No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

KUNTRELL JACKSON, Petitioner,

v.

STATE OF ARKANSAS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
Counsel of Record
ALICIA A. D'ADDARIO
BRANDON J. BUSKEY
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Petitioner

March 21, 2011

QUESTIONS PRESENTED

Kuntrell Jackson has been sentenced to life imprisonment without the possibility of parole for an offense committed when he was fourteen years old. He is one of only 73 fourteen-year-olds serving such a sentence throughout the United States. His case presents an ideal vehicle for this Court's consideration of the question left undecided by Graham v. Florida and Sullivan v. Florida – whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense – because, while Kuntrell's offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy shot a shop attendant. Kuntrell himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot. The robbery "plan," such as it was, was spur-of-the-moment, formed just before the robbery, while Kuntrell, his cousin, and another older teen were walking together through a housing project. Because Arkansas law made a life-without-parole sentence mandatory upon Kuntrell's homicide conviction, neither his age nor any of these other mitigating circumstances could be considered by his sentencer. Under these circumstances, the questions presented are:

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

PETITION FOR CERTIORARI

Kuntrell Jackson respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the majority of the Arkansas Supreme Court, together with a concurring opinion by one Justice and a dissenting opinion by two Justices, is reported at 2011 Ark. 49 and is attached as Appendix A. The order of the Jefferson County Circuit Court is unreported and is attached as Appendix B.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on February 9, 2011. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

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

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

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In Graham v. Florida, 130 S. Ct. 2011 (2010), this Court held that the Eighth

and Fourteenth Amendments prohibit sentencing an adolescent of seventeen or younger to be imprisoned for life, with no possibility of consideration for parole, as the punishment for a nonhomicide offense. The Court in Graham did not address the question whether such a sentence would be constitutionally permissible for a homicide offense. That question will eventually need to be authoritatively resolved by a decision of this Court because – as illustrated by Kuntrell Jackson's present petition and by the certiorari petition being filed today on behalf of Evan Miller in Alabama – state courts are holding that Graham has no implications for homicide sentencing, even when the juvenile offender is as young as fourteen.

In the wake of the lower courts' constrictive applications of Graham, Kuntrell Jackson's case offers an exceptionally good setting for the Court's consideration of the issue that Graham left unresolved, together with a pair of closely related issues. Yes, Kuntrell Jackson stands convicted of murder as a result of his participation in a robbery in which the victim's death occurred. But Kuntrell's personal culpability for the events leading to that tragic outcome cannot rationally be regarded as any greater than Terrance Graham's culpability. Unlike Terrance Graham, Kuntrell never held a weapon in his hand; he did not offer any physical violence to the victim of the storefront robbery in which she was shot to death by one of his older companions; the robbery itself was impetuous rather than preplanned; the prosecution did not contend – and under Arkansas' accomplice-liability and felony-murder it rules was not obliged to prove – that Kuntrell intended or expected any shooting; and Kuntrell was three years younger than Terrance Graham. And none of these circumstances could even be

considered in mitigation by Kuntrell's sentencer, because Arkansas law prescribed a mandatory life-without-parole sentence based solely on the crime-of-conviction. Yet, over two dissents (and despite a third Justice's discontent with the mandatory character of Kuntrell's sentence), the Arkansas Supreme Court used Kuntrell's case not only to curb Graham's constitutional rule but to produce a result flatly at odds with Graham on the facts of both cases. With respect, such a drastic abridgment of Graham should not be left unreviewed by this Court.

A. The Rarity of Life Without Parole Sentences for Young Adolescents

Nationwide, Kuntrell Jackson is one of only seventy-three children age fourteen or younger who have been condemned to die in prison through sentences of life without parole.[1] In the vast majority of states, no child Kuntrell's age has ever received such a sentence. Only eighteen states have imposed such sentences on children fourteen or younger.[2] In ten of these states, no more than one or two children Kuntrell's age have

---

[1]Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20 (2007), available at http://www.eji.org/eji/files/20071017cruelandunusual.pdf. Since the publication of this report, while a handful of these children have obtained relief from their convictions or sentences, including under this Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), there have also been a few new sentences imposed. Thus, this number remains fairly constant at just over seventy children.

[2]Cruel and Unusual at 20. This report identified eighteen states, in addition to Arkansas, where thirteen- or fourteen-year-olds have been sentenced to death in prison. A total of eighteen states, not nineteen, is more relevant to this Court's analysis because California statutorily prohibited the imposition of life imprisonment without parole on a defendant under age sixteen who is convicted of first-degree murder, Cal. Pen. Code, § 190.5(b), and also no longer permits fourteen-year-olds to be sentenced to life without parole for any offense, see In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

been sentenced to life imprisonment without parole. Internationally, the United States is the only country in the world where death-in-prison sentences have been imposed on young adolescents.[3]

These seventy-three cases represent just a tiny fraction of cases in which children fourteen or younger could have received such sentences. According to the FBI's Uniform Crime Statistics, since 1990, 3,632 children age fourteen or younger were arrested for homicide.[4] Yet only fifty-eight children that age have been sentenced to life without parole for homicide offenses during the same period, representing less than two percent of those arrested.

B. **Kuntrell's Background, Offense, and Conviction.**

Kuntrell Jackson grew up in public housing projects in Blytheville, Arkansas, an impoverished community notable for drugs and violence, including several shootings. (App.R. 9.)[5] Kuntrell's biological father abandoned the family before Kuntrell's birth and never played a significant role in Kuntrell's life. Id. A longtime boyfriend of Kuntrell's mother, one Leander Bobo, was the closest thing Kuntrell had

---

[3]See Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law & Practice, 42 U.S.F. L. Rev. 983, 990 (2008).

[4]This total is based on the Department of Justice Uniform Crime Reports for 1990 to 2009. See generally U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States, http://www.fbi.gov/ucr/ucr.htm. The underlying data for each year is found in the report for that year at Table 38.

[5]Citations to the record on appeal are designated as "(App.R.)." Citations to the clerk's record at trial are designated as "(C.)," and citations to the trial record are designated as "(R.)."

to a father figure. Bobo was an abusive alcoholic who drained the family's resources. Id. Kuntrell's mother was sent to prison for shooting and injuring a neighbor when Kuntrell was about six years old. Id. When Kuntrell was about thirteen years old, his older brother Douglas was also imprisoned for shooting someone. (App.R. 9-10.) Not long after this, Bobo left the family; two of Kuntrell's teenage sisters became pregnant; and several other relatives were incarcerated. (App.R. 10.)

After Kuntrell was indicted in the present case – on one count of capital felony murder pursuant to Arkansas Code § 5-10-101, and one count of aggravated robbery pursuant to Arkansas Code § 5-12-103 (C. 3-4), the presiding judge at a preliminary hearing described his mental capacity as "borderline or near borderline." (App.R. 28.) Kuntrell's inability to engage in abstract reasoning places his mental functioning at the 4th percentile compared to children his age. (App.R. 27.)

The felony-murder and robbery charges were based on an incident that occurred on November 18, 1999, only seventeen days past Kuntrell's fourteenth birthday. According to the state's evidence at trial, Kuntrell and two older boys named Derrick Shields and Travis Booker (Kuntrell's cousin) were walking through a housing project together when the three began discussing the idea of robbing a local video store. See Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004). Thereafter, Kuntrell became aware that Shields was carrying a shotgun in his coat sleeve. Id. When they arrived at the store, the other two boys entered, while Kuntrell decided to remain outside. Id. Inside, Shields pointed the gun at the store clerk and demanded money six or seven times. Id. at 758-59. The clerk refused each demand. Id. at 759. During this exchange, Kuntrell

entered the store. Id. When the clerk threatened to call the police, Shields shot and killed her. Id. The boys ran from the store. Id. They did not take any money. Id.

Kuntrell was convicted of capital murder and aggravated robbery on July 19, 2003, following a two-day trial. (R. 357.) The judge, legally barred from considering Kuntrell's level of involvement in the offense or his background, imposed a mandatory sentence of life without the possibility of parole for the capital murder conviction.[6] (R. 359-61.)

