CV-13-942

IN THE SUPREME COURT OF ARKANSAS

RAY HOBBS, Director,
Arkansas Department of Correction — APPELLANT

V. — NO. CV-13-942

ULONZO GORDON — APPELLEE

AN APPEAL FROM THE
LEE COUNTY CIRCUIT COURT

THE HONORABLE RICHARD LEE PROCTOR,
CIRCUIT JUDGE

ABSTRACT, BRIEF and ADDENDUM OF APPELLANT

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INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL None.

II. BASIS OF SUPREME COURT JURISDICTION See Section V.

( ) Check here if no basis for Supreme Court Jurisdiction is being asserted, or check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) ___ Construction of Constitution of Arkansas

(2) _X_ Death penalty, life imprisonment

(3) _X_ Extraordinary writs

(4) ___ Elections and election procedures

(5) ___ Discipline of attorneys

(6) ___ Discipline and disability of judges

(7) ___ Previous appeal in Supreme Court

(8) _X_ Appeal to Supreme Court by law, see Ark. Sup. Ct. R. 1-2(a)(2), (3), (8) (2013); see also In re Review of Habeas Corpus Proceedings, 313 Ark. 168, 852 S.W.2d 791 (1993).

III. NATURE OF APPEAL Civil appeal of order that, pursuant to Miller v. Alabama, 132 S. Ct. 2455 (2012), granted relief on Appellee's habeas-corpus petition, vacated and set aside his sentence of life imprisonment without the possibility of parole for capital murder, and transferred the case to the Crittenden County Circuit Court for resentencing.

(1) ___ Administrative or regulatory action

(2) ___ Rule 37

(3) ___ Rule on Clerk

(4) ___ Interlocutory appeal

(5) ___ Usury

(6) ___ Products liability

(7) ___ Oil, gas, or mineral rights

(8) ___ Torts

(9) ___ Construction of deed or will

(10) ___ Contract

(11) ___ Criminal

This is an appeal from the circuit court's order granting relief on Appellee's habeas-corpus petition, which, pursuant to Miller v. Alabama, 132 S. Ct. 2455 (2012), vacated and set aside Appellee's capital-murder sentence of life imprisonment without the possibility of parole and transferred the case to the Crittenden County Circuit Court for resentencing.

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT? No.

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

(_X_) appeal presents issue of first impression,

(___) appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,

(_X_) appeal involves federal constitutional interpretation,

(_X_) appeal is of substantial public interest,

(_X_) appeal involves significant issue needing clarification or development of the law, or overruling of precedent.

(_X_) appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

JURISDICTIONAL STATEMENT

I.

This appeal from the circuit court's grant of habeas-corpus relief to Appellee Ulonzo Gordon presents a question of federal constitutional interpretation and two questions regarding the interpretation of the habeas-corpus statute, Ark. Code Ann. § 16-112-101 to -123 (Repl. 2006): (1) whether claims under Miller v. Alabama, 132 S. Ct. 2455 (2012), challenging the mandatory method of imposing the punishment of life without parole for capital murder, are cognizable under the habeas-corpus statute; (2) whether Miller is retroactively applicable to cases on collateral review; and (3) if the answers to (1) and (2) are "yes," whether the circuit court may grant relief on the petition without first issuing a writ of habeas corpus, causing the writ be served on the warden, requiring the warden to file a return justifying the commitment, and making the necessary findings, as prescribed by Ark. Code Ann. § 16-112-103 to -118 (Repl. 2006).

II.

I express a belief, based on a reasoned and studied professional judgment, that the questions presented by this appeal are jurisdictionally significant.

Question (1) presents an issue of first impression involving the interpretation of the habeas-corpus statute, and so Supreme Court jurisdiction is appropriate pursuant to Ark. Sup. Ct. R. 1-2(b)(1) & (6) (2013). Question (2) presents a question of federal constitutional interpretation, see Rowe v. State, 243 Ark. 375, 419 S.W.2d 806 (1967), and is also an issue upon which there is a split among the federal courts and state courts of last resort, and so Supreme Court jurisdiction is appropriate under Ark. Sup. Ct. R. 1-2(b)(3) & (4) (2013). Question (3) requests that the Court clarify the interpretation of the habeas-corpus statute by recognizing its mandatory nature and enforcing its plain terms, and so Supreme Court jurisdiction is appropriate pursuant to Ark. Sup. Ct. R. 1-2(b)(5) (2013). Finally, questions (1)-(3) pose the overarching question of whether society's well-established interest in the finality of criminal judgments and the Legislature's considered judgment that life without the possibility of parole is an appropriate sentence for capital murder, should be set aside—via an unprecedented expansion of the narrow remedy of habeas corpus—in the case of an individual who was allegedly 17 at the time he committed the murder. Questions (1)-(3) are, accordingly, of substantial public interest, and so the Supreme Court's jurisdiction is appropriate pursuant to Ark. Sup. Ct. R. 1-2(b)(4) (2013).

Respectfully Submitted:

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POINTS ON APPEAL AND PRINCIPAL AUTHORITIES

I.

APPELLEE'S HABEAS-CORPUS PETITION FAILED TO DEMONSTRATE PROBABLE CAUSE TO BELIEVE THAT HE IS BEING DETAINED WITHOUT LAWFUL AUTHORITY BECAUSE CLAIMS UNDER MILLER V. ALABAMA, 132 S. Ct. 2455 (2012), ARE NOT COGNIZABLE UNDER THE HABEAS-CORPUS STATUTE.

Pineda v. State, 2009 Ark. 471.

Cloird v. State, 349 Ark. 33, 76 S.W.3d 813 (2002).

II.

APPELLEE'S HABEAS-CORPUS PETITION FAILED TO DEMONSTRATE PROBABLE CAUSE TO BELIEVE THAT HE IS BEING DETAINED WITHOUT LAWFUL AUTHORITY BECAUSE MILLER V. ALABAMA, 132 S. Ct. 2455 (2012), DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW.

Schriro v. Summerlin, 542 U.S. 348 (2004).

Chaidez v. United States, 133 S. Ct. 1103 (2013).

III.

EVEN IF PROBABLE CAUSE EXISTED TO ISSUE THE WRIT, THE WARDEN WAS NOT SERVED WITH THE WRIT, WAS NOT

AFFORDED THE OPPORTUNITY TO FILE A RETURN, AND THERE WAS NO TRIAL OF THE WRIT, AS REQUIRED BY THE HABEAS CORPUS STATUTE.

Ark. Code Ann. §§ 16-112-103 to -108 (Repl. 2006).

Smith v. State, 347 Ark. 277, 61 S.W.3d 168 (2001).

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ABSTRACT

[Abstractor's Note: There is no testimony to be abstracted because the circuit court did not hold a hearing in this case. The trial record of Appellee's direct appeal, No. CR 95-1113, is cited "Tr. R." and is incorporated into the record of this postconviction proceeding pursuant to Drymon v. State, 327 Ark. 375, 378, 958 S.W.2d 825 (1997), and need not be abstracted.]

STATEMENT OF THE CASE

This appeal is from the circuit court's grant of habeas-corpus relief to Appellee Ulonzo Gordon, who was convicted in a jury trial 18 years ago of the premeditated-and-deliberated capital murder of Otis Webster. Cooper v. State, 324 Ark. 135, 138-39, 919 S.W.2d 205, 207-08 (1996), overruled on other grounds by MacKintrush v. State, 334 Ark. 390, 978 S.W.2d 293 (1998). On January 28, 1995, Gordon and his codefendants James Cooper and Jeremy Moten drove to a parking lot in the "project area" of West Memphis, pulled up to where Webster was talking to a group of people, and

> Moten and Gordon got out and drew pistols. They told [a bystander] to get out of the way. Shots were fired, and Moten then chased Webster, shot him once, swore at him, and then shot him three more times as he lay on the ground. Cooper drove away with Gordon as his passenger and then picked up Moten.

Cooper, 324 Ark. at 138-39, 919 S.W.2d at 208. Gordon was sentenced to life imprisonment without the possibility of parole because the State waived the death penalty. Id., see also Tr. R. 101 (State's death-penalty waiver).

So far as the State knew at trial and ever since, Gordon was born on August 18, 1976. R. 7, Add. 7. In the habeas-corpus petition filed below, however, Gordon alleged that he was born on August 18, 1977. R. 2, Add. 2. If that is true, Gordon committed capital murder about six months shy of his eighteenth birthday. R. 2, Add. 2. Gordon attached a photocopy of a

Tennessee birth certificate to the petition in support of this allegation. R. 2, 8, Add. 2, 8.[1] Arguing that his sentence was unconstitutional under Miller v. Alabama, 132 S. Ct. 2455 (2012), Gordon sought resentencing. R. 4, Add. 4.

Appellant submitted a memorandum of law to the circuit court. R. 19-36, Add. 9-26. The memorandum noted that under the habeas-corpus statute, the respondent is not required to file a response to allegations—that is, file a "return"—unless and until the circuit court determines that probable cause exists to believe that the petitioner is being detained illegally. R. 19-20, Add. 9-10. The memorandum recited that its purpose was to assist the circuit court in making the initial probable-cause determination. R. 20, Add. 10. The memorandum went on to argue that, because Miller was not retroactive and because Gordon's claim was not cognizable under the habeas statute, his petition failed at the initial probable-cause stage, and relief should be denied. R. 21-27, Add. 11-17.

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[1] The photocopy spells Appellee's first name "Ulonzso," as does the verification of the petition below. R. 6, 8, Add. 6, 8. Appellant, however, uses the spelling of his judgment-and-commitment order, which was followed by habeas counsel in the caption of the petition below.

On August 7, 2013, the circuit court stated in a letter to counsel that "[i]t appears that [Miller] is applicable" and that, "[a]ccordingly, Whiteside v. State, 2013 Ark. 176, and Jackson v. Norris, 2013 Ark. 175, require this Court to grant the Petition of Ulonzo Gordon for habeas relief." R. 40-41, Add. 27-28. The circuit court directed Gordon's counsel to prepare an order vacating his sentence and remanding his case to the sentencing court for further proceedings. Id. In the order, the Court found that "the grant of the writ is compelled by the decision of the United States Supreme Court in Miller v. Alabama/Jackson v. Hobbs, 132 S. Ct. 2455 (2012), and of the Arkansas Supreme Court in Jackson v. Norris, 2013 Ark. 175." R. 42, Add. 29. The order was filed of record on August 23, 2013, and Appellant filed a notice of appeal on Monday, September 23, 2013. R. 42, 54-56, Add. 29, 33-35.

In the interim, Appellant filed a motion for reconsideration on September 9, 2013, based on the fact that the circuit court had not caused a writ of habeas corpus to be issued and served on Appellant, had not required Appellant to file a return justifying the confinement, and had not conducted a trial on the writ, as required by Ark. Code Ann. § 16-112-103 et seq. R. 51-53, Add. 30-32. The circuit court did not rule on that motion, and, in an

abundance of caution, Appellant filed a second notice of appeal on October 15, 2013. R. 57-59, Add. 36-38. This appeal followed.

