IN THE
SUPREME COURT OF THE UNITED STATES

VERNELL CONLEY
PETITIONER,

v.

WENDY KELLEY, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION
RESPONDENT.

APPENDIX

Ex. A: Opinion of the Arkansas Supreme Court in *Conley v. Kelley,* 2019 Ark. 23, 566 S.W.3d 116 (2014)

2019 Ark. 23
Supreme Court of Arkansas.

Vernell CONLEY, Appellant
v.
Wendy KELLEY, Appellee

No. CV-18-559
|
Opinion Delivered: January 31, 2019

Synopsis
Background: After convictions and sentences for delivery of crack cocaine, possession of marijuana, and possession of drug paraphernalia were affirmed on direct appeal, 2011 Ark. App. 597, 385 S.W.3d 875, defendant filed a petition for postconviction relief. The Supreme Court, 2014 Ark. 172, 433 S.W.3d 234, reversed in part, and remanded with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia. Defendant then filed a petition for writ of habeas corpus. The Circuit Court, Lincoln County, Jodi Raines Dennis, J., dismissed defendant's petition. Defendant appealed.

Holdings: The Supreme Court, Courtney Hudson Goodson, J., held that:

[1] defendant's assertion that his existing judgment and commitment order continued to reflect two convictions that were dismissed on remand following Supreme Court's partial grant of postconviction relief did not allege a jurisdictional defect;

[2] defendant's sentence for conviction for delivery of crack cocaine was not facially invalid; and

[3] judgment that sentenced defendant for conviction of delivery of crack cocaine was not defective for purposes of a habeas petition.

Affirmed.

Conley v. Kelley, 2019 Ark. 23 (2019)
566 S.W.3d 116

Josephine Linker Hart, J., filed dissenting opinion.

See also: 2011 Ark. App. 420.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

**117 APPEAL FROM THE LINCOLN COUNTY CIRCUIT COURT [NO. CV-18-15], HONORABLE JODI RAINES DENNIS, JUDGE

Attorneys and Law Firms

J. Thomas Sullivan, Little Rock, for appellant.

Leslie Rutledge, Att'y Gen., by: Vada Berger, Ass't Att'y Gen., for appellee.

Opinion

COURTNEY HUDSON GOODSON, Associate Justice

*1 Appellant Vernell Conley appeals the circuit court's denial of his petition for a writ of habeas corpus. For reversal, Conley argues that (1) the circuit court erred in holding that his claims were not appropriate **118 for resolution in the habeas process; (2) the extant judgment and commitment order under which he is committed is void or defective as a result of this court's decision in *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234, which vacated two of the three sentences that he challenged; (3) his confinement under the existing judgment and commitment order is unlawful because his sentence on the remaining count was determined by a jury that also considered evidence deemed insufficient to support his conviction on the two dismissed counts; and (4) his confinement on the remaining count violates his due-process rights because, in sentencing him, the jury *2 considered evidence deemed insufficient to support his conviction on the two dismissed counts. We affirm.

I. *Background*

By amended felony information, the prosecuting attorney in Washington County charged Conley with delivery of a controlled substance (crack cocaine); possession of a controlled substance (marijuana) with intent to deliver; and possession of drug paraphernalia (digital scales). The information also alleged that Conley was a habitual offender with more than four previous felony convictions. Conley stood trial before a jury on August 26, 2010. The State's evidence disclosed that Conley delivered 0.5813 grams of crack cocaine to undercover police officers. According to the testimony, the delivery occurred on the evening of September 15,

2009, at a park in Fayetteville. However, the officers did not arrest Conley until November 6, 2009. On that date, the officers also executed a search warrant at Conley's home, where they discovered 32.5 grams of marijuana in a plastic bag and a set of digital scales. The jury found Conley guilty of delivery of crack cocaine and possession of the digital scales as drug paraphernalia. The jury acquitted Conley of possession of marijuana with intent to deliver and instead found him guilty of the lesser-included offense of possession of marijuana. As a habitual offender, Conley received sentences of sixty years for delivery of a controlled substance, six years for possession of a controlled substance, and thirty years for possession of drug ***3** paraphernalia.[1] In affirming, the Arkansas Court of Appeals refused to reach the merits of Conley's sufficiency-of-the-evidence arguments after it determined that Conley's directed-verdict motions were not specific enough to preserve the issues raised on appeal. *Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875.

Thereafter, Conley filed a petition for postconviction relief pursuant to Rule 37.1. The circuit court later granted Conley leave to file an amended petition, and in that amended petition, he alleged that he was denied effective assistance of counsel because his trial counsel (1) failed to present a witness after informing the jury in his opening statement that he would produce a witness who would testify that the marijuana and the paraphernalia did not belong to Conley, (2) did not make adequate motions for directed verdict, and (3) failed to move for severance of the possession and delivery offenses. The circuit court denied the petition, and Conley appealed. On appeal, we affirmed on Conley's first point when we could not conclude that he suffered any prejudice from counsel's remark in opening statement. *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234. However, we reversed on Conley's second argument because the evidence was not sufficient ****119** to support Conley's conviction of the possession charges and trial counsel's failure to make a proper directed-verdict motion was both deficient and prejudicial. *Id.* Because Conley's severance argument was directed solely to the possession offenses, and we determined that those charges were to be dismissed, we did not address it. We therefore ***4** "[a]ffirmed in part; reversed and remanded in part with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia." *Id.* at 13, 433 S.W.3d at 243. Conley did not petition for rehearing, and our mandate issued on May 6, 2014. Our mandate reads in its entirety:

> THIS POSTCONVICTION CRIMINAL APPEAL WAS SUBMITTED TO THE ARKANSAS SUPREME COURT ON THE RECORD OF THE WASHINGTON COUNTY CIRCUIT COURT AND BRIEFS OF THE RESPECTIVE PARTIES. AFTER DUE CONSIDERATION, IT IS THE DECISION OF THE COURT THAT THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH DIRECTIONS FOR THE REASONS SET OUT IN THE ATTACHED OPINION.

Conley filed a federal habeas petition on March 26, 2015. On Conley's motion, the federal proceedings were held in abeyance to allow him to exhaust his state remedies. Pursuant to our opinion in Conley's Rule 37 appeal, the Washington County Circuit Court entered a formal order on August 27, 2015, dismissing Conley's possession convictions. However, the circuit court did not conduct a resentencing hearing on the delivery charge or enter a new judgment and commitment order reflecting the dismissal of the two possession convictions. On April 7, 2017, Conley filed a motion to recall the mandate in his Rule 37 appeal and for leave to file an out-of-time petition for rehearing. We unanimously denied that motion on April 27, 2017. Conley remains imprisoned on his 720-month delivery sentence.

II. *State Habeas Petition*

***5** Conley filed his petition for a writ of habeas corpus in the Lincoln County Circuit Court on January 26, 2018.[2] Therein, Conley argued that (1) the existing judgment and commitment order under which he is committed is void or defective as a result of our decision in his Rule 37 appeal, which vacated two of the three sentences that he challenged; (2) his confinement under the judgment and commitment order is unlawful because his sentence on the remaining count was determined by a jury that also considered evidence deemed insufficient to support his conviction on the two dismissed counts; and (3) his confinement on the remaining count violates his due-process rights. Conley sought a new sentencing hearing limited to evidence supporting his delivery conviction and the entry of a new judgment reflecting the jury's sentence imposed on that count. The circuit court dismissed Conley's petition.

A. Standard of Review

A writ of habeas corpus is proper when a judgment of conviction is invalid on its face or when a circuit court lacks jurisdiction over the cause. *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503. Under our statute, a petitioner who does not allege his or her actual innocence must plead either the facial invalidity of the judgment or the lack of jurisdiction by the circuit court and make a showing by affidavit or ****120** other evidence of probable cause to believe that the petitioner is being illegally detained. *Id.*; Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2016). Unless the petitioner can show that the circuit court lacked ***6** jurisdiction or that the judgment is facially invalid, there is no basis for a finding that a writ of habeas corpus should issue. *Williams v. Kelley*, 2017 Ark. 200, 521 S.W.3d 104.

A circuit court's decision on a petition for a writ of habeas corpus will be upheld unless it is clearly erroneous. *Johnson v. State*, 2018 Ark. 42, 538 S.W.3d 819. A decision is clearly erroneous when, although there is evidence to support it, the appellate court, after reviewing the

Conley filed a federal habeas petition on March 26, 2015. On Conley's motion, the federal proceedings were held in abeyance to allow him to exhaust his state remedies. Pursuant to our opinion in Conley's Rule 37 appeal, the Washington County Circuit Court entered a formal order on August 27, 2015, dismissing Conley's possession convictions. However, the circuit court did not conduct a resentencing hearing on the delivery charge or enter a new judgment and commitment order reflecting the dismissal of the two possession convictions. On April 7, 2017, Conley filed a motion to recall the mandate in his Rule 37 appeal and for leave to file an out-of-time petition for rehearing. We unanimously denied that motion on April 27, 2017. Conley remains imprisoned on his 720-month delivery sentence.

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entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.*

B. Analysis

Conley first argues that the circuit court erred in concluding that his claims were not appropriate for resolution in the habeas corpus process. In dismissing his petition, the circuit court found that Conley's delivery conviction had been addressed on direct appeal and in a Rule 37 petition, and that "[a] habeas corpus proceeding does not provide a means to revisit the merits of issues that could have been addressed and settled, in the trial court, on appeal, or in a post-conviction proceeding." The circuit court concluded that Conley's allegations did not offer any evidence establishing probable cause that he is entitled to a writ of habeas corpus.

Conley suggests that because his existing judgment and commitment order continues to reflect the two dismissed possession convictions, he has alleged a jurisdictional defect that is cognizable in a habeas petition. In our Rule 37 opinion, we *7 affirmed in part and reversed and remanded in part "with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia." *Conley*, 2014 Ark. 172, at 13, 433 S.W.3d at 243. We did not order a new sentencing hearing on the delivery charge or the entry of a new judgment. If Conley believed additional direction should have been given, he could have petitioned for rehearing rather than assuming that the mandate would have given direction that was not set forth in the opinion. Conley's argument that the issue of the "correctness of the recitations in the existing judgment did not arise until after this Court's mandate issued," is not persuasive. Our mandate did not add to or subtract from our opinion, and it was not inconsistent with the opinion in any way. Regardless, what Conley has advanced as a jurisdictional claim does not establish the circuit court's lack of subject-matter or territorial jurisdiction. *See Rayford v. Kelley*, 2016 Ark. 462, 507 S.W.3d 483 (per curiam) (holding that jurisdiction is the power to hear and determine the subject matter in controversy, and that a circuit court has subject-matter jurisdiction to hear and determine cases involving violations of criminal statutes); *Cloird v. State*, 349 Ark. 33, 76 S.W.3d 813 (2002) (per curiam) (holding that an allegation that an offense was committed outside the territorial jurisdiction of the court is cognizable in a habeas proceeding).

Conley also argues in this section that even a facially valid sentence may result in jurisdictional error when it is imposed in violation of a statutorily authorized process, or if there is a change in the law that renders a previously valid sentence invalid. However, Conley's sentence was not imposed in violation of a statutorily authorized process, and **8** unlike the claim in *Jackson*, Conley's claim does not concern a statutorily authorized sentence that was later declared unconstitutional. *See* **121** *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906 (remanding for resentencing of a juvenile offender after his mandatory-life-without-parole sentence was

declared unconstitutional).

Conley argues in his second point that the existing judgment and commitment order is void or defective in that it continues to reflect his sentence on the two possession charges which have been dismissed. Conley asserts that the judgment contains erroneous findings regarding his delivery charge as a result of this "Court's failure to direct the trial court to conduct a re-sentencing proceeding limited to Count 1, the only count on which the jury's original verdict withstood Review in the Rule 37 appeal." Conley argues that "the trial court was not at fault in failing to order a re-sentencing hearing" and that we should correct our "procedural error in this case."

