

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**

**SUPPLEMENTAL APPENDIX FOR RESPONDENT
STATE OF ARKANSAS**

LESLIE RUTLEDGE

Arkansas Attorney General

NICHOLAS J. BRONNI

Arkansas Solicitor General

VINCENT M. WAGNER

Deputy Solicitor General

VADA BERGER

Senior Assistant Attorney General

Counsel of Record

OFFICE OF THE ARKANSAS

ATTORNEY GENERAL

323 Center St., Suite 200

Little Rock, AR 72201

(501) 682-1052

vada.berger@arkansasag.gov

TABLE OF CONTENTS

	PAGE
<i>Whiteside v. State</i> , 2019 Ark. 349, 588 S.W.3d 720	Supp. App. 1
Mandate, <i>Whiteside v. State</i> , Arkansas Supreme Court Case No. CR-10-1200 (issued May 30, 2013)	Supp. App. 10
Order, <i>Whiteside v. Kelley</i> , Jefferson County Circuit Court Case No. 35CV-14-150 (entered Mar. 4, 2015)	Supp. App. 11
Statement of Case and Argument in Appellant’s Brief, <i>Whiteside v. State</i> , Arkansas Supreme Court Case No. CR-19-264 (filed May 20, 2019)	Supp. App. 16
Argument in Appellant’s Reply Brief, <i>Whiteside v. State</i> , Arkansas Supreme Court Case No. CR-19-264 (filed Aug. 12, 2019)	Supp. App. 44

Cite as 2019 Ark. 349
SUPREME COURT OF ARKANSAS
No. CR-19-264

LEMUEL WHITESIDE

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: November 21, 2019

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT
[60CR-09-1183]

HONORABLE BARRY SIMS, JUDGE

AFFIRMED.

ROBIN F. WYNNE, Associate Justice

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 (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

direct appeal, 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 (2012). See *Whiteside v. Arkansas*, 567 U.S. 950 (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

¹Whiteside'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 (2005), the Supreme Court invalidated the death penalty for juveniles.

²Specifically, 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."

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 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 Whiteside's motion, and this appeal followed.

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 (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.

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.”

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.” *Ingle v. Ark. Dep’t of Human Servs.*, 2014 Ark. 471, at 5–6, 449 S.W.3d 283, 287. This court has explained:

³Whiteside 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.”).

[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.” 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.

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 after considering the same evidence in the same case.⁴ The aggravated robbery

⁴At trial, the jury was not presented with evidence of the youth factors later determined necessary in *Miller v. Alabama*, 567 U.S. 460 (2012).

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 (2012) (prohibiting mandatory life sentences for juvenile offenders) or of *Graham v. Florida*, 560 U.S. 48 (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

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.

J. Thomas Sullivan, for appellant.

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

MANDATE

AFFIRMED IN PART;
REVERSED AND REMANDED IN PART
CRIMINAL

STATE OF ARKANSAS
In the Supreme Court

Proceedings of April 25, 2013

CR10-1200

LEMUEL SESSION WHITESIDE

APPELLANT

v. Appeal from Pulaski Circuit, Seventh Division
(No. CR2009-1183)

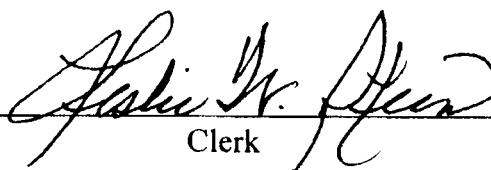
STATE OF ARKANSAS

APPELLEE

This criminal appeal was submitted to the Arkansas Supreme Court on the record of the Circuit Court of Pulaski County, Seventh Division, and briefs of the respective parties. After due consideration, it is the decision of the Court that the judgment of the trial court is affirmed in part; reversed and remanded in part for the reasons set out in the attached opinion.

Danielson, J., concurs.

IN TESTIMONY, that the above is a true copy of
the judgment of the Arkansas Supreme Court. I,
Leslie W. Steen, Clerk, set my hand and affix the
seal this 30th day of May, A.D. 2013.


Clerk

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

LEMUEL WHITESIDE

PETITIONER

vs.

No. CV-2014-170-5

WENDY KELLEY, Director,
Arkansas Department of Correction

RESPONDENT

ORDER

Before the Court is petitioner Lemuel Whiteside's petition pursuant to Ark. Code Ann. § 16-90-111 (Supp. 2013) and Ark. Code Ann. §§ 16-112-101 et seq., (Repl. 2006). In 2010, a Pulaski County jury found petitioner guilty of capital murder and aggravated robbery for which he was sentenced to life without parole and 35 years, respectively, with the latter enhanced by 15 years due to his use of a firearm during the commission of the offense. Petition at Exhibit A. Petitioner was 17 at the time he committed the offenses. Id. Following various appellate proceedings, the Arkansas Supreme Court held that petitioner was entitled to resentencing for his capital-murder conviction, with a permissible range of punishment of 10 to 40 years or life. Whiteside v. State, 2013 Ark. 176, at 5-9, 426 S.W.3d 917, 920-22, cert. denied, 134 S. Ct. 311 (2013). Insofar as the Court is aware, that resentencing is still pending in Pulaski County Circuit Court.

In this Court, petitioner is seeking relief from the 35-year sentence he received for his aggravated-robbery conviction on the ground that the sentence

FILED

MAR - 4 2015 ✓

violates the Eighth and Fourteenth Amendments because the trial court improperly instructed the jury that the sentencing range was 10 to 40 years or life. In support of this claim, he principally relies on the holding of Graham v. Florida, 560 U.S. 48, 75 (2010), that the Eighth Amendment forbids the imposition of life without parole on a juvenile nonhomicide offender. He claims that the inclusion of life as a permissible punishment rendered his 35-year sentence illegal because the jury may have considered life when sentencing him to 35 years' imprisonment. Petition at 9, ¶ 17. He adds that, because the sentence for aggravated robbery is illegal, then, so, too, is its 15-year enhancement for its commission with a firearm.

The Court lacks jurisdiction to entertain petitioner's claims to the extent that they are brought pursuant Ark. Code Ann. § 16-90-111. The Arkansas Supreme Court has held that "it is the court where the judgment was entered that has authority to act under Arkansas Code Annotated section 16-90-111." Wesley v. Hobbs, 2014 Ark. 260, at 2 (per curiam). The judgment here was entered in Pulaski County Circuit Court, Petition at Exhibit A, and, thus, only that court has jurisdiction to entertain a petition under § 16-90-111. To the extent that the instant petition purports to request relief pursuant to § 16-90-111, petitioner has filed it "in the wrong court[.]" Wesley, 2014 Ark. 260, at 2, and his request for relief under that provision is hereby dismissed for lack of

jurisdiction.