C. **Procedural History of the Judgment in Issue**

Based on this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), Kuntrell filed a petition for a writ of habeas corpus under Arkansas Code § 16-112-101 et seq., in the Jefferson County Circuit Court on January 8, 2008. Kuntrell asserted in the petition that the Eighth and Fourteenth Amendments prohibit a mandatory sentence of life-without-parole for a fourteen-year-old child who was not the trigger person and who did not intend to kill. The state filed a motion to dismiss. Following a non-evidentiary hearing, the circuit court granted the state's motion on September 17, 2008, ruling that Kuntrell's constitutional claims did not go to the jurisdiction of the convicting court and were therefore not cognizable in state habeas. See Appendix B.

Kuntrell filed a timely appeal to the Arkansas Supreme Court on March 27, 2009. While the case was pending, this Court decided Graham v. Florida, 130 S.Ct.

---

[6]The trial court did not sentence Kuntrell for the aggravated robbery conviction. Jackson, 194 S.W.3d at 759.

2011 (2010), holding that juveniles cannot be sentenced to life without parole for nonhomicide offenses. On June 16, 2010, Kuntrell filed a motion requesting leave from the supreme court to brief the impact of Graham on Kuntrell's appeal. The court granted Kuntrell's motion on August 6, 2010. Kuntrell filed his brief on August 21, 2010. It advanced three arguments based on Graham. First, Graham confirmed Kuntrell's basic submission that juveniles sentenced to life imprisonment without parole could maintain categorical challenges to their sentences under the Eighth and Fourteenth Amendments. Second, Graham's recognition that a young person's age must constitutionally be considered at sentencing prohibited mandatory sentences of life without parole for juveniles. Third, because Kuntrell did not commit the shooting and did not intend the victim's death, Graham invalidated his life-without- parole sentence.

The Arkansas Supreme Court affirmed Kuntrell's sentence on February 9, 2011. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011). Unlike the lower state court, it entertained and rejected Kuntrell's federal constitutional claims on the merits.

D. The State Supreme Court Ruling

Squarely addressing Kuntrell's Eighth and Fourteenth Amendment claims, the Arkansas Supreme Court concluded that "the [United States Supreme] Court's holdings in Roper and Graham are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile." A four-justice majority therefore "decline[d] to extend

the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue." Id. Justices dissented from the court's judgment. Id. (Danielson, J., joined by Corbin, J., dissenting). The dissent concluded that Graham rendered Kuntrell's sentence unconstitutional because the state failed to prove that he had any intent to kill. Id. (citing Graham, 130 S.Ct. at 2018). The dissenters emphasized that Kuntrell's role in the offense was equal to or less than that of Terrance Graham. Id. In addition, they observed that the mandatory sentence imposed upon Kuntrell did not take account of Kuntrell's young age or other mitigating circumstances, as is required under Graham. Id. (citing Graham, 130 S.Ct. at 2031). A third justice wrote a separate concurrence to note his agreement with Kuntrell's submission that, in the case of a juvenile convicted of felony murder, the sentencer should not be permitted to impose a sentence of life without the possibility of parole in the absence of a procedure for considering aggravating and mitigating evidence. Id. (Brown, J., concurring). The concurrence noted that such individualized consideration in Kuntrell's case "may well have convinced the jury that life without parole was too severe and not appropriate in light of Jackson's age and circumstances." Id.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DECIDE THE QUESTION UNRESOLVED BY GRAHAM v. FLORIDA AND SULLIVAN v. FLORIDA, WHETHER A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED UPON A FOURTEEN-YEAR-OLD CHILD FOR THE CRIME OF MURDER CONSTITUTES CATEGORICALLY CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

When this Court in Graham v. Florida began consideration of the

constitutionality of sentencing youthful offenders to lifelong imprisonment with no possibility of ever being considered for release, it took instruction from the well-informed contemporary understanding of the common characteristics of young people that had informed its earlier decision in Roper v. Simmons. It cited scientific studies of adolescent brain structure and functioning which confirm the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. It was these common features of youth that led the Court to conclude that juveniles under eighteen possess an inherently "lessened culpability," Graham v. Florida, 130 S.Ct. 2011, 2026 (2005) (citing Roper v. Simmons, 543 U.S. 551, 569-70 (2005)) and "are less deserving of the most severe punishments [than adults]." Id.

Logically the same teachings of science, commonsense observations of teen behavior, and moral reasoning compel two additional conclusions: One is that adolescents' degree of "lessened culpability" cannot rationally be supposed to be crime-specific – more lessened in the case of home-invasion robbery, for example, than in the case of robbery-murder. The second is that, by every measure deemed relevant in Roper and Graham, children under fifteen are a distinct and distinctly less culpable class as compared with older juveniles. Moreover, national statistics demonstrate that children fourteen or younger are particularly rarely sentenced to die in prison. These considerations manifestly call into question the decision of the Arkansas Supreme Court in Kuntrell Jackson's case that the constitutional holdings of Roper and Graham

allow the imposition of a life-without-parole sentence on a fourteen-year-old convicted of homicide.

A. The Court's Reasoning in Graham Requires the Conclusion that Sentencing Children of Fourteen and Under to Life Imprisonment With No Possibility of Parole Violates the Eighth and Fourteenth Amendments.

Following Roper, this Court in Graham recognized three defining characteristics of youth, which together establish that "juvenile offenders cannot with reliability be classified among the worst offenders." Graham, 130 S.Ct. at 2026 (quoting Roper, 543 U.S. at 569) (quotations omitted). Relative to adults, juveniles demonstrate a "lack of maturity and an underdeveloped sense of responsibility . . . are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." Id. (quoting Roper, 543 U.S. at 569-70).

Each of these characteristics applies with greater force to the subset of children fourteen and younger. Relying on recent advances in our society's understanding of brain development, the Court noted that "parts of the brain involved in behavior control continue to mature through late adolescence." Graham, 130 S.Ct. at 2026. Thus, younger children lag behind their older teenage counterparts in maturity. This implication is thoroughly documented by systematic child development studies and widely recognized by child-protective laws, including those which aim to protect children against the consequences of their own underdeveloped judgment.

1. Scientific Research Firmly Supports the Legal Recognition that Fourteen-Year-Old Children Are Developmentally Different from Older Teens in Constitutionally Relevant Ways.

Extensive scientific research supports the legal recognition of young adolescence as a distinct developmental period. Relative to the cognition of adults and even older adolescents, young teenage judgment is handicapped in nearly every conceivable way: young adolescents lack life experience and background knowledge to inform their choices; they struggle to generate options and to imagine consequences; and, perhaps for good reason, they lack the necessary self-confidence to make reasoned judgments and stick by them.[7] Even when compared to twelfth graders (rather than adults), eighth graders show relative deficiencies in imagining risks and future consequences.[8] At fourteen, the major transformation in brain structure that will result in a

---

[7]See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267–70 (1989) (Young adolescents show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than mid-adolscents); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones).

[8]Catherine C. Lewis, How Adolescents Approach Decisions, 52 Child Dev. 538, 543 (1981); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Dev. Psychol. 257, 271 (2001) (noting important differences in decision-making competence of early adolescents and older teenagers).

sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[9]

---

[9]See Luna, supra note 7, at 257; see also Thomas J. Whitford et al., Brain Maturation in Adolescence, 28 Human Brian Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization"). At the core of this transformation are co-occurring increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–83 (2004). Myelination increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior – it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Charles Geier & Beatriz Luna, The Maturation of Incentive Processing and Cognitive Control, 93 Pharmacol. Biochem. Behav. 212, 216 (2009); see also Giedd, supra, at 80 (during myelination transmission time between neurons is increased up to 100 times). White matter in the brain increases in a linear fashion, such that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. Giedd, supra, at 80.

Cortical gray matter is thickest early in adolescence. Id. at 82. Later in the teenage years, this cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. Id.; see also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neurosci. & Biobehav. Rev. 417, 439 (2000).

