***** EXECUTION SCHEDULED APRIL 24, 2017 *****
IN THE ARKANSAS SUPREME COURT
No. CR 97-949

MARCEL WAYNE WILLIAMS, Movant

v.

STATE OF ARKANSAS, Respondent

MOTION TO RECALL THE MANDATE
AND FOR STAY OF EXECUTION

A recall of a mandate in this Court will occur only in extraordinary circumstances, where a reopening of the case is needed to avoid a miscarriage of justice or protect the integrity of the judicial process. *Ward v. State*, 2015 Ark. 60, 12 (2015). The Movant, Marcel Wayne Williams, urges this Court to recall its direct appeal mandate and reopen his appellate proceedings on the basis that his appellate briefing—both his opening Brief and reply brief—was plagiarized and contained whole swaths of argument sections lifted entirely from other sources without attribution. Indeed, of the fourteen-page reply brief filed, nearly ten-pages were cut and pasted verbatim from a 1961 United States Supreme Court case. That Mr. Williams was deprived of meaningful appellate review by virtue of his attorney's decision to plagiarize a majority of the briefing in Mr. Williams's case is the exact type of "error in the appellate process" that this Court has identified for recall of the mandate. *See Nooner v. State*, 2014 Ark. 296, 8 (2014) (defining an error as "an error that *this court* made or overlooked while reviewing a case in which the death sentence was imposed.") (emphasis in original). As such, allowing such a

defect or breakdown in Mr. Williams's appellate process to stand would result in both a miscarriage of justice as well as tarnish the integrity of the judicial process as a whole. *Ward*, 2015 Ark. at 12.

Second, due to the failings of direct-appeal counsel, several claims raised in Mr. Williams's federal habeas proceedings were dismissed because they were not first presented on direct appeal to this Court. *See* Ex. 4 (*Williams v. Hobbs*, Opinion and Order) (June 19, 2006). Whether direct-appeal counsel's otherwise ineffective assistance excuses the default of those claims in federal-habeas proceedings is currently at issue in the United States Supreme Court. On January 13, 2017, the United States Supreme Court granted a writ of certiorari to consider the following question:

> Whether the rule established in *Martinez v. Ryan*, 132 S. Ct. 1309 (201) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) – ineffective assistance of counsel in an initial-review collateral proceeding can provide cause to overcome the procedural default of a substantial claim of ineffective assistance of trial counsel – also applied to the procedural default of a substantial claim of ineffective assistance of appellate counsel.

Davila v. Davis, No. 16-6219. The case was argued April 24, 2017. This Court should stay Mr. Williams's execution, recall the mandate (or set the case for full briefing and argument), because the United States Supreme Court will soon decide whether the ineffective assistance of Mr. Williams's direct-appeal counsel was cause to excuse the procedural default of claims raised in his federal-habeas proceedings.

I. BACKGROUND AND PROCEDURAL HISTORY

Mr. Williams was convicted of capital murder following a trial in which his state-appointed lawyers conceded his guilt in the opening statement, passed on cross-examination of the prosecution's witnesses, and presented virtually no evidence at the sentencing hearing. The only witness Mr. Williams's lawyers called was an inmate who did not know Mr. Williams at all, but who used to be on death row, and testified that life was more pleasant on death row than in the general population of the prison. Mr. Williams's jury then recommended a death sentence, which the trial court accepted.

Mr. Williams's direct appeal proceedings. The subject of this motion concerns Mr. Williams's direct-appeal proceedings. Mr. Williams's lead trial counsel, Mr. Herbert Wright, continued to represent Mr. Williams on his direct appeal. Mr. Wright moved this Court for extensions of time in which to file a brief on Mr. Williams's behalf. This Court granted him a six-month extension to file Mr. Williams's opening brief, noting in bold letters that it was to be the final extension. *Williams v. State*, 332 Ark. 671 (1998). In spite of this admonishment, Mr. Wright again moved for a three-month continuance. *Id.* This Court issued an order to show cause why Mr. Wright should not be held in contempt and allowed him thirty days to file the opening brief. *Id.* Mr. Wright would later appear before this Court and enter a plea of guilty to a contempt citation for failing to file Mr. Williams's brief on time. *Williams v. State*, 333 Ark. 580, 581 (1998).

