

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LEMUEL WHITESIDE
PETITIONER,

v.
THE STATE OF ARKANSAS
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

J. THOMAS SULLIVAN
MEMBER, BAR OF THE
SUPREME COURT
1122 WEST CAPITOL
LITTLE ROCK, ARKANSAS 72201
501/376-6280
sullivanatty@gmail.com

COUNSEL OF RECORD FOR PETITIONER,
LEMUEL WHITESIDE

QUESTION PRESENTED FOR REVIEW

WHETHER, FOLLOWING THIS COURT'S DECISION IN *GRAHAM v. FLORIDA*, 560 U.S. 48, 79 (2010), THE TRIAL COURT ERRED IN INSTRUCTING PETITIONER WHITESIDE'S TRIAL JURY THAT HE COULD BE SENTENCED TO A TERM OF LIFE IMPRISONMENT FOR A NON-HOMICIDE CRIME, AGGRAVATED ROBBERY, COMMITTED AS THE UNDERLYING FELONY OF A CAPITAL FELONY MURDER CHARGE ON WHICH HE WAS SENTENCED TO A MANDATORY SENTENCE OF LIFE IMPRISONMENT, THE OFFENSES HAVING BEEN COMMITTED WHILE HE WAS A JUVENILE.

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OPINION BELOW

Petitioner Whiteside appealed the sentence imposed by the Pulaski County Circuit Court to the Arkansas Supreme Court, which affirmed in *Whiteside v. State*, 2019 Ark. 349, 588 S.W.3d 720 on the ground that the court lacked jurisdiction to consider his claim on the merits. A copy of the opinion is appended as Exhibit A. The court denied his petition for rehearing in an order attached as Exhibit B.

JURISDICTION

Whiteside invokes the Court's jurisdiction pursuant to 28 U.S.C. § 1257(a), authorizing review of the decision rendered by the Arkansas Supreme Court upholding denial of his Motion for New Trial of Other Relief. The court denied rehearing on January 23, 2020. This petition is timely if filed on or before April 22, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

Petitioner Lemuel Whiteside again petitions this Court for review of disposition of claims arising from sentences imposed on his convictions for capital felony murder and the underlying felony of aggravated robbery. Because the procedural history of the case is somewhat complex, the following summary of decisions may provide clarification of the posture of the current claim:

- *Whiteside v. State*, 383 S.W.3d 859 (Ark. 2010), affirming conviction and sentence life imprisonment for capital felony murder on direct appeal;
- *Whiteside v. Arkansas*, 567 U.S. 850 (2012), *granting certiorari, vacating judgment and remanding* for reconsideration in light of *Miller v. Alabama*, 567 U.S. 460 (2012);
- *Whiteside v. State*, 426 S.W. 3d 917 (Ark. 2013), *opinion on remand* from *Whiteside v. Arkansas*, 567 U.S. 850 (2012);
- *Whiteside v. Arkansas*, 513 U.S. 922 (2013), *cert. denied*;
- *Whiteside v. State*. 588 S.W.3d 720 (Ark. 2019), *affirming denial of motion for new trial*.

A. *Summary of material facts*

Whiteside and another juvenile, Cambrin Barnes, were charged with capital felony murder and the underlying felony aggravated robbery in the attempted robbery of James London. Whiteside's girlfriend, Loretta Talley, drove Whiteside, Barnes, and another young woman, Cynthia Arrington, who was not involved in the offenses, to Whiteside's mother's house. Their purpose was to

facilitate the robbery of James London, who supposedly had a substantial sum of money from his tax return with him at the time.

After two failed attempts, Whiteside and Barnes approached the residence in their final effort to induce London to leave the residence where they would rob him. Arrington testified for the prosecution that she observed Whiteside hand a handgun to Barnes prior to the final robbery attempt. Whiteside entered the residence and London left with him. Once outside, Barnes confronted London with the weapon and demanded the money. When London lunged toward Barnes, Barnes fired a single, fatal shot. Barnes fled the scene in the car driven by Talley. *Whiteside v. State*, 383 S.W.3d 859, 862-63 (Ark. 2010).

Whiteside returned to the victim and testified at trial that he attempted to perform CPR on London after a 9-1-1- call had been made. Barnes entered a plea of guilty to the charge of capital murder and was sentenced to serve a term of forty (40) years in the Arkansas Department of Correction pursuant to a plea agreement. The aggravated robbery charge was dismissed. *See, Whiteside v. State*, 426 S.W. 3d 917, 918 (Ark. 2013), *opinion on remand from Whiteside v. Arkansas*, 567 U.S. 850 (2012).