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that control executive functioning and process risk do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., Brain Development During Childhood and Adolescence: a Longitudinal MRI Study, 2 Nature Neurosci. 861, 862 (1999); see also Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neurosci. 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Beatriz Luna & John A. Sweeney, The Emergence of Collaborative Brain Function, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). These "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature

Early teenagers' incapacity for responsible decisionmaking is closely related to adolescent risk-taking.[10] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[11] "The temporal gap between the arousal of the socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of

---

well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence, 58 Am. Psychologist 1009, 1013 (2003). Indeed, the brain does not appear to finish growing completely until late adolescence. Elizabeth R. Sowell et al., Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping, 9 NeuroImage 587, 596 (1998); see also Halpern-Felsher & Cauffman, supra note 8, at 271 ("Importance progress in the development of decision-making competence occurs sometime during late adolescence. . . .").

[10]See, e.g., Laurence Steinberg, Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 Current Dir. Psychol. Sci. 55, 56–58 (2007); Geier & Luna, supra note 9, at 218; Ann E. Kelley et al., Risk Taking and Novelty Seeking in Adolescence, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004). The literature documenting adolescents' proclivity for risk-taking is too extensive even to summarize within the compass of this brief.

[11]Laurence Steinberg, Elizabeth Cauffman, et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report, 44 Dev. Psychol. 1764, 1764 (2008).

heightened vulnerability to risk taking during middle adolescence."[12] The dangers created by this gap are compounded by the fact that, while all adolescents are more peer-oriented than adults, vulnerability to peer pressure, especially for boys, appears to increase during early adolescence to an all-time high in eighth grade.[13] It may fairly be said that extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[14] Fortunately, most teens grow out of this behavior as a predictable part of the maturation process.[15]

Young teens, to a greater extent than older teens, are also handicapped by their

---

[12]Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[13]Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841, 848 (1986); id. at 846 (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong"); see also Mann supra note 7, at 267–268, 274 (early adolescence associated with greatest conformity to peer group pressure); Steinberg, Risk-Taking, supra note 10, at 57 (susceptibility to antisocial peer influence peaks in mid-adolescence); N. Dickon Reppucci, Adolescent Development and Juvenile Justice, 27 Am. J. Community Psychol. 307, 318 (1999) (social conformity peaks around age 15)

[14]Spear, supra note 9, at 421; Reppucci, supra note 13, at 319.

[15]Spear, supra note 11, at 421 (adolescent experimentation in risk-taking is transient for most individuals); Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 L. & Human Behav. 219, 229 (2002) (defying rules is part of adolescent experimentation with autonomy and identity development, and many youths who manifest "deviance" in adolescence will not do so in adulthood); Reppucci, supra note 13, at 319 ("[D]esistance from antisocial behavior is also a predictable part of the maturation process.").

undeveloped sense of self and their inability to imagine their futures.[16] It is not until the late teens or early twenties that they begin to form a coherent identity – although teens sixteen and older have a more mature sense of self than adolescents under fifteen.[17] Very few young adolescents think about their future beyond age 30.[18] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family; with this added perspective, their ability to plan and to realistically anticipate long-term consequences

---

[16]See Nurmi, supra note 7, at 12–13; see also Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence, 20 L. & Human Behav. 249, 255 (1996) (moral reasoning and reflectiveness are associated with sense of identity, which does not begin to consolidate until late teens or early twenties; extreme vulnerability in self-image seen especially in younger adolescents); Seagrave & Grisso, supra note 15, at 229 ("Many adolescents focus excessively on present circumstances and weight the importance of risks differently than do adults, especially when under emotional stress or in situations where a solution is not readily apparent."); Reppucci, supra note 13, at 318 (adolescents "discount the future more than adults" and "weigh more heavily the short-term versus the long-term consequences of decisions"); Jeffrey Arnett, Reckless Behavior in Adolescence, 12 Dev. Rev. 339, 344 (1992) (adolescents' limited life experience impairs ability to fully apprehend possible negative consequences of their actions); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Dev. Rev. 78, 90 (2008) (feelings of self-consciousness increase during early adolescence, peak around age 15, then decline).

[17]Steinberg, Social Neuroscience, supra note 16, at 94 (future orientation and planning increase from 16–18); Seagrave & Grisso, supra note 15, at 226 (adolescence is time of dramatic changes in identity, during which adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender"); id. at 229 (adolescents "focus excessively on present circumstances").

[18]Nurmi, supra note 7, at 27.

improves.[19]

The flip side of young adolescents' nascent sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. Nothing about fourteen-year-olds' character is permanent. They have years of development ahead, during which they can (and, in most cases, will) grow into moral, law-abiding adults.[20] In this regard:

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
>
> . . . [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught, arrested, prosecuted or sanctioned . . . .[21]

As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[22] For these reasons, adolescents fourteen and younger are a distinct group of young offenders who must be considered separately from older juveniles when evaluating whether a sentence of life imprisonment without parole is

---

[19]Id. at 27–29.

[20]See supra note 15.

[21]Steinberg, supra note 12, at 478.

[22]See, e.g., Laurence Steinberg, Sandra Graham et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 28 (2009) [hereinafter Steinberg, Graham, et al., Future Orientation]; Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Dev. Psycho. 1531, 1540 (2007); Steinberg, Cauffman, et al., supra note 11, at 1775–76.

cruel and unusual. By limiting its analysis to whether Graham invalidated sentences of life imprisonment without parole for all juveniles, the Arkansas Supreme Court mischaracterized the central issue in this case. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. 2011). Kuntrell's Eighth Amendment claim pertains only to whether fourteen-year-old children must be exempted from the penultimate punishment due to their inherent and substantial differences from adults and older teens.

2. The Law Recognizes the Critical Differences Between Fourteen-Year Old Children and Older Adolescents.

The differences in development between younger and older juveniles are reflected in the laws and holdings of the state legislatures, the state courts, Congress, and this Court. Each of these legal authorities has understood the need to make special provisions for children under fifteen.

The Arkansas legislature, like that of all other states, has enacted laws distinguishing between fourteen-year old children and older teenagers. These laws evidence the state's judgment that younger children lack the maturity and decision-making capacity necessary to make responsible choices about fundamental aspects of their personal lives. Unlike older juveniles, they are prohibited from driving, Ark. Stat. Ann. § 27-16-604; prevented from getting married without a court order, Ark. Stat. Ann. §§ 9-11-102 (a) (minimum age restrictions) - 103 (court order provisions); required to attend school, Ark. Stat. Ann. § 6-18-201; and allowed to work a range of jobs only under certain restrictions, see Ark. Stat. Ann. §§ 11-6-105–110. Similarly, the federal government strictly regulates the hours and conditions under which

fourteen-year olds may be employed. 29 U.S.C. §§ 203, 212, 213.

State courts have determined that sentencing decisions must take into account the differences between young children and older teenagers. For instance, Kentucky's highest court has held that imposing a sentence of life in prison without parole on two fourteen-year-olds convicted of rape was cruel and unusual punishment. Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968). The Nevada Supreme Court struck down the same sentence under the Eighth Amendment for a child under the age of fifteen who had been convicted of murder. Naovarath v. State, 779 P.2d 944, 948-49 (Nev. 1989).

In Stanford v. Kentucky, this Court distinguished younger adolescents from those over the age of fifteen, permitting sixteen- and seventeen-year-olds to be subjected to harsher punishments, including death. 492 U.S. 361, 380 (1989). While Stanford was later overruled by Roper insofar as it allowed the execution of the sixteen- and seventeen-year-olds, this Court has never abandoned the insight that there exists a constitutionally significant difference between young adolescents and older teenagers with respect to sentencing. See also Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) (prohibiting the death penalty for children fifteen and under, in part because "[a]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive and less self-disciplined than adults" (quotation marks omitted) (emphasis added)). These precedents establish that fourteen-year-olds are substantially different from older teenagers in ways that are constitutionally relevant to sentencing.

