THIS IS A CAPITAL CASE. EXECUTION SCHEDULED APRIL 27, 2017

Nos. CR 01-364, CR06-511

IN THE ARKANSAS SUPREME COURT

KENNETH D. WILLIAMS — Movant/Appellant

v.

STATE OF ARKANSAS, — Respondent/Appellee

Appeal from the Circuit Court of Lincoln County

MOTION TO RECALL THE MANDATE AND MOTION FOR STAY OF EXECUTION CONCERNING JURORS' FAILURE TO CONSIDER MITIGATING EVIDENCE

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Dated: April 24, 2017

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MOTION TO RECALL THE MANDATE

Kenneth Williams was sentenced to death by a jury that refused to acknowledge, consider, and weigh all but one of the sixteen mitigating circumstances on which the defense presented unrefuted evidence. Among those circumstances was expert and lay testimony that Mr. Williams suffers from "borderline mental retardation," that he witnessed "chronic marital conflict" and domestic abuse when his father was in the home, that he grew up in "marked poverty," and that he suffered from inadequate parenting on account of his mother's mental retardation. *See* Ex. 1(verdict form) at 5-6; Tr. 2116 (per Yolanda Williams); 2122 (per Patricia Williams); 2138, 2144, 2153-58 (per Dr. Mark Cunningham).

Quite apart from finding that the defense had not *established* these mitigating circumstances, the jury found that the defense had *presented no evidence* of them at all. The jurors not only declined to mark options A or B on "Form 2" (which would indicate that one or more jurors found that the mitigating circumstance was proven by a preponderance of the evidence), but declined even to mark option C, which provided as follows:

> There was some evidence to support the following circumstances. However, having considered this evidence, the jury unanimously agreed that it was insufficient to establish that the mitigating circumstances probably existed.

Ex. 1 at 4. The jurors marked option C *only* for the mitigating circumstance that

Mr. Williams "experienced family dysfunction which extended from generation to generation." *Id.* at 5. The remaining mitigating circumstances were left unchecked. *Id.* at 5-6.

The Court failed to acknowledge the error on direct appeal. Mr. Williams argued that the jurors failed to consider the evidence, but the Court ruled that the jurors need not "believe" or "accept" mitigating testimony, even if it was offered by an expert and unrefuted. *Williams v. State*, 67 S.W.3d 548, 562 (Ark. 2002). The Court did not address Mr. Williams's argument that the jurors had simply ignored the evidence.

Two years later, however, the Court grasped and remedied the same error in *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004). The Court in *Anderson* noted the difference between the Option C language from Mr. Anderson's trial (the same language used at Mr. Williams's trial) and an earlier version. Based on the different language, the Court observed that a jury's failure to acknowledge mitigating evidence by at least checking Option C means that the jury failed to consider the evidence at all: "While the evidence may not have *established* that a mitigating circumstance 'probably existed' for the murder, it was certainly *presented* for that purpose." *Id.* at 358 (emphases in original). The jury in *Anderson* marked Option D, finding that no evidence was offered by either party to support any mitigating circumstance. The Court therefore vacated Anderson's

death sentence. *Id.* at 359-60; *see also Nooner v. State*, 438 S.W.3d 233, 243 (Ark. 2014) (explaining that the Court in *Anderson* "relied on the new language from Option C of Form 2," and denying relief to Mr. Nooner because his jury was given an earlier verdict form). Three years later the Court affirmed the denial of post-conviction relief to Mr. Williams. *See Williams v. State*, 251 S.W.3d 290 (Ark. 2007). Rejecting a claim that trial counsel performed ineffectively by not objection to the verdict form, the Court refused to revisit its direct-appeal finding that the jury did not err by declining to credit and find the defense's mitigating circumstances. *Id.* at 297-98. The Court nowhere mentioned the intervening decision in *Anderson*.

The Court's two decisions left Mr. Williams without a remedy for his unconstitutional sentence: "The sentencer … may determine the weight to be given relevant mitigation evidence. But they may not give it no weight by excluding such evidence from their consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982). The Court should recall its mandate because its ruling reflects an indisputable "error in the appellate process," that is, "an error that this court made or overlooked while reviewing a case in which the death sentence was imposed." *Ward v. State*, 455 S.W.3d 818, 821 (Ark. 2015); *Engram v. State*, 200 S.W.3d 367, 369-70 (Ark. 2004).

BACKGROUND AND PROCEDURAL HISTORY

A. Trial

Kenneth Dewayne Williams was charged with the capital murder of Cecil Boren in the course of a felony and other crimes, including aggravated robbery and escape in the first-degree. Mr. Williams had escaped from the Cummins Unit of the Arkansas Department of Correction, where he was serving a life sentence. Trial began on August 28, 2000. The State's evidence was that Mr. Williams escaped from the Cummins Unit by hiding in a "slop tank" containing food waste bound for the hogs on the prison farm, and then making his way across country, where he came to the home of Cecil Boren. Mr. Boren, who was outside his house gardening that morning, was found dead of seven gunshot wounds near the house, but there was no evidence establishing the sequence of events resulting in his death. Money, clothing, and guns were missing from the house and his truck was gone. The next day, law enforcement officers in Missouri who had recognized the license plate number of Mr. Boren's truck conducted a high-speed chase, ending in a crash and Mr. Williams's arrest. On August 29, 2000, the jury returned a verdict of guilty on the charges of capital murder, aggravated robbery, escape in the first degree, and theft of property on August 29, 2000.

