

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 2019, TERM

LEMUEL WHITESIDE
PETITIONER,

v.

THE STATE OF ARKANSAS
RESPONDENT.

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

APPENDIX

- EXHIBIT A: OPINION OF THE ARKANSAS SUPREME COURT IN
WHITESIDE v. STATE, 2019 Ark. 349, 588 S.W.3d 720
- EXHIBIT B: ORDER DENYING REHEARING ISSUED BY ARKANSAS
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ENTERED BY PULASKI COUNTY CIRCUIT COURT
NO. 60CR-09-1183, NOV. 13, 2018
- EXHIBIT D: APPELLANT’S MOTION FOR NEW TRIAL OR OTHER
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ENTERED BY PULASKI COUNTY CIRCUIT COURT
NO. 60CR-09-1183, JAN. 9, 2019

EXHIBIT A: OPINION OF THE ARKANSAS SUPREME COURT IN
WHITESIDE v. *STATE*, 2019 Ark. 349, 588 S.W.3d 720

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2019 Ark. 349
Supreme Court of Arkansas.

Lemuel WHITESIDE, Appellant
v.
STATE of Arkansas, Appellee

No. CR-19-264
|
Opinion Delivered: November 21, 2019

Synopsis

Background: Following affirmance on direct appeal of defendant's conviction and 35-year prison sentence for aggravated robbery, 2013 Ark. 176, 426 S.W.3d 917, he moved for new sentencing hearing or other post-conviction relief. The Circuit Court, Pulaski County, Barry Sims, J., denied the motion. Defendant appealed.

[Holding:] The Supreme Court, Wynne, J., held that Circuit Court lacked jurisdiction to entertain defendant's postconviction motion for new sentencing hearing on his 35-year sentence for aggravated robbery.

Affirmed.

Hart, J., filed dissenting opinion.

****721** APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [60CR-09-1183],
HONORABLE BARRY SIMS, JUDGE

Attorneys and Law Firms

J. Thomas Sullivan, Little Rock, for appellant.

Leslie Rutledge, Att'y Gen., by: David L. Eanes Jr., Ass't Att'y Gen., for appellee.

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Opinion

ROBIN F. WYNNE, Associate Justice

*1 Lemuel Session Whiteside appeals from the Pulaski County Circuit Court’s order denying his motion for a new trial or other relief, in which he sought a new sentencing hearing on his aggravated-robbery conviction. He argues on appeal that his thirty-five-year sentence for aggravated robbery violated the protection afforded him by the United States Constitution because the jury was improperly instructed that it could consider and impose a sentence of life imprisonment contrary to *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). We affirm.

Whiteside was seventeen years old at the time he committed capital-felony murder and aggravated robbery in connection with the robbery and death of James London. He was initially sentenced to life in prison without parole for the capital murder and thirty-five years in prison for the aggravated robbery; he was also given a fifteen-year sentencing enhancement for employing a firearm in connection with the aggravated robbery. On *2 direct appeal, **722 this court affirmed. ■ *Whiteside v. State*, 2011 Ark. 371, 383 S.W.3d 859 (■ *Whiteside I*). However, the Supreme Court of the United States granted his petition for writ of certiorari, vacated the judgment, and remanded to this court for further consideration in light of its recent decision in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). See *Whiteside v. Arkansas*, 567 U.S. 950, 133 S.Ct. 65, 183 L.Ed.2d 708 (2012). In *Miller*, the Supreme Court held that mandatory life sentences for juvenile offenders violates the Eighth Amendment’s prohibition on cruel and unusual punishment.

On remand, this court considered whether Whiteside’s mandatory sentence¹ of life without parole under Ark. Code Ann. § 5-10-101(c) (Supp. 2007) was prohibited by the Supreme Court’s decision in *Miller*, *supra*. *Whiteside v. State*, 2013 Ark. 176, 426 S.W.3d 917 (*Whiteside II*). The case was briefed by the parties and orally argued before this court. This court “reaffirmed” the decision in ■ *Whiteside I* with the exception that the sentence for capital murder was reversed and remanded for a resentencing hearing pursuant to *Miller*. This court rejected Whiteside’s arguments that he should also be entitled to resentencing on his aggravated-robbery conviction and its enhancement:²

*3 Whiteside’s sentence for aggravated robbery, as well as his sentence enhancement for the use of a firearm, is authorized by statute and is not

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affected by the decision in *Miller*. Thus, these sentences are still valid, and we remand only the sentence for his capital-murder conviction.