3. The Singular Characteristics of Young Adolescents that Distinguish Them from Older Teens and Adults Are No Less Applicable to Homicide Offenses than to Other Crimes

The signature features of youth identified by the Court in Roper and reaffirmed in Graham are just as much in operation when a young adolescent commits a homicide offense as when he or she commits a nonhomicide offense. There is no reason to imagine that fatal acts committed by a child of thirteen or fourteen are typically less impulsive, more farsighted, more cognizant of likely consequences, less peer-influenced, or more susceptible to self-control than nonfatal criminal acts.

And, no matter what the precise nature of their crimes, children under fifteen "are more capable of change . . . and their actions are less likely to be evidence of irretrievably depraved character" than is the case with older teenagers and adults, Graham, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 570) (quotations omitted). As a class, young teens who fall into criminality have a greater potential to reform their character deficiencies as they advance in age and maturity. Id. (citing Roper, 543 U.S. at 570) (quotations omitted).

The Court's Eighth Amendment analysis of the permissible severity of any particular punishment includes consideration of the question "whether the challenged sentencing practice serves legitimate penological goals." Graham, 130 S. Ct. at 2026. Following the reasoning in Graham, it is apparent that the characteristics of fourteen-year-olds frustrate any plausible purpose for imposing the penultimately harsh, permanent sanction of life imprisonment without parole.

Life imprisonment without parole is the harshest penalty available under

Arkansas law for juvenile offenders. The Graham Court found that, while death sentences are unique, a sentence of life without parole also "alters the offender's life by a forfeiture that is irrevocable." Id. at 2027. Such a sentence "deprives the convict of the most basic liberties without giving hope of restoration." Id. Moreover, "[l]ife without parole is an especially harsh punishment for a juvenile," who will "serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. For these reasons, Kuntrell's life without parole sentence constitutes an extremely harsh, final judgment that denies all hope for the future.

None of the generally recognized purposes of punishment is adequate to justify imposing such an endless, rigidly inflexible sentence on a young adolescent. "Retribution is a legitimate reason to punish," but "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Graham, 130 S. Ct. at 2028. Both Roper and Graham recognized that, even with respect to older teens, "the case for retribution is not as strong with a minor as with an adult." Id. (quoting Roper, 543 U.S. at 571).

The deterrence rationale for punishment also fails in the case of young adolescents. Even with respect to older teens, the Court has recognized that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Roper, 543 U.S. at 571. Teenagers' impulsivity and lack of future-orientation means that they are "less likely to take a possible punishment into consideration when making decisions." Graham, 130 S. Ct. at 2028–29. Again these observations are especially true of young adolescents. Given

that eighth graders struggle to imagine their lives only a few years into the future, it is unlikely that they would plan their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Moreover, testing of individuals from 10 and 30 years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals."[23]

"While incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts," Graham, 130 S. Ct. at 2029, it is insufficient to support making a permanent, unalterable judgment about a young adolescent whose character is as yet unformed. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, 543 U.S. at 572. Younger adolescents have an even greater capacity for change than older teens, rendering it peculiarly unreliable and ill-advised for "the sentencer to make a judgment that the juvenile is incorrigible," Graham, 130 S. Ct. at 2029.

Finally, a life without parole sentence for a young adolescent "forswears altogether the rehabilitative ideal." Id. at 2030. Given the especially high potential for rehabilitation of young adolescents, such a denial of the "chance to demonstrate growth and maturity," id. at 2029, cannot be justified. Because none of the purposes

---

[23]Steinberg, Graham et al., Future Orientation, supra note 22, at 36.

of punishment adequately supports a sentence of life without parole for a fourteen-year-old child, Kuntrell's constitutional claim to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," id. at 2030, warrants review by this Court.

B. The Extreme Rarity With Which Fourteen-Year-Olds Are Sentenced to Life in Prison without Parole Dramatically Supports Kuntrell's Eighth Amendment Claim.

The determination whether a sentence is cruel and unusual must also take into account " objective indicia of national consensus." Graham, 130 S. Ct. at 2023. In this regard the Court has found that "[a]ctual sentencing practices are an important part of the . . . inquiry into consensus." Id. Kuntrell is one of only four fourteen-year-old children known to have been sentenced to life imprisonment without parole in the State of Arkansas.[24] Just 73 children age fourteen or younger have been sentenced to life imprisonment without parole in the entire United States.[25]

This number is substantially less than the 123 sentences which the Court in Graham found demonstrated that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2023, 2026. It is also comparable to the number of sentences found indicative of a national consensus repudiating a sentencing practice in previous cases. When Roper recognized a national consensus against death

---

[24]Neither Arkansas's Department of Corrections nor undersigned counsel's extensive research, see note 1, supra, could identify more than four children Kuntrell's age who have been sentenced to life imprisonment without parole in Arkansas. See also Equal Justice Initiative, Cruel and Unusual, supra note 1, at 20.

[25]See Cruel and Unusual, supra note 1, at 20.

sentences for juveniles, 72 juvenile offenders were under that sentence.[26] When Atkins v. Virginia, 536 U.S. 304 (2002), found a national consensus against death sentences for persons with mental retardation, it was estimated that one to three percent of the death-row population – roughly 71 people – were mentally retarded.[27]

The total of 73 young adolescents serving sentences of life without parole is particularly strong evidence of the rarity of these sentences for two reasons. First, as the Court noted in Graham, "a juvenile sentenced to life without parole is likely to live in prison for decades," and thus "these statistics likely reflect nearly all [young adolescent] offenders who have received a life without parole sentence stretching back many years." 130 S. Ct. at 2024. Second, these cases represent just a tiny fraction of cases in which people fourteen or younger might have received such sentences. According to the FBI's Uniform Crime Statistics, since 1995, 103,068 children fourteen or younger have been arrested for offenses that could potentially expose them to life without parole, and 1,878 of those children were arrested for homicides.[28] In same time period in Arkansas, 153 juveniles were arrested for murder or non-negligent

---

[26]Victor L. Streib, Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – September 30, 2004 3 (2004), available at http://www.demaction.org/dia/organizations/ncadp/Affiliate/Toolkit/Resources/DeathPenalty/JuvDeathSept302004.pdf.

[27]See Atkins, 536 U.S. at 309 n.5; Death Penalty Information Center, Size of Death Row By Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size- death-row-year#year (last visited Oct. 12, 2010) (showing 3,557 death row inmates in 2002).

[28]These number were compiled from data available at http://www.fbi.gov/ucr.

homicide.[29] However, only two fourteen-year-olds, about one percent of all arrested, including Kuntrell Jackson, have been sentenced to life imprisonment without parole for crimes committed during that time period.[30] Graham found that similar data supported a conclusion that the sentencing practice at issue was unusual. 130 S. Ct. at 2025.

Children of fourteen or younger are known to have been sentenced to life without parole in only eighteen states.[31] Thus, in the vast majority of states, no child of Kuntrell's age has been subjected to life imprisonment without the possibility of parole. That only a minority of states have imposed these sentences is strong evidence of a national consensus. See, e.g., Roper, 543 U.S. at 564–65; Atkins, 536 U.S. at 316. Moreover, in ten of the eighteen states which have sentenced children as young as fourteen to life without the possibility of parole, no more than one or two children have received that sentence.[32]

One of these eighteen states, Colorado, no longer allows the imposition of life

---

[29]See U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States 338 (2004), available at http://www.fbi.gov/ucr/ucr.htm; id. at 328 (2003); id. at 292 (2002); id. at 292 (2001); id. at 274 (2000); id. at 270 (1999); id. at 268 (1998); id. at 280 (1997); id. at 272 (1996); id. at 266 (1995).

[30]The other two fourteen-year-olds' arrests predate 1995.

[31]Cruel and Unusual, supra note 1, at 20. Although this report indicates that there are nineteen states in which thirteen- and fourteen-year-olds have been sentenced to life without parole, there are now only eighteen because the only such sentence in California has recently been overturned. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

[32]Cruel and Unusual, supra note 1, at 20.

without parole on any juvenile. See Colo. Rev. Stat. § 17-22.5-104(IV). Texas also has formally abolished life without parole for all juveniles. See Tex. Penal Code Ann. § 12.31(b)(1). California courts have prohibited life without parole for children under sixteen. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009). The fact that these three states have moved away from sentencing young adolescents to die in prison reveals a distinct trend against imposing this sentence.