The purpose of a writ of habeas corpus is to remedy a detention of an illegal period of time. *Morgan v. State*, 2017 Ark. 57, 510 S.W.3d 253 (per curiam). Conley is not serving a sentence for the dismissed possession charges, and he does not argue that his sentence for the delivery charge is outside the statutory range for a habitual offender sentenced for a class Y felony. Therefore, Conley's delivery sentence is not facially invalid, and he is not being detained for an illegal period of time. *See Beyard v. State*, 2017 Ark. 203, 2017 WL 2378181 (stating that if a sentence is within the limits set by statute, it is legal). Conley cites no law mandating the entry of a new judgment when fewer than all of the multiple ***9** convictions were dismissed, and it is undisputed that he is not serving a sentence for either dismissed possession charge.

In his third point, Conley argues that the judgment is defective because the jury that set the sentence considered evidence not only on the delivery charge but also on the vacated possession charges. Conley cites two cases in support of this argument: *Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000), and *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003). Neither is persuasive. *Buckley* was a direct appeal in which we held that reversible error occurred in the sentencing phase of Buckley's trial because a law-enforcement officer testified without firsthand knowledge to Buckley's prior drug activities. This type of evidentiary-error claim does not call into question the legality of the sentence or the jurisdiction of the circuit court. In *Taylor*, the circuit court lacked statutory authority to impose a twenty-year suspended sentence, and as a result, it lacked authority to revoke the suspension and sentence Taylor to twenty years in prison. Here, the sentence for the delivery charge was statutorily authorized, and we have said that a claim that the improper admission of evidence may have contributed to a sentence is not cognizable in a habeas proceeding. *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503.

For his final point, Conley argues that his due-process rights were violated because the jury sentenced him on the delivery count while considering evidence deemed insufficient to sustain his conviction on the two dismissed possession counts. Assertions of trial error and due process claims do not implicate the facial validity of the judgment or the ***10** jurisdiction of the circuit

court. *Williams v. Kelley*, 2017 Ark. 200, 521 S.W.3d 104. Thus, the trial court did not clearly err by denying relief on this claim.

III. *Conclusion*

"A habeas corpus proceeding does not afford a prisoner an opportunity to retry his case." *Johnson*, 2018 Ark. 42, at 3, 538 S.W.3d at 821. In essence, Conley is ****122** attempting to pursue arguments now that were not made at trial and to resurrect arguments that were addressed in his Rule 37 appeal. None of Conley's arguments provide evidence of probable cause to believe that he is being illegally detained, and the circuit court did not clearly err in dismissing his petition.

Affirmed.

Hart, J., dissents.

Josephine Linker Hart, Justice, dissenting.

The circuit court clearly erred when it agreed with the State that Mr. Conley had failed to state a claim that is cognizable in an Arkansas habeas proceeding. The circuit court dismissed Mr. Conley's habeas petition without an evidentiary hearing. In its written order, the circuit court reasoned,

> Habeas corpus petitions are restricted to questions of whether the petitioner is in custody pursuant to a valid conviction or whether the convicting court had proper jurisdiction. Mere allegations do not establish probable cause. A petition for a writ of habeas corpus is not a substitute for post-conviction relief. A sufficiency of the evidence challenge is not a cognizable claim in a habeas action. Petitioner's challenge to the sufficiency of the charging instrument are not jurisdictional and should have been raised prior to trial.

These findings are as curious as they are illogical. In his habeas petition, Mr. Conley had asserted three grounds for relief that may be summarized as follows: (1) he remains ***11** confined on a judgment and commitment order that has been rendered void or fundamentally defective due to the supreme court's decision in the Rule 37 case; (2) he remains confined under a sixty-year sentence that was imposed by a Jury that considered the evidence supporting the marijuana and paraphernalia counts; and (3) his continued confinement under the same judgment and commitment order, which was rendered invalid by the Arkansas Supreme Court decision and was the result of the jury considering evidence relating to the two counts that the

supreme court dismissed, violates due process of law. From the foregoing, it is obvious that the circuit court's findings do not address Mr. Conley's petition.

In pertinent part, the Arkansas habeas statute states:

> The writ of habeas corpus shall be granted forthwith by any of the officers enumerated in S 16-112-102(a) to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority, is imprisoned when by law he or she is entitled to bail, or who has alleged actual innocence of the offense or offenses for which the person was convicted.

Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2016). The Arkansas Constitution attempts to safeguard the writ of habeas corpus stating, "The privilege of the writ of habeas corpus shall not be suspended; except by the General Assembly, in case of rebellion, insurrection or invasion, when the public safety may require it." Ark. const. art, 2 § 11. Nonetheless, our case law has narrowed the focus of the writ, as this court noted most recently in *Proctor v. Kelley*, 2018 Ark. 382, 562 S.W.3d 837 "Unless the petitioner can show that the trial court ***12** lacked jurisdiction or that the judgment is facially invalid, there is no basis for a finding that a writ of habeas corpus should issue."

I will leave for another day a broader discussion of the dubious authority for the Arkansas Supreme Court's diminution of the writ of habeas corpus. At present, I ****123** decline to speculate at what point the Arkansas Supreme Court appointed itself the General Assembly or whether there was some rebellion, insurrection, or invasion that I happened to miss. However, it is simply Orwellian to suggest that Mr. Conley's existing judgment and conviction order is not "facially invalid." It is not disputed that in light of our opinion in the Rule 37 case, *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234, the judgment and commitment order no longer correctly reflects the offenses for which Mr. Conley was convicted. It is an undisputable fact that the only judgment and commitment order in this case still shows that Mr. Conley was convicted of not only distribution of crack cocaine but also possession of drug paraphernalia and possession of marijuana. This leaves room for no other logical conclusion other than that the circuit court clearly erred in finding that Conley had not stated a claim that was cognizable in state habeas proceedings.

I am mindful that upon remand, the circuit court entered an order echoing our holding in the Rule 37 case, which dismissed the marijuana and paraphernalia-possession counts. However, only the judgment and commitment order and its successor the sentencing order is authorized by this court as the proper document for the final disposition of a criminal case. *See* Ark. Sup. Ct.

Admin. Order No. 8 ("When any charge ***13** results in a commitment to the Arkansas Department of Correction or any of the following—probation, suspended imposition of sentence, commitment to Arkansas Community Correction or to the county jail, a fine, restitution, and/or court costs—the Sentencing Order shall be submitted."). Accordingly, this court, in exercising its superintending authority over circuit courts, has made mandatory the use of the sentencing order (and its direct predecessor, the judgment and commitment order). Therefore, the bit of creative writing that the circuit court drafted purporting to echo our holding in the Rule 37 case is a nullity. It is untenable to require the circuit courts of this state to execute a specific document—a judgment and commitment order—and then ignore the very rules that we have promulgated. At the very least, this court should reverse and remand this case to the circuit court to enter a substituted judgment and commitment order, consistent with our opinion in the Rule 37 case.

Regarding Mr. Conley's contention that he should have received a new sentencing hearing, arguably this court's case law that limits habeas corpus to situations in which either the trial court lacked jurisdiction or the judgment is facially invalid precludes giving Mr. Conley this relief. However, it is clear that the statutory authority for habeas corpus is much broader; it allows the writ to issue if a person is imprisoned without lawful authority. Ark. Code Ann. § 16-112-103(a)(1).

With perfect hindsight, I can see that the relief we granted in the Rule 37 case was unjust and wrong. While it may have been tempting to "split the baby," our disposition ***14** completely ignored the dynamics and realities of a trial. Simply dismissing the paraphernalia and marijuana counts was unjust to both the State and to Mr. Conley. The grant of a new trial was the proper remedy.

Our decision to simply dismiss those counts denied the State a chance to reopen the case and provide additional evidence to link Mr. Conley to the contraband. This is the very reason why we require specific directed-verdict motions before we consider challenges to the sufficiency of the evidence on direct appeal. When a specific directed-verdict motion is made at trial and the State offers no more proof, it is logical that the State has no other evidence ****124** to submit. However, in Mr. Conley's case, his trial counsel failed to raise a specific directed-verdict motion, so the State was not put on notice of any deficiency in its case.

Our decision was also unjust to Mr. Conley. While he did get his ninety-year sentence reduced to sixty years, it does not diminish the fact that he nonetheless received a 60-year sentence for selling $ 100 worth of narcotics that was based at least in part on the jury's consideration of evidence of crimes that this court later dismissed. The former is a violation of the Eighth Amendment and the latter a violation of due process.

In his habeas petition, Mr. Conley quoted the following instruction that the circuit judge read to the jury at the start of the penalty phase of his trial:

> Ladies and gentlemen, members of the jury, you have found Vernell Conley guilty of Delivery of a Controlled Substance Crack Cocaine, Possession of a Controlled Substance Marijuana, and Possession of Drug Paraphernalia. The law provides that after the jury returns a verdict or verdicts of guilt but before it sentences the State and the Defendant may present additional evidence to be ***15** considered by the jury in its deliberations on sentencing. In your deliberations on the sentences to be imposed you may consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial. You'll now hear evidence that you may consider in arriving at appropriate sentences.

It is virtually beyond dispute that the dismissed counts affected the jury's sentence because the circuit judge told the jury to consider the evidence in support of those counts. It is a well-established legal principle in Arkansas law that jurors are presumed to comprehend and follow court instructions. *Kelly v. State*, 350 Ark. 238, 85 S.W.3d 893 (2002). How much the marijuana and paraphernalia counts contributed to the jury's decision to give Mr. Conley sixty years for selling $ 100 worth of crack can never be known. I can think of no more fundamental aspect of due process than that a jury's decision be based on relevant evidence. A flawed trial process produces unjust results that go beyond the question whether the defendant "did it." The State has no interest in an excessive sentence. It is common knowledge that we spend three times more money to keep a prisoner in the penitentiary than we require our schools to spend to educate a child in a public school.

In my view, Mr. Conley is also wrongly imprisoned on a sentence that is so disproportionate as to violate the Eighth Amendment. The majority has apparently failed to recall that *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906 (*Jackson II*), which Mr. Conley cites, is a habeas case. It arose on remand after the Supreme Court reversed *Jackson v. Norris*, 2011 Ark. 49, 378 S.W.3d 103 (*Jackson I*) in ***16** *Jackson v. Arkansas*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), a companion case to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). As in the case before us, *Jackson I* disposed of Jackson's Eighth Amendment challenge stating, "Jackson has failed to allege or show that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the sentence. We hold that the circuit court's dismissal of the petition for writ of habeas corpus was not clearly erroneous." *Jackson I*, 2011 Ark. 49, at 5, 378 S.W.3d at 106. Inexplicably, this court continues to cite and rely on the same rationale that the Supreme Court

of the United States has expressly rejected in habeas cases.

**125 The Supreme Court's Eighth Amendment jurisprudence has long required that the punishment for a crime "should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910). This proportionality analysis has been at the heart of the Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), *Graham v. Florida,* 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller*, 567 U.S. 460, 132 S.Ct. 2455.

The writ of habeas corpus is one of the cornerstones of Anglo-American jurisprudence. It is expressly protected by the Arkansas Constitution. Ark. Const. art. 2, § 11. As such, this common-law privilege is greater than our flawed case law, which has been overruled, albeit sub silentio, by the Supreme Court of the United States. *Miller*, supra. I would reverse and remand this case to the circuit court for further proceedings.

I dissent.

Footnotes

1 The circuit court also sentenced Conley for an earlier delivery charge to an additional term of eighty-four months to be served consecutively to the other three sentences. The jury did not decide that sentence and it is not at issue in this appeal.

2 Conley filed a previous habeas petition in Jefferson County, but that petition was dismissed when Conley transferred to a prison unit in a different county.

