

Can US Supreme Court Require States to Apply New Fed Rules Retroactively on State Collateral Attack?

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In December 2014, the U.S. Supreme Court agreed to decide whether the new rule it announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (the Eighth Amendment forbids mandatory life-without-parole sentences for juveniles), applies retroactively "to this case." See *Toca v. Louisiana*, 135 S. Ct. 781 (2014). Were "this case" being considered on federal habeas review, *Teague v. Lane*, 489 U.S. 288 (1989), likely would control *Miller's* retroactivity. *Teague* holds that new rules announced by the Supreme Court do not apply retroactively on federal habeas unless they are "substantive" or are "watershed" procedural rules. And because *Teague* is a gloss on the federal habeas statute (which arguably is silent on retroactivity), the Supreme Court's jurisdiction to decide *Miller's* retroactivity would be clear.

But "this case" arises from a *state-court* collateral attack. *Toca* pursued his *Miller* claim under a state statute allowing Louisiana courts to vacate an otherwise final conviction if the prisoner's custody violates the federal Constitution. Louisiana's statute does not address whether prisoners can benefit from the retroactive application of new constitutional rules. Louisiana courts have filled that gap by adopting *Teague*, and they have held that *Miller* does not satisfy either *Teague* exception to nonretroactivity. Because *Toca* challenges that holding, the Supreme Court has added a second question presented: "Is a federal question raised by a claim that a state collateral review court erroneously failed to find a *Teague* exception?"

Unfortunately, the Supreme Court will not have a chance to answer either question this term. *Toca* recently negotiated a deal with state prosecutors that will free him from prison after 31 years, which will compel dismissing the writ of certiorari on mootness grounds. Nonetheless, the second question presented in *Toca* remains open and important. I believe the answer to that question should have been "no." When a state court chooses to incorporate federal precedent into its own law, the misapplication of that precedent does not raise a substantial federal question. But that does not mean that the Supreme Court would have lacked jurisdiction to decide *Miller's* retroactivity in *Toca*. The Constitution itself may compel all collateral attack courts to apply certain new rules retroactively. Or an equal-treatment principle might compel states that afford a

collateral attack remedy for federal constitutional violations to afford at least as much retroactive effect to new federal rules as a federal habeas court would under *Teague*. I explore these issues below.

Teague's Nonretroactivity Principle

Under *Teague*, federal habeas courts lack authority to disturb a state-court conviction based on a new rule of constitutional criminal procedure announced after the prisoner's judgment achieved finality, i.e., after direct appeals are exhausted. Interests in federalism, comity and finality generally trump any benefit from awarding the prisoner a collateral postconviction remedy. So if the prisoner's conviction was lawful under precedent as it existed at the time of direct appeal, then federal courts are barred from using subsequent (pro-defendant) legal developments to award habeas relief. But *Teague's* nonretroactivity principle must yield in two circumstances: "New constitutional rules announced by this Court that place certain kinds of primary individual conduct beyond the power of the states to proscribe, as well as 'watershed' rules of criminal procedure, must be applied in ... all federal habeas corpus proceedings." *Danforth v. Minnesota*, 552 U.S. 264, 266 (2008).

Answer to Toca's Second Question Is "No"

The Supreme Court in *Danforth* made clear that "*Teague* is based on statutory authority that extends only to federal courts applying a federal statute," and thus "cannot be read as imposing a binding obligation on state courts." *Danforth*, 552 U.S. at 279-80. Finality of state convictions "is a matter that states should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts."

Because *state law* controls the retroactivity of a new federal rule raised on state collateral attack, a state court's refusal to find a *Teague* exception ordinarily does not present a federal question.

To be sure, a federal question would arise if a "state court 'felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did.'" *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) (citation omitted). But no such question arises where the state court made "clear by a plain statement ... that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." The Louisiana Supreme Court made just such a "plain statement" 22 years ago when it "adopt[ed] the *Teague* standards for all cases on collateral review in our state courts" while "recogniz[ing] that we are not bound to adopt the *Teague* standards." *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1297 (La. 1992). Because the Louisiana courts voluntarily adopted *Teague's* retroactivity principles, their conclusion that *Miller* does not satisfy a *Teague* exception does not raise a federal question. Thus, the answer to *Toca's* second question should have been "no."

Does the Constitution Compel a Minimum Level of Retroactivity?

The Supreme Court nonetheless might have concluded that the Constitution itself compels the retroactive application of at least some new rules. If it does, the court would have had jurisdiction to decide whether *Miller* announced just such a new rule.