The penalty phase began the same day. The State presented a Missouri state trooper who had witnessed the death of truck driver Michael Greenwood in the

crash that followed the high-speed chase; the surviving victim of the murder for which Mr. Williams had been serving the life sentence; and the victim of an earlier aggravated robbery. Members of Mr. Boren's family also testified.

The defense presented several witnesses who testified to Mr. Williams's troubled upbringing, which included an abusive father, absent mother, and frequent hospital visits, as well as his learning difficulties and tendency to be a follower. Tr. 2130-76. The defense also called Dr. Mark Cunningham, a clinical and forensic psychologist who conducted an evaluation based on interviews with Mr. Williams and third parties, records review, and neuropsychological testing. Dr. Cunningham testified that Mr. Williams achieved a full-scale score of 70 on an IQ test, which meant that his "true" IQ score was between 67 and 75. Tr. 2151. Mr. Williams is "mentally slow" and has a "severe learning disability." Tr. 2164. Dr. Cunningham further testified that other aspects of the neuropsychological testing revealed psychological deficits in a number of areas, indicating "brain dysfunction" linked to impairments in judgment, reasoning, attention, and language comprehension. Tr. 2151-52.

Dr. Cunningham described nineteen different "emotionally damaging" factors that he identified in Mr. Williams's history and discussed how these factors affected Mr. Williams's psychological development. Tr. 2152-53. Among other factors, Dr. Cunningham described the "extreme economic deprivation" in which

Mr. Williams grew up. Tr. 2138. "His mother speaks of the homes they lived in being rat and roach infested. The utilities were repeatedly turned off … [A]t times they didn't have enough to eat." Tr. 2138. Mr. Williams's childhood featured "low levels of parental involvement," "lots of family conflict," and "child maltreatment." Tr. 2143, 2156. His family history included multiple generations of alcoholism, domestic violence, and intellectual deficiencies, including his father's open use of marijuana and crack cocaine. Tr. 2147-49, 2155, 2172. At age six, Mr. Williams began to smoke marijuana "when his father allows him to take hits off his joint." Tr. 2169. Dr. Cunningham described Mr. Williams's mother as "mildly mentally retarded," with an IQ of 68; she was "very slow" and had trouble learning from parenting classes. Tr. 2153.

Mr. Williams's household featured "a climate of abuse and hostility." Tr. 2159. His father was "routinely whupping the boys" with enough force to leave welts and bruises. Tr. 2157. Mr. Williams witnessed his father's horrific abuse of his mother, specifically "slapping her and pushing her and hitting her with his fist and body-slamming her onto the ground," and even choking her "until she would strangle and gag." Tr. 2158, 2172. On one occasion he cut her across the stomach with a broken bottle. Tr. 2158. On another, he kidnapped her at gunpoint and held her for several days. Tr. 2158.

The jury sentenced Mr. Williams to death on August 30, 2000. It found in aggravation that Mr. Williams was unlawfully at liberty from a felony sentence, that he had previously committed another violent felony, that he had knowingly caused the death of more than one person in one criminal episode, and that the murder had been committed to avoid arrest or effect an escape. Tr. 2248. Respecting mitigation, the jury indicated on the verdict form that "[t]here was some evidence presented to support" that Mr. Williams "experienced family dysfunction which extended from generation to generation," but the evidence was "insufficient to establish that the mitigating circumstance[] probably existed." Ex. 1 at 4-5. The jury found no *evidence* of any other mitigating circumstance. *Id.* at 4-6.

Key to Mr. Williams's claim is the verdict form completed by the jury and attached to this motion as Exhibit 1. In "Form 2," the jury was asked to make one of four findings as to mitigating circumstances. Form 2 listed all sixteen of the defense's mitigating circumstances,[1] and provided it four possible findings for the jurors to reach:

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[1] The mitigating circumstances were as follows:

(i) The capital murder was committed while the capacity of Kenneth Williams to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as the result of mental disease or defect;

(ii) The youth of Kenneth D. Williams at the time of the commission of the capital murder;

Footnote continued on next page

(A) We the jury find the following mitigating circumstance(s) probably existed:

(B) One or more members of the jury believed that the following mitigating circumstance(s) probably existed, but the jury did not unanimously agree that such mitigating circumstance(s) probably existed:

(C) There was some evidence presented to support the following mitigating circumstance(s). However, after having considered

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Footnote continued from previous page

(iii) Kenneth D. Williams experienced family dysfunction which extended from generation to generation;

(iv) Kenneth D. Williams suffered repeated hospitalizations during infancy including treatment for viral meningitis;

(v) Kenneth D. Williams was exposed to parental substance abuse;

(vi) Kenneth Williams suffered from inadequate parenting, including lack of parental responsibility and mild mental retardation of his mother;

(vii) Kenneth D. Williams suffered because of his father's absence from the home;

(viii) Kenneth D. Williams was exposed to chronic marital conflict when his father was present in the home including and witnessed domestic violence (*sic*.);

(ix) Kenneth D. Williams suffers from Attention Deficit Disorder;

(x) Kenneth D. Williams grew up in marked poverty and harsh household circumstances;

(xi) Kenneth D, Williams has learning disabilities;

(xii) Kenneth D. Williams was exposed to corruptive family influences;

(xiii) Kenneth D. Williams experienced failures of the Arkansas Juvenile System;

(xiv) Kenneth D. Williams suffers from borderline mental retardation;

(xv) The Arkansas Department of Correction was negligent to the community in classifying Kenneth D. Williams and allowing him to be placed in the of Cummins Unit; and

(xvi) The Arkansas Department of Correction was negligent in allowing Kenneth D. Williams to escape from the Cummins Unit.