Ex. B: Order Dismissing Petition for Writ of Habeas Corpus, *Conley v. Kelley*, No.40CV-18-15-5 (Lincoln County (Arkansas) Circuit Court, Eleventh Judicial District, West—Fifth Division)

IN THE CIRCUIT COURT OF LINCOLN COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT, WEST - FIFTH DIVISION

VERNELL CONLEY
Inmate # 110709

PETITIONER

v. No. 40CV-18-15-5

WENDY KELLEY, Director,
Arkansas Department of Correction

RESPONDENT

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

On this day comes on for consideration the January 26, 2018, petition for writ of habeas corpus filed by J. Thomas Sullivan, Attorney at Law. From the examination of the pleadings, review of the memorandum submitted on behalf of respondent, review of petitioner's response to the memorandum, and analysis of applicable law, the Court finds as follows:

HISTORY

The petitioner was convicted by a Washington County jury of delivery of a controlled substance (crack cocaine), possession of a controlled substance (marijuana), and possession of drug paraphernalia. He was sentenced to serve a total of 90 years in the Arkansas Department of Correction. The Court of Appeals affirmed. *Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875 (2011). Conley filed an unsuccessful Rule 37 petition which was affirmed in part and reversed in part. Petitioner's convictions for possession of a controlled substance (marijuana) and possession of drug paraphernalia were reversed. The Rule 37 petition also sought relief from the conviction on count one alleging that counsel was ineffective for not moving to sever the delivery charge from the two possession charges. The Arkansas Supreme Court found they did not need to address the severance issue on count one since they reversed the two possession counts. *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234 (2014). Per the Mandate, the Washington County Circuit Court entered an order dismissing the convictions on count two and count three.

CLAIM

Petitioner argues that he is being held illegally. He claims that his conviction for delivery of a controlled substance (crack cocaine) should be declared void because the jury's verdict of guilty on the delivery of a controlled substance (crack cocaine) charge and the 60-year sentence was tainted by the evidence submitted on the two charges later dismissed by the Arkansas Supreme Court. Petitioner argues that the Judgment and Commitment Order was rendered void by the reversal of counts two and three entitling him to a new sentencing on count one.

HABEAS CORPUS LAW

Arkansas Code Annotated § 16-112-103 (a)(1) provides, in pertinent part, that "[t]he writ of habeas corpus shall be granted forthwith ... to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority[.]" To succeed on a petition for writ of habeas corpus, petitioner must show that the Judgment and Commitment Order is invalid on its face or that the trial court lacked jurisdiction. *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503 (2015).

ANALYSIS

It appears that petitioner is seeking relief from the Arkansas Supreme Court's rulings in *Conley v. State*, 2011 Ark. App. 597, 385 S.W.3d 875 (2011) and *Conley v. State*, 2014 Ark. 172, 433 S.W.3d 234 (2014). A petition for a writ of habeas corpus is not a substitute for post-conviction relief nor does it provide an opportunity to retry a case. *Wesson v. Hobbs*, 2014 Ark. 285 (per curiam); *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam).

Whether the petitioner is entitled to relief from the delivery of a controlled substance (crack cocaine) conviction has been addressed on direct appeal and in a Rule 37 petition. A habeas corpus proceeding does not provide a means to revisit the merits of issues that could have been addressed,

and settled, in the trial court, on appeal, or in a post-conviction proceeding. *Murphy v. State*, 2013 Ark. 155 (2013).

RULING

The allegations raised by petitioner do not offer any evidence establishing probable cause that he is entitled to a writ of habeas corpus.

The petition is DISMISSED.

IT IS SO ORDERED this 7th day of May 2018.

JODI RAINES DENNIS
CIRCUIT JUDGE
40CV-18-15-5

cc: Mr. J. Thomas Sullivan
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Ms. Veda Berger
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Ex. C: Judgment and Commitment Order, *State v. Conley*, No. CR 2009-206-6 (Washington County (Arkansas) Circuit Court--Sixth Division, entered August 30, 2010)

Defendant's full name: **VERNELL RENOLD CONLEY**

JUDGMENT AND COMMITMENT ORDER
IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
FOURTH DISTRICT – 1 DIVISION

On **August 30, 2010,** the Defendant appeared before the Court, was advised of the nature of the charge(s), of constitutional and legal rights, of the effect of a guilty plea upon those rights, and of the right to make a statement before sentencing. The Court made the following findings:

DEFENDANT'S FULL NAME: **Vernell Renold Conley**
DATE OF BIRTH: **1/16/1973**
RACE: **B**
SEX: **M**
SID#: **625386**
DEFENDANT'S ATTORNEY: **Blake Warren**
PROSECUTING ATTORNEY OR DEPUTY: **Denis Dean/Mark Booher**
CHANGE OF VENUE FROM: **N/A**

FILED FOR RECORD
2010 AUG 31 AM 10:30
WASHINGTON COUNTY
CIRCUIT CLERK

Defendant was represented by: **X** private counsel __ appointed counsel
__ public defender __ himself/herself

Defendant made a voluntary, knowing and intelligent waiver of the right to counsel: __ Yes **X** No

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, 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 (A.D.O.C.) for the term specified on each offense shown below:

TOTAL NUMBER OF COUNTS: **5**

Offense #1

Docket #: **CR 2009-2046-1**
Arrest Tracking #: **5437699**

ACA # of offense: **5-64-401**
Name of Offense: **Delivery of a Controlled Substance (Crack Cocaine)**
Seriousness Level of Offense: **7**
Criminal History Score: **10**
Presumptive Sentence: **PEN 300**
Sentence is a departure from the sentencing grid __ Yes **X** No.
Offense is a **X** Felony __ Misdemeanor.
Classification of offense: __ A __ B __ C __ D __ U **X** Y
Sentence imposed: **720** months.
Suspended imposition of sentence: ___months
Defendant was sentenced as an Habitual Offender under ACA 5-4-501, Subsection __ (a) **X** (b) __ (c) __ (d).
Sentence was enhanced by A.C.A. ___. **N/A**
Defendant __ attempted __ solicited __ conspired to commit the offense. **N/A**
Offense date: **September 15, 2009**
Number of Counts: **1**
Defendant was on __ probation **X** parole at time of conviction. __ N/A
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence:
__ Yes **X** No
Victim of the offense was __ under __ over the age of 18 years. **X** N/A
Defendant voluntarily, intelligently, and knowingly entered a:
___ negotiated plea of guilty or nolo contendere.
___ plea directly to the Court of guilty or nolo contendere
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the Court, and sentenced by __ the Court __ a jury.
X was found guilty at a jury trial, and sentenced by **X** the Court __ a jury.

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Offense #2 Defendant's full name: **VERNELL RENOLD CONLEY**

Docket #: **CR 2009-2046-1**
Arrest Tracking #: **5437699**

ACA # of offense: **5-64-401**
Name of Offense: **Possession of a Controlled Substance 2nd Offense (Marijuana)**
Seriousness Level of Offense: **2**
Criminal History Score: **10**
Presumptive Sentence: **PEN 60/RCF/AS**
Sentence is a departure from the sentencing grid **X** Yes __ No.
Offense is a **X** Felony __ Misdemeanor.
Classification of offense: __ A __ B __ C **X** D __ U __ Y
Sentence imposed: **180** months.
Suspended imposition of sentence: __ months.
Defendant was sentenced as an Habitual Offender under ACA 5-4-501, Subsection __ (a) **X** (b) __ (c) __ (d).
Sentence was enhanced by A.C.A. ___. **N/A**
Defendant __ attempted __ solicited __ conspired to commit the offense. **N/A**
Offense date: **November 6, 2009**
Number of Counts: **1**
Defendant was on __ probation **X** parole at time of conviction. __ N/A
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence:
__ Yes **X** No
Victim of the offense was __ under __ over the age of 18 years. **X** N/A
Defendant voluntarily, intelligently, and knowingly entered a:
___ negotiated plea of guilty or nolo contendere.
___ plea directly to the Court of guilty or nolo contendere
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the Court, and sentenced by __ the Court __ a jury.
X was found guilty at a jury trial, and sentenced by **X** the Court __ a jury.

Offense #3 Docket #: **CR 2009-2046-1**
Arrest Tracking #: **5437699**

ACA # of offense: **5-64-403**
Name of Offense: **Possession of Drug Paraphernalia**
Seriousness Level of Offense: **3**
Criminal History Score: **10**
Presumptive Sentence: **PEN 60/RCF/AS**
Sentence is a departure from the sentencing grid **X** Yes __ No.
Offense is a **X** Felony __ Misdemeanor.
Classification of offense: __ A __ B **X** C __ D __ U __ Y
Sentence imposed: **360** months.
Suspended imposition of sentence: __ months.
Defendant was sentenced as an Habitual Offender under ACA 5-4-501, Subsection __ (a) **X** (b) __ (c) __ (d). N/A
Sentence was enhanced by A.C.A. ___. **N/A**
Defendant __ attempted __ solicited __ conspired to commit the offense. **N/A**
Offense date: **November 6, 2009**
Number of Counts: **1**
Defendant was on __ probation **X** parole at time of conviction. __ N/A
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence:
__ Yes **X** No
Victim of the offense was __ under __ over the age of 18 years. **X** N/A
Defendant voluntarily, intelligently, and knowingly entered a:
___ negotiated plea of guilty or nolo contendere.
___ plea directly to the Court of guilty or nolo contendere
Defendant
___ entered a plea as shown above and was sentenced by a jury.
___ was found guilty of said charge(s) by the Court, and sentenced by __ the Court __ a jury.
X was found guilty at a jury trial, and sentenced by **X** the Court __ a jury.

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Offense #4

Defendant's full name: **VERNELL RENOLD CONLEY**

Docket #: **CR 2006-138-1**
Arrest Tracking #:

ACA # of offense: **5-64-401**
Name of Offense: **Delivery of a Controlled Substance (Crack Cocaine)**
Seriousness Level of Offense: 7
Criminal History Score: **10**
Presumptive Sentence: **PEN 300**
Sentence is a departure from the sentencing grid _X_ Yes __ No.
Offense is a _X_ Felony __ Misdemeanor.
Classification of offense: __ A __ B __ C __ D __ U _X_ Y
Sentence imposed: 84 months.
Suspended imposition of sentence: __ months.
Defendant was sentenced as an Habitual Offender under ACA 5-4-501, Subsection __ (a) __ (b) __ (c) __ (d). **N/A**
Sentence was enhanced by A.C.A. __. **N/A**
Defendant __ attempted __ solicited __ conspired to commit the offense. **N/A**
Offense date: **December 29, 2004 and January 6, 2005**
Number of Counts: 2
Defendant was on __ probation _X_ parole at time of conviction. __ N/A
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence:
_X_ Yes __ No
Victim of the offense was __ under __ over the age of 18 years. _X_ N/A
Defendant voluntarily, intelligently, and knowingly entered a:
__ negotiated plea of guilty or nolo contendere.
__ plea directly to the Court of guilty or nolo contendere
Defendant
__ entered a plea as shown above and was sentenced by a jury.
_X_ was found guilty of said charge(s) by the Court, and sentenced by _X_ the Court __ a jury.
__ was found guilty at a jury trial, and sentenced by __ the Court __ a jury.

Offense #5

Docket #:
Arrest Tracking #:

ACA # of offense:
Name of Offense:
Seriousness Level of Offense
Criminal History Score:
Presumptive Sentence:
Sentence is a departure from the sentencing grid __ Yes __ No.
Offense is a __ Felony __ Misdemeanor.
Classification of offense: __ A __ B __ C __ D __ U __ Y
Sentence imposed: _months.
Suspended imposition of sentence: __ months.
Defendant was sentenced as an Habitual Offender under ACA 5-4-501, Subsection __ (a) __ (b) __ (c) __ (d). N/A
Sentence was enhanced by A.C.A. __. **N/A**
Defendant __ attempted __ solicited __ conspired to commit the offense. **N/A**
Offense date:
Number of Counts:
Defendant was on __ probation __ parole at time of conviction. __ N/A
Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence:
__ Yes __ No
Victim of the offense was __ under __ over the age of 18 years. __ N/A
Defendant voluntarily, intelligently, and knowingly entered a:
__ negotiated plea of guilty or nolo contendere.
__ plea directly to the Court of guilty or nolo contendere
Defendant
__ entered a plea as shown above and was sentenced by a jury.
__ was found guilty of said charge(s) by the Court, and sentenced by __ the Court __ a jury.
__ was found guilty at a jury trial, and sentenced by __ the Court __ a jury.

