

EXECUTION SCHEDULED FOR APRIL 24, 2017

IN THE ARKANSAS SUPREME COURT

MARCEL WAYNE WILLIAMS

Movant/Appellant

v.

No. CR-97-949

STATE OF ARKANSAS

Respondent/Appellee

**EMERGENCY MOTION TO RECALL THE MANDATE AND FOR STAY
OF EXECUTION**

Movant/Appellant Marcel Wayne Williams respectfully requests that the Court recall its mandate in the above-captioned case, vacate his death sentence, and remand for resentencing. As explained in detail below, the review of Mr. Williams’s death sentence on direct appeal was defective. This Court has never reviewed the sentencing-phase verdict forms because they are absent from the record. The Court’s failure to notice the absence of the verdict forms in the record and its inability to review Mr. Williams’s death sentence as required by law amounts to a breakdown in the appellate process sufficient to recall the mandate.

On April 5, 1995, the Pulaski County Prosecutor charged Mr. Williams by felony information with capital murder, kidnapping, rape, and aggravated robbery stemming from the November 20, 1994 abduction of Stacy Errickson. Mr. Williams was tried on these charges in a four-day trial in January 1997. During the guilt phase of the trial, he fully admitted he committed the heinous acts. Mr. Williams was convicted on all counts. During the sentencing phase of the trial, the State submitted

evidence to support three aggravating circumstances, and Mr. Williams's attorneys submitted evidence as to one mitigating circumstance—that he had accepted responsibility for the crime.¹ Mr. Williams was sentenced to death by Judgment and Commitment Order filed on January 15, 1997. On February 5, 1997, Mr. Williams filed a notice of appeal designating the entire record and all proceedings, evidence, and testimony for purposes of appeal.

On June 10, 1999, the Arkansas Supreme Court issued its decision on Mr. Williams's direct appeal. Although counsel on direct appeal submitted multiple points of error, for purposes of the instant motion, included in counsel's argument on appeal was a challenge to the sufficiency of the evidence to support the imposition

¹ Mr. Williams's argued in postconviction that trial counsel was ineffective for failing to offer evidence of mitigation during the sentencing phase. *Williams v. State*, 347 Ark. 371, 64 S.W.3d 709 (2002). On appeal, the Court held that postconviction counsel did not substantiate what mitigation evidence should have been presented and that not putting on mitigation at trial was a strategic decision. *Id.* In federal habeas, although Judge Holmes allowed Mr. Williams to put on evidence that his trial counsel was ineffective at the sentencing phase and ultimately granted a new sentencing, that decision was reversed on the basis that his ineffective-assistance claim was procedurally barred. *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009).

of the death penalty. *See Williams v. State*, 338 Ark. 97, 108-110, 991 S.W.2d 565, 570-71 (1999). The majority opinion concluded that it was the “duty of the jury” to balance “aggravating and mitigating circumstances” and that “substantial evidence supported the jury’s finding that aggravating circumstances existed beyond a reasonable doubt and that they outweighed the defendant’s mitigating circumstances.” *Id.* at 109, 991 S.W.2d at 571. The Court also performed a review pursuant to Arkansas Supreme Court Rule 4-3(h) (1999), and found “no error.” *Id.* at 123, 991 S.W.2d at 579.

ARGUMENT

The Court should recall its mandate and remand for resentencing because it failed to provide its legally-required review of Mr. Williams’s death sentence. The Court’s failure to recognize the absence of the sentencing-phase verdict forms in the record and then subsequent review of the jury’s decision to sentence Mr. Williams to death without having the written verdict forms constitutes a breakdown in the appellate process that warrants relief.

Undersigned counsel has reviewed the record lodged on appeal in *Williams v. State*, CR-97-949. The record does not contain any signed, written verdict forms from the jury, either as to the finding of guilt on capital murder or as to sentencing. Moreover, undersigned counsel has reviewed the briefs filed by both Mr. Williams’s direct-appeal counsel and the State, and the briefs fail to include any abstract of the

jury's verdict² or verdict form in the addendum. The Arkansas Supreme Court simply never had the signed, written verdict forms to review whether the necessary findings were made to impose a sentence of death.