Petitioner's request for relief pursuant to the habeas-corpus statute, Ark. Code Ann. §§ 16-112-101 et seq., likewise is dismissed because it fails to demonstrate probable cause to believe that he is being "detained without lawful authority[.]" Ark. Code Ann. § 16-112-103(a)(1). See, e.g., Craig v. Hobbs, 2012 Ark. 218, at 3-4 (per curiam)(holding that a habeas petition not supported by probable cause is properly dismissed). For purposes of the habeas-corpus statute, a detention is unlawful when the judgment imposing it is invalid on its face or when the committing court lacked jurisdiction. E.g., id., at 2. Petitioner's claim that his sentence for aggravated robbery is illegal does not state a claim of facial invalidity, and he does not purport to claim that the committing court lacked jurisdiction.

The Arkansas Supreme Court has limited illegal-sentence claims cognizable in habeas proceedings to those apparent "on the face of the commitment order[.]" Murphy v. State, 2013 Ark. 155, at 4 (per curiam); see also, e.g., Misenheimer v. Hobbs, 2012 Ark. 343, at 4 (per curiam)(refusing to consider validity of convictions used to establish habitual-offender status in habeas proceeding). Habeas proceedings thus are "not intended to require an extensive review of the record of the trial proceedings[.]" with "the court's inquiry into the validity of the judgment . . . limited to the face of the

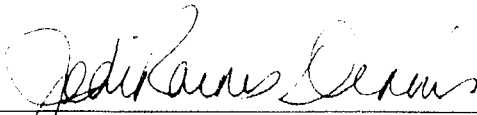
commitment order.” Murphy, 2013 Ark. 155, at 3; but cf., e.g., Darrough v. State, 2013 Ark. 28, at 3 (per curiam)(stating that habeas challenge that requires only a “limited review” of a “limited number of documents” from record permissible). Consistently with this formulation, a claim that a sentence is unconstitutionally excessive despite its being within a permissible range is not a cognizable habeas claim, Bliss v. Hobbs, 2012 Ark. 315, at 5 (per curiam) (stating that due-process, vindictive-sentence claim not cognizable), nor is a claim that a sentence was imposed in an illegal manner. Pineda v. Norris, 2009 Ark. 471, at 2 (per curiam).

Petitioner’s challenge to his sentence for aggravated robbery is not cognizable under these standards. The error he claims is not apparent on the face of the commitment order, as it requires resort to the record to examine the trial court’s instructions to the jury. And, petitioner admits that the actual sentence imposed on him for aggravated robbery – 35 years – fell within the range permitted both by the Arkansas statute for a Class Y felony, see Ark. Code Ann. § 5-4-401(a)(1)(Repl. 2006), and by the constitution. Petition at 6-7, ¶¶ 12, 14. Moreover, the claim he makes is not an illegal-sentence claim, but, rather, either an excessive-sentence claim or a claim that his sentence was imposed in an illegal manner, as he does not dispute that the trial court had the authority to impose a 35-year sentence. E.g., Goins v. Norris, 2012 Ark. 192,

at 4 (per curiam)(holding Goins failed to demonstrate probable cause that his sentence was illegal because sentence within prescribed statutory range for underlying offense, irrespective of whether he was improperly sentenced as an habitual offender); cf. Hobbs v. Gordon, 2014 Ark. 225, at 7-8, 434 S.W.3d 364, 368-69 (holding claim that life sentence actually imposed was itself unconstitutional because mandatory was cognizable in habeas proceeding).

Petitioner's challenge to his sentence for aggravated robbery is not cognizable in these proceedings, and, thus, his petition for a writ of habeas corpus is hereby dismissed for failure to demonstrate probable cause. And, because his challenge to his aggravated-robbery sentence is unavailing, the Court need not consider his challenge to the 15-year enhancement of it, which is premised solely on his claim of invalidity of the underlying 35-year sentence. See Petition at 10-15, ¶¶ 19-33. The petition is hereby dismissed due to lack of jurisdiction and failure to demonstrate probable cause.

It is so ordered.



Jodi Raines Dennis
Circuit Judge

3-2-2015

Date

2014-170-5

No. 19-264

IN THE
SUPREME COURT OF ARKANSAS

LEMUEL WHITESIDE,

APPELLANT,

v.

THE STATE OF ARKANSAS,

APPELLEE.

ON APPEAL FROM THE SIXTH JUDICIAL DISTRICT CIRCUIT COURT
FOURTH DIVISION,
HON. BARRY SIMS, JUDGE PRESIDING

ABSTRACT, BRIEF, and ADDENDUM

J. THOMAS SULLIVAN
ARKANSAS BAR NO.2006019
1122 WEST CAPITOL
LITTLE ROCK, ARKANSAS 72201
501/376-6280
sullivanatty@gmail.com

STATEMENT OF THE CASE

Appellant Lemuel Whiteside was charged with the offense of capital felony murder committed during the course of committing aggravated robbery. He was tried before a jury and convicted of both the underlying offense and capital felony murder. The jury also found that Appellant used a firearm in the commission of the offenses charged. Appellant was sentenced to the mandatory life sentence on the capital murder 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 50 years, and ordered the enhanced 50-year sentence to be served concurrently with the mandatory life sentence.

On direct appeal, the Court 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 Appellant'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, this Court reversed the life sentence and remanded for resentencing on the capital murder conviction. *Whiteside v. State*, 2013 Ark. 176, at *10, 426 S.W.3d 917, 222. However, the Court rejected Appellant's argument

SOC-1

that the resentencing should also include resentencing on the aggravated robbery count. *Id.* at *8-*9, 426 S.W.3d at 221.

The trial court issued its *Nunc Pro Tunc* Amended Sentencing Order [ADD/6-7; R/186-88], imposing the 10-year sentence agreed upon by the State and Appellant on the capital murder charge pursuant to the remand for re-sentencing ordered by this Court. Appellant then filed his Motion for New Trial, [ADD/9-27; R/191-209], arguing that the sentence imposed on the aggravated robbery count was unlawful in light of the Supreme Court's decision in *Graham v. Florida*, 560 U.S. 48, 79 (2010), prohibiting the imposition of a life sentence without parole eligibility for an offender convicted of a non-homicide offense while a juvenile. This issue was neither argued, nor addressed by this Court in its decision remanding the case for re-sentencing.

Defense counsel relied on *Graham* in contesting the statutory range of sentences including life sentence options on both the capital felony murder and aggravated robbery counts. [ABS/105-107; 109; 110-111, 117-118, 121, 122-123, 125-127, 128; R/564-566. 569, 570, 579, 586, 589, 590-592. 594]. Counsel specifically objected to the jury being instructed on a life imprisonment sentence on the aggravated robbery, relying on *Graham*, [ABS/105-107, 109. 110-111, 118; R/564-67, 568-69, 570-71, 578]. The trial court denied the objections and refused

SOC-2

to delete the life sentence option in the instruction. [ABS/218; R/568]. It instructed the jury at the sentencing phase of trial 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. [ABS/121; R/586].

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. (R. 588) If you sentence Lemuel Whiteside to

SOC-3

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.

[ABS/123-5; R/588]. After the jury deliberated and reached its sentencing decision, the trial court read the sentencing recommendation on the aggravated robbery charge, imprisonment for 35 years. [ABS/128; R/594].