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Defendant's full name: **VERNELL RENOLD CONLEY**

Indicate which sentences are to run consecutively: **Offenses 2 and 3 are to run consecutively to Offense 1. Offense 4 is to run consecutively to Offenses 1, 2, and 3 for a total of 1164 months in the Department of Correction**
Death Penalty: __ Execution Date:__.
Total time to serve on all offenses listed above: 1164 months
Time is to be served at: X Department of Correction __ Regional Punishment Facility
Jail time credit: _ days. X None (By agreement)

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 (D.C.P.) __ Yes X No
Failure to meet the criteria or violation of the rules of the D.C.P. could result in transfer to the A.D.O.C.
Fines $_____ Court Costs $ __.
A judgment of restitution is hereby entered against the Defendant in the amount and terms as shown below:
Amount $__ Due immediately __ Installments of __.
Payment to be made to:__. **SEE BELOW**
If multiple beneficiaries, give names and show payment priority:
(1)__ (2)__.

Defendant is a Sex or Child Offender as defined in ACA 12-12-903, and is ordered to complete the Sex Offender Registration Form:
__ Yes ___ No X N/A
Defendant is alleged to be a sexually violent predator, and is ordered to undergo an evaluation at a facility designated by the Department of Community Correction pursuant to A.C.A. 12-12-918: __ Yes __ No X N/A.
Defendant has committed an aggravated sex offense, as defined in A.C.A. 12-12-903. __ Yes __ No X N/A
Defendant was adjudicated guilty of a felony offense, a misdemeanor sexual offense, or a repeat offense (as defined in A.C.A. 12-12-1103), and is ordered to have a DNA sample drawn at:
__ a D.C.P. facility X the A.D.O.C. or __ (other) : __ Yes _ No.
Defendant was informed of the right to appeal: X Yes __ No
Appeal bond: $ None Set.
The Washington County Sheriff is hereby ordered to transport the Defendant to X the Arkansas Department of Correction __ Regional Punishment Facility.

The short report of circumstances attached hereto is approved.

Date: 08/30/10 Circuit Judge: WILLIAM A. STOREY Signature: William A Storey

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

Date: 8·31·10 Circuit Clerk/Deputy: Bobbie Boyd

(Seal)

SUSPENDED SENTENCE CONDITIONED UPON:

1. Paying the $20 Booking Fee 60 days after release.
2. Paying the $125 Drug Crime Fee 90 days after release.
3. Paying the $250 DNA collection fee payable at a rate of $100/mo starting 120 days after release.
4. Defendant remaining on good behavior and committing no violations of any laws.

2010 36037

Form Revised 07/2003

PROSECUTOR'S SHORT REPORT OF CIRCUMSTANCES

This information is provided pursuant to ACA § 12-27-27-113 ©(1) & (2) (Supp. 1993)

Defendant's Name: **Vernell Renold Conley** SID# **625386**

Case #'s: **CR 2009-2046-1** County: **Washington**

SUMMARY OF THE FACTS: **The Defendant sold crack cocaine to a confidential informant. The Defendant was in possession of over 1 ounce of Marijuana with the intent to deliver it. The Defendant was in possession of a digital scale used to weigh controlled substances. The Defendant violated the terms of his suspended sentence when he committed the new offenses of Delivery of Cocaine, Possession of Marijuana, and Possession of Drug Paraphernalia.**

II. FACTORS:

AGGRAVATING

( ) Production or use of any weapon during the criminal episode.

( ) Threat or violence toward witness(es) or victim(s).

( ) Defendant knew or had reason to know the victims were particularly vulnerable (aged, handicapped, very young, etc.)

( ) Ability to make restitution, reparation or return property and failed to do so.

( ) Violation of position or public trust or Recognized professional ethic.

( ) Degree of property loss, personal injury or threatened personal injury substantially greater than characteristic for the crime.

( ) There is a single conviction for a crime involving multiple victims or incidents.

(X) Defendant on probation or parole at the time of the crime.

(X) Persistent involvement in similar criminal offenses.

(X) Repetition of behavior pattern which contributes to criminal conduct, e.g., return to drug or alcohol abuse.

(X) Prior record of similar offenses.

(X) Serious prior record.

( ) Pursuant to a Guilty or No Contest Plea, other crimes were dismissed or not prosecuted.

( ) New criminal activity while on pre-trial release.

(X) Persistent criminal misconduct while under supervision.

( ) Efforts to conceal crime.

( ) Other: _____

MITIGATING

( ) Victim(s) provoked the crime to substantial Degree, or other evidence that misconduct by victim contributed to the criminal episode.

( ) Cooperation with criminal justice agencies in resolution or other criminal activity.

( ) Effort to make restitution or reparation (particularly before required to do so by sentencing).

( ) Degree of property loss, personal injury or threatened personal injury substantially less than characteristic for the crime.

( ) Special effort on part of perpetrator to minimize the harm or risk.

( ) Peripheral involvement in criminal episode (e.g., passive accessory)

( ) Evidence of withdrawal, duress, necessity or lack of sustained criminal intent or diminished mental capacity (e.g., mental retardation) which is insufficient to constitute a defense but is indicative of reduced culpability.

( ) No prior parole or probation difficulty.

( ) Efforts to deal with problems associated with past criminal conduct.

( ) No, or minimal, prior record.

( ) Other: _____.

SIGNED: _____ SIGNED: _____

Circuit Judge Prosecuting Attorney or Deputy Prosecutor

2010 36038

Ex. D: Mandate, *Conley v. Kelley*, 2014 Ark. 172, 433 S.W.3d 234

MANDATE

AFFIRMED IN PART

REVERSED AND REMANDED IN PART WITH DIRECTIONS

PROCEEDINGS OF APRIL 17, 2014

SUPREME COURT CASE NO. CR-13-21

VERNELL R. CONLEY — APPELLANT

V. APPEAL FROM WASHINGTON COUNTY CIRCUIT COURT
(CR2009-2046-1)

STATE OF ARKANSAS — APPELLEE

THIS POSTCONVICTION CRIMINAL APPEAL WAS SUBMITTED TO THE ARKANSAS SUPREME COURT ON THE RECORD OF THE WASHINGTON COUNTY CIRCUIT COURT AND BRIEFS OF THE RESPECTIVE PARTIES. AFTER DUE CONSIDERATION, IT IS THE DECISION OF THE COURT THAT THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED IN PART; REVERSED AND REMANDED IN PART WITH DIRECTIONS FOR THE REASONS SET OUT IN THE ATTACHED OPINION.

HART, J., CONCURS.

IN TESTIMONY, THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE JUDGMENT OF THE ARKANSAS SUPREME COURT, I, LESLIE STEEN, CLERK, SET MY HAND AND AFFIX MY OFFICIAL SEAL, ON THIS 6TH DAY OF MAY, 2014.

LESLIE STEEN, CLERK

Ex. E: Order dismissing Counts 2 and 3, *State v. Conley*, No. CR 2009-206-6 (Washington County (Arkansas) Circuit Court--Sixth Division, entered August 27, 2015)

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS
SIXTH DIVISION

STATE OF ARKANSAS PLAINTIFF

VS. No. CR 2009-2046-6

VERNELL R. CONLEY DEFENDANT

ORDER

Now on this 27th day of August, 2015, comes on for consideration the mandate issued in Arkansas Supreme Court Case No. CR-13-21 (2014 Ark. 172), the Court finds as follows:

1. That the charge of Possession of a Controlled Substance (Marijuana) is hereby dismissed.

2. That the charge of Possession of Drug Paraphernalia is hereby dismissed.

IT IS SO ORDERED.

MARK LINDSAY, CIRCUIT JUDGE

Copy via email to :

Mieka Hatcher

2015 3262

Ex. F: Petition for Writ of Habeas Corpus, *Conley v. Kelley*, No.40CV-18-15-5 (Lincoln County (Arkansas) Circuit Court, Eleventh Judicial District, West—Fifth Division)

IN THE ELEVENTH JUDICIAL DISTRICT (WEST)
CIRCUIT COURT OF LINCOLN COUNTY, ARKANSAS

VERNELL CONLEY,
Petitioner,

v. NO._____

WENDY KELLEY, Director,
Arkansas Department of Correction,
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE CIRCUIT COURT:

VERNELL CONLEY, Petitioner, through his counsel of record, J. Thomas Sullivan, petitions for relief from the facially illegal judgment entered against him by the Washington County Circuit Court, Fourth District, Division 1. In support of this petition, Petitioner Conley would show the following:

1. Petitioner Conley is an inmate incarcerated in the Varner Unit of the Arkansas Department of Correction, which is located within the jurisdiction of the Eleventh Judicial District Circuit Court of Lincoln County, Arkansas. He is incarcerated pursuant to a Judgment and Commitment Order entered by the Washington County Circuit Court, Fourth Judicial District, Division 1. [Exhibit A: Judgment and Commitment Order in No. CR-2009-2046-1].

2. Respondent Wendy Kelley, as Director of the Arkansas Department of Correction, is the individual who has custody and control of Petitioner by virtue of his confinement in the Department of Correction.

3. Petitioner invokes the jurisdiction of the Circuit Court pursuant to Article 2, Section 11 of the Arkansas Constitution and Arkansas Code Ann. § 16-112-101, *et seq.*

CLAIMS FOR HABEAS RELIEF

1. PETITIONER CONLEY IS UNLAWFULLY CONFINED IN THE ARKANSAS DEPARTMENT OF CORRECTION UNDER THE EXTANT JUDGMENT AND COMMITMENT ORDER ENTERED BY THE WASHINGTON COUNTY CIRCUIT COURT IN THIS CASE THAT HAS BEEN RENDERED VOID OR FUNDAMENTALLY DEFECTIVE BASED ON THE REVERSAL AND DISMISSAL OF CONVICTIONS ON TWO OF THREE COUNTS ON WHICH CONLEY WAS TRIED AND SENTENCED BY THE COURT IN *CONLEY v. STATE*, 2014 Ark. 172, 433 S.W.3d 234 (2014).

2. PETITIONER'S CONFINEMENT PURSUANT TO THE EXTANT JUDGMENT AND COMMITMENT ORDER IS UNLAWFUL WHERE HE REMAINS CONFINED ON THE 60-YEAR SENTENCE IMPOSED ON THE REMAINING COUNT ON WHICH HE WAS CONVICTED IN THE WASHINGTON COUNTY CIRCUIT COURT BY A JURY WHICH DETERMINED THE SENTENCE TO BE IMPOSED ON COUNT 1 OF THE INFORMATION WHILE CONSIDERING THE STATE'S EVIDENCE ADDUCED IN SUPPORT OF COUNTS 2 AND 3 THAT WAS HELD INSUFFICIENT TO SUPPORT CONVICTION ON THOSE COUNTS

3. PETITIONER CONLEY IS CONFINED UNDER THE JUDGMENT AND COMMITMENT ORDER OF THE WASHINGTON COUNTY CIRCUIT COURT WHICH HAS SUBSEQUENTLY BEEN RENDERED INVALID, OR VOID, BY THE ACTION OF THE ARKANSAS SUPREME COURT IN *CONLEY v. STATE*, 2014 Ark. 172, 433 S.W.3d 234 (2014) DISMISSING HIS CONVICTIONS ON COUNTS 2 AND 3 OF THE INFORMATION UPON WHICH HE WAS CONVICTED AT TRIAL, BUT WHICH REMAINS IN EFFECT, VIOLATING HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HIS SENTENCE ON COUNT 1 WAS DETERMINED BY THE JURY WHILE CONSIDERING EVIDENCE OFFERED BY THE PROSECUTION WITH RESPECT TO COUNTS 2 AND 3 WHICH WAS RULED INSUFFICIENT TO SUPPORT CONVICTION ON THOSE COUNTS.

