

NO. 19-8668

IN THE
SUPREME COURT OF THE UNITED STATES

LEMUEL WHITESIDE
PETITIONER,

v.

THE STATE OF ARKANSAS
RESPONDENT.

PETITIONER'S REPLY BRIEF

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

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PETITIONER WHITESIDE'S
REPLY TO STATE'S BRIEF IN OPPOSITION

1. THE STATE'S CLAIM THAT THE STATE SUPREME COURT RULED ON THE BASIS OF AN ADEQUATE AND INDEPENDENT STATE LAW GROUND IS NOT SUPPORTED BY THE RECORD.

The Attorney General argues that the Arkansas Supreme Court's refusal to rule on Petitioner Whiteside's claim arising under the Eighth and Fourteenth Amendments reflects an adequate and independent state law ground that deprives this Court of jurisdiction to consider his claim. Whiteside was convicted at trial of capital felony murder and aggravated robbery and sentenced mandatorily under ARK. CODE ANN. § 5-4-104(b) to life imprisonment without parole on the capital murder count. The jury imposed a 35-year term on the aggravated robbery, enhanced by 15 years for use of a firearm in the commission of that offense. *Whiteside v. State*, 383 S.W.3d 859 (Ark. 2011) [*Whiteside I*]. The life sentence was vacated in *Whiteside v. Arkansas*, 567 U.S. 850 (2012) and remanded for reconsideration in light of *Miller v. Alabama*, 567 U.S. 460 (2012).

The question presented in Whiteside's petition is whether the trial court committed constitutional error in improperly instructing his jury that he could be sentenced to 10-40 years *or life imprisonment* on the aggravated robbery offense that was an included offense of the capital felony murder charge on which he was convicted in light of *Graham v. Florida*, 560 U.S. 48 (2010). There, the question

of whether a life sentence with prospect for parole eligibility imposed on a juvenile for a nonhomicide felony violates the Eighth Amendment when the juvenile is also convicted of a homicide was left unanswered. *Id.* at 63 (“The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.”).

On remand from *Whiteside v. Arkansas*, the parties briefed and argued issues relating to the disposition of the sentencing issue before the Arkansas Supreme Court. Whiteside argued that because the capital murder and aggravated robbery offenses arose from a single episode and that the underlying felony was a necessary element in the proof of capital *felony* murder, he should be resentenced by a new jury on both charges. The supreme court ordered resentencing on the murder conviction only, rejecting Whiteside’s argument that he was entitled to resentencing on the aggravated robbery charge. *Whiteside v. State*, 426 S.W. 3d 917 (Ark. 2013), *cert. denied*, 513 U.S. 922 [*Whiteside II*]. Instead, it found that the convictions obtained on the two charges were distinct and that relief on the murder count did not require resentencing on the underlying felony, concluding: “Thus, these sentences are still valid, and we remand only the sentence for his capital-murder conviction.” *Id.* at 921-22. It ordered:

We reverse and remand Whiteside’s capital-murder sentence to the circuit court for resentencing within the discretionary statutory sentencing range for a Class Y felony, and we instruct the circuit court to hold a sentencing hearing where Whiteside can present *Miller*

evidence for consideration.

Id. at 922. The State maintains that this order effectively barred the trial court from ruling on his motion for new trial, depriving him of review by the Arkansas Supreme Court on the straightforward issue presented here. Contrary to the State's position, [BIO, at 12], the decision of the court below does not constitute an *adequate and independent* state procedural default rule barring this Court's review.

