

In the Supreme Court of the United States

LEMUEL WHITESIDE,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

**On Petition for Writ of Certiorari
To the Supreme Court of Arkansas**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should consider a defaulted challenge to a 35-year sentence for aggravated robbery in order to decide whether instructing the jury that it could sentence petitioner Lemuel Whiteside – who was 17 years old at the time of the offense and also committed a homicide – to 10 to 40 years or life for that offense violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

LIST OF RELATED PROCEEDINGS

State of Arkansas v. Lemuel Whiteside, Pulaski County Circuit Court Case No. 60CR-09-1183 (judgment entered Aug. 5, 2010)

Lemuel Whiteside v. State of Arkansas, Arkansas Supreme Court Case No. CR-10-1200 (opinion issued Sept. 22, 2011)

Lemuel Whiteside v. State of Arkansas, United States Supreme Court Case No. 11-7979 (judgment issued Aug. 13, 2012)

Lemuel Whiteside v. State of Arkansas, Arkansas Supreme Court Case No. CR-10-1200 (opinion issued Apr. 22, 2013)

Lemuel Whiteside v. State of Arkansas, United States Supreme Court Case No. 13-5562 (petition denied Oct. 7, 2013)

Lemuel Whiteside v. Ray Hobbs, Jefferson County Circuit Court Case No. 35CV-14-170 (judgment entered Mar. 4, 2015)

State of Arkansas v. Lemuel Whiteside, Pulaski County Circuit Court Case No. 60CR-09-1183 (nunc pro tunc sentencing order entered Nov. 13, 2018; motion for new trial denied Jan. 9, 2019)

Lemuel Whiteside v. State of Arkansas, Arkansas Supreme Court Case No. CR-19-264 (opinion issued Nov. 21, 2019)

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INTRODUCTION

In January, 2009, when he was 17 years old, petitioner Lemuel Whiteside robbed and murdered James London. He planned and initiated the robbery, directed other participants, restrained London while he pleaded for his life, and provided the triggerman with the loaded gun used to shoot and kill London. Over a year later, an Arkansas jury convicted Whiteside of aggravated robbery and capital murder. Consistently with Arkansas's then-existing statutory framework, Whiteside received a mandatory life-without-parole sentence for the capital murder, and the jury sentenced him to 35 years' imprisonment for the aggravated robbery. The Arkansas Supreme Court affirmed his convictions and sentence.

This Court subsequently vacated the judgment and remanded the case to the Arkansas Supreme Court for reconsideration in light of its subsequent decision in *Miller v. Alabama*, 567 U.S. 460 (2012). On remand, the Arkansas Supreme Court held that Whiteside was entitled to resentencing for his capital-murder conviction, but it specifically rejected his claim that he also was entitled to resentencing on his aggravated-robbery conviction. Pursuant to an agreement by the parties, the trial court subsequently sentenced Whiteside to 10 years' imprisonment for his capital-murder conviction.

Whiteside then filed a motion in the state trial court challenging – for the first time in the course of the litigation – his 35-year sentence for aggravated robbery and seeking resentencing. In that motion, he argued that his aggravated-robbery sentence violated the Eighth Amendment and due process because his jury had been instructed that the permissible sentence for that offense was 10 to 40 years or life,

and, that, contrary to that instruction, life was not permissible for a juvenile who committed a nonhomicide offense.

Arkansas opposed the motion on the ground that the Arkansas Supreme Court's remand order limited the court's jurisdiction to reconsidering Whiteside's sentence for capital murder. The state trial court summarily denied relief. And the Arkansas Supreme Court subsequently affirmed that denial on the grounds that the trial court's jurisdiction on remand was limited to reconsidering Whiteside's sentence for capital murder, and, in any event, his failure to raise that claim earlier foreclosed consideration of his latest, new challenge to his aggravated-robbery sentence.

Whiteside seeks review of that decision, arguing that his aggravated-robbery sentence is unconstitutional because the jury was advised that it could have sentenced him to life for that offense. His petition should be denied because, even if the petition presented an otherwise meritorious issue, the decision below rests on an adequate and independent state-law ground – namely, Whiteside's failure to raise his claim earlier. Moreover, and in any event, the petition should be denied chiefly because, even to consider Whiteside's attack on the jury instruction, this Court would first have to decide – in the abstract and in a case in which the petitioner is not under a life sentence – an open question about the validity of life sentences for nonhomicide offenses when a juvenile also committed a homicide. Review should be denied.