Whiteside II, 2013 Ark. 176, at 9, 426 S.W.3d at 922.

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. He argued that he was entitled to the retroactive benefit of

Graham v. Florida, which held that the Eighth Amendment prohibited imposition of a life sentence without a meaningful possibility of parole for a juvenile offender convicted of a nonhomicide offense; that the aggravated-robbery sentencing instruction, which included the option of a life sentence, resulted in a constitutionally flawed sentencing process; and that the error in the sentencing instruction warrants a new sentencing hearing on that conviction. The State filed a response in opposition, essentially arguing that the circuit court had no jurisdiction to reconsider the sentence imposed on the aggravated robbery, and Whiteside filed a reply. The circuit court entered an order denying **723 Whiteside's motion, and this appeal followed.

*4 On appeal, Whiteside argues that his thirty-five-year sentence for aggravated robbery, while within the statutory range, was "imposed illegally" because the circuit court improperly instructed the jury, over the defense's objection, that the applicable sentencing range was ten to forty years, or life. He relies on the decision in *Graham, supra*. He contends that "the jury was engaged in determining punishment in light of two unconstitutional operating premises: that he would be subject to a life sentence on the capital murder charge, and a sentence within the Class Y sentencing range of 10–40 years confinement, or life, on the underlying felony charge of aggravated robbery." Whiteside points out that while the *Graham* issue was raised during trial and rejected by the circuit court, the alleged defect in the sentencing instruction on aggravated robbery was not argued in his direct appeal and has never been addressed by this court. Whiteside characterizes this alleged error as an issue of "illegal sentence" or a "jurisdictional defect" that can be raised at any time. He further argues that the imposition of the aggravated-robbery sentence based on a defective instruction failing to recognize *Graham* violated his right to due process of law in the sentencing process dictated by state law. For this argument, he relies on *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175

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(1980), in which the Supreme Court held that affirmance of Hicks's mandatory forty-year sentence that was imposed pursuant to a statute that had since been held unconstitutional violated his right to due process under the Fourteenth Amendment because the state court assumed that a jury also would have sentenced Hicks to forty years, the maximum sentence permitted under the statutory sentencing range.

*5 In his conclusion and prayer for relief, Whiteside asks this court to reverse or vacate both the thirty-five-year sentence for aggravated robbery and the consecutive fifteen-year firearm enhancement³ imposed by the jury. Further, he requests that this court exercise its authority to order the sentence imposed on the aggravated robbery count to a term of ten years in the Arkansas Department of Correction, commensurate with the ten-year sentence imposed on remand by the circuit court on the capital murder count, "to avoid the irregularity in imposition of a greater punishment for aggravated robbery than for the capital felony murder predicated on the lesser offense."

[1] [2] [3] [4] [5] [6] The State presents several arguments against reaching the merits in this appeal. First, the State argues that the appeal should be dismissed for lack of jurisdiction. On remand, the circuit court was vested with jurisdiction only to the extent conferred by our opinion and mandate. *Ward v. State*, 2017 Ark. 215, at 3, 521 S.W.3d 480, 482 (citing *Dolphin v. Wilson*, 335 Ark. 113, 983 S.W.2d 113 (1998)). "The mandate is the official notice of action of the appellate court, directed to the court below, advising that court of the action taken by the appellate court, and directing the lower court to have the appellate court's judgment duly recognized, obeyed, and executed." **724 *Ingle v. Ark. Dep't of Human Servs.*, 2014 Ark. 471, at 5–6, 449 S.W.3d 283, 287. This court has explained:

*6 [T]he "lower court is vested with jurisdiction only to the extent conferred by the appellate court's opinion and mandate." *City of Dover v. Barton*, 342 Ark. 521, 525, 29 S.W.3d 698, 700 (2000) (quoting *Dolphin*, 335 Ark. at 118, 983 S.W.2d at 115). Therefore, the question of whether the lower court followed the mandate is not simply one of whether the lower court was correct in its construction of the case, but also involves a question of the lower court's jurisdiction. *Id.* at 118–19, 983 S.W.2d at 115. Similarly, when a case is remanded for a specific act, the entire case is not reopened, but rather the lower tribunal is only authorized to carry out the appellate court's mandate, and the trial court may be powerless to undertake any proceedings beyond those specified. *Id.* If an appellate court remands with specific instructions, those instructions must be followed exactly, to ensure that the lower court's decision is in accord with that of the appellate court. *Id.*

Ingle, 2014 Ark. 471, at 6–7, 449 S.W.3d at 287. In the present case, this court's mandate in *Whiteside II* stated that "it is the decision of the Court that the judgment of the circuit court is affirmed in part; reversed and remanded in part for the reasons set out in the attached opinion."