ARGUMENT

Standard of Review

A circuit court's rulings in postconviction proceedings are generally reviewed for clear error. E.g., Burgie v. Hobbs, 2013 Ark. 360, at 3 (per curiam). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with the definite and firm conviction that a mistake has been made. Id. In reviewing the circuit court's interpretation of the habeas-corpus statute, however, the standard of review is de novo. E.g., Wickham v. State, 2009 Ark. 357, at 5, 324 S.W.3d 344, 347. The basic rule of statutory construction is to give effect to what the Legislature intended when it wrote the statute. E.g., Brown v. Kelton, 2011 Ark. 93, at 3, 380 S.W.3d 361, 364. In considering the meaning of a statute, the statute is construed just as it reads and its words are given their ordinary and usually accepted meaning in common language. Id. The statute is read so that no word is left void, superfluous or insignificant, so as to give meaning and effect to every word in the statute, if possible. Id. Additionally, the statute is considered beside other statutes relevant to the subject matter in question to determine its meaning. Id.

"When a statute is clear . . . it is given its plain meaning," and the legislative intent "must be gathered from the plain meaning of the language

used." Magness v. State, 2012 Ark. 16, at 3-4, 386 S.W.3d 390, 393. When a statute is ambiguous, however, the entire act is examined. E.g., Harrell v. State, 2013 Ark. 421, at 2. A statute is ambiguous only where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning. E.g., Magness, 2012 Ark. 16, at 3-4, 386 S.W.3d at 393. The provisions in a statute must be read so that they are consistent, harmonious, and sensible in an effort to give effect to every part. See, e.g., Sesley v.State, 2011 Ark. 104, at 6-7, 380 S.W.3d 390, 393-394.

Finally, it is well-settled that the word "shall" in a statute means that compliance with the terms of the statute is mandatory, not optional. Smith v. State, 347 Ark. 277, 281, 61 S.W.3d 168, 171 (2001).

I.

APPELLEE'S HABEAS-CORPUS PETITION FAILED TO DEMONSTRATE PROBABLE CAUSE TO BELIEVE THAT HE IS BEING DETAINED WITHOUT LAWFUL AUTHORITY BECAUSE CLAIMS UNDER MILLER V. ALABAMA, 132 S. Ct. 2455 (2012), ARE NOT COGNIZABLE UNDER THE HABEAS-CORPUS STATUTE

It is axiomatic that habeas-corpus relief is available only when the petitioner's judgment of conviction is invalid on its face, or when a circuit

court lacked jurisdiction over the cause. E.g., Goins v. Norris, 2012 Ark. 192, at 2 (per curiam). It is equally well-settled that "[d]etention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct." Meadows v. State, 2013 Ark. 440, at 4 (per curiam)(citing Flowers v. State, 347 Ark. 760, 763, 68 S.W.3d 289, 291 (2002))(emphasis supplied).

Pursuant to these precedents, this Court's cases distinguish facial invalidity of the judgment from a claim that a sentence was imposed in an illegal manner, i.e., a claim that asserts a procedural defect in the imposition of an otherwise legal sentence. See, e.g., Goins, 2012 Ark. 192, at 2, 4 (per curiam)(holding that Goins's claim that he was improperly sentenced as a habitual offender was not cognizable in a habeas proceeding because the sentence was within the permissible range for the underlying offense without regard to habitual status); Pineda v. Norris, 2009 Ark. 471, at 1 (per curiam); cf., e.g., Blanks v. State, 300 Ark. 398, 400, 779 S.W.2d 168, 169 (1989)(drawing a distinction in a non-habeas case between a facially invalid illegal sentence and a sentence imposed in an illegal manner). The latter type of claim is not cognizable under the habeas-corpus statute. E.g., Pineda, at 2. Under these legal standards, Gordon's claim is a manner-of-imposition claim and is not cognizable under the habeas-corpus statute.

Miller is unmistakably clear that life imprisonment without the possibility of parole remains a valid punishment for capital murder, even for juveniles:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

Miller, 132 S. Ct. at 2471 (emphasis supplied); see also id. 2469 ("[W]e do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger."). Miller does no more than prescribe the procedural requirements for imposing life without parole on a juvenile. Id. Thus, in the parlance of this Court's habeas-corpus decisions, Miller mandates the manner in which the sentence of life without parole for capital murder may be imposed. Id. at 2468-2469.

Because life imprisonment without the possibility of parole is still a lawful punishment for capital murder, Miller, 132 S.Ct. at 2469, 2471, the basis of Gordon's claim cannot be that he is being "[detained] for an illegal period of time[.]" Meadows v. State, 2013 Ark. 440, at 4. Nor can his claim be that his sentence is facially illegal: his judgment-and-commitment order states that his conviction is for capital murder and that his sentence is life

imprisonment without the possibility of parole. At bottom, Gordon's claim is that, 18 years ago, the sentencer in his case did not "follow a certain process—considering [his] youth and attendant characteristics—before imposing" its legal punishment upon him. Because the habeas-corpus statute does not encompass such a manner-of-imposition claim, Gordon's Miller claim is not cognizable.

Gordon may argue that Jackson v. Norris, 2013 Ark. 175, ___ S.W.3d ___, in which this Court remanded Jackson's case for resentencing after Miller, implies that Miller claims are cognizable under the statute. Such an argument is mistaken. As Appellant conceded in Jackson, under the rule established in Yates v. Aiken, 484 U.S. 211, 217-18 (1988), Jackson was entitled to the benefit of the United States Supreme Court's decision in his own case because he had previously received a merits review of an issue in this Court. He was thus entitled to resentencing regardless of any defenses that might otherwise have applied; and this Court's holding was explicitly—and exclusively—based on Appellant's concession. Jackson, 2013 Ark. 175, at 6 ("We agree with the State's concession that Jackson is entitled to the

benefit of the United States Supreme Court's opinion in his own case.") (citing Yates, supra.)[2]

Accordingly, Gordon's petition below failed to demonstrate probable cause to believe he is unlawfully detained, and the circuit court's grant of relief should be reversed.

II.

APPELLEE'S HABEAS-CORPUS PETITION FAILED TO DEMONSTRATE PROBABLE CAUSE TO BELIEVE THAT HE IS BEING DETAINED WITHOUT LAWFUL AUTHORITY BECAUSE MILLER V. ALABAMA, 132 S. Ct. 2455 (2012), DOES NOT APPLY RETROACTIVELY TO CASES ON COLLATERAL REVIEW.

A. Applicable Law. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principal of finality which is essential to the operation of our criminal justice system[,]" and it is unfair to "continually force States to marshal resources to

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[2] Whiteside v. State, 2013 Ark. 176, does not change the above analysis. Because Whiteside's case was on direct appeal when Miller was decided, Whiteside has no bearing on whether Miller claims are cognizable under the habeas-corpus statute.

keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." Teague v. Lane, 489 U.S. 288, 309, 310 (1989) (plurality opinion). Accord Camp v. State, 364 Ark. 459, 464-65, 221 S.W.3d 365, 369 (2006) (explaining that "inroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and holding that "principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction for sentencing."). Pursuant to these principles, in state habeas-corpus proceedings, this Court previously has followed the retroactivity analysis used by the United States Supreme Court. Rowe v. State, 243 Ark. 375, 376, 419 S.W.2d 806, 807 (1967). The United States Supreme Court follows the framework of the plurality opinion in Teague when determining whether a new criminal constitutional rule applies retroactively in collateral proceedings to convictions that are already final. See, e.g., Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).[3]

Under Teague, "new" rules of constitutional criminal procedure do not apply retroactively on collateral review, subject only to a pair of narrow

[3] Unless otherwise noted, citations to Teague in this brief are to the plurality opinion, the holding of which was subsequently adopted by the full Court. See, e.g., Butler v. McKellar, 494 U.S. 407, 412 (1990).

exceptions. Teague, 489 U.S. at 308. First, a new rule may be applied on collateral review if it is "substantive," as opposed to "procedural." See, e.g., Schriro v. Summerlin, 542 U.S. 348, 351-52 (2004). Second, a new rule may be applied retroactively if it is "a watershed rule of criminal procedure[,]" see, e.g., Whorton v. Bockting, 549 U.S. 406, 416 (2007) (citation and quotations omitted).

Here, it is undisputed that Gordon's case is "final" for purposes of retroactivity because "a judgment of conviction has been entered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Armstrong v. State, 373 Ark. 347, 350, 284 S.W.3d 1, 3 (2008) (citations and quotations omitted).

B. Miller defined a new rule. "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Chaidez, 133 S. Ct. at 1107 (quoting Teague, 489 U.S. at 301)(emphasis in Teague). "And a holding is not so dictated . . . unless it would have been apparent to all reasonable jurists." Chaidez, 133 S. Ct. at 1107 (citations and quotations omitted). Here, Miller's holding was not dictated by precedent existing in 1996, when Gordon's conviction became final, especially given that for a dozen years after his conviction, capital punishment was a constitutional punishment for at least some

juveniles. See Roper v. Simmons, 543 U.S. 551, 561-62, 568 (2005). And Miller itself was not a straightforward application of existing precedent; it was the result of the Supreme Court's fusing of two distinct "strands of precedent[.]" Miller, 132 S. Ct. at 2463. The first such "set of decisions" was Roper and Graham v. Florida, 560 U.S. 48 (2008), which invalidated capital sentences for juvenile murderers and life-without-parole sentences for juvenile non-homicide offenders, respectively. Miller, 132 S. Ct. at 2464. The second set of decisions are those that regulate the admission of mitigating evidence in the penalty phase of a capital trial, which, prior to Miller, had not been extended beyond that context. See id. at 2463-69. Thus, Miller's prohibition on the mandatory imposition of life-without-parole sentences for juvenile homicide offenders was not dictated by precedent existing in 1996.

C. The Miller rule is procedural. The United States Supreme Court has held that "[a] rule is substantive rather than procedural if it alters the range of conduct or class of persons that the law punishes." Summerlin, 542 U.S. at 353; see also, e.g., Butler v. McKellar, 494 U.S. 407, 415 (1990) (rule is substantive if "it places certain kinds of primary, private behavior beyond the power of the criminal law to proscribe."). "By contrast, rules

that regulate only the manner of determining the defendant's culpability are procedural." Summerlin, 542 U.S. at 353 (emphasis in Summerlin).

Under these definitions, Miller is properly considered a procedural rule. The decision itself states that:

> Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.

Miller, 132 S. Ct. at 2471 (emphasis supplied). As can be seen, Miller does not "alter[] the range of conduct . . . that the law punishes." Summerlin, 542 U.S. at 353. The range of conduct criminalized by the capital murder statute—premeditated and deliberated homicide, Ark. Code Ann. § 5-10-101(a)(4) (Supp. 1993); homicide committed in the course of, or in immediate flight from, the commission of an enumerated felony such as rape or kidnapping, id. § (a)(1), (2); murder for hire, id. § (a)(7); and so forth—is unaffected by Miller. And, Miller does not "alter[] . . . the class of persons that the law punishes." Summerlin, 542 U.S. at 353. The Supreme Court in Miller expressly declined to erect a categorical ban on life-without-parole sentences for juveniles. Miller, 132 S. Ct. at 2469 ("We . . . hold that the Eighth Amendment forbids a sentencing scheme that mandates life without possibility of parole for juvenile offenders. . . . Because that holding is

sufficient to decide [this case], we do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . .")(emphasis supplied).