JURISDICTION

Although Whiteside's petition purports to raise a claim under the Eighth and Fourteenth Amendments to the United States Constitution, this Court does have not

discretionary jurisdiction pursuant to 28 U.S.C. § 1257(a) to consider his claims because the Arkansas Supreme Court held the claim could not be considered on a state-law ground.

STATUTORY PROVISIONS INVOLVED

Arkansas Code Annotated § 5-4-401(a)(1)(superseded) provided that “[a] defendant convicted of a [Class Y] felony shall receive a determinate sentence . . . [of] not less than ten (10) years and not more than forty (40) years, or life[.]” Arkansas Code Annotated § 5-12-103(b)(superseded) provided that “[a]ggravated robbery is a Class Y felony.” Arkansas Code Annotated § 16-93-1301(c)(1)(B)(superseded), provided that, for offenses committed after January 1, 1994, “[i]nmates sentenced to life imprisonment shall not be eligible for transfer unless the sentences are commuted to a term of years by executive clemency.”

STATEMENT

1. On January 28, 2009, then 17-year-old Whiteside masterminded and directed the murder and robbery of James London. After receiving a telephone call from his mother informing him that London was at their house and carrying a lot of money, Whiteside began rounding up conspirators to help him rob London. In particular, he called his girlfriend, Leanna Talley, and told her to join him at Cambrin Barnes’s house so that they could all go and rob London. Trial Record (TR) 3, 228, 229-31, 237, 281, 298, 315-17, 319, 323-24.¹

¹Although the Clerk of the Arkansas Supreme Court recently has been unable to locate it, the record of the trial is on permanent file with the Clerk as *Whiteside v. State*, No. CR-10-1200.

Eventually, Whiteside, Barnes, and Cynthia Arrington all got into Talley's car at Barnes's house, with Talley driving. TR 230-31, 320. Whiteside directed Talley to drive to his house. TR 231-34. After they arrived, Whiteside and Barnes entered the house, with Whiteside holding a .40 caliber gun that he habitually carried. TR 235, 322-23. They returned to the car approximately five minutes later, with Whiteside reporting that, even though his mother had called him to the house, she now did not want him to rob London. TR 235, 321. As they drove away, Whiteside directed Talley to return to the house "because [London] was scared and he was about to empty his pockets." Whiteside said that they would "catch [London] coming out [of] the house." TR 235, 322.

While they were driving back to the house, Whiteside handed Barnes his .40 caliber gun. TR 322-23. Just before Whiteside and Barnes got out of the car, Whiteside gave Barnes directions about remaining outside in the bushes while he went inside to make London come out. TR 323. Whiteside then went inside the house, and later emerged with London. TR 237, 323-25. London was trying to get away, but Whiteside pushed him up against the wall by pulling on his shirt. TR 237, 240, 245. London told Whiteside and Barnes that he would give them "all I have. I don't want to die. I'll give you my money." TR 238.

When London managed to wrest free of Whiteside and moved toward Barnes, Barnes shot him in the chest. TR 237, 289. Although London ran toward the next-door neighbor's house, he collapsed and died in the neighbor's yard soon after being shot. TR 238, 282, 327. After the shooting, Whiteside and Barnes ran to Talley's car.

TR 238, 251. Barnes got in, but Whiteside did not. TR 238-39. When Barnes got in, he told Talley to “Go, go, go.” TR 238. When Talley asked about Whiteside, Barnes responded that he was going back to get the money. TR 238-39. No cash was found on London’s body at the hospital or at the crime scene. TR 302, 307-08. A spent .40 caliber hull was recovered from the scene, and the medical examiner retrieved a .40 caliber bullet from London’s body. TR 293, 392-93, 401.

2. Based on this evidence, the State of Arkansas charged Whiteside as an adult with capital murder and aggravated robbery. TR 1. The trial was held on July 13-14, 2010, after this Court had issued its opinion in *Graham v. Florida*, 560 U.S. 48 (2010), but before it decided *Miller*. TR 131, 425. The jury found Whiteside guilty, and it also concluded that he had used a firearm during the commission of both crimes. TR 550.

