were *Miller* retroactive under the *Teague* test, it would guarantee access to relief for all of the people serving mandatory sentences of life without parole for crimes committed as juveniles, no matter the date of conviction.

Pursuant to *Teague*, a new constitutional rule is retroactive if it is substantive rather than procedural in nature.[14] Substantive rules "include[] decisions that narrow the scope of a criminal statute by interpreting its terms."[15] This includes interpretations that modify an element of an offense, as the Court recognized in *Schriro v. Summerlin*, a case involving the application of the Court's interpretations of the Sixth Amendment right to a jury trial in *Ring v. Arizona*,[16] and its predecessor, *Apprendi v. New Jersey*.[17] *Ring* and *Apprendi* announced that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"[18]

At the time of Mr. Summerlin's 1981 trial, Arizona law allowed a sentencing judge, rather than a jury, to decide whether aggravating factors that opened the door to a death sentence were present.[19] On collateral appeal, Mr. Summerlin argued that *Ring* was a substantive, rather than a procedural, rule because by invalidating the determination of aggravating factors by a judge, it altered the elements of the statute under which he was convicted.[20] In rejecting

12. *Compare, e.g.*, Campos v. State, 816 N.W.2d 480, 488–90 (Minn. 2012) (exclusively relying on *Teague*), *with In re* Personal Restraint Petition of Markel, 111 P.3d 249, 251 & n.1 (Wash. 2005) (relying on *Teague* but noting that Washington courts may go beyond *Teague* where appropriate).
13. *See Danforth*, 552 U.S. at 287–88.
14. Schriro v. Summerlin, 542 U.S. 348, 351, 352 & n.4 (2004). Retroactivity analyses are further complicated under federal law where the defendant has previously sought relief on habeas grounds and is, at the time of consideration, requesting relief under a second and successive petition. 28 U.S.C. § 2244(b)(2)(A) (2006). While a full assessment of those complications is outside the scope of this Essay, I note that federal habeas requirements on second and successive petitions are understood to allow retroactive application where "the right combination of holdings" indicates the Supreme Court's intent that a rule be employed retroactively. Tyler v. Cain, 533 U.S. 656, 666 (2001). The combination of holdings from *Miller*, *Summerlin*, and *Alleyne* that I detail herein appear to fit that bill.
15. *Summerlin*, 542 U.S. at 351.
16. 536 U.S. 584 (2002).
17. 530 U.S. 466 (2000).
18. *Summerlin*, 542 U.S. at 350 (alteration in original) (quoting *Apprendi*, 530 U.S. at 490).
19. *Id.*
20. *Id.* at 353–54.

this argument, the Court agreed that a "decision that modifies the elements of an offense is normally substantive rather than procedural,"[21] but went on to explain:

> But that is not what *Ring* did; the range of conduct punished by death in Arizona was the same before *Ring* as after. *Ring* held that, because Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. [*Ring*,]536 U.S.[] at 609. This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.[22]

In other words, if the Alabama statute pursuant to which Evan Miller had been sentenced made age and its consequences relevant to sentencing under state law, the Sixth Amendment would require that Alabama afford him the procedure of having those facts determined by a jury. But because the Supreme Court, rather than Alabama, made age and its consequences essential to life without parole sentencing in cases involving juveniles, age at the time of the offense functions as an element of the offense, rendering the *Miller* rule substantive and therefore retroactive.

Yet, to date, of the four jurisdictions to address the question of whether *Miller* made age an element of the underlying offense[23]—Florida, Michigan, Minnesota, and Mississippi—only the Mississippi Supreme Court has answered in the affirmative. Relying on *Summerlin*'s discussion of interpretations nar-

21. *Id.* at 354.

22. *Id.*

23. A handful of other jurisdictions have also tackled the question of retroactivity on other grounds. Some favor retroactive application of *Miller*. *See, e.g.*, Alejandro v. United States, No. 13 Civ. 4364, 2013 WL 4574066 (S.D.N.Y. Aug. 22, 2013); People v. Williams, 982 N.E.2d 181 (Ill. App. Ct. 2012); People v. Morfin, 981 N.E.2d 1010 (Ill. App. Ct. 2012); State v. Ragland, 836 N.W.2d 107 (Iowa 2013); State v. Bennett, 820 N.W.2d 769 (Iowa Ct. App. 2012) (unpublished); State v. Lockheart, 820 N.W.2d 769 (Iowa Ct. App. 2012) (unpublished); State v. Simmons, 99 So. 3d 28 (La. 2012) (per curiam); Tulloch v. Gerry, No. 12-CV-849, 2013 WL 4011621, at *9 (N.H. Super. Ct. July 29, 2013); *see also In re* Pendleton, No. 12-3617, 2013 WL 5486170 (3d Cir. Oct. 3, 2013) (per curiam) (concluding that petitioners showed prima facie evidence that *Miller* is retroactive); Johnson v. United States, 720 F.3d 720 (8th Cir. 2013) (per curiam) (awarding preliminary authorization for review by the district court following government's concession that *Miller* is retroactive). Others have denied relief. *See In re* Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013); Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013) (per curiam). As a defendant need only show that a new rule is substantive in one way, a determination that age and its consequences function as an element of the underlying criminal law post-*Miller* would be sufficient for a defendant to obtain relief.