Ex. 1 at 2-6.

this evidence, the jury unanimously agreed that it was insufficient to establish that the mitigating circumstance(s) probably existed:

(D) No evidence of a mitigating circumstance was presented by either party during any portion of the trial.

Ex. 1 at 2-6. The form required consistent findings. Therefore, it instructed the jurors to refrain from marking any one mitigating factor in multiple sections (such as a factor being found both unanimously and non-unanimously), and to mark option (D) "only if no evidence of a mitigating circumstance was presented." *Id.*

When the jury reported that it had reached a verdict, the judge inspected the verdict form. Tr. 2246. He observed that the jurors had not completed Form 2, and that options A, B, C and D were all blank. Tr. 2246. He sent the jurors back and directed them to complete Form 2 and to "check at least something." Tr. 2246-47. The jury returned to the courtroom with a completed Form 2; this time, Part C was checked next to the circumstance that "Kenneth D. Williams experienced family dysfunction which extended from generation to generation." Ex. 1 at 5; Tr. 2249. The foreman told the judge that the jury had made the same mark beforehand, but "I feel that the Court overlooked it." Tr. 2248. The court responded, "You didn't have to say that," and remarked, "I'm going to take your word for it that that was there." Tr. 2248.

Having found that some evidence supported one mitigating circumstance, that no evidence supported fifteen others, and no mitigating circumstance was

proven, the jury found that the aggravating circumstances outweighed "any mitigating circumstances" and justified a sentence of death. Ex. 1 at 7. The jury sentenced Mr. Williams accordingly. *Id.* at 8.

B. Subsequent judicial proceedings

1. Direct appeal

This Court affirmed the convictions and sentences on direct appeal. *Williams v. State*, 67 S.W.3d 548 (Ark. 2002) (*Williams-1*). Mr. Williams argued, among other things, that the jury "impermissibly ignored mitigating evidence" as shown by the verdict form. Direct Appeal Br. at 19-20. Misconstruing the argument, the Court recast it as a contention that "the jury erred when it concluded this testimony was insufficient to establish a mitigating factor." *Williams-1*, 67 S.W.3d at 562. The Court then rejected the recharacterized claim, reasoning that a defendant's offering of mitigating evidence does not oblige the jury to believe the evidence or find that it establishes a mitigating circumstance. *Id.* A jury "is not bound to accept opinion testimony of experts as conclusive, and it is not compelled to believe their testimony any more than the testimony of other witnesses." *Id.* (quoting *Davasher v. State*, 823 S.W.2d 863, 872 (Ark. 1992)).

2. The Rule 37 appeal

The Court confronted a similar claim on Rule 37 review. *See Williams v. State*, 251 S.W.3d 290 (Ark. 2007) (*Williams-2*). Mr. Williams refashioned the

claim as one of trial counsel's ineffective assistance, observing that counsel did not object to the jury's failure to consider mitigating evidence and to mark the verdict form accordingly. Rule 37 Appeal Br. at vii, Arg.7-10. The Court observed that Mr. Williams could not relitigate his direct appeal claim on Rule 37 review, and it adhered to its ruling from five years earlier. *Williams-2*, 251 S.W.3d at 297-98. The Court also reasoned that the jury's Form 2 findings did not mean that the jury erred. In light of the jury's broad discretion to determine mitigating circumstances, the Court reasoned, the jury permissibly declined to conclude "that any other proposed mitigator constituted a mitigating circumstance." *Id.* at 298.

As support for its holding on Rule 37 review, the Court relied on *Hill v. State*, 962 S.W.2d 762, 764 (Ark. 1998) – a case that governed an earlier version of Form 2 and Section C prior to the revision of the pattern instructions to include the language that appeared on Mr. Williams's jury form. Based on the previous version of the form, *Hill* construed the jury's refusal to acknowledge evidence of a mitigating circumstance as a ruling that the proffered circumstance was not truly mitigating. *Hill*, 962 S.W.2d at 764. But the Court had reached a contrary reading of the revised language in 2004. *See Anderson v. State*, 163 S.W.3d 333 (Ark. 2004). In *Anderson* the Court explained that the jury's failure to acknowledge evidence of a mitigating circumstance means that the jury did not consider the evidence, and *not* that the jury simply found the mitigator unproven or non-

mitigating:

> While the evidence may not have *established* that a mitigating circumstance "probably existed" for the murder, it was certainly *presented* for that purpose.

Id. at 358. If the jury considers the evidence but finds it non-mitigating, *Anderson* explained, it must check Section C for the circumstance at issue. *Id.* ("What the jury should have checked, if it did not believe the evidence presented rose to the level of mitigating evidence, is Form 2 C.").