Whiteside declined a plea offer, was tried before a jury, and convicted of both the underlying offense and capital felony murder. The jury also found that he used a firearm in the commission of the offenses charged. He was sentenced to the

mandatory life sentence on the capital felony murder as a matter of law and the trial jury set his punishment on the aggravated robbery charge at thirty-five (35) years and fifteen (15) years on the firearm enhancement count. The Court imposed the firearm sentence to be served consecutively to the 35 year sentence on the aggravated robbery count for a total term of confinement of 50 years, and ordered the 50 year sentence to be served concurrently with the mandatory life sentence. *Id.* at 919.

A. *Procedural history of the litigation*

On direct appeal, Whiteside contested his capital felony murder conviction and the life sentence imposed on that charge. The Arkansas Supreme Court rejected his arguments and affirmed the judgment and sentence. *Whiteside*, 383 S.W.3d at 868. Thereafter, the Court granted his petition for a writ of certiorari, vacated the judgment, and remanded for reconsideration in light of *Miller v. Alabama*, 567 U.S. 460 (2012). *Whiteside v. Arkansas*, 567 U.S. 850 (2012).

On remand, the Arkansas Supreme Court ordered re-briefing. In his argument to the state court, Whiteside argued that the court should remand the cause for resentencing, consistent with the Court's decision in *Miller, supra*. He also argued that because the capital felony murder charge arose from the same incident on which the aggravated robbery count was based, the court should order resentencing on both offenses to afford him a fair sentencing verdict.

Resentencing on both charges was necessary, he argued, in order for a single jury to determine the proper punishment for his involvement in the entire criminal episode, rather than permitting two juries to set punishment for the capital and underlying felonies.

The state supreme court rejected this argument, holding that the two offenses were to be considered as separate offenses. Because the conviction and sentence on the aggravated robbery had not been disturbed based on this Court's application of *Miller*, the court held that resentencing on the robbery count was not required. *Whiteside v. State*, 426 S.W. 3d 917, 921-22 (Ark. 2013). It remanded for resentencing on the capital felony murder charge only, expressly limiting the trial court's authority to preclude resentencing on the aggravated robbery. *Id.* Whiteside unsuccessfully petitioned the Court to review his argument with respect to the resentencing. *Whiteside v. Arkansas*, 513 U.S. 922 (2013), *cert. denied*.

On resentencing, the trial court imposed a sentence of ten years in the Arkansas Department of Correction on the capital murder count and ordered this sentence to be served concurrently with the 50-year sentence imposed by the jury on the aggravated robbery charge, enhanced by the 15-year term for Whiteside's use of a firearm in the attempted commission of the robbery. The sentencing order includes the following reference to the agreed disposition:

Therefore, by agreement of all parties, this court hereby amends, *no pro tunc*, Mr. Whiteside's original sentence of life imprisonment without the possibility of parole to a sentence of ten (10) years in the Arkansas Department of Correction. . . . *It is further agreed that Mr. Whiteside's acceptance of this agreement shall not act as a waiver to any appellate rights or to collaterally attack his prior convictions in this case.*

[APP. EXHIBIT C: Nunc Pro Tunc Amended Sentencing Order] (emphasis added).

Following the resentencing, Whiteside filed a Motion for New Trial or Other Relief. [APP. EXHIBIT D]. The ten year sentence rendered the 50-year concurrent sentence on the aggravated robbery prejudicial. When Whiteside was faced with the mandatorily- imposed sentence of life imprisonment without possibility of parole, the concurrent 50-year sentence did not result in any actual prejudice because he would never be eligible for parole or discharge, even assuming he completed serving the sentence on the aggravated robbery count.

C. Preservation of the federal constitutional claim

In moving for new trial, Whiteside argued that the trial court committed constitutional error in instructing jurors that they could consider and impose a sentence of life imprisonment on the aggravated robbery count based on the decision in *Graham v. Florida*, 560 U.S. 48, 79 (2010). Throughout the proceedings in the trial court, trial counsel had persistently objected to the imposition of the mandatory life sentence prescribed by state law for commission

of capital murder, arguing *Graham* by analogy and effectively anticipating the decision in *Miller v. Alabama*. For example, in specifically objecting to the jury instruction on punishment for capital murder trial counsel argued:

MR. KRAUSE: I've been handed by the bailiff now, have the following standard punishment instruction on capital murder. (As read), "You have found Lemuel Whiteside guilty of capital murder. Capital murder is punishable by imprisonment in the Department of Corrections for life without the possibility of parole."

Your Honor, my objection to that instruction is that it does violate the holding of *Graham against Florida* as well as the 8th Amendment of the United States Constitution's clause against cruel and unusual punishment as it applies to this state by, of course, virtue of the 14th Amendment as well as our state's constitutional prohibition against the same, that is cruel and unusual punishment.

