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SUPREME COURT OF ARKANSAS

No. CR-17-533

	Opinion Delivered: May 24, 2018
DERRICK LYNELL HARRIS APPELLANT	APPEAL FROM THE DREW COUNTY CIRCUIT COURT
V.	[NO. 22CR-96-34-1B]
STATE OF ARKANSAS APPELLEE	HONORABLE SAM POPE, JUDGE
	REVERSED AND REMANDED.

JOHN DAN KEMP, Chief Justice

Appellant Derrick Lynell Harris appeals from the Drew County Circuit Court's order denying him a resentencing hearing and imposing a sentence of life with parole eligibility pursuant to the Fair Sentencing of Minors Act of 2017 (FSMA).[1] We reverse and remand.

In 1996, Harris was found guilty by a Drew County jury of capital murder. The capital-murder statute in effect at the time of Harris's offense provided for a sentence of either death or life imprisonment without parole. *See* Ark. Code Ann. § 5-10-101(c) (Supp. 1995).[2] Because Harris was fifteen years old[3] when he committed the crime, he was

[1] *See* Act of Mar. 20, 2017, No. 539, 2017 Ark. Acts 2615.

[2] *See also* Ark. Code Ann. § 5-4-104(b) (Supp. 1995) (stating that "[a] defendant convicted of capital murder . . . shall be sentenced to death or life imprisonment without parole"); Ark. Code Ann. § 5-4-615 (Repl. 1993) (stating that "[a] person convicted of a

ineligible for the death penalty. *See Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (holding that the Eighth and Fourteenth Amendments to the United States Constitution prohibit the execution of a person who was under sixteen years of age at the time of his or her offense). Thus, he was sentenced to a mandatory term of life imprisonment without the possibility of parole. *See Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998) (affirming conviction and sentence).

In 2012, the Supreme Court of the United States held that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile offenders. *Miller v. Alabama*, 567 U.S. 460, 479 (2012). Harris petitioned for writ of habeas corpus under *Miller*, and the Jefferson County Circuit Court issued the writ in 2016. The circuit court vacated Harris's mandatory sentence of life without parole and remanded for resentencing. On remand, and pursuant to the FSMA, the Drew County Circuit Court summarily resentenced Harris to life imprisonment with the possibility of parole after thirty years.

Harris contends that the FSMA does not apply to him, and therefore, he is entitled to resentencing pursuant to this court's decisions in *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906, and *Kelley v. Gordon*, 2015 Ark. 277, 465 S.W.3d 842. Further, he raises

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capital offense shall be punished by death by lethal injection or by life imprisonment without parole").

[3] Harris was born on May 2, 1980. The crime occurred on February 19, 1996.

numerous constitutional challenges to the FSMA. We begin with a discussion of pertinent case law and legislative enactments.

I. *Juvenile Sentencing*

A. Case Law

On June 25, 2012, the Supreme Court handed down its decision in *Miller v. Alabama* and a companion case from Arkansas, *Jackson v. Hobbs*. Each case involved a fourteen-year-old offender convicted of murder and sentenced to mandatory life in prison without parole. Relying on its line of precedent holding that certain punishments are disproportionate when applied to juveniles,[4] the Court held that mandatory life without parole for juvenile offenders violates the Eighth Amendment's prohibition on "cruel and unusual punishments." *Miller*, 567 U.S. at 465. The Court explained that

> [m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot

[4] *See, e.g.*, *Graham v. Florida*, 560 U.S. 48 (2010) (holding that a sentence of life without parole violates the Eighth Amendment when imposed on juveniles in nonhomicide cases); *Roper v. Simmons*, 543 U.S. 551 (2005) (barring capital punishment for those under the age of eighteen at the time of their crimes). *Roper* and *Graham* established that "children are constitutionally different from adults for purposes of sentencing [b]ecause juveniles have diminished culpability and greater prospects for reform." *Miller*, 567 U.S. at 471.

> usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Id. at 477–78 (internal citations omitted). Accordingly, the Court held that defendants who committed homicide crimes as juveniles and faced a sentence of life without parole were entitled to a sentencing hearing that would permit the judge or jury to consider the individual characteristics of the defendant and the individual circumstances of the crime as mitigating factors for a lesser sentence. *Id.* at 489. Because the mandatory life-without-parole sentencing schemes in Alabama and Arkansas violated the Eighth Amendment's ban on cruel and unusual punishment, the Court reversed the judgments of this court and the Alabama Court of Criminal Appeals and remanded the cases for further proceedings. *Id.*

On remand in *Jackson v. Norris*,[5] we rejected the State's argument that the Eighth Amendment violation could be cured by severing the capital-murder statute, Arkansas Code Annotated section 5-10-101(c) (Repl. 1997), to provide for a sentence of life with parole. 2013 Ark. 175, 426 S.W.3d 906. We explained that the imposition of that sentence would not allow for consideration of *Miller* evidence. *Id.*, 426 S.W.3d 906. Instead, we severed language from the statute "so that, for juveniles convicted of capital murder, all

[5] *Jackson v. Hobbs* was styled *Jackson v. Norris* on remand.

that remain[ed] [was] that capital murder is a Class Y felony." *Id.*, at 7–8, 426 S.W.3d at 910. We remanded the case for a sentencing hearing at which Jackson could present *Miller* evidence for consideration and instructed that Jackson's sentence must fall within the discretionary sentencing range for a Class Y felony, which is ten to forty years or life. *Id.* at 9, 426 S.W.3d at 911 (citing Ark. Code Ann. § 5-4-401(a)(1) (Repl. 1997)); *see also Whiteside v. State*, 2013 Ark. 176, 426 S.W.3d 917 (reversing juvenile offender's capital-murder sentence and remanding to the circuit court for resentencing within the discretionary statutory-sentencing range for a Class Y felony and directing that a sentencing hearing be held for presentation and consideration of *Miller* evidence).

After Jackson obtained relief, other "*Miller* defendants" sought resentencing. The State took the position that *Miller* did not apply retroactively to cases on collateral review. We disagreed, and in *Kelley v. Gordon*, 2015 Ark. 277, 465 S.W.3d 842, *cert. denied*, 136 S. Ct. 1378 (2016), we held that, as a matter of "fundamental fairness and evenhanded justice," *Miller* applied to all juvenile offenders convicted of capital murder. *Id.* at 7, 465 S.W.3d at 846. In doing so, we stated that Gordon was entitled to the same relief from his unconstitutional sentence as Jackson received—namely, a sentencing proceeding at which he will have the opportunity to present *Miller* evidence. *Id.*, 465 S.W.3d at 846. Consequently, we affirmed the circuit court's order vacating Gordon's life-without-parole sentence and reinvesting the sentencing court with jurisdiction to hold a new sentencing hearing under *Miller*. *Id.*, 465 S.W.3d at 846.

After this court decided *Gordon*, the Supreme Court resolved a split of authority and held that *Miller*'s prohibition on mandatory life without parole for juvenile offenders is retroactive to cases on collateral review. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The Court noted that giving *Miller* retroactive effect "does not require States to relitigate sentences . . . in every case where a juvenile offender received mandatory life without parole." *Id.* at 736. Rather, the Court indicated that states could "remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id.*

B. Acts of the Arkansas General Assembly

Since the Supreme Court handed down its decision in *Miller*, the Arkansas General Assembly has twice revised the punishment authorized for juveniles convicted of capital murder. In 2013, the legislature passed Act 1490, which provided for two alternative sentences for a juvenile convicted of that offense: life imprisonment without parole or life with the possibility of parole after serving a minimum of twenty-eight years' imprisonment. *See* Act of Apr. 22, 2013, No. 1490, §§ 2–3, 2013 Ark. Acts 6587, 6588–89. Act 1490 did not apply retroactively. *Id.* § 1, 2013 Ark. Acts at 6588.[6]

[6] Act 1490 contained no emergency clause or specified effective date. The 2013 regular session of the General Assembly adjourned *sine die* on May 17, 2013. Op. Ark. Att'y Gen. No. 049 (2013). Therefore, Act 1490 became effective on August 16, 2013. *See Reeves v. State*, 374 Ark. 415, 421 n.2, 288 S.W.3d 577, 582 n.2 (2008) (stating that pursuant to amendment 7 of the Arkansas Constitution, acts of the General Assembly that do not carry an emergency clause or specified effective date become effective on the ninety-first day after adjournment of the legislative session at which they were enacted).