In a more recent opinion, the Court reconciled the results of *Hill* and *Anderson*. *See Nooner v. State*, 438 S.W.3d 233, 243-44 (Ark. 2014). The Court explained that *Anderson* language excerpted above stemmed from an intervening amendment to Section C. *Id.* at 243. The Court reproduced the older and newer versions of Form 2 in its opinion, including the old and new versions of Section C.

> [Old version]: C. ( ) There was evidence of the following mitigating circumstances, but the jury unanimously agreed that they did not exist at the time of the murder
>
> ***
>
> [New version]: C. ( ) There was some evidence presented to support the following circumstance(s). However, having considered this evidence, the jury unanimously agreed it was insufficient to establish that the mitigating circumstance(s) probably existed:

Nooner, 438 S.W.3d at 250-51. In *Nooner* the Court reasoned that *Anderson* did not overrule *Hill*, but rather, that the two cases involved different sets of instructions and different verdict forms. *Id.* at 243-44. Taken together, *Hill* and *Anderson* mean that a jury's failure to mark Sections A, B, or C on the *old verdict form* implies that the jury considered the underlying mitigating evidence but did not consider the evidence mitigating; on the *newer verdict form*, however, such a finding means that the jury did not even consider the mitigating evidence presented by the defense.

Even though it decided Mr. Williams's post-conviction appeal three years after *Anderson*, and even though Mr. Williams's jury used the same form at issue in *Anderson*, the Court did not cite *Anderson* in its decision. It instead relied on the older rule from *Hill*, reasoning that the jurors must have considered the evidence but found it to be non-mitigating. *See Williams-2*, 251 S.W.3d at 298.

3. Federal habeas corpus

The federal courts denied relief on Mr. Williams's several claims. *See Williams v. Norris*, No. 5:07-cv-00234 SWW, 2008 WL 4820559 (E.D. Ark. Nov. 4, 2008) (*Williams-3*), *aff'd Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010) (*Williams-4*), *cert. denied*, 562 U.S. 1290 (2011). Neither court addressed the precise question that Mr. Williams now raises. Denying a petition for writ of habeas corpus, the federal district court rejected Mr. Williams's claim that trial

counsel performed ineffectively by failing to object to the jury's verdict. The court reasoned that the jury's instructions and "incomplete" verdict form did not violate the Eighth Amendment because they did not *preclude* the jury from considering mitigating evidence. *Williams-3*, 2008 WL 4820559, at *13. The Court also believed the error harmless, reasoning that the jury's mere failure to complete the form did not undermine or diminish the State's substantial aggravating evidence. *Id.* The Eighth Circuit affirmed the denial of relief for the same reasons. *See Williams*-4, 612 F.3d at 955-56.

C. Current Proceedings

On February 27, 2017, Governor Asa Hutchinson scheduled eight execution dates, including that of Mr. Williams, for a ten-day period in April. Mr. Williams filed a clemency application, which was denied on April 5, 2017. The State has scheduled his execution on April 27, 2017. On April 21, 2017, Mr. Williams filed a motion to recall the mandate advancing different grounds from those asserted here. The previously filed motion contends that that the jurors committed misconduct and were biased by the receipt of extra-record evidence,[2] that Mr. Williams is exempt from the death penalty because he is intellectually disabled, and that the jury failed to reach a unanimous verdict on any conviction that made Mr. Williams

[2] The facts regarding bias and misconduct underlying the juror claim may explain why the jury failed to consider the undisputed mitigating evidence presented to it.

death-eligible; the motion also asks the Court to stay Mr. Williams's execution on these bases, and, alternatively to reinvest jurisdiction in the circuit court to consider Mr. Williams's claim that the State suppressed favorable evidence under *Brady v. Maryland*, 373 U.S. 83 (1964). Mr. Williams also moved the Court, on the same date, to stay his execution pending his petition for writ of habeas corpus in the Circuit Court of Lincoln County, which also asserts his claim of intellectual disability. These motions remain pending as of this writing.[3]

ARGUMENT

I. MR. WILLIAMS'S CLAIM IS COGNIZABLE ON A MOTION TO RECALL THE MANDA1TE.

This Court has the inherent authority to recall its mandate and reopen a case under the appropriate "extraordinary circumstances." *Robbins v. State*, 114 S.W.3d 217, 223 (Ark. 2003); Ark. Sup. Ct. R. 5–3(d). The remedy is available "as a last resort to avoid a miscarriage of justice or to protect the integrity of the judicial process." *Nooner*, 438 S.W.3d at 239 (quotation omitted). Recall of the mandate requires "an error in the appellate process," which this Court defines as "an error that this court made or overlooked while reviewing a case in which the death sentence was imposed." *Ward v. State*, 455 S.W.3d 818, 821 (Ark. 2015); *Engram*

[3] The circuit court dismissed the petition for writ of habeas corpus in part on pleading grounds. Mr. Williams is correcting the pleading deficiency and refiling the habeas petition

v. State, 200 S.W.3d 367, 369-70 (Ark. 2004).

The *Robbins* opinion is instructive, and the Court considers its factors in deciding whether to exercise its inherent power. *See Nooner*, 438 S.W.3d at 240. Robbins sought recall of the mandate in his capital case because an error the jury had committed in completing the sentencing forms was the same as an error that had required relief in another case, and this Court had "mistakenly missed the error" on his direct appeal. 114 S.W.3d at 218. This Court noted that it had inherent power to recall its mandate, a power that it shares with the federal courts. The Court then determined that the "unique" circumstances required it to set aside the mandate: a legally similar case had garnered relief, the federal district court had dismissed Robbins's habeas petition without prejudice because this Court had never addressed the issue on appeal, and the case was a capital one. *Id.* at 222-23.