Even if the Court had not stated outright that Miller did not create a substantive rule, the decision fits comfortably into the Supreme Court's procedural-rule cases. In Summerlin, for example, the Court considered whether the rule announced in Ring v. Arizona, 536 U.S. 584 (2002), was substantive or procedural under Teague. Summerlin, 542 U.S. at 353-54. Ring held that judges were no longer permitted to be the finders of fact with respect to the aggravating circumstances necessary to impose a capital sentence. Id. (citing Ring, 536 U.S. at 609). The Supreme Court held that the rule established in Ring "is properly classified as procedural" because Ring "did not alter the range of conduct [the] law subjected to the death penalty." Id. Instead, the Summerlin court explained, "Ring altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." Id. Just as Ring altered only the permissible methods for imposing a capital sentence, Miller altered only the permissible methods for imposing a life-without-parole sentence on a juvenile. The Miller rule is, accordingly, procedural.

D. Miller is not a watershed rule. The second Teague exception "is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Beard v. Banks, 542 U.S. 406, 417 (2004) (citations and quotations omitted). It is well-established that the exception is "exceedingly narrow." Bockting, 549 U.S. at 417; see also id. ("We have observed that it is unlikely that any such rules have yet to emerge[.] And in the years since Teague, we have rejected every claim that a new rule satisfied the requirements for watershed status.") (citations and quotations omitted). A watershed rule must both "prevent an impermissibly large risk of an inaccurate conviction" and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."). Id. (citations and quotations omitted). In fact, the only rule ever identified by the Court as watershed is the one announced in Gideon v. Wainwright, 373 U.S. 335 (1963), which guaranteed the right to counsel for any indigent defendant charged with a felony. "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished." Summerlin, 542 U.S. at 352 (quoting Teague, 489 U.S. at 313)(emphasis supplied in Summerlin).

Miller did not announce a watershed rule. The Miller rule has no bearing on the accuracy of Gordon's conviction—he was, and remains, guilty of capital murder. And the Miller rule is undisputedly more modest in application than Gideon—the latter applies to every defendant charged with a felony; the former only to juveniles charged with capital murder, which is a narrow species of homicide. Although Miller may reduce the number of juveniles sentenced to life without parole, it does not approach the centrality of Gideon's guarantee of counsel for those accused of felonies.

E. Neither Miller nor Jackson v. Norris, 2013 Ark. 175, held the Miller rule retroactive. Gordon advanced several arguments below in favor of Miller's retroactivity, none of which change the above analysis.

1. The fact that Kuntrell Jackson's case was decided along with Evan Miller's does not mandate Miller's retroactivity. Gordon argued below that the fact that Kuntrell Jackson's case was decided alongside Evan Miller's case demonstrated the Supreme Court's intent to apply Miller retroactively:

> [T]he operative distinction between Miller and Jackson . . . is that Miller was on direct appeal, whereas Jackson was in post-conviction on a state writ of habeas corpus, long after the judgment was "final" for all state and federal purposes. If the decision was not retroactive, Miller and Jackson would have been decided differently from each other.

R. 3, Add. 3. Gordon's argument is without merit. It is not true that when the United States Supreme Court reviews a constitutional question decided in state collateral-review proceedings, the rule announced is automatically retroactive. In general, of course, neither the Arkansas Supreme Court nor the United States Supreme Court decide issues sub silentio. See, e.g., Massey v. Fulks, 2011 Ark. 4, at 10-11, 376 S.W.3d 389, 394 (quoting Webster v. Fall, 266 U.S. 507, 511 (1925)). With respect to Gordon's specific argument, moreover, there are two cases directly on point, Padilla v. Kentucky, 559 U.S. 356 (2012), and Chaidez v. United States, 133 S. Ct. 1103 (2013), that refute his argument.

The procedural posture of Jose Padilla's case at the Supreme Court was identical to Kuntrell Jackson's. "[T]he Supreme Court of Kentucky denied Padilla postconviction relief[,]" rejecting his argument that defense counsel was ineffective for failing to advise him about the deportation consequences of a guilty plea. Id. at 359-60 (quoting Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008)). The United States Supreme Court subsequently granted certiorari from the Kentucky Supreme Court's merits determination of Padilla's constitutional issue, and reversed. Padilla, 559 U.S. at 360-75. The case was remanded to the Kentucky Supreme Court for further proceedings. Id. at 375.

If Gordon's argument were correct, then the fact that Padilla was decided on certiorari from a state collateral-review proceeding would have meant that the United States Supreme Court intended Padilla to be automatically retroactive. But, as the United States Supreme Court has since held, Padilla is not retroactive to cases on collateral review. Chaidez, 133 S. Ct. at 1107. Here, just as in Padilla, the United States Supreme Court granted certiorari from a state collateral proceeding and reversed this Court's merits determination of Jackson's claim. Miller, 132 S. Ct. at 2461-62. As with Jose Padilla's case, the fact that Kuntrell Jackson's case originated in a state collateral proceeding does not mean that the Miller rule is automatically retroactive. As explained above, under Teague, it is not.

Nor does this Court's decision in Jackson v. Norris, 2013 Ark. 175, ___ S.W.3d ___, in which this Court remanded Jackson's case for resentencing after Miller, imply that Miller is retroactive or bar Appellant from raising retroactivity here. As Appellant conceded in Jackson, under the rule established in Yates v. Aiken, 484 U.S. 211, 217-18 (1988), Jackson was entitled to the benefit of the United States Supreme Court's decision in his own case because he had previously received a merits review of this issue in this Court. He was thus entitled to resentencing, regardless of any defenses that might otherwise have applied; and this Court's holding was

explicitly—and exclusively—based on Appellant's concession. Jackson, 2013 Ark. 175, at 6 ("We agree with the State's concession that Jackson is entitled to the benefit of the United States Supreme Court's opinion in his own case.") (citing Yates, supra.) [4]

2. The fact that the Supreme Court cited retroactive cases in Miller does not make its rule retroactive. Gordon also argued below that Miller was retroactive because two of the cases cited by the Supreme Court in that case, Roper and Graham, were retroactive. R. 3, Add. 3. Miller itself refutes this argument. If Roper and Graham are retroactive—which has not been established by the United States Supreme Court—that is so only because they erect categorical bans on a certain type of punishment for all juveniles, making them substantive rules under Teague. But Miller itself distinguished Roper and Graham on this point, declining to announce a categorical ban on life-without-parole sentences for juveniles, instead

[4] Whiteside, 2013 Ark. 176, does not change the above analysis. Whiteside was entitled to resentencing pursuant to Miller because his case was on direct appeal when Miller was decided; the case has no bearing on whether Miller applies retroactively to cases that were long since final, such as Gordon's.

barring only the use of a certain procedure for imposing that (still lawful) punishment. Miller, 132 S. Ct. at 2471 ("Our decision does not categorically bar a penalty for a class of offenders or a type of crime—as, for example, we did in Roper or Graham."). Simply put, there is no "strands of precedent" exception to Teague, and Gordon's argument to that effect is without merit.

3. Ark. Code Ann. § 16-112-118(b)(1) does not make Miller retroactive. Finally, Gordon cited a section of the habeas-corpus statute, Ark. Code Ann. § 16-112-118(b)(1), in favor of Miller's retroactivity. The section reads:

> If it appears that the prisoner is in custody by virtue of process from any court legally constituted or issued by any officer in the exercise of judicial proceedings before him, the prisoner can only be discharged in one (1) of the following cases:
>
> (A) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum, or person;
>
> (B) Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the party has become entitled to his or her discharge;

Ark. Code Ann. § 16-112-118(b)(1) (Repl. 2006). The argument is apparently that Miller is an "event" that entitles Gordon to his discharge.

The argument fails, first of all, because it assumes what it sets out to prove—that Gordon is entitled to discharge under the habeas statute. Second, Appellant's research reveals no case in which this section has been

used to invalidate a sentence based on a new rule of constitutional criminal procedure, and Gordon cited no such case below. Indeed, this Court has held that § 118(b)(1) does not relieve the petitioner of his burden to demonstrate the facial invalidity of the judgment or lack of jurisdiction in the trial court as a prerequisite for relief. See, e.g., George v. State, 285 Ark. 84, 86, 685 S.W.2d 141, 142 (1985). Finally, if this section of the habeas-corpus statute furnished a basis for retroactivity, it could be used as a basis for habeas relief in any case recognizing a new rule of constitutional law—an approach that finds no support in the text of the statute or this Court's precedents.

F. The better-reasoned authority from other jurisdictions supports a holding that Miller is not retroactive. Several jurisdictions have ruled on Miller's retroactivity, with divergent results. The state supreme courts of Louisiana, Minnesota, and Pennsylvania have held that Miller is not retroactive, as have intermediate courts of appeal in Florida and Michigan. See State v. Tate, ___ So.3d ___, 2013 WL 5912118, at * 3-9 (La. 2013); Chambers v. State, 831 N.W.2d 311, 324-31 (Minn. 2013); Commonwealth v. Cunningham, ___ A.3d ___, ___, 2013 WL 5814388, at * 6-7 (Pa. 2013); People v. Carp, 828 N.W.2d 685, 707-13 (Mich. App. 2012), appeal granted, 838 N.W.2d 873 (Mich. 2013); Geter v. State, 115 So.3d

375, 377-85 (Fla. App. Dist. Ct. 2012), reh'g denied, 115 So.3d 385. The state supreme courts of Iowa, Massachusetts, and Mississippi, and intermediate courts of appeal in Illinois, have held that Miller is retroactive. State v. Ragland, 836 N.W.2d 107, 114-17 (Iowa 2013); Diatchenko v. District Attorney, 466 Mass. 655, ___ N.E. ___, ___, 2013 WL 6726856 at *3-10 (Mass. 2013); Jones v. State, 122 So.3d 698, 2013 WL 3756564, at * 2-5 (Miss. 2013); People v. Williams, 982 N.E.2d 181, 196-99 (Ill. App. Ct. 2012) (holding that Miller is a watershed rule of criminal procedure); People v. Morfin, 981 N.E.2d 1010, 1019-23 (Ill. App. Ct. 2012) (holding that Miller is a new substantive rule of criminal procedure).

Two federal courts of appeal have held, pursuant to Teague, that Miller is not retroactive. In re Morgan, 713 F.3d 1365, 1366-68 (11th Cir. 2013), reh'g denied, 717 F.3d 1186; Craig v. Cain, 2013 WL 69128, at *1-3 (5th Cir. 2013). No federal court of appeal has held that Miller is retroactive. Two federal courts of appeal have ruled, however, that the issue is sufficiently debatable to permit the petitioners in those cases to file second or subsequent petitions for federal habeas-corpus relief and allow the district courts to finally decide the matter. See In re Pendleton, 732 F.3d 280, 282-83 (3rd Cir. 2013) (concluding that "Petitioners have made a prima facie showing that Miller is retroactive[,]" while "stress[ing] that our grant is

tentative[.]"); Johnson v. United States, 720 F.3d 720, 720-21 (8th Cir. 2013) (ruling that, particularly in light of the Justice Department's concession, Johnson had established a prima facie case that Miller is retroactive, but stressing that "a prima facie showing in this context is simply a sufficient showing of possible merit to warrant a fuller exploration by the district court[.]"); but see Johnson, 720 F.3d at 721 (Colloton, J., dissenting) (opining that Miller is not retroactive for the reasons given in Morgan, 713 F.3d 1365).