Following the Supreme Court's *Montgomery* decision, the legislature passed the FSMA to "eliminate life without parole as a sentencing option for minors and to create more age-appropriate sentencing standards in compliance with the United States Constitution for minors who commit serious crimes." *See* Act of Mar. 20, 2017, No. 539, § 2(c), 2017 Ark. Acts 2615, 2617. The FSMA authorizes only one punishment for juvenile offenders convicted of capital murder: life with the possibility of parole after serving a minimum of thirty years' imprisonment. *See* FSMA § 3 (codified at Ark. Code Ann. § 5-4-104(b) (Supp. 2017)), and § 6 (codified at Ark. Code Ann. § 5-10-101(c) (Supp. 2017)). In addition, the parole-eligibility provision of the FSMA states that it "applies retroactively to a minor whose [first-degree murder or capital-murder] offense was committed before he or she was eighteen (18) years of age, including minors serving sentences of life, regardless of the original sentences that were imposed." FSMA § 13 (codified at Ark. Code Ann. § 16-93-621(a)(2)(B) (Supp. 2017)). The Act provides that all juvenile offenders sentenced to imprisonment are entitled to a parole-eligibility hearing at which the parole board shall take into consideration, among other things, *Miller* evidence and evidence of rehabilitation. *Id.* (codified at Ark. Code Ann. § 16-93-621(b) (Supp. 2017)). The emergency clause of the FSMA states that "more than one hundred persons in Arkansas are entitled to relief" under the *Miller* and *Montgomery* decisions and that the Act is "immediately necessary in order to make those persons eligible for parole." FSMA § 14.

II. *Proceedings in Harris's Case*

Having summarized the relevant juvenile-sentencing law, we turn to the proceedings in Harris's case. As previously noted, following the issuance of a writ of habeas corpus, the Jefferson County Circuit Court vacated Harris's life-without-parole sentence and remanded the case to the Drew County Circuit Court for resentencing. The resentencing hearing was set for May 2017. On March 22, 2017, two days after the FSMA was passed, the State filed a "Motion to Discontinue Resentencing." The State argued that the FSMA "retroactively established" parole eligibility for Harris and other similarly situated minors sentenced to life imprisonment without parole for capital murder. The State further argued that, because Harris's parole eligibility would be calculated by the FSMA, the issue of resentencing was moot. Finally, the State contended that the prior order vacating Harris's original sentence should be withdrawn.

Harris filed a response to the State's motion and argued that he was entitled to a resentencing hearing under this court's precedent in *Jackson* and *Gordon* because he was similarly situated to the defendants in those cases. He contended that the retroactive parole-eligibility provision of the FSMA was inapplicable to him because his life sentence had been vacated and he currently had no sentence of imprisonment to which parole eligibility could attach. Harris further contended that the substantive penalty provision of the FSMA for juvenile offenders convicted of capital murder—life imprisonment with parole eligibility after thirty years—was not retroactive and thus did not apply to him.

On May 3, 2017, the State filed a motion for determination of the sentencing range. The motion noted that Harris objected to the retroactivity of the FSMA and stated

that if the Act was not retroactive, then Harris should be sentenced in accordance with this court's decision in *Jackson*, which provided a range of ten to forty years' imprisonment or life.