The Court does not require strict satisfaction of the three "*Robbins* factors," i.e., citation to a precedent "on all fours" with the present one, a stay entered by the federal court on habeas review, and the scrutiny surrounding a death penalty case. Indeed, the Court has never fully delineated the circumstances that might justify recall of the mandate. *See Ward*, 455 S.W.3d at 820-21; *Robbins*, 114 S.W.3d at 222; *Wertz v. State*, 493 S.W.3d 772, 775 (Ark. 2016). It is impossible to define all such circumstances in advance, precisely because the court's power to recall its mandate is "to be held in reserve against grave, unforeseen contingencies."

Robbins, 114 S.W.3d at 222; *see also Isom v. State*, 462 S.W.3d 638, 643 (2015) (stressing that *Robbins* factors are not exhaustive and can apply to both direct and post-conviction appeal mandates).

The circumstances of Mr. Williams's case justify recall of the mandate. Mr. Williams demonstrates "an error that this court made or overlooked while reviewing a case in which the death sentence was imposed." *Ward*, 455 S.W.3d at 821; *Engram*, 200 S.W.3d at 369-70. As explained above, the Court on direct appeal and Rule 37 review analyzed Mr. Williams's claim based on an obsolete set of instructions. The Court reasoned that the jury must have considered the fifteen mitigating circumstances that it declined to mark on the form as being supported by evidence, and that the jury simply found the evidence and circumstances to be non-mitigating. *See Williams-2*, 251 S.W.3d at 298, citing *Hill*, 962 S.W.2d at 764. The Court's error in *Williams-2* compounded the error from *Williams-1*, in which the Court held that the jury was not compelled to find the mitigating circumstances proffered by the defense, despite Mr. Williams's argument that the jury failed even to *consider* the evidence underlying those circumstances. *See Williams-1*, 67 S.W.3d at 562.

Between *Williams-1* and *Williams-2*, the Court recognized that the *Hill* reasoning cannot apply to the newly-adopted language of Form 2 Section C. *See Anderson*, 163 S.W.3d at 358. The Court's reasoning in *Anderson* disproves its

surmise in *Williams-2* that the jury must have "considered" the mitigating evidence but did not find it mitigating: "While the evidence may not have *established* that a mitigating circumstance 'probably existed' for the murder, it was certainly *presented* for that purpose." *Anderson*, 163 S.W.3d at 358 (emphases in original). By failing to acknowledge that the evidence was presented as to 15 of the 16 mitigating circumstances at trial, the jury wholly failed to consider that evidence in crafting a sentence. *See id.* at 360 (by failing to acknowledge any mitigators on Sections A, B, and C, "the jury eliminated from its consideration all evidence presented of mitigating circumstances and sentenced Anderson to death solely based on the aggravating circumstance").

The Court not only made an error in the course of its review, *see Ward*, 455 S.W.3d at 821, but the error is analytically identical to the one at issue in *Anderson*. Otherwise stated, Mr. Williams's claim is "on all fours" with *Anderson*. *See Robbins*, 114 S.W.3d at 222. The error in both cases is the same: the jury failed to consider mitigating circumstances, as demonstrated by its verdict. The present case differs from *Anderson* only because the jury acknowledged evidence of one mitigating circumstance out of sixteen in Mr. Williams's case, as opposed to zero

mitigating circumstances out of three in *Anderson*.[4] But the distinction makes no difference. The sentencer cannot refuse to consider *any* relevant mitigating evidence, let alone the majority of it. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982) ("The sentencer … may determine the weight to be given relevant mitigation evidence. But they may not give it no weight by excluding such evidence from their consideration."). Even a partial refusal to consider mitigating evidence violates the Eighth and Fourteenth Amendments. *See id.* at 124 (noting that trial court refused to consider defendant's "violent background," while considering other mitigation); *Wright v. Walls*, 288 F.3d 937, 942-43 (7th Cir. 2002) (trial judge violated *Eddings* by refusing to consider defendant's traumatic background, despite also considering his emotional disturbance).[5]

Finally, this is a capital case with an imminent execution date, or, as *Robbins* describes it, "a death case where heightened scrutiny is required." 114 S.W.3d at 223. The jury's failure to consider Mr. Williams's evidence undermines the

[4] The mitigating factors in *Anderson* were that the defendant came from an abusive family, that his mother was mentally retarded, and that he was separated from his family and sent to a foster home at an early age. *Anderson*, 163 S.W.3d at 2004.

[5] The Eighth Circuit's opinion in *Dansby v. Norris*, 682 F.3d 711 (8th Cir.2012), is not to the contrary. The court in *Dansby* rejected the general proposition that the Eighth Amendment requires the jury to find that the defendant presented evidence of a mitigating circumstance if the defendant actually did so. *Id.* at 725-26. The circumstances of *Dansby*, however, demonstrate that the defendant was sentenced under the pre-*Anderson* version of Form 2, and the Eighth Circuit relied on *Hill* as the governing statement of Arkansas law. *Id.* at 726. Mr. Dansby was tried in 1992, which predated the relevant amendment to Form 2. *See Nooner*, 438 S.W.3d at 243-44 ("Our holding in *Anderson* was an extension of the change in the amended Form 2").

reliability of his death sentence. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Mr. Williams's jury ignored evidence that would have called for a lesser sentence.