Following this Court's remand for re-sentencing, the prosecution and Appellant reached an agreement in which Whiteside waived jury sentencing and the State recommended the trial court impose a sentence of 10 years on the capital murder charge. The trial court entered the Nunc Pro Tunc Amended Sentencing

SOC-4

Order, setting his sentence at 10 years in the Arkansas Department of Correction. [ADD/6-7; R/186-187].

Whiteside then filed his Motion for New Trial or Other Relief, [ADD/6-25; R/191-210], arguing that the 35-year sentence imposed on the aggravated robbery count violated his constitutional right under *Graham*, which prohibited imposition of a life sentence without expectation for parole eligibility on a defendant who committed a non-homicide offense while a juvenile. Because the trial court instructed the jury, over defense counsel's objections, that it could impose a sentence within the statutory sentencing range of 10-40 years, or life, Whiteside argued that even a sentence within the range of years was tainted by the jury's ability to consider life as a sentencing option because it is not possible to determine what sentence jurors would have imposed had the option of life imprisonment not been included in the instruction. [ADD/15-24; R/199-208].

The State responded by arguing that the trial court had no jurisdiction to reconsider the sentence imposed on the aggravated robbery, [ADD/26-27; R/231-232], and Whiteside replied to the State's argument. [ADD/28-34; R/233-239]. The trial court overruled the Motion for New Trial or Other Relief, [ADD/35; R/241], and Whiteside gave his notice of appeal. [ADD/36-37; R/257-258].

SOC-5

ARGUMENT

THE 35-YEAR SENTENCE IMPOSED ON APPELLANT WHITESIDE'S ARMED ROBBERY CONVICTION VIOLATED THE PROTECTION AFFORDED HIM BY THE UNITED STATES CONSTITUTION WHERE 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, 79 (2010), BECAUSE APPELLANT WAS A JUVENILE WHEN HE COMMITTED THE NON-HOMICIDE FELONY OFFENSE VIOLATING HIS RIGHT TO DUE PROCESS OF LAW.

The imposition of a sentence imposed contrary to law presents an issue of law resolved by the Court *de novo*. *Yarbrough v. State*, 370 Ark. 31, 33, 257 S.W.3d 50, 53 (2007).

A. *Whiteside's constitutional claim*

There is no question that had the jury imposed a life sentence on the aggravated robbery count, as authorized by the trial court in its sentencing phase instructions, [ABS/121; R/586; SOC/3-4], the sentence would have been unconstitutional in light of *Graham v. Florida*, 560 U.S. 48, 79 (2010). There, the United States Supreme Court held that imposition of a life sentence without prospect for parole on an offender who committed a non-homicide felony while a juvenile violates the Eighth Amendment. This Court has applied *Graham* in Arkansas cases. *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).

Despite defense counsel's persistent and unequivocal objections to the inclusion of a life sentence option in its instructions, [[ABS/105-107; 109; 110-111, 117-118, 121, 122-123, 125-127, 128; R/564-566. 569, 570, 579, 586, 589, 590-592. 594; SOC/2], the trial court overruled the objections and refused to delete the life sentence option from its instructions. [ABS/218; R/568; SOC/3].

Instead, the trial court agreed with the State's argument that Graham did not apply to imposition of a life sentence on a non-homicide felony when the felony is "associated" with commission of a homicide. [ABS/106; R/564]. The argument would necessarily fail later when the mandatory life sentence imposed upon juveniles convicted of homicide was held unconstitutional in *Miller v. Alabama*, 567 U.S. 460 (2012), leading to vacation of Whiteside's life sentence on the capital murder charge. *Whiteside v. Arkansas*, 567 U.S. 850 (2012).

The trial jury imposed a sentence of 35 years on the aggravated robbery, enhanced by 15 years for use of a firearm in commission of the robbery, [ADD/6-7; R/640, 642] and the trial court ordered these sentences to be served consecutively. [ADD/2; R/71]. On direct appeal, this Court upheld Whiteside's conviction and sentence on the capital murder count. 2011 Ark. 371, at *8-*10, 383 S.W.3d at 866. On remand from the United States Supreme Court, this Court remanded for resentencing. *Whiteside v. State*, 2013 Ark. 176, at *10, 426 S.W.3d

917, 222. The trial court imposed a 10-year sentence on the capital murder charge on agreed recommendation in its Nunc Pro Tunc Amended Sentencing Order once Whiteside waived his right to resentencing by jury. [Ex. C: ADD/6-7; R/186-187].

While the 35-year sentence was within the range authorized by statute, the trial court's sentencing instruction violated the constitutional protection afforded Whiteside by improperly authorizing his jury to consider imposing a sentence of life imprisonment, contrary to the Supreme Court's holding in *Graham*. The trial court's action in instructing the jury contrary to *Graham* violated his right to due process by tainting the sentence imposed by the jury, as Whiteside argued in his Motion for New Trial or Other Relief, citing *Hicks v. Oklahoma*, 447 U.S. 343, 345-46 (1980). [Ex. D: ADD/24-25; R/207-208].

Significantly, the sentence imposed by the jury on the aggravated robbery conviction following the trial court's constitutionally-infirm sentencing instruction under *Graham* did not result in facial prejudice to Whiteside until the resentencing decision. Originally, the life sentence was to be served concurrently with the 35 year sentence on the aggravated robbery, [ABS/130; R/596]. Because the sentence imposed on the capital murder was life without parole, [Ex. A: ADD/1, 3; R/070, 072], Whiteside would never have had any expectation for parole on the aggravated robbery sentence and, thus, there was no prejudice from the sentence on that charge that was constitutionally prohibited under *Graham*.

B. The trial court's denial of Appellant's Motion for New Trial or Other Relief

Appellant Whiteside filed his Motion for New Trial or Other Relief [Ex. D: ADD/8-27; R/191-210] following the trial court's entry of its *nunc pro tunc* order imposing sentence on the capital murder charge, challenging the sentence on the aggravated robbery charge as imposed in violation of the Eighth Amendment and Supreme Court's holding in *Graham, supra*. Whiteside argued that the 35 year sentence, while within the statutory range of 10 to 40 years or life for a Class Y felony, ARK. CODE ANN. § 5-4-401(a)(1), based on the designation of aggravated robbery as a Class Y felony, ARK. CODE ANN. § 5-12-103(b), had been set by the jury improperly instructed that it could consider imposing a life sentence as an option in setting his punishment.

It is not possible to discern from the trial record whether jurors were influenced by the life sentence option included in the flawed instruction that reflected the statutory punishment range at the time of the offense. The statutory range, which included the option for life imprisonment, had been rendered unconstitutional by the announcement of the modified holding in *Graham* on July 6, 2010, prior to trial on July 13-14, 2010 [ABS/1; R/070].]. Consequently, Whiteside argued that even a sentence within the statutory range could not be found to be harmless, [Ex. D: ADD/16-25; R/199-208], relying on cases involving

the same problem of statutorily-authorized sentences imposed on legally-flawed sentencing instructions. [ADD/19-21; R202-204].