PROCEDURAL HISTORY OF THE CASE

A. Petitioner Conley's trial and direct appeal

4. Conley was tried before a jury on August 26, 2010, on a three-count information alleging: (1). delivery of a controlled substance (crack cocaine); (2). possession of a controlled substance with the intent to deliver (marijuana); and (3). possession of drug paraphernalia. *Conley v. State*, 2011 Ark. App. 597, *1, 385 S.W.3d 875, 876 (2014) [*Conley I*].

5. The State's evidence showed that Conley sold $100 worth of crack cocaine, or about 0.5813 grams, to undercover officers after one, Detective Howard, spoke with Conley over the telephone to set up the buy. He testified at trial that he recognized Conley's voice and a photograph of Conley he had been shown at the time of the transaction, which occurred on September 15, 2009, although he admitted that he could not recall the make and model of Conley's car in which he was sitting at that time. A second detective, Lee, testified that he was in Howard's car, observed and overheard the drug transaction, which was being recorded. The recording of the conversation was played for the jury. Following the transaction, the officers followed Conley as he drove to the location where they had earlier determined that he lived. Conley was arrested some seven weeks later on November 6, 2009, when officers executed a

search of his residence, recovering 32.5 grams of marijuana and digital scales. *Conley I*, 2011 Ark. App. 597, at *1-*2, 385 S.W.3d at 876-77.

6. After trial counsel's motions for directed verdicts on all three counts were denied, *id.* at *2-*3, 385 S.W.3d at 877, the jury convicted Conley on the delivery of cocaine charge and the possession of drug paraphernalia charge, acquitting him of possession of marijuana with intent to deliver, but convicting on the lesser-included offense of possession of marijuana. *Id.*, at *3, 385 S.W.3d at 877.

7. At sentencing, the State offered evidence that Petitioner had previously been convicted of four or more felonies and character evidence through his former parole officer that Conley was a "career drug dealer" and that the chances that he would reform were "slim." *Id.*

8. The jury sentenced Conley to 60 years on the cocaine delivery charge, 15 years on the lesser-included charge of possession of marijuana and 30 years on the possession of drug paraphernalia count. *Conley I*, 2011 Ark. App. 597, at *3, 385 S.W.3d at 877. Both the Arkansas Court of Appeals, *id.* and Arkansas Supreme Court, *Conley v. State*, 2014 Ark. 172, at 3*, 433 S.W.3d 234, 238 (2014), relate in published opnions that Conley was sentenced to "six years" on Count 2, the possession of marijuana charge. However, the judgment reflects that the court actually imposed a sentence of 180 months on that count, [Ex. A, Judgment, at 2].The trial court ordered the 30 year and 15 year sentences to be served concurrently to each other and consecutive to the 60-year term on the cocaine delivery count. [Ex. A, Judgment, at 4]. The judgment also reflects that the trial court imposed an 84-month sentence on a prior delivery offense, [Ex. A, Judgment, at 3], to be served consecutively to the consecutive sentences imposed on Counts 1 and 2 and 3, for a total sentence of 1164 months. [Ex. A, Judgment, at 4].

9. Conley's convictions on all three counts charged in the information were sustained by the Arkansas Court of Appeals on direct appeal based on its conclusion that trial counsel's directed verdict motions were insufficient as to all counts, specifically analyzing the evidence and arguments made by trial counsel on each charge. *Conley I,* 2011 Ark. App. 597, *5-*7, 385 S.W.3d at 878-79.

10. No petition for review was filed in the Arkansas Supreme Court.

B. Petitioner's Rule 37.1 action

11. Conley filed for post-conviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure arguing that trial counsel was ineffective in failing to make legally sufficient challenges to the sufficiency of the State's evidence on each of the three counts charged. Conley also alleged that trial counsel was ineffective in failing to move for severance of the possession of marijuana and paraphernalia charges alleged in Counts 2 and 3, respectively, from Count 1, the delivery of cocaine charge.

12. Following an evidentiary hearing, the Washington County Circuit Court found that Petitioner failed to demonstrate prejudice necessary to obtain relief on his ineffective assistance claims arising from the defective directed verdict motions. *Conley v. State*, 2014 Ark. 172, at

10*, 433 S.W.3d 234, 242 (2014) [*Conley II*] ("Because the circuit court determined that no prejudice resulted from the failure to make the directed-verdict motions, the appeal of that decision requires us to review whether there was sufficient evidence to support the verdicts.").

13. On appeal from the denial of relief on his Rule 37.1 petition by the circuit court, the Supreme Court reversed that court's rejection of Conley's ineffective assistance claims arising from the flawed directed verdict motions. Instead, the Court held that trial counsel was ineffective with respect to his challenges to the sufficiency of the evidence supporting the possession of marijuana and paraphernalia charges, Counts 2 and 3. In so doing, the Court found that the evidence on these two counts was insufficient:

> In turn, we hold that trial counsel's performance was deficient and prejudicial, because had trial counsel made a proper motion for directed verdict, the sufficiency-of-the-evidence argument raised on appeal would have been successful. Accordingly, we reverse and remand with directions to dismiss the charges of possession of a controlled substance and possession of drug paraphernalia.

Conley II, 2014 Ark. 172, at *9-*12, 433 S.W.3d at 241-43. Thus, Petitioner met the prejudice prong under *Strickland v. Washington*, 466 U.S. 668, 694 (1984) with respect to his ineffective assistance claim regarding trial counsel's motion for directed verdict as to Counts 2 and 3. The Court did *not* find that counsel's defective motion with respect to Count 1, the cocaine delivery charge, warranted relief, by implication finding the evidence sufficient to support the conviction on Count 1.

14. In the Rule 37.1 petition rejected by the trial court, Conley alleged that trial counsel rendered ineffective assistance in failing to move to sever Count 1 charging delivery of a controlled substance, from Counts 2 and 3, which charged possession offenses that did not occur in the same circumstance as the delivery count and were subject to severance under Rule 22.2(a), Arkansas Rules of Criminal Procedure. The rule provides for mandatory severance upon motion when offenses have been joined in a single complaint based on similarity. The right to severance under this theory of joinder has been characterized by this Court as *absolute*. *Turner v. State*, 2011 Ark. 111, 280 S.W.3d 400, at *3-*5, 380 S.W.3d 400, 403; *Clay v. State*, 318 Ark. at 553, 559, 886 S.W.2d at 610, 613 (1994).

15. In ruling against Conley on this ineffective assistance claim, the Washington County Circuit Court had held:

> 2. That Defendant/Petitioner has failed to demonstrate that he suffered prejudice as a result of trial counsel's failure to seek a severance of the courts relating to possession of marijuana and possession of drug paraphernalia.

(Trial Court's Order denying relief on Petitioner's Rule 37 claims, Order, at ¶ B 2).

16. With respect to Conley's ineffective assistance claim relating to trial counsel's failure to move for severance of Count 1 from Counts 2 and 3, the Court declined to consider the claim on

the merits, explaining:

> Conley's final argument is that trial counsel was deficient for not moving to sever the possession offenses from the delivery charge. This issue is solely directed to the possession offenses. Because we have already found counsel's performance deficient with regard to those convictions, and because those charges are to be dismissed, we need not address this claim of ineffective assistance of counsel.[2] *See Rackley v. State,* 2014 Ark. 39; *Wicoff v. State,* 321 Ark. 97, 900 S.W.2d 187 (1995); *Sheridan v. State,* 331 Ark. 1, 959 S.W.2d 29 (1998).

Conley II, 2014 Ark. 172, at *12-*13, 433 S.W.3d at 243.

17. The Court's disposition was repeated in the directive to the trial court in the mandate issued on May 7, 2014 [Exhibit B: Mandate in No. CR-13-21]. The Washington County Circuit Court entered its order complying with the Court's mandate more than a year later on August 27, 2015. [Exhibit C: Order in No. 2009-2046--6].

C. Conley's federal habeas action

18. Petitioner Conley filed his federal habeas petition, *pro se*, in No. 5:15-cv-00093-JLH-JTR on March 26. 2015, approximately five months prior to entry of the Washington County Circuit Court's Order dismissing Counts 2 and 3, as charged in the information.

19. In his federal petition filed *pro se* Conley again alleged ineffective assistance of trial counsel under the Sixth Amendment based on counsel's failure to move for severance of Count 1 and Counts 2 and 3 which were joined based on the theory of similarity of offenses charged.

20. Thereafter, the United States Magistrate Judge appointed undersigned counsel to represent Conley throughout the litigation of his federal habeas petition.

21. Petitioner, through appointed counsel, moved the District Court to hold the federal proceedings in abeyance in order to permit him to exhaust state remedies to obtain review of his ineffective assistance claim based on trial counsel's failure to move for severance. Petitioner Conley relied on *Rhines v. Weber*, 544 U.S. 269 (2005) in support of his argument for abeyance.

22. The Magistrate Judge granted Conley's motion and on appeal by Respondent Kelley, the District Court upheld the Magistrate Judge and ordered the federal proceedings held in abeyance to permit Conley to proceed with exhaustion efforts in the Arkansas state courts.

D. Conley's request to proceed on out-of-time petition for rehearing

23. After abeyance was ordered in the federal proceedings Conley, through undersigned counsel, filed a Motion to Recall Mandate and Motion for Leave to File Out-of-Time Petition for Rehearing in the Supreme Court in CR-13-21.

24. In his Petition for Rehearing Conley moved the Court grant rehearing with respect to its disposition of his claim that trial counsel rendered ineffective assistance in failing to move for severance of Count 1 and Counts 2 and 3. *Conley II*, 2014 Ark. 172, at *12-*13, 433 S.W.3d at 243. Conley argued that the dismissal ordered on Counts 2 and 3 did not warrant the Court's conclusion that its grant of relief on these counts essentially mooted his claim of prejudice from trial counsel's failure to move for severance prior to trial.

25. The Court denied the relief Conley requested in his motions seeking recall of the mandate and leave to file an out-of-time petition for rehearing. [Exhibit D: Formal Order issued by Arkansas Supreme Court in ASCt No. CR-13-21].

E. Petitioner's first state habeas corpus petition

26. Following dismissal of Petitioner Conley's motions to recall the mandate issued by the Court following its order granting relief on his Rule 37.1 petition and requesting leave to file an out-of-time petition for rehearing, Conley filed a petition for writ of habeas corpus pursuant to Article 2, Section 11 of the Arkansas Constitution and Arkansas Code Ann. § 16-112-101, *et seq.*,in the Jefferson County Circuit Court seeking relief from the extant Judgment and Commitment Order 27. Petitioner was incarcerated at the Tucker Maximum Unit located in Jefferson County at the time of filing his petition in the Jefferson County Circuit Court and was granted leave to proceed *in forma pauperis*.

28. In his petition, Conley argued that he was confined illegally because the Judgment and Commitment Order authorizing his incarceration continued to reflect his convictions on all three counts upon which he had been convicted and the 90- year sentence imposed by the trial court which had never been amended to delete the 30-year punishment imposed on Counts 2 and 3 which had been ordered to be served consecutively to the 60-year sentence on Count 1 by the trial court. The 30-year term was effectively vacated in *Conley II*, 2014 Ark. 172, at *9-*12, 433 S.W.3d at 241-43, when it ordered the convictions on Counts 2 and 3 dismissed.