II. THE COURT SHOULD VACATE MR. WILLIAMS'S DEATH SENTENCE, WHICH WAS IMPOSED BY AN ILL-INFORMED JURY THAT IGNORED THE VAST MAJORITY OF MITIGATING EVIDENCE OFFERED BY THE DEFENSE.

The merits of Mr. Williams's claim justify relief for the reasons already explained. First, the jury failed to acknowledge that the defense had presented evidence of fifteen mitigating circumstances beyond the single one the jury identified. *See* Ex. 1 at 2-6. This Court's opinions in *Anderson* and *Nooner* make clear that such an error, when undertaken by the jury using the same Form 2 as in *Anderson*, means that the jury failed to consider the evidence and *not* that the jury declined to find it mitigating. *Anderson*,163 S.W.3d at 358; *Nooner*, 438 S.W.3d at 250-51. The jury thereby ignored critical mitigating evidence. That evidence includes Mr. Williams's limited intellectual function and "borderline mental retardation," his having witnessed and been the victim of horrific domestic abuse from his father, his mother's intellectual disability and consequent inability to parent him effectively, and even his young age of 20 at the time of the offense. Ex.

1 at 2-6; Tr. 2138, 2143, 2147-59, 2164, 2172.

Mr. Williams was entitled to have his jury consider *all* the mitigating evidence instead of one-sixteenth of it. Jurors may decide what weight to give mitigating evidence, but they cannot "give it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15. The jurors' failure to consider the mitigating evidence violated Mr. Williams's rights under the Eighth and Fourteenth Amendments. *Id.*; *see also Wright*, 288 F.3d at 942-43 (granting habeas relief because the sentencing judge considered only the defendant's emotional disturbance and refused to consider his traumatic background, including a mental impairment and abuse from his adopted mother). Mr. Williams's sentence also fails under Arkansas law. The jury cannot validly determine that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt under Ark. Code Ann. § 5-4-603 without the court's assurance that the jury has considered all relevant mitigating evidence in the first place. *See Anderson*, 163 S.W.3d at 359 (citing *Anderson v. State*, 108 S.W.3d 592, 609 (Ark. 2003)).[6]

The Court must reject any suggestion that the error was harmless. The jury's

[6] There is nothing to the contrary in the Court's opinions in *Decay v. State*, 352 S.W.3d 319 (Ark. 2009); *Wertz v. State*, 287 S.W.3d 528 (Ark. 2008); or *Williams v. State*, 251 S.W.3d 290 (Ark. 2007). All three cases stand for the undisputed proposition – supported by *Hill* and still good law after *Anderson* – that the jury need not find a mitigating circumstance simply because the defendant presents evidence of it. What the jury cannot do is refuse to acknowledge and consider the evidence. *See Anderson*, 163 S.W.3d at 357-60.

failure to consider evidence of fifteen mitigating circumstances reflects "the wholesale exclusion" of evidence supporting those circumstances. *Wright*, 288 F.3d at 946 (sentence unconstitutional even though judge considered other mitigation). The overlooked mitigation was substantial. It suggested, among other things, that Mr. Williams is intellectually impaired if not disabled; that he suffered and witnessed horrific abuse from a father who punched, body-slammed, choked, and gagged Mr. Williams's mother in view of the children (whom he also beat and whipped); that Mr. Williams had untreated mental illness and unaddressed learning disabilities; and that the Williams children often went underfed in the family's home, which was infested with rats and roaches. *Cf. Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (defendant prejudiced by counsel's ineffective failure to develop evidence that defendant was severely neglected and abused as a child, and that he was "borderline mentally retarded"); *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003) (poverty and abuse while in alcoholic mother's custody; physical and sexual abuse in foster care; diminished mental capacity). A full consideration of an offender's life history is a "part of the process of inflicting the penalty of death." *Eddings*, 455 U.S. at 112. That process was fatally incomplete at Mr. Williams's trial.

III. THE COURT SHOULD STAY MR. WILLIAMS'S EXECUTION.

The Court should also grant a stay to allow Mr. Williams to litigate the

claims in this motion. Under Ark. Code Ann. § 16-90-506(a)(1), this Court has the authority to stay the execution of a death sentence in light of "any competent judicial proceeding." A motion to recall the mandate is such a competent proceeding. Ark. Sup. Ct. Rule 5-3(d). The Court will grant a stay when a case presents a constitutional issue that is "bona fide and not frivolous" but cannot be resolved before the scheduled execution. *Singleton v. Norris*, 964 S.W.2d 366, 372 (Ark. 1998) (opinion on rehearing). The Court should stay Mr. Williams's execution, which would otherwise extinguish his meritorious claim.

CONCLUSION

WHEREFORE, Movant-Appellant respectfully requests that the Court recall its mandate, that it stay the execution currently scheduled for April 27, 2017, that it accept the instant motion as a case and entertain full briefing and oral argument, and that it grant such other and further relief as law and justice require.