The State responded initially to Appellant's Motion for New Trial or Other Relief [Ex. E: ADD/28-29; R/231-232] that Whiteside failed to demonstrate an "actual point of relief under Rule 33.3 of the Arkansas Rules of Criminal Procedure or A.C.A. § 16-89-130." [ADD/28; R/231]. Contrary to the State's position, both the statute, ARK. CODE ANN. § 16-89-130(c)4) (authorizing new trial "[w]here the court has misinstructed or refused to properly instruct the jury), specifically, and Rule 33.3, broadly (and person convicted of a felony may "file a motion for new trial or any other application for relief") provide authority for Appellant's Motion for New Trial or Other Relief.

The State also responded that the trial court was "only vested with the limited jurisdiction conferred upon it by the mandate" of this Court in returning the case to the trial court for resentencing. [Ex. E: ADD/29; R/232]. Whiteside acknowledges that the trial court recognized this limitation in its *nunc pro tunc* resentencing order: "The sentence for aggravated robbery and the firearm enhancement were not disturbed and are not at issue at resentencing." [Ex. C: ADD/6; R/186]. While Appellant responded to the State's reliance on *City of Dover v. Barton*, 342 Ark. 541, 29 S.W.3d 698 (2000), [Ex. F: ADD/31-34; R/234-237], it appears that the Court's decision in *Ward v. State*, 2017 Ark. 215, at 2-3,

521 S.W.3d 480, 481-82, is consistent with the State's position, even if *Barton* is distinguishable factually and as a matter of law.

However, the fact that the trial court may not have had discretion to consider Whiteside's claim based on *Graham* is academic since the court denied the Motion for New Trial or Other Relief and did not exercise discretion in addressing the constitutional issue. [Ex. G: ADD/37; R/241]. In moving for new trial, Appellant Whiteside considered it necessary to preserve error and obtain a ruling from the trial court in order to preserve the constitutional claim for review in this Court on appeal from the resentencing order. The denial of relief preserves error for review.

C. The Court's jurisdiction on appeal from resentencing

Appellant recognizes that under the circumstances of this Court's remand its jurisdiction in this appeal may prove to be an issue in the context of review of Whiteside's claim raised in the Motion for New Trial or Other Relief. The Court has jurisdiction over appeals following disposition of post-trial motions pursuant to ARK. CODE ANN. § 16-91-105(b)(5) (notice of appeal following ruling on post-trial motion for relief). Although Appellant argued unsuccessfully for resentencing on the aggravated robbery count when the Court heard the case on remand from the Supreme Court, his claim was grounded in interpretation of the statute governing remand for resentencing, ARK. CODE ANN. § 16-97-101. The Court rejected his argument that the felony murder and underlying felony counts had to be considered

in a single sentencing proceeding in order to correctly reflect the decision of the “jury.” *Whiteside v. State*, 2013 Ark. 176, at *9-*10, 426 S.W.3d at 921-22.

Moreover, in his Motion for New Trial or Other Relief, Whiteside made a different argument, based on his claim of constitutional violation under *Graham*, not decided by the Court previously and, thus, it is not precluded from consideration on the merits by application of the *law of the case doctrine*. See, e.g., *Carmago v. State*, 337 Ark. 105, 109-10, 987 S.W.2d 680, 683 (1999). Additionally, there is significant change in facts underlying Appellant’s claim, the fact that the entry of the 10-year sentence on resentencing now results in actual prejudice from the 50-year consecutive sentence imposed on the aggravated robbery count, as increased by the firearm enhancement. The Court explained:

The doctrine is not inflexible and does not absolutely preclude correction of error, but it prevents an issue raised in a prior appeal from being raised in a subsequent appeal “unless the evidence materially varies between the two appeals.” *Kemp v. State*, 335 Ark. 139, 142, 983 S.W.2d 383, 385 (1998).

Carmago, id. at 110. 987 S.W.2d at 683.

Prior to the trial court’s imposition of the 10-year sentence on the capital murder charge, Appellant Whiteside was serving a life sentence without the reasonable expectation of parole and any implication for parole eligibility on the aggravated robbery sentence was essentially mooted by the life sentence. Since he could have still be sentenced under the Class Y sentencing range on remand he

could not demonstrate prejudice from the 35-year sentence imposed on the aggravated robbery charge until he received a sentence other than life imprisonment on the capital murder count. In its remand order, the Court expressly rejected the State's argument that it could modify Whiteside's sentence to life with the possibility of parole, finding that this would violate the express requirement imposed on *Graham* for individualized sentencing including the sentencer's consideration of Whiteside's age as a mitigating factor. It held:

In the present case, as in *Jackson*, we find that Whiteside's capital-murder sentence should be reversed and remanded for resentencing under the discretionary range for a Class Y felony, as provided in Ark.Code Ann. § 5-4-401(a)(1) (Repl.2006). We also direct that a sentencing hearing be held in which Whiteside may present for the jury's consideration any mitigating evidence as provided in *Miller*. We thus reject the State's alternative argument that this court can sever the "without parole" language in Ark.Code Ann. § 5-10-101(c)(1), leaving Whiteside with a mandatory life sentence. As we noted in *Jackson*, this would not permit consideration by the jury of the required *Miller* evidence. *Id.* at 7, 426 S.W.3d at 910.

Whiteside, 2013 Ark. 176, at *8, 426 S.W.3d at 921. Because resentencing could have resulted in imposition of a life sentence even upon consideration of mitigation evidence relating to Whiteside's age at the time of the offense, the 35-year aggravated robbery sentence only became prejudicial in fact when a less onerous sentence was imposed on the capital murder charge.

Finally, Appellant notes that the terms of the resentencing agreement with the State expressly, as reflected in the Nunc Pro Tunc Amended Sentencing Order, provided:

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.

[Ex. C: ADD/7; R/187]. Whiteside recognizes that issues of jurisdiction are matters of law that cannot be created or waived by the parties. *Pennington v. State*, 2014 Ark. 414, at *2, 497 S.W.3d 186, 187. There, the Court explained:

[W]e 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).

Here, Appellant argues that the 35-year sentence imposed on the aggravated robbery, enhanced by 15 years, is void or voidable, even though the sentence imposed would fall within the statutory range of punishment permitted, apart from the constitutional limitation recognized in *Graham v. Florida*.

D. The aggravated robbery sentence was imposed illegally

[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, 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 persisted in his objection 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, Appellant Whiteside'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 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 would be imposed as sentence of life imprisonment. The life sentence imposed in the case was subsequently held to be unconstitutional, *Whiteside*, 2013 Ark. 176, at *10, 426 S.W.3d 917, 222.

Thus, 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 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 jurisdictional defect in the sentencing instruction on aggravated robbery based on *Graham v. Florida* had not been argued on the direct appeal, nor in the remand brief, and has never been addressed by the Court.