This strong evidence of a national consensus is not undermined by the fact that many states do not explicitly prohibit life without parole for fourteen-year-old children. Graham, 130 S. Ct. at 2025. State statutory schemes that theoretically permit a life-without-parole sentence for a fourteen-year-old child are typically the result of two separate legislative enactments: a provision authorizing life-without-parole sentences for adults, and a provision authorizing the transfer of fourteen-year-olds to adult court. This exogenous conjunction is insufficient to demonstrate that these states have made a deliberate judgment that such a sentence is appropriate, especially where – as is true in the vast majority of states – such a sentence has never actually been imposed. See Graham, 130 S. Ct. at 2025 ("[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences."); Thompson v. Oklahoma, 487 U.S. 815, 829 n.24 (1988) ("That these three States have all set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but tells us nothing

about the judgment these States have made regarding the appropriate punishment for such youthful offenders.").

The paucity of cases in which sentences of life imprisonment without parole have actually been imposed on fourteen-year-old children demonstrates that "[t]he sentencing practice now under consideration is exceedingly rare." Graham, 130 S. Ct. at 2026. The national consensus against such sentences strongly supports the conclusion that such sentences are cruel and unusual.

II. REVIEW SHOULD ALSO BE GRANTED TO DETERMINE WHETHER, CONSISTENTLY WITH GRAHAM v. FLORIDA, A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE CAN BE IMPOSED UPON A MURDER CONVICTION WHICH IS BASED SOLELY ON ACCESSORIAL-LIABILITY AND FELONY-MURDER PRINCIPLES, WITH NO SHOWING THAT THE JUVENILE OFFENDER KILLED OR INTENDED TO KILL ANYONE.

At Kuntrell's trial, the prosecution relied upon theories of robbery-murder and accessorial liability to obtain a conviction of homicide and of capital murder. These theories made it irrelevant whether Kuntrell committed the homicide himself or intended the victim's death. Accordingly, the prosecution acknowledged that Derrick Shields was the actual killer, and it did not undertake the burden of proving even that Kuntrell knew, let alone shared, Shields' homicidal intent. See Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011) (Danielson, J., joined by Corbin, J., dissenting) ("Jackson did not kill and any evidence of intent to kill was severely lacking."); see also id. (Brown, J., concurring) ("[Jackson] was convicted of a murder that occurred in the course of committing a felony – not deliberated or premeditated murder."). Under the felony-murder provisions of Arkansas Code §5-10-101

(a)(1)(A)(vi) and §5-10-101(a)(1)(B), the elements of the state's murder case against Kuntrell were simply that he knowingly participated in an armed robbery and that, during the course of the robbery and in furtherance of it, one of his co-defendants killed the victim in a manner evincing extreme indifference to human life.

It was undisputed that Kuntrell did not provide the gun used in the shooting, handle the gun at any point prior to or during the offense, or fire the fatal shot. See Jackson v. State, 194 S.W.3d 757, 758-59 (Ark. 2004) (summarizing facts of the crime). The most plausible inference from the State's evidence is that none of the three boys expected anyone to be killed: when the shot was fired, Kuntrell and his two older co-defendants ran away without taking any money. See id. at 759. The entire episode, while undeniably tragic, bore the hallmark of impulsivity, not premeditation.

A. A Life-Without-Parole Sentence for a Juvenile Who Was Not Convicted of Intentional Murder Appears Starkly at Odds with Graham.

Although the specific holding in Graham invalidated life-without-parole sentences only for nonhomicide offenses, the Court relied heavily on the rationale that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, 130 S.Ct. at 2027 (emphasis added). The Court pointedly stated that, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Id. (emphasis added).

Kuntrell undeniably stands convicted of a homicide crime through the joint application of Arkansas' felony-murder and accessorial-liability rules. Those rules did

not require proof of an intent to kill – or even of an awareness of the likelihood of fatal consequences – in order to sustain his conviction. He fired no weapon, he possessed no weapon, he engaged in no physical violence toward the homicide victim throughout the course of the events that led up to one of his older companions suddenly shooting her. From the standpoint of individual culpability, his actions in connection with that crime cannot be meaningfully distinguished from those of Terrance Graham. Jackson, 2011 WL 478600 (Danielson, J., dissenting) ("Jackson's involvement in the robbery was no more, if not less than, Graham's involvement had been.") To the extent there are distinctions between Kuntrell's and Terrance Graham's respective degrees of involvement and responsibility, they suggest that Kuntrell was the less culpable of the two. Kuntrell was initially unaware that one of his co-defendants was armed; he at first elected to stay outside the store where the robbery took place, and he entered the store only after his co-defendant was already brandishing the gun. Jackson v. State, 194 S.W.3d at 758-59. Cf. Jackson v. Norris, 2011 WL 478600 (Danielson, J., dissenting) (noting that Kuntrell's "involvement in the robbery was limited").

B. A National Consensus Has Emerged Against Sentencing Juveniles to Life Without the Possibility of Parole for Unintentional Homicides.

The rarity of life-without-parole sentences for children under the age of fifteen who were convicted of homicides in cases where the state did not establish their intent to kill further demonstrates that Kuntrell's sentence is at odds with Graham. In Graham, the Court relied on the fact that only 123 juveniles of any age had been sentenced to life-without-parole for nonhomicide offenses to find that "[t]he sentencing

practice now under consideration is exceedingly rare. And 'it is fair to say a national consensus has developed against it.'" Id. at 2026 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)). Here, the evidence of consensus is even stronger than in Graham. Only twenty-one children under fifteen are known to have received a life-without-parole sentence for homicide offenses where the state did not establish intent to kill.

C. A Sentence of Life Without Parole for a Juvenile Who Did Not Intend to Kill Cannot be Justified under Any Valid Penological Goal.

Sentencing a juvenile who did not intend to kill to life without the possibility of parole does not "serve[] legitimate penological goals." Graham, 130 S.Ct. at 2026. Considering the degree of harm caused, felony murder is obviously a more serious crime than the nonhomicide offenses on which it is predicated; hence, it is traditionally and legitimately punished more severely. But the application of felony-murder liability to young children becomes problematic in the light of the differences between children and adults recognized in Roper and Graham. The felony-murder doctrine rests essentially on the idea that one who chooses to become involved in a potentially violent felony should reasonably anticipate injury to victims or bystanders. Society is therefore justified in holding the participating offenders responsible for any death that may occur, regardless of whether those who did not personally perform the lethal act specifically intended death. See Tyson v. Arizona, 481 U.S. 137, 159-60 (1987). As Graham implicitly recognizes, this rationale is incompatible with our modern understanding of juveniles. Juveniles as a group, and especially younger juveniles under the age of fifteen, have a significantly impaired ability to anticipate future

consequences.[33] For this reason, they are less able to recognize that their participation in a robbery may lead to someone's injury or death. Moreover, juveniles' poor impulse control and high susceptibility to peer influence inhibit their ability to withdraw from potentially deadly situations when they are encouraged into wrongdoing by others. See Graham, 130 S.Ct. at 2026.

These considerations severely undermine the penological justifications for sentencing a child who is only fourteen years old to life without the possibility of parole when that child did not intend to kill. Cf. Graham, 130 S.Ct. at 2030 (acknowledging the absence of penological justifications for sentencing children to life without parole for nonhomicides). Just as a child who does not commit a homicide must be considered less amenable to deterrence, Graham, 130 S.Ct. at 2028 (citing Roper, 543 U.S. at 571), so, too, must be a child who unintentionally participated in a homicide. Cf. Enmund v. Florida, 458 U.S. 782, 798-99 (1982) ("We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably

---

[33]See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252-56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267-70 (1989) (13-year-olds show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than 15-year-olds); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones)

deter one who does not kill and has no intention or purpose that life will be taken.").