Respectfully submitted:

/s/ Deborah Ann Czuba

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Dated: April 24, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2017, I served this Motion, with its Exhibit, on counsel for the State by requesting that the Clerk of this Court place a copy in the Attorney General's box, and by email service on the Attorney General at oag@ArkansasAG.gov.

/s/ Deborah Ann Czuba
Deborah Anne Czuba

FORM 1
AGGRAVATING CIRCUMSTANCES

WE, THE JURY, AFTER CAREFUL DELIBERATION, HAVE UNANIMOUSLY DETERMINED THAT THE STATE HAS PROVED BEYOND A REASONABLE DOUBT THE FOLLOWING AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES:

1. (✓) AT THE TIME OF THE CAPITAL MURDER KENNETH WILLIAMS WAS UNLAWFULLY AT LIBERTY AFTER BEING SENTENCED TO IMPRISONMENT AS A RESULT OF A FELONY CONVICTION.

2. (✓) KENNETH WILLIAMS PREVIOUSLY COMMITTED ANOTHER FELONY AN ELEMENT OF WHICH WAS THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON OR CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON.

3. (✓) IN THE COMMISSION OF THE CAPITAL MURDER, KENNETH WILLIAMS KNOWINGLY CAUSED THE DEATH OF MORE THAN ONE PERSON IN THE SAME CRIMINAL EPISODE.

4. (✓) THE CAPITAL MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING AN ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

[redacted]
FOREPERSON

500(B)

INSTRUCTION NO. _____

FORM 2
MITIGATING CIRCUMSTANCES

A. We the jury find the following mitigating circumstance(s) probably existed:

[Note: If any circumstances are checked in this section, you should not complete Section D. Any factor or factors checked in this section should not be checked again in any other section.]

( ) The capital murder was committed while the capacity of Kenneth D. Williams to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as the result of mental disease or defect.

( ) The youth of Kenneth D. Williams at the time of the commission of the capital murder.

( ) Kenneth D. Williams experienced family dysfunction which extended from generation to generation.

( ) Kenneth D. Williams suffered repeated hospitalization during Kenneth D. Williams infancy including treatment for viral meningitis.

( ) Kenneth D. Williams was exposed to parental substance abuse.

( ) Kenneth D. Williams suffered from inadequate parenting, including lack of parental responsibility and mild mental retardation of his mother.

( ) Kenneth D. Williams suffered because of his father's absence from the home.

( ) Kenneth D. Williams was exposed to chronic marital conflict when his father was present in the home including and witnessed domestic violence.

( ) Kenneth D. Williams suffers from Attention Deficit Disorder.

( ) Kenneth D. Williams grew up in marked poverty and harsh household circumstances.

( ) Kenneth D. Williams has learning disabilities.

500(c)

( ) Kenneth D. Williams was exposed to corruptive family influences.

( ) Kenneth D. Williams experienced failures of the Arkansas Juvenile System.

( ) Kenneth D. Williams suffers from Borderline mental retardation.

( ) The Arkansas Department of Correction was negligent to the community in classifying Kenneth D. Williams and allowing him to be placed in the [illegible] population of [illegible]

( ) The Arkansas Department of Correction was negligent in allowing Kenneth D. Williams to escape from the Cummins Unit.

( ) OTHER: SPECIFY IN WRITING. _____

_____

B. One or more members of the jury believed that the following mitigating circumstance(s) probably existed, but the jury did not unanimously agree that such mitigating circumstance(s) probably existed.

[Note: If any circumstances are checked in this section, you should not complete Section D. Any factor or factors checked in this section should not be checked again in any other section.]

( ) The capital murder was committed while the capacity of Kenneth D. Williams to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as the result of mental disease or defect.

( ) The youth of Kenneth D. Williams at the time of the commission of the capital murder.

( ) Kenneth D. Williams experienced family dysfunction which extended from generation to generation.

( ) Kenneth D. Williams suffered repeated hospitalization during Kenneth D. Williams infancy including treatment for viral meningitis.

( ) Kenneth D. Williams was exposed to parental substance abuse. 5002(D)

( ) Kenneth D. Williams suffered from inadequate parenting, including lack of parental responsibility and mild mental retardation of his mother.

( ) Kenneth D. Williams suffered because of his father's absence from the home.

( ) Kenneth D. Williams was exposed to chronic marital conflict when his father was present in the home including and witnessed domestic violence.

( ) Kenneth D. Williams suffers from Attention Deficit Disorder.

( ) Kenneth D. Williams grew up in marked poverty and harsh household circumstances.

( ) Kenneth D. Williams has learning disabilities.

( ) Kenneth D. Williams was exposed to corruptive family influences.

( ) Kenneth D. Williams experienced failures of the Arkansas Juvenile System.

( ) Kenneth D. Williams suffers from mental retardation.

( ) The Arkansas Department of Correction was negligent to the community in classifying Kenneth D. Williams and allowing him to be placed in the population of

( ) The Arkansas Department of Correction was negligent in allowing Kenneth D. Williams to escape from the Cummins Unit.

( ) OTHER: SPECIFY IN WRITING. _____

_____

C. There was some evidence presented to support the following circumstance(s). However, having considered this evidence, the jury unanimously agreed that it was insufficient to establish that the mitigating circumstance(s) probably existed.

