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June 1, 2011

Mr. William K. Suter
Clerk of the Court
United States Supreme Court
No. 1 First Street, N.E.
Washington, D.C. 20543

RE: *Kuntrell Jackson v. Ray Hobbs, Director ADC*
No. 10-9647

Dear Mr. Suter:

Please find enclosed for filing the original and ten (10) copies of *Respondent's Brief in Opposition* in the above-styled case. Opposing counsel has been served as indicated on the enclosed certificate of service.

Sincerely,

A handwritten signature in black ink, appearing to read "D.R. Raupp".

By: David R. Raupp
Senior Assistant Attorney General
For: Kent G. Holt
Assistant Attorney General
(501) 682-5322

KGH/jt
Enclosure

cc: Mr. Bryan A. Stevenson
Counsel of Record
Alicia A. D'Addario
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Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104

NO. 10-9647

IN THE SUPREME COURT OF THE UNITED STATES

KUNTRELL JACKSON, *Petitioner*

v.

RAY HOBBS, Director

Arkansas Department of Correction, *Respondent*

On Petition for Writ of Certiorari to the
Supreme Court of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

DUSTIN McDANIEL
Arkansas Attorney General

BY: *KENT G. HOLT
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323 Center Street, Suite 1100
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ATTORNEYS FOR RESPONDENT
*COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old defendant convicted of capital murder violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the Arkansas legislature has put in place a statutory mechanism for considering the reduced criminal culpability of a juvenile offender?
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, but was found to have participated as an accomplice?
3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old defendant as a result of a mandatory sentencing scheme for capital murder after the offender's age and other circumstances have been considered in whether to transfer the case to juvenile court?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES

<i>Beulah v. State</i> , 344 Ark. 528, 42 S.W.3d 461 (2001).....	4
<i>Graham v. Florida</i> , ___ U.S. ___, 130 S.Ct. 2011 (2010).....	5
<i>Jackson v. State</i> , No. CA 02-535, slip op. 2003 WL 193412 (Ark. App. Jan. 29, 2003).....	1
<i>Jackson v. State</i> , 359 Ark. 87, 194 S.W.3d 757 (2004).....	5
<i>Solem v. Helm</i> , 463 U.S. 277, 103 S.Ct. 3001 (1983).....	6
<i>Witherspoon v. State</i> , 72 Ark. App. 151, 46 S.W.3d 549 (2001).....	4

STATUTES

28 U.S.C. §1257(a).....	1
Ark. Code Ann. § 9-27-101 et seq.....	1
Ark. Code Ann. § 9-27-318(g) (Repl. 2002).....	3
Ark. Code Ann. § 9-27-318(h).....	4
Ark. Code Ann. § 9-27-318(i).....	4
Ark. Code Ann. § (c)(2)(A).....	4

OTHER AUTHORITIES

“Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation,” P. Annino, D. Rasmussen, C. Boehme Rice, Public Interest Law Center, College of Law, Florida State University, p.4 (September 14, 2009).....	6
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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).

CONSTITUTIONAL PROVISIONS INVOLVED

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.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

Respondent relies on the description of the proceedings contained in the opinion below and incorporates that description by reference. Respondent also relies on the proceeding of the Arkansas Court of Appeals in *Jackson v. State*, No. CA 02-535, slip op. 2003 WL 193412 (Ark. App. Jan. 29, 2003), that considered the denial of the petitioner’s motion to transfer his case to juvenile court.

REASONS FOR DENYING THE WRIT

The Respondent agrees that, in the context of the American criminal justice system, there are valid reasons for taking into account the different characteristics of juvenile offenders. This is the reason why Arkansas has an extensive juvenile code which considers the ages of juvenile offenders as well as the various crimes that they may commit. *See* Ark. Code Ann. § 9-27-101 et seq. In the instant case, the petitioner availed himself of the very procedures of that code,

seeking an individualized determination as to his prospects for rehabilitation and the danger that he posed to society. Even the petitioner's own authority states that "a small percentage [of juvenile offenders] – between five and ten percent, according to most studies – become chronic offenders." (Pet. at 16) It is in that context that the criminal justice system must, and does, deal with juvenile offenders. Clearly, the Arkansas legislature has, within its statutory scheme, considered whether a life-without-parole sentence for a homicide offense is appropriate. The Arkansas Court of Appeals review of the facts adduced at the transfer hearing wherein the petitioner sought adjudication in the juvenile system, are set out in its opinion and bear repeating here:

Kuntrell Jackson was charged in the criminal division of circuit court with capital murder. Appellant was fourteen years old at the time the offense was allegedly committed. This is an interlocutory appeal from an order denying appellant's motion to transfer his case to juvenile court.