For those reasons, I would ask for that to be disallowed.

THE COURT: All right, your objection is overruled, Counsel.

(Trial Transcript, 445-46).¹

Counsel also objected to the imposition of a life sentence for the underlying felony of aggravated robbery, pointing out that a life sentence operates to deny an Arkansas defendant the possibility of parole. Counsel argued that under *Graham*, Whiteside could not be sentenced to life in prison because the sentence would constitute cruel and unusual punishment. (Trial Transcript, 435-39). Counsel

¹ Note that in Arkansas practice, the transcript is included with the Record on Appeal so that the transcript pages may also bear a Record page number that will differ from the transcript page number. Petitioner's counsel uses the transcript page numbers in this petition

reiterated his argument in objecting to the punishment instruction regarding parole eligibility upon conviction for aggravated robbery for the defendant sentenced to term of ten to 40 years that also referenced the life sentence option. (Trial Transcript, 439-40).

Counsel persisted in his objection to the punishment instruction the trial court intended to give to the jury, again on the ground that the aggravated robbery sentencing instruction authorizing jurors to impose a life sentence would violate *Graham* and the Eighth Amendment. (Trial Transcript, 441). The trial court overruled the objection. (Trial Transcript, 441-42).

The trial court overruled defense counsel's objection to the punishment instruction on the aggravated robbery count, agreeing with the State that *Graham* did not apply in the circumstance in which the case also involved commission of a homicide. (Trial Transcript, 436-37).

Finally, trial counsel renewed his objection when presented with the final instructions before the jury was instructed by the court, arguing:

MR. KRAUSE: Okay. Same objection. And let me clarify regarding all of these instructions that include giving the potential to this jury of sentencing life without the possibility of parole, *or life sentence, as it applies in the aggravated robbery.*

Again, my objection is not so much to the instructions per se, but if it is in fact prohibited by law to sentence someone in Mr. Whiteside's shoes to life in the Arkansas Department of Correction without the possibility of parole or life, then by instructing the jury that they have that option is essentially combing a bald head. So

that's essentially my objection to them. *We are instructing them on options that are expressly forbidden as sentencing options. Yet it would be to the actual pronouncement of that sentence that I would ultimately object to and have to.*

THE COURT: All right. Thank you, Counsel.

(Trial Transcript, 447-48, emphasis added).

The trial court then instructed the jury as follows:

**REQUESTED INSTRUCTION NO. 1, CLASS Y FELONY
CAPITAL MURDER**

You have found Lemuel Whiteside guilty of capital murder. Capital murder is punishable by imprisonment in the Department of Correction for life without the possibility of parole.

REQUESTED INSTRUCTION NO. 2, AMCI 2d 9101

You have found Lemuel Whiteside guilty of aggravated robbery. Aggravated robbery is punishable by imprisonment in the Department of Corrections for not less than ten years and not more than 40 years, or for life.

REQUESTED INSTRUCTION NO. 3, AMCI 2d 9201

You have found Lemuel Whiteside guilty of the offense of aggravated robbery and have further found that Lemuel Whiteside employed a firearm as a means of committing the offense. Employing a firearm as a means of committing aggravated robbery is punishable by imprisonment in the Arkansas Department of Correction for an extended term not to exceed 15 years. The term of imprisonment for employing a firearm is in addition to any term of imprisonment for the offense of aggravated robbery.

.....

REQUESTED INSTRUCTION NO. 4, AMCI 2d 9404

In your deliberations on the sentence to be imposed, you may

consider the possibility that Lemuel Whiteside will be paroled. Eligibility for parole is as follows:

Aggravated robbery is punishable by life imprisonment or a term of years. Persons under sentence of life imprisonment are not eligible for parole. If you sentence Lemuel Whiteside to imprisonment for a term of years, he will be eligible for parole after he serves seventy percent (70%) of the term you impose. This percentage of imprisonment will not be reduced by the earning of meritorious good time during his imprisonment.

REQUESTED INSTRUCTION NO. 5, AMCI 2d 9111

After hearing arguments of counsel, you will again retire to consider and complete the following verdict forms:

We, the Jury, having found Lemuel Whiteside guilty of capital murder fix his sentence at a term of life without possibility of parole in the Arkansas Department of Corrections, to be signed by the foreperson.

And, We, the Jury, having found Lemuel Whiteside guilty of aggravated robbery, fix his sentence at a term of blank, not less than ten years nor more than 40 years or life in the Arkansas Department of Corrections, to be signed by the foreperson;

And, We, the Jury, having found Lemuel Whiteside guilty of employing a firearm as a means of committing aggravated robbery, fix his sentence at a term of blank, not to exceed 15 years in the Arkansas Department of Corrections, to be signed by the foreperson.