In declining to consider Whiteside's argument seeking extension of *Graham* to preclude imposition of a life sentence without prospect for parole on a nonhomicide offense, even when the juvenile offender has also been convicted of a homicide offense, the court below explained:

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

Whiteside III, 588 S.W.3d at 724. Nothing in the language of the court's opinion, nor the mandate, however, expressly addressed the jurisdiction of the trial court on remand to consider other issues arising in the prosecution. Rather, the court's language suggests that its decision not to consider "Whiteside's *Graham* argument" was based on procedural default because the argument was not raised in

his original direct appeal. However, in suggesting that the “*Graham* argument” could have been raised in the state court in *Whiteside II*, the *Whiteside III* court deviated from the procedural default rule regularly applied by Arkansas courts requiring that an issue first be presented to the trial court for its consideration in order to be preserved for purposes of appeal.¹

The State argues that the Court lacks jurisdiction to review the issue raised here because the lower court applied an adequate and independent state procedural ground by refusing to rule on the constitutional claim in *Whiteside III*. [BIO, at 12]. But, in order to deny this Court jurisdiction under 28 U.S.C. § 1257(a) on a federal constitutional claim that has been presented to the highest court of the state based on procedural default under state law, the state court decision must rest on a “firmly established and regularly followed” state procedural rule. *Lee v. Kemna*, 534 U.S. 362, 376 (2002). The Court retains authority to address those issues. *Id.* at 375; *Foster v. Chatman*, 136 S.Ct. 1737, 1745-47 (2016).

¹ See e.g., *Hinkston v. State*, 10 S.W.3d 906, 909 (2000). There, the court held that the Sixth Amendment Compulsory Process claim argued on appeal was defaulted where trial counsel was rebuffed by the trial court when counsel attempted to offer expert testimony on the capital defendant’s ability to form the culpable mental state required for commission of the capital offense, relying only on the state evidence rule governing admission of expert testimony, but did not urge the Sixth Amendment claim alternatively. The court declined to review the constitutional claim, explaining: “We do not consider arguments, even constitutional ones, raised for the first time on appeal.” *Id.*, at 10 S.W.3d at 909.

The State contends that the decision of the Arkansas Supreme Court rests on application of precisely such a rule. [BIO, at 11-18]. However, the State explains that the disposition did *not* rely on the typical rule of procedural default under state law--that the litigant failed to preserve error in the trial court and, thus, procedurally defaulted the claim for purposes of appellate review.²

Instead, the State expressly disavows reliance on a procedural default based on the fact that Whiteside's challenge based on extension of the reasoning in *Graham* was not asserted in his original direct appeal, arguing:

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.*

[BIO, at 17 (emphasis added)]. The mandate, however, includes no language precluding the circuit court from considering any issue that would arise following the resentencing and entry of the amended sentencing order. [STATE'S SUPP. APP., at 10]. Instead, it only refers to the court's opinion directing the circuit court to conduct the resentencing on the murder charge. This claim that the court applied a different rule of procedural default arising from restriction of a trial court's

² The *Lee* Court recognized the validity of a similar contemporaneous objection rule in discussing procedural default in *Osborne v. Ohio*, 495 U.S. 103, 123 (1990). *Lee*, 534 U.S. at 376-77.

jurisdiction by the appellate court's mandate is wholly unsupported by the record. While *Whiteside III* alludes to such a restriction, 588 S.W.3d at 724, the court did not articulate such a rule that is regularly applied and the decision referenced in its opinion, relying on *Ward v. State*, 521 S.W.3d. 480 (Ark. 2017). *Ward*, however, involved appeal from a trial court's imposition of a sentence on remand in direct contravention of the court's basis for reversing the sentence imposed at trial. *Id.* at 482. It did not involve the litigant's argument of a new issue on remand related to legality of the sentence.

Not only did the court fail to reference any rule or language in *Whiteside II* expressly barring the trial court from considering the constitutional issue raised following imposition of the ten-year sentence in the resentencing, the State demonstrates no regular application of such a rule arguably depriving this Court of jurisdiction to address the issue on the merits. *Ward* did not rest on application of such a rule and the State points to no other decision in which the criminal defendant's constitutional right to direct appeal has been compromised in this factual context. In fact, the *Buckley* litigation referenced in *Whiteside II* demonstrates that no such rule has been routinely applied.