At sentencing, Whiteside objected to being sentenced to life imprisonment for capital murder – the sole punishment available – on the ground that the sentence would violate the Eighth Amendment because he was a juvenile offender who was not the triggerman and who had not been proven to have intent to kill. TR 553-59, 575-76, 596. The court overruled his objection. TR 559, 576, 586, 596. Whiteside also objected to the jury’s being instructed that the sentencing range for aggravated robbery was imprisonment for 10 to 40 years or life – the sentence authorized by Ark. Code Ann. § 5-4-401(a)(1) – on the ground that *Graham* precluded a life-without-parole sentence for an aggravated robbery committed as a juvenile. TR 566-68, 569, 570, 572. The trial court overruled this objection as well. TR 568, 570, 571-72, 587. The

court also instructed the jury that Whiteside's aggravated-robbery sentence was subject to an enhancement of up to 15 years' imprisonment due to his use of a firearm. TR 587. The jury sentenced Whiteside to 35 years' imprisonment for aggravated robbery, enhanced by 15 years due to his use of a firearm. TR 595. The court imposed the aggravated-robbery sentence concurrently with the sentence for capital murder. TR 70-72, 597.

3. Among the five enumerated claims Whiteside raised for reversal on appeal, he claimed that his life-without-parole sentence for capital murder violated the Eighth Amendment because he was a nontriggerman 17-year-old when he committed the offense who had not been proven to have intent to kill London. *See Whiteside v. State*, 2011 Ark. 371, at 8-10, 383 S.W.3d 859, 865-66 (*Whiteside I*). Although he subsequently withdrew the argument in his reply brief due to intervening case law, he also claimed that the enhancement of his sentence for aggravated robbery was improper. *See id.*, 2011 Ark. 371, at 14 n.3, 383 S.W.3d at 868 n.3. And, most relevant here, despite challenging the jury instruction for the sentencing range for aggravated robbery at trial, he did not raise that issue on appeal. *See generally id.* The Arkansas Supreme Court affirmed, rejecting Whiteside's Eighth Amendment challenge to his sentence for capital murder on the merits. *Whiteside I*, 2011 Ark. 371, at 8-10, 383 S.W.3d at 865-66.

Whiteside then sought certiorari in this Court. Among other things, he argued that his sentence for capital murder violated the Eighth Amendment because he was

a 17-year-old nontriggerman who had not been proven to have intent to kill. Following the Court's decision in *Miller*, this Court granted Whiteside's petition, vacated the Arkansas Supreme Court's decision, and remanded the case for further consideration in light of *Miller*. *Whiteside v. Arkansas*, 567 U.S. 950 (2012).

4. On remand to the Arkansas Supreme Court, Arkansas argued that Whiteside had defaulted any *Miller* claim. *See Whiteside v. State*, 2013 Ark. 176, at 4, 426 S.W.3d 917, 919 (*Whiteside II*). In the alternative, Arkansas argued that the Court should reaffirm Whiteside's convictions, reaffirm his aggravated-robbery sentence, and either sentence him to life with parole or remand for resentencing in the range of 10 to 40 years or life for his capital-murder conviction. *See id.*, 2013 Ark. 176, at 6-8, 426 S.W.3d at 920-21.

In response, Whiteside asserted that his *Miller* claim was not defaulted, proposed his own remedy, and argued that the Eighth Amendment precluded life as a sentence for capital murder because he was a juvenile nontriggerman who had not been proven to have intent to kill. *See Whiteside II*, 2013 Ark. 176, at 4-6, 9, 426 S.W.3d at 919-20, 922. He also argued that, if the case were remanded to the trial court for resentencing on his capital-murder conviction, then he also would be entitled to resentencing on his aggravated-robbery conviction on state-law grounds. In particular, he argued that sentencing for his crimes was a unitary decision and that, under an Arkansas statute governing sentencing, a single jury must impose punishment – on all convictions – in a case. *Id.*, 2013 Ark. 176, at 8-9, 426 S.W.3d at 921-22. But importantly, Whiteside never argued that he should be resentenced for aggravated robbery on the

ground that his sentence for that offense was unconstitutional because the jury had been instructed that life was a permissible sentence. *See generally id.*