All 12 of you must agree on the verdicts, but only the foreman need sign the verdict forms.

(Trial transcript, 456-60).

In his Motion for New Trial or Other Relief, Whiteside argued that the trial court committed jurisdictional error in authorizing jurors to consider imposition of

a life sentence that would have entailed life without possibility of parole under Arkansas law, contrary to the reasoning relied upon by the Court in *Graham*. He argued that he was entitled to rely on *Graham*, retroactively and consequently, the trial committed constitutional error in authorizing the jury's consideration and imposition of a sentence that could result in life imprisonment for an offense not involving a homicide. [APP. EXHIBIT D, at 6-7].

On appeal from denial of relief, Whiteside continued to rely on *Graham*. He argued that the Court's reservation of the question of whether imposition of a life sentence not affording a juvenile offender eligibility for parole, was effectively answered by *Miller*, which requires that imposition of that sentence would be appropriate only when the sentencing authority considered the juvenile offender's age in determining whether the offender's culpability was diminished as a result and thus, might not support such a harsh penalty. (Appellant's Opening Brief, ARG-1-3).

D. Disposition of Petitioner's claim by the Arkansas Supreme Court

The state supreme court addressed Whiteside's constitutional claim based on the Eighth and Fourteenth Amendments in reliance on *Graham*, but disposed of his appeal on the basis of procedural default. *Whiteside v. State*, 588 S.W.3d 720, 724 (Ark. 2019). The jury instruction authorizing imposition of a life sentence on the aggravated robbery charge had not been raised on direct appeal from his

convictions on both counts. The court initially addressed the limitation on the trial court's authority on remand for resentencing the precluded the trial court from resentencing Whiteside on the aggravated robbery charge. It concluded, as Whiteside conceded, that the trial court could not have engaged in resentencing on the robbery count, and rejected his argument that the denial of relief on the motion for new trial preserved the issue of constitutional error in the instruction on that charge. *Id.* at 724. Instead, the supreme court concluded that the issue was defaulted based on the fact that it had not been raised in the direct appeal, explaining:

The bottom line is that Whiteside's *Graham* argument regarding the aggravated-robbery jury instructions could have been raised in *Whiteside I* or *Whiteside II*, but it was not. Instead, he waited until he was resentenced on the capital-murder conviction to raise the issue for the first time in a motion for new trial. This was too late. The circuit court was without jurisdiction to entertain an argument for resentencing on a conviction and sentence that had been affirmed by this court. *See Ward, supra*. Thus, the circuit court did not err by denying the motion for new trial or other relief, and we affirm.

Id., referencing the decision on direct appeal in *Whiteside I* and the decision on remand from this Court in *Whiteside II*.

Whiteside petitioned the court for rehearing, arguing that it had not expressly limited its own authority to review the trial court's action in resentencing him on the capital murder charge, but only limited the trial court's authority on remand to resentencing on that charge. He argued that nothing limited the supreme

court's authority to review the action taken by the trial court on his Motion for New Trial or Other Relief, pointing out that had the trial court taken action on the new trial motion, the supreme court surely would have retained its authority to review that action. (Appellant's Petition for Rehearing, 2-3).

Whiteside also re-urged his argument that the trial court's life sentence option included in the aggravated robbery sentencing instruction resulted in jurisdictional error under Arkansas law, which did not have to be preserved by objection and could be raised at any time in the proceedings. (Appellant's Petition for Rehearing, 3-6). The court denied rehearing, [APP. EXHIBIT B].

Petitioner seeks review of the decision of the Arkansas Supreme Court holding that his federal constitutional claim was defaulted and moves the Court resolve the issue left unanswered in *Graham*, whether imposition of a life sentence without possibility of parole violates the Eighth Amendment when accompanied by a conviction for homicide.

REASONS FOR GRANTING THE WRIT

At the outset, Whiteside recognizes that the *Graham* Court left unresolved the question of whether imposition of a life sentence that precludes eligibility for parole when imposed upon a juvenile offender convicted of a non-homicide offense violates the Eighth Amendment prohibition against infliction of "cruel and unusual punishment" when the offender is also convicted of a homicide. The

Court explained this limitation to the general application of an Eighth Amendment limitation on the sentencing of juveniles convicted of non-homicide offenses:

Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. *The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.*

Graham v. Florida, 560 U.S. at 63 (emphasis added).