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The opinion was very clear that the circuit court was instructed to hold a sentencing hearing for the capital-murder conviction only; the sentence for aggravated robbery and the sentence enhancement for the use of a firearm were expressly found to be “still valid.” Thus, the circuit court had no authority to entertain appellant’s motion for new trial or other relief concerning the sentence for aggravated robbery and firearm enhancement. 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.

*7 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.

Affirmed.

Hart, J., dissents.

Josephine Linker Hart, Justice, dissenting.

I dissent. Both the United States and Arkansas Constitutions guarantee the accused a fair and impartial trial. *See* U.S. Const. amend. V, VI, Ark. Const., Art. 2. This includes sentencing proceedings. Separating Whiteside’s capital felony-murder conviction (for which he originally received a mandatory sentence of life without the possibility of parole) from his aggravated-robbery conviction (for which he received a sentence of an additional thirty-five years in prison after the jury was told he could be sentenced to up to forty years, or life) defies the reality of sentencing by jury.

At Whiteside’s first and only trial, the jury imposed both of these sentences at the same time

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after considering the same **725 evidence in the same case.⁴ The aggravated robbery *8 conviction was a necessary element of the capital murder conviction. Any suggestion that the jury's sentencing considerations for these offenses would not have informed each other is simply a farce. Accordingly, even if the thirty-five-year sentence ultimately imposed by the jury for the aggravated-robbery charge was within the applicable sentencing range, he still should have been entitled to resentencing. *See Glaze v. State*, 2011 Ark. 464, 385 S.W.3d 203 (remanding for resentencing due to the jury's consideration of a sentencing range authorized by a habitual-offender statute, held to be repealed by implication, when a properly instructed jury might have imposed a lesser minimum sentence under the applicable law). However, after the U.S. Supreme Court reversed this court's affirmances of Whiteside's convictions, this court limited the circuit court's reconsideration of sentencing to just the capital-murder conviction. This was a breakdown in the appellate process.

Whether based upon violation of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (prohibiting mandatory life sentences for juvenile offenders) or of *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) (prohibiting life sentences without a meaningful possibility of parole for juvenile offenders convicted of nonhomicide offense), Whiteside should be resentenced on *both* the capital felony-murder and the aggravated-robbery convictions. Allowing Whiteside to be resentenced on only one of these convictions does not reflect a fair and just resolution. To fairly assess this issue, we should consider whether this court would have answered these questions the same way if instead the jury had given Whiteside a bottom-range sentence on the aggravated-robbery conviction (an entirely plausible outcome since *9 the jury was operating under the assumption that Whiteside would already be sentenced to life in prison without the possibility of parole for the capital felony-murder conviction), and it was the State asking this court to allow resentencing for both of Whiteside's convictions.

I dissent.

All Citations

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Footnotes

¹ Whiteside's sentence of life imprisonment was mandatory because the only authorized sentences for capital murder at that time were either life without parole or death, and in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Supreme

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Court invalidated the death penalty for juveniles.

- 2 Specifically, he argued that that (1) Ark. Code Ann. § 16-97-101 (Repl. 2006) requires “the jury,” and not two different juries, to impose punishment in a case and (2) because aggravated robbery is an element-included offense of capital murder, the jury’s punishment decision is necessarily a “unitary determination.”
- 3 Whiteside argues that the fifteen-year firearm enhancement “must be vacated” for various reasons. Suffice it to say, the *conviction* for the underlying felony of aggravated robbery was not reversed, and there is no basis for automatic reversal of the enhancement under Ark. Code Ann. § 16-90-120(d) (“Any reversal of a defendant’s conviction for the commission of the felony shall automatically reverse the prison sentence which may be imposed under this section.”).
- 4 At trial, the jury was not presented with evidence of the youth factors later determined necessary in *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).