Harris then filed a motion for resentencing under *Jackson* and *Gordon* and asserted that the circuit court should grant him a resentencing hearing to present *Miller* evidence, then resentence him within the discretionary range of ten to forty years or life. He further asserted that applying the current punishment under the FSMA would violate *Jackson* and *Gordon*, the purpose of the FSMA, and a host of federal and state constitutional provisions.[7]

The circuit court held a hearing on May 8, 2017. The State argued that, pursuant to the FSMA, Harris should be sentenced to life with the possibility of parole after thirty years. Harris reiterated his argument that he was entitled to resentencing pursuant to this court's decision in *Jackson*. He maintained that the parole-eligibility provision of the FSMA

[7] Specifically, Harris contended that (1) the legislature did not intend the new sentence for juvenile capital murder to apply retroactively, (2) this court has already held that *Miller* is not satisfied by summarily resentencing a *Miller* defendant to life with the possibility of parole, (3) treating a defendant differently than other *Miller* defendants already resentenced is "patently unfair" and denies "fundamental fairness and evenhanded justice," (4) treating a defendant differently than other *Miller* defendants already resentenced would violate the federal and state equality clauses, (5) the federal and state ex post facto clauses forbid cutting the punishment range from (a) ten to forty years or life to (b) life only, (6) a defendant is entitled to individualized resentencing by "judge or jury," and a parole hearing does not suffice, (7) retroactively applying the new punishment for juvenile capital murder makes the FSMA an unconstitutional bill of attainder, and (8) applying sections 3 and 6 of the FSMA retroactively makes the statute "special" legislation forbidden by the state constitution.

was inapplicable to him because his sentence had been vacated and that the penalty provision of the FSMA was inapplicable to him because it was not retroactive. The circuit court ruled that the FSMA applied to Harris and sentenced him to a term of life with the possibility of parole after thirty years. A new sentencing order was entered, and Harris timely filed a notice of appeal.

III. *Arguments and Analysis*

On appeal, Harris contends that his case is controlled by the precedent set forth in *Jackson* and *Gordon* and that the FSMA does not apply to him. Further, he raises constitutional challenges to the FSMA. To resolve the issues in this case, we must construe the FSMA. The question of the correct application and interpretation of an Arkansas statute is a question of law which this court decides de novo. *E.g.*, *Worsham v. Bassett*, 2016 Ark. 146, 489 S.W.3d 162.

In arguing that the FSMA applies to Harris, the State primarily relies on a provision of the act that sets forth parole eligibility for juveniles. This provision is codified at Arkansas Code Annotated section 16-93-621, which is entitled "Parole eligibility—A person who was a minor at the time of committing an offense that was committed before, on, or after March 20, 2017." *See* FSMA § 13. Section 16-93-621(a)(2), which pertains to those juveniles who committed capital and first-degree murder, states,

> (2)(A) A minor who was convicted and sentenced to the department for an offense committed before he or she was eighteen (18) years of age, in which the death of another person occurred, and that was committed before, on, or after March 20, 2017, is eligible for release on parole no later than after twenty-five (25) years of incarceration if he or she was convicted of murder in the first degree, § 5-10-102, or

> no later than after thirty (30) years of incarceration if he or she was convicted of capital murder, § 5-10-101, including any applicable sentencing enhancements, unless by law the minor is eligible for earlier parole eligibility.
>
> (B) Subdivision (a)(2)(A) of this section applies retroactively to a minor whose offense was committed before he or she was eighteen (18) years of age, including minors serving sentences of life, regardless of the original sentences that were imposed.

The State argues that the legislature clearly intended for this provision to apply retroactively to juvenile offenders who committed their crimes before the effective date of the FSMA. However, by its plain language, the provision applies only to those juvenile offenders who are serving a sentence for either capital or first-degree murder. Here, Harris's sentence was vacated in 2016. Thereafter, Harris was no longer serving a sentence to which parole eligibility could attach. Accordingly, we hold that the parole-eligibility provision of the FSMA did not apply to Harris at the time of his May 8, 2017 hearing.

Moreover, the penalty provisions of the FSMA do not apply in this case. Section 3, which concerns the authorized sentences for capital murder or treason, amended Arkansas Code Annotated section 5-4-104(b) to read that "if the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder or treason [then] he or she shall be sentenced to life imprisonment with the possibility of parole after serving a minimum of thirty (30) years' imprisonment." FSMA § 3. Section 6 of the Act, which concerns the punishment for capital murder, amended Arkansas Code Annotated section 5-10-101(c) to provide that if the defendant was younger than eighteen years of age at the time he or she committed the capital murder, the punishment is life imprisonment

with the possibility of parole after serving a minimum of thirty years' imprisonment. FSMA § 6.