By similar logic, the doubly reduced moral culpability of children who do not intend to kill undermines retribution as a rationale for life-without-parole sentences. See Graham, 130 S.Ct. at 2028; cf. Enmund, 458 U.S. at 800-01. And though a child who does not personally cause death but participates in dangerous criminal activity may warrant incapacitation,"it does not follow that he would be a risk to society for the rest of his life." Graham, 130 S.Ct. at 2029. Finally, the Court unequivocally found in Graham that, for young offenders like Kuntrell, "[a] sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation." Id. at 2029-30. The failure of penological theory to justify Kuntrell's sentence of life without parole for an unintentional killing brings that sentence into an acute tension with Graham that only this Court can authoritatively resolve.

III. THE COURT SHOULD ALSO GRANT THIS PETITION TO CONSIDER WHETHER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE FORBIDS THE IMPOSITION OF A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE ON A FOURTEEN-YEAR-OLD CHILD – A PROCEDURE WHICH PRECLUDES THE SENTENCER FROM TAKING THE CHILD'S AGE OR ANY OTHER MITIGATING CIRCUMSTANCES INTO CONSIDERATION.

Once the jury found Kuntrell guilty of capital murder, a life-without-parole sentence was mandatory. Ark. Code §5-10-101 (c)(1). Arkansas law precluded the trial judge from considering Kuntrell's young age, his relatively minimal role in the offense, his past life history, his future life potentialities, or anything else in mitigation of the statutorily prescribed punishment of imprisonment until death. As the two dissenting justices on the Arkansas Supreme Court recognized, the imposition of a sentence of life

imprisonment without parole on a fourteen-year-old child absent consideration of whether the sentence is proportionate to the crime and to the child cannot readily be squared with Graham. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011) (Danielson, J., joined by Corbin, J., dissenting) ("Also of great concern to me is that once Jackson was convicted, the circuit court had no discretion in sentencing. At the time of sentencing, the circuit court could not consider the defendant's age or any other mitigating circumstances – the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility of parole.") (citing Graham, 130 S.Ct. At 2031); see also id. (Brown, J., concurring) ("I agree with Jackson's argument that this state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life without the possibility of parole.").

Although the sentence at issue in Graham was not mandatory, the Graham Court's reasoning logically implicates mandatory sentences. Florida and its state amici in Graham defended life-without-parole sentences for juveniles by asserting that Florida law and the laws of other states gave adequate consideration to a young offender's age through the screening process by which children were designated for trial either in juvenile court or, alternatively, as adults. Graham, 130 S.Ct. at 2030-31. In addition, before condemning Graham to life in prison, the trial judge held a sentencing hearing at which he determined that Graham's sentencing range was between five years and life without parole.

Despite these transfer procedures and the trial court's sentencing options, this

Court found that Florida's laws were inadequate to assure the constitutionally requisite consideration of a juvenile offender's age as a factor in determining whether he or she should be consigned to lifelong incarceration. The defect in Florida's juvenile sentencing scheme, according to the Court, was that it was "insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." Graham, 130 S.Ct. at 2031; see also Roper v. Simmons, 543 U.S. 551, 572-73 (2005) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."); Naovarath v. Nevada, 779 P.2d 944, 946-47 (Nev. 1989) ("Children are and should be judged by different standards from those imposed upon mature adults."). The Graham Court explained that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S.Ct. at 2031.

Because Kuntrell's sentence was mandatory, Arkansas law allowed less consideration of his moral culpability than the Florida system invalidated by Graham. At a minimum, this Court's reasoning in Graham implies the requirement that some consideration be given to a juvenile's age as bearing on the appropriate punishment for his or her crime before the child can be condemned to spend the rest of his or her life in prison. Cf. Graham, 130 S.Ct. at 2042 (Roberts, J., concurring) ("[Graham] was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was

unconstitutionally excessive."); id. at 2055 (Thomas, J., dissenting) ("The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented."); see also Andrews v. State, 329 S.W.3d 369, 388 (Mo. 2010) (Wolff, J. dissenting) ("The imposition of a life sentence without parole-without consideration of Andrews' age-fails to ensure that Andrews' sentence is proportional to his crime. As such, the Missouri sentencing mandate is flawed and violates the Eighth Amendment.").

In the capital-sentencing context, from which this Court derived the constitutional framework it relied upon in Graham, this Court has insisted that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Roberts v. Louisiana, 431 U.S. 633 (1977); Summer v. Shuman, 483 U.S. 66 (1987). That requirement has not been extended to life-without-parole sentencing for adults, see Harmelin v. Michigan, 501 U.S. 957, 995–96 (1996), and nothing in Kuntrell's submissions to this Court suggests that it should be. The teaching of Graham, however, is that imprisoning a child for his or her entire natural life, with no hope that he or she can ever be considered for release, shares the irrevocability and much of the life-extinguishing severity of a death sentence, and is therefore subject to some of the same Eighth Amendment safeguards. When, as in

Kuntrell's case, a state imposes such a terminal imprisonment-until-death sentence under procedures that preclude any consideration of the young offender's age or other mitigating circumstances, it is Graham, not Harmelin, that dictates the constitutional rule of decision. Certiorari should accordingly be granted to correct the view of the Arkansas court below that, in connection with the sentencing of a fourteen-year-old boy, "the life-imprisonment punishment . . . mandated by the legislature . . . [has] been determined by the Supreme Court in Harmelin v. Michigan [citation omitted] as not violative of the Eighth Amendment," Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant a writ of certiorari to the Arkansas Supreme Court.

Respectfully submitted,

BRYAN A. STEVENSON
Counsel of Record
ALICIA A. D'ADDARIO
BRANDON BUSKEY
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

APPENDICES

A. Arkansas Supreme Court Order affirming judgment of the Circuit Court of the Eleventh Judicial Circuit-West Second Division, Jefferson County (Feb. 9, 2011).

B. Circuit Court of the Eleventh Judicial Circuit-West Second Division, Jefferson County Order and judgment denying habeas relief (Sept. 17, 2008).

APPENDIX A

Cite as 2011 Ark. 49

SUPREME COURT OF ARKANSAS

No. 09-145

KUNTRELL JACKSON,
APPELLANT,

VS.

LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION,
APPELLEE,

Opinion Delivered February 9, 2011

APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT,
NO. CV-08-28-2,
HON. ROBERT HOLDEN WYATT, JR., JUDGE,

AFFIRMED.

KAREN R. BAKER, Associate Justice

This is an appeal from a denial of a petition for a writ of habeas corpus. Appellant Kuntrell Jackson was convicted of capital murder and aggravated robbery by a jury in Mississippi County Circuit Court on July 19, 2003. After the jury rendered a verdict, the trial court sentenced Jackson to life imprisonment without the possibility of parole. We affirmed. *Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (2004). Jackson did not file a petition for postconviction relief.

On January 8, 2008, Jackson filed a petition seeking a writ of habeas corpus in the Jefferson County Circuit Court. The State moved to dismiss the petition. After a hearing, the State's motion to dismiss was granted. In its order dismissing appellant's petition for writ of habeas corpus, the circuit court found that Jackson failed to demonstrate that his

commitment was facially invalid or that the Mississippi County Circuit Court lacked jurisdiction to sentence him to life imprisonment without the possibility of parole. This appeal followed.

Jackson's argument on appeal is that the circuit court erred in denying his petition because it lacked lawful authority to impose the sentence of life imprisonment without the possibility of parole for an offense committed when Jackson was fourteen years old. Jackson specifically argues that the Eighth and Fourteenth Amendments to the United States Constitution and article 2, sections 8 and 9 of the Arkansas Constitution prohibit the mandatory sentencing of children fourteen years of age and younger to life without the possibility of parole. We find no error and affirm.