When Mr. Wright did ultimately file an appellate brief, it was comprised of arguments plagiarized from federal court opinions, state court opinions, and appellants'

briefing in other state courts. The entire rule section of the *Batson* claim was lifted verbatim from the *Batson* decision itself. Mr. Wright even neglected to remove the precautionary language the United States Supreme Court gave to trial courts in examining the claim. *Compare* Ex. 1 at 1086 ("We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges create a prima facie case of discrimination against black jurors.") *with Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (same).

The remainder of the opening brief fared no better. Mr. Wright dumped entire rule sections from the Court of Appeals and this Court in Mr. Williams's brief. *See, e.g.*, Ex. 1 at 1092-93 (three rule sections on coerced statements copied directly without attribution). In a claim concerning the prosecution's introduction of prejudicial photographs, Mr. Wright almost exclusively cited Georgia law because the argument was copied from an appellant brief filed in Georgia courts. *See* Ex. 1 at 1102 (copying from an appellant's brief in *McAllister v. Georgia*). At the conclusion of an argument section on peremptory challenges, Mr. Wright included a nonsensical quotation about "children weep[ing]" and cited Atticus Finch. *See id.* at 1089.

In Exhibits 1 and 2 appended to this motion, Mr. Williams has highlighted the portions of Mr. Wright's opening and reply briefs that he has identified as plagiarized. As a sampling of the highlighted portions of the brief demonstrate, entire sections were copied from other sources and Mr. Wright simply shoehorned in random facts from

Mr. Williams's case in an apparent effort to make it appear relevant to Mr. Williams's case. As the exhibits demonstrate, Mr. Wright did not absentmindedly neglect to attribute certain citations to the source. Rather, he wholesale copied and pasted entire arguments into the brief and passed them off as his own.

This Court affirmed Mr. Williams's conviction and death sentence, finding nearly all claims either meritless or claims that were repeatedly raised and rejected by this Court on previous occasions. *See Williams v. State*, 338 Ark. 97 (1999).

Mr. Williams's Rule 37 proceedings. The remainder of Mr. Williams's state and federal habeas proceedings illustrate just how fatal Mr. Williams's incompetent state court representation proved to be. After this Court affirmed Mr. Williams's judgment and sentence on direct appeal, Attorney William McLean was appointed to represent Mr. Williams in Rule 37 postconviction proceedings. His representation was abysmal. Attorney McLean did not file a single motion for appointment of, or funding for, an investigator, mitigation specialist, or any mental health expert. The extent of his "investigation" was picking up the phone and calling trial counsel. He did not request a single record or interview a single member of Mr. Williams's family. Ultimately, Attorney McLean filed a conclusory three-and-one-half page petition for state postconviction relief, listing fifteen terse claims of ineffective assistance of counsel.[1]

[1] Attorney McLean never had Mr. Williams verify his Rule 37 petition. In *Wooten v. State*, 2010 Ark. 467 (2010), this Court held that the lack of a verification on a Rule 37 petition

Just prior to the postconviction hearing, Attorney McLean affirmatively withdrew fourteen of the fifteen claims for relief, leaving one bare claim challenging Mr. Williams's entire conviction and death sentence. Unsurprisingly, the Rule 37 court denied relief, finding Attorney McLean "offered no factual substantiation" to prove his solitary claim. This Court agreed, finding that Attorney McLean "failed to call anyone to the stand at the Rule 37 hearing or to proffer the substance of any specific testimony to show what evidence could have been presented." *Williams v. State*, 347 Ark. 371, 380 (2002). Attorney McLean's performance in this case was so deficient that even the

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constitutes a defect in the appellate process warranting recall of the mandate. Shortly after that decision, in 2011, (and prior to this Court's decision in *Ward v. State* overruling *Wooten*), Mr. Williams filed a Motion to Recall the Mandate based on his lack of verification of his Rule 37 petition as well as ineffective assistance of Attorney McLean. *See Williams v. State*, No. CR-00-00822 (Jan. 18, 2011). To the extent that this Court's recent decision in *Ward v. State*, 2015 Ark. 62, 4 (2015) held that both an unverified petition along with a "cumulation of postconviction errors" can constitute a breakdown in the appellate process, Mr. Williams's again moves to recall his Rule 37 mandate and to stay his execution to allow this Court to set it as a case and order full briefing and oral argument to consider this question. *See Williams v. State*, No. CR-00-00822 (Jan. 18, 2011), incorporated by reference as if fully set forth herein.