The jury's signed, written sentencing-phase verdict forms are essential for the Court to review a death sentence on appeal. At the time of Mr. Williams's direct appeal, the Court was required in death cases to "review all errors prejudicial to the appellant in accordance with Ark. Code Ann. § 16-91-113(a)." Ark. Sup. Ct. R. 4-3(h) (1999).³ Subsection (a) of the statutory provision stated that "[t]he Supreme Court need only review those matters briefed and argued by the appellant, *except that where either a sentence for life imprisonment or death has been imposed the Supreme Court shall review all errors prejudicial to the rights of the appellant.*" Ark. Code Ann. § 16-91-113(a) (emphasis added).⁴ This review of "prejudicial errors" was well recognized in other death-penalty cases before Mr. Williams's case was decided on appeal. *See, e.g., Greene v. State*, 335 Ark. 1, 8-9, 977 S.W.2d 192, 195 (1998) ("When this Court reviews a death sentence, it must review the record in

² At the time of Mr. Williams's appeal, counsel was required by former Ark. Sup. Ct. R. 9(d) to "abstract the pleadings."

³ Although Rule 4-3(h) now appears as Rule 4-3(i), it is substantively the same.

⁴ It does not appear that the substantive text of this statute has changed since 1999.

accordance with Ark. Code Ann. § 16–91–113(a) (1987) and Ark. Sup.Ct. R. 4–3(h) for all errors raised in the trial court that are prejudicial to the appellant regardless of whether the errors are raised on appeal.”); *Hill v. State*, 331 Ark. 312, 326, 962 S.W.2d 762, 769 (1998) (noting mandatory review under both the rule and the statute); *Franz v. State*, 296 Ark. 181, 188, 754 S.W.2d 839, 842-43 (1988)⁵ (holding that in death cases, the Court had the obligation to “make its own examination of the record when an appeal is taken”). Moreover, a separate statutory provision in effect at the time of Mr. Williams’s appeal required that “[o]n an appellate review of a death sentence, the Supreme Court shall conduct a harmless error review of the defendant’s death sentence” when the jury erred in finding the existence of any aggravating circumstance and the jury had found no mitigating circumstance. Ark. Code Ann. § 5-4-603(d). Years earlier the Court had adopted an exception to preservation in death cases where error involved a matter essential to the jury’s consideration of the death penalty itself. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980).

⁵ Although *Franz* was later overruled by the Arkansas Supreme Court in *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999), Mr. Williams cites *Franz* here only to explain the type of review the Court conducted in death cases pre-*Robbins*.

A jury's decision to impose a death sentence is clearly prejudicial to the appellant where life in prison without parole is an option. Further, the only rational way for an appellate court to review that prejudicial decision for error is by reviewing the jury's written findings, which are encompassed in death-sentencing verdict forms 1, 2, and 3. There is zero evidence that the Arkansas Supreme Court had those forms before it when it reviewed Mr. Williams's death sentence. Although the *Williams* Court claimed to have performed its obligatory review under Rule 4-3(h), it simply could not have properly performed that review without the jury's sentencing-phase verdict forms. Furthermore, and perhaps more egregious, the *Williams* Court referenced "the jury's finding that aggravating circumstances existed beyond a reasonable doubt and . . . outweighed the defendant's mitigating circumstances," yet there was no written record before it that the jury had made those findings.

The Court did have the benefit of the transcript from the trial below, which indicated the following after the jury returned its sentencing verdict:

The Court: Okay, let's start from the beginning. The Form 1 says, We, the jury, after careful deliberation have unanimously determined that the State has proved beyond a reasonable doubt the following aggravating circumstance or circumstances.

The first one is *checked*; that Marcel Williams previously committed another felony; . . .

The second one is also *checked*; the capital murder was committed for pecuniary gain; and,

The third, that the capital murder was committed in an especially cruel or depraved manner. That was signed by Mr. Pollins. So, you unanimously agree that those aggravating circumstances existed.

Mr. Pollins: Yes, sir.

The Court: Then Form 5 or Form 2 on page 5; we unanimously find that the following mitigating circumstance probably existed. You've *checked* that Marcel Williams has accepted responsibility for his conduct and admitted his participation in the crime. That was a unanimous finding by the jury?

Mr. Pollins: Yes, sir.

The Court: Then on Form 3; we the jury conclude that one or more aggravating circumstances did exist beyond a reasonable doubt at the time of the commission of the capital murder, and that's *checked*. That the aggravating circumstances outweigh beyond a reasonable doubt any mitigating circumstances find by any juror to exist. And that the aggravating circumstances justify beyond a reasonable doubt the sentence of death. That's signed by Mr. Pollins, and that was a unanimous decision?

Mr. Pollins: Yes, Your Honor.

The Court: Then verdict Form 4; we, the jury after careful deliberations have determined that Marcel Williams shall be sentenced to death by lethal injection, and that signed by each of you.