Appellant submits that the jurisdictions finding Miller nonretroactive are better reasoned, and should be followed by this Court. Many of the state courts holding in favor of retroactivity cite Jackson as an indication that the United States Supreme Court intended Miller to be retroactive. See Diatchenko, ___ N.E.2d at ___, 2013 WL 6726856 at *7; Ragland, 836 N.W.2d at 116; Morfin, 981 N.E.2d at 1022-23; Williams, 982 N.E.2d at 198. This reasoning fails for the reasons explained supra, § II.E.1. Just as the fact that Jose Padilla's case was reviewed on certiorari from a state collateral-review proceeding did not mandate Padilla's retroactivity, the fact that this Court's initial decision in Jackson v. Norris, 2011 Ark. 49, 378 S.W.3d 103, was reviewed on certiorari from a state collateral review proceeding does not mandate Miller's retroactivity.

A panel of the Illinois Court of Appeals has ruled that Miller qualifies as a watershed rule of criminal procedure. Williams, 982 N.E.2d at 197-98. Not even the other jurisdictions holding in favor of retroactivity, including the other panel of the Illinois Court of Appeals, adopt this conclusion. See Diatchenko, 2013 WL 6726856 at *6 n.11; Ragland, 836 N.W.2d at 115-17; Morfin, 981 N.E. at 1021. In any event, Williams's reasoning is unavailing for the reasons given supra, § II.D.

Finally, the Supreme Court of Iowa in Ragland, although tacitly acknowledging that Miller mandates only that a sentencer follow a certain process before imposing a life-without-parole sentence, see Miller, 132 S. Ct. at 2471, nevertheless held the rule to be retroactive because the procedure it mandates is rooted in the substance of the Eighth Amendment. See Ragland, 836 N.W.2d at 115 ("From a broad perspective, Miller does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing."). This reasoning should not be followed by this Court because it proves too much: every rule of criminal procedure, after all, has a substantive source. For example, the procedure required to demonstrate a prima facie case of racial discrimination in the exercise of peremptory challenges, defined by Batson v. Kentucky, 476 U.S. 79 (1986), is rooted in

the substance of the Equal Protection Clause, but Teague itself holds that Batson is not a substantive rule. Teague, 489 U.S. at 311. In sum, the well-reasoned weight of authority from other jurisdictions weighs in favor of Appellant's argument that Miller is not retroactive.

Because Miller announced a new rule of constitutional criminal procedure that does not satisfy either of the narrow Teague exceptions, Miller does not apply to Gordon's long-final sentence.

III.

EVEN IF PROBABLE CAUSE EXISTED TO ISSUE THE WRIT, THE CIRCUIT COURT ERRED BY NOT ISSUING A WRIT OF HABEAS CORPUS, CAUSING IT TO BE SERVED ON APPELLANT, REQUIRING APPELLANT TO FILE A RETURN, AND CONDUCTING A TRIAL OF THE WRIT TO ASCERTAIN THE MATERIAL FACTS, AS REQUIRED BY THE HABEAS CORPUS STATUTE

In non-optional language, the habeas-corpus statute requires that "[t]he writ of habeas corpus shall be issued, served, and tried in the manner prescribed in this chapter." Ark. Code Ann. § 16-112-101 (Repl. 2006) (emphasis supplied); see also Smith, 347 Ark. at 281, 61 S.W.3d at 171.

The first step in the process prescribed by the statute is the probable-cause determination. Ark. Code Ann. § 16-112-103 (a)(1) (Repl. 2006). If a

petitioner clears the probable-cause hurdle, the statute then requires the circuit court to issue the writ of habeas corpus and cause the writ to be "served" on the warden. Ark. Code Ann. § 16-112-106(a). The statute defines the format of the writ, requiring that it, among other things, be signed by the judicial officer who issues it, be directed to the person having custody of the petitioner (identified by name or title), and specify the time and place that it is to be returned to the judicial officer who issued it. Ark. Code Ann. § 16-112-105(a)-(c) (Repl. 2006). The statute further governs proper service of the writ, providing that the writ may be served by notice or upon the person having immediate custody of the petitioner if the named warden is not available; the statute provides for sanctions against efforts to conceal the prisoner in an effort to avoid service. Ark. Code Ann. § 16-112-106 (Repl. 2006).

Upon a showing of probable cause and issuance of the writ, the next step is that the warden "return[s]" the writ to the issuing judicial authority. Ark. Code Ann. § 16-112-108 (Repl. 2006). The statute provides a tight timetable for the return—three days in most cases. Ark. Code Ann. § 16-112-108(a) (Repl. 2006). It requires that the warden provide certain information in his or her possession "relating to the commitment[,]" including a copy of the commitment, and a declaration "[w]hether he or she

has or has not the party in his or her custody or under his power or restraint" and, if so, "the authority and true cause of the imprisonment or restraint." Ark. Code Ann. § 16-112-108(c)(1), (2), -109(a) (Repl. 2009). Finally, the statute directs the warden to produce the petitioner, unless sickness or other infirmity prevents it. Ark. Code Ann. §§ 16-112-108(a), -112 (Repl. 2006).

Upon return of the writ and the warden's justification for the petitioner's detention, the petitioner is then given an opportunity to show that the detention is unlawful, while the custodian may amend the return, all so that the "material facts" regarding the prisoner's confinement "may be ascertained." Ark. Code Ann. § 16-112-113(a) & (b) (Repl. 2006); see also Ark. Code Ann. § 16-112-114(a) (Repl. 2006) (discussing return of the writ "for trial").

After the warden returns the writ, and "after hearing the matter, both upon the return and any other evidence," which may include the calling of witnesses, the judge "shall either discharge or remand the petitioner, admit the prisoner to bail, or make such order as may be proper." Ark. Code Ann. § 16-112-114, & -115 (Repl. 2006). The statute also provides, however, that the above fact-finding procedures are unavailable following the return of the writ "if the process or commitment shall appear regular on its face." Ark. Code Ann. § 16-112-114(b). This latter provision is the statutory source for

this Court's well-established holdings that a writ of habeas corpus may be granted only if the petitioner demonstrates lack of jurisdiction of the sentencing court, or facial invalidity of the judgment, e.g., Friend v. Norris, 364 Ark. 315, 316-17, 219 S.W.3d 123, 125 (2005).

Importantly, the issuance of a writ of habeas corpus is not synonymous with a grant of relief from the underlying commitment. Instead, the writ is the mechanism by which a prisoner who has demonstrated probable cause is brought before the court in order for the warden to justify the challenged confinement. In other words, issuance of the writ may be warranted to inquire into the justification for the prisoner's detention, but a denial of relief on the petition nevertheless may be warranted after that inquiry is complete.

Because it granted Gordon relief based on the allegations made in his petition without issuing the writ to Appellant, the circuit court below did not follow the procedures mandated by the statute, and conflated granting of the writ with ultimate relief from the underlying commitment. Instead of transferring Gordon's case to the sentencing court upon a showing of probable cause, the next step in the proceeding should have been to order Appellant to file a return to justify the confinement, if possible, and to assist the circuit court in determining the material facts, i.e., whether Gordon's

allegation about his age is true or not. Because Gordon put into controversy his true age, alleging that the age as reflected in Appellant's records and his judgment-and-commitment order is wrong, it cannot be assumed simply from the allegations and records before the Court that Gordon was, as a matter of fact, under age 18 when he committed capital murder. The statute requires further findings of the "material fact[s]" before relief can be granted. The circuit court's grant of relief on the allegations of the petition is analogous to a grant of summary judgment in favor of a plaintiff before the defendant has had a chance to file an answer (which, after all, allows the defendant to admit or deny the averments in the complaint, see Ark. R. Civ. Proc. 8(b) (2013)). For this reason, even if Gordon has demonstrated probable cause to believe he is being detained unlawfully, the circuit court's order should be reversed and this case remanded for further proceedings in compliance with the statute.

CONCLUSION

For the reasons stated and the authorities relied upon, the State respectfully asks this Court to reverse the circuit court and either (a) dismiss the petition by holding that probable cause did not exist to issue the writ, or (b) reverse and remand with instructions that the circuit court issue the writ

to be served on the warden and for further proceedings as required by the habeas statute.

CERTIFICATE OF SERVICE

On January 13, 2013, I served the foregoing document by mailing a copy by U.S. Mail, postage prepaid, on the circuit court below and upon counsel of record:

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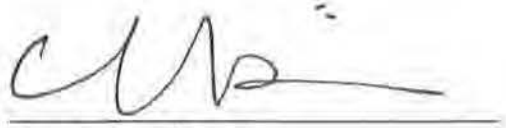

Christian Harris

Case Name: RAY HOBBS, Director, Arkansas v. ULONZO GORDON
Department of Correction
Docket Number: CV-13-942
Title of Document: Brief of Appellee

CERTIFICATE OF COMPLIANCE

I have submitted and served on opposing counsel (except for incarcerated pro se litigants) an unredacted, and, if required, a redacted PDF document(s) that comply with the Rules of the Supreme Court and Court of Appeals. The PDF document(s) are identical to the corresponding parts of the paper document(s) from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

(Signature of filing party)

The Offices of the Arkansas Attorney General
(Firm)

1/13/13
(Date)

ADDENDUM

INDEX OF ADDENDUM

IN THE CIRCUIT COURT OF LEE COUNTY, ARKANSAS

ULONZO GORDON, **Petitioner**

vs. No. 39CV-13-83

RAY HOBBS, Director,
Arkansas Department of Correction, **Respondent**

PETITION FOR WRIT OF HABEAS CORPUS

Comes now the Petitioner, Ulonzo Gordon, through his attorneys, D'lorah L. Hughes and Jeff Rosenzweig, and for his Petition for Writ of Habeas Corpus brought pursuant to Article 2 § 11 of the Arkansas Constitution and Ark. Code Ann. § 16-112-101 et. seq. states as follows:

1. Petitioner Ulonzo Gordon is an inmate in the Arkansas Department of Correction. He is currently incarcerated at the East Arkansas Regional Unit - Brickeys, located in Lee County.

2. Respondent Hobbs is the Director of the Arkansas Department of Correction and, as such, has custody and control of Petitioner.

3. Venue on petitions for writ of habeas corpus is in the county where the aggrieved person is incarcerated. Therefore, venue is proper in Lee County.[1]

4. The Court should be aware that Petitioner has previously filed a State petition for Writ of Habeas Corpus, Case No. 39-CV-13-50, in Lee County for relief under Miller and

[1] Although Ark. Code Ann. § 16-90-111 provides that the sentencing court may correct an illegal sentence at any time, the Arkansas Supreme Court has held that this provision is superseded by Rule 37, A.R.Crim.P. The time provisions of Rule 37 have long since passed, making habeas corpus the only effective remedy.

Jackson. The Court denied that petition on April 17, 2013 and Petitioner filed to appeal the ruling on May 13, 2013. The Notice of Appeal for the prior habeas petition is attached (Exhibit 1 to this petition). This Writ of Habeas Corpus petition supersedes all prior filings.

5. Petitioner is currently serving a sentence of life imprisonment without parole for Capital Murder. The judgment (Exhibit 2 to this petition) demonstrates that the offense for which the petitioner was convicted occurred on or about January 28, 1995, and that a judgment of conviction was entered on June 16, 1995, in the Circuit Court of Crittenden County. Although the Respondent may argue that the defect must appear on the face of the judgment, Ark. Code Ann. § 16-112-103(a)(1) explicitly provides that the petition may be supported by "affidavit or other evidence." This petition does not address convictions for any offense where the sentence is less than life.