E. The error in the aggravated robbery sentencing instruction warrants modification of the sentence previously imposed by the jury or a new sentencing hearing.

As the decisions in *Cantrell* and *Donaldson* demonstrate, 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, this 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. That 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 Appellant 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,

[ABS/121; R/586], 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 35-year sentence 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 Appellant'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 Supreme Court held that the assumption by the 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 Appellant's reliance

on *Hicks* in support of the 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 the *Hicks* 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).

Appellant cannot contest the facts relied upon by this Court in affirming his convictions in the direct appeal, *Whiteside v. State*, 2011 Ark. 371, at *1-*3, 383 S.W.3d 859, 862-63, including testimony that he was primarily responsible for instigating the robbery attempt. However, the record showed that Whiteside did not leave the scene of the robbery with State's witnesses Cynthia Arrington and Leanna Talley, along with co-defendant Cambrin Barnes, after Barnes shot the intended robbery victim, Mr. London. [ABS/8-9; R/236-238, testimony of Cynthia Arrington]. Barnes shot the victim as the victim lunged at him during the robbery

attempt. [ABS/42; R/235-236, testimony of Leanna Talley].

State's witness Talley testified that while Barnes was in the car as they drove from the scene, she saw Lemuel Whiteside attempting to give CPR to the victim. She testified that Barnes was in "shock," saying "Why did he do that, you know, why did he do that, you know?" before telling her to drive away before the police arrived. [ABS/43, 56; R/327, 366]. She then explained during her cross-examination:

Lemuel started giving him CPR. He still had his shirt on. You asked if he took his shirt off stem the flow of blood. I suppose he – he didn't – I didn't see him with his shirt off till I came back.

I'm looking at State's Exhibit Number 6. There is a shirt in that picture. That's Lemuel's shirt. Covered in blood. That's Mr. London's blood. I saw this when I came back to the house having dropped off Cambrin Barnes and Cynthia Arrington. I came back to the house and I told the police that, "I saw Lemuel giving Mr. London CPR." Mouth-to-mouth resuscitation. And he had his shirt off and was trying to stem the flow of blood.

[ABS/58; R/368-369]. The witness also testified:

It wasn't until after Cambrin Barnes shot Mr. London that Lemuel came out of the house, ran across to where Mr. London was, and began to give him CPR.

[ABS/63; R/381]. She concluded her testimony:

Lemuel Whiteside never attempted to get in my car after the robbery. No, he never – Only Cambrin Barnes got in my car.

Lemuel Whiteside left his home at 9810 Comstock and went over to his neighbor's, 9816, to address Mr. London. And that was to

give him CPR. That's what I saw with my own eyes. And he was still tending to him when I got back.

[ABS/64; R/384-386]. Little Rock Police Department Detective testified that he did not observe Lemuel Whiteside perform CPR on Mr. London; the body had already been removed from the scene by ambulance when he arrived. [ABS/79; R/442]. Whiteside also testified that he performed CPR on the victim during testimony in the punishment phase. [ADD/120; R/584].

Leanna Talley testified that she had been dating Lemuel Whiteside for a month before the offense happened, that she believed she loved him and they were seriously involved. [ABS/35, 50; R/310, 349]. While her testimony may be doubted based on her relationship with Appellant and she admitted that she had not been truthful in her interview with police, [ABS/36; R/312], her credibility with respect to her testimony that Appellant performed CPR on London would be a matter for jury determination on resentencing.

In Appellant's case, the Court 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.

Finally, because the underlying sentence imposed on the aggravated robbery conviction is invalid, having been determined based on a constitutionally-impermissible directive that jurors could impose a life sentence on this charge contrary to *Graham v. Florida*, the 15-year enhancement for use of a firearm in the commission of the offense must be vacated. ARK. CODE ANN. § 16-20-120(d). Under this section, the reversal of the conviction imposed on the underlying felony enhanced by this section requires reversal of the enhancement:

(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.

Although the jury imposed the firearm enhancement only on the aggravated robbery count, [Ex. B: ADD/5; R/642, and Ex. A: ADD/1-2; R/70-71], it could theoretically have been imposed on the life imprisonment sentence for the capital murder. However, because that sentence was vacated, the firearm enhancement could not have survived in that instance.

CONCLUSION AND PRAYER FOR RELIEF

The trial court committed constitutional error in instructing jurors that they could consider imposing a sentence of life imprisonment on Appellate Whiteside

on the aggravated robbery count on which had been convicted at trial. The court did so over the repeated objections of defense counsel that under the United States Supreme Court's decision in *Graham v. Florida*, a life sentence without prospect for parole or parole eligibility imposed for a non-homicide offense on a defendant who committed the offense while a juvenile violated the Eighth Amendment. The trial court exceeded its authority in directing jurors to consider the range of punishment that would include the possibility of life imprisonment and in doing so, committed error tainting the 35-year sentence imposed by the jury on the aggravated robbery charge. Because it is not possible to discern the basis for the jury's determination or to exclude prejudice from the constitutionally-impermissible directive that life imprisonment was a sentence alternative, and in light of the fact that jurors were also told that the sentence on the capital murder count would be life imprisonment—a sentence later held unconstitutional—Whiteside's right to due process of law was violated by the trial court's error.

Appellant Whiteside respectfully moves this Court reverse or vacate the 35-year sentence for aggravated robbery and 15-year firearm enhancement imposed by the jury, ordered to be served consecutively to the 35-year term for a total sentence of 50 years, or 600 months. [Ex. B: ADD/2; R/071]. Further, Appellant moves the Court exercise its authority to order the sentence imposed on the aggravated robbery count to a term of 10 years in the Arkansas Department of

Correction, commensurate with the 10-year sentence imposed on remand by the Circuit Court on the capital murder count, [Ex. C: ADD/6-7; R/186-187], to avoid the irregularity in imposition of a greater punishment for aggravated robbery than for the capital felony murder predicated on the lesser offense.

Respectfully submitted this 20th day of May, 2019.

/s/ J. Thomas Sullivan
J. Thomas Sullivan `
AR Bar No. 2006019
1122 West Capitol
Little Rock, Arkansas 72201
(501) 376-6277
sullivanatty@gmail.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I, J. Thomas Sullivan, hereby certify that a true and correct copy of the Appellant's Abstract, Brief, and Addendum has been served in compliance with Administrative Order of the Supreme Court 21, section 7, on May 20, 2019, to the following:

Darnisa C. Evans Johnson

Vada Berger

Office of the Arkansas Attorney General

/s/ J. Thomas Sullivan
J. Thomas Sullivan

NO. CR-19-264

IN THE
ARKANSAS SUPREME COURT

LEMUEL SISSION WHITESIDE,
APPELLANT,
v.

STATE OF ARKANSAS,
APPELLEE.