Since the enactment of the criminal code, this court has consistently held that sentencing shall be in accordance with the statute in effect at the time of the commission of the offense. *See, e.g.*, *Cody v. State*, 326 Ark. 85, 929 S.W.2d 159 (1996). In addition, this court has observed a strict rule of construction against retroactive operation, and we indulge in the presumption that the legislature intended statutes, or amendments thereof, enacted by it, to operate prospectively only and not retroactively. *E.g.*, *Bean v. Office of Child Support Enf't*, 340 Ark. 286, 9 S.W.3d 520 (2000). The rule of prospectivity applies unless "the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or by terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof." *Estate of Wood v. Ark. Dep't of Human Servs.*, 319 Ark. 697, 700–01, 894 S.W.2d 573, 575 (1995). Further, we have held that in the absence of an express statement that a sentencing statute will apply retroactively, the statute will apply prospectively only. *See State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

Here, we find no general retroactivity provision in the FSMA, nor is there one attached to the penalty provisions of the Act. Therefore, we conclude that the legislature did not intend for the penalty provisions to apply retroactively. *See State v. Ross*, 344 Ark. 364, 39 S.W.3d 789 (2001) (noting that sentencing is controlled entirely by statute and

stating that only when the General Assembly expressly provides that an act should be applied retroactively will we do so).

Our conclusion is bolstered by the fact that the legislature expressly stated its intent that other sections of the FSMA apply retroactively, regardless of the date of the commission of the criminal offense. *See* FSMA §§ 9–13 (amending title 16, chapter 93 to provide parole eligibility to a person who was a minor at the time of committing an offense "before, on, or after the effective date of this act"). We have recognized that the express designation of one thing may be properly construed to mean the exclusion of another. *E.g.*, *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 375 Ark. 379, 291 S.W.3d 190 (2009). Therefore, when the legislature includes retroactivity language in some sections of an act but omits it in other sections of the same act, we may presume that the legislature acted intentionally and purposely in the disparate inclusion or exclusion. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *Bolin v. State*, 2015 Ark. 149, at 5–6, 459 S.W.3d 788, 791–92 (stating that when there was no "general expression of intent that the whole act should apply retroactively," but a "specific expression of intent" that part of the act applies retroactively, the court could conclude that the only retroactive part of the law was that expressly designated in the act). Had the legislature intended for the penalty provisions in sections 3 and 6 to be retroactive, it could have included language to that effect as it did for the parole-eligibility provisions in sections 9–13. *See Bolin*, 2015 Ark. 149, 459 S.W.3d 788.

Finally, although the FSMA contains an emergency clause and therefore became effective on March 20, 2017, we find no language in the clause that expressly states or

necessarily implies that the penalty provisions of the FSMA apply retroactively. Based on the foregoing analysis, we hold that the penalty provisions of the FSMA are not retroactive. Therefore, the revised punishment for juveniles convicted of capital murder applies only to crimes committed on or after March 20, 2017, the effective date of the FSMA.

IV. *Conclusion*

In sum, the relevant provisions of the FSMA are inapplicable to Harris. This leaves him in the same situation as the defendant in *Jackson*. Therefore, he is entitled to a hearing to present *Miller* evidence for consideration and sentencing within the discretionary range for a Class Y felony, which is ten to forty years or life. Having determined that the FSMA does not apply in this case, we need not address Harris's remaining arguments on appeal. *See, e.g.*, *Solis v. State*, 371 Ark. 590, 269 S.W.3d 352 (2007) (stating that if we can resolve a case without reaching constitutional arguments, it is our duty to do so).

Reversed and remanded.

WYNNE, J., concurs.

WOOD, J., dissents without written opinion.

WOMACK, J., dissents.