6. Petitioner was born on August 18, 1977. Petitioner's official Birth Certificate demonstrating this fact is attached (Exhibit 3 to this petition). The Circuit Court of Crittenden County and the Arkansas Department of Correction incorrectly list Petitioner's date of birth as August 18, 1976. Based on his offense date and his true date of birth, he was 17 years old at the time of the commission of the offense for which he was convicted.

7. At the time of the commission of the offense for which he was convicted, Capital Murder in Arkansas was punishable only by either life imprisonment or death. Ark. Code Ann. § 5-4-601 (or its predecessor Ark. Stat. Ann. § 41-1501). In 2005, the United States Supreme Court declared the death penalty to be an unconstitutional sentence for juveniles convicted of any crime. Roper v. Simmons, 543 U.S. 551 (2005). As such, life without parole was the only available sentence for a juvenile convicted of capital murder in Arkansas and was mandatorily imposed on Petitioner. See Ark. Code Ann. §5-4-601. See also Roper, 543 U.S. at 578; Miller

v. Alabama, 132 S.Ct. 2455, 2462-63 (2012).

8. In 2012, the United States Supreme Court held in Miller v. Alabama and Jackson v. Hobbs that the Eighth Amendment forbids the mandatory imposition of a sentence of life imprisonment without parole for a homicide offense occurring before the defendant's 18th birthday. 132 S.Ct. 2455 (2012).

9. As part of these rulings, the United States Supreme Court stated that "youth matters" in determining an appropriate sentence for a juvenile offender. Furthermore, a defendant's child status, along with other relevant mitigating factors related to age and "the extent of [the defendant's] participation in the conduct," must be taken into consideration by the sentencing court. Id. at 2465, 2468. When these factors are considered, "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." Id. at 2469. See also Jackson v. Norris, 2013 Ark. 175 (2013).

10. Although Petitioner anticipates that the Respondent will argue that the decisions of the United States Supreme Court and the Arkansas Supreme Court are not retroactive, such argument, if made, is meritless. First, the operative distinction between the Miller and Jackson cases in the United States Supreme Court is that Miller was on direct appeal, whereas Jackson was in post-conviction on a state writ of habeas corpus, long after the judgment was "final" for all state and federal purposes. If the decision was not retroactive, Miller and Jackson would have been decided differently from each other. Second, the cases on which the Supreme Court relied, Roper and Graham v. Florida, are fully retroactive. 453 U.S. 551; 560 U.S. 48 (2010).

11. Thus, under the authority of Ark. Code Ann. § 16-112-118(b)(1)(A) and (B), particularly (B):

> (A) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum, or person;
>
> (B) Where, though the original imprisonment was lawful, yet, by some act, omission, or event which has taken place afterward, the party has become entitled to his or her discharge;

Petitioner is entitled to the grant of the state writ of habeas corpus with regard to his sentence of life imprisonment without parole for Capital Murder. The filing of this petition tolls the one-year federal limitations period for the filing of a federal habeas corpus petition. 28 U.S.C.A. § 2244(d)(2). The attached judgment of the Circuit Court of Crittenden County demonstrates, as required by Ark. Code Ann. § 16-112-103 and the relevant case law, that pursuant to the Supreme Court's decision in Miller and Jackson, Petitioner is detained without lawful authority on the conviction(s) for Capital Murder.

12. Therefore, this Court should find Petitioner's mandatory life without parole sentence unconstitutional in violation of his rights protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Arkansas Constitution, and Arkansas law and vacate his illegal sentence. Should the State of Arkansas seek to resentence Ulonzo Gordon to a legal term of imprisonment for those offenses, the State must institute proceedings in the Circuit Court of Crittenden County, as required by Ark. Code Ann. § 6-112-117.

WHEREFORE, Ulonzo Gordon prays that the writ of habeas corpus be granted as to his conviction for Capital Murder and prays that this Court vacate his unconstitutional sentence and order a resentencing hearing.

Respectfully submitted,

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(501) 372-5247

Counsel for Petitioner

AFFIDAVIT

The petitioner states under oath that he has read the foregoing petition for post-conviction relief and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

U. Gordon

ULONZSO GORDON
Petitioner

STATE OF ARKANSAS
COUNTY OF Lee

Subscribed and sworn to before me the undersigned officer this 15 day of June, 2013

Michael D Allen

NOTARY PUBLIC

MICHAEL D. ALLEN
CRITTENDEN COUNTY
NOTARY PUBLIC -- ARKANSAS
My Commission Expires March 1, 2015

Exhibit 2

-7-

A14 G17

:MENT AND COMMITMENT ORDF

IN THE Cl... COURT OF CRITTENDEN COUN... ...ANSAS

DISTRICT DIVISION

On 6-16, 1995 the defendant personally appeared before the Court and, having been informed by the Court of the nature the charge(s), of his/her constitutional and legal rights, of the effect of a guilty plea upon those rights, and of his/her right to make a ...atement before sentencing, the Court made the following findings:

☐ Defendant voluntarily, intelligently, and knowingly entered: ☐ negotiated plea or ☐ plea directly to the court of ☐ guilty or ☐ nolo contendere to the charge(s) herein enumerated and acknowledged factual bases for charge(s);

☐ Defendant is found guilty of said charge(s) by the Court, sitting as trier of fact:

☒ Defendant was found guilty at jury trial.

☐ Defendant entered a plea as shown above and was sentenced by a jury.

DEFENDANT'S FULL NAME	DATE OF BIRTH	RACE	SEX	SID #	CHANGE OF VENUE FROM:
ULONZO GORDON	8-18-76	B	M		

DEFENDANT'S ATTORNEY	Criminal History Score	PROSECUTING ATTORNEY OR DEPUTY	AT#
TIMOTHY GINN	N/A	FRED THORNE/LINDSEY FAIRLEY	265290

☒ Defendant was represented by ☐ private counsel ☐ court appointed legal counsel ☒ public defender ☐ himself/herself.

☐ Defendant made a voluntary, knowing and intelligent waiver of his/her right to counsel.

There being no legal cause shown by the defendant, as requested, why judgment should not be pronounced against him/her, a judgment of conviction is hereby entered against the defendant on each charge enumerated, fines levied, and court costs assessed. The defendant is sentenced to the Arkansas Department of Correction for the term specified on each charge shown below:

CODE NO.	OFFENSE	A/S/C	OFFENSE DATE	DOCKET #	COUNTS	F/M	CLASS	Sent. Imposed	S.I.S.
5-10-101	#1 CAPITAL MURDER		1-28-95	95-149	1	F	Y	LIFE WP	-0-
	#2								
	#3								
	#4								

Indicate which sentences are to run consecutively.

☐ DEATH PENALTY; EXECUTION DATE

..ME TO SERVE AT ARKANSAS DEPARTMENT OF CORRECTION LIFE WITH-OUT PAROLE

☒ Jail time credit: 133 days or ☐ None

☐ The Defendant was convicted of a target offense under the Community Punishment Act. The Court hereby orders that the Defendant be judicially transferred to the Department of Community Punishment.

FINE $

COURT COSTS $

A judgment of restitution is hereby entered against the Defendant in the amount and terms as shown below:

Amount$ ☐ Due immediately or ☐ Installments(specify)

Payment to be made to ☐ Dept. of Community Punishment or ☐

If multiple beneficiaries, give names and show payment priority.

FILED

at ____ o'clock ____ m

JUN 16 1995

DONNA PALMER

☐ Defendant is a Child Sex Offender as defined in A.C.A. 12-12-902.

☐ Other

☐ Commitment is a result of the revocation of Defendant's probation or suspended imposition of sentence.

☐ Defendant was informed of the right to appeal.

APPEAL BOND:$

	Offense #1	Offense #2	Offense #3	Offense #4
Presumptive Sentence	N/A			
Sentenced as Habitual Offender under A.C.A. 5-4-501.				
Victim of the offense was under the age of 18 years.				

The County Sheriff is hereby ordered and directed to transport the defendant to ☒ The Arkansas Department of Correction or ☐ ____ County Jail, or ☐ ____ Regional Punishment Facility.

The short report of circumstances attached hereto is approved.

Date 6/16/95 Circuit Judge(Print or type) DAVID BURNETT Circuit Judge (Signature) David Burnett

I certify this is a true and correct record of this Court.

6/16/95 Circuit Clerk/Deputy Donna Palmer

A CERTIFIED TRUE COPY

(Seal) June 3 2013

TERRY HAWKINS

CIRCUIT COURT CLERK

BY: D.C.

Date I acknowledge receipt of judgment. Defendant (Signature)

SHERIFF'S RETURN

Date Rel.On Appeal Bond	Date Ret. To Custody	I certify the Def. named within was delivered to:	Date	Sheriff/Deputy(Sig.)
		☐ The A.D.C. or ☐ Regional Punishment Facility		

Add. %

White: Court File, Blue: A.D.C., Green: A.O.C., Goldenrod: Prosecutor, Pink: Defense Attorney, Yellow: Sheriff, Pink:Defendant

Exhibit 3

CERTIFICATE OF LIVE BIRTH (OR) 141- 9811

TENNESSEE DEPARTMENT OF PUBLIC HEALTH
VITAL RECORDS

CHILD—NAME (FIRST / MIDDLE / LAST)			DATE OF BIRTH (MONTH, DAY, YEAR)	HOUR
1. Ulonzso	Tyrone	Gordon	2a. August 18, 1977	2b. 9:52 A.M.

SEX	THIS BIRTH—SINGLE, TWIN, TRIPLET, ETC. (SPECIFY)	IF NOT SINGLE BIRTH—BORN FIRST, SECOND, ETC. (SPECIFY)
3. Male	4a. Single	4b.

COUNTY OF BIRTH	CITY, TOWN, OR LOCATION OF BIRTH	INSIDE CITY LIMITS (SPECIFY YES OR NO)	HOSPITAL—NAME (IF NOT IN HOSPITAL, GIVE STREET AND NUMBER)
5a. Shelby	5b. Memphis	5c. Yes	5d. City of Memphis Hospital

MOTHER—MAIDEN NAME (FIRST / MIDDLE / LAST)			AGE (AT TIME OF THIS BIRTH)	STATE OF BIRTH (IF NOT IN U.S.A., NAME COUNTRY)
6a. Lillie	B.	Gordon	6b. 15	6c. Missigsippi

RESIDENCE—STATE	COUNTY	CITY, TOWN, OR LOCATION	INSIDE CITY LIMITS (SPECIFY YES OR NO)	STREET AND NUMBER
7a. Arkansas	7b. Crittenden	7c. West Memphis	7d. Yes	7e. 328 South 13th.

FATHER—NAME (FIRST / MIDDLE / LAST)	AGE (AT TIME OF THIS BIRTH)	STATE OF BIRTH (IF NOT IN U.S.A., NAME COUNTRY)
8a.	8b.	8c.

I CERTIFY THAT I HAVE INSPECTED THIS CERTIFICATE FOR ACCURACY.