EXHIBIT B: ORDER DENYING REHEARING ISSUED BY ARKANSAS
SUPREME COURT ON JANUARY 23, 2020

OFFICE OF THE CLERK
ARKANSAS SUPREME COURT
625 MARSHALL STREET
LITTLE ROCK, AR 72201

JANUARY 23, 2020

RE: SUPREME COURT CASE NO. CR-19-264
LEMUEL WHITESIDE V. STATE OF ARKANSAS

THE ARKANSAS SUPREME COURT ISSUED THE FOLLOWING ORDER TODAY IN THE
ABOVE STYLED CASE:

“APPELLANT’S PETITION FOR REHEARING IS DENIED. HART, J., WOULD GRANT.
APPELLANT’S MOTION FOR LEAVE TO FILE REPLY BRIEF TO STATE’S RESPONSE TO
PETITION FOR REHEARING IS DENIED. HART AND WOOD, JJ., WOULD GRANT.”

SINCERELY,

A handwritten signature in black ink, appearing to read "Stacey Pectol", written in a cursive style.

STACEY PECTOL, CLERK

CC: J. THOMAS SULLIVAN
DAVID L. EANES, JR., ASSISTANT ATTORNEY GENERAL
PULASKI COUNTY CIRCUIT COURT, SEVENTH DIVISION
(CASE NO. 60CR-09-1183)

EXHIBIT C: NUNC PRO TUND AMENDED SENTENCING ORDER
ENTERED BY PULASKI COUNTY CIRCUIT COURT
NO. 60CR-09-1183, NOV. 13, 2018

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION**

STATE OF ARKANSAS

PLAINTIFF

VS.

NO. 60CR-09-1183

LEMUEL WHITESIDE

DEFENDANT

NUNC PRO TUNC AMENDED SENTENCING ORDER

On August 5, 2010, following a jury trial, this Court sentenced Lemuel Whiteside, a juvenile offender, to life imprisonment without the possibility of parole on the charge of capital murder. Whiteside was also convicted of aggravated robbery, whereby he was sentenced to thirty-five (35) years and an additional fifteen (15) years for a felony firearm enhancement. This court ordered the life sentence to be served concurrently to the aggravated robbery and felony firearm enhancement. Pursuant to Miller v. Alabama, the Supreme Court of the United States held that mandatory sentences of life without parole are unconstitutional for juvenile offenders. 567 U.S. 460 (2012). In Jackson v. Norris, the Supreme Court of Arkansas stated that Miller cases fell within the statutory discretionary range for a class Y felony. 2013 Ark. 175 (2013). The sentence for aggravated robbery and the firearm enhancement were not disturbed and are not at issue at resentencing.

Therefore, by agreement of all parties, this court hereby amends, nunc 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. Furthermore, Mr. Whiteside shall be granted credit for all time spent in custody on that sentence, as well as five hundred twenty-eight (528) days served prior to conviction. This ten (10) year sentence shall continue to be served concurrently with the sentence for the aggravated robbery and felony firearm enhancement.

It is further agreed 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.

IT IS ORDERED



CIRCUIT JUDGE

DATE: 11-13-18

EXHIBIT D: APPELLANT'S MOTION FOR NEW TRIAL

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

SEVENTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

v.

NO. 60CR-09-1183

LEMUEL SISSION WHITESIDE

DEFENDANT

MOTION FOR NEW TRIAL OR OTHER RELIEF

TO THE HONORABLE PULASKI COUNTY CIRCUIT COURT:

DEFENDANT LEMUEL WHITESIDE, through his counsel of record, J. Thomas Sullivan, respectfully moves for new trial from the Nunc Pro Tunc Amended Sentencing Order entered by this Court on November 13, 2018. Defendant argues that the sentence imposed upon his conviction for the offense of aggravated robbery is void, or voidable, and was imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Defendant alleges:

THE SENTENCE IMPOSED FOR THE OFFENSE OF AGGRAVATED ROBBERY IN THIS CASE WAS THE RESULT OF AN UNCONSTITUTIONAL AND ILLEGAL JURY INSTRUCTION THAT IMPROPERLY ADVISED JURORS THAT THEY COULD IMPOSE A SENTENCE OF 10 TO 40 YEARS OR LIFE IMPRISONMENT BECAUSE THE EIGHTH AMENDMENT HAD PREVIOUSLY BEEN HELD TO PRECLUDE IMPOSITION OF A LIFE SENTENCE THAT DID NOT INCLUDE PAROLE ELIGIBILITY UPON OFFENDERS WHO WERE JUVENILES ON THE DATE OF THE OFFENSE, AND SIMULTANEOUSLY ADVISED THE JURY THAT DEFENDANT HAD BEEN SENTENCED TO LIFE WITHOUT PAROLE FOR CAPITAL MURDER, A SENTENCE SUBSEQUENTLY HELD TO BE UNCONSTITUTIONAL.