Court of Appeals for the Eighth Circuit found his actions to be negligent. *Williams v. Norris*, 576 F.3d 850, 862 (8th Cir. 2009).

Mr. Williams's federal habeas proceedings. Mr. Williams's federal habeas proceedings developed the case that Mr. Williams's state-court lawyers failed to present. A powerful mitigation story of profound and unrelenting emotional, physical, and sexual abuse by multiple perpetrators was presented. *Williams v. Norris*, No. 5:02-CV-00450, 2006 WL 1699835, *2 (E.D. Ark., June 19, 2006). The federal district court, after an evidentiary hearing, granted relief on the basis that Mr. Wright rendered ineffective assistance of counsel. The federal district court found that he failed to present compelling mitigating evidence that Mr. Williams was "subject to every category of traumatic experience that is generally used to describe childhood trauma" including "physical and psychological abuse by his mother and stepfather; gross medical, nutritional, and educational neglect; exposure to violence in the childhood home and neighborhood; and a violent gang-rape while in prison as an adolescent." *Id.* The case that Mr. Wright failed to present was "as compelling as the evidence in *Wiggins* [*v. Smith*, 539 U.S. 510 (2003)]." *Id.*

Unfortunately for Mr. Williams, the State appealed the ruling and Mr. Williams's death sentence was reinstated by the Court of the Appeals for the Eighth Circuit—not because the trove of mitigation evidence was not compelling—but because the evidence was not first presented by Attorney McLean in state court and procedural rules barred the federal district court from granting relief in light of the underdeveloped state court

record. *Williams v. Norris*, 576 F.3d 850, 862-63 (8th Cir. 2009). The Eighth Circuit held that unfortunately for Mr. Williams, "attorney negligence . . . is chargeable to the client." *Williams*, 576 F.3d at 862. Mr. Williams appealed to the United States Supreme Court, who denied relief. In denying certiorari review, United States Supreme Court Justices Sotomayor and Ginsburg lamented the "unacceptable cost to the interests of justice . . . in this particular case." *Williams v. Hobbs*, 131 S. Ct. 558 (2010).

Given this procedural history and the way in which the poor performance of Mr. Wright on direct appeal and Attorney McLean in Rule 37 proceedings prevented meaningful review by this Court and by the federal courts, the miscarriage of justice in this case is profound. The defect in these appellate proceedings began with Mr. Wright, whose actions in plagiarizing work and passing it off as his own and otherwise presenting meritless claims on direct appeal deprived this Court of meaningful appellate review. Mr. Williams respectfully requests that this Motion be granted and set as a case, that a stay of execution be granted, and that this Court recall its direct appeal mandate.

II. THE MOTION TO RECALL THE MANDATE STANDARD

This Court will recall a mandate and reopen a case only in extraordinary circumstances. *Ward v. State*, 2015 Ark. 62 (2015). To ensure that the decision to recall a mandate is not exercised arbitrarily, this Court considers certain factors, including whether there is a defect or breakdown in the appellate process, whether claims were dismissed in federal court because of unexhausted state-court claims, and whether the appeal is a death case requiring heightened scrutiny. *Id.* at 12. Strict satisfaction of all

three facts is not required given this Court's inherent authority to determine whether extraordinary circumstances exist. *Id.* at 13 (citing *Nooner v. State*, 2014 Ark. 296 (2014)). Rather, the Court's power to recall its mandate is to be "held in reserve against grave, unforeseen contingencies." *Robbins v. State*, 353 Ark. 556, 563 (2003) (citing *Calderon v. Thompson*, 523 U.S. 538 (1998)).