The Arkansas Supreme Court held Whiteside was entitled to the benefit of *Miller*. *Whiteside II*, 2013 Ark. 176, at 4-5, 426 S.W.3d at 919-20. Then, after severing the language contained in various Arkansas statutes, the court held that the appropriate sentencing range for Whiteside's capital-murder conviction was 10 to 40 years or life. *Id.*, 2013 Ark. 176, at 4-5, 6-8, 426 S.W.3d at 919, 920-21. It declined to reach his claim that a sentence of life imprisonment for that offense would violate the Eighth Amendment. *Whiteside II*, 2013 Ark. 176, at 4-9, 426 S.W.3d at 919-22. And it rejected his claim that he was entitled to resentencing on his aggravated-robbery conviction. *Id.*, 2013 Ark. 176, at 8-9, 426 S.W.3d at 921-22. The court thus "reaffirm[ed] the] decision in *Whiteside I* on all points raised by [him] in that appeal, with the exception of his sentence for capital murder." *Id.*, 2013 Ark. 176, at 9, 426 S.W.3d at 922.

In light of its rejection of Whiteside's request that he be resentenced for his aggravated-robbery conviction, the Arkansas Supreme Court explicitly concluded that his sentences with regard that offense were "still valid[.]" *Id.*, 2013 Ark. 176, at 9, 426 S.W.3d at 922. It then "remand[ed] only [for sentencing] for his capital-murder conviction." *Id.*, 2013 Ark. 176, at 9, 426 S.W.3d at 922. The court's mandate, affirming in part and reversing in part "for the reasons set out" in the court's opinion, issued on May 30, 2013. Supp. App. 10. This Court denied Whiteside's subsequent petition for a writ of certiorari on October 7, 2013. *Whiteside v. Arkansas*, 571 U.S. 922 (2013).

5. After the case had been remanded, Whiteside filed a motion in the state trial court on February 6, 2014, in which he sought a continuance of his resentencing for capital murder. Record (R) 124-25.² The basis for the request was that he had filed a state habeas petition in another court. R 124. Attached to his motion was a copy of the petition he represented that he had filed. R 124, 126-41. The primary claim in the petition was that his aggravated-robbery sentence was unconstitutional because the jury had been instructed that it could sentence him to life for that offense. R 130-34. The state habeas court denied the petition in an order entered on March 4, 2015. Supp. App. 11-15. The court specifically noted that Whiteside claimed his aggravated-robbery sentence violated the Eighth and Fourteenth Amendments because the jury had been instructed that it could sentence him to life imprisonment. Supp. App. 11-12. He did not appeal that order.

6. Pursuant to an agreement by the parties, the state trial court subsequently sentenced Whiteside to 10 years' imprisonment for his capital-murder conviction, to be served concurrently with his sentence for aggravated robbery. Pet. App. Ex. C. The court's order recited that parties also had agreed that Whiteside's "acceptance of th[e] agreement shall not act as a waiver to any appellate rights or rights to collaterally attack his prior convictions in this case." Pet. App. Ex. C. Following the entry of this order, Whiteside filed a "Motion for New Trial or Other Relief." Pet. App. Ex. D.

²The record of the proceedings on remand is on permanent file with the clerk of the Arkansas Supreme Court as *Whiteside v. State*, No. CR-19-264.

In that motion, Whiteside alleged for the first time in that proceeding that his aggravated-robbery sentence was unconstitutional because the jury had been instructed that the sentencing range was 10 to 40 years or life while also having been instructed that the sentence for capital murder was life imprisonment. Pet. App. Ex. D 1, 7-18. He thus sought resentencing for his aggravated-robbery conviction. Pet. App. Ex. D 19. In response, Arkansas argued that the trial court “was only vested with the limited jurisdiction conferred upon it by the mandate from the Supreme Court of Arkansas and is precluded from considering other issues.” R 232. The trial court summarily denied the motion. Pet. App. Ex. E.

7. Whiteside appealed and argued only that the trial court erred by denying his motion for a new trial on the ground that his 35-year sentence for aggravated robbery violated the Eighth and Fourteenth Amendments. Recognizing that Arkansas had resisted the motion on the ground that the trial court lacked authority under *Whiteside II* to consider that argument, Whiteside raised various arguments as to why that decision did not preclude consideration of his new claim. In particular, he argued that Arkansas’s mandate rule did not bar the Arkansas Supreme Court’s consideration of the claim because his was an illegal-sentence claim and the parties below had agreed, upon his resentencing for capital murder, that Whiteside had not waived his appellate rights to challenge his prior convictions. Supp. App. 30-32.