rowing the scope of a statute, it determined that because Mississippi's sentencing laws could not be applied against juveniles post-*Miller* without consideration of a juvenile's age and its consequences, "*Miller* [therefore] modified [Mississippi's] substantive law by narrowing its application for juveniles."[24]

The Minnesota Supreme Court, in contrast, also relying on *Summerlin*, stated: "By requiring a sentencer to consider the potentially mitigating circumstances of an offender's youth and attendant characteristics, the *Miller* rule does not create a requirement that is the 'functional equivalent of an element,'" because it does not require the court to find any particular fact before imposing life without parole in a juvenile homicide case.[25] Likewise, the Michigan Court of Appeals determined that *Miller* was not retroactive, noting that: "*Miller* does not alter the elements necessary for a homicide conviction. Rather it simply necessitates the consideration of certain factors, when juveniles are involved, in sentencing."[26] And Florida's Third District Court of Appeal, assessing whether *Miller*'s rule is substantive or procedural under its own retroactivity law rather than under *Teague*, noted that "*Miller* does not require the sentencer to conduct an inquiry into an element of the offense already determined by a jury beyond a reasonable doubt for which the offender was convicted."[27]

What the Minnesota, Michigan, and Florida courts did not have at their disposal was the U.S. Supreme Court's June 2013 decision in *Alleyne v. United States*.[28] Though, as described below, *Alleyne* is unrelated to juvenile sentencing, its explication of the meaning of an "element" of a crime reinforces *Summerlin*'s substantive/procedural divide and shows that the Mississippi Supreme Court answered the *Miller* retroactivity puzzle correctly.

II. AGE AS AN ELEMENT

In *Alleyne*, the Court considered whether to extend the *Apprendi-Ring* line of Sixth Amendment jury trial right cases to mandate determination by a jury of

24. Jones v. State, No. 2009-CT-02033-SCT, 2013 WL 3756564, at *3 (Miss. July 18, 2013) (en banc).
25. Chambers v. State, 831 N.W.2d 311, 329 (Minn. 2013) (quoting Ring v. Arizona, 536 U.S. 584, 609 (2002)).
26. People v. Carp, 828 N.W.2d 685, 711 (Mich. Ct. App. 2012).
27. Geter v. State, 115 So. 3d 375, 381 (Fla. Dist. Ct. App. 2012).
28. Following the announcement of *Alleyne*, Florida's First District Court of Appeals adopted the rationale of a previous decision without additional analysis. *See* Gonzalez v. State, 101 So. 3d 886, 888 (Fla. Dist. Ct. App. 2013) (adopting reasoning of *Geter*, 115 So. 3d at 381). Otherwise, with the exception of preliminary orders in favor of retroactivity issued by the Third and Eighth Circuits, *In re Pendelton*, 2013 WL 5486170; *Johnson*, 720 F.3d 720, and orders finding retroactivity in the Southern District of New York and a New Hampshire trial court, *Alejandro*, 2013 WL 4574066; *Tulloch*, 2013 WL 4011621, all state and federal opinions regarding the retroactivity of *Miller* were decided before the Court announced *Alleyne v. United States*, 133 S. Ct. 2151 (2013). *See supra* notes 23–27.

not only facts that increase the statutory maximum sentence but also facts that increase the statutory minimum.[29] The statute at issue criminalized "us[ing] or carr[ying] a firearm in relation to a 'crime of violence,'" and carried a penalty range of five years to life in prison as a general matter, seven years to life if a firearm is "brandished," and ten years to life if a firearm is discharged.[30] The opinion centered on whether a fact that may increase a statutory minimum sentence—in that case the manner in which the firearm was used—was an "element" of the offense. The Court concluded that it was.

The Court's determination that the fact of how a firearm was used is an element of the offense provides clear guidance regarding the nature of what constitutes a criminal element more broadly. As the Court explained:

> It is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed. . . . And because the legally prescribed range *is* the penalty affixed to the crime . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense.
>
> . . . .
>
> Moreover, it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment. . . . This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury.[31]

As such, the Court determined that it was irrelevant that the defendant may have received a seven-year sentence even without a jury finding of brandishing given that the lower range was five years to life. The Court reasoned that because the existence of that fact alters the prescribed range, "[i]t is no answer to say that the defendant could have received the same sentence with or without that fact."[32] Analogously, the fact that under *Miller* a juvenile may be sentenced to life without parole so long as the sentencer considers age and its consequences is also "beside the point."[33]