Buckley, who had no prior drug convictions, was originally convicted on two counts of delivery of \$40 worth of cocaine and sentenced by the jury to two life sentences, ordered by the court to be served consecutively. *Buckley v. State*,

20 S.W.3d 331, 333 (Ark. 2000). The supreme court vacated the sentences and remanded for resentencing based on improper admission of hearsay concerning his purported reputation as a drug dealer. The new jury imposed 28-year sentences on the two charges, again ordered to be served consecutively. Buckley appealed, raising challenges to the sentencing procedure before the trial court outside the scope of the remand, arguing that “the trial court erred in finding that the State had a right to a jury trial on resentencing and in denying his motion to waive resentencing by a new jury.” *Buckley v. State*, 76 S.W.3d 825, 829-32 (Ark. 2002). [PET. at 24]. The supreme court addressed his arguments on the merits, never mentioning any limitation on the trial court’s jurisdiction to consider Buckley’s challenges as being outside the scope of the mandate remanding for resentencing.

The State’s response to *Buckley* is simply that “nothing . . . in that litigation conflicts with, or casts doubt on . . .” the court’s refusal to consider Petitioner’s constitutional claim in *Whiteside III*. [BIO, at 16]. That is absolutely incorrect. The court’s disposition of Buckley’s claims on their merits unequivocally undermines the argument that its decision rests on a “firmly established and regularly followed” state procedural rule affecting this Court’s jurisdiction, based on *Lee v. Kemna, supra*.

The State also argues that Whiteside’s challenge was “raised too late” because the court had held that the sentence was “still valid” in *Whiteside II*. [BIO,

at 19]. The State fails to recognize that the issue was not truly ripe until the resentencing. Only after the trial court imposed the ten year sentence on remand did Whiteside suffer actual prejudice from the aggravated robbery sentence. Until that point, the 35-year sentence, ordered to be served concurrently with the subsequently vacated life sentence on the murder count would not, in a real sense, impact the prospects for rehabilitation prompting the Court’s focus in *Graham*.

But the fact that Whiteside did not raise his *Graham*-related challenge until resentencing does not insulate the aggravated robbery sentence from review should this Court grant the petition, even if the 35-year sentence was not illegal at the time it was imposed. The entire body of the Court’s Eighth Amendment jurisprudence relating to limitations on sentencing of juvenile offenders has been subject to retroactive application as an exception to the general rule of non-retroactivity for new rules recognized in *Teague v. Lane*, 489 U.S. 288, 300 (1989). *See Roper v. Simmons*, 543 U.S. 515 (2005) (death penalty); *Graham* (life without parole prospects for nonhomicide offenses); and *Miller v. Alabama, supra* (mandatory life without parole for homicide); *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016). Thus, if Whiteside prevails in this Court, retroactive application of the limitation will apply in a reconsideration of the sentence. *Kelley v. Gordon*, 465 S.W.3d 842, 845-46 (Ark. 2015) (acknowledging retroactivity requirement under *Teague*, 489 U.S. at 300); and *Hale v. Hobbs*, 443 S.W.3d 533, 535 (Ark. 2014)

(applying *Graham* retroactively based on lack of parole eligibility for life sentence imposed on juvenile for nonhomicide offense).

Whiteside clearly presented his federal constitutional claim to both the trial court in his motion for new trial and to the supreme court in his appeal from the trial court's denial of his claim. The court below fully explained his constitutional challenge in its appeal, *Whiteside III*, at 723-24, then affirmed the trial court's denial of his motion for new trial. *Id.* at 724. His claim in the state courts--and here—remains unresolved in light of the holding in *Graham*. That the jury sentenced him to 35 years, enhanced by 15 years, instead of life, does not bar relief in this Court because both state decisions, [PET., at 18-19], and this Court's holding in *Hicks v. Oklahoma*, 447 U.S. 343, 347 (1980), require resentencing when jurors are improperly instructed in sentencing. [PET., at 17-20]. Because it is impossible to determine what the jury would have done in terms of sentencing had it been properly instructed, or not permitted to consider the life sentence option, the constitutional error would also amount to structure error because the trial record cannot be evaluated to determine harm.