A writ of habeas corpus will only lie where the commitment is invalid on its face or where the court authorizing the commitment lacked jurisdiction. *Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289 (2002); *McKinnon v. Norris*, 366 Ark. 404, 231 S.W.3d 725 (2006) (per curiam). The writ may be granted where a petitioner pleads either facial invalidity or lack of jurisdiction and makes a "showing, by affidavit or other evidence, [of] probable cause to believe" he is so detained. *See* Ark. Code Ann. § 16-112-103 (Repl. 2006). This court has recognized that detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *See Bangs v. State*, 310 Ark. 235, 835 S.W.2d 294 (1992); *see also Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam); *Meny v. Norris*, 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam).

Jackson argues that his sentence is unusual, excessive, and in violation of his rights under the Eighth and Fourteenth Amendments of the U.S. Constitution, as well as article 2, sections 8 and 9 of the Arkansas Constitution. Jackson correctly notes that a sentence of life imprisonment without the possibility of parole is the penultimate punishment under Arkansas law, exceeded only by the death penalty. For capital offenses, the legislature has proscribed only these two punishments. *See* Ark. Code Ann. § 5-4-615 (Repl. 1997).

In Arkansas, sentencing is entirely a matter of statute, and this court defers to the legislature in all matters related to sentencing. *See* Ark. Code Ann. § 5-4-104(a) (Rep. 1997); *State v. Britt*, 368 Ark. 273, 244 S.W.3d 665 (2006). Where the law does not authorize the particular sentence pronounced by a trial court, the sentence is unauthorized and illegal, and the case must be reversed and remanded; however, if a sentence is within the limits set by the legislature, it is legal. *State v. Joslin*, 364 Ark. 545, 222 S.W.3d 168 (2006); *Porter v. State*, 281 Ark. 277, 663 S.W.2d 723 (1984). We have specifically rejected the claim that a sentence of life imprisonment without parole violates the Eighth Amendment of the United States Constitution's prohibition against cruel or unusual punishment and stated that such a sentence is not unconstitutionally excessive when it is within the statutory bounds. *See Dyas v. State*, 260 Ark. 303, 539 S.W.2d 251 (1976).

This court has held that if the sentence fixed by the trial court is within legislative limits, we are not free to reduce it even though we might consider it to be unduly harsh, with three extremely narrow exceptions: (1) where the punishment resulted from passion or

prejudice; (2) where it was a clear abuse of the jury's discretion; or (3) where it was so wholly disproportionate to the nature of the offense so as to shock the moral sense of the community. *Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001). In *Bunch*, the court concluded that none of the three exceptions applied where the life-imprisonment punishment was mandated by the legislature and had been determined by the Supreme Court in *Harmelin v. Michigan*, 501 U.S. 957 (1991), as not violative of the Eighth Amendment. *Id.* Likewise, in the instant case, the sentencing court imposed a sentence of life imprisonment without parole, which is the sentence mandated by the legislature and one that we have determined to be constitutional when imposed within the statutory bounds.

Jackson also contends that dismissing his petition was erroneous because his sentence violated his federal constitutional rights pursuant to *Roper v. Simmons*, 543 U.S. 551 (2005), as extended by the Supreme Court last year to cases with juvenile defendants involving a sentence of life imprisonment without the possibility of parole for nonhomicide crimes by *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010). In *Roper*, the Court held that execution of criminal defendants who are juveniles at the time the crime was committed is prohibited by the Eighth and Fourteenth Amendments, but clearly limited its holding to death-penalty cases involving juveniles: "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper*, 543 U.S. at 568. The Court expressly noted that although the execution of a juvenile is impermissible under the Eighth and Fourteenth Amendments, sentencing a juvenile to life imprisonment is not.

Id. at 578–79.

The Supreme Court's decision in *Graham* marked the first time the Court elected to extend a categorical ban on a particular type of punishment in a case that did not involve the death penalty. The Court in *Graham* employed a categorical analysis in reaching its conclusion that sentencing juveniles to life imprisonment without parole was excessive for nonhomicide offenses; however, the Court limited its ban to *nonhomicide* crimes. *Graham*, 130 S. Ct. at 2030. In reaching its conclusion, the Court specifically acknowledged this distinction between homicide and nonhomicide offenses, noting that "[t]here is a line 'between homicide and other serious violent offenses against the individual.'" *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). The Court's holdings in *Roper* and *Graham* are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile. We decline to extend the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue.

Jackson has failed to allege or show that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the sentence. We hold that the circuit court's dismissal of the petition for writ of habeas corpus was not clearly erroneous.

Affirmed.

BROWN, J., concurs.

CORBIN, J., and DANIELSON, J., dissent.

ROBERT L. BROWN, Justice, concurring. I concur in the decision. The majority is correct that the United States Supreme Court has held that sentencing juveniles to life in prison without parole for non-homicidal offenses violates the Eighth Amendment prohibition in the United States Constitution against cruel and unusual punishment. *Graham v. Florida*, 130 S. Ct. 2011 (2010). The case before us, however, is a homicide case, which renders *Graham* inapposite. There is no case from the United States Supreme Court finding a comparable violation of the Eighth Amendment for juveniles sentenced to life without parole for felony murder. That Court, of course, is the last word on the extent of Eighth Amendment protection. *Arkansas v. Sullivan*, 532 U.S. 769 (2001) (per curiam).

The majority is also correct that sentencing for crimes upon conviction is entirely a matter of statute. Ark. Code Ann. § 5-4-104(a) (Repl. 1997); *State v. Britt*, 368 Ark. 273, 244 S.W.3d 665 (2006). And once there is a conviction for capital murder for juveniles, life without parole for the offender becomes the mandatory sentence without any requirement for a pre-sentence hearing. Ark. Code Ann. § 5-4-602(3)(B)(ii) (Repl. 2006). Hence, for Kuntrell Jackson, who was age fourteen at the time of the crime, his only remedy to avoid spending the rest of his life in prison afer the conviction for capital murder is executive clemency from the governor.

I agree with Jackson's argument that this state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life without the possibility of parole. Here, Jackson maintains he was not the

trigger man in the homicide, and, indeed, he was convicted of a murder that occurred in the course of committing a felony—not deliberated or premeditated murder. Ark. Code Ann. § 5-10-101.

Hearing those factors at a sentencing-phase hearing may well have convinced the jury that life without parole was too severe and not appropriate in light of Jackson's age and circumstances. As it stands today, no sentencing hearing for a juvenile is available by statute once the death penalty is no longer an option and a conviction for capital murder has been had.

The General Assembly should examine this part of the criminal code to determine whether a sentencing hearing is appropriate before a mandatory sentence of life without parole is imposed on a person who was a juvenile at the time of the homicide and when the basis for the conviction is not premeditated murder but felony murder.

PAUL E. DANIELSON, Justice, dissenting. I respectfully dissent from the majority's decision to affirm the denial of habeas relief in the instant case. I understand that the sentence fixed by the circuit court was within legislative limits; however, I disagree that this is not a case in which the particular facts allow us, if not require us, to provide relief.

Appellant Kuntrell Jackson was barely fourteen on the night of the incident that led to his arrest. He was walking with an older cousin and friend, Travis Booker and Derrick Shields, through the Chickasaw Courts housing project in Blytheville when the boys began discussing the idea of robbing the Movie Magic video store. On the way to Movie Magic,

Jackson became aware of the fact that Shields was carrying a sawed-off .410 gauge shotgun in his coat sleeve. When they arrived at the store, Shields and Booker went in, but Jackson elected to remain outside by the door. Shields pointed the shot gun at the video clerk, Laurie Troup, and demanded that she "give up the money." Troup told Shields that she did not have any money. A few moments later, Jackson went inside. Shields demanded that Troup give up the money five or six more times, and each time she refused. After Troup mentioned something about calling the police, Shields shot her in the face. The three boys then fled to Jackson's house without taking any money.

Jackson was tried as an adult and convicted of capital murder when, pursuant to Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1997), the State proved that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, *or an accomplice*, caused Troup's death under circumstances manifesting an extreme indifference to the value of human life. The only sentence available for that conviction was death or life imprisonment without parole. *See* Ark. Code Ann. § 5-10-101(c)(1). Jackson was sentenced to life imprisonment without the possibility of parole.