On November 18, 1999, Laurie Troup was working at Movie Magic, a video store in Blytheville, when appellant and two other juveniles entered the store and demanded that she give them money. When Troup refused to hand over the money, she was shot in the face with a sawed-off shotgun. The juveniles fled without taking any money.

The juveniles were apprehended in March 2001, and all three gave incriminating statements to police. According to their statements, which were introduced at the transfer hearing, appellant and his cohorts planned to rob the video store because they wanted money. Appellant contended that one of his accomplices supplied the weapon and fired the fatal shot and that he was the lookout.

In addition to the juveniles' statements to police, the circuit judge was also presented with appellant's juvenile arrest history at the transfer hearing. In February 2000, appellant was adjudicated delinquent for shoplifting, stealing two cars, and attempting to steal a third car. While on probation less than a month later, appellant was arrested for committing two counts of auto theft. In October 2000, appellant was adjudicated delinquent for theft by receiving a vehicle, criminal trespass, and fleeing. He was committed to the Division of Youth Services as a serious offender.

The results of a forensic psychiatric evaluation were also considered by the circuit judge. The psychologist found that appellant appeared to understand the charges against him and found no psychiatric impairment that would have caused him to be unable to conform his behavior to the requirements of the law at the time of the offense.

At the transfer hearing, Jack Wallace, a juvenile intake officer, testified that there was no rehabilitation program available in the juvenile system at that time in the event appellant was found guilty of capital murder.

In determining whether to retain jurisdiction or to transfer the case, the circuit judge must consider the following factors pursuant to Ark. Code Ann. § 9-27-318(g) (Repl. 2002):

- (1) The seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in the criminal division of circuit court;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court which are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;
- (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

In its order denying appellant's motion to transfer, the circuit court relied on the first nine factors. At the hearing, the circuit judge noted the seriousness of the offense and gave due consideration to the fact that the offense involved a firearm, was for pecuniary gain, and endangered the life of another. The circuit court's decision on whether to transfer the case to juvenile court will not be reversed unless the decision is clearly erroneous. *Witherspoon v. State*, 72 Ark. App. 151, 46 S.W.3d 549 (2001).

Appellant argues on appeal to this court that society would be better served if he were prosecuted in the juvenile division of the circuit court with extended juvenile jurisdiction where he could possibly be rehabilitated rather than transferring his case to the criminal division where he will be tried as an adult and could face life without parole. Appellant maintains that he was only seventeen days beyond his fourteenth birthday at the time of the alleged offense and lacks maturity that could be gained with time and rehabilitative services. He points out that his arrest history consisted of property crimes and was not indicative of a propensity for crimes against persons. Finally, appellant argues that he was not the leader of the group.

Arkansas Code Annotated (c)(2)(A) provides that the criminal division of circuit court and the juvenile division of circuit court have concurrent jurisdiction, and a prosecuting attorney may charge a juvenile in either division when a case involves a juvenile fourteen or fifteen years old when he engages in conduct that, if committed by an adult, would be capital murder. Upon a finding by the criminal division of circuit court that a juvenile age fourteen or fifteen and charged with crimes in subdivision (c)(2) of this section should be transferred to the juvenile division of circuit court, the judge shall enter an order to transfer as an extended juvenile jurisdiction case. Ark. Code Ann. § 9-27-318(i). Therefore, the case cannot become an extended juvenile jurisdiction case unless it is transferred to the juvenile division of circuit court. The trial court must find by clear and convincing evidence that the juvenile should be tried as an adult. Ark. Code Ann. § 9-27-318(h).

There is nothing in the record that would suggest that the circuit judge failed to consider all of the relevant factors in section 9-27-318(g). The circuit court is not required to enumerate all ten factors in its written findings. *See Beulah v. State*, 344 Ark. 528, 42 S.W.3d 461 (2001). The circuit court's failure to specifically mention certain evidence presented by the appellant in its order does not mean that the court ignored the evidence or failed to consider it. *Id.* We cannot say that the circuit court clearly erred in its decision to retain jurisdiction over this appellant.

Jackson, slip op. at 1-3.

Following his trial and conviction for capital murder, the petitioner's appeal was considered by the Arkansas Supreme Court. In its opinion, the court noted that testimony adduced at trial indicated that the petitioner, once the robbery was in progress, admonished the clerk of the store that "we ain't playin'." *Jackson v. State*, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004).