III. APPELLATE COUNSEL'S PERFORMANCE IN THIS CAPITAL CASE CONSTITUTES A DEFECT OR BREAKDOWN IN THE APPELLATE PROCEEDINGS

This Court should reopen Mr. Williams's direct appeal proceedings given the catastrophic breakdown of appellate proceedings due to Mr. Wright's plagiarized briefing and otherwise incompetent representation. These objectionable and inexcusable actions of trial counsel not only threaten the integrity of Mr. Williams's direct-appeal process, but the entire appellate process for condemned persons appearing before this Court. *See Nooner v. State*, 2014 Ark. 296, 8 (2014). The following two mutually-reinforcing reasons constitute a breakdown or defect in Mr. Williams's appellate proceedings.

First, significant portions of the briefing Mr. Wright prepared and filed on Mr. Williams's behalf were plagiarized and contained whole swaths of argument sections lifted entirely from other sources without attribution. That Mr. Wright plagariazed portions of his brief given the lengthy extensions of time this Court afforded him is particularly alarming. Mr. Wright filed a Notice of Appeal in Mr. Williams's case on August 14, 1997. *See Williams v. State*, CR 97-949. Mr. Wright requested an extension

of time, and this Court issued a six-month extension, with a notation in bold letters that the extension was to be final. *Id.* Instead of filing Mr. Williams's opening brief on March 23, 1998, Mr. Wright again requested more time. *Id.* This Court granted another extension over the Respondent's objection, but also issued an order to show cause as to why Mr. Wright should not be held in contempt. *Id.*; *see also Williams v. State*, 332 Ark. 671 (1998). Two weeks prior to filing the brief, Mr. Wright appeared before this Court and entered a plea of guilty to the contempt citation. *Williams v. State*, 333 Ark. 580 (1998). Mr. Wright accepted responsibility for violating the Court's order in this case, and represented that his caseload was unusually heavy at the time. *Id.* Nonetheless, he paid the $250.00 fine and was referred to the Committee on Professional Conduct. *Id.* Two weeks later, Mr. Wright filed a twenty-five-page brief on Mr. Williams's behalf raising a half-dozen claims, some as short as two sentences and a longer *Batson* claim and involuntary statement claim. *See* Ex. 1.

Despite receiving continual extensions of time, the brief was replete with language plagiarized from various court opinions and briefing from appellants in other states. Entire sections lifted language from other court cases, including references to short citations of cases that Mr. Wright had not previously cited. *Compare* Ex. 1 at 1092 (entire section of "Appellant's Statement Was Not Voluntary") *with Stephens v. State*, 328 Ark. 81 (1997). The *Batson* test Mr. Wright articulated were two paragraphs lifted from *Batson* itself, including the language cautioning trial judges to use their judgment in deciding whether a prima facie case is made. *See* Ex. 1 at 1086. The legal analysis that

Mr. Wright advanced for this Court to determine whether admission of photographs was unduly prejudicial cited Georgia state law and the language mimicked an appellant's opening brief filed weeks earlier in *McAllister v. Georgia*. *See* Ex. 1 at 1102 (writing in Mr. Williams's brief that "[t]he Georgia Supreme Court has held that photographs taken 'after autopsy incisions . . .' are *per se* inadmissible").

Mr. Wright's attempt at a reply was even more shocking. The brief totaled fourteen pages, and roughly 80% of the brief was plagiarized. Half of the three-page *Batson* reply claim was copied verbatim from the Eighth Circuit case of *Davison v. Harris*, 30 F.3d 963 (1994). *See, e.g.*, Ex. 2 at 3 (referencing cases "in this circuit"). Of the ten-page reply claim concerning the admission of involuntary statements, only thirteen sentences were authored by Mr. Wright. The remainder belonged to Justice Frankfurter in his decision in *Culombe v. Connecticut*, 367 U.S. 568 (1961), which Mr. Wright passed off as his own argument by inserting random citations to the record intermittently to support the claim.