As noted by the majority, our United States Supreme Court has held that not only does the execution of criminal defendants who are juveniles violate the Eighth and Fourteenth Amendments, sentencing a juvenile to life imprisonment without the possibility of parole is also an excessive punishment in violation of the Eighth and Fourteenth Amendments for a nonhomicide offense. *See Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010). The facts

in *Graham* are not terribly different from the facts in the instant case, except that the victim in *Graham* did not die from Graham's accomplice's physical attack:

> In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Id. at ___, 130 S. Ct. at 2018. Graham was charged as an adult for the armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole; and attempted armed-robbery, a second-degree felony carrying a maximum penalty of fifteen years' imprisonment. *See Graham*, *supra*. Graham pleaded guilty to both charges under a plea agreement, which was accepted by the trial court. *See id.* He was then placed on probation after serving some jail time. *See id.* Graham was actually only sentenced to life imprisonment by the trial court after violating the terms of his probation by engaging in subsequent criminal activity. *See id.*

In analyzing whether this sentence was constitutional under the Eighth Amendment, the Supreme Court noted that:

> [W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.
>
> . . . .
>
> Here one cannot dispute that this defendant posed an immediate risk,

> for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.

Id. at ___, 130 S. Ct. at 2027, 2029.

In the instant case, Jackson did not kill and any evidence of intent to kill was severely lacking. He never possessed the weapon, he was not the shooter, and his involvement in the robbery was limited. While he was convicted of capital murder, that conviction was only obtained by proving that he was an accomplice, and his accomplice took someone's life in the course of a felony, the aggravated robbery. Jackson's involvement in the robbery was no more, if not less than, Graham's involvement had been. I simply cannot ignore the fact that the analysis of the United States Supreme Court in *Graham* applies to the juvenile defendant in the instant case, regardless of the fact that, in the instant case, the prosecution was able to secure a capital-murder conviction through our felony-murder statute.

Also of great concern to me is that once Jackson was convicted, the circuit court had no discretion in sentencing. At the time of sentencing, the circuit court could not consider the defendant's age or any other mitigating circumstances—the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility of parole. "An

offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, ___ U.S. at ___, 130 S. Ct. at 2031.

For these reasons, I believe that the sentence as applied in the instant case violates the prohibition against cruel and unusual punishment found in the Eighth and Fourteenth Amendments of the United States Constitution and article 2, section 9 of the Arkansas Constitution and, therefore, is illegal. Detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *See Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003). Accordingly, I would reverse the denial of Jackson's petition for a writ of habeas corpus.

CORBIN, J., joins.

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT - WEST
SECOND DIVISION

KUNTRELL JACKSON — PETITIONER

VS. — NO. CV-2008-28-2

LARRY NORRIS, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION — RESPONDENT

ORDER

Pending before the Court is a Petition for Writ of *Habeas Corpus* filed by the Petitioner, KUNTRELL JACKSON, on January 8, 2008. Also pending is a Motion to Dismiss Petition for Writ of *Habeas Corpus* filed by the Respondent, LARRY NORRIS.

FACTS

Petitioner was convicted by a jury of Capital Murder on June 19, 2003, in the Circuit Court of Mississippi County, Arkansas. Capital Murder is a violation of Ark. Code Ann. § 5-10-101. Punishment for Capital Murder is either death by lethal injection or life in the Arkansas Department of Correction without the possibility of parole. Because the State waived the death penalty in this case, Petitioner was sentenced to life in the Arkansas Department of Correction without parole. Petitioner was fourteen (14) years old at the time the Capital Murder was committed.

Prior to the jury trial, and in compliance with Ark. Code Ann. § 9-27-318, a Motion to Transfer to Juvenile Court was filed on behalf of the Petitioner. The Circuit Court of

FILED
SEP 17 2008
FLORA C. COOK
Circuit Clerk
JEFFERSON COUNTY, ARKANSAS

0000187

7/690

Mississippi County held a hearing pursuant to Ark. Code Ann. § 9-27-318 and found by clear and convincing evidence that the Petitioner was not entitled to have his case transferred to the Juvenile Division of Mississippi County Circuit Court. An interlocutory appeal followed and the Arkansas Court of Appeals affirmed the decision of the Mississippi County Circuit Court, denying the transfer to Juvenile Court. *See, Jackson v. State*, WL 193412 (Ark. App.) 2003.

The jury trial was held and on June 19, 2003 the Petitioner was convicted of Capital Murder. Following his conviction, Petitioner appealed and the Supreme Court of Arkansas affirmed his conviction. *See, Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (2004). In addition to considering the issues raised on appeal by the Petitioner, the Supreme Court, pursuant to Ark. Sup. Ct. R. 4-3(h), examined the record and all objections abstracted and certified by the State. The Supreme Court held that there were no rulings adverse to the Petitioner which constituted any prejudicial error.

RELIEF SOUGHT

The Petition for Writ of *Habeas Corpus* alleges:

(a) Sentencing a fourteen (14) year old child to die in prison violates that Eighth Amendment's prohibition against cruel and unusual punishment pursuant to *Roper v. Simmons*, 543 U.S. 551 (2005); and,

(b) That the mandatory nature of the sentence for Capital Murder violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

STANDARD FOR WRIT

To succeed on a petition for writ of *habeas corpus*, Petitioner must show that the Judgment and Commitment Order is invalid on its face or that the trial court lacked

Trial

jurisdiction, *Davis v. Reed*, 316 Ark. 575, 577, 873 S.W.2d 624, 525 (1994); *Wallace v. Willock*, 301 Ark. 69, 781 S.W.2d 478 (1989). The Petitioner must plead either the facial invalidity or the lack of jurisdiction and make a showing, by affidavit or other evidence, of probable cause to believe he is illegally detained. *Mackey v. Lockhart*, 307 Ark. 321, 323, 819 S.W.2d 702, 704; Ark Code Ann. 16-112-103 (1987).

CONCLUSION

Petitioner does not contend that the Judgment and Commitment Order is invalid on its face and, likewise, does not contend that the Circuit Court of Mississippi County did not have jurisdiction over him. Petitioner's sole argument is that due to his age at the time of the murder, the cruel and unusual clause of the Eighth Amendment to the United States Constitution has been violated. Further, he argues that the mandatory nature of his sentence violates the Eighth and Fourteenth Amendments of the United States Constitution and Article II of the Arkansas Constitution, because the Court was prohibited from considering mitigation evidence. Petitioner was sentenced pursuant to Arkansas Law. His sentence is neither excessive nor is it contrary to Arkansas Law.

A *habeas corpus* proceeding does not afford a petitioner the opportunity to re-try his case. *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991). The remedy available to Petitioner to correct any errors that may have occurred at his trial is a direct appeal. *Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990). Petitioner had a direct appeal to the Arkansas Supreme Court and pursuant to Ark. Sup. Ct. R. 4-3(h), the entire record was examined and there were no rulings adverse to the Appellant which constituted prejudicial error.

The allegations raised by Petitioner do not demonstrate that the trial court lacked jurisdiction or that the commitment is invalid on its face. The trial court had personal jurisdiction over Petitioner and jurisdiction over the subject matter thus, had the authority to render the judgment. *See, Johnson v. State*, 298 Ark. 479, 769 S.W.2d (1989); *Richie v. State*, 298 Ark. 358, 767 S.W.2d 522 (1989).

Therefore, Petitioner's claims are not cognizable under Ark. Code Ann. §16-112-101 *et seq.*, and his Petition for Writ of *Habeas Corpus* is **DISMISSED.**

IT IS SO ORDERED, this 17th day of September, 2008.

ROBERT H. WYATT, JR.
CIRCUIT JUDGE

xc: Office of the Attorney General
Habeas Section
Via-Facsimile: (501) 682-8203

The Equal Justice Initiative of Alabama
Attention: Mr. Bryan A. Stephenson, Mr. Brandon J. Buskey & Ms. Alicia A. D'Addario
122 Commerce St.
Montgomery, AL 36104
Via-Facsimile: (334) 269-1806

'17/693