The thrust of *Graham*'s Eighth Amendment analysis lies in its concern that the imposition of a life sentence that does not afford potential eligibility for release from incarceration by parole irreparably damages juvenile offenders who are deprived of any prospect for rehabilitation to facilitate their return to society. 560 U.S. at 70-74. With respect to the four widely recognized penological goals, retribution, deterrence, rehabilitation or incapacitation, only the last, is served by imposition of a sentence of life without potential for parole eligibility when assessed in terms of the reduced culpability recognized for juveniles generally, as the Court explained in *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

Although the life sentence that could be imposed for commission of a non-homicide offense under Arkansas did not include a statutorily-prescribed preclusion of parole eligibility—life without parole or life without eligibility for

parole—as the model Arkansas jury instruction explains, *Graham* applied to Arkansas juvenile offenders because parole is not available under state law for individuals serving life sentences. Consequently, *Graham* has been applied to afford relief to Arkansas inmates serving life for non-homicide offenses committed while juveniles. *Gordon v. State*, 465 S.W.3d 842, 845-46 (Ark. 2015); *accord*, *Pennington v. State*, 497 S.W.3d 186, 187-88 (Ark. 2014) (holding imposition of life sentence without possibility of parole for non-homicide felonies requires relief).

As trial counsel correctly anticipated his objections to the sentencing options available on conviction for capital murder for Whiteside as a juvenile offender, the decision in *Graham* suggested that the life sentence without parole imposed by the Missouri court in *Roper*, were subject to some limitation based upon the same concern for the reduced culpability of juvenile offenders attributable to the lack of emotional and mental maturity typically evidenced by the factor of age. Following *Graham* and Whiteside’s conviction, the Court turned its attention to mandatorily-imposed life sentences for juvenile homicide offenders. Whiteside benefitted from the retroactive application of *Miller v. Alabama* to vacate his life sentence, which had been imposed by law without consideration of his age as a mitigating factor in the sentencing decision.

The interplay of *Graham* and *Miller* provided significant development in the

Court's consideration of Eighth Amendment values when applied to juvenile offenders in light of its conclusion in *Roper* that juveniles committing serious crimes, including murder: "*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68. An important gap in the Court's juvenile sentencing jurisprudence involves the issue expressly left unresolved by *Graham*. That issue is whether imposition of a life sentence for a non-homicide offense--one precluding potential eligibility for parole--violates the Eighth Amendment protection against infliction of cruel and unusual punishment when the juvenile has also committed a homicide.

Petitioner Whiteside's final disposition of his prosecution for capital felony murder falls within the gap created by *Graham*'s unresolved issue, as the prosecutor successfully argued in favor of the instruction including the option for imposition of a life sentence by jurors. He now stands sentenced to ten years imprisonment for capital murder and a total of 50 years to be served for aggravated robbery including the 15-year enhancement for use of a firearm. His sentences on the two related offenses imposed by his trial jury did not include the express consideration of his age as a factor to be considered in the imposition of the sentence on the underlying felony, as would have been required for the jury's decision to impose a life sentence on the capital charge under *Miller*.

Whiteside's case raises the issue identified, but not resolved in *Graham*,

with respect to the imposition of life imprisonment without potential for parole eligibility for a non-homicide offense committed with a homicide. After *Miller*, it would logically appear that this unresolved question should be addressed for application in capital felony murder prosecutions. However, Whiteside did not suffer a life sentence on the aggravated robbery charge and the thirty-five (35) year sentence imposed by the jury was within the statutory range of ten (10) to forty (40) years wholly compliant with *Graham*'s sentencing limitation. He argues that assuming the instruction involved a potential Eighth Amendment violation, the jury's sentencing decision does not moot his claim because the inclusion of an improper sentencing option compromises the integrity of the sentence actually imposed.

A. *Whiteside's objection based on the trial court's instruction including the option of imposition of a life sentence was not mooted by the sentence actually imposed.*

As Whiteside argued on appeal from the denial of his new trial motion following his resentencing, the inclusion of an improper instruction relating to the life sentence option on which the jury was instructed does not correct the constitutional error committed. If, in fact, the jury should not have been given the option of considering a life sentence in light of the interplay between *Graham* and *Miller*, the inclusion of this option could not be harmless, despite the fact that the jury ultimately imposed a sentence within the range of years statutorily-authorized

and acceptable.

In *Backus v. State*, 484 S.W.2d 515 (Ark. 1972), the state supreme court rejected the argument that the jury's imposition of a sentence within the statutory range demonstrated lack of prejudice despite the inclusion of an unauthorized sentencing option in the instructions. It explained:

Accordingly, under the instructions of the court, it was necessary that the jury fix appellant's sentence at not less than three years and one day, or not more than five years. But can anyone say that the jury ignored the two previous felony convictions in assessing punishment for Backus? Would not this evidence be calculated to increase the sentence? In fact, the purpose in passing the Habitual Criminal Act was to increase the punishment for repeated offenders. Certainly, we cannot say that the jury would have fixed the same punishment even though they had not been apprised of the previous convictions. In *Crosby v. State*, 154 Ark. 20, 241 S.W. 380, we said:

‘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.’