ROBIN F. WYNNE, Justice, concurring. I do not agree with the majority's conclusion that the relevant portions of the Fair Sentencing of Minors Act of 2017 (FSMA) are not applicable to Derrick Harris. But because I believe that it would be fundamentally

unfair to deny him the relief on resentencing already afforded by this court to similarly-situated individuals, I concur in the disposition of the case.

The capital-murder statute in effect when Harris committed the offense for which he was convicted provided that a person found to have violated the statute would be sentenced to either death or life imprisonment without parole. Ark. Code Ann. § 5-10-101(c) (Supp. 1995). The FSMA amended section 5-10-101(c) to state that the sentence for a person who commits capital murder while under the age of eighteen is "life imprisonment with the possibility of parole after serving a minimum of thirty (30) years' imprisonment." The majority concludes that because this portion of the FSMA was not made retroactive, the FSMA does not apply to Harris. What the majority fails to understand is that it was not necessary for the amendment to section 5-10-101 to be made retroactive due to the operation of other provisions of the FSMA.

The FSMA also amended Arkansas Code Annotated section 16-93-621 to state:

> A minor who was convicted and sentenced to the department for an offense committed before he or she was eighteen (18) years of age, in which the death of another person occurred, and that was committed before, on, or after March 20, 2017, is eligible for release on parole no later than after twenty-five (25) years of incarceration if he or she was convicted of murder in the first degree, § 5-10-102, or no later than after thirty (30) years of incarceration if he or she was convicted of capital murder, § 5-10-101, including any applicable sentencing enhancements, unless by law the minor is eligible for earlier parole eligibility.

Ark. Code Ann. § 16-93-621(a)(2)(A) (Supp. 2017). Section 16-93-621(a)(2)(B) states that subdivision (a)(2)(A) applies retroactively to a minor whose offense was committed before

he or she was eighteen years of age, including minors serving sentences of life, regardless of the original sentences that were imposed.

The parole-eligibility provisions of the FSMA are clearly and expressly meant to apply retroactively. The majority concludes that "the parole eligibility provision did not apply to Harris at the time of his May 8, 2017 hearing" because after his original sentence was vacated, "Harris was no longer serving a sentence to which parole-eligibility could attach." The parole-eligibility provision applies to any sentence for a crime involving a death that was committed by a juvenile *before, on, or after* the effective date of the FSMA, and the FSMA clearly states that the provision is to be applied retroactively regardless of the original sentence imposed. The trial court resentenced Harris to life imprisonment, and regardless of when that sentence was imposed, the parole-eligibility provision applies to that sentence because the offense was committed before Harris was eighteen years of age. The fact that he was not serving a sentence of life imprisonment on the date of his resentencing hearing makes no difference whatsoever, and the majority's holding flies squarely in the face of the express language used by the legislature in the FSMA.

In 1996, Harris was sentenced to life imprisonment. Under the applicable statute in effect at that time, he was not eligible for parole. Under the FSMA, the portion of the statute stating that he is not eligible for parole has been expressly, retroactively overridden to provide that he is eligible for parole after thirty years. The sentence of life imprisonment remains unchanged. As the only change involved parole eligibility, and that change expressly applies regardless of the timing of the offense or the sentence imposed

under the original statute, it was not necessary for the legislature to make the revisions to section 5-10-101 in the FSMA retroactive. Under the statute as it existed in 1995, read in conjunction with section 16-93-621 as amended by the FSMA, it was permissible for the trial court to sentence Harris to life imprisonment with his parole eligibility to be determined as provided under the FSMA. This is exactly what the trial court did. The majority's conclusion that the FSMA cannot apply to Harris is incorrect. Further, as the possibility of release on parole satisfies the requirements of *Miller v. Alabama*, 567 U.S. 460 (2012), his sentence violates neither the state nor the federal constitutions.