The Arkansas Supreme Court affirmed the denial of Whiteside’s motion for a new trial because the trial court lacked jurisdiction to entertain his challenge to his aggravated-robbery sentence. Supp. App. 5-7. It explained that, in *Whiteside II*, it had

rejected Whiteside’s request that he be resentenced on his aggravated-robbery conviction and remanded only for resentencing for the capital-murder conviction. Supp. App. 6. The court thus concluded the trial court was precluded from granting the requested relief on the ground that a “lower court is vested with jurisdiction only to the extent conferred by the appellate court’s opinion and mandate.” Supp. App. 6 (cleaned up).

Lastly, having explained that its earlier opinion remanding for resentencing on the capital-murder conviction had limited the trial court’s authority, the court added “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.” Supp. App. 7. It then explained that, under Arkansas law, Whiteside’s attempt to raise that claim belatedly in a motion for a new trial on remand was “too late.” Supp. App. 7. And it reiterated, in the penultimate sentence of its opinion, that “[t]he circuit court was without jurisdiction to entertain an argument for resentencing on a conviction and sentence that had been affirmed by this court.” Supp. App. 7. Whiteside petitioned for rehearing, which was denied. Pet. App. Ex. B. His petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. The Arkansas Supreme Court’s decision rests on an adequate and independent state-law ground.

Whiteside asks this Court to decide whether his 35-year sentence for an aggravated robbery that he committed as a juvenile violates due process and the Eighth Amendment because the jury was instructed that life was a possible sentence for that

nonhomicide offense. This Court lacks jurisdiction to consider that multi-layered claim because the Arkansas Supreme Court’s decision, affirming the denial of Whiteside’s motion for a new trial, rests on an adequate and independent state-law ground.

This Court lacks jurisdiction under 28 U.S.C. § 1257(a) to review an issue of federal law if the state court’s decision rests on a state-law ground that is independent of the merits of the federal question and adequate to support the judgment. *E.g.*, *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016). That rule applies irrespective of whether the state-law ground is “substantive or procedural.” *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

The Arkansas Supreme Court here affirmed the denial of Whiteside’s motion for a new trial based on well-established law that a lower court is constrained on remand by the scope of an appellate mandate. *See, e.g.*, *Ingle v. Ark. Dep’t Human Servs.*, 2014 Ark. 471, at 5-7, 449 S.W.3d 283, 287. Whether characterized as the application of Arkansas’s mandate rule, a procedural-default rule, or a combination of the two, the parties agree that the Arkansas Supreme Court’s decision was based on a state-law ground. *See, e.g.*, Petition at 1, 11, 20. Consequently, this Court lacks jurisdiction to entertain Whiteside’s petition, and it should be denied on that basis. *See, e.g.*, *Sochor v. Florida*, 504 U.S. 527, 534 (1992).

Conceding that the Arkansas Supreme Court’s decision rests on an otherwise generally adequate state-law ground, Whiteside attempts to sidestep the consequences of that fact on the grounds that this is an “exceptional case[] in which exorbitant application of a generally sound rule renders the state ground inadequate to

stop consideration of a federal question.” *Lee v. Kemna*, 534 U.S. 362, 376 (2002).
Petition at 21-22.

But *Lee* does not support Whiteside’s argument. There, this Court held that a state rule, injected into the case on appeal, which required a written motion and an affidavit in order to obtain a continuance due to a missing witness, could not bar federal habeas review of Lee’s due-process claim that the denial of a continuance presented him from presenting a defense. *Lee*, 534 U.S. at 366. The Court held that, in the circumstances there, a perfect motion would not have prevailed due to the reason the trial court denied it (the judge’s unavailability), no state appellate decision previously required flawless compliance with the rule in the sudden, unanticipated circumstances that occurred at trial, and, most importantly, Lee had substantially complied with the rule. *Id.*, 534 U.S. at 381-83.

