CV-13-942

IN THE SUPREME COURT OF ARKANSAS

RAY HOBBS, Director,
Arkansas Department of Correction — APPELLANT

V. CV-13-942

ULONZO GORDON — APPELLEE

APPEAL FROM LEE CIRCUIT COURT

HON. RICHARD PROCTOR, CIRCUIT JUDGE

BRIEF OF APPELLEE ULONZO GORDON

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TABLE OF CONTENTS

POINTS ON APPEAL

I.

MR. GORDON'S CLAIMS UNDER *MILLER V. ALABAMA* ARE COGNIZABLE UNDER THE HABEAS CORPUS STATUTE. HABEAS CORPUS IS THE ONLY REMEDY CURRENTLY AVAILABLE TO CORRECT MR. GORDON'S UNCONSTITUTIONAL MANDATORY SENTENCE OF LIFE WITHOUT PAROLE.

II.

MILLER V. ALABAMA APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW. IT FALLS WITHIN AN EXCEPTION TO THE GENERAL RULE OF NONRETROACTIVITY AND THE UNITED STATES SUPREME COURT INTENDED ITS RULING TO BE RETROACTIVE.

III.

THE UNDERLYING PURPOSE OF SERVICE PURSUANT TO ARKANSAS'S HABEAS CORPUS STATUTE HAS BEEN FULFILLED. APPELLANT WAS PROVIDED WITH NOTICE OF MR. GORDON'S CLAIMS. THE PRINCIPLES OF JUDICIAL ECONOMY WEIGH STRONGLY AGAINST FINDING OTHERWISE.

TABLE OF AUTHORITIES

Other authorities

STATEMENT OF THE CASE

On June 16, 1995, Ulonzo Gordon was convicted of capital murder and sentenced to a mandatory life without the possibility of parole. At the time of his conviction, capital murder was only punishable by life imprisonment or death. Ark. Code Ann. § 5-10-101(c), invalidated in part by *Jackson v. Norris*, 2013 Ark. 175 (2013). Born August 18, 1977, Mr. Gordon was seventeen years old at the time of the offense as well as the conviction. The judgment and commitment (Appellant's Add. 7) had a clerical error as to his birthdate. The correct date was in his birth certificate. Appellant's Add. 8. It does not appear that the State challenges this date of birth. (For ease of reference, Gordon will refer to Director Hobbs in this brief as "the State."

The death penalty was not sought in this case. Moreover, since the United States Supreme Court declared that sentencing juveniles to death was a violation the Eighth Amendment's prohibition against cruel and unusual punishment, see *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005), the only available sentence was life without parole. Given that Mr. Gordon's sentence was imposed mandatorily, the sentencing court was prohibited from considering any pertinent information regarding his age, familial or home environment, potential for rehabilitation, or the circumstances surrounding the offense. Evidence at Mr. Gordon's trial demonstrated

that he did not kill or injure the victim of the offense at issue. *Gordon v. State*, 324 Ark. 135, 139, 919 S.W.2d 205, 208 (1996). Mr. Gordon was only present at the scene of the crime with a handgun but fired no shots. *Id.*

Moreover, the only shots that were those of Jeremy Moten, Mr. Gordon's co-defendant, who was twenty years old at the time of the offense. Id. (Mr. Moten's defense was that of justification, self-defense.) Additionally, because of the mandatory nature of the sentence, Mr. Gordon could not present any evidence of the childhood trauma he suffered or other poignant or difficult circumstances which he endured.

After Mr. Gordon was sentenced to life without parole, his conviction was affirmed on direct appeal on April 15, 1996. *Gordon, supra.* Mr. Gordon subsequently filed a timely petition for post-conviction relief pursuant to Rule 37, A.R.Crim.P. *Gordon v. State*, CR 96-878, 1997 WL 583031 (Ark. Sept. 18, 1997). The Circuit Court of Crittenden County denied his petition. Id. Mr. Gordon appealed the circuit court's dismissal pro se to this Court. *Id.* On September 18, 1997, this Court affirmed the dismissal of Mr. Gordon's post-conviction petition. *Id.*

On June 25, 2012, the United States Supreme Court held in *Miller v. Alabama*, 132 S.Ct 2455 (2012), that the sentence of mandatory life without parole for those under the age of eighteen to be cruel and unusual punishment in violation of the

Constitution's Eighth Amendment. On April 12, 2013, Mr. Gordon filed a state petition for writ of habeas corpus pro se in Lee County for relief pursuant to *Miller*. Appellant's Br., at Add. 20. On April 17, 2013, his petition was denied. Id., at Add. 22. Mr. Gordon appealed the ruling denying his petition on May 13, 2013. Appellant's Br., at Add. 24.

Mr. Gordon subsequently gained the assistance of counsel who filed a notice of entry of appearance on June 24, 2013. Notice of Entry of Appearance, *Gordon v. State*, Case No. CV-13-50 (Jun. 24, 2013). Also on June 24, 2013, a state petition for writ of habeas corpus was filed on Mr. Gordon's behalf by counsel in the Circuit Court of Lee County. Appellant's Br., at Add. 1. That writ superseded all prior filings. The Circuit Court granted Mr. Gordon's writ of habeas corpus, finding that "the grant of the writ is compelled by the decision of the United States Supreme Court in *Miller v. Alabama*, 132 S.Ct. 2455 (2012), and of [this Court] in *Jackson v. Norris*, 2013 Ark. 175." Id., at Add. 29. The Circuit Court ordered Mr. Gordon's sentence of life imprisonment without parole to be vacated and set aside. *Id.* The State appealed.

Mr. Gordon argues that he is serving an unconstitutional sentence of mandatory life without parole, a sentence he received as a juvenile. This Court should affirm the Circuit Court of Lee County's grant of Mr. Gordon's habeas petition, as his claim is

both cognizable under Arkansas' habeas statute and fully retroactive under *Miller*, and that there has been sufficient procedural compliance with the habeas statute.

ARGUMENT

Standard of Review

Questions of law are subject to de novo review by this Court. *Scissom v. State*, 367 Ark. 368, 369, 240 S.W.3d 100, 101 (2006). The issue of the retroactivity of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), involves a question of law. Accordingly, *de novo* is the proper standard of review in this case. Further, where a claim involves a lower court's interpretation of an Arkansas statute, the standard of review for this Court is *de novo*. *Wickham v. State*, 2009 Ark. 357, at 5, 324 S.W.3d 344, 347. As this case involves the circuit court's interpretation of the Arkansas habeas corpus statute, such as the cognizability of Mr. Gordon's claim and the accompanying service requirements, the appropriate standard of review is *de novo*.

I.

MR. GORDON'S CLAIMS UNDER *MILLER V. ALABAMA* ARE COGNIZABLE UNDER THE HABEAS CORPUS STATUTE. HABEAS CORPUS IS THE ONLY REMEDY CURRENTLY AVAILABLE TO CORRECT MR. GORDON'S UNCONSTITUTIONAL MANDATORY SENTENCE OF LIFE WITHOUT PAROLE.

A. *Jackson v. Norris* established that claims made under *Miller v. Alabama* are cognizable under Arkansas's habeas statute.

On remand from the United States Supreme Court, the Arkansas Supreme

Court determined that *Miller's* bar on mandatory life without parole sentences for juveniles should be applied in Jackson, where the petitioner was on collateral review. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Jackson v. Norris*, 2013 Ark. 175. This ruling applies to all subsequent habeas claims under *Miller* in Arkansas.

Jackson v. Hobbs, as *Jackson v. Norris* was known in the United States Supreme Court, was argued the same day as *Miller* but separately. Nonetheless, the two cases were decided in a single opinion. The operative distinction between Mr. Miller's case and Mr. Jackson's case is that Mr. Miller was on direct appeal and Mr. Jackson was on collateral review. *Id.* If this distinction were relevant to the Court then the cases would have been decided separately and most likely presenting different outcomes. On remand from the United States Supreme Court in *Jackson v. Norris*, this Court determined that Mr. Jackson was entitled to the benefit of Miller by means of a state writ of habeas corpus. 2013 Ark. 175, at 2, 9.

Mr. Gordon is identically situated to Mr. Jackson in that he seeks the issuance of a state writ of habeas corpus to cure his "void and illegal" life without parole sentence, which was mandatorily imposed under the now-severed Arkansas capital murder statute. See *Whiteside v. State*, 2013 Ark. 176, at 4 (explaining that the capital murder statute, imposing a mandatory life without parole sentence on juveniles found guilty of capital murder, was "unauthorized and illegal" under the

Eighth Amendment). Under this Court's decision in *Jackson v Norris*, Mr. Gordon's claim is cognizable by means of a state habeas petition. 2013 Ark. 175, at 2. The State argues that *Jackson* should not apply in this case because Mr. Jackson was "entitled to the benefit of the *Miller* decision in his own case." See Appellant's Br., at 5. Although this Court agreed with the State's concession in *Jackson*, the Court's holding was not "exclusively" premised on this concession. Id. Rather, under *Yates v. Aiken*, 484 U.S. 211, 218, 108 S.Ct. 534(1988), the Arkansas Supreme Court was obligated to give Mr. Jackson the benefit of the *Miller* decision because it had previously reviewed the merits of his claim. Although the Court did not reach certain of the issues presented in this case, there was no need to do so; the Court did not rule on this issue *sub silentio*. Therefore, Mr. Gordon's claim for habeas relief is cognizable under the Arkansas habeas statute pursuant to *Jackson*.

B. Mr. Gordon has no other remedy available to "right the wrong" of his unconstitutional mandatory life without parole sentence.

i. Mr. Gordon has a right to relief.

Article 2, §13, part of the Declaration of Rights of the Arkansas Constitution, states:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice

> freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws.

While this provision is a restatement of the common law's equitable maxim "where there is a right, there is a remedy," it is also a dictate that every wrong is to be remedied by a "certain remedy." Id. (emphasis added). This Court's decisions in both *Jackson* and *Whiteside* clearly demonstrate that a writ of habeas corpus provides this "certain" remedy. The failure to give Mr. Gordon a remedy would also violate Mr. Gordon's federal and state constitutional rights of due process and equal protection. Fourteenth Amendment. Art. 2 § 8, Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227 (1980)(a state's refusal to enforce its own law and rules violates due process and equal protection guarantees)

ii. While other forms of post-conviction relief exist, only the issuance of a writ of habeas corpus is appropriate to redress Mr. Gordon's injury.

Error coram nobis: This Court made clear in *State v. Larimore,* 341 Ark. 397, 406, 17 S.W.3d. 87, 92 (2000), that "a writ of error coram nobis [is] available to address certain errors . . . found in one of four categories: insanity . . . a coerced guilty plea, material evidence withheld . . . or a third-party confession to the crime . . . ." Moreover, a writ of error coram nobis is an exceedingly narrow remedy, only

appropriate "when an issue was not addressed or could not have been addressed at trial because it was somehow hidden or unknown or would have prevented the rendition of the judgment had it been known to the trial court." *Pitts v. State*, 336 Ark. 580, 582, 986 S.W.2d 407, 409 (1999) (per curiam). Mr. Gordon's case presents none of these criteria.

Rule 37: Rule 37 requires that a petition be filed within 60 days of the issuance of the mandate affirming Mr. Gordon's conviction on direct appeal expired some 15 years before *Miller* was decided. As such, through no fault of his own, Mr. Gordon was unable to raise any *Miller* claims at the trial or appellate court level or seek Rule 37 relief because *Miller* was decided seventeen years after Gordon's conviction Therefore, Rule 37 relief is not the appropriate remedy to redress Mr. Gordon's injury. A writ of habeas corpus is thus the only proper remedy.

C. The "invalidity on the face of the judgment" rule is impractical and is not supported by the language of Arkansas habeas statute.

To properly inquire into whether a sentence is invalid on its face, a court is required to look beyond the face of the Judgment and Commitment Order ("judgment"), as provided as an exhibit to a state petition for writ of habeas corpus. Ark. Code Ann. § 16-112-103(a)(1).

i. The "invalidity on the face of the judgment" rule is impractical and leaves essential questions of fact ambiguous.

Reliance on a rule requiring invalidity to appear on the face of a judgment for purposes of a state habeas petition does not suffice to address constitutional challenges to an illegal sentence. In many of these cases, including *Jackson*, further inquiry into the exact nature of the sentence received is required to truly and accurately address the merits of the petition. See *Jackson*, 2013 Ark. 175, at 2 (looking beyond the face of Kuntrell Jackson's judgment to the *Miller* decision to determine that his sentence was illegal). Dependence on a facial invalidity rule is impractical.

Nonetheless, Mr. Gordon's Judgment and Commitment form has provisions for the date of the offense (1/28/95) and his date of birth (8/18/76). Appellant's Br., at Add. 7. However, the clerk recorded his age erroneously; he was born August 18, 1977. Appellant's Br., at Add. 8. Had the clerk accurately recorded his age, the face of the judgment would have reflected that Mr. Gordon was 17 at the time of the offense.

Moreover, a blind reliance on the face of the judgment would be an absurdity. Thus, further inquiry beyond the minimally informative face of the judgment is necessary to appropriately and fully determine whether Mr. Gordon's sentence was

mandatory in violation of *Miller*; the "invalidity on the face of the judgment" should not be controlling. Indeed, until recent years when this Court imposed a series of different judgment forms, the judgments—now known as Sentencing Orders— were idiosyncratically different from each other, and the Department of Correction received inmates pursuant to a separate document.

ii. The "invalidity on the face of the judgment" rule is not supported by Arkansas statutory text.

The language of the Arkansas habeas statute itself does not support the "invalid[ity] on the face of the judgment" rule cited by Appellant. See Appellant's Br., at 4. Instead, the express language of the Arkansas statutes note that a writ of habeas corpus may issue based on an "affidavit or other evidence" of an illegal sentence, or premised on a subsequent "event" rendering the original sentence illegal. Ark. Code Ann. § 16-112-103(a)(1). In reliance on the governing statutory text, Mr. Gordon has illustrated through extensive evidence and subsequent events that his sentence is cognizable under Arkansas statutory law.

The Arkansas habeas statute notes that an illegal sentence may be demonstrated by "affidavit or other evidence." Nowhere within the Arkansas habeas statute is there a requirement of "facial invalidity." See Ark. Code Ann. § 16-112-103. Specifically, the statute only requires a showing of "probable cause to believe [an individual] is

detained without lawful authority" by affidavit or other evidence. Ark. Code Ann.. § 16-112-103(a)(1). Rather, the "face of the judgment" rule is a metaphor for the concept of noncognizability of claims due to trial error; it is not an irrevocable deference to the writings on a sheet of paper or omissions from such a form. Accordingly, the statute permits—or rather, requires—the inclusion of supplemental information beyond the face of the judgment to support an allegation of an illegal sentence in a petition for writ of habeas corpus.

Other Arkansas statutes relating to the issuance of writs of habeas corpus are also devoid of any language relating to a simple examination of the "face of the judgment." See Ark. Code Ann. § 16-112-118. In addressing claims within a petition for writ of habeas corpus, Ark. Code Ann. § 16-112-118(b)(1)(B) states that a prisoner may be discharged "[w]here, 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." Instead, any event which subsequently renders a previously valid sentence unlawful may be addressed by a petition for writ of habeas corpus and the claims included therein are cognizable. Thus, the statute makes clear that a writ of habeas corpus is the proper vehicle for addressing Mr. Gordon's illegal sentence.

Alhough Mr. Gordon's sentence of mandatory life without parole was valid at

the time of his conviction, the subsequent event of the Miller decision renders his habeas claim cognizable. Because Miller bars the mandatory imposition of life without parole on juveniles, the sentence received by Mr. Gordon, the decision qualifies as a subsequent event under the Arkansas habeas statute. See Ark. Code Ann. § 16-112-118(b)(1)(B).

D. Mr. Gordon's sentence is invalid on its face.

Even if this Court finds that the "invalidity on the face of the judgment" rule is supported by the language of the Arkansas habeas statute, Mr. Gordon's sentence is invalid on its face under *Jackson v. Norris*.

In *Jackson*, this Court severed Ark. Code Ann. § 5-10-101(c) "so that, for juveniles convicted of capital murder, all that remains is that 'capital murder is a Class Y felony'" with a sentencing range of ten to forty years or life. *Jackson*, 2013 Ark. 175, at 7-8. The Court made this direction prior to determining the relevant Miller factors to be considered, effectively creating a new range of sentences that may be issued to juveniles convicted of capital murder. Id. at 9. The result of this change is that it now renders all sentences beyond life invalid as applied to juveniles convicted of capital murder and it prevents the imposition of mandatory life sentences.

The face of Mr. Gordon's Judgment and Commitment Order lists his sentence

for capital murder as "Life WP" ("life without parole"). Appellant's Br., at Add. 7. Since life without parole is an invalid sentence when issued to juveniles convicted of capital murder in Arkansas, the judgment is invalid on its face and Appellee's habeas claims are, thus, cognizable.

Should this Court accept the State's argument that a life without parole sentence is not invalid on its face, Mr. Gordon's claim still prevails. The sentence at issue in this habeas proceeding is a mandatory term of life without parole rather than a life without parole sentence generally. There is no question that at the time of Mr. Gordon's offense and trial there were only two possible punishments for capital murder, no matter the age of the offender—life without parole or death. No mitigating factor could alter that legislative requirement.

The *Miller* court, as did the Supreme Court in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010), made a constitutionally significant distinction between a mandatory term of life without parole and a discretionary one. See *Miller*, 132 S.Ct. at 2469 (2012). A life without parole sentence made after consideration of relevant factors and with alternatives of lesser sentences does not violate the Eighth Amendment; however, a life without parole sentence mandatorily imposed on a juvenile does. Id. at 2469. Appellant's attempt to broaden the focus of this habeas proceeding from mandatory life without parole sentences to life without parole

sentences, generally, fails to account for this distinction. There should be no question that Arkansas's life without parole statute means exactly that. There is no possibility of release other than through gubernatorial clemency— an essentially unreviewable and arbitrary act.

A mandatory life without parole sentence is per se unconstitutional under the Eighth Amendment when imposed upon a juvenile offender; it is never valid, on its face or otherwise.

II.

MILLER V. ALABAMA APPLIES RETROACTIVELY TO CASES ON COLLATERAL REVIEW. IT FALLS WITHIN AN EXCEPTION TO THE GENERAL RULE OF NONRETROACTIVITY AND THE UNITED STATES SUPREME COURT INTENDED ITS RULING TO BE RETROACTIVE.

As a matter of federal habeas corpus jurisprudence, new rules of criminal procedure (as opposed to substantive law) are not applicable to cases that have become final before the new rule is announced, unless that rule falls within an exception to this general principle of nonretroactivity. *Teague v. Lane*, 489 U.S. 288, 310, 109 S.Ct. 1060 (1989). In *Teague*, the United States Supreme Court recognized two exceptions to the general rule of nonretroactivity for cases on collateral review. First, a new rule should apply retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal

law-making authority to proscribe." *Teague*, 489 U.S. at 311 (citation omitted). This is referred to as the substantive rule exception. Second, a new rule should apply retroactively if it "requires the observance of 'those procedures that . . . are implicit in ordered liberty.'" *Id.* This is referred to as the watershed rule exception. *Miller* falls within both exceptions.

A. Arkansas has applied cases retroactively under the substantive *Teague* exception.

A state may choose how to apply new rules of criminal procedure retroactively when reviewing its own state criminal convictions. *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029 (2008). This Court has relied on *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989), for its analysis of the substantive *Teague* exception. See *Engram v. State*, 360 Ark. 140, 200 S.W.3d 367 (2004).

In *Penry*, the United States Supreme Court interpreted the substantive *Teague* exception "to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status . . . ." *Penry*, 492 U.S. at 330 (emphasis added). Thus, under *Teague* and *Penry*, a new rule of criminal procedure is retroactive if it (1) prohibits a certain category of punishment, (2) for a class of defendants, and (3) because of their status. *Miller* prohibits a certain category of punishment (mandatory

life without parole) for a class of defendants (juveniles) because of their status as juveniles. *Miller*, 132 S. Ct. at 2467-69 (recognizing a fundamental difference between juveniles and adults and noting that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders").

Further, in *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004), a rule was determined to be "substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." Id. at 353. *Miller* alters the class of persons that the law may punish with mandatory sentences of life without parole by prohibiting these sentences for juveniles.

The State's contention that *Miller* is governed by *Summerlin* is misguided. In *Summerlin*, the United States Supreme Court determined that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), which required the finding of an aggravating factor to sentence a defendant to death be made by the jury instead of the trial judge, did not fall within *Teague's* substantive rule exception. *Summerlin*, 542 U.S. at 353. This is because requiring the jury rather than a judge to find an essential fact bearing on punishment merely altered the "range of permissible methods for determining whether a defendant's conduct is punishable by death" and "[r]ules that allocate decision making authority in this fashion are prototypical procedural rules." *Id.* The

court in *Summerlin* further noted, however, that if a rule made a certain fact essential to the death penalty, rather than allocating who determines that fact, then that would be substantive. Id. at 354.

Contrary to the State's contention, *Miller* is not a prototypical procedural rule because it does not merely allocate decision making authority; rather it requires that essential facts (certain mitigating factors) be taken into account before a juvenile convicted of homicide can be sentenced to life without parole. *Miller*, 132 S. Ct. at 2475. Prior to *Miller*, no mitigating factors could affect the sentencer's requirement that a juvenile convicted of capital murder be sentenced to life without parole. This is now an essential step that must be taken before such a sentence can be imposed. As such, *Miller* is a substantive rule.

Moreover, the substantive impact of this rule is illustrated by the General Assembly's amendment of Ark. Code Ann. § 5-10-101(c) after *Jackson*. Acts 2013, No. 1490, §1. On remand in *Jackson*, this Court prohibited mandatory life without parole sentences for juveniles due to their status by severing . § 5-10-101(c) (Repl. 1997) "so that, for juveniles convicted of capital murder, all that remains is that 'capital murder is a Class Y felony.'" 2013 Ark. 175 at 7-8. Act 1490 changed that going forward, but could not affect those sentenced before that time. Because *Miller* prohibits a category of punishment to a class of offenders based on their status and

has a substantive impact on Arkansas's sentencing scheme, it is a substantive rule.

B. *Miller* announces a watershed rule of criminal procedure.

Even if this Court finds that the rule announced in *Miller* is procedural rather than substantive, it should still apply retroactively under Teague's watershed rule exception. Watershed rules implicate the "fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257 (1990); see also *Whorton v. Bockting*, 549 U.S. 406, 418, 127 S.Ct. 1173 (2007) (a watershed rule "alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding").

The Court in *Miller* announced a new rule that provides fairness by requiring trial courts to consider a juvenile offender's youthful characteristics before imposing a sentence of life without parole for capital murder. 132 S. Ct. at 2464-65. In *Miller* the Supreme Court recognized that "juveniles have diminished culpability and greater prospects for reform," and, because of this, "are less deserving of the most severe punishments." Id. at 2464 (citation omitted). As such, mandatory sentencing schemes pose too great a risk of disproportionate punishment by making youth, and all that accompanies it, irrelevant to the imposition of this harsh sentence. *Id.* at 2469. Therefore, the decision in *Miller* alters the bedrock procedural elements necessary to the fairness of sentencing juveniles in such proceedings.

Further, the new rule in *Miller* implicates the accuracy of sentencing because mandatory life without parole "disregards the possibility rehabilitation even when the circumstances most suggest it." *Id.* at 2468. Life without parole rejects altogether any idea of rehabilitation and reflects an irrevocable judgment about one's value and place in society. *Id.* at 2465 (citation omitted). In Miller the United States Supreme Court recognized that "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'" *Id.* at 2464 (citation omitted). Therefore, the new rule in *Miller* provides a method for courts to accurately sentence juveniles convicted of capital murder. An appellate court in Illinois found *Miller* to apply retroactively under the watershed exception. *People v. Williams*, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012) (holding *Miller* to be a watershed rule because the petitioner was "denied a basic precept of justice by not receiving any consideration of his age from the circuit court in sentencing" and that *Miller* "not only changed procedures, but also made a substantial change in law") (internal quotation omitted).

While it is true that the United States Supreme Court has only recognized one "watershed rule of criminal procedure," that announced by *Gideon v. Wainwright.* 372 U.S. 335, 83 S.Ct. 792 (1963) (establishing the right to counsel for indigent criminal defendants charged with a felony). In fact, "there came a time in the

mid-summer of 2012, when the "growth in social capacity...alter[ed] our understanding" of the culpability of juvenile offenders in the criminal justice system," recognizing another rule to fit within the watershed exception. Molly F. Martinson, NEGOTIATING MILLER MADNESS: WHY NORTH CAROLINA GETS JUVENILE RESENTENCING RIGHT WHILE OTHER STATES DROP THE BALL, 91 N.C. L. Rev. 2179, 2196 (2013).

The State argues that *Miller* did not announce a watershed rule in the same way as *Gideon* due to the fact that the rule in *Miller* is far more modest in nature. The State claims that, whereas *Gideon* applies to every defendant charged with a felony, the rule announced in *Miller* only applies to juveniles charged with capital murder, which is indisputably a narrow category of homicide. That is a specious distinction.

Without the rule announced in *Gideon*, the risk of an inaccurate result of a criminal proceeding is inadvertently high. Likewise, if a court does not look at the mitigating factors laid out in *Miller* before imposing a sentence of life without parole, a comparable risk of an inaccurate sentence is present. Further, just as *Gideon* "alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding," *Whorton*, 549 U.S. at 408, by requiring indigent criminal defendants to be afforded counsel to promote fair trials, *Gideon*, 372 U.S. at 344, *Miller* does the same by guaranteeing the process to which juries must adhere to in order to fairly

sentence a juvenile convicted of murder. *Miller*, 132 S. Ct. at 2475.

While the Supreme Court has declined to classify new rules as watershed rules on multiple occasions, these cases were distinguishable from *Miller*. One example is *Beard v. Banks*, 542 U.S. 406, 126 S.Ct. 2572 (2002). In *Banks* the court determined that the rule announced in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860 (1988), was not a watershed rule. *Mills* held that there was a substantial probability that reasonable jurors thought they were precluded from considering mitigating evidence unless all jurors agreed on the existence of a particular circumstance and that due to misunderstanding the judge and verdict form, and that this created a high risk of the jury inadvertently imposing the death penalty. The *Banks* court found this not to be a watershed rule because it had "none of the primacy and centrality of the rule adopted in *Gideon*." *Banks*, 542 U.S. at 420 (citation omitted). *Mills* was in no way central to the criminal proceedings concerning a class of individuals as a whole. *Miller* is easily distinguishable because it affects how an entire class of individuals is sentenced.

Further, the *Banks* court held that the *Mills* rule did not spawn a "fundamental shift in 'our understanding of the bedrock procedural elements'" essential to fundamental fairness. *Banks*, 542 U.S. at 420 (citation omitted). *Miller* along with *Graham* created a massive shift in the sentencing of juveniles because they "have

diminished culpability and greater prospects for reform" due to a "lack of maturity and an underdeveloped sense of responsibility, lead[ing] to recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S. Ct. at 2464 (citation omitted). By requiring state courts to account for the attributes of youth, *Miller* is a watershed rule of criminal procedure.

Therefore, if this Court finds that the new rule set out in *Miller* is procedural in nature, it should still be applied retroactively because it is a "watershed rule of criminal procedure" pursuant to the second exception under *Teague*.

C. The United States Supreme Court intended *Miller* to be retroactive.

Writs of habeas corpus are not to be "used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions discussed *supra*. Due to this, the United States Supreme Court will simply "refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated" in order to "avoid[] the inequity resulting from the uneven application of new rules to similarly situated defendants." Id. By including Mr. Jackson in the *Miller* decision, the United States Supreme Court clearly intended for the new rule to apply retroactively.

Miller concerned two fourteen year olds, Evan Miller on direct appeal and

Kuntrell Jackson on certiorari from a state petition for writ of habeas corpus. Despite granting certiorari and hearing oral arguments separately, the Supreme Court specifically chose to include Jackson in the *Miller* opinion. Any issue of retroactivity could have been avoided by announcing this same rule with Evan Miller alone; yet the court included Kuntrell Jackson in the opinion without drawing any meaningful distinction between direct and collateral status of the two. Thus, it is obvious that the court intended for *Miller* to apply retroactively.

Further, when a new rule is applied to the defendant in the case announcing the rule, "evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 489 U.S. at 300. The new rule announced in *Miller* was applied to Kuntrell Jackson by this Court on remand in *Jackson*, 2013 Ark. 175, which ordered that Jackson receive the benefit of the opinion in his case by having a sentencing hearing where he may present mitigation evidence and be sentenced within the range of a Class Y felony. *Jackson*, 2013 Ark. 175 at 1. Mr. Gordon is similarly situated with Jackson: both (1) were charged with capital murder under Ark. Code Ann. § 5-10-101 (Repl. 1997) for events that occurred when they were juveniles; (2) received a mandatory sentence of life without parole; and (3) appeared before this Court seeking relief under *Miller* on a petition for a state writ of habeas corpus. Because *Miller* falls within an exception to the general rule of

nonretroactivity, an inequity will result if this new rule is not applied evenly to Mr. Gordon. This inequity cannot be avoided by the mere concession that Kuntrell Jackson is entitled to the benefit of *Miller* in his own case. *Jackson*, 2013 Ark. 175 at 6. The fact remains that under the State's proposition, similarly situated defendants would not be treated the same, although when evenhanded justice requires otherwise. The State mischaracterizes this viewpoint as arguing that whenever the United States Supreme Court announces a rule in state collateral review proceedings that the rule is automatically retroactive, Appellant's Br., at 14, and claims there are two cases directly on point to refute this, *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2012), and *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

However, Mr. Gordon does not argue that *Miller* is automatically retroactive because Kuntrell Jackson was on a state writ of habeas corpus; rather, *Miller* is retroactive because it falls within an exception to the general rule of nonretroactivity. *Padilla* and *Chaidez* are distinguishable because those arguing in favor of their retroactive application did not argue that they fit into either *Teague* exception. *Chaidez*, 133 S. Ct. at 1107 n. 3 ("Teague stated two exceptions . . . [and] Chaidez does not argue that either of those exceptions is relevant here."); see *Padilla*, 559 U.S. at 356 (containing no mention of *Teague* or its exceptions). *Padilla* and *Chaidez* are further distinguishable from Mr. Gordon's situation in that they dealt with

immigration law and collateral consequences of conviction, whereas this case concerns criminal law and direct consequences of conviction. Further, those two cases did not involve similarly situated defendants.

Further, that *Miller* relied on two cases that are fully retroactive themselves, *Roper* and *Graham*, shows that the court intended *Miller* to also be retroactive. Miller, 132 S. Ct. at 2468 ("Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions."). *Roper* prohibits capital punishment for juveniles, 543 U.S. at 578, while *Graham* prohibits life without parole for juveniles convicted of nonhomicide offenses, 560 U.S. at 82. The Court failed to explicitly state that *Roper* and *Graham* were retroactive, yet this is the effect those cases have been given and it would have been wholly illogical to have asserted otherwise. The Supreme Court did not have to explicitly state that *Miller* is retroactive for it to be so. *Miller's* reliance on *Roper* and *Graham* —two indisputably retroactive decisions—shows that it should be retroactive as well.

D. The better-reasoned authority of other courts holds that *Miller* is retroactive.

The better-reasoned authority on the Eighth Amendment and the issue of retroactivity under *Miller* is this Court's decision in *Jackson*. However, if this Court believes, as the State contends, that the "better-reasoned authority" is not its own

decision in *Jackson*, then surely a suitable alternative is the reasoning from the courts of its sister states in the Eighth Circuit.

Four of the seven Eighth Circuit states, including Arkansas, have determined that *Miller* applies to cases on collateral review. See, e.g., *Jackson*, 2013 Ark. 175 (applying *Miller* retroactively to Kuntrell Jackson's case); *State v. Ragland*, 836 N.W.2d 107 (Iowa 2013) (holding *Miller* to be a substantive change in the law that applies retroactively to cases on collateral review); *State v. Mantich*, 287 Neb. 320, at 11 (2014) (holding that *Miller* announced a "new substantive rule" that applies retroactively on collateral review and observing that the United States Supreme Court applied the rule announced in *Miller* to Kuntrell Jackson, who was before the Court on collateral review); Associated Press, South Dakota Man Serving Life for Cab Driver Death to Get Resentencing Hearing, *Rapid City Journal* (Dec. 13, 2013)[1]

Minnesota is the only state in the Eighth Circuit that has found that *Miller* does not apply retroactively. North Dakota has no prisoners meeting the *Miller* criteria; Missouri has not yet ruled on this issue. Moreover, the Eighth Circuit itself has determined there was a "prima facie showing" that *Miller* announced a new rule of

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[1] http://rapidcityjournal.com/news/local/south-dakota-man-serving-life-for-cab-driver-death-to/article_cf93e5ad-d2d3-5e3c-a5e0-3c3cbba53761.html

constitutional law that has been "made retroactive to cases on collateral review by the Supreme Court." *Johnson v. United States*, 720 F.3d 720, 720 (8th Cir. 2013). Based on this breakdown, the overwhelming majority of the states within the Eighth Circuit—four out of the six with inmates affected by *Miller*—are unified in applying *Miller* to cases on collateral review.

III.

THE UNDERLYING PURPOSE OF SERVICE PURSUANT TO ARKANSAS'S HABEAS CORPUS STATUTE HAS BEEN FULFILLED. APPELLANT WAS PROVIDED WITH NOTICE OF MR. GORDON'S CLAIMS. THE PRINCIPLES OF JUDICIAL ECONOMY WEIGH STRONGLY AGAINST FINDING OTHERWISE.

As there is no issue of material fact in this case there is no concomitant need to conduct a trial of the writ as to the material facts. According to his birth certificate, Mr. Gordon was under the age of 18 years old when he committed the crime for which he received his life without parole sentence. (Add. 8) This document was also attached as an exhibit to Mr. Gordon's habeas petition, so there is no question that the circuit judge interpreted it to list Mr. Gordon's correct age.

By filing a response to Mr. Gordon's habeas petition, Appellant acknowledged that he received notice of the habeas petition, thus fulfilling the purpose of the "return" requirement in the habeas statute. If a "defendant is actually served with summons, the court acquires jurisdiction of his person, though the writ be defective

or the service irregular." *St. Louis, I.M. & S. Ry. Co. v. State*, 55 Ark. 200, 209, 17 S.W. 806, 808 (1891). The purpose of a summons is to "apprise a defendant of the pendency of the suit and afford him timely opportunity to be heard" on the claim or charge. *Nucor Corp. v. Kilman*, 358 Ark. 107, 122, 186 S.W.3d 720, 729 (2004). Therefore, when the State responded to the summons Mr. Gordon served at the outset of the litigation, the purpose of the habeas statute's notice requirement was fulfilled.

In *Nucor*, this Court determined that a summons was not defective when it failed to correctly identify "other defendants" in the suit. 358 Ark. at 122, 186 S.W.3d at 729. The Court stated that when literal application leads to "absurd consequences," "alternative interpretation(s)" should be accepted to achieve the statute's purpose. Id. Therefore, since the purpose of a summons is to "apprise a defendant that a suit is pending," the summons served its purpose to afford the defendant an "opportunity to be heard." Id. at 122-23, 186 S.W.3d at 729.

When the State responded to the summons Mr. Gordon served at the outset of the litigation, it received notice and thus fulfilled the purpose of the summons requirement in the habeas statute. The State responded to the summons served by filing both a "Motion to Quash Summons" and a brief in response to Mr. Gordon's habeas petition. See Appellant's Br., at Add. 9-18. By filing such documents, it both acknowledged that it received the habeas petition and would be prepared to be

heard. This effectively fulfilled the purpose of a summons, apprising "that a suit [was] pending against him and afford[ing] him an opportunity to be heard." *Nucor*, 358 Ark. at 122-23, 186 S.W.3d at 729.

Moreover, to allow the State to now assert that Mr. Hobbs was not properly served with the summons while simultaneously filing a brief in response to Mr. Gordon's habeas petition is prejudicial. This allows the State to have the advantage of a positive ruling from this Court while still maintaining that he may no longer be a party on the theory that he was not "served properly." This assertion by the State would lead to "absurd consequences." Id. at 122, 186 S.W.3d at 729. Therefore, when the State responded to the summons Mr. Gordon served at the commencement of the litigation, it received adequate notice in accepting service of the habeas petition.

Should the Court find petitioner's service lacking in some respect, principles of judicial economy and efficiency weigh strongly against remanding Mr. Gordon's claim back to the circuit court. Remanding Mr. Gordon's claim back to the circuit court would require an unnecessary expenditure of this Court's time and resources. As both parties are prepared to move forward on the substantive claims at issue in Mr. Gordon's appeal, it would be a poor use of this Court's time and energy to await perfection of supposedly inadequate service. Even if this Court were to remand these

proceedings, pending perfection of service, this ruling would only further postpone a ruling by this Court on the substantive questions already before it on appeal.

Furthermore, the State has failed to demonstrate any undue hardship or injury resulting from supposedly inadequate service. A defect of service might be a defense or an avoidance if there were a default or it was a factor in preventing the State from presenting its position. However, any hypothetical injuries would easily be remedied by this Court's ruling without remanding to the trial court on the matter of service. The State had notice. The State was not defaulted out of a claim. The issues presented are all issues of law and have been fully joined.

In addition, with the claims of those whom are similarly situated being held in abeyance pending this Court's decision on the substantive questions before it, judicial economy and efficiency weigh against remanding to perfect service. As there are numerous circuit courts waiting to rule on similar cases pending the outcome of this appeal, an order remanding these proceedings to the circuit court will only further delay those proceedings and unduly burden those courts. Were this Court to remand these proceedings back to the circuit court, there is absolutely no indication that the lower court's decision would change subsequent to the remedy of service (a contention not disputed by appellant). As such, this Court will again be called upon to address the same substantive issues that are already before it. Considering those

burdens already placed upon lower courts at this time and the broader principles of judicial efficiency, it is only logical that this Court rule on the substantive issues before it.

Even if this Court finds service lacking, Arkansas statutes are unclear as related to the procedure associated with petitions for writs of habeas corpus and this Court should deem Appellee's habeas petition as served properly.

State petitions for writs of habeas corpus are governed by Ark. Code Ann.. §§ 16-112-101 to 123. These statutes outline the procedures associated with how habeas petitions are to be "issued, served, and tried" in the state. Ark. Code Ann. § 16-112-101. Though these statutes are part of Arkansas's law, much confusion exists regarding the correct filing procedure.

There are currently 58 individuals who have been convicted in Arkansas that have claims pursuant to Miller. All individuals filed state habeas petitions in Arkansas circuit courts subsequent to this Court's decision in *Jackson*, 2013 Ark. 175. All *Miller* habeas petitions are believed to have been filed in a manner consistent with the relevant habeas statutes, serving both the director of the Arkansas Department of Correction, Ray Hobbs, as defendant and the Attorney General, Dustin McDaniel, as the opposing party. *Id.*; see Appellant's Br., Add. 1-5.

The fact that lower courts have interpreted the filing and service of identical

habeas petitions differently illustrates the inherent ambiguity of how the statutes are abided by through practice. Subject to a specific court interpretation, a petitioner may potentially lose the ability to have her case heard, though all habeas statutes are followed correctly.

Accordingly, as the governing habeas statutes in Arkansas are ambiguous and it is unclear how to abide by them in practice, Appellee's habeas petition should be regarded as served properly.

CONCLUSION

For the above stated reasons, Mr. Gordon respectfully prays that this Court affirm the circuit court's granting of his state petition for writ of habeas corpus such that he may proceed to resentencing in the county of conviction.

ULONZO GORDON

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CERTIFICATE OF SERVICE

I certify that on this 13th day of March, 2014, I served the foregoing document by mailing a copy of same by U.S. Mail, postage prepaid, to the following counsel of record:

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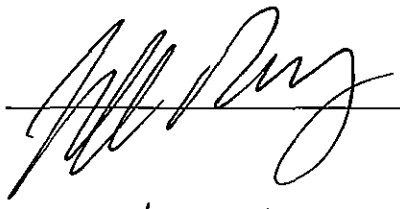
JEFF ROSENZWEIG

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 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.



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