ON APPEAL FROM
THE CIRCUIT COURT OF PULASKI COUNTY,
SIXTH JUDICIAL DISTRICT, SEVENTH DIVISION
THE HONORABLE BARRY SIMMS, JUDGE PRESIDING

APPELLANT WHITESIDE'S REPLY BRIEF

J. Thomas Sullivan
Arkansas Bar #2006019
1122 West Capitol
Little Rock AR. 72201
501/376-6280
sullivanatty@gmail.com

WHITESIDE'S ARGUMENT IN REPLY

THE 35-YEAR SENTENCE IMPOSED ON APPELLANT WHITESIDE'S ARMED ROBBERY CONVICTION VIOLATED THE PROTECTION AFFORDED HIM BY THE UNITED STATES CONSTITUTION WHERE 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, 79 (2010), BECAUSE APPELLANT WAS A JUVENILE WHEN HE COMMITTED THE NON-HOMICIDE FELONY OFFENSE VIOLATING HIS RIGHT TO DUE PROCESS OF LAW.

A. *Whiteside's constitutional claim*

The State first argues that this appeal should be dismissed for lack of jurisdiction, **Counterpoint I**, [State's Brief, at 1], yet cites no authority for the proposition that this Court lacks jurisdiction to consider Whiteside's appeal from the resentencing by the circuit court ordered by the Court in *Whiteside v. State*, 2013 Ark. 176, at *10, 426 S.W.3d 917, 922. This Court clearly has jurisdiction to hear an appeal from resentencing, as the State's authority, *Ward v. State*, 2017 Ark. 215, *1, 521 S.W.3d 480, 481, unquestionably demonstrates. *Accord*, *Walls v. State*, 341 Ark. 787, 789, 20 S.W.3d 322, 323 (2000); *Buckley v. State*, 349 Ark. 53, 60, 76 S.W.3d 825, 829 (2002) (appeal from resentencing on remand).

Whiteside acknowledges that his 35-year sentence on the aggravated robbery charge does not involve imposition of the life sentence without parole condemned by *Graham v. Florida*, 560 U.S. 48, 79 (2010). The issue presented here involves the violation of due process resulting from the constitutionally-impermissible jury

instruction given at trial that permitted jurors to consider imposition of a life sentence, contrary to *Graham*, and Arkansas decisions relied on the Opening Brief.

The State argues in its **Section A** that this Court lacks jurisdiction over the appeal because “the circuit court lacked jurisdiction to consider any issue regarding the sentence for the aggravated-robbery conviction.” [State’s Brief, at 2]. Consequently, the State then concludes that if the circuit court lacked jurisdiction, this Court must lack jurisdiction, as well. [State’s Brief, at 2]. Here, the State conflates the issue addressed in the Court’s remand order with the issue raised in Whiteside’s Motion for New Trial or Other Relief. The issue addressed in the remand decision was based on Whiteside’s claim that he was entitled to resentencing on the aggravated robbery conviction because it was included within the felony capital murder on which he was being resentenced. The Court explained:

Whiteside argues that if this court remands for resentencing on his capital-murder conviction, he should also be entitled to resentencing on his aggravated-robbery conviction and its enhancement as well. He contends that Ark.Code Ann. § 16–97–101 (Repl.2006), requires “the jury,” and not two different juries, to impose punishment in a case. We agree with the State that there is no merit to this argument, as there is nothing in this statute that requires the same jury to resentence a defendant for each conviction even after the case has been remanded. In fact, if Whiteside’s argument was correct, then this statute would prohibit all remands for resentencing.

2013 Ark. 176, at *8, 426 S.W.3d at 921. The address addressed differs completely from that raised in his Motion for New Trial, which argued that the

sentence imposed on the aggravated robbery conviction was tainted by the trial court's use of a sentencing instruction that authorized jurors to consider imposition of a life sentence, held unconstitutional in *Graham*.

Regardless of whether the court had authority to grant new trial based on a jurisdictionally-defective judgment is rendered moot because the trial court denied the motion. The State's reliance on *Lacy v. State*, 2018 Ark. 174, *6, 545 S.W.3d 746, 750, does not support its argument that this Court has no jurisdiction--even if the circuit court would arguably have acted outside its jurisdiction had it granted the new trial motion, leaving unresolved the issue as to whether it had jurisdiction to grant relief upon a finding that the sentencing order was jurisdictionally-defective—in which event the State could have appealed that finding.

While Whiteside does recognize the apparent relevance of *Ward* to the question of whether the trial court may go beyond the scope of a limited remand from this Court, [State's Brief, at 3], this does not reflect a *concession* that it forecloses this Court's review of the sentence imposed on the aggravated robbery for jurisdictional defect. The limited jurisdiction accorded the trial court on remand does not limit, or implicate, this Court's jurisdiction on appeal from resentencing, and the State has cited no authority even suggesting that it does.

In **Section B**, the State argues that Whiteside's arguments are foreclosed by the *law of the case* doctrine. [State's Brief, at 4]. Because the issue raised in this

appeal from resentencing differs completely from any issue litigated in this Court in the initial direct appeal and on remand, the doctrine simply does not apply. *Carmago v. State*, 337 Ark. 105, 109-10, 987 S.W.2d 680, 683 (1999). Moreover, *Carmago* noted that the doctrine:

. . . is not inflexible and does not absolutely preclude correction of error,” but it prevents an issue raised in a prior appeal from being raised in a subsequent appeal “unless the evidence materially varies between the two appeals.”

Id. at 110, 987 S.W.2d at 683. Here, the issue was not “raised” in the prior appeal.

Nor was the issue here *implicitly* decided in *Whiteside v. State*, 2011 Ark. 371, at 14, 383 S.W.3d 859, 868, as the State argues. [State’s Brief, at 5]. Although Whiteside’s trial counsel objected to the instruction authorizing jurors to consider imposing a life sentence on the aggravated robbery conviction, [ABS/218; R/567-68; SOC/3-4], appellate counsel did not argue this issue in the initial direct appeal, focusing only on the mandatory sentence of life imprisonment without parole imposed on the capital murder conviction. [Appellant’s Brief and Addendum, No. 10-1200, ARG/1-30]. Counsel did abstract the objection in the opening brief in the initial appeal, [Appellant’s Abstract, No. 10-1200, Ab. 234-36; R/566-68], but did not raise the issue of jurisdictional error in the appeal. The State did not address this objection in its brief. [State’s Brief, No. 10-1200 at 1-19]. Moreover, the issue raised in the instant appeal involves the type of error that cannot be waived by failure to preserve or argue error at trial or on appeal, as the

Court observed in *Whiteside* with respect to a claim raised in the initial direct appeal not preserved by objection at trial:

[B]ecause this issue concerns a void or illegal sentence, which this court has held is an issue akin to subject-matter jurisdiction, it cannot be waived by a party. *See Mayes v. State*, 351 Ark. 26, 89 S.W.3d 926 (2002). Hence, it may be raised for the first time on appeal. *Id.*

2011 Ark. 371, at 11, 383 S.W.3d at 866.

Similarly, the State's reliance on *Howard v. State*, 367 Ark. 18, 41-42, 238 S.W.3d 24, 42 (2006), in arguing that the Court's review pursuant to ARK. SUP. CT. RULE 4-3(h) constitutes an implied ruling on the issue raised in this appeal precluding further review, must be distinguished because Howard was sentenced to death, while the sentence challenged by Whiteside is the 35-year sentence imposed on his aggravated robbery conviction. The rule reflects the statutory requirement for appellate review by this Court, ARK. CODE ANN. § 16-91-113(a):

The Supreme Court need only review those matters briefed and argued by the appellant, *except that where either a sentence for life imprisonment or death has been imposed* the Supreme Court shall review all errors prejudicial to the rights of the appellant. (emphasis added).