By contrast, this case does not concern an exorbitant application of an otherwise sound rule. To start, Whiteside’s claim that his challenge to his aggravated-robbery sentence only “ripened[]” when he received the 10-year sentence for capital murder on remand – Petition at 21 – is belied by the record. He raised the same claim he raises here in a state habeas petition before his resentencing. And, in both of his prior trips to the Arkansas Supreme Court, Whiteside challenged his aggravated-robbery sentence, just on different grounds. See *Whiteside II*, 2013 Ark. 176, at 8-9, 426 S.W.3d at 921-22 (rejecting arguments that resentencing on aggravated robbery should occur because same jury should decide both and unitary decision); *Whiteside I*, 2011 Ark. 371, at 14 n.3, 383 S.W.3d at 868 n.3 (noting withdrawal of challenge to

enhancement of aggravated-robbery sentence). And a challenge to that sentence in those proceedings would not have been futile even though he previously received a life sentence for capital murder because the Arkansas Supreme Court reviews – and sometimes reverses – companion term-of-years sentences even when an appellant remains subject to a life sentence. *See, e.g., Ellis v. State*, 2019 Ark. 286, at 1-5, 585 S.W.3d 661, 662-65 (reversing firearm enhancements imposed consecutively to life sentence). It also ignores the fact that, in his first appeal, Whiteside challenged the validity of his life sentence. *See Whiteside I*, 2011 Ark. 371, at 8-14, 383 S.W.3d at 865-68.

Moreover, when the case was before the Arkansas Supreme Court in *Whiteside II* for reconsideration in light of *Miller*, Whiteside knew that his case had the possibility of being remanded to the trial court for resentencing. In *Whiteside II*, he filed his brief *after* the State filed its initial brief, in which it advocated, as one of three alternatives, that the case be remanded for his resentencing for the capital murder in the range of 10 to 40 years or life. At that juncture, he had every incentive to challenge his sentence for his aggravated-robbery conviction. Indeed, he requested resentencing on that conviction – just *not* on the ground that the jury instruction concerning the sentencing range was unconstitutional. *See Whiteside II*, 2013 Ark. 176, at 8-9, 426 S.W.3d at 9-10. Thus, by the time Whiteside raised his claim in his motion for a new trial following the remand in *Whiteside II*, the claim was not newly ripe, as he avers; rather, it was spoiled.

Whiteside likewise is mistaken when he suggests that the Arkansas Supreme Court's decision ran afoul of the sentencing agreement's provision that, by agreeing to a 10-year sentence for capital murder, he was not waiving "any appellate rights[.]" Pet. App. Ex. C. Nothing in the parties' agreement changed – or could change – the scope of the Arkansas Supreme Court's mandate in *Whiteside II* or required that court to consider wholly new arguments that Whiteside previously had declined to raise. Indeed, a conclusion to the contrary would mean that a right of appeal afforded by state law requires appellate courts to conclude that no claim is procedurally defaulted or otherwise barred from review. *Lee's* language cannot possibly be read that broadly.

Equally implausible is Whiteside's suggestion that, even if the mandate in *Whiteside II* precluded the lower court from resentencing him on his aggravated-robbery conviction, nothing about the mandate prohibited the Arkansas Supreme Court itself from entertaining his claim, which he advocated below. Supp. App. 47. The argument ignores the case's procedural posture. On appeal, the Arkansas Supreme Court was reviewing the trial court's decision denying his motion for a new trial. That review did not encompass the power to ignore its own mandate rule, and, in any event, adhering to that rule was not an "exorbitant application" of state law. It hardly was unreasonable for that court to conclude that what was settled in *Whiteside II* and bound the trial court bound it as well in a subsequent appeal. Indeed, a contrary result would thwart the purpose of the mandate rule itself, which is to promote finality and thwart piecemeal litigation. *See, e.g., Dolphin v. Wilson*, 335 Ark. 113, 120, 983 S.W.2d 113, 116 (1998); *see also, e.g., Illinois v. Illinois Cent. R. Co.*, 184 U.S. 77,

92-93 (1902)(refusing to consider claims “not left open” by Court’s previous opinion and mandate after noting that doing so would “lead to endless litigation[]”)(cleaned up).

Whiteside’s observations that the Arkansas Supreme Court entertains arguments on appeal after remands for resentencing and that, in some limited circumstances, it entertains claims of error not preserved below are just that – observations – and do not demonstrate an unfair or exorbitant application of state-law rules here. In the only case Whiteside cites that concerned a sentencing remand, the Arkansas Supreme Court found that hearsay evidence had been improperly admitted during the sentencing phase of a trial, and, after remand, it entertained additional challenges to the new sentence. *Buckley v. State*, 341 Ark. 864, 866, 873-75, 20 S.W.3d 331, 333, 337-39 (2000); *see generally Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Nothing about the appeal following the resentencing in that litigation conflicts with, or casts doubt on, the Arkansas Supreme Court’s conclusion here that *Whiteside II* circumscribed what the trial court (or even the court itself) could consider in subsequent proceedings.