What is relevant is how *Miller*'s prohibition of mandatory life without parole sentences for crimes committed by juveniles converts the defendant's age at the time of the crime into an element of the underlying offense, rendering the

29. *Alleyne*, 133 S. Ct. at 2155–56.
30. *Id.* at 2156 (quoting 18 U.S.C. § 924(c)(1)(A) (2012)).
31. *Id.* at 2160–61 (citations omitted).
32. *Id.* at 2162.
33. *Id.*

Miller rule substantive for retroactivity purposes. Take, for example, the relevant statute from Minnesota's criminal code:

> *Life without release.* The court shall sentence a person to life imprisonment without possibility of release under the following circumstances:
>
> 1. the person is convicted of first-degree murder [that is premeditated or related to specific offenses including the killing of a peace officer or acts related to terrorism] . . . ;
>
> 2. the person is convicted of committing first-degree murder in the course of a kidnapping . . . ; or
>
> 3. the person is convicted of first-degree murder [related to specific offenses including burglary, aggravated robbery, and escape], and the court determines on the record at the time of sentencing that the person has one or more previous convictions for a heinous crime.[34]

The statute is silent as to the defendant's age at the time of the offense, but because it mandates a sentence of life without the possibility of parole, *Miller* requires that the statute be read to apply only to defendants age eighteen or older at the time of the crime.[35] As such, the defendant's age at offense triggers the mandatory minimum, and therefore, along with the core crimes described in the statute, "constitute[s] a new, aggravated crime"[36] for which age at the time of the offense is an element. Thus, the Minnesota Supreme Court erred when it determined (without, of course, the benefit of *Alleyne*) that the *Miller* rule is not the functional equivalent of an element. As the Mississippi Supreme Court recognized (even without the benefit of *Alleyne*), *Miller* narrows the scope of any statute that mandates a minimum sentence of life without parole and interprets its terms.

CONCLUSION

Minnesota's statute is not unique; prior to *Miller*, over 2000 juveniles were sentenced under statutes that mandated a minimum sentence of life without pa-

34. MINN. STAT. ANN. § 609.106 subdiv. 2 (West 2009).

35. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

36. *See Alleyne*, 133 S. Ct. at 2161. Although this statutory interpretation arguably creates a new offense for all defendants and not just juveniles, adult defendants could not obtain relief under *Miller*. A determination that *Miller* is retroactive merely provides access to the courts for application of the substantive rule from *Miller*, which only aids defendants who were under eighteen at the time of their offenses. Moreover, on a prospective basis, jurisdictions with mandatory life without parole sentencing are working to amend their statutes to explicitly comply with *Miller*, so this interpretation is relevant only to those individuals who were under eighteen at the time of their offense and whose convictions were final prior to the announcement of the *Miller* rule.

role.[37] Those statutes prohibited judges from taking into account any mitigating circumstances, including age and its consequences. For Evan Miller, for example, Alabama law prohibited the trial court from considering whether his culpability may have been reduced given that "Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten."[38] And as with each of the other juveniles sentenced to mandatory life without parole, the trial court could not consider whether, at age fourteen, Miller had the potential to be rehabilitated and reformed.

Moving forward post-*Miller*, courts must consider a juvenile's youth at sentencing. In light of both *Summerlin* and *Alleyne*, we must look backward as well. Each statute must be read to treat age at the time of the crime as an element of any offense mandating life in prison without parole. Put simply, the *Miller* rule is substantive and retroactive.

37. *See, e.g.*, 18 U.S.C. § 1111 (2012); ALA. CODE §§ 13A-5-40 to -45 (LexisNexis 2005); ARK. CODE ANN. § 5-10-101(c)(1) (2006); CONN. GEN. STAT. ANN. § 53a–35a (West 2012); DEL. CODE ANN. tit. 11, § 4209(a) (2005); FLA. STAT. ANN. § 775.082(1) (West 2010); HAW. REV. STAT. ANN. § 706-656(1) (LexisNexis 2007); IDAHO CODE ANN. § 18-4004 (2004); IND. CODE ANN. § 35-50-2-9 (LexisNexis 2009); MASS. ANN. LAWS ch. 265, § 2 (LexisNexis 2010); MICH. COMP. LAWS ANN. § 750.316 (West 2004); MO. ANN. STAT. § 565.020 (West 2012); NEB. REV. STAT. § 29-2522 (2008); N.C. GEN. STAT. § 14-17 (2012); 18 PA. CONS. STAT. ANN. § 1102 (West 1998); S.D. CODIFIED LAWS § 22-6-1(1) (2006); TEX. PENAL CODE ANN. § 12.31(a) (West 2011); VA. CODE ANN. § 18.2-10 (2009); WASH. REV. CODE ANN. § 10.95.030 (West 2012).

38. *Miller*, 132 S. Ct. at 2469.