In support of his claim for relief Defendant would show the following:

A. Summary of Material Facts

1. Procedural history of the case

Defendant Whiteside was charged with the offense of capital felony murder committed in the act of committing the included offense of aggravated robbery. He was tried before a jury and convicted of both the underlying offense and capital felony murder. The jury also found that Defendant used a firearm in the commission of the offenses charged. Defendant 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 35 years and 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.

On direct appeal, Defendant 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 v. State*, 2011 Ark. 371, at *14, 383 S.W.3d 859, 868. Thereafter, the United States Supreme Court granted Defendant's petition, vacated the judgment, and remanded

the cause for reconsideration in light of its decision in *Miller v. Alabama*, 567 U.S. 460 (2012). *Whiteside v. Arkansas*, 567 U.S. 850 (2012).

On remand, the state supreme court reversed the life sentence and remanded for resentencing on the capital felony murder conviction. *Whiteside v. State*, 2013 Ark. 176, at *10, 426 S.W.3d 917, 222. In its decision on remand, however, the Arkansas court rejected Defendant's argument that the resentencing order required that the resentencing proceeding should include a determination of the sentence to be imposed on the aggravated robbery count, as well as the capital felony murder charge. *Id.* at *8-*9, 426 S.W.3d at 221. The issue raised in this motion was neither argued, nor addressed by the Arkansas Supreme Court.

This Court issued its Nunc Pro Tunc Amended Sentencing Order on November 13, 2018, imposing the 10 year sentence agreed upon by the State and Defendant on the capital murder charge pursuant to the remand ordered by the state supreme court.

2. *Unconstitutional jury instruction*

The Court proceeded with sentencing following the jury's verdicts of guilty on the capital felony murder and aggravated robbery charges, instructing the jury:

THE COURT: Ladies and gentlemen, I have further instructions.

**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).

3. *Trial counsel's objection to the aggravated robbery instruction*

Prior to the Court instructing the jury, counsel reviewed the proposed instructions and objected to both the instructions on the capital felony murder life sentence instruction and the sentencing instruction on the aggravated robbery count. The record reflects the exchanges between counsel and the Court, respectively:

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).

.....

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).

Argument and Authorities

In *Florida v. Graham*, 560 U.S. 48, 79 (2010), the Supreme Court held that the prohibition of infliction of "cruel and unusual punishments" included in the

Eighth Amendment to the Constitution precludes the imposition of a life sentence that does not offer the prospect for parole upon an offender who commits a crime not involving a homicide offense as a juvenile. The Arkansas Supreme Court recognized *Graham* while rejecting Whiteside's argument that the Court's logic in extending the protection afforded by the Eighth Amendment to juveniles who commit non-homicide offenses to bar functionally-mandatory life sentences without possibility or prospect for parole would extend to mandatory life without parole sentences imposed for homicide offenses. *Whiteside*, 2011 Ark. 371, at *8-*10, 383 S.W.3d at 866, *vacated*, *Whiteside v. Arkansas*, 567 U.S. 850 (2012), and *rev'd*, 2013 Ark. 176, at *10, 426 S.W.3d 917, 222. The relief on remand from the Supreme Court was eventually required because the Court did adapt its reasoning in *Graham* to preclude imposition of mandatory life without parole sentences for juveniles convicted of capital murder in *Miller, supra*, and its companion case, *Jackson v. Hobbs*.

1. *Whiteside is entitled to the retroactive benefit of Graham v. Florida*

The Court's 2010 holding in *Graham v. Florida* barring imposition of life without parole sentences for juveniles committing non-homicide offenses applies to Whiteside. The rule announced in *Graham* is accorded prospective application by the Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1989), and is applicable to Whiteside because his conviction on the aggravated robbery count

was not final before announcement of the new rule. And, the retroactivity analysis ultimately applied to juvenile homicide offenders in *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016)--based on the exception to the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989)--recognizes that substantive limitations on the exercise of state power apply retroactively. Thus, *Graham* necessarily applies to benefit juveniles sentenced to life without parole, or possibility or prospect of parole, for non-homicide offenses under *Graham* because the new rule is grounded in the protection of a substantive right under the Eighth Amendment.