And the other case that Whiteside cites to support the position that the Arkansas Supreme Court could have considered his new argument, *Wicks v. State*, 270 Ark. 781, 785-87, 606 S.W.2d 366, 369-70 (1980), is even less applicable here. That case concerns the types of claims that Arkansas’s appellate courts will consider on direct appeal in criminal cases in the absence of an objection below. This case is not about whether a claim that wasn’t raised below could be raised on direct review; nor did the

Arkansas Supreme Court hold that it would not consider Whiteside's claim because he failed to raise it below. Rather, it held that it could not reach Whiteside's new claim because the mandate from the previous appellate proceeding limited the scope of the proceedings on remand. Moreover, Whiteside did not rely on *Wicks* in his briefing before the Arkansas Supreme Court here, *see generally* Supp. App. 17-43, 45-59, and that court has held that it will not consider whether a claim can be raised pursuant to *Wicks* when an appellant has not invoked it. *See, e.g., Anderson v. State*, 2011 Ark. 461, at 7, 385 S.W.3d 214, 200. Having failed to invoke *Wicks*, Whiteside has not demonstrated that the Arkansas Supreme Court made an exorbitant "elect[ion]" not to apply it here. Petition at 24.

Nor was the Arkansas Supreme Court's decision to give effect to its previous opinion in *Whiteside II* exorbitant on the ground that Whiteside's claim amounted to an illegal-sentence claim that could be raised at any time under Arkansas law – an argument that found no purchase here with the Arkansas Supreme Court and rightly so. *See* Supp. App. 4, 30-32. Whiteside is not suffering from an illegal sentence as that term is understood under Arkansas law. To the contrary, it is undisputed that Arkansas law authorizes his 35-year sentence, and Whiteside does not claim any statutory violation culminating in its imposition. His claim, rather, is that the process through which that sentence was imposed on him was unconstitutional.

Under Arkansas law – as one of the cases he relies on, *Cantrell v. State*, 2009 Ark. 456, 343 S.W.3d 591, makes clear – that is not an illegal sentence. In *Cantrell*, the court held that Cantrell's claim that the jury was improperly instructed and he was

improperly sentenced as a habitual offender when the charging instrument contained no such allegation was not an illegal-sentence claim that could be raised for the first time on appeal. *Id.*, 2009 Ark. 456, at 8-11, 343 S.W.3d 591, 596-97. Distinguishing Cantrell's claim from claims in which a statutory violation was alleged, the Arkansas Supreme Court held that he had raised a due-process claim and such claims must be raised below to be considered on appeal. *Id.*, 2009 Ark. 456, at 8-11, 343 S.W.3d 591, 596-97; *cf. Whiteside II*, 2013 Ark. 176, at 4, 426 S.W.3d at 919 (concluding that Whiteside's mandatory-life-without-parole sentence authorized by Arkansas statute, but unconstitutional under Eighth Amendment, could be challenged for first time on appeal). Indeed, there, the court reiterated its longstanding rule that constitutional claims will not be considered for the first on appeal. *Cantrell*, 2009 Ark. 456, at 11, 343 S.W.3d 591, 597. As was the case with Cantrell's due-process claim, Whiteside's Eighth Amendment, due-process claim is not an illegal-sentence claim.

Finally, no more persuasive is Whiteside's claim that the Arkansas Supreme Court's decision is undermined by allegedly inconsistent rationales. There is no inconsistency. The court explained at length that the scope of the mandate in *Whiteside II* limited the trial court to resentencing him on his capital-murder conviction. Supp. App. 5-7. Likewise, it was the issuance of the mandate – and its limiting effect – that made Whiteside's challenge to his sentence for aggravated robbery on remand too late, as the mandate rule precludes the raising of a “new” claim “after remand[,] when [it is] inconsistent with th[e supreme] court's [earlier] opinion and mandate[.]”