While the sentence imposed on Harris by the trial court is legally permissible, I am nevertheless compelled to agree that he should receive the same remedy that this court applied to Kuntrell Jackson. Like Harris, Jackson received a mandatory sentence of life imprisonment without parole for a capital murder committed while he was a juvenile. The Supreme Court of the United States granted certiorari from the denial of his petition for writ of habeas corpus as a companion case to *Miller*. On remand following that court's holding that Jackson's sentence violated the Eighth Amendment, we instructed the Mississippi County Circuit Court to hold a sentencing hearing where Jackson could present *Miller* evidence for consideration. *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906. We further instructed the court that the sentencing range for Jackson was to be ten to forty years, or life. *Id.*

Harris sought and was granted habeas relief pursuant to *Miller*, as well as our decisions in *Jackson* and *Kelley v. Gordon*, 2015 Ark. 277, 465 S.W.3d 842. As the majority

recounts, Harris was granted habeas relief, and his sentence was vacated in 2016, prior to passage of the FSMA. If his resentencing had been completed prior to passage of the Act, he would have been entitled to the same sentencing relief as Jackson. In *Gordon*, we held that the holding in *Miller* would be applied retroactively in Arkansas. We did so on the basis that fundamental fairness required that prisoners similarly situated to Jackson receive the same relief to which he was entitled as a successful petitioner to the Supreme Court of the United States. Under *Gordon*, Harris was entitled to the same habeas relief as Jackson, and he would have been subject to the same punishment range on resentencing but for the timing in the trial court. For the reasons of fundamental fairness and evenhanded justice that drove our decision in *Gordon*, I believe Harris should receive the same remedy that was applied in *Jackson*.

For these reasons, I concur.

SHAWN A. WOMACK, Justice, dissenting. The Fair Sentencing of Minors Act of 2017 ("FSMA") was thoughtfully designed by the General Assembly to address, in two ways, the constitutional questions regarding the sentencing of convicted murderers who committed their crimes while they were still minors. First, it responded to the United States Supreme Court decisions in *Miller vs. Alabama*, 567 U.S. 460 (2012) and *Montgomery vs. Louisiana*, __ U.S. __, 136 S. Ct. 718 (2016). Second, it amended the sentencing statute for juvenile offenders committing capital murder or first-degree murder.

The decision in *Miller* left the Arkansas sentencing statute constitutionally defective as it pertained to the sentences of those who committed capital or first-degree murder as

minors. The first prong of the FSMA sought to follow the road map laid out by the Supreme Court in *Montgomery* by statutorily curing the defect for those who were sentenced prior to *Miller*. This first prong specifically and retroactively provided parole eligibility to those juvenile offenders sentenced under the previous version of the statute. The second prong addressed the underlying sentencing statute to cure its constitutional defects.

Determining the sentencing ranges for crimes committed within our state is a policy determination that belongs to the people through their elected representatives in the legislative branch. *State v. Freeman*, 312 Ark. 34, 37, 846 S.W.2d 660, 661 (1993) ("It is well settled that it is for the legislative branch . . . to determine the kind of conduct that constitutes a crime and the nature and extent of punishment which may be imposed."). It is the role of the judiciary to apply those sentences within the legislatively determined range when a defendant is convicted, so long as the terms of the sentencing statute are not constitutionally defective. On rare occasions the courts are faced with a statutory void and they must step in and act when there is an absence of legislative action or, as in this case, when the void is created by a constitutionally infirm action.

Mr. Harris is part of a class of people who have come to be known as "the Miller defendants." The so-called *Miller* defendants were convicted of murders that were committed while they were still minors and sentenced to life without parole under a statute that was then presumed to be constitutional. Then, the Supreme Court in *Miller* determined that sentencing a defendant to life without parole for a crime committed as a

juvenile violated the United States Constitution. That decision created a vacuum in Arkansas' sentencing structure where, without legislative action, this court was forced to step in and fashion a constitutional remedy in two cases, *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906, and *Kelley v. Gordon*, 2015 Ark. 277, 465 S.W.3d 842. In *Jackson*, this court severed the defective statute as it applied to juveniles, ordered a new sentencing hearing to consider the factors laid out in *Miller*, and proscribed a sentencing range of 10 to 40 years or life. *Gordon*, also decided during the vacuum, received the same treatment.