This has been the law in this state since, at least, 1899,[FN2] and has been reiterated dozens of times.

FN2. See *Magness v. State*, 67 Ark. 594, 50 S.W. 554, 59 S.W. 529, where this court, quoting from *Deery v. Cray*, 5 Wall. 795, 807, 72 U.S. 795, 18 L.Ed. 653, said: ‘It is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.’

It follows that the judgment of the trial court was erroneous.

484 S.W.2d at 517. Similarly, the court applied the same prejudice analysis in *Glaze v. State*, in reviewing a contention that the accused had been sentenced under a statute repealed by implication. 385 S.W.3d 203, 212 (2011).

A similar approach was taken by the Court in *Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980), where the state court had concluded that jurors would have imposed a maximum sentence had resentencing been ordered following the determination that the habitual offender statute under which Hicks had been sentenced was unconstitutional. The fact that the forty-year sentence would have been within the statutory range did not excuse remand for resentencing by a jury where jury sentencing had been provided by law. While violation of the right to jury sentencing under state law was the precise point on which *Hicks* rests, the Court's opinion also reflects the error in concluding that a properly instructed jury would have reached the same sentencing verdict as that returned on an instruction based on an unconstitutional statute.

Under Arkansas law and relying by analogy on *Hicks*, the inclusion of the option of imposing a life sentence at Whiteside's trial, if constitutional error, should not be deemed cured as harmless by the fact that jurors did impose a sentence within the authorized statutory range. What cannot be determined is what the jury would have done if not instructed on the option of life, which may well

have resulted in jurors compromising on the 35-year sentence as a mid-point between ten years and life.

It is not certain, of course, that this view of the probable prejudice caused by inclusion of an arguably unconstitutional option of imposition of a life sentence in the instructions given the jury sentencing Petitioner would necessarily result in relief. What is more certain is that his sentences on the two counts will afford the Court an appropriate opportunity to close the jurisprudential gap left open in *Graham*.

But, since the lower court did not address the federal constitutional claim on the merits given its conclusion that Whiteside defaulted the claim by failing to raise it on direct appeal with his challenges to his capital conviction and life sentence. Because the decision below rests on procedural default, Whiteside must demonstrate that the application of the procedural default by the Arkansas Supreme Court was unreasonable in denying review on the merits of his claim.

B. The Arkansas Supreme Court's application of a rule of procedural default should not bar review of Whiteside's claim on the merits.

The court below held that Whiteside procedurally defaulted his claim that the trial court issued a constitutionally-flawed sentencing instruction in failing to raise the claim on direct appeal from his convictions and sentences imposed for capital felony murder and its underlying felony, aggravated robbery. *Whiteside v.* 588 S.W.3d at 724. Whiteside concedes that the challenge to the sentencing

instructions was not urged in the direct appeal. However, the error only became ripe for review when he sustained prejudice as a result of the sentencing error; not until his life sentence was vacated by this Court and resentencing ordered by the state court on remand did the issue of prejudice based on the aggravating robbery instructions and sentence begin to mature. As long as he was ordered to serve a life sentence with no expectation for parole eligibility, the 35-year sentence imposed on the aggravated robbery, enhanced by the 15 years imposed for use of a firearm during commission of the offense, cumulated to a sentence of 50 years, this concurrent sentence imposed no prejudice. Once he was sentenced to serve a term of ten years on the capital offense by the trial court on remand, the disparity in the two sentences became apparent and the prejudice from the impermissible life sentence option included in the aggravated robbery sentencing instruction ripened.

Petitioner argues that the procedural bar interposed by the lower court should not serve to deprive this Court of jurisdiction to consider his claim on the merits. In the leading case addressing the adequacy of a procedural default imposed by a state court barring review of a federal constitutional claim, *Lee v. Kemna*, 534 U.S. 362, 376 (2002), the Court explained its position on default:

Ordinarily, violation of “firmly established and regularly followed” state rules—for example, those involved in this case—will be adequate to foreclose review of a federal claim. There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question. See *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13,

68 L.Ed. 143 (1923) (Holmes, J.) (“Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”). This case fits within that limited category.