It is unsurprisingly that the plagiarized brief does not address the unique facts of Mr. Williams's case and is nonsensical. Mr. Wright (or rather, Justice Frankfurter) wrote in support of the claim that the trial court erred in allowing Mr. Williams's statement into evidence because:

> […] persons who are suspected of crime will not always be unreluctant to answer questions put by the police. Since under the procedures of Anglo-American criminal justice they cannot be constrained by legal process to give answers which incriminate them, the police have

> resorted to other means to unbend their reluctance, lest criminal investigation founder. Kindness, cajolery, entreaty, deception, persistent cross-questioning.

Ex. 2 at 4-5. This example was a clear flag that Mr. Wright was not the author of this brief. Other portions of Mr. Wright's briefing were irrational, as is seen in this portion of his brief that expounds on the Star Chamber proceedings. Ex. 2 at 9. And the confusion and bizarre language abounds. Mr. Wright referred to "our federal system," *id.* at 10, referenced the "all-night grilling of prisoners," *id.* at 11, and expounded on the procedures under the "Anglo-American" criminal justice system, *see id.* at 5, 12.

Accordingly, Mr. Wright—who was likely paid for legal research and writing he did not do—breached his duty of loyalty to Mr. Williams and deprived Mr. Williams of any right to a meaningful appeal in violation of his constitutional rights. In this capital case, direct-appeal counsel's performance resulted in a miscarriage of justice and also besmirched the integrity of the judicial process.

Second, this Court cannot rely on the original work Mr. Wright did do to rectify the defect in his plagiarized work. Of the portions of the briefing that Mr. Wright actually drafted, the claims were hastily-written or nonsensical, made fatal concessions, or were boilerplate claims that were previously rejected by this Court.

The twenty-five-page brief raised a potpourri of hastily-written claims. The majority of the brief raised three main claims: a sufficiency of the evidence claim (Claim 2), a *Batson* claim (Claim 3), and a claim that the trial court erred in admitted involuntary statements (Claim 4). First, Mr. Wright's challenge to the sufficiency of the evidence

on appeal made no sense given the fact that he conceded Mr. Williams's guilt in opening statement at trial. Second, as recounted above, both the *Batson* and involuntary statements claim were drafted using language lifted from unattributed sources. But even within those claims, Mr. Wright's arguments were unpersuasive. For example, Mr. Wright undercut his own *Batson* argument when he conceded that the prosecution gave a racially-neutral reason for striking a juror. *See* Ex. 1 at 1088. This Court pointed out as much in its opinion. *See Williams*, 338 Ark. at 111 ("As Williams acknowledges, the prosecution stated race-neutral bases for the challenges"). Other portions of Mr. Wright's original *Batson* argument were simply bizarre, including an irrelevant citation from Atticus Finch. Ex. 1 at 1089. This off reference to "children weep[ing]" did nothing to support the argument of racial bias in jury selection.

The remaining claims Mr. Wright drafted were boilerplate claims that this Court had repeatedly rejected. Mr. Wright argued in four sentences that the trial court erred in allowing victim impact evidence, *see* Ex. 1 at 1096, which this Court held was "without merit" and raised and rejected "on many occasions," *Williams*, 338 Ark. at 116. Mr. Wright argued in two sentences that Arkansas's capital murder scheme was unconstitutional, *see* Ex. 1 at 1096, which this Court held was "without merit" and have "previously held and do so here again," *see Williams*, 338 Ark. at 115. Mr. Wright argued in two sentences that the Eighth Amendment prohibits death being imposed in a racially discriminatory manner, *see* Ex. 1 at 1097, which this Court "already [] rejected" two years prior, *see Williams*, 338 Ark. at 115. So too did this Court reject Mr. Wright's two-

sentence claim that the capital murder statute was void for vagueness, *see Williams*, 338 Ark. at 116 ("this argument, too, has been rejected"); along with Mr. Wright's one-sentence claim that Arkansas's death statute violates the Eighth Amendment, *see Williams*, 338 Ark. at 116 ("This argument has been repeatedly rejected").