RULE 4-3(i), which now governs this Court's scope of appellate review, provides:

(i) Court's Review of Errors in Death or Life Imprisonment Cases. When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. § 16-91-113(a). To make that review possible, the appellant must abstract, or include in the Addendum, as appropriate, all rulings adverse to him or her made by the circuit court on all objections, motions and requests made by either party, together

with such parts of the record as are needed for an understanding of each adverse ruling. *The Attorney General will make certain and certify that all of those objections have been abstracted, or included in the Addendum, and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.* (emphasis added).

The State did not brief the issue in the initial direct appeal that it now argues was implicitly decided and rejected by the Court in its RULE 4-3(h) affirmation.

Second, the Court clearly rejected Whiteside's argument in the remand that the aggravated robbery and murder convictions should be treated as part of a single capital felony murder conviction for purposes of resentencing. *Whiteside*, 2013 Ark. 136, at *9, 426 S.W.3d 921-22. Thus, the aggravated robbery sentence was not embraced by the requirement for review of preserved, unbriefed errors by this Court precisely because that sentence did not involve death or life imprisonment. The State relied on the holding that the sentences imposed on the capital murder and aggravated robbery counts were separate for purposes of resentencing in opposing Appellant's Motion for New Trial. [ADD. (Ex. 3) at 28-29; R/231-232].

Third, RULE 4-3(i) and Section § 16-91-113(a) require review of only prejudicial errors. Whiteside suffered no prejudice from the imposition of an impermissible sentence on the aggravated robbery conviction so long as the life sentence on the capital murder conviction remained intact, or even after the life sentence was vacated until he was resentenced to a term of years on the murder count less than the aggravated robbery sentence, which were to be served

concurrently. The State complains that Whiteside cites no authority supporting this argument, but this is a matter of simple math. The Court could have corrected the sentence imposed on the aggravated robbery count, but it was not required to do so under Rule 4-3, and because the issue had not been briefed by counsel, it was not required to do so under Section 16-91-113(a). The State's conclusory argument that this mathematical reality has "no traction," [State's Brief, at 7], is inexplicable. The Court could have addressed the error in the aggravated robbery sentence by modification, *Meny v. State*, 340 Ark. 418, 423-24, 13 S.W.3d 143, 146-147 (2000) (modifying sentence to reflect dismissal on one count of underlying rape that merged with felony-murder count under prior law), but the concurrent life sentence would still have resulted in no relief being corrected in terms of the sentence Whiteside was required to serve. Following resentencing to the ten-year term on the capital murder count, the constitutionally-flawed sentence imposed on the aggravated robbery has resulted in a lengthier sentence attributable to the 35 years on the aggravated robbery count.

Finally, the State's reliance on ARK. R. CRIM. P. 33.3 and ARK. CODE ANN. § 16-91-105(b), *Cigainero v. State*, 310 Ark. 504, 507, 838 S.W.2d 361, 363 (1992), and *State v. Boyette*, 362 Ark. 27, 33, 207 S.W.3d 488, 493 (2005), address the timeliness of the filing of a post-trial motion or application for relief. The State argues that because Appellant's post-trial motion was not filed in 2010, after

circuit court lacked jurisdiction to entertain the motion. The circuit court denied the motion without stating its reasoning. [ADD. (Ex. G), at 37; R/241]. First, to the extent that the State is arguing that Whiteside waived his attack on the aggravated robbery sentence because the post-trial motion was not filed until resentencing on the capital murder, the circuit court's order expressly provided:

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.

[*Nunc Pro Tunc* Amended Sentencing Order, Ex. C, ADD/7; R/187].

Second, the remand order limited the circuit court's action to conducting a resentencing hearing on the capital murder conviction order; it said nothing about the circuit court's jurisdiction, nor did it address the issue of whether the resentencing would result in entry of an Amended Sentence, such that both the capital murder and aggravated robbery sentences would continue to constitute the sentence imposed in the case. Instead, it expressly provided: "This ten (10) year sentence shall continue to be served concurrently with the sentence for the aggravated robbery and felony firearm enhancement." [*Nunc Pro Tunc* Amended Sentence Order, Ex. C, ADD/6; R/186]. There continues to be a single sentencing order in this case, referencing the sentences imposed on the two counts and providing for their concurrent application. The State offers no authority for the

proposition that either RULE 33.3 or Section 16-91-105(b) impair the authority of the circuit court in these circumstances as a matter of jurisdiction.

Third, once again, there is no authority cited by the State to support the claim that this Court's jurisdiction to correct a void or illegal sentence on appeal from the resentencing ordered on remand is impaired by either court rule or statutory provision.

In **Section C**, the State argues alternatively, that the sentencing instruction authorizing jurors to impose a life sentence on the aggravated robbery count did not violate *Graham v. Florida*. Instead, the State contends that because Whiteside was convicted of both a homicide and aggravated robbery, different considerations must apply to the sentencing authority. [State's Brief, at 9-10]. But the *Graham* Court did not rule that a different rule permitting imposition of life sentences on non-homicide felonies would apply when the juvenile had also committed a homicide at all. Instead, the Court examined the evidence of life sentences imposed on juveniles for non-homicide offenses in addressing the existence of a national consensus against use of life sentences. The complete reference reads:

. . . According to a recent study, nationwide there are only 109 juvenile offenders serving sentences of life without parole for nonhomicide offenses. See P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to Nation 2* (Sept. 14, 2009) (hereinafter Annino).

The State contends that this study's tally is inaccurate because it does not count juvenile offenders who were convicted of both a homicide

and a nonhomicide offense, even when the offender received a life without parole sentence for the nonhomicide. This distinction is unpersuasive. 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. (emphasis added).

Graham, 560 U.S. at 62-63. The State's reference in its brief is taken out of context and provides no authority whatsoever for the proposition that the Court recognized that life sentences for juveniles convicted of non-homicide offenses could be imposed consistent with the Eighth Amendment protections the Court relied on in announcing the sentencing limitation. In fact, the highlighted sentence within the reference illustrates one of the problems presented here, that jurors may have imposed punishment on the aggravated robbery "in part for the homicide." Moreover, the Court's order vacating Whiteside's mandatory life sentence for capital murder, based on *Miller v. Alabama*, 567 U.S. 460 (2012), undermines the State's argument because *Miller* limited the state's sentencing authority in homicide cases involving juveniles further, rather than permitting imposition of mandatory life sentences when a non-homicide offense was also committed.