Petitioner argues that this is just such a case for the following reasons:

1. Whiteside’s federal constitutional claim was clearly set forth in Motion for New Trial or Other Relief. [APP. EXHIBIT D]. The state courts were aware that his decision to agree to accept the sentence recommended by the prosecution was based on a representation that his “appellate rights or rights to collaterally attack his prior convictions” would not be *waived* by his agreement to accept the recommended sentence. [APP. EXHIBIT C]. The state supreme court confirmed this understanding in its opinion:

On remand, on November 13, 2018, the circuit court entered a nunc pro tunc amended sentencing order in which, by agreement of the parties, Whiteside was sentenced to a concurrent term of ten years’ imprisonment for the capital murder. The sentences for aggravated robbery and the firearm enhancement were expressly undisturbed and not at issue in the resentencing. However, the order also stated that “Mr. Whiteside’s acceptance of this agreement shall not act as a waiver to any appellate rights or rights to collaterally attack his prior convictions in this case.” On December 12, 2018, Whiteside filed the motion for new trial or other relief that is at issue in the present appeal.

Whiteside, 588 S.W.3d at 722. Whiteside recognizes, of course, that the ten year sentence that he agreed to accept is the most favorable sentence that could have been imposed under ARK. CODE ANN. § 5-4-401(a)(1). Nevertheless, both the trial

court and the prosecution was able to avoid a resentencing hearing before a newly-empanelled jury to afford him the resentencing that had been ordered by the supreme court in its opinion on remand. *Whiteside*, 426 S.W.3d at 922.

The application of the procedural default to bar review of the federal constitutional issue on the merits frustrated Whiteside's legitimate expectation that he could exercise his appellate rights to challenge his sentence on the aggravated robbery charge. The lower courts clearly understood this expectation, promised in the order entered by the trial court, yet denied by the supreme court on appeal. As a matter of essential fairness, the application of a procedural default by the supreme court not only served to deprive him of a decision on the merits on his direct appeal, but would deprive him of an opportunity to have his claim heard by this Court should defer to the state supreme court's bar.

2. The jurisdiction of the Arkansas Supreme Court on direct appeal was not limited by a routinely-imposed rule of procedural default due because the jurisdiction of the trial court was limited in the court's remand order. Petitioner concedes that the trial court's jurisdiction was limited by the remand order to preclude resentencing on the aggravated robbery charge. But the state supreme court cited no rule or even policy limiting its jurisdiction to review a trial court's action on remand. It explained:

Although Whiteside concedes that this court held in *Ward v. State*, 2017 Ark. 215, 521 S.W.3d. 480, that the circuit court exceeded its

jurisdiction on remand when it failed to follow this court's mandate, he nonetheless maintains that the point is "academic" since the circuit court denied his motion for new trial; he contends that this denial of relief preserved the error for review.

Whiteside, 588 S.W.3d at 724. In *Ward*, itself, the supreme court reviewed the action of the trial court for violation of its earlier remand limiting the trial court's jurisdiction. 521 S.W.3d at 482. In the instant case, the trial court did not act beyond the authority ordered in the remand; had it done so, the court would clearly have exercised its jurisdiction to reverse the trial court.

The lower court was not deprived of jurisdiction to entertain Petitioner's claim from the denial of his Motion for New Trial or Other Relief. Rather, it exercised its discretion to find his claim defaulted, in the process depriving him of an opportunity for review of his constitutional claim by this Court in the certiorari process. The Arkansas Supreme Court routinely exercises its jurisdiction to review appellate issues following remand, including remand for resentencing. *Buckley v. State*, 76 S.W.3d 825, 829 (Ark. 2002), *appeal after remand for resentencing in Buckley v. State*, 20 S.W.3d 331 (Ark. 2000). It elected not to do so in this case, but could have reviewed an unpreserved claim under its jurisdiction, had it elected to do so. *See, e.g., Wicks v. State*, 606 S.W.2d 366 (Ark. 1980) (eschewing plain error review generally, but conceding limited circumstances under which court will consider unpreserved claims of error)

3. The claim Whiteside raised in his Motion for New Trial or Other

Relief involved a matter of jurisdictional error based on the trial court's use of a constitutionally-impermissible sentencing instruction. Jurisdictional error is not waived based on failure to properly preserve the issue. In *Pennington v. Hobbs*, the Arkansas Supreme Court explained the consequences of a sentencing error reflecting the trial court's action not conforming to the limitations imposed by statute:

On reconsideration, we find that the sentencing orders entered against appellant are facially invalid. While the specific issue was not raised by appellant, issues concerning a void or illegal sentence are akin to subject-matter jurisdiction and cannot be waived by either party. *Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003) (citing *Flowers v. State*, 347 Ark. 760, 68 S.W.3d 289 (2002)). This court may review a void or illegal judgment sua sponte regardless of whether the issue is raised by a party. See *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

497 S.W.3d 186, 187 (Ark. 2014).

The court has also held that a sentence may be void, and certainly voidable, if it reflects a statutory violation in the sentencing process, regardless of whether it is facially legal. In *Cantrell v. State*, 343 S.W.3d 591 (2009), the court explained that a sentence may be void even though the jury imposed a term of years within the statutory range:

We define[d] an illegal sentence as one which the trial court lacks the authority to impose, *even if on its face the sentence is within the statutory range.* (emphasis added).