As a matter of federal constitutional protection, this same approach applies in Arkansas cases, as the state supreme court held in *Gordon v. State*, 2015 Ark. 277, at *5-*6, 465 S.W.3d 842, 845-46; *accord*, *Pennington v. State*, 2014 Ark. 441, at *2-*3, 497 S.W.3d 186, 187-88 (holding imposition of life sentence without possibility of parole for non-homicide felonies requires relief).

The jury instructions regarding the range of punishment for the offense of aggravated robbery given at Whiteside's trial authorized jurors to consider imposition of a sentence of 10-40 years, or life. While this range of punishment may have been statutorily-authorized at the time of trial, based on ARK. CODE ANN. § 5-12-103(b), defining aggravated robbery as Class Y felony, and ARK. CODE ANN. § 5-4-401(a)(1), setting punishment range for Class Y felony as 10-40 years, or life, it could not properly apply to Whiteside's sentence under *Graham* and

Arkansas decisions. The instructions governing the jury's sentencing discretion relied on an unconstitutional and, thus, illegal, statement of law.

2. *The aggravated robbery sentencing instruction resulted in a constitutionally flawed sentencing process*

Although the 35 year term of imprisonment determined by the jury to be the appropriate sentence for the aggravated robbery charge upon which Defendant Whiteside was convicted, the jury's decision was arrived at by its consideration of an unconstitutional option of life imprisonment included in the trial court's sentencing instruction. Excerpts from the trial transcript reflect that jurors were instructed in conformity with the Arkansas model jury instructions, which have been found to be legally correct upon being promulgated by the state supreme court and which must be given at trial unless shown to reflect incorrect statements of applicable law. *Lipscomb v. State*, 271 Ark. 337, 609 S.W.2d 15 (1980). Here, the aggravated robbery sentencing instruction given at Defendant's trial did not comport with applicable law.

However, Defendant recognizes that the 35 year term of confinement imposed by the sentencing jury does fall within the statutory range authorized for Class Y felonies, the class of felony authorized for punishment of the offense of aggravated robbery. Consequently, the sentence imposed on the aggravated robbery conviction is not *facially* illegal, as would be the case if the Judgment and Commitment Order recited imposition of a term of years not within the sentencing

range authorized by statute. *Flowers v. State*, 347 Ark. 760, 68 S.W.3d 289 (2002).

In *Pennington v. Hobbs*, *supra*, 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).

2014 Ark. 414, at *2, 497 S.W.3d 186, 187.

But, 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*, 2009 Ark. 456, 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).

Id., at *9, 343 S.W.3d at 596, citing *Donaldson v. State*, 370 Ark. 3, 6, 257 S.W.3d 74, 76-77 (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. *Id.* at 5-6, 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.

349 Ark. 447, 459, 79 S.W.3d 347, 354 (2002).

Here, Defendant's jury was instructed on a sentencing range that had effectively been voided with respect to the life sentence option by *Graham v. Florida*, interjecting a constitutionally-impermissible consideration for jurors considering what punishment would be appropriate for his sentence on the aggravated robbery charge. Critically, in addition to that error in the jury instructions, jurors were also deliberating on Whiteside's sentence for aggravated robbery while also having been instructed that the law provided that his sentence on the capital murder count imposed as sentence of life imprisonment. The life sentence imposed in the case was subsequent held to be unconstitutional, *Whiteside*, 2013 Ark. 176, at *10, 426 S.W.3d 917, 222.

Thus, Defendant Whiteside's trial jury was engaged in determining punishment in light of two unconstitutional operating premises: that he would be subject to a life sentence on the capital murder charge, and a sentence within the Class Y sentencing range of 10-40 years confinement, or life, on the underlying felony charge of aggravated robbery. On remand, the Arkansas Supreme Court rejected Whiteside's argument that he was entitled to a resentencing hearing in which the sentences on both charges would be considered by a newly-empanelled sentencing jury. *Id.* at *8-*9, 426 S.W.3d at 221. But the issue of the fundamental defect in the sentencing instruction on aggravated robbery had not been argued on the direct appeal, nor in the remand brief, and has never been addressed by this Court or the supreme court.