[Note: If any circumstances are checked in this section, you should not complete Section D. Any factor or factors checked in this section should not be checked again in any other section.]

500(E)

( ) The capital murder was committed while the capacity of Kenneth D. Williams to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as the result of mental disease or defect.

( ) The youth of Kenneth D. Williams at the time of the commission of the capital murder.

(✓) Kenneth D. Williams experienced family dysfunction which extended from generation to generation.

( ) Kenneth D. Williams suffered repeated hospitalization during Kenneth D. Williams infancy including treatment for viral meningitis.

( ) Kenneth D. Williams was exposed to parental substance abuse.

( ) Kenneth D. Williams suffered from inadequate parenting, including lack of parental responsibility and mild mental retardation of his mother.

( ) Kenneth D. Williams suffered because of his father's absence from the home.

( ) Kenneth D. Williams was exposed to chronic marital conflict when his father was present in the home including and witnessed domestic violence.

( ) Kenneth D. Williams suffers from Attention Deficit Disorder.

( ) Kenneth D. Williams grew up in marked poverty and harsh household circumstances.

( ) Kenneth D. Williams has learning disabilities.

( ) Kenneth D. Williams was exposed to corruptive family influences.

( ) Kenneth D. Williams experienced failures of the Arkansas Juvenile System.

( ) Kenneth D. Williams suffers from mental retardation.

( ) The Arkansas Department of Correction was negligent to the community in classifying Kenneth D. Williams and allowing him to be placed in the population of Cummins unit ADC

500(F)

( ) The Arkansas Department of Correction was negligent in allowing Kenneth D. Williams to escape from the Cummins Unit.

( ) OTHER: SPECIFY IN WRITING. _____

_____

D. ( ) No evidence of a mitigating circumstance was presented by either party during any portion of the trial.

[Check only if no evidence of a mitigating circumstance was presented.]

[redacted]

FOREMAN

500(6)

FORM 3

CONCLUSIONS

THE JURY, HAVING REACHED ITS FINAL CONCLUSIONS, WILL SO INDICATE BY HAVING ITS FOREMAN PLACE A CHECK MARK IN THE APPROPRIATE SPACE ( ) IN ACCORDANCE WITH THE JURY'S FINDINGS. IN ORDER TO CHECK ANY SPACE, YOUR CONCLUSIONS MUST BE UNANIMOUS. THE FOREMAN OF THE JURY WILL THEN SIGN AT THE END OF THIS FORM.

WE THE JURY CONCLUDE:

(a) (✓) ONE OR MORE AGGRAVATING CIRCUMSTANCES DID EXIST BEYOND A REASONABLE DOUBT, AT THE TIME OF THE COMMISSION OF THE CAPITAL MURDER.

(IF YOU DO NOT UNANIMOUSLY AGREE TO CHECK PARAGRAPH (a), THEN SKIP (b) AND (c) AND SENTENCE KENNETH WILLIAMS TO LIFE IMPRISONMENT WITHOUT PAROLE ON FORM 4.)

(b) (✓) THE AGGRAVATING CIRCUMSTANCES OUTWEIGH BEYOND A REASONABLE DOUBT ANY MITIGATING CIRCUMSTANCES FOUND BY ANY JUROR TO EXIST.

(IF YOU DO NOT UNANIMOUSLY AGREE TO CHECK PARAGRAPH (b), THEN SKIP (c) AND SENTENCE KENNETH WILLIAMS TO LIFE IMPRISONMENT WITHOUT PAROLE ON FORM 4.)

(c) (✓) THE AGGRAVATING CIRCUMSTANCES JUSTIFY BEYOND A REASONABLE DOUBT A SENTENCE OF DEATH.

(IF YOU DO NOT UNANIMOUSLY AGREE TO CHECK PARAGRAPH (c), THEN SENTENCE KENNETH WILLIAMS TO LIFE IMPRISONMENT WITHOUT PAROLE ON FORM 4.)

IF YOU HAVE CHECKED PARAGRAPHS (a), (b), AND (c), THEN SENTENCE KENNETH WILLIAMS TO DEATH ON FORM 4.

OTHERWISE, SENTENCE KENNETH WILLIAMS TO LIFE IMPRISONMENT WITHOUT PAROLE ON FORM 4.

[redacted]

FOREMAN

500(H)

FORM 4
VERDICT

WE, THE JURY, AFTER CAREFUL DELIBERATION, HAVE DETERMINED THAT KENNETH WILLIAMS SHALL BE SENTENCED TO:

A. ( ) LIFE IMPRISONMENT WITHOUT PAROLE.

B. (✓) DEATH.

(IF YOU RETURN A VERDICT OF DEATH, EACH JUROR MUST SIGN THIS VERDICT.)

[redacted]

FOREPERSON

[redacted]

500(I)

AMCI 2d 9312.2-VF

STAGE TWO: STANDARD VERDICT FORM - HABITUAL OFFENDER STATUS UNDISPUTED

WE, THE JURY, HAVING FOUND KENNETH WILLIAMS GUILTY OF THEFT OF PROPERTY, FIX HIS SENTENCE AT A TERM OF 40 (NOT LESS THAN TWENTY-FIVE (25) YEARS NOR MORE THAN FORTY (40) YEARS) IN THE ARKANSAS DEPARTMENT OF CORRECTIONS.

[redacted]

FOREMAN

500(J)