29. Additionally, Conley argued that because the 60-year sentence on Count 1 had been assessed by the jury while it also considered the punishment to be imposed on Counts 2 and 3, with no limiting instruction from the trial court confining the jury's consideration of evidence offered on each count to its determination of punishment on that count, nothing precluded jurors from basing their punishment decision on Count 1 on evidence offered by the prosecution in support of its case on Count 2 or 3. Consequently, the sentence imposed on Count 1, which should have been based solely on evidence relating to that charge and Petitioner's prior convictions offered for enhancement, cannot be determined to be free from taint by the jury's consideration of the evidence adduced on Counts 2 and 3 which the Court held insufficient in Conley's appeal from the denial of Rule 37.1 relief.

30. Conley moved to have the extant Judgment and Commitment Order vacated and that he be resentenced by a jury on Count 1, limited to the evidence offered at trial in support of that count.

31. The Jefferson County Circuit Court dismissed Conley's petition, holding that because this Court had ordered Counts 2 and 3 dismissed, he was no longer in custody pursuant to those counts. It found:

> A threshold issue is whether or not this Court has jurisdiction. The petitioner is housed at the Tucker Maximum Security Unit located in Jefferson County. The ADC's current records do not reflect that the petitioner is incarcerated on the dismissed convictions for possession of a controlled substance (marijuana) and possession of drug paraphernalia convictions in 72CR-09-2046. When a petitioner is not incarcerated as a direct result of the conviction which is the bases (sic) of his habeas, the Circuit Court lacks jurisdiction to grant relief. *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007); Anderson v. State, 352 Ark. 36, 98 S.W.3d 403 (2003); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam). A habeas proceeding cannot be maintained with respect to a sentence that is no longer in effect. *Bradford v. State*, 3011 Ark. 494 (2011).

[*Conley v. Kelley*, No. 35C-17-349-5, Circuit Court of Jefferson County, Eleventh Judicial District West, *Order Dismissing Petition for Writ of Habeas Corpus*, at 3 (July 24, 2017)].

32. Petitioner Conley appealed the Jefferson County Circuit Court's order dismissing his habeas corpus petition to the Arkansas Supreme Court. *Conley v. Kelley*, No. CV-17-700.

33. Following the filing of Appellant Conley's opening brief, Appellee Kelley moved to dismiss the appeal, arguing that the transfer of Conley from the Tucker Maximum Security Unit located in Jefferson County to the Varner Unit located in Lincoln County divested the Jefferson County Circuit Court of jurisdiction over Conley. Based on precedent, ADC's transfer of Conley from an institution located in one county within the jurisdiction of the Eleventh Judicial District, Jefferson County, to another institution located in a different county, Lincoln County, deprived this Court of its appellate jurisdiction, Appellee Kelley argued that this Court no longer had jurisdiction over Conley's case on appeal. [Motion to Dismiss, or, in the Alternative, Motion for Extension of Time in which to File Brief, at 1-2].

34. Appellee Kelley alternatively sought a fifteen day extension of time to file her brief in response to Conley's opening brief in the event the Court denied her motion to dismiss. [Motion to Dismiss, or, in the Alternative, Motion for Extension of Time in which to File Brief, at 3].

35. The Supreme Court issued its order dismissing Conley's appeal on December 14, 2017, in Case No. CV-17-700, with three Justices voting to grant the extension of time to file Appellee's brief, as requested by the State in its dismissal motion. [Exhibit E: Order Dismissing Appeal in No. CV-17-700, entered by Arkansas Supreme Court on December 14, 2017].

F. Petitioner's state habeas corpus action herein

36. Based on Petitioner Conley's current confinement in the Varner Unit of the Arkansas Department of Correction under the direction of Responent Wendy Kelley, Director of the Department of Correction, Petitioner now brings his petition for writ of habeas corpus pursuant

to Article 2, Section 11 of the Arkansas Constitution and Arkansas Code Ann. § 16-112-101, *et seq.*

REASONS FOR GRANTING RELIEF

CLAIM FOR HABEAS RELIEF 1

1. PETITIONER CONLEY IS UNLAWFULLY CONFINED IN THE ARKANSAS DEPARTMENT OF CORRECTION UNDER THE EXTANT JUDGMENT AND COMMITMENT ORDER ENTERED BY THE WASHINGTON COUNTY CIRCUIT COURT IN THIS CASE THAT HAS BEEN RENDERED VOID OR FUNDAMENTALLY DEFECTIVE BASED ON THE REVERSAL AND DISMISSAL OF CONVICTIONS ON TWO OF THREE COUNTS ON WHICH CONLEY WAS TRIED AND SENTENCED BY THE COURT IN *CONLEY v. STATE*, 2014 Ark. 172, 433 S.W.3d 234 (2014).

37. Conley remains confined in the Arkansas Department of Correction under the Judgment and Commitment Order entered by the Washington County Circuit Court in Case No. 2009-2046-6, on August 31,2010. [Exhibit A: Judgment and Commitment Order, No. CR-2009-2046-1, Washington County Circuit Court].

38. The extant Judgment and Commitment Order reflects that Petitioner was convicted on Counts 1, 2, and 3 charged in the information and sentenced to serve 60 years on Count 1, 30 years concurrently on Counts 2 and 3 and consecutively to the 60 years on Count 1, and an additional term of 84 months on an unrelated delivery charge, to be served to the 90 years imposed on Counts 1 and the concurrent terms on Counts 2 and 3.

39. The Supreme Court did not order a new sentencing proceeding or entry of an Amended Judgment and Commitment Order in this case after granting relief by ordering dismissal of Counts 2 and 3 in Conley's appeal from the denial of Rule 37 relief by the Washington County Circuit Court. *Conley v. State v. State*, 2014 Ark. 172, 433 S.W.3d 234 (2014).

40. Petitioner is currently confined on a void or invalid judgment that remains in effect in his case, regardless of any action that the Arkansas Department of Correction may administratively take to reflect that the convictions and 30 term of imprisonment imposed on Counts 2 and 3 are no longer in effect with respect to his commitment under the jurisdiction and control of Respondent Kelley and the Department.

2. PETITIONER'S CONFINEMENT PURSUANT TO THE EXTANT JUDGMENT AND COMMITMENT ORDER IS UNLAWFUL WHERE HE REMAINS CONFINED ON THE 60-YEAR SENTENCE IMPOSED ON THE REMAINING COUNT ON WHICH HE WAS CONVICTED IN THE WASHINGTON COUNTY CIRCUIT COURT BY A JURY WHICH DETERMINED THE SENTENCE TO BE IMPOSED ON COUNT 1 OF THE INFORMATION WHILE CONSIDERING THE STATE'S EVIDENCE

ADDUCED IN SUPPORT OF COUNTS 2 AND 3 THAT WAS HELD INSUFFICIENT TO SUPPORT CONVICTION ON THOSE COUNTS

41. The extant Judgment and Commitment Order entered by the Washington County Circuit Court [Exhibit A], and still in effect, is no longer correct in light of the Arkansas Supreme Court's holding on Petitioner's appeal from denial of his Rule 37.1 petition for post-conviction relief. The Supreme Court voided the convictions on Counts 2 and 3 of the information upon which Petitioner had been conviction, thus vacating 30 years of the total sentence reflected in the Judgment and Commitment Order still in effect. The existing Judgment and Commitment Order includes a sentence now imposed in violation of the statutory authority of the Circuit Court as a consequence.

42. Further, the sentence imposed in the existing Judgment and Commitment Order, reflects an illegal sentence because the jury's sentence imposed on Count 1 of the information was based on consideration of the totality of criminal conduct including the conduct alleged to have been committed by Petitioner Conley in Counts 2 and 3. Jurors were instructed that they could consider all evidence adduced at trial in support of their sentencing decision. This would have included the evidence adduced by the State in support of the allegations included in Counts 2 and 3 of the information which was held insufficient to support Conley's convictions on those counts.

43. The trial court instructed Conley's jury as follows:

> THE COURT: Ladies and gentlemen, members of the jury, you have found Vernell Conley guilty of Delivery of a Controlled Substance Crack Cocaine, Possession of a Controlled Substance Marijuana, and Possession of Drug Paraphernalia. The law provides that after the jury returns a verdict or verdicts of guilt but before it sentences the State and the Defendant may present additional evidence to be considered by the jury in its deliberations on sentencing. In your deliberations on the sentences to be imposed you may consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial. You'll now hear evidence that you may consider in arriving at appropriate sentences. The State may call its first witness.

(Trial Transcript, at 203-04).

44. Once the Supreme Court ordered the convictions on the possession counts vacated, the Court's conclusion that the evidence supporting Counts 2 and 3 was insufficient would have supported a remand for resentencing.

45. Although the 60 year sentence imposed by the jury on Count 1 was within the statutory limits, it is impossible to determine whether jurors considered the evidence offered on the possession counts in setting punishment imposed on Count 1. *Backus v. State*, 253 Ark. 60, 62, 484 S.W.2d 515, 517 (1972); *Glaze v. State*, 2011 Ark. 464, *13, 385 S.W.3d 203, 212 (2011) (both holding statutorily authorized sentence nevertheless warrants relief where jury not properly

instructed on law). Here, by analogy, the record does not exclude the possibility that jurors considered evidence supporting Conley's guilt on the possession counts—ruled insufficient on appeal—in setting punishment in excess of the statutory minimum.

46. Here, the Washington County Circuit Court did not enter an Amended Judgment and Commitment Order based on the action taken by the Arkansas Supreme Court. Instead, it entered an order reflecting only the action taken by the Supreme Court in directing that the charges that were alleged in Counts 2 and 3 of the information be dismissed. The Circuit Court entered the required order. [Exhibit C].

47. The Circuit Court complied with the mandate of the Arkansas Supreme Court. [Exhibit B].

48. However, the existing Judgment and Commitment Order do not properly reflect the status of the case in light of the action of the Supreme Court in reversing and dismissing the convictions on Counts 2 and 3 of the information. The existing Judgment and Commitment Order have been rendered void by the reversal of the convictions on Counts 2 and 3.

49. Petitioner Conley was entitled to a new sentencing proceeding following the Supreme Court's decision to void his convictions on Counts 2 and 3 on which he was convicted so that the sentence determined by the trial jury would only reflect his guilt as to Count 1, which the Supreme Court held, by implication, was supported by sufficient evidence.

50. Because the Judgment and Commitment Order entered by the Washington County Circuit Court, which remains in effect, includes the 60-year term of imprisonment found by the trial jury on Count 1 after consideration of all evidence adduced at trial, including that found insufficient to support Petitioner Conley's convictions on Counts 2 and 3, Conley is unlawfully deprived of his liberty and entitled to relief by writ of habeas corpus.

> 3. PETITIONER CONLEY IS CONFINED UNDER THE JUDGMENT AND COMMITMENT ORDER OF THE WASHINGTON COUNTY CIRCUIT COURT WHICH HAS SUBSEQUENTLY BEEN RENDERED INVALID, OR VOID, BY THE ACTION OF THE ARKANSAS SUPREME COURT IN *CONLEY v. STATE*, 2014 Ark. 172, 433 S.W.3d 234 (2014) DISMISSING HIS CONVICTIONS ON COUNTS 2 AND 3 OF THE INFORMATION UPON WHICH HE WAS CONVICTED AT TRIAL, BUT WHICH REMAINS IN EFFECT, VIOLATING HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HIS SENTENCE ON COUNT 1 WAS DETERMINED BY THE JURY WHILE CONSIDERING EVIDENCE OFFERED BY THE PROSECUTION WITH RESPECT TO COUNTS 2 AND 3 WHICH WAS RULED INSUFFICIENT TO SUPPORT CONVICTION ON THOSE COUNTS.

51. Third, as a matter of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, Petitioner is entitled to relief from his confinement based on the

extant Judgment and Commitment Order entered by the Washington County Circuit Court in his case.