3. *The error in the aggravated robbery sentencing instruction warrants a new trial—more specifically, a new sentencing hearing—on that charge.*

As the decisions in *Cantrell* and *Donaldson*, jurisdictional error in the imposition of a sentence is not *cured* simply because the sentence falls within the statutory range. Here, for instance, the sentence on the aggravated robbery is tainted by the error in the sentencing instruction improperly advising jurors that a life sentence was a lawful option in imposing punishment on that charge. The fact that the sentence arrived at by the jury following its deliberations—35 years confinement—provides no additional information from which a reviewing court

could discern the way in which the jury reached that determination, or whether the life sentence option included in the instruction was a factor relied upon by jurors in reaching their collective decision. In such situations, the Arkansas Supreme Court has held that the sentence ultimately imposed lies within the statutory range does not cure the error relating to an incorrect statement of law in the sentencing instruction.

For instance, in considering an argument advanced by the State in *Backus v. State*, 253 Ark. 60, 484 S.W.2d 515 (1972), that a jury sentence within the statutory range demonstrated lack of prejudice despite the inclusion of an unauthorized sentence in the instructions, the Supreme Court rejected the argument, explaining:

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.

253 Ark. at 62, 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 with the adoption of Section 5-4-501. 2011 Ark. 464, *13, 385 S.W.3d 203, 212 (2011).

The approach in excusing any requirement for proof of actual prejudice in the jury’s deliberation process is consistent with the doctrine of structural error, in which proof of error not susceptible to determination for prejudice, warrants relief precisely because review of the trial record cannot provide accurate insight into the actual impact of the error in the trial process. The doctrine is articulated in *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (Rehnquist, C.J., concurring) and applied in *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), where Justice Scalia explained that a confusing or inaccurate instruction on “reasonable doubt” required reversal because a review of the record—as typically relied upon for review of errors made in the course of admission or exclusion of evidence—does not supply

a reliable means that a conviction rests on evidence establishing the accused's guilt beyond a reasonable doubt.

In *Teater v. State*, 89 Ark. App. 215, 201 S.W.3d 442 (2005), the Arkansas Court of Appeals cited *Sullivan* and held that the trial court's refusal to instruct on the law on lack of criminal responsibility, or insanity, deprived the reviewing court of the ability to assess whether the jury would have returned a different verdict had it been instructed on the basis of evidence offered by defense experts. The court's approach is consistent with the most basic of Arkansas rules governing the trial process, that a defendant is entitled to a jury instruction on a defensive theory or lesser-included offense when there is any evidence in record, however slight, to support the instruction. *Robinson v. State*, 269 Ark. 90, 598 S.W.2d 421 (1980).

The rule is essentially based on a presumption that the failure to instruct prejudiced the accused because it is simply impossible to discern, from the trial record and regardless of how strong the State's case might be when compared to the evidence warranting the instruction, what the jury would have done had it been properly instructed on the defensive theory advanced by the accused or had it properly instructed the jury on a lesser-included offense supported by evidence rationally supporting conviction on the lesser and acquittal on the greater evidence.

In Defendant Whiteside's case, it is impossible to discern from the record what jurors would have determined to be the appropriate sentence had they not

been instructed that they could have imposed a life sentence on the aggravated robbery count. While they did not impose the statutory maximum term of years, 40 years, the maximum sentence, life, in deciding to impose a prison sentence of 35 years, there is no way to accurately determine what sentence might have been imposed by the jury in compromising had the life sentence option not been included in the instruction.

Similarly, there is simply no way to assess what impact the knowledge that the law required imposition of a sentence of life without the possibility of parole upon conviction for capital murder, as jurors were instructed by the Court, (Trial Transcript, 456), might have had on the jury's decision on the aggravated robbery sentence. And, to the extent that the life without possibility of parole sentence imposed by law on the capital murder was a factor in the jury's sentencing decision on the aggravated robbery, it is not possible to discern what jurors would have done once that sentencing option had been struck down in *Miller v. Alabama*, *supra*, and not statutorily-authorized in Whiteside's case.

Because the jury was incorrectly instructed on the applicable range of sentence for aggravated robbery and it deliberated on sentencing with that incorrect instruction and without awareness that the life without possibility of parole sentence imposed on the capital murder count would also be declared

unconstitutional in *Miller*, the sentence of 35 years imposed by the jury on the aggravated robbery is not reliable.