R. 1116-17 (emphasis added). Thereafter, the court polled the jurors and they each indicated they agreed with the verdict.

At best, this transcript is confusing as to what the jury found. At worst, it illustrates that the jurors failed to make the necessary findings to sentence Mr. Williams to death. The only *checked* boxes, which indicate agreement, were: that

two aggravating circumstances found, that one mitigating circumstance found, and that one or more aggravating circumstances did exist beyond a reasonable doubt at the time of the commission of the capital murder. While the jurors might have actually checked other boxes, it is impossible to determine without the written verdict forms. Based on the circuit court’s reading of the transcript, the jury failed to check that the aggravating circumstances outweighed the mitigating circumstances—despite the *Williams*’s Court’s reference to that “finding”—or that the aggravating circumstances warranted justified a death sentence beyond a reasonable doubt. If that is in fact what the jury found, the death sentence cannot stand. *See Camargo v. State*, 327 Ark. 631, 644, 940 S.W.2d 464, 471 (1997) (“We have consistently held that the death sentence may not be imposed unless the jury makes the required statutory finding.”). The uncertainty of the transcript belies the importance of reviewing the written verdict forms.

Nevertheless, even if the transcript of the proceedings was crystal clear, the written findings are still required. *See id.* at 644-45, 940 S.W.2d at 471. In *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), in response to the State’s contention that the appellant did not suffer any prejudice due to the fact that the jurors appeared and orally confirmed their death-sentence verdicts in open court, this Court cited to the United States Supreme Court’s rule that all errors relating to mitigating circumstances are prejudicial as outlined in *Skipper v. South Carolina*, 476 U.S. 1

(1986), and refused to apply a harmless-error analysis. *See also Williams v. State*, 2001 Ark. 389 (per curiam) (noting that jury verdict forms must be included in the record and addendum where a jury trial was held).

The Court will recall a mandate in extraordinary circumstances after considering three factors: (1) whether there was a defect in the appellate process; (2) whether federal-court proceedings were dismissed because of unexhausted claims; and (3) whether a death sentence is involved. *Wertz v. State*, 2016 Ark. 249, 493 S.W.3d 772. These factors are not strictly applied but rather serve as a guide. *Id.* A defect in the appellate process includes an error that falls within the exceptions for consideration of errors not raised at trial under *Wicks, supra*.

Recall of the mandate is warranted here. First, this is a death case. Second, there was a clear defect in the appellate process. The Court failed—under its own obligation—to recognize that the jury’s written sentencing findings were not in the record. This is so despite the fact that the Court indicated it had performed its duty as required by the law. Without those written sentencing-phase jury verdicts, the Court could not determine that Mr. Williams’s death sentence was fairly imposed. Finally, though no federal court has dismissed this claim for non-exhaustion, the absence of that factor does not preclude recall where an error of this magnitude is involved. Indeed, the Court recently recalled the mandate to correct a different sentencing-form error in the absence of an exhaustion problem. *Wertz, supra*.

Lastly, although many cases illustrate the Court's struggle to overcome inconsistencies in its review of death-penalty cases throughout the 1980s and 1990s, the Court clarified *just six months after Mr. Williams's appellate decision was handed down* that it had an affirmative duty to review the record in all death cases for "egregious errors" and adopted mandatory review even where the death-sentenced individual did not desire an appeal. *See Robbins*, 339 Ark. at 379, 5 S.W.3d at 51. "Fundamental fairness and evenhanded justice" would entitle Mr. Williams to the same relief. *See Kelley v. Gordon*, 2015 Ark. 277, 465 S.W.3d 842.

PRAYER FOR RELIEF

This Motion to Recall the Mandate should be granted, Mr. Williams's death sentence should be vacated, and the case should be remanded for resentencing. Mr. Williams is scheduled for execution on Monday, April 24, 2017, and a stay of that execution is necessary to protect Mr. Williams's right to resentencing.

In the alternative, should the necessity for relief not be apparent on the face of this motion, Mr. Williams requests that the court grant the motion to stay execution and take the motion to recall as a case. In that instance, Mr. Williams also petitions this Court for a Writ of Certiorari to Complete the Record and respectfully asks that the Court issue the writ to the Pulaski County Circuit Court to furnish the jury verdict forms in his underlying case.

Dated: April 19, 2017

Respectfully submitted,

/s/ Scott W. Braden

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2017, I filed the foregoing Motion with the Clerk of Court via the eFlex electronic filing system, which shall send notification to counsel for Appellee.

/s/ Scott W. Braden
SCOTT W. BRADEN