9d. MOTHER'S SIGNATURE * Lillie B. Gordon

I CERTIFY THAT THE ABOVE NAMED CHILD WAS BORN ALIVE AT THE PLACE AND TIME AND ON THE DATE STATED ABOVE.	ATTENDANT—M.D., D.O., MIDWIFE, OTHER (SPECIFY)	DATE SIGNED (MONTH, DAY, YEAR)
9a. SIGNATURE Robert D. Mayfield M.D.	9b. M.D.	9c. August 20, 1977
NAME (TYPE OR PRINT) 9d. Robert Mayfield	MAILING ADDRESS (STREET OR R.F.D., NO., CITY OR TOWN, STATE, ZIP) 9e. 860 Madison Avenue	
REGISTRAR—SIGNATURE 10a. Frances Baker Deputy		DATE RECEIVED BY LOCAL REGISTRAR (MONTH, DAY, YEAR) 10b. AUG 26 1977

MOTHER'S NAME AND MAILING ADDRESS
A. NAME
B. STREET ADDRESS
C. CITY, STATE, ZIP
11a.

Miss Lillie Gordon
328 South 13th.
West Memphis, Arkansas 72301

5462787

I hereby certify the above to be a true and correct copy of the original document on file in this department. This certified copy is valid only when printed on security paper showing the red embossed seal of the Department of Health. Alteration or erasure voids this certification.
Tennessee Code Annotated 68-3-101 et seq., Vital Records Act of 1977.

Teresa S. Hendricks
STATE REGISTRAR

Darris Conner
Darris Conner
Local Registrar
Shelby County

OCT 03 2012
Date Issued

CERTIFICATION OF VITAL RECORD

Exh. b. Add. 8

IN THE CIRCUIT COURT OF LEE COUNTY, ARKANSAS
CIVIL DIVISION

ULONZO GORDON
ADC # 106251 PETITIONER

V. NO. 39CV-13-83

RAY HOBBS, Director,
Arkansas Department of Correction RESPONDENT

RESPONSE AND MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now Respondent, Ray Hobbs, Director, Arkansas Department of Correction, by and through counsel, Dustin McDaniel, Attorney General, and Christian Harris, Assistant Attorney General, and for his response and memorandum in opposition, states:

1. Respondent appears specially pending the disposition of his motion to quash the summons issued in this case. As the motion to quash explains, the Arkansas Rules of Civil Procedure do not apply in postconviction habeas proceedings. E.g., Carter v. State, 2010 Ark. 29, 3-4, 2010 WL 199646 at * 2 ("[W]e have never applied the Arkansas Rules of Civil Procedure to postconviction proceedings. Nor do we apply those

rules to a postconviction habeas proceeding.") (citations omitted). Under the habeas statute, the responsive pleading or answer is denoted the "return," and is not required unless the Court first finds that the petition "show[s], by affidavit or other evidence, probable cause to believe [the petitioner] is detained without lawful authority[.]" Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006).

2. Respondent maintains, therefore, that he is not required to file a formal return until the formal probable-cause determination is made; and offers this memorandum of authorities to assist the Court in that determination. If this Court rules to the contrary, Respondent requests that this memorandum be considered a responsive pleading and for leave to plead further. Subject to the foregoing qualification, Respondent answers the Petition as follows.

3. In 1995, Petitioner Ulonzo Gordon was convicted by a Crittenden County jury of capital murder, in violation of Ark. Code Ann. § 5-10-101(a)(4)(Repl. 1993), and sentenced to life imprisonment without parole by operation of law, see id. at § 101(c)(Repl. 1993).

4. In the current petition,[1] Gordon invokes the state habeas corpus statute, Ark. Code Ann. § 16-112-101 et seq., and argues that the recent case of Miller v. Alabama, 132 S. Ct. 2455 (Jun. 25, 2012), renders his sentence unconstitutional. Miller holds that a mandatory sentence of life imprisonment without parole for an offender who was less than 18 when he committed a homicide offense violates the Eighth Amendment's prohibition on cruel and unusual punishment. Miller, 132 S.Ct. at 2464. The petition should be denied, for two reasons.

5. First, because Gordon's Miller claim is, and can only be, that his sentence was imposed upon him by an illegal procedure, namely, by a mandatory punishment scheme, his claim is not cognizable under the state habeas-corpus statute.

---

[1] Respondent notes that Judge Proctor has already denied relief in a habeas-corpus action filed by Gordon pro se in Lee County Circuit Court, in which the he advanced the exact same Miller argument as advanced here through new counsel. See Petition, Lee Count Circuit Court No. CV-39CV-13-50, attached as Respondent's Exhibit A, order denying relief, attached as Respondent's Exhibit B. Judge Proctor's ruling is currently on appeal to the Arkansas Supreme Court. As far as Respondent is aware, Gordon's brief on appeal was due on July 22, 2013. See Letter from the Criminal Justice Coordinator, attached as Respondent's Exhibit C. The current petition states somewhat cryptically that it is intended to supersede all previous filings, although Respondent has not, as of the date of this filing, been served with any motion to dismiss the above appeal.

6. The Arkansas Supreme Court precedents interpreting the habeas-corpus statute distinguish a claim that a sentence is illegal on its face from a claim that a sentence was imposed in an illegal manner, i.e., a claim that asserts a procedural defect in the imposition of an otherwise legal sentence. E.g., Pineda v. Norris, 2009 Ark. 471, at 1 (per curiam) (citing Cooley v. State, 322 Ark. 348, 350-51, 909 S.W.2d 312, 313 (1995)); see also, e.g., Fritts v. State, 298 Ark. 533, 534, 768 S.W.2d 541, 542 (1989). The latter type of claim is not cognizable under the habeas-corpus statute. E.g., id.; Cooley, 322 Ark. at 350-51, 909 S.W.2d at 313.

7. Life imprisonment without parole for a juvenile is still a legal sentence, because Miller did not categorically invalidate the substantive punishment of life without parole for juveniles convicted of murder. Instead, the United States Supreme Court invalidated the procedure of imposing such sentences mandatorily. See Miller, 132 S. Ct. at 2469 ("We . . . hold that the Eighth Amendment forbids a sentencing scheme that mandates life without parole for juvenile offenders. . . . Because that holding is sufficient to decide [this case], we do not consider [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles . . .")(emphasis supplied); see also id. at

2471 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty.")(emphasis supplied).

8. Under these precedents, Gordon's Miller claim is not cognizable under the habeas-corpus statute. His sentence is within the range allowed by law. See Miller, 132 S. Ct. at 2469 & n.8, 2471. Gordon's Miller claim is a claim that his sentence was imposed in an illegal manner because it was imposed by a mandatory process, instead of by a discretionary process that allowed the sentencer to take into account the characteristics of his youth. Such a claim is not cognizable under the habeas-corpus statute.

9. Respondent is mindful of the Arkansas Supreme Court's decision in Jackson v. Norris, 2013 Ark. 175, in which the Arkansas Supreme Court, on remand from Jackson's proceedings in the United States Supreme Court as the companion case to Evan Miller's remanded Kuntrell Jackson's case to the circuit court for resentencing. Id. at 6.

10. Jackson does not hold, however, that Miller claims are cognizable under the state habeas corpus statute. See generally id. at 1-9. Instead, the Arkansas Supreme Court specifically based its holding, pursuant to Yates v. Aiken, 484 U.S. 211, 218 (1988), on "the State's concession that Jackson is entitled to the benefit of the United States Supreme Court's opinion in his own case." Id. at 6.

11. Thus, the Arkansas Supreme Court did not have occasion in Jackson to opine on the cognizability of Miller claims under the habeas-corpus statute. But cf. Whiteside v. State, 2013 Ark. 176, at 4 (stating in obiter dictum in a direct appeal that because the decision in Miller involves a void or illegal sentence, the issue is subject to challenge at any time and may be raised for the first time on appeal).[2] For the reasons given above, such claims are not cognizable, and the petition should be denied.

12. Second, even if Gordon's claim were cognizable in this habeas proceeding, he still is not entitled to relief because Miller does not apply retroactively to this collateral proceeding instituted long after his conviction

---

[2] Respondent notes that the issue of Miller cognizability under the state habeas corpus statute is pending on appeal in two cases pending in the Arkansas Supreme Court, Murry v. State, No. 12-880, 2013 Ark. 64 (petition for rehearing pending), and White v. Hobbs, No. 11-719.

became final. Although not required to do so, see Danforth v. Minnesota, 552 U.S. 264, 288 (2008), Arkansas previously has relied on the retroactivity analysis used by the United States Supreme Court when considering challenges to state-court convictions in habeas-corpus proceedings pursuant to 28 U.S.C. § 2254. Rowe v. State, 243 Ark. 375, 376, 419 S.W.2d 806, 807 (1967). In those proceedings, the Supreme Court now follows the framework first laid out in a plurality opinion in Teague v. Lane, 489 U.S. 288 (1989): a new criminal constitutional rule applies retroactively in collateral proceedings to convictions that are already final only if the rule is substantive or it 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)(citations and quotations omitted).

13. Under this framework, a state conviction is final when the availability of a direct appeal has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely-filed petition has been denied. E.g., Caspari v. Bohlen, 510 U.S. 383, 390 (1994). A rule is "new," in turn, if it "breaks new ground[,]" "was not dictated by precedent existing at the time [a] defendant's conviction became final[,]" or "imposes a new obligation on the States or the Federal Government." Teague, 489 U.S. at 301

(plurality opinion)(emphasis in original). And finally, substantive rules include those that place a class of conduct beyond the power of the states to proscribe or prohibit "a certain category of punishment for a class of defendants because of their status or offense." Saffle v. Parks, 494 U.S. 484, 494 (1990)(citation and quotations omitted).

14. Miller has no applicability to Gordon's state-habeas proceedings under this framework. His capital-murder conviction was entered in 1995, and has long been final. Miller, 132 S. Ct. at 2469, announced a new rule because, among other things, its requirement that juveniles not be subjected to mandatory life-without-parole sentences breaks new ground and imposes new obligations on the states by requiring sentencers to take into account how juveniles are different before a life-without-parole sentence can be imposed. And, given that at least some juveniles could be executed until 2005, see Roper v. Simmons, 543 U.S. 551, 561-62, 568 (2005), it cannot be said that Miller's prohibition on the mandatory imposition of life-without-parole sentences for juvenile homicide offenders was dictated by precedent existing in 1995.

15. Nor does Miller's rule lie within one of the two exceptions to the rule against the retroactive application of new criminal rules. The rule is not a watershed rule of criminal procedure, as it does not both prevent the risk of

an inaccurate conviction and alter the understanding of "bedrock procedural elements essential to the fairness of a proceeding." Whorton, 549 U.S. at 418 (citations and quotations omitted). Nor is it a substantive rule because it does not place a class of conduct beyond the power of the states to proscribe and "does not categorically bar a penalty for a class of offenders or type of crime[.]" Miller, 132 S. Ct. at 2471. Rather, Miller "mandates only that a sentence follow a certain process – considering [a homicide] offender's youth and attendant circumstances – before imposing [life without parole]." Id. Rules that only "alter[ ] the range of permissible methods for determining whether a defendant's conduct is punishable by" a particular penalty are not substantive. Schriro v. Summerlin, 542 U.S. 348, 353 (2004). In sum, Miller does not apply to this collateral proceeding challenging a sentence imposed 17 years before it was decided.

