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CRIMINAL CONVICTIONS

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Over the past year, the Illinois appellate courts have been making a muddle of our state's retroactivity doctrine, stretching the law by ordering some prisoners who committed murders as juveniles to be resentenced.

The impulse is honorable, but the legal reasoning is flimsy. Cleaning up the mess is a job for the Illinois General Assembly.

It all started in 2012, when the U.S. Supreme Court issued a momentous decision in a criminal case called *Miller v. Alabama*. The court held that state sentencing schemes mandating life in prison without the possibility of parole (LWOP) for juvenile murderers violated the Eighth Amendment.

Miller was accepted in the legal community with little acrimony. Although the decision irked some commentators, most of us were comfortable acknowledging that the immaturity and impetuosity of juveniles typically make them less morally culpable than adults.

Besides, the Supreme Court had banned only mandatory LWOP sentencing schemes, not those where judges retained discretion to issue a lesser sentence. The very worst youthful offenders, therefore, could still remain behind bars for life.

Miller made the mandatory sentencing rules for juveniles in 26 states and in the federal government unconstitutional. But a vexing question remained. Should the *Miller* rule apply retroactively to prisoners who had already been sentenced, perhaps years ago, under mandatory LWOP rules?

It's true that new rules for the conduct of criminal trials must be applied to cases that are still pending. But once the direct appeal process is complete, the Constitution doesn't require the state to reopen the case.

It's up to the states to determine when to apply new rules to already-final cases. And indeed, some states give their courts the ability to apply new rules to all cases, whether final or not, in order to assure that similarly situated defendants are treated equally.

But other states have adopted more stringent rules, acknowledging that both victims of crime and society at large have an interest in bringing closure to criminal cases.

Illinois is one of the parsimonious states. In 1990, in *People v. Flowers*, the Illinois Supreme Court adopted the restrictive federal standard of *Teague v. Lane* (1989) for determining when a new rule should be applied retroactively to final cases.

Under *Teague* and *Flowers*, a newly announced rule will not be applied to already-final cases with two exceptions.

First, the new rule will have full retroactive effect when it is "substantive" in nature, meaning that the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." For example, if a law banning homosexual sodomy were deemed unconstitutional, a defendant would be entitled to a reversal of his conviction regardless of whether his case was final or not.

> ***"(O)nce the direct appeal process is complete, the Constitution doesn't require the state to reopen the case."***

Likewise, "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense" are considered substantive and therefore retroactive. *Penry v. Lynaugh* (1989). In *Penry,* the Supreme Court held that the execution of persons with mental retardation violated the Eighth Amendment and that this rule was substantive and, therefore, retroactive.

The second exception to Teague is for constitutional rules of criminal procedure that are "watershed" in nature, "implicating the fundamental fairness and accuracy of the criminal proceeding." Watershed rules alter our understanding of the procedural elements essential for a fair trial.

The only example to date of a rule that would meet this standard, according to the Supreme Court, was the holding in *Gideon v. Wainwright* (1963) that any indigent defendant charged with a felony must be provided with counsel.

Given these standards, should the *Miller* rule (forbidding imposition of an LWOP sentence where the judge had no discretion to give a lesser term) be applied retroactively to the estimated 105 final cases in Illinois where a minor defendant was convicted of murder?

Our appellate courts have so far said yes. But common sense — as well as every other state and federal court to have applied *Teague* to the question — suggests the correct answer is no.

First, *Miller* is not a new substantive rule. The primary individual conduct engaged in by the juvenile defendants was murder and murder by juveniles has not been decriminalized. Nor has the Supreme Court prohibited a category of punishment for a class of defendants. After all, LWOP sentences for juveniles are still allowed so long as certain procedures — i.e., allowing judges to consider lesser sentences — are followed.

Nonetheless, a panel of the 1st District, in *People v. Morfin* (2012), concluded that *Miller* did announce a new substantive rule, because it "mandates a sentencing range broader than that provided by statute for minors convicted of first-degree murder."

It's not clear why this observation about the breadth of sentencing led the court to conclude that the new *Miller* rule was substantive, at least under the first exception to the *Teague* standard.

In fact, another 1st District panel held quite the opposite, stating in *People v. Williams* (2012) that the *Miller* rule was procedural. Although its reasoning was irreconcilable with *Morfin*, the *Williams* court likewise concluded that *Miller*

should have retroactive effect because it was not only procedural, but "watershed" too, thus satisfying the second *Teague* exception.

This holding is fanciful. Since issuing *Teague* in 1989, the Supreme Court has never found a new rule of criminal procedure to be "watershed." And *Miller* does no more than tell states that before sentencing a juvenile to LWOP the judge must be allowed the option of choosing a lesser penalty. That's important, but it's hardly "watershed" stuff.

To its credit, a 5th District panel, in *People v. Johnson* (2013), seemed to acknowledge the irreconcilability of the two 1st District opinions, but instead of articulating its own position, stated only that "we agree with our colleagues in the 1st District" that *Miller* should be applied retroactively. What a mess!

Here's the problem as I see it. The appellate judges in our state believe fairness dictates that they apply the *Miller* rule across the board to all juvenile defendants who were given mandatory LWOP sentences for their murder convictions. But a fair application of the *Teague* doctrine can't get them to that result.

That's unfortunate, but it's dictated by the Illinois Supreme Court's (arguably ill-considered) decision to adopt the *Teague* retroactivity rules in the first place. The proper course of action is for the appellate courts to faithfully apply *Teague* and leave it to the state Supreme Court to modify its retroactivity rules if it deems appropriate.

Of course, there is another option. The Illinois General Assembly could pass legislation, as other states have done, that would authorize resentencing hearings for each of the 105 defendants who were given mandatory LWOP sentences for murders committed while they were minors.

Legislation would allow the Illinois Supreme Court to dodge having to decide whether to apply its retroactivity doctrine in good faith or allow resentencing to proceed in already-final cases.

The first approach would effectively deny any hope for defendants sentenced under an unconstitutional scheme. The second would undermine rule of law values. Ideally, the court will not have to make that Hobson's choice.