Dolphin, 335 Ark. at 120-21, 983 S.W.2d at 115-17. Whiteside’s challenge to his aggravated-robbery sentence on remand was inconsistent with the Arkansas Supreme Court’s conclusion that his aggravated-robbery sentence was “still valid[]” and its directive that the trial court only consider his capital-murder sentence. *Whiteside II*, 2013 Ark. 176, at 9, 426 S.W.3d at 922. Thus, Whiteside’s claim was raised too late, and the mandate rule precluded its consideration.

At the end of the day, Whiteside’s complaint isn’t really that the Arkansas Supreme Court exorbitantly applied the mandate rule. Rather, his chief argument amounts to little more than an assertion that that court should have found another state-law reason to consider his new claim. But as explained above, no such avenues existed, and Whiteside cannot demonstrate that the Arkansas Supreme Court’s refusal to entertain his claim stemmed from the unfair, inconsistent, or unreasonable application of a state procedural rule. Thus, the decision below rests on an adequate and independent state-law ground, and the petition should be denied for lack of jurisdiction.

II. This case is a poor vehicle for deciding the issues presented in the petition.

Whiteside’s petition seeks abstract review of an issue that isn’t presented by the facts of this case. That is, he asks this Court to decide whether the Eighth Amendment prohibits imposing a life sentence for a nonhomicide offense when a juvenile is simultaneously sentenced for a homicide offense. Recognizing that his case does not actually present that question – since he received a 35-year sentence (plus 15 due to his use of a firearm) for aggravated robbery – he argues that deciding that such a

sentence would be unconstitutional would warrant reviewing his own claim that instructing the jury that he *could have* received a life sentence for aggravated robbery violated due process. In a case in which the petitioner is not serving a life sentence, the Court should not grant certiorari to answer the primary question of whether the Eighth Amendment prohibits a juvenile offender from being sentenced to life imprisonment for a nonhomicide while simultaneously being sentenced for a homicide in order to answer the subordinate question of whether a jury instruction authorizing a life sentence for the nonhomicide violates due process. If the Court considers the primary question undecided, it should wait to decide it in a case in which it actually is presented.

Nor does Whiteside point to any split among the lower courts on the Eighth Amendment issue that would warrant reaching out and addressing that question in the abstract. Indeed, Whiteside does not identify *any case from any court* addressing whether the Eighth Amendment prohibits a juvenile who has committed both a homicide and a nonhomicide and is sentenced at the same time for both offenses from being sentenced to life imprisonment for the latter. Again, as noted above, his own case does not contain a decision on that score. And unsurprisingly, against that backdrop, he fails to identify any decision, conflict, or confusion on the subsidiary issue of whether a jury's *mere consideration* – not imposition – of a life sentence for a nonhomicide offense committed by a juvenile homicide offender violates due process. Nor – just as tellingly – does he actually claim that the Eighth Amendment prohibits a juvenile offender from receiving life imprisonment for a nonhomicide offense when

sentenced for both a homicide and a nonhomicide. Instead, at best, he merely claims that this Court left that question unresolved in *Graham*. Petition at 13-17.

Further underscoring why review isn't warranted here is the fact that Arkansas law no longer authorizes life-without-parole sentences for juvenile nonhomicide offenders. That is true no matter what sentences they received or what offenses they have committed, including offenses committed in combination with a homicide offense. In 2017, the Arkansas General Assembly adopted the Fair Sentencing of Minors Act of 2017, and from the date of enactment forward, the Act makes juvenile nonhomicide offenders eligible for parole no later than after they have served 20 years of their sentences for such offenses. Ark. Code Ann. § 16-93-621(a)(1)(Supp. 2019). Thus, the petition presents an issue that cannot recur even under Arkansas law and that cannot possibly justify deciding – even on Whiteside's view – potentially weighty constitutional issues in the abstract.

Finally, Whiteside's suggestion that his sentence for aggravated robbery is unduly harsh when compared to his 10-year sentence for capital murder does not change the analysis. Petition at 21; *see also* Supp. App. 43. The prosecution in this case no doubt agreed to Whiteside's receiving the minimum sentence for capital murder on remand because he already was serving a longer sentence that was unchallengeable in that proceeding. He is in a poor position to claim that, because he got the bare minimum sentence for one crime due to a preexisting sentence for another crime, that minimum sentence now renders the preexisting sentence too harsh. His petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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