The decisions in *Jackson* and *Gordon*, while appropriate given the then existing circumstances, were isolated in time between the *Miller* and *Montgomery* decisions and prior to the passage of the FSMA. Accordingly, the remedies in those cases—a new sentencing hearing under the severed statute with *Miller* evidence presented—should also be isolated and are no longer necessary for the fair and just disposition of cases involving the so-called *Miller* defendants, including Harris. The General Assembly, through the passage of the FSMA, has removed the need for any further *Jackson* based resolutions in a way that is consistent with *Montgomery*.

The effect of *Miller* was to render our statute defective. The effect of the FSMA was to cure the defect in the statute. Jackson and Gordon were resentenced during the period of defect; the other *Miller* defendants were not. Harris argues that the FSMA cannot apply to him because his original sentence was vacated prior to the passage of the Act. However, he was not resentenced before the Act took effect. The key event from a timing standpoint is not the date of the granting of his habeas corpus petition, which was a necessary

formality on the road to resentencing, but rather the date of his resentencing itself. At the time of Harris's resentencing, the FSMA was effective, and the defect in the statute under which Harris had originally been sentenced was cured via the parole-eligibility provisions of the FSMA.

There is no question that the sentencing provision under the FSMA, life with parole eligibility after 30 years for capital murder or life with parole eligibility after 25 years for first-degree murder, is more lenient than the original provision of the statute that existed at the time of Harris's conviction. There is also no question that the *Jackson* remedy sought by Harris––a new hearing with a sentencing range of 10 to 40 years or life––is more lenient than the original provision of the statute that existed at the time of Harris's conviction. The difference is that one was judicially created by this court in a vacuum as a necessary, but temporary, resolution to the *Miller* situation, while the other was legislatively created as a permanent solution to *Miller*.

Whether we apply the FSMA or the *Jackson* remedy to Harris, he will end up with a sentence that is more lenient than any sentence he could have received under the statute in place at the time of his conviction. Either way, the timeline of events is still constrained to the following factual sequence: (1) Harris was convicted of committing capital murder while he was a juvenile; (2) Harris was sentenced under a statute that required life without parole (a presumed valid sentence at the time); (3) the Supreme Court decided *Miller* and prohibited mandatory life sentences for juvenile offenders, creating a defect in the statute and a void in the law in Arkansas; (4) the defective statute was severed by this court in

Jackson and then cured by the General Assembly when it enacted the FSMA and provided a uniform parole-eligibility component for juvenile offenders; and (5) Harris was resentenced.

What Harris has asked us to do, and what the majority has, in fact, done today, is to choose the judicially created response to *Miller* while ignoring the legislative cure of the statute, which was expressly permitted under *Montgomery*. I believe that this is the wrong approach, and I would instead remand this case to the circuit court with an instruction to sentence Harris, without a new hearing, to "life imprisonment with the possibility of parole after serving a minimum of thirty (30) years' imprisonment." Ark. Code Ann. § 5-10-101(c) (Supp. 2017).

Finally, I would be remiss if I did not highlight that the practical effect of the majority's decision today extends far beyond the case of Mr. Harris. It is estimated that there are over 50 so-called *Miller* defendants who need to be resentenced. Some with convictions from more than two decades ago. By needlessly ignoring the FSMA, this court has not only opened the flood gates but has also likely opened the prison doors. This decision means that there will now be over 50 individual resentencing hearings throughout the state, many in cases in which key witnesses have either died, retired from their positions in law enforcement and moved away, or are otherwise unavailable. It means that some, if not several, of these convicted murderers could serve as little as 10 years for their crimes and others could be released with a sentence of time served for murders occurring before 2008. It means that the families of the victims will be forced to relive these tragedies

as they endure these unnecessary hearings. It also means that not only will the resources of the court system be heavily taxed, but so will the resources of the counties that will be required to hold these murderers in their local jails for extended periods of time while waiting for and conducting resentencing hearings. Each of these consequences would be unnecessary if the majority would simply apply the constitutionally valid, uniform, and Supreme Court sanctioned remedies of the FSMA. I respectfully dissent.

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