WHEREFORE, Respondent respectfully requests that the petition be denied, and for all other relief to which he may be entitled.

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8108
FAX: (501) 682-8203
christian.harris@arkansasag.gov

By: _____

Christian Harris
Ark. Bar No. 2002207
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on July 24, 2013, I sent a copy of this motion by U.S. Mail, and via email, to the following counsel of record:

D'Lorah L. Hughes
University of Arkansas School of Law
Legal Clinic
1 University of Arkansas
Fayetteville, AR 72701
dlhughes@uark.edu

-and-

Jeff Rosenzweig, Esq.
300 Spring St., Suite 300
Little Rock, AR 72201
jrosenzweig@att.net

_____

Christian Harris

IN THE CIRCUIT COURT OF LEE COUNTY, ARKANSAS

DIVISION

ULONZO TYRONE HARDEN 39CV-13-50 PETITIONER

VS. NO. ~~CR-95-149~~

STATE OF ARKANSAS RESPONDENT

ARKANSAS DEPT. OF CORRECTION - DIRECTOR ANN. BAY HOUSE;

HABEAS CORPUS PETITION
(ACA § 16-112-101-123)

Comes now the Petitioner, ULONZO TYRONE HARDEN, ADC #104256 and for his/her pro se Habeas Corpus Petition for absolute dismissal of the criminal conviction against him/her, alleges and states:

1. That Petitioner, an indigent, is a prisoner in custody of the Arkansas Department of Correction, E.A.R.U. BRUCE, AR Unit, under sentence of the Circuit Court of LEE County, Arkansas, having been sentenced on JUNE 16, 1995, for conviction of a felony.

2. That said conviction was based on an information or warrant filed against Defendant/Petitioner on or about January 23, 1995, accusing the Defendant/Petitioner of the offense(s) of CAPITAL MURDER

in violation of Ark. Code Ann. 5-10-101, a class Y felony.

3. That Petitioner is being held unlawfully and this Court has jurisdiction pursuant to the Arkansas Constitution and Arkansas Code Annotated 16-112-101, et seq.

4. That the Trial Court lacked jurisdiction and/or the Petitioner is held pursuant to an invalid conviction. Petitioner bases this allegation upon the following facts:

THAT AT THE TIME OF OFFENSE COMMITTED - ULONZO TYRONE HARDEN WAS ONLY 17 YEARS OLD, SENTENCED TO LIFE WITHOUT THE POSSIBILITY OF PAROLE. IS A 8TH AMENDMENT VIOLATION, CRUEL AND UNUSUAL PUNISHMENT. "SEE" EXHIBIT (1) CERTIFICATE OF LIVE BIRTH, AUGUST 18, 1977) STATE OF TENNESSEE, COUNTY OF SHELBY, CITY OF MEMPHIS. ALSO SEE EXHIBIT #2 & #3. JUDGE -

FILED AT 9:20 O'CLOCK A M

APR 12 2013

CIRCUIT CLERK

RESPONDENT'S EXHIBIT A

MIGHT ADD CONSTRAINT ORDER-I WAS CRITICIZED LOUDLY BY MR. BOARDS WAS SENTENCED JUNE-16-1995. SEE "KUHN ROY JACKSON VS RAY HOBBS. "DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTION NOS. 10-9646, 10-9647). ARGUED MARCH-20TH-2012. DECIDED-JUNE 25TH. 2012) (SEE "HOLDING-SUPREME COURT OF THE UNITED STATES "EVAN MILLER-PETITIONER VS ALABAMA. HOLDING SUPREME COURT-JUSTICE "KAGAN "HELD THAT MANDATORY "LIFE IMPRISONMENT WITHOUT PAROLE POSSIBILITY, FOR THOSE UNDER THE AGE OF 18 AT THE TIME OF THEIR CRIME, VIOLATED THE 8TH AMENDMENT - PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT-REVERSED AND REMANDED." THE 8TH-AMENDMENT FORBIDS A- - - - SEE OTHER SIDE

5. That Petitioner is entitled to have the conviction dismissed with an absolute bar to prosecution.

WHEREFORE, Petitioner prays this Court enter an order dismissing his/her conviction with prejudice; to set a hearing on the motion herein; to appoint an attorney for Petitioner for such hearing, and for all relief which may be just and proper.

Respectfully submitted,

X _____
Petitioner, pro se
ADC # 106261
EARU BARNEY AR Unit
Arkansas Department of Correction
EARLEY, AR 72320

STATE OF ARKANSAS)
) SS
COUNTY OF Lee)

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, on this 9 day of April, 2013.

_____
NOTARY PUBLIC

My Commission Expires: March 1, 2015

MICHAEL D. ALLEN
CRITTENDEN COUNTY
NOTARY PUBLIC -- ARKANSAS
My Commission Expires March 1, 2015

SENTENCING SCHEME THAT MANDATES "LIFE IN PRISON WITHOUT PAROLE POSSIBILITY FOR JUVENILE HOMICIDE OFFENDERS. (A) THE EIGHTH AMENDMENT PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT "GUARANTEES INDIVIDUALS THE RIGHT not to be subject to EXCESSIVE SANCTIONS." ROPER VS. SIMMONS, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed. 2d. 1.

SEE" GRAHAM, 560 U.S. AT ... 130 S. Ct. AT 2026.

THOSE CASES RELIED ON THREE SIGNIFICANT GAPS BETWEEN "JUVENILES AND ADULTS. FIRST CHILDREN HAVE A LACK "OF maturity AND A UNDERDEVELOPED SENSE OF "RESPONSIBILITY.

LEADING TO RECKLESSNESS, IMPULSIVITY AND NEEDLESS RISK TAKEN.

IN THE CIRCUIT COURT OF LEE COUNTY, ARKANSAS
CIVIL DIVISION

ULONZSO TYRONE GORDON **PETITIONER**

VS **NO. CV-39CV-13-50**

STATE OF ARKANSAS **RESPONDENT**

ORDER DENYING HABEAS CORPUS PETITION

Now on this 17 day of April, 2013, comes on to be heard the Petition for Habeas Corpus. From the matters contained in the Petition, the Court finds:

1. This Petition was filed on April 12, 2013, and was forwarded to the Court. The Petition alleges that the Circuit Court of Crittenden County, Arkansas, Cause No. CR-95-149, issued a conviction that was void and illegal and lacked jurisdiction to convict the Petitioner of the offense for which he was convicted.

2. The burden is on the petitioner in a habeas corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face, Otherwise, there is no basis for a finding that the writ should be issued. The Petitioner must plead either the facial invalidity or the lack of jurisdiction and make a "showing by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. *Young v. Norris,* 365 Ark. 219, 226 S.W.3rd, 797 (2006).

3. Conclusory allegations are not sufficient to establish grounds that warrant relief without facts to support the petition.

4. The Court finds that the petition lacks sufficient merit to justify the relief requested. The petition does not address issues that are appropriate for habeas corpus relief.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the

FILED
9:30 O'CLOCK A M
APR 22 2013
CIRCUIT CLERK
LEE COUNTY, AR

RESPONDENT'S EXHIBIT 15

Habeas Corpus Petition filed April 12, 2013, is hereby denied and the request for an evidentiary hearing will be denied.

GIVEN UNDER MY HAND AS CIRCUIT JUDGE this day hereinabove set forth.

Richard L. Proctor
Circuit Judge, Div. 2

cc: Ulonzso Tyrone Gordon
ADC # 106251
East Arkansas Regional Unit
P.O. Box 180
Brickeys, AR 72320

C-800-42

IN THE CIRCUIT COURT OF LEE, COUNTY, ARKANSAS

Civil/Crim DIVISION

PETITIONER

Alonzo Tyrone Gordon

VS. NO. Cr. 95-149 / 39.Cv-13-50

STATE OF ARKANSAS RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that Alonzo Tyrone Gordon, appeals to the Supreme Court of Arkansas from the final Order of the Circuit Court of LEE County, Arkansas entered April - 17th, 2013

APPELLATE JURISDICTION

The appellate jurisdiction of the Supreme Court or the Court of Appeals is invoked pursuant to Rule 2, Rules of Appellate Procedure – Criminal.

DESIGNATION OF RECORD

Petitioner/Appellant hereby designates the entire record, and all proceedings, exhibits, evidence, and documents introduced in evidence to be contained in the record on appeal.

FILED
AT 2:30 O'CLOCK A M
MAY 13 2013
CIRCUIT CLERK
LEE COUNTY, ARKANSAS

CERTIFICATE OF ORDER OR TRANSCRIPT

Ulonzo Tyrone Gordon states, that for good cause shown, he has requested the Circuit Court to cause the Transcript of the Designated Record of Appeal, deemed essential, to be ordered, certified, transmitted to the Clerk of the Supreme Court for filing and docketing. (See attached Petition for Leave to Proceed In Forma Pauperis with supporting affidavit.)

Ulonzo Tyrone Gordon
Name:
Address:
East Arkansas Regional Unit
P. O. Box 180
326 Lee 601
Brickeys, AR 72320-0180

VERIFICATION

I, Ulonzo Tyrone Gordon, the petitioner herein, and in support of my Notice of Appeal, after first being duly sworn, do hereby swear that the statements, matters, and things contained in my Notice of Appeal are a true and accurate account to the best of my knowledge, information, and belief and for the purposes herein stated, set forth, and contained.

U. Gordon

STATE OF ARKANSAS
COUNTY OF Lee

Subscribed and sworn to before me a notary on this 8 day of May, 2013.

Geneva V. Jones
Notary Public

My Commission expires: 1-10-2015

GENEVA V. JONES
NOTARY PUBLIC-STATE OF ARKANSAS
LEE COUNTY
My Commission Expires 01-10-2015

Office of the
CRIMINAL JUSTICE COORDINATOR
SUPREME COURT OF THE STATE OF ARKANSAS

Sue Newbery
Criminal Justice Coordinator
Phone (501) 682-1637

Justice Building, Suite 1300
625 Marshall Street
Little Rock, Arkansas 72201

June 11, 2013

Mr. Ulonszo T. Gordon
a/k/a Ulonzo T. Gordon
ADC No. 106251
East Arkansas Regional Unit
P.O. Box 180
Brickeys, AR 72320-0180

Re: *Ulonszo Gordon v. Ray Hobbs, Director, Arkansas Department of Correction,* **CV-13-511,** appeal from order entered April 22, 2013 [Circuit Court of Lee County, 39CV-13-50, pro se petition for writ of habeas corpus denied]

Dear Mr. Gordon:

This letter is to advise you that an appeal from the above-referenced order has been lodged in the Arkansas Supreme Court. The record on appeal indicates that you are proceeding pro se; that is, you are proceeding without the services of an attorney.

Eight copies of your brief are due here no later than **Monday, July 22, 2013.** Enclosed is a copy of Supreme Court Rule 4-7 that sets out the requirements for briefs in postconviction and civil appeals in which the appellant is incarcerated and proceeding pro se. Also enclosed is a checklist to assist you in determining whether your brief complies with the rule before submitting it. Briefs that do not comply with the rule will be returned for correction.

If you have questions about the form or content of a brief, it is recommended that you consult an attorney. This office is not in a position to assist you in the preparation of the brief. Please inform this office if you have a change of address, including a change in prison units.