Moreover, the imposition of the aggravated robbery sentence based on a defective instruction failing to recognize the Court's decision in *Graham v. Florida*, violated Defendant's right to due process of law in the sentencing process dictated by state law. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). There, the Court held that the assumption by state court that a jury would have imposed the same sentence that was imposed as a mandatory sentence under a statute later held unconstitutional violated due process under the Fourteenth Amendment. *Id.* at 345. On direct appeal, the court rejected Defendant's reliance on *Hicks* in support of a different argument--that the imposition of a mandatory life sentence on the capital murder charge violated his right to jury sentencing under state law. *Whiteside v. State*, 2011 Ark. 371, at *13-*14, 383 S.W.3d at 868. But, *Hicks* is relevant on the instant point, because there the Supreme Court held that the state appellate court could not conclude, consistent with the guarantee of due process, that the sentencing jury would have imposed the same punishment as the sentence imposed under the mandatory sentencing statute later declared unconstitutional. The Court explained:

In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. *Such an arbitrary*

disregard of the petitioner's right to liberty is a denial of due process of law.

447 U.S. at 346 (emphasis added).

In Defendant's case, the Arkansas courts cannot simply assume that his sentencing jury would have reached the same result had jurors been properly instructed in light of *Graham v. Florida*. Nor can it be assumed that jurors would have reached the same sentencing result on the aggravated robbery count had they not been instructed on the life without possibility of parole sentence for capital murder mandated by statute later held unconstitutional in *Miller* at the same time as they deliberated on his sentence on the aggravated robbery count. To simply assume that the jury would have returned the identical sentencing verdict and refuse to grant relief from the illegal 35-year sentence in this case will violate Whiteside's right to due process of law under the Fourteenth Amendment.

CONCLUSION

Under Arkansas law, an accused who exercises the Sixth Amendment right to trial by jury will typically be sentenced by the same jury in a separate proceeding unless the State and defense agree to have punishment set by the trial court upon conviction. ARK. CODE ANN. § 5-4-103. Defendant was sentenced by his trial jury following conviction for capital felony murder and the underlying felony offense of aggravated robbery. The sentence imposed on the capital murder court was set aside by the Arkansas Supreme Court, which remanded the cause to

this Court for resentencing, resulting in the imposition of a 10 year sentence on this count, to be served concurrently with the sentence imposed on the aggravated robbery count by this Court, as reflected in the Nunc Pro Tunc Amended Sentencing Order.

Based on the foregoing argument and authorities, Defendant Whiteside respectfully moves the Court grant his Motion for New Trial for the limited purpose of vacating the 35 year term of confinement previously imposed by the trial jury on the aggravated robbery count be vacated. Defendant further moves the Court modify the sentence on this count to a term of 10 years confinement, the statutory minimum authorized for Class Y felonies under Arkansas law; or, alternatively, empanel a new sentencing jury for the purpose of resentencing on the aggravated robbery count in conformity with the decision in *Graham v. Florida*.

This motion for relief pursuant to ARK. R. CRIM. P. Rule 33.3 is brought in good faith that the action is meritorious and is not brought for purposes of delay.

Respectfully submitted this 12th day of December, 2018.

s/ J. Thomas Sullivan
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, J. Thomas Sullivan, hereby certify that a true and correct copy of the foregoing Entry of Appearance of Counsel has been served in compliance with Administrative Order of the Supreme Court 21, section 7, on December 12, 2018, to the following:

Mr. John Johnson
Chief Deputy Prosecuting Attorney

Mr. Lemuel Whiteside
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/S/ J. Thomas Sullivan
J. Thomas Sullivan

EXHIBIT E: ORDER DENYING MOTION FOR NEW TRIAL
ENTERED BY PULASKI COUNTY CIRCUIT COURT
NO. 60CR-09-1183, JAN. 9, 2019

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SEVENTH DIVISION

STATE OF ARKANSAS

PLAINTIFF

VS.

60CR-09-1183

LEMUEL WHITESIDE

DEFENDANT

ORDER

On this date, defendant's *Motion for a New Trial* came on for review. After careful consideration of the pleadings filed by both parties and all other relevant law and facts the Court finds the motion shall be **DENIED**.

IT IS SO ORDERED.


BARRY SIMS
CIRCUIT JUDGE

1-9-19

DATE

cc: Mark Hampton
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