Now, in seeking certiorari, the petitioner, understandably, seeks a broad categorical rule that would ignore any details regarding his criminal history, and, simply by virtue of his age, prevent the imposition of a life sentence for his participation in the commission of a homicide offense. This Court's opinion in *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010), issued a categorical rule with regard to the imposition of life-without-parole sentences for juveniles committing *non*-homicide offenses and certainly acknowledged in its holding that "there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather the constitutionality of such sentences depends on the particular crimes for which they are imposed." *Graham* at ___, 130 S.Ct. at 2041 (Roberts, C.J., concurring) (emphasis in original).

Understandably, the petitioner seeks to have a new categorical rule that would include, not just his age group, but his crime. However, *Graham* took as its foundational underpinning that "death was different," irrespective of the role one or more individuals took in carrying it out. The first study cited in this Court's opinion, *Id.* at 2023, defined the terms under which the decision was cast. "'[N]on-homicide' is any criminal conviction where the juvenile is not convicted of any type or degree of homicide. 'Non-homicide' does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill anyone but was convicted as an accomplice to a murder. Individuals convicted of attempted

homicide or felony murder are defined as homicide offenders.” See “Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation,” P. Annino, D. Rasmussen, C. Boehme Rice, Public Interest Law Center, College of Law, Florida State University, p.4 (September 14, 2009).¹

To take the petitioner’s approach at this time would be to dispense with the proportionality review that compares “the gravity of the offense and the harshness of the penalty.” *Solem v. Helm*, 463 U.S. 277, 290-291, 103 S.Ct. 3001, 3010 (1983). The court settled only a year ago on a conclusion that the harshness of life-without-parole sentences is appropriate for the gravity of homicide offenses like the petitioner’s, despite his youth at the time.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

DUSTIN McDANIEL
Arkansas Attorney General

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¹ The study can be found at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf. (Last accessed 6/1/2011)

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TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	1
CONCLUSION	6

TABLE OF AUTHORITIES

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Ark. Code Ann. § 9-27-318(g) (Repl. 2002)	3
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Ark. Code Ann. § (c)(2)(A).....	4

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REASONS FOR DENYING THE WRIT

The Respondent agrees that, in the context of the American criminal justice system, there are valid reasons for taking into account the different characteristics of juvenile offenders. This is the reason why Arkansas has an extensive juvenile code which considers the ages of juvenile offenders as well as the various crimes that they may commit. *See* Ark. Code Ann. § 9-27-101 et seq. In the instant case, the petitioner availed himself of the very procedures of that code,

seeking an individualized determination as to his prospects for rehabilitation and the danger that he posed to society. Even the petitioner's own authority states that "a small percentage [of juvenile offenders] – between five and ten percent, according to most studies – become chronic offenders." (Pet. at 16) It is in that context that the criminal justice system must, and does, deal with juvenile offenders. Clearly, the Arkansas legislature has, within its statutory scheme, considered whether a life-without-parole sentence for a homicide offense is appropriate. The Arkansas Court of Appeals review of the facts adduced at the transfer hearing wherein the petitioner sought adjudication in the juvenile system, are set out in its opinion and bear repeating here:

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The juveniles were apprehended in March 2001, and all three gave incriminating statements to police. According to their statements, which were introduced at the transfer hearing, appellant and his cohorts planned to rob the video store because they wanted money. Appellant contended that one of his accomplices supplied the weapon and fired the fatal shot and that he was the lookout.

In addition to the juveniles' statements to police, the circuit judge was also presented with appellant's juvenile arrest history at the transfer hearing. In February 2000, appellant was adjudicated delinquent for shoplifting, stealing two cars, and attempting to steal a third car. While on probation less than a month later, appellant was arrested for committing two counts of auto theft. In October 2000, appellant was adjudicated delinquent for theft by receiving a vehicle, criminal trespass, and fleeing. He was committed to the Division of Youth Services as a serious offender.

The results of a forensic psychiatric evaluation were also considered by the circuit judge. The psychologist found that appellant appeared to understand the charges against him and found no psychiatric impairment that would have caused him to be unable to conform his behavior to the requirements of the law at the time of the offense.

At the transfer hearing, Jack Wallace, a juvenile intake officer, testified that there was no rehabilitation program available in the juvenile system at that time in the event appellant was found guilty of capital murder.

In determining whether to retain jurisdiction or to transfer the case, the circuit judge must consider the following factors pursuant to Ark. Code Ann. § 9-27-318(g) (Repl. 2002):

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- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court which are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;
- (8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- (9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

In its order denying appellant's motion to transfer, the circuit court relied on the first nine factors. At the hearing, the circuit judge noted the seriousness of the offense and gave due consideration to the fact that the offense involved a firearm, was for pecuniary gain, and endangered the life of another. The circuit court's decision on whether to transfer the case to juvenile court will not be reversed unless the decision is clearly erroneous. *Witherspoon v. State*, 72 Ark. App. 151, 46 S.W.3d 549 (2001).