Cordially,

Office of the Criminal Justice Coordinator

cc Clerk of the Arkansas Supreme Court
Office of the Attorney General
Circuit Clerk of Lee County

San:Ram

RESPONDENT'S EXHIBIT C

RICHARD L. PROCTOR

CIRCUIT JUDGE • DIVISION TWO
FIRST JUDICIAL CIRCUIT OF ARKANSAS

Chambers: 705 E. Union, Room 11
Wynne, Arkansas 72396
Telephone: 870-238-3831
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Elvetta Stacy
Certified Court Reporter
elvetta.stacy@att.net
Gwen Bretherick
Trial Court Assistant
gwenbreth@sbcglobal.net

August 5, 2013

D'lorah L. Hughes
University of Arkansas School of Law Legal Clinic
1 University of Arkansas
Fayetteville, AR 72701

Jeff Rosenzweig, Attorney
300 Spring St., Suite 310
Little Rock, AR 72201

Christian Harris, Asst. Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201

RE: Ulonzo Gordon vs. Ray Hobbs, Director
Lee Circuit No. 39CV-13-83

Counsel:

The Court has received a Petition for Writ of Habeas Corpus on behalf of Ulonzo Gordon. It appears that Miller v. Alabama, 132 St. Ct. 2455 (2012), is applicable. Accordingly, Whiteside v. State, 2013 Ark. 176, and Jackson v. Norris, 2013 Ark. 175, require this Court to grant the Petition of Ulonzo Gordon for habeas relief.

The Court would ask that the attorneys for the Petitioner prepare the appropriate order granting the writ and transferring this case to the sentencing Court for further action. In Jackson, the Court held:

> "We agree with the State's FN1 concession that Jackson is entitled to the benefit of the United State's Supreme Court's opinion in his own case. See Yates v. Aiken, 484 U.S. 211, 218, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988). Given the holding in Miller, we reverse the denial of the petition for writ of

habeas corpus, issue the writ, and remand to the Jefferson County Circuit Court with instructions that the case be transferred to the Mississippi County Circuit Court. See Waddle v. Sargent, 313 Ark. 539, 545, 855 S.W.2d 919, 922 (1993) (issuing the writ in a Lincoln County habeas corpus case and placing the prisoner in the custody of Faulkner County law enforcement to be held on a capital-murder charge); see also Ark.Code Ann. § 16–112–102(a)(1) (Repl.2006) (granting power to this court to issue writ); Ark.Code Ann. § 16–112–115 (Repl.2006) (permitting the "judge before whom writ is returned" to "make such order as may be proper")."

The order should reflect that this matter be transferred to the Crittenden County Circuit Court for such orders as may be proper.

The order should also reflect that the issues with regard to the issuance of summons and the Motion to Quash are moot. Please prepare the appropriate order and return to me for entry.

Respectfully,

Richard L. Proctor

Richard L. Proctor, Circuit Judge, Div. 2

RLP:r

Original of Letter to Clerk for Filing
Mary Ann Wilkinson, Circuit Clerk
15 E. Chestnut St.
Marianna, AR 72360

IN THE CIRCUIT COURT OF LEE COUNTY

ULONZO GORDON — PETITIONER

v. — No. 39CV-13-83

RAY HOBBS, Director,
Arkansas Department of Correction — RESPONDENT

ORDER

Before the Court on this date is a Petition for Writ of Habeas Corpus filed by Petitioner Ulonzo Gordon. The Court finds that the grant of the writ is compelled by the decision of the United States Supreme Court in *Miller v. Alabama / Jackson v. Hobbs*, 132 S.Ct. 2455 (2012), and of the Arkansas Supreme Court in *Jackson v. Norris*, 2013 Ark. 175. Petitioner Gordon's sentence of life imprisonment without parole is hereby vacated and set aside.

The writ having been granted, the Circuit Court of Crittenden County is hereby reinvested with jurisdiction to conduct resentencing proceedings. Accordingly, matters surrounding the issuance of summons and Respondent's Motion to Quash are moot.

IT IS SO ORDERED this 22 day of August, 2013.

Richard L Proctor

Hon. Richard L. Proctor
Circuit Judge

8/22/13
Date

PREPARED BY:

D'lorah L. Hughes
Ark. Bar No. 2009001
University of Arkansas
1 University of Arkansas
Fayetteville, AR 72701

Jeff Rosenzweig
Ark. Bar. No. 77115
300 Spring St., Suite 310
Little Rock, AR 72201

FILED
AT 9:30 O'CLOCK A M
AUG 23 2013
CIRCUIT CLERK
LEE COUNTY, AR

IN THE CIRCUIT COURT OF LEE COUNTY

ULONZO GORDON PETITIONER

V. NO. 39CV-13-83

RAY HOBBS, Director,
Arkansas Department of Correction RESPONDENT

MOTION FOR RECONSIDERATION

Comes now Ray Hobbs, Director, Arkansas Department of Correction, by and through counsel, Dustin McDaniel, Attorney General, and Christian Harris, Assistant Attorney General, and for his Motion for Reconsideration, states:

By an order file-marked August 23, 2013, the Court granted petitioner Gordon's petition for a writ of habeas corpus, finding that Miller v. Alabama, 132 S. Ct. 2455 (2012) and Jackson v. Norris, 2013 Ark. 175 compelled the grant of the writ. The Court vacated his life-without-parole sentence and transferred the case for resentencing to Crittenden County Circuit Court, where petitioner originally was tried. Because the order is inconsistent with the procedure outlined by the habeas-corpus statute, respondent respectfully seeks reconsideration.

FILED
AT 4 O'CLOCK P M
SEP 09 2013
CIRCUIT CLERK
LEE COUNTY, AR

The habeas-corpus statutes require that the writ should issue to require petitioner's custodian to submit a return in order that the material facts can be ascertained before deciding whether and what relief might ensue. See generally Ark. Code Ann. §§16-112-103, -105, -108, -109, -113, -114 (Repl. 2006). Thus, if the Court has concluded—as it apparently has—that relief is not barred as a matter of law for the two reasons advanced in respondent's Response and Memorandum and that petitioner's petition and submissions sufficiently demonstrate probable cause to believe he may be unlawfully detained, the Court should do no more than issue the writ requiring respondent to submit a return so that the material facts can be ascertained as to the lawfulness, *vel non*, of petitioner's custody. In other words, granting the writ at this stage means only that respondent should file a return, and, if he disputes the unlawfulness of petitioner's custody, the Court should conduct a hearing to ascertain material facts.

Wherefore, respondent respectfully ask the Court to reconsider its August 23, order, so that he may file a return and the Court thereafter ascertain material facts as to the lawfulness of petitioner's custody.

DATED this 9th of September, 2013.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: David R. Rapp

for Christian Harris (ABN 2002207)
Assistant Attorney General
323 Center St. Suite 200
Little Rock, AR 72205
(501) 682-8108
(501) 682-8203 (fax)
christian.harris@arkansasag.gov

CERTIFICATE OF SERVICE

I, Christian Harris, certify that a copy of the foregoing has been served on the following counsel of record by mailing a copy of same by U.S. Mail, postage prepaid, on September 9, 2013:

Professor D'Lorah L. Hughes
University of Arkansas School of Law
Legal Clinic
1 University of Arkansas
Fayetteville, AR 72701

Honorable Richard L. Proctor
Division 2
705 E. Union, Room 11
Wynne, AR 72396

Jeff Rosenzweig, Esq.
300 Spring St., Suite 300
Little Rock, AR 72201

M R. R

for Christian Harris

IN THE CIRCUIT COURT OF LEE COUNTY

ULONZO GORDON PETITIONER

V. NO. 39CV-13-83

RAY HOBBS, Director,
Arkansas Department of Correction RESPONDENT

NOTICE OF APPEAL

Comes now Ray Hobbs, Director, Arkansas Department of Correction, by and through counsel Dustin McDaniel, Attorney General, and Christian Harris, Assistant Attorney General, and for his Notice of Appeal, states:

1. The party taking the appeal is the Respondent, Ray Hobbs, Director, Arkansas Department of Correction.

2. This appeal is from the Court's Order, entered of record on August 23, 2013, granting a writ of habeas corpus to Petitioner and reinvesting the Circuit Court of Crittenden County with jurisdiction to conduct resentencing proceedings.

3. Respondent designates the entire record before the circuit court as the record on appeal.

FILED
AT 9 O'CLOCK A M
SEP 23 2013
CIRCUIT CLERK
LEE COUNTY, AR

4. There is no transcript to be ordered from the court reporter because the circuit court did not hold an evidentiary hearing in this case.

5. This appeal is to the Arkansas Supreme Court because it involves a collateral challenge to a criminal conviction where the jury imposed a life sentence, see Ark. R. Sup. Ct. 1-2(a)(2) (2012).

DATED this 23rd day of September, 2013.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: _____

Christian Harris (ABN 2002207)
Assistant Attorney General
323 Center St. Suite 200
Little Rock, AR 72205
(501) 682-8108
(501) 682-8203 (fax)
christian.harris@arkansasag.gov

CERTIFICATE OF SERVICE

I, Christian Harris, certify that a copy of the foregoing has been served on the following counsel of record by mailing a copy of same by U.S. Mail, postage prepaid, on 23rd day of September, 2013:

Professor D'Lorah L. Hughes
University of Arkansas School of Law
Legal Clinic
1 University of Arkansas
Fayetteville, AR 72701

Honorable Richard L. Proctor
Division 2
705 E. Union, Room 11
Wynne, AR 72396

Jeff Rosenzweig, Esq.
300 Spring St., Suite 300
Little Rock, AR 72201

Christian Harris

IN THE CIRCUIT COURT OF LEE COUNTY

ULONZO GORDON PETITIONER

V. NO. 39CV-13-83

RAY HOBBS, Director,
Arkansas Department of Correction RESPONDENT

SECOND NOTICE OF APPEAL

Comes now Ray Hobbs, Director, Arkansas Department of Correction, by and through counsel Dustin McDaniel, Attorney General, and Christian Harris, Assistant Attorney General, and for his Second Notice of Appeal, states:

1. The party taking the appeal is the Respondent, Ray Hobbs, Director, Arkansas Department of Correction.

2. This appeal is from the Court's Order, entered of record on August 23, 2013, granting a writ of habeas corpus to Petitioner and reinvesting the Circuit Court of Crittenden County with jurisdiction to conduct resentencing proceedings, and the subsequent denial by operation of law, on October 9, 2013, of Respondent's Motion for Reconsideration, which was filed on September 9, 2013.

FILED
AT 11:50 O'CLOCK AM
OCT 15 2013
CIRCUIT CLERK
LEE COUNTY, AR

3. Respondent designates the entire record before the circuit court as the record on appeal.

4. There is no transcript to be ordered from the court reporter because the circuit court did not hold an evidentiary hearing in this case.

5. This appeal is to the Arkansas Supreme Court because it involves a collateral challenge to a criminal conviction where the jury imposed a life sentence, see Ark. R. Sup. Ct. 1-2(a)(2) (2012).

DATED this 11th day of October, 2013.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

By: _____

Christian Harris (ABN 2002207)
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CERTIFICATE OF SERVICE

I, Christian Harris, certify that a copy of the foregoing has been served on the following counsel of record by mailing a copy of same by U.S. Mail, postage prepaid, on this 11th day of October, 2013:

Professor D'Lorah L. Hughes
University of Arkansas School of Law
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