****CAPITAL CASE: Execution Scheduled for APRIL 17, 2017****

No._____

In the

Supreme Court of The United States

STATE OF ARKANSAS **PETITIONER**

V.

DON WILLIAM DAVIS **RESPONDENT**

APPLICATION TO VACATE STAY OF EXECUTION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Petitioner respectfully requests that this Court grant a writ of *certiorari* and vacate Respondent's stay of execution, which is scheduled for 7 p.m. CDT, today April 17, 2017. The majority and dissenting opinions from the Arkansas Supreme Court, which are not reported, are attached.

Jurisdiction

This Court has jurisdiction to enter a stay under 28 U.S.C. 2101(f), 28 U.S.C. 1651, and Supreme Court Rule 23.

Introduction

Respondent Don Davis is an Arkansas prisoner who is under a sentence of death that was imposed in 1992 for the brutal murder of Jane Daniel in 1990. He is scheduled to be executed at 7 p.m. CDT, today April 17, 2017; the warrant to carry out his execution expires at 12 a.m.

The Arkansas Supreme Court today at Davis's urging entered a stay of that execution in a 4-3 decision based on an erroneous understanding of the question presented in *McWilliams v. Dunn*, No. 16-5294. The question presented in that case is: "When this Court held in [*Ake v. Oklahoma*, 470 U.S. 68 (1985)] that an indigent defendant is entitled to meaningful expert assistance for the 'evaluation, preparation, and presentation of the defense' did it clearly establish [for purposes of federal habeas review] that the expert should be independent of the prosecution?" The Arkansas Supreme Court clearly misinterpreted that question and held that case was relevant to the non-habeas issues raised by Davis below. Indeed, as explained by the dissenting opinions in the Arkansas Supreme Court, that question has no bearing on Davis' case, and the Arkansas Supreme Court's interpretation of that question clearly misapplies federal law. *Davis v. State*, Nos. CR-92-1385 & CR-00-528 (Apr. 17, 2017) (Womack, J. dissenting); *id.* (Baker, J., dissenting).

Reasons for Granting the Writ and Vacating the Stay

It is axiomatic that this Court is the final arbiter of what federal law means. *See, e.g., Arkansas v. Sullivan*, 532 U.S. 769 (2001). When a state Supreme Court makes a significant, meaningful, and consequential error of federal law, it is up to this Court to remedy that error. Here, as explained by the dissenting justices of the Arkansas Supreme Court, that majority erroneously interpreted the question presented as affecting Davis.

Numerous state and federal decisions have previously considered Davis's claim of error under *Ake v. Oklahoma,* 470 U.S. 68 (1985), and all have long been final. Even still, Davis asked the Arkansas Supreme Court to recall the mandates it issued 25 and 17 years ago in his direct and collateral-review appeals, and to stay his execution. He premised his request on *McWilliams v. Dunn,* apparently believing that when this Court decides that case it may hold that *Ake v. Oklahoma,* 470 U.S. 68 (1985) "clearly established" his entitlement to funds to hire an independent psychiatric expert of his choosing for the penalty phase of his trial.

But the issue before this Court in *McWilliams* is whether *Ake* clearly established that, for purposes of federal habeas review, that the Constitution guarantees the provision of a psychiatric expert independent of the prosecution. *McWilliams v. Dunn,* No. 16-5294, Brief of Petitioner, at i. As a matter of federal law, that decision will not affect Davis's conviction. Indeed, under basic federal

law principles, when this Court applies a new rule of federal law to the parties in a case, it generally only applies to cases *that are still open on direct review*. *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005) (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993)). The corollary is also true. A change in decisional law generally is not retroactive to cases that are already final when the decisional change is announced, unless the change affects the substantive definition of crime for which one stands convicted. *Gonzalez*, 545 U.S. at 536 & n.9 (citing *Bousley v. United States*, 523 U.S. 614, 619-21 (1998) and *Fiore v. White*, 531 U.S. 225, 228-29 (2001)(per curiam)).

Further, any decision in *McWilliams* would not apply to his habeas case considering traditional principles of retroactive application of changes in decisional law. *Carlson v. Hyundai Motor Co.*, 222 F.3d 1044, 1045 (8th Cir. 2000) "('Generally, a change in the law that would have governed [a] dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance' warranting" relief from a final judgment"), *cert. denied*, 529 U.S. 1004 (2000)).

Lastly, the stay should be vacated because Arkansas will suffer irreparable harm if it is not vacated. Indeed, as multiple filings in this Court and the lower courts have made clear in the past few days, Arkansas's supply of lethal injections drugs are set to expire in just two weeks and Arkansas has no supplier of drugs. Thus, allowing the stay to stand will effectively prevent Arkansas from seeing

justice done.

Conclusion

For the forgoing reasons, the stay should be vacated.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

By: _____

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this 17th day of April, 2017, he has emailed this document to counsel for Mr. Davis.

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FORMAL ORDER

STATE OF ARKANSAS,)

) SCT.

SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 17, 2017, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CR-92-1385 AND CR-00-528

DON WILLIAM DAVIS APPELLANT

V. APPEAL FROM BENTON COUNTY CIRