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

APPELLANT'S REPLY BRIEF

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In a bit of revisionist history, Gordon's brief first asserts that he "was only present at the scene of the crime with a handgun and fired no shots." Brief of Appellee at Statement of Case at 1-2. The trial record reveals, however, that Gordon rode to the crime scene in the same car with Jeremy Moten and James Cooper, and fled the scene with them after the murder. Cooper v. State, 324 Ark. 135, 138-39, 919 S.W.2d 205, 208 (1996). And Tony Johnson, who was warned out of the way as Moten and Gordon drew their handguns on the victim, Otis Webster, testified that Gordon fired shots in his direction as he and Webster fled in opposite directions away from the gunmen. Cooper, 324 Ark. at 139, 919 S.W.2d at 208 (reciting that "one or both of" Moten and Gordon fired shots at Webster); see also Trial Record 416 ("I looked over at [Webster], and he looked at me, and both of us took out runnin' and that's when they started shootin'."), 446 (answering in the affirmative to defense counsel's question "Did [Gordon] shoot in your direction?"). Gordon's attempt to minimize his culpability in the capital murder of Otis Webster fails. His arguments in favor of affirmance are also unavailing.

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

1. Appellant has cited the well-established rule that relief is not available under the habeas-corpus statute unless the petitioner's judgment of conviction is invalid on its face or the sentencing court lacked subject-matter jurisdiction over the petitioner. E.g., Goins v. Norris, 2012 Ark. 192, at 2 (per curiam). That rule, which accords with the scope of the common-law writ of habeas corpus, is likely as venerable a rule of law as appears in the Arkansas Reports. E.g., Ex Parte Williams, 99 Ark. 475, 476, 138 S.W. 985, 986 (1911) (citing Ex Parte Perdue, 58 Ark. 285, 24 S.W. 423 (1893)). Gordon argues, however, that this Court should abandon this durable rule because it is not explicitly found in the text of the statute and because it is "impractical." The argument is unavailing, for two reasons.

First, as Appellant explained in his opening brief, the text of the statute does support the facial-invalidity-or-lack-of-jurisdiction rule. See Ark. Code Ann. § 16-112-114(b)(providing that at the trial of the writ, "no . .

. circuit judge shall hear or permit any evidence on the hearing or examination before him or her, other than the return to the writ, if the process or commitment shall appear regular on its face."). Second, even if the rule could not be found in the text of the statute, it has been long become part of the statute itself by this Court's interpretation. E.g., Wagner v. State, 2010 Ark. 389, at 16 n.2, 368 S.W.3d 914, 925 n.2 ("It is well-settled that any interpretation of a statute by this [Court] subsequently becomes part of the statute itself. The General Assembly is presumed to be familiar with this court's interpretations of its statutes, and if it disagrees with those interpretations, it can amend the statutes. Without such an amendment, however, our interpretation of a statute remains the law.") (citations omitted).

2. Gordon also argues that reliance on the rule "does not suffice to address constitutional challenges to an illegal sentence." Brief of Appellee at Arg. 6. That fact, by itself, is not a compelling reason to expand the scope of the habeas-corpus statute—Gordon's allegation simply confirms that the remedy is, and ever has been, a narrow remedy. E.g., Birchett v. State, 303 Ark. 220, 220, 795 S.W.2d 53, 54 (1990) (declining to expand "the narrow scope of the remedy available under habeas corpus proceedings[,] and "reiterat[ing] the settled rule that a petition for such a writ is only proper

when it is shown that a commitment is invalid on its face or the court lacked jurisdiction.").

Gordon's argument illustrates his misapprehension of the difference between the substantive sentence imposed on him and the method in which that sentence was imposed upon him. E.g., Goins v. Norris, 2012 Ark. 192, at 2 (per curiam) (rejecting habeas-corpus challenge to the method in which a legal sentence was imposed on the petitioner). If Gordon's sentence had been death, for example, the illegality of his sentence under Roper v. Simmons, 543 U.S. 551 (2005), would be apparent on the face of his commitment. That is precisely so because death is a substantive sentence. Gordon's sentence is life without the possibility of parole.[1] And as Miller

[1] Put another way, the sentence that appears on Gordon's judgment-and-commitment order is life without the possibility of parole, not *mandatory* life without the possibility of parole. R. 7, Add. 7. To learn that Gordon was sentenced to life without parole by operation of law rather than pursuant to a sentencing trial where the jury chose a sentence of life without parole after being presented with evidence of aggravating circumstances and mitigating circumstances, one must go to the record, which reveals that the State waived the death penalty. Tr. R. 101. A claim that requires the court go to the record in order to grant relief, of course, is the textbook example of

holds, that sentence is still constitutional, even as applied to juvenile capital murderers. Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012) (emphasis in original). Miller is only aimed at the method in which that sentence is imposed.

3. Gordon's argument that he has no other forum to pursue his Eighth-Amendment challenge to the method in which his legal sentence was imposed, and his citation to Article 2, § 13 of the Arkansas Constitution, miss the mark. So far as Appellant can determine, section 13 has never been applied in a habeas proceeding. Moreover, Gordon ignores that there is another forum available to him, namely, the federal courts. If this Court denies relief he can immediately file for federal habeas-corpus relief. The federal habeas-corpus statute of limitations is tolled during the pendency of this action (assuming, arguendo, that Miller is retroactive). See 28 U.S.C. § 2244(d)(1)(C).

4. Finally, a multiplicity of other sentencing challenges filed by other petitioners whose cases are long final will surely follow if the circuit court is

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a claim that is not cognizable under the habeas-corpus statute. E.g., Meny v. Norris, 340 Ark. 418, 420, 13 S.W.3d 143, 144-45 (2000) (noting the writ will not be issued to correct errors or irregularities that occurred at trial because the proper remedy for such claims is a direct appeal).

affirmed. If Gordon may use the habeas-corpus statute to challenge the method by which his otherwise-legal sentence was imposed upon him, why should another inmate who believes that error occurred during sentencing be prevented from doing the same? See, e.g., Birchett, 303 Ark. at 221-22, 795 S.W.2d at 54-55 (challenging application of the habitual-offender statute); Vankirk v. State, 2011 Ark. 428, 385 S.W.3d 144 (Confrontation Clause applies in sentencing phase); Kemp v. State, 324 Ark. 178, 204-06, 919 S.W.2d 943, 955-57 (1996) (constitutional challenge to the admission of victim-impact evidence); Anderson v. State, 357 Ark. 180, 219-24, 163 S.W.3d 333, 357-60 (2004) (challenge to jury's findings in mitigation). The Court may anticipate that all manner of sentencing challenges in long-final cases will be lodged, both by capital petitioners and others, if the scope of the writ is expanded in the way that Gordon proposes.[2]

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[2] Nor should the Court be necessarily confident that it can plug the breach in habeas-corpus statute proposed by Gordon by limiting this case to its facts, or otherwise. Compare Robbins v. State, 353 Ark. 556, 564, 114 S.W.3d 217, 223 (2003) (reopening capital case by recalling the mandate, but cautioning that the unique circumstances in that case "combine to make this case *sui generis*. Indeed, we consider this case to be one of a kind, not

5. In sum, habeas corpus has been an unquestionably narrow remedy under Arkansas law, and it should remain so.

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.

1. Gordon's argument that Miller falls under the substantive exception to Teague simply cannot be squared with the Supreme Court's opinion in Miller. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes[,]" held the Court in Summerlin, 542 U.S. 348, 353 (2004) (emphasis supplied), and Miller, in unmistakably parallel language, explicitly denies that it did either of those things: "Our decision does not categorically bar a penalty for a class of offenders or a type of crime . . . [i]nstead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant

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to be repeated."), with, e.g., Roberts v. State, 2013 Ark. 57, ___ S.W.3d ___ (adjudicating recent recall-the-mandate claim made by a capital petitioner).

characteristics—before imposing" the sentence of life without parole. Miller, 132 S. Ct. at 2471(emphasis in original).

2. In the face of Padilla v. Kentucky, 559 U.S. 356 (2012), and Chaidez v. United States, 133 S. Ct. 1103 (2013), Gordon has abandoned the argument that he made to the circuit court in favor of retroactivity, which was that Miller is necessarily retroactive because Jackson v. Hobbs, No.10-9647, was decided along with it. R. 3-4, Add. 3-4. Nevertheless, that procedural posture was of no moment for retroactivity purposes.

A federal claim reviewed on the merits by a state court—no matter what the procedural posture under state law—falls under the Supreme Court's certiorari jurisdiction. United States Supreme Court Rule 10(a). The procedural posture of Kuntrell Jackson's case with respect to Arkansas law was immaterial to the United States Supreme Court's certiorari jurisdiction of his Eighth Amendment claim. So far as the Supreme Court was concerned, it reviewed this Court's merits adjudication of Jackson's claim directly from this Court, which this Court recognized in Jackson on remand. See Jackson v. Norris, 2013 Ark. 175, at 6, ___ S.W.3d ___, ___ (citing Yates v. Aiken, 484 U.S. 211, 218 (1988)).

3. Gordon's assertion that Act 1490 of 2013 indicates the General Assembly's understanding that the Miller rule falls under the substantive-

rule exception of Teague is without merit. Act 1490 amended the capital-murder statute to allow a sentence of either life without the possibility of parole or a minimum sentence of 28 years for a juvenile convicted of capital murder. Ark. Code Ann. § 5-10-101(c)(1)(B) (Repl. 2013). The Act was no doubt a response to Miller, but, if anything, the Act indicates a legislative intent that capital murderers in Gordon's position, i.e., who received a legal life-without-parole sentence for capital murder before Miller was decided, do not merit relief from their sentences. See, e.g., Jackson v. State, 359 Ark. 87, 92, 194 S.W.3d 757, 761 (2004) (recognizing that this Court "[has] a duty to construe statutes as having only a prospective operation unless the purpose and the intention of the Legislature to give them a retroactive effect are expressly declared or necessarily implied by the language used."); State v. Murphy, 315 Ark. 68, 71-72, 864 S.W.2d 842, 844 (1993) (considering whether an amendment to the habitual-offender statute should be applied retroactively). Act 1490 is of no help to Gordon's argument.

4. Finally, Gordon maintains that 56 inmates in the Department of Correction are similarly situated to him and that it is unfair if Kuntrell Jackson obtains a Miller resentencing, while they do not. Gordon invokes the alleged unfairness of his situation both in support of his arguments to expand the scope of the habeas-corpus statute and his arguments that Miller

is retroactive under Teague. As an initial matter, this argument finds no support in the law—this Court has never held that a cause of action is cognizable under the habeas-corpus statute because it would be "unfair" not to do so. Similarly, there is no "unfairness" exception to Teague.

Moreover, the argument does not account for the cost, both in terms of judicial and litigation resources, and, more importantly, in human and societal terms, of a holding that Miller claims are cognizable under the habeas statute and retroactive under Teague. By hypothesis, the 56 capital murderers Gordon refers to received their otherwise legal life-without-parole sentences either by guilty plea or because the State waived the death penalty. No separate sentencing trial occurred for any of them. If a latter-day resentencing process is to be accurate, the parties would be obliged to locate witnesses and proof that no-one before ever had to find or develop, and the judiciary would be tasked with supervising that process. Doing so will entail a tremendous outlay of judicial resources, and forcing the State to prepare for sentencing trials that never happened when the case was fresh will place the State at a distinct disadvantage. The multiplicity of appeals that will inevitably follow the new sentences will entail further outlay of resources.

As to the human cost of a holding in Gordon's favor, simply put, reopening these cases for resentencing would exact a terrible human cost on

those who would necessarily have to participate in resentencing proceedings. The families and friends of Gordon and the others' victims—to the extent that they can even be located now, years later— would be forced to undergo sentencing trials that the law at the time legitimately, and constitutionally, spared them. Some of the victims' family members in the 56 cases that Gordon relies upon, no doubt, may have supported the defendant's guilty plea in order to avoid the trauma and anguish of a sentencing trial. Going back on that promise of finality and closure now in the name of fairness would be a cruel irony.

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

1. Gordon's contention that a petitioner can obtain relief under the habeas-corpus statute upon a finding of "substantial compliance" with the statute finds no support in the text of the statute or this Court's caselaw. The habeas-corpus statute is unambiguously clear that "[t]he writ of habeas

corpus shall be issued, served, and tried in the manner prescribed by this chapter." Ark. Code Ann. § 16-112-101 (Repl. 2013). So far as Appellant can determine, this Court has never held that habeas-corpus relief is available upon a showing of "substantial compliance" with the statute.

Gordon's citation of cases interpreting Rule 4 of the Arkansas Rules of Civil Procedure is meritless. It is well-settled that the Arkansas Rules of Civil Procedure do not apply to habeas-corpus proceedings. E.g., Burnley v. Norris, 2011 Ark. 381, at 2. And, "substantial compliance" is not the law under Civil Procedure Rule 4 anyway, so cases interpreting that rule are of no help to Gordon. E.g., Shotzman v. Berumen, 363 Ark. 215, 234, 213 S.W.3d 13, 24 (2005) (rejecting argument that "strict technical compliance with Rule 4 is 'archaic[.]'").

2. Gordon's contention that there are no material facts to be determined by the circuit court is also unavailing. The habeas-corpus statute does not provide for motions for summary judgment. Moreover, Appellant notes that Gordon has put into contention his true age, which has not been finally determined by the circuit court because there has been no return filed or trial upon the writ, as required by Ark. Code Ann. § 16-112-106 to -115 (Repl. 2013).

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.

Case Name: Ray Hobbs v. Ulonzo Gordon
Docket Number: CV 13-942
Title of Document: Reply Brief of Appellant

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)

Christian Harris

(Printed)

Arkansas Attorney General's Office

(Firm)

March 31, 2014

(Date)