In addition to reciting boilerplate claims, Mr. Wright failed to properly abstract the record, which the State raised in responsive briefing. *See* Ex. 3 at 25. Instead of abstracting the objections where Mr. Williams received adverse rulings, Mr. Wright instead "set out *verbatim*" what happened in the trial court and included "verbiage not necessary to understanding the argument." *Id.* (emphasis in original). Additionally, Mr. Wright neglected to attach copies of the photographs he argued were inadmissible for review. *Id.* Accordingly, the original work that Mr. Wright did draft and submit on Mr. Williams's behalf cannot save the plagiarized briefing on this appeal.

As such, this Court should either set this motion as a case or recall the mandate on the bases that Mr. Wright's work in this case—both plagiarized and incompetent—constitute a defect in Mr. Williams's appellate proceedings. Given that Mr. Williams is under an imminent sentence of death, and the importance of heightened scrutiny in death cases, the miscarriage of justice if his appeal were endorsed by this Court given Mr. Wright's performance would be profound.

IV. THE PENDING UNITED STATES SUPREME COURT CASE OF *DAVILA V. DAVIS* MAY BE INSTRUCTIVE AND THIS COURT SHOULD STAY MR. WILLIAMS'S EXECUTION

This Court should issue a stay of execution and take this motion as a case for a second reason: the United States Supreme Court will decide whether Mr. Wright's incompetent performance on direct appeal should excuse the procedural default of claims raised in Mr. Williams's federal habeas proceedings. *See Davila v. Davis*, No. 16-6219. In Mr. Williams's federal habeas proceedings, he raised twenty constitutional claims for relief. In response, the State argued that several of the claims should have been raised on direct appeal or Rule 37 proceedings and were thus defaulted. The federal district court agreed, finding that several claims should have been "presented to the state courts" but were not. *See, e.g.*, Ex. 4 at 15 (dismissing Claim Six for failing to present the claim in state court); *see also id.* at 16 (dismissing Claim Nine) (same); *id.* at 19 (dismissing Claims Fourteen and Fifteen) (same); *id.* at 20 (Claim Nineteen) (same).

The question presented to the United States Supreme Court in *Davila*, if resolved favorably for the Petitioner, would allow a potential avenue for relief for Mr. Williams to reopen his federal habeas proceedings. Mr. Williams would attempt to demonstrate that Mr. Wright's ineffective assistance of counsel on direct appeal excuses the procedural default of claims identified by the federal district court. Accordingly, this Court should stay his execution given the open question in *Davila v. Davis*. *See* Ark. Code Ann. § 16-90-506(a)(1).

V. A STAY OF MR. WILLIAMS'S EXECUTION IS WARRANTED

Under Arkansas Code section 16-90-506(a)(1), this Court has the jurisdiction and authority to stay Mr. Williams's execution in light of any competent judicial proceeding.

Here, Mr. Williams's claim that because of Mr. Wright's performance, there was a defect or breakdown in his appellate proceedings constitutes a bona fide and not frivolous issue that warrants a stay of execution for this Court to consider whether to recall the direct appeal mandate. *Singleton v. Norris*, 332 Ark. 196, 207 (1998). Further, the United States Supreme Court's grant of petition for writ of certiorari in *Davila v. Davis*, No. 16-6219, raises a potential avenue for relief, and is second "competent judicial proceeding" that warrants a stay of execution. Ark. Code Ann. § 16-90-506(a)(1).

WHEREFORE, for the foregoing reasons, Mr. Williams respectfully moves this Court to recall its direct appeal mandate, or, at a minimum, take this motion as a case to consider more fully whether to recall the mandate, stay Mr. Williams's execution, and grant any relief as this Court deems just.

Respectfully submitted,

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Scott W. Braden
Ark. Bar No. 2007123
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324 – 6114
Counsel for Movant Marcel Wayne Williams

CERTIFICATE OF SERVICE

I certify that on April 24th, 2017, I filed the foregoing Motion to Recall the Mandate with the Clerk of the Court via the eFlex electronic filign system, which shall serve as notification to all parties.

/s/ Scott W. Braden
Scott W. Braden