

**SUPREME COURT OF ARKANSAS**

No. 12-880

HERSHEL GLEN MURRY  
APPELLANT

v.

RAY HOBBS, DIRECTOR,  
ARKANSAS DEPARTMENT OF  
CORRECTION  
APPELLEE**Opinion Delivered** February 14, 2013PRO SE MOTIONS FOR  
APPOINTMENT OF COUNSEL AND  
FOR EXTENSION OF BRIEF TIME  
[PRO SE APPEAL FROM THE  
JEFFERSON COUNTY CIRCUIT  
COURT, CV 12-359, HON. JODI  
RAINES DENNIS, JUDGE]APPEAL DISMISSED; MOTIONS  
MOOT.**PER CURIAM**

Nedra Sharp was murdered in Little River County on January 11, 1980, and her son, appellant Hershel Glen Murry, who was seventeen years old at the time of the murder, was subsequently charged as an adult and tried for the killing. A jury convicted appellant of first-degree murder and sentenced him to life imprisonment without the possibility of parole. This court affirmed. *Murry v. State*, 276 Ark. 372, 635 S.W.2d 237 (1982).

On July 9, 2012, appellant filed in the Jefferson County Circuit Court a petition for writ of habeas corpus, arguing that his life sentence was illegal because appellant was a minor when the crime was committed. The circuit court denied the petition by written order, and appellant timely filed a notice of appeal from that order.

Now before us are appellant's motions for appointment of counsel and for an extension of time in which to file his brief-in-chief. Appellant has also timely filed his brief, however, so the motion for extension of time is moot. Furthermore, as it is clear that appellant could

not prevail if his appeal were allowed to proceed, the appeal is dismissed and the motion for appointment of counsel is moot. An appeal of the denial of postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Girley v. Hobbs*, 2012 Ark. 447 (per curiam); *Williams v. Norris*, 2012 Ark. 30 (per curiam); *Russell v. Howell*, 2011 Ark. 456 (per curiam); *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

A writ of habeas corpus is only proper when a judgment of conviction is invalid on its face or when a circuit court lacked jurisdiction over the cause. *Girley*, 2012 Ark. 447; *Abernathy v. Norris*, 2011 Ark. 335 (per curiam). The burden is on the petitioner in a habeas-corpus petition to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam).

Appellant's habeas petition alleges that his commitment is invalid on its face, as he was sentenced to life without the possibility of parole for a murder committed while he was still a minor.<sup>1</sup> In support of his argument, he relies on the United States Supreme Court's decision in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which appellant argues barred the imposition of life-without-parole sentences on juvenile offenders. Thus, appellant contends, his continued incarceration is "in direct violation of newly established Federal Law." He is mistaken.

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<sup>1</sup>Appellant was born June 14, 1962, and was 17 years and 211 days old when the murder was committed on January 11, 1980.

In *Miller*, the Supreme Court explicitly held that the Eighth Amendment’s protections against cruel and unusual punishment forbid a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile homicide offenders. *See Miller*, 132 S. Ct. at 2464, 2469. Thus, *Miller* is only applicable in Arkansas when a mandatory life sentence is imposed without the sentencer’s being able to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *Id.* at 2469. As is most important to appellant’s case, the *Miller* court explained that, “[b]ecause that holding is sufficient to decide these cases, we do not consider [the appellants’] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.” *Id.*

Appellant was charged with, and convicted of, first-degree murder pursuant to Arkansas Statutes Annotated section 41-1502 (Supp. 1977). At the time of appellant’s trial, first-degree murder was a Class A felony.<sup>2</sup> Ark. Stat. Ann. § 41-1502(3) (Supp. 1977). Such a felony was punishable by “not less than five years nor more than fifty years, or life.” Ark. Stat. Ann. § 41-901 (Supp. 1977). The jury was authorized to sentence appellant to any term within that range. *See* Ark. Stat. Ann. § 41-803(3) (Supp. 1977). The only mandatory life sentence in Arkansas’s sentencing scheme at the time of appellant’s crime was for capital murder, of which appellant was neither charged nor convicted. *See* Ark. Stat. Ann. § 41-803(2) (“A defendant convicted of capital murder shall be sentenced to death or life

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<sup>2</sup>Murder in the first degree is now a Class Y felony. Ark. Code Ann. § 5-10-102 (Repl. 2005). It carries a sentencing range of not less than ten years and not more than forty years, or life. Ark. Code Ann. § 5-4-401.

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imprisonment without parole.”). In the instant case, appellant’s life sentence was not mandatory; it was imposed by a jury after deliberation. *Miller* is simply inapposite.

Also in reliance upon *Miller*, appellant argues that his sentence is illegal because he was never afforded a “juvenile to adult transfer stage” and was “automatically mandated to an adult court and sentencing scheme.” *Miller*, however, noted that the existence of juvenile-transfer procedures did not somehow make mandatory life sentences acceptable for juveniles who were tried as adults. See 132 S. Ct. at 2473–75. Nothing in *Miller* mandates that a juvenile must be afforded a transfer hearing before he can be sentenced to life imprisonment; indeed, the Court noted that many states require that juveniles of a certain age who commit specific crimes must be tried as an adult, which added to the need for individualized sentencing for those juveniles who were convicted in adult court. See *id.* at 2474–75.

Because appellant’s life sentence was not mandatory, but was instead chosen from a range of possible punishments, he cannot demonstrate that his sentence is illegal under *Miller*. Accordingly, it is clear that he could not prevail if his appeal were allowed to proceed. His appeal is therefore dismissed, and the motions for appointment of counsel and extension of brief time are moot.

Appeal dismissed; motions moot.

*Hershel Glen Murry*, pro se appellant.

No response.