343 S.W.3d at 596, citing *Donaldson v. State*, 257 S.W.3d 74, 76-77 (Ark. 2007), where the court held:

We take this opportunity to note that, for purposes of appellate review, the issue of an illegal sentence is not solely whether it is within the prescribed statutory range, but whether the trial court had the authority to impose the sentence.

While trial counsel objected to the instruction in this case, *Donaldson* also holds that where the sentence is imposed in violation of a controlling statute limiting the trial court's discretion, claims of jurisdictional error do not require objection at trial and may be raised for the first time on appeal. 257 S.W.3d at 76.

In *Thomas v. State*, the court explained the rationale underlying this approach:

[T]his court views an issue of a void or illegal sentence as being an issue of subject-matter jurisdiction, in that it cannot be waived by the parties and thus may be addressed for the first time on appeal.

79 S.W.3d 347, 354 (Ark. 2002).

4. The court cited no authority, whether statutory, court rule, or prior decision in which it had applied a procedural bar to its review of a claim of jurisdictional error involving federal constitutional issue based on the limited remand previously ordered. In fact, in *Ward*, the only authority cited in its decision, it had engaged in appellate review to correct an inappropriate exercise of the trial court's jurisdiction. But, perhaps more telling, the court itself did not explain its application of the procedural default consistently. It held that Whiteside had defaulted the federal constitutional claim asserted in his Motion for New Trial

or Other Relief, by not raising the issue in his direct appeal from his conviction and sentence on the aggravated robbery charge, which would be a rule consistently applied in Arkansas appeals. For example, in *Hinkston v. State*, 10 S.W.3d 906 (2000), the court refused to review a Sixth Amendment compulsory process claim on the merits where trial counsel had argued for admission of expert testimony relating to accused's mental impairment only on state evidence law grounds and appellate counsel had asserted the federal protection for the first time on appeal. The court held: "We do not consider arguments, even constitutional ones, raised for the first time on appeal." *Id.* at 909.

Instead, the court held that Whiteside had defaulted his federal constitutional claim based on the defective sentencing instruction because he did not raise it on the direct appeal or on the remand from this Court. Again, the court explained:

The bottom line is that Whiteside's *Graham* argument regarding the aggravated-robbery jury instructions could have been raised in *Whiteside I* or *Whiteside II*, but it was not. Instead, he waited until he was resentenced on the capital-murder conviction to raise the issue for the first time in a motion for new trial. This was too late.

Whiteside, 588 S.W.3d at 724. It then predicated its default on the fact that the trial court lacked jurisdiction to order relief on the Motion for New Trial or Other Relief based on the limited authority conferred by the court in its remand for resentencing on the capital murder charge.

In *Lee v. Kemna*, the Court observed, relying on *Douglas v. Alabama*, 380

U.S. 415, 422 (1965):

“[T]he adequacy of state procedural bars to the assertion of federal questions,” we have recognized, is not within the State's prerogative finally to decide; rather, adequacy “is itself a federal question.”

534 U.S. at 375. Here, as in *Lee*, the application of the procedural default to bar review on the merits of the claim does not rest on a state rule fairly and consistently applied. Instead, the state court’s disposition effectively precludes this Court’s review on an unresolved question of Eighth Amendment protection. Its procedural bar is not predicated on authority circumscribing its appellate jurisdiction, nor support in prior decisions of the court.

CONCLUSION AND PRAYER FOR RELIEF

Based on the foregoing analysis, the Court should not defer to the procedural default asserted by the Arkansas Supreme Court. Petitioner Whiteside prays the Court grant his petition and issue the writ of certiorari; upon hearing, Petitioner prays the Court hold that the trial court committed constitutional error in its inclusion of the life sentencing option on his conviction for aggravated robbery and remand this cause for further proceedings consistent with the Court's decision.

Respectfully submitted this 22nd day of April, 2020.

/s/ J. Thomas Sullivan

J. Thomas Sullivan

Member of the Bar of the

Supreme Court of the United States

1122 West Capitol

Little Rock, Arkansas 72201

(501) 376-6277

sullivanatty@gmail.com

Attorney for the Petitioner

Lemuel Whiteside