While the Court held in *Berna v. State*, 282 Ark. 563, 566-67, 670 S.W.2d 434, 436-37 (1984) that trial error is not always prejudicial, requiring reversal,

[State's Brief, at 11], the Court applied Whiteside's reasoning here in its decision in *Glaze v. State*, 2011 Ark. 464, *13, 385 S.W.3d 203, 212 (2011). There, the jury was instructed incorrectly, as here, and the Court vacated the sentence imposed by the jury and remanded for resentencing, even though the sentence imposed by jurors fell within the statutory range. The Court explained:

The fact that Glaze received a sentence of twenty-five years, which falls within the sentencing range of both statutes, is irrelevant as there is the possibility that the jury would have returned a sentence less than the minimum set forth in Ark.Code Ann. § 16–90–201; thus, the effect of sentencing Glaze under section 16–90–201 was prejudicial. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). Therefore, we reverse and remand for resentencing under Ark.Code Ann. § 5–4–501.

This disposition was consistent with *Backus v. State*, 253 Ark. 60, 62, 484 S.W.2d 515, 517 (1972), and long-standing Arkansas precedent cited there and quoted in Whiteside's opening brief, at 13.

Berna may have recognized a general requirement for prejudice as a prerequisite for reversal, but it does not apply universally. For instance, Arkansas courts routinely hold that failure to instruct on a lesser-included or defensive instruction raised by the evidence will require reversal, even though the defendant can never actually prove that the jury would have convicted on the lesser, or acquitted on a defensive instruction, had jurors been properly instructed. *E.g.*, *Harshaw v. State*, 344 Ark. 129, 132, 79 S.W.3d 753, 755 (2001) (reversible error to refuse to give lesser-included offense instruction supported by evidence); *Teater*

v. State, 89 Ark. App. 215, 201 S.W.3d 442 (2005) (reversal required where trial court refused to instruct on defensive theory of insanity supported by evidence); *Kemp v. State*, 74 S.W.3d 224, 348 Ark. 750 (2002). Reversal for structural error without necessity of demonstrating prejudice is recognized as a matter of federal constitutional error, as the Court's decision in *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991), provides, and as illustrated by Chief Justice Rehnquist in his concurrence. *See also, United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (deprivation of defendant's right to counsel of choice required reversal without proof of prejudice in denial of preferred counsel for trial of case).

Finally, in **Section D**, the State argues that Whiteside raised an issue in this appeal based on *Hicks v. Oklahoma*, 447 U.S. 343 (1980) and *Glaze, supra*, not presented to the trial court, and thus waived the issue. Appellant argued that his sentence imposed by the jury on the aggravated robbery count based on a jury instruction violating *Graham v. Florida* violated his right to Due Process of Law under the Fourteenth Amendment in his Motion for New Trial or Other Relief. [ADD. Ex. D, at 17-18; R/207-08]. Similarly, Appellant cited to both *Glaze v. State* and *Hicks v. Oklahoma*, at some length, in his Motion for New Trial or Other Relief. [ADD. Ex. D, at 14; R/204] and [ADD. Ex. D, at 17-18; R/207-08], respectively. The argument advanced in the Motion for New Trial or Other Relief was then urged in his opening brief on this appeal. [Appellant's Brief and

Addendum, ARG-13; ARG-16-17]. Additionally, the State notes that Whiteside raised this issue in a habeas proceeding, [State's Brief, SOC/3, n.1] but the denial of relief was not appealed to this Court. Res judicata does not apply in habeas proceedings. *Cloird v. State*, 349 Ark. 33, 41, 76 S.W.3d 813, 818 (2002).

In **Section E**, the State argues that because Whiteside's conviction on the aggravated robbery count was upheld by this Court on direct appeal, he would not be entitled to relief from the 15-year enhancement for use of a firearm in the commission of the offense even if the Court were to order resentencing. Section 16-90-120(d) does expressly refer to reversal of the *conviction* and the State is correct that the conviction on the aggravated robbery was upheld on direct appeal. Because the same evidence considered by jurors to impose a sentence on a conviction will be relied upon in setting the enhancement sentence, Appellant moves the Court read the statute expansively to address the situation in which a resentencing is the relief ordered, such that the error occasioned by the constitutionally-defective sentencing instruction in this case requires resentencing on the firearm enhancement.

Because jurors were improperly instructed on the sentencing range applicable to the aggravated robbery sentence, the 15-year sentence must be found to be compromised even though there was no error in the enhancement instruction itself. Those jurors who imposed the 35-year sentence on the aggravated robbery

but who then considered the appropriate sentence for the firearm enhancement may have arrived at their sentence enhancement decision based upon their conclusion that Whiteside was fortunate to have avoided imposition of a life sentence on that charge and imposed the maximum term available for the enhancement. For this reason, the 15-year sentence imposed for the enhancement of the void, or illegal, 35-year sentence imposed on the aggravated robbery charge, should be vacated and the case remanded for resentencing both Whiteside's conviction for aggravated robbery and the enhancement of his sentence on that charge.

CONCLUSION

The State has offered no authority for the proposition that the circuit court's sentencing jury instruction was constitutionally valid and not rendered defective by the Supreme Court's decision in *Graham v. Florida*. Because jurors were authorized to consider whether to impose a life sentence upon Whiteside's conviction for the underlying felony of aggravated robbery, then impose an enhanced sentence for his use of a firearm in the commission of the aggravated robbery, the 35-year sentence, enhanced by 15 years for a total sentence of 50 years to be served in the Arkansas Department of Correction violates *Graham* and results in a denial of Due Process of Law pursuant to *Hicks v. Oklahoma, supra*.

It is not possible to discern from the trial record what sentence jurors would have imposed had they been properly instructed that the applicable sentencing

range was 10 to 40 years, *but not life*. Jurors may have compromised and imposed a lesser sentence, as low as 10 years, or imposed a term of up to 40 years. Arkansas decisions consistently have held that where the sentence imposed is in the statutory range and would otherwise be lawful, but the jury was improperly instructed on the law, the sentence cannot stand, an approach consistent with the Supreme Court's explanation for its decision in *Hicks*.

Appellant Whiteside respectfully moves the Court review the sentencing issues in this case as matters of involving a void or illegal sentence on the aggravated robbery count and vacate the sentence, including the enhancement sentence, and remand for resentencing.

Respectfully submitted this 6th day of August, 2019.

/s/ J. Thomas Sullivan
J. Thomas Sullivan
AR Bar No. 2006019
1122 West Capitol
Little Rock, Arkansas 72201
(501) 376-6277
sullivanatty@gmail.com

CERTIFICATE OF SERVICE

I, J. Thomas Sullivan, hereby certify that a true and correct copy of the Appellant's Reply Brief has been served in compliance with Administrative Order of the Supreme Court 21, section 7, on August 6, 2019, to the following: Darnisa C. Evans Johnson, David Eanes, Office of the Arkansas Attorney General.

/s/ J. Thomas Sullivan
J. Thomas Sullivan