Neither the record, nor Arkansas law, support the State's argument that the Court lacks jurisdiction to consider Whiteside's claim. Here, whatever local practice is advanced by the State to defeat jurisdiction, the issue in Whiteside's petition has been properly presented to the state courts, which have declined to

review it on the merits. This Court’s jurisdiction cannot be so easily prevented by the action of a state court in declining to address the federal constitutional question before it. *Michigan v. Long*, 463 U.S. 1032, 1043 (1983).

2. WHITESIDE’S PETITION PRESENTS THE OPTIMAL CIRCUMSTANCE FOR RESOLUTION OF THE ISSUE NOT RESOLVED IN *GRAHAM*.

The State contends that this case is a “poor vehicle” for deciding the issues presented in Whiteside’s petition, [BIO, at 19], arguing that the Court should wait until a litigant actually serving a life sentence now insulated from attack by *Graham* presents a similar claim. [BIO, at 20]. It argues that review in his case will require determination in the abstract because Arkansas law has now been amended to eliminate life without parole sentences for juvenile nonhomicide offenders. [BIO, at 21].

The issue left unresolved in *Graham* represents another piece in the Court’s overall determination of sentencing options available to states for juveniles convicted of felony offenses. Another piece of this understanding of the Eighth Amendment’s application to juvenile offenders is before the Court this term in *Jones v. Mississippi*, No. 18-1259, 140 S.Ct. 1293 (2020), concerning the decision-making process required when a trial court considers imposition of life sentence for a juvenile who has been convicted of homicide.

The State notes that Whiteside does not argue that imposition of a life sentence for a nonhomicide offense violates the Eighth or Fourteenth Amendments. Whiteside agrees that there may circumstances under which the Court would find that a life sentence would be constitutionally-permissible. Under *Miller v. Alabama*, however, it could hardly be the case that the sentencing authority could consider imposing a life sentence without at least the same protections afforded under *Miller* when a life sentence is an option under consideration for a the defendant convicted of a homicide.

It is also entirely likely that there are other issues that will arise once the Court does answer the question left open in *Graham*, such as how states might consider the impact of cumulative sentencing on parole eligibility for juvenile offenders. *See, e.g., State v. Frank*, 522 S.W.3d 881, 885-88, *esp. nn. 8-12* (Mo. 2017). Whiteside does not suggest that review of his claim will conclude issues that may well arise in light of the overall impact of *Roper*, *Graham*, *Miller* and *Montgomery*, and now, *Jones v. Mississippi*. But it does present an opportunity to answer the question left unanswered in *Graham* that eventually will provide direction to state courts addressing issues impacted by its Eighth Amendment analysis.

Further, the fact that Whiteside did not suffer imposition of a life sentence by his jury does not render this case inappropriate for decision in light of the

principle announced in *Hicks v. Oklahoma, supra*, requiring resentencing when a sentence has been imposed by a jury erroneously instructed on the applicable law. Presumably, its application to Whiteside's sentence would be initially committed to the state courts on remand.

Finally, the State offers no suggestion of any detriment that would be attributable to this Court's consideration of Whiteside's claim due to the fact that he was not, himself, sentenced to life on his aggravated robbery conviction. Because the issue left open in *Graham* is squarely before this Court, as it was in the state courts, Whiteside's case presents an optimal situation for consideration of the issue.

CONCLUSION

Petitioner Whiteside's claim was fairly presented to the Arkansas courts, but not addressed by the state supreme court on his direct appeal from his resentencing. The issue presented in his petition is ripe for review at this time. He respectfully moves the Court grant his petition and issue the writ of certiorari to the Arkansas Supreme Court.

Respectfully submitted this 21st day of December, 2020.

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