Teague's nonretroactivity principle extends neither to "substantive categorical guarantees accorded by the Constitution," *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989), i.e., those rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense," nor to "[w]atershed rules of criminal procedure" which "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990). Such rules are so fundamental to the fair administration of our criminal justice system that prisoners are entitled to a federal collateral attack remedy based on the Constitution as it interpreted today. If *Teague's* nonretroactivity principle must yield for new substantive rules that put certain conduct (or sentences) beyond the power of the legislature to proscribe (or impose), and for new procedural rules deemed necessary to prevent erroneous guilt determinations, then perhaps the Constitution itself mandates retroactive application of those rules by any government (federal or state) that affords a collateral attack remedy. *But see Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (the Constitution does not require states to afford any collateral attack remedy).

The Supreme Court has suggested that states may be constitutionally obligated to give retroactive effect to new "watershed" rules. In *Danforth*, the court held that states were free to afford retroactive effect to new federal rules that did not satisfy a *Teague* exception. Perhaps concerned its holding would support the converse proposition (state courts can refuse to afford retroactive effect to new rules that *do* satisfy a *Teague* exception), the majority footnoted that it was leaving open the question of whether *Teague's* "watershed" exception bound state courts. *Danforth*, 552 U.S. at 269 n.4. That was intriguing because prior to *Teague*, the Supreme Court had required *state* collateral attack courts to apply the court's right-to-counsel decisions retroactively. E.g., *Kitchens v. Smith*, 401 U.S. 847, 847 (1971); *Arsenault v. Massachusetts*, 393 U.S. 5, 6 (1968); *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968). And in *Johnson v. New Jersey*, 384 U.S. 719 (1966), the court never questioned its jurisdiction to decide, in case arising on state collateral attack, whether the new rule announced in *Escobedo v. Illinois*, 378 U.S. 478 (1964), should apply retroactively.

These pre-*Teague* cases show that the court clearly believed it had the power to require state courts to apply *some* new federal rules retroactively on collateral attack. While the court did not explain the source of the power it exercised, the court in *Toca* could have relied on these pre-*Teague* decisions to hold that it has jurisdiction to decide whether *Miller* ought to apply retroactively on state collateral attack.

What About Equal Treatment?

Alternatively, the Supreme Court could have avoided a broader constitutional ruling by invoking the equal-treatment rationale it employed in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

In *Griffith*, the Supreme Court granted certiorari, along with a companion federal case, to decide whether defendants whose direct appeals were pending when *Batson v. Kentucky*, 476 U.S. 79 (1986), issued could benefit from *Batson's* new rule. The court held that any defendant whose conviction was not final when the Supreme Court announced a new rule must receive the benefit of that rule (assuming it was properly raised and preserved). No one doubted the court's authority to dictate that requirement to *federal* appellate courts. But the court also applied its retroactivity holding to *state* appellate courts. It explained that a state's failure to apply a new rule to defendants with pending direct appeals "violates basic norms of constitutional adjudication," and cited the unfairness of giving one defendant the benefit of a new rule while denying that same benefit to other similarly situated defendants. *Griffith*, 479 U.S. at 322-23.

Perhaps what was true of state-court direct appeals ought to be true of state-court collateral attacks. It may "violate[] basic norms of constitutional adjudication" for the state court whose judgment is being collaterally attacked to deny relief to a state prisoner when *Teague* would compel a federal court to grant habeas relief to an identically situated prisoner. So the court might have resolved the jurisdictional issue in *Toca* by holding that if a federal court is required to disturb an otherwise-final state court judgment because the new federal rule is either "substantive" or "watershed" under *Teague*, then the federal Constitution requires a state court to disturb its own otherwise-final judgment in the same circumstances. Given that state prisoners must exhaust their federal claims in state court, requiring state collateral attack courts to afford relief for new rules that apply retroactively under *Teague* would not only have brought a welcome symmetry to the court's retroactivity jurisprudence, but would have afforded the court a jurisdictional hook upon which to decide *Miller's* retroactivity in *Toca*. The resolution of these questions will have to await another case arising on state collateral attack seeking the retroactive application of a new federal rule. •

Sanders is an Assistant U.S. Attorney in the District of N.J. The opinions expressed in this article are his, not those of the Office or the Department of Justice. This article was submitted to the Law Journal before any merits or amicus briefs were filed in Toca.