52. Petitioner relies by analogy on the Court's implicit recognition in *Custis v. United States*, 511 U.S. 485, 497 (1994) that a sentence relying on a prior conviction may be challenged once the prior conviction is set aside in the context of federal sentences that rely on prior convictions obtained in state proceedings.

53. Here, Petitioner's sentence on Count 1 has been impugned by the relief granted by the Arkansas Supreme Court in its post-conviction review of the convictions obtained on Counts 2 and 3. There is no way to assess from the trial record whether the trial jury factored evidence offered by the prosecution in support of its case on Counts 2 and 3, when determining the sentence to be imposed on Count 1, or in fact, all three counts. Instead, the trial court's instructions to the jury prior to their sentencing deliberations simply advised jurors that they could consider the evidence adduced at trial in determining what sentences would be appropriate.

54. Here, the jury determined that maximum sentences were appropriate on Counts 2 and 3, and that a substantial sentence—60 years—within the statutory range of 10 years to life on Count 1, was appropriate. (Trial Transcript, at 225).

55. It is impossible to determine from the record whether the jury's review of the evidence offered on Counts 2 and 3 influenced jurors to assess the 60-year sentence on the delivery of cocaine count which was left intact by the Court in its decision on appeal from denial of Rule 37 relief.

CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing argument and supporting evidence from the record, Petitioner Conley moves the Court hold the Judgment and Commitment entered upon the trial jury's conviction void and without legal effect and direct the Circuit Court of Washington County to order the extant Order vacated; and further, that the Washington County Circuit Court proceed to conduct a new sentencing hearing limited to evidence supporting Petitioner's conviction on Count 1 of the information, charging a single act of delivery of cocaine, then to enter an Amended Judgment and Commitment Order reflecting the jury's sentence imposed on this single count.

Respectfully submitted this 26th day of January, 2018.

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Ex. G: Out-of-Time Petition for Rehearing, *Conley v. Arkansas*, No. CR-13-21 (Arkansas Supreme Court), TENDERED, April 7, 2017, On Remand from the United States District Court, Eastern District of Arkansas

NO. CR-13-21

IN THE SUPREME COURT OF ARKANSAS

VERNELL R. CONLEY,
Appellant/Petitioner,

v.

THE STATE OF ARKANSAS,
Appellee/Respondent.

OUT-OF-TIME PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT:

APPELLANT/PETITIONER VERNELL R. CONLEY, through his counsel of record, J. THOMAS SULLIVAN, by appointment of the United States District Court for the Eastern District of Arkansas, respectfully files his Out-of-Time Petitioner for Rehearing pursuant to the order of this Court granting Leave to File and Rules 2-3, Petitions for Rehearing, and 5-3, Mandate, Rules of the Supreme Court and Court of Appeals. Petitioner argues the following:

I. THE COURT SHOULD GRANT REHEARING TO CONSIDER APPELLANT'S ARGUMENT ON APPEAL THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO SEVER COUNT 1 FROM COUNTS 2 AND 3 THAT WERE JOINED FOR TRIAL BASED ON SIMILARITY OF OFFENSES.

The Court ordered relief from the convictions on Counts 2 and 3, which charged Conley with possession of marijuana and possession of drug paraphernalia, based on trial counsel's ineffective assistance in failing to properly preserve meritorious challenges to the sufficiency of the evidence offered by the State on these counts charged. *Conley v. State*, 2014 Ark. 172, at *12, 433 S.W.3d 234, 243 (2014). However, based on its disposition on the challenges related to Counts 2 and 3, the Court concluded that it was unnecessary to address the claim Conley presented on appeal based on trial counsel's ineffectiveness based on counsel's failure to move for severance of Count 1, which alleged delivery of cocaine on an unrelated occasion, from the two possession counts. The Court explained:

> Conley's final argument is that trial counsel was deficient for not moving to sever the possession offenses from the delivery charge. This issue is solely directed to the possession offenses. Because we have already found counsel's performance deficient with regard to those convictions, and because those charges are to be dismissed, we need not address this claim of ineffective assistance of counsel.[2] *See Rackley v. State*, 2014 Ark. 39; *Wicoff v. State*, 321 Ark. 97, 900 S.W.2d 187 (1995); *Sheridan v. State*, 331 Ark. 1, 959 S.W.2d 29 (1998).

2014 Ark. 172, at *12-*13, 433 S.W.3d at 243. The decisions cited by the Court are distinguishable based on the facts from the instant case. In each, the Court ordered a new trial and concluded that this relief did not required consideration of ineffective assistance of counsel. *Rackley*, 2014 Ark. 39, at *5; *Wicoff*, 321 Ark. at 102-03, 900 S.W.2d at 190; and *Sheridan*, 331 Ark. at 6, 959 S.W.2d at 32. In

Rackley and *Sheridan*, moreover, the finding of trial counsel's ineffectiveness was based on representation of conflicting interests of co-defendants tainted all proceedings in the trial court.

In Conley's case, however, the IAC claim relating to counsel's failure to move for severance was not rendered moot by the Court's disposition on Counts 2 and 3 because it left intact his conviction and sentence on Count 1. The Court seemingly addressed this situation by finding that: "This issue is solely directed to the possession offenses." Yet in his appellate brief, Conley did not limit his plea for relief based on counsel's failure to protect his right to sever the offenses charged based solely on the possession charges. His point of error stated:

> III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEVER COUNT ONE FROM COUNTS TWO AND THREE.

[Brief of Appellant, Arg. 7]. Further, appellate counsel expressly argued:

> This Court should reverse and *remand for a new trial on all three counts where Vernell Conley can receive a fair trial.* At a minimum, Vernell Conley should receive a new trial on counts two and three.

[Brief of Appellant, Arg. 9, emphasis added]. The Court gave Conley even greater relief than the new trial he pleaded for as to each count in vacating and dismissing his convictions on Counts 2 and 3. It failed to afford Conley any relief as to Count 1, arguably finding that counsel's failure to properly frame his directed verdict motion as to insufficient evidence on Count 1 did not result in probable prejudice to Conley since the evidence was sufficient to convict.

The Court in *Turner v. State*, 2011 Ark. 111, 280 S.W.3d 400, explained the problem posed by the joinder of offenses based on their similarity:

> [T]he liberal joinder rule is accompanied by a limiting severance rule that recognizes the grave risk of prejudice from joint disposition of unrelated charges and, accordingly, provides a defendant with an absolute right to a severance of offenses joined solely on the ground that they are of same or similar character.

2011 Ark. 111, at *4-*5, 380 S.W.3d at 403; *Clay v. State*, 318 Ark. at 553, 559, 886 S.W.2d at 610, 613.

Conley relied on *Teas v. State*, 266 Ark. 572, 573, 587 S.W.2d 28, 29 (1979), and *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995), in his Brief, at 7-8, in arguing that the offenses were improperly joined despite the fact that both were drug offenses, as here. As Justice George Rose Smith explained, concurring in *Teas*: "In drug cases the State cannot ordinarily prove that the accused sold drugs on one occasion by proving that he sold them on other occasions." 266 Ark. at 575, 587 S.W.2d at 30. Here, as in *Teas* and *Bunn*, there was no evidence that the two occurrences giving rise to the allegations in Counts 1 and, then, 2 and 3, arose from common factual scenario and severance was mandatory, upon timely motion.

Had trial counsel moved for severance, there was a reasonable probability that the trial court would have correctly applied Arkansas law on joinder and severance of charges and Conley would have been afforded separate trials. The

juries would not have heard evidence of the unrelated offenses when considering his guilt on the charge or charges properly before them in the separate trials.

Because of the impossibility of determining whether improper joinder has resulted in actual prejudice to the defendant based on "an unfair disadvantage, due to confusion of law and evidence by the trier of fact and the 'smear' effect such confusion can produce," *Turner*, at *4, 380 S.W.3d at 402-403, the defendant moving for severance is not required to demonstrate prejudice or probable prejudice in order to obtain relief from the joinder under state law. Instead, the right to severance is deemed an "absolute right." *Passley*, 323 Ark. at 308, 915 S.W.2d at 251; *Clay v. State*, 318 Ark. at 553, 886 S.W.2d at 610.

The *Clay* Court specifically addressed the potential prejudice inherent in joinder of drug trafficking offenses:

> In drug cases the State cannot ordinarily prove that the accused sold drugs on one occasion by proving that he sold them on other occasions. *Rios v. State*, 262 Ark. 407, 557 S.W.2d 198 (1977); *Sweatt v. State*, 251 Ark. 650, 473 S.W.2d 913 (1971). Such proof of other sales, as we pointed out in *Sweatt*, would merely show that the accused had dealt in drugs before and hence was likely to do so again.
>
> *Clay*, 318 Ark. at 554–55, 886 S.W.2d at 611 (quoting *Teas v. State*, 266 Ark. 572, 575, 587 S.W.2d 28, 30 (1979) (Smith J., concurring)).

The "absolute right" to severance of offenses joined based on their similarity essentially translates to a structural error claim in which prejudice is presumed because of the difficulty or impossibility of establishing prejudice as a threshold

for obtaining relief from a conviction in which the structural error occurred. *Teater v. State*, 89 Ark. App. 215, 201 S.W.3d 442 (2005) (holding trial court refusal to give defensive instruction raised by evidence subject to structural error analysis because record does not reveal whether jurors would have returned different verdict on evidence presented if properly instructed).

Conley concedes that the evidence was sufficient, on the record, to support the jury's conviction on the delivery count, as the Court of Appeals recitation of his insufficiency argument implicitly shows, *Conley v. State*, 2011 Ark. 597, *1-*2, 385 S.W.3d 875, 876. The opinion shows that insufficiency was argued aggressively on the direct appeal:

> Conley argues that the evidence introduced at trial to show that he sold crack cocaine to an undercover officer was inaccurate, inconsistent, and unreliable to the point that it could not compel a conclusion, without resorting to speculation and conjecture, that he committed the offense of delivery of a controlled substance. First, he challenges the evidence as to his identity. He points out that the controlled buy took place on a dark, rainy night; that none of the detectives had met him in person prior to the buy; and that one officer incorrectly referred to him as "Vernon" minutes prior to the buy. He also argues that none of the detectives were able to get a make or model of the car he allegedly occupied or a description of his clothing or general appearance. Conley next complains about the audio recording of the controlled buy, arguing that the suspect's voice on the recording was almost entirely inaudible and that the audible parts contained no references to drugs or illegal activities. He argues that the jury was left with the detectives' interpretations of what the suspect was actually saying and the meaning of code words. Conley also argues that no money was found on him or during the search of his home; that he was never found to be in possession of crack

> cocaine; and that there was no testimony from other witnesses that he was known to sell crack cocaine.

Id. at *4, 385 S.W.3d at 877-78. The State argued that these arguments had not been made at trial and the court declined to consider his insufficient challenge on the merits because of trial counsel's failure to preserve error with a timely and correct motion for directed verdict. *Id.*at *4-*5, 385 S.W.3d at 878. Consequently, he did not argue counsel's failure to preserve error on this count in this appeal.

What is clear, however, that the general principle that the right to severance is *absolute* pertains to the viability of the ineffectiveness claim predicated on counsel's failure to move to sever the counts. Despite the sufficiency of the evidence, there is no way to assess whether jurors considered the insufficient evidence offered on the possession counts in finding guilt on the delivery count.

Having found not only that trial counsel was ineffective in failing to preserve error on the issue of insufficiency of the evidence supporting Conley's convictions on Counts 2 and 3, and further, ordering those possession convictions vacated, review on the merits of Conley's ineffective assistance claim with respect to the failure to move for severance is not only mooted by the Court's disposition on the two possession counts. The Court's disposition on the possession counts makes review of the ineffectiveness claim based on the failure to move for severance more important in terms of enforcing Conley's procedural rights in this case. Review on rehearing is warranted.

II. THE COURT SHOULD GRANT REHEARING AND REMAND THIS CASE FOR A NEW SENTENCING HEARING BEFORE A JURY ON COUNT 1 OF THE INFORMATION.