Appellant argues on appeal to this court that society would be better served if he were prosecuted in the juvenile division of the circuit court with extended juvenile jurisdiction where he could possibly be rehabilitated rather than transferring his case to the criminal division where he will be tried as an adult and could face life without parole. Appellant maintains that he was only seventeen days beyond his fourteenth birthday at the time of the alleged offense and lacks maturity that could be gained with time and rehabilitative services. He points out that his arrest history consisted of property crimes and was not indicative of a propensity for crimes against persons. Finally, appellant argues that he was not the leader of the group.

Arkansas Code Annotated (c)(2)(A) provides that the criminal division of circuit court and the juvenile division of circuit court have concurrent jurisdiction, and a prosecuting attorney may charge a juvenile in either division when a case involves a juvenile fourteen or fifteen years old when he engages in conduct that, if committed by an adult, would be capital murder. Upon a finding by the criminal division of circuit court that a juvenile age fourteen or fifteen and charged with crimes in subdivision (c)(2) of this section should be transferred to the juvenile division of circuit court, the judge shall enter an order to transfer as an extended juvenile jurisdiction case. Ark. Code Ann. § 9-27-318(i). Therefore, the case cannot become an extended juvenile jurisdiction case unless it is transferred to the juvenile division of circuit court. The trial court must find by clear and convincing evidence that the juvenile should be tried as an adult. Ark. Code Ann. § 9-27-318(h).

There is nothing in the record that would suggest that the circuit judge failed to consider all of the relevant factors in section 9-27-318(g). The circuit court is not required to enumerate all ten factors in its written findings. *See Beulah v. State*, 344 Ark. 528, 42 S.W.3d 461 (2001). The circuit court's failure to specifically mention certain evidence presented by the appellant in its order does not mean that the court ignored the evidence or failed to consider it. *Id.* We cannot say that the circuit court clearly erred in its decision to retain jurisdiction over this appellant.

Following his trial and conviction for capital murder, the petitioner's appeal was considered by the Arkansas Supreme Court. In its opinion, the court noted that testimony adduced at trial indicated that the petitioner, once the robbery was in progress, admonished the clerk of the store that "we ain't playin'." *Jackson v. State*, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004).

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Understandably, the petitioner seeks to have a new categorical rule that would include, not just his age group, but his crime. However, *Graham* took as its foundational underpinning that "death was different," irrespective of the role one or more individuals took in carrying it out. The first study cited in this Court's opinion, *Id.* at 2023, defined the terms under which the decision was cast. "[N]on-homicide' is any criminal conviction where the juvenile is not convicted of any type or degree of homicide. 'Non-homicide' does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill anyone but was convicted as an accomplice to a murder. Individuals convicted of attempted

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To take the petitioner’s approach at this time would be to dispense with the proportionality review that compares “the gravity of the offense and the harshness of the penalty.” *Solem v. Helm*, 463 U.S. 277, 290-291, 103 S.Ct. 3001, 3010 (1983). The court settled only a year ago on a conclusion that the harshness of life-without-parole sentences is appropriate for the gravity of homicide offenses like the petitioner’s, despite his youth at the time.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

DUSTIN McDANIEL
Arkansas Attorney General

BY:

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No. 10-9647

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

KUNTRELL JACKSON

PETITIONER

V.

RAY HOBBS, Director of
ARKANSAS DEPARTMENT OF CORRECTION

RESPONDENT

CERTIFICATE OF SERVICE

I, Kent G. Holt, depose and say that I am an attorney in the office of Dustin McDaniel, Arkansas Attorney General, and an attorney of record for Ray Hobbs, Director, Arkansas Department of Correction, respondent herein, and that on June 1, 2011, pursuant to the Rules of the Supreme Court, I served two copies of the attached *Respondent's Brief in Opposition* on the petitioner herein as follows:

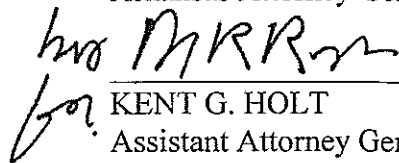
By mailing two (2) copies in a duly addressed envelope, with first class postage prepaid, to Bryan A. Stevenson, Counsel of Record, Alicia A. D'Addario, Brandon J. Buskey, Equal Justice Initiative, 122 Commerce Street, Montgomery AL 36104

All parties required to be served have been served.

DATED: June 1, 2011

Respectfully submitted,

DUSTIN McDANIEL
Arkansas Attorney General


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