Regardless of whether the ineffective assistance claim based on trial counsel's failure to move for severance has been rendered moot by the Court's action in vacating Conley's convictions on the possession counts, the Court's disposition leaves unresolved the question of whether the case should be remanded for resentencing on the remaining conviction on Count 1, the delivery count. Conley's jury imposed punishment based on the evidence presented with respect to both the delivery and possession counts, in response to the trial court's instruction:

> THE COURT: Ladies and gentlemen, members of the jury, you have found Vernell Conley guilty of Delivery of a Controlled Substance Crack Cocaine, Possession of a Controlled Substance Marijuana, and Possession of Drug Paraphernalia. The law provides that after the jury returns a verdict or verdicts of guilt but before it sentences the State and the Defendant may present additional evidence to be considered by the jury in its deliberations on sentencing. In your deliberations on the sentences to be imposed you may consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial. You'll now hear evidence that you may consider in arriving at appropriate sentences. The State may call its first witness.

(Trial Transcript, at 203-04). The issue presented here arose as a result of the Court's vacating Conley's convictions on Counts 2 and 3, voiding the 15 and 30 year sentences, respectively imposed on the marijuana possession and drug paraphernalia possession counts. (Trial Transcript, at 229-30).

It is not possible to determine from the trial record whether jurors considered the State's evidence adduced on the possession counts when imposing the 60 year sentence on Count 1, but since the Court has held the possession evidence was insufficient to support conviction, the jury's consideration of that evidence for any purpose in assessing punishment on the delivery count would have been improper. The trial court's instruction, moreover, did not direct jurors to consider only evidence relating to the individual counts in arriving at a sentence as to each count. Thus, jurors were presumably free to consider the possession evidence in imposing the 60 year term on the delivery conviction. Even if instructed to segregate their consideration of the evidence as to the separate counts, the record cannot resolve the issue of whether the sentence on Count 1 was influenced by the other, insufficient evidence offered on Counts 2 and 3, upon which they had convicted.

The 60 year sentence imposed was within the statutory range, between the low end—10 years—and maximum—life. Yet, that fact does not answer the question of whether the insufficient evidence on the possession charges influenced jurors in their decision to impose the 60 year term. In an analogous situation, where a jury imposes a sentence within the statutory range, but was improperly instructed, this Court has held that the sentence imposed is presumably tainted and unreliable because the record cannot disclose the jury's reasoning, in fact, for imposing a sentence in excess of the minimum. *Backus v. State*, 253 Ark. 60, 62,

484 S.W.2d 515, 517 (1972); *Glaze v. State*, 2011 Ark. 464, *13, 385 S.W.3d 203, 212 (2011); and *Crosby v. State*, 154 Ark. 20, 241 S.W. 380, 382 (1922):

> Where the effect of an erroneous instruction or ruling of the trial court might result in prejudice, the rule is that the judgment must be reversed on account of such ruling, unless it affirmatively appears that there was no prejudice. No such showing is reflected by this record.

Because the record does not affirmatively show that there was no prejudice with respect to the jury's consideration of all evidence adduced at trial in imposing the 60 year term of imprisonment on Count 1, the Court should either modify the sentence to the minimum term of years or remand for resentencing.

CONCLUSION

Based on the foregoing argument, Appellant Conley respectfully moves the Court grant his Out-of-Time Petition for rehearing and on rehearing, order his conviction on Count 1 reversed and remand for new trial, or alternatively, remand this cause for resentencing on Count 1.

Respectfully submitted this 7th day of April, 2017.

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Ex. H: Formal Order, *Conley v. Arkansas*, No. CR-13-21 (Arkansas Supreme Court), Denying Motion to Recall Mandate and for Leave to File Out-of-Time Petition for Rehearing, April 27, 2017, On Remand from the United States District Court, Eastern District of Arkansas

FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 27, 2017, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-13-21

VERNELL R. CONLEY APPELLANT

V. APPEAL FROM WASHINGTON COUNTY CIRCUIT COURT - 72CR-09-2046

STATE OF ARKANSAS APPELLEE

MOTION OF J. THOMAS SULLIVAN FOR LEAVE TO APPEAR AS COUNSEL ON MOTION TO RECALL THE MANDATE IS GRANTED. APPELLANT'S MOTION TO RECALL THE MANDATE AND FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING ON REMAND FROM THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS IS DENIED.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 27TH DAY OF APRIL, 2017.

Stacy Pectol

CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK

CC: J. THOMAS SULLIVAN
VADA BERGER, ASSISTANT ATTORNEY GENERAL
HONORABLE MARK LINDSAY, CIRCUIT JUDGE

Ex. I: Excerpt from Appellant's Opening Brief, *Conley v. Kelley*, No. CV-18-559 (Arkansas Supreme Court)

4. PETITIONER CONLEY IS CONFINED UNDER THE JUDGMENT AND COMMITMENT ORDER OF THE WASHINGTON COUNTY CIRCUIT COURT WHICH HAS SUBSEQUENTLY BEEN RENDERED INVALID, OR VOID, BY THE ACTION OF THE ARKANSAS SUPREME COURT IN *CONLEY v. STATE*, 2014 Ark. 172, 433 S.W.3d 234 DISMISSING HIS CONVICTIONS ON COUNTS 2 AND 3 OF THE INFORMATION UPON WHICH HE WAS CONVICTED AT TRIAL, BUT WHICH REMAINS IN EFFECT, VIOLATING HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE HIS SENTENCE ON COUNT 1 WAS DETERMINED BY THE JURY WHILE CONSIDERING EVIDENCE OFFERED BY THE PROSECUTION WITH RESPECT TO COUNTS 2 AND 3 WHICH WAS RULED INSUFFICIENT TO SUPPORT CONVICTION ON THOSE COUNTS.

Conley's right to due process of law, protected by the Fourteenth Amendment to the United States Constitution, has been violated by his continuing incarceration pursuant to the extant Judgment and Commitment Order entered by the Washington County Circuit Court in his case. The sentence under which he is incarcerated has been impugned as a result of the action of this Court in *Conley*, which has rendered the recitations in the judgment referring to his convictions on Counts 2 and 3 on which he was convicted, was essentially voided once the convictions on those counts were ordered dismissed by the Court.

Because Conley was never re-sentenced on the evidence supporting conviction on Count 1, which was upheld by the court of appeals on direct appeal and this Court in the appeal from denial of Rule 37 relief, he is incarcerated on a judgment that imposes a sentence resting on evidence admitted at trial on all three

counts on which he stood trial before the jury, including evidence found to be legally-insufficient to support conviction on Counts 2 and 3. Conley was entitled to re-sentencing on Count 1, but has never been afforded the relief to which he was entitled as a matter of law as he has argued in Point 3 in this appeal.

The State argued that Conley's claim in his petition, [ADD. 20-22, ¶¶ 51-55; R/21-23], "appears to be a repackaging of his second ground for relief," [Memorandum Concerning Probable Cause, ADD. 44-45; R/54-55], which is not cognizable in habeas corpus because it constitutes a "due process" claim. The State relies on *Clay v. State*, 2017 Ark. 294, 528 S.W.3d 836, in support of its conclusion that due process claims are not cognizable in habeas corpus. But in *Clay*, the due process claim actually addressed the sufficiency of the charging instrument and the petitioner's argument that the evidence failed on the issue of intent, as the Court explained:

> Clay reargues, under the guise of a due-process violation, that the intention to commit a robbery was never formed before the beginning of the fatal assault. As stated, due-process claims do not implicate the facial validity of the judgment or the jurisdiction of the trial court. *See Philyaw*, 2015 Ark. 465, 477 S.W.3d 503. Although claims of a defective information that raise a jurisdictional issue—such as those that raise a claim of an illegal sentence—are cognizable in a habeas proceeding, allegations of a defective information are not generally considered to be jurisdictional and are treated as trial error.

Clay, 2017 Ark. 294, at *3-*4, 528 S.W.3d at 838-39. Similarly, in *Philyaw*, cited in *Clay*, the Court found the judgment facially valid in correctly reflecting the offense on which the petitioner had been conviction, then explaining:

> Furthermore, to the extent that Philyaw takes issue with the admission of evidence or improper argument, claiming that it may have contributed to his sentence of life, such a challenge is not cognizable in a habeas proceeding.

Philyaw v. State, 2015 Ark. 465, at *5, 477 S.W.3d 503, 506. Neither decision addresses the question of whether the trial court's jurisdiction in imposing a sentence of sixty-years on Count 1 based on evidence adduced at trial which ultimately included evidence held legally-insufficient on the other two counts was proper. The trial court's jurisdiction was, in fact, impugned by the finding of evidentiary insufficiency on Counts 2 and 3 in the Rule 37 appeal and this action must have effectively served to divest the trial court of jurisdiction to leave its sentence on Count 1 in effect. The *Clay* Court noted the petitioner's reliance on *Cole v. Arkansas*, 333 U.S. 196, 201 (1948), in which the Court observed:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

The logic of *Cole* applies to Conley's case precisely because he has been sentenced to serve a prison term on evidence subsequently held legally-insufficient to support his conviction on a charge that *was* made, and likely influenced the jury's sentencing decision on the single Count on which the evidence was deemed

sufficient to support his conviction. By analogy, the Court in *Custis v. United States*, 511 U.S. 485, 497 (1994) held that a sentence relying on a prior conviction may be challenged once the prior conviction is set aside in the context of federal sentences that rely on prior convictions obtained in state proceedings.

As to the argument that Conley "repackaged" his second claim to allege a due process violation, a single set of facts often raises multiple claims, or multiple sources of protection that may be implicated in a case. Thus, in some cases, both federal and state constitutional issues arise from a single set of facts, as in the *Sullivan* litigation: *State v. Sullivan*, 340 Ark. 315, 11 S.W.3d 526, 527-28 (2000) *supplemental opinion on denial of rehearing*, 16 S.W.3d 551 (Ark. 2000); *reversed by Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001); and *State v. Sullivan*, 348 Ark. 647, 665-66, 74 S.W.3d 215, 218-23 (Ark. 2002) (on remand from *Arkansas v. Sullivan*, upholding suppression of evidence under state constitution). Similarly, in this litigation, Conley prevailed on his ineffective assistance of counsel claim in his Rule 37 appeal, while losing on his claim of insufficient evidence on Counts 2 and 3 in his direct appeal. Both arose from the same evidence ultimately found to be legally insufficient at trial. In a real sense, the ineffective assistance claim was "repackaged," with the meritorious claim of ineffective assistance serving to meet the second *Strickland* prong necessary to demonstrate the Sixth Amendment violation, while insufficient evidence claims are based on due process violations..

Moreover, in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Court held that where the jury sentenced the defendant to a mandatory prison term under the state's habitual offender statute and the mandatory sentencing statute was later held to be unconstitutional, in subsequently affirming the sentence imposed under the constitutional statute, rather than re-sentencing, "the State deprived the petitioner of his liberty without due process of law." *Id.* at 347. Arkansas law also provides for jury sentencing and the failure to afford Conley a new sentencing proceeding, restricting the jury's consideration to evidence legally sufficient to support his conviction on Count 1 effectively deprived him of a fair sentencing procedure.

Conley's due process claim in this instance reflects the consequence of the Court's original failure to order a remand for re-sentencing. Since he had a right under state law to be sentenced on evidence supporting his conviction, he was denied the right to a fair sentencing verdict where the jury was instructed by the trial court that it could "consider both the evidence presented in the first stage of the trial where you rendered verdicts on guilt and the evidence to be presented in this part of the trial." [ADD. 89-90; Tr. 203-04].

Conley's continued confinement under an order that reflects a sentence based on an instruction subsequently rendered incorrect by the Court's action in ordering relief in his Rule 37 appeal violates his right to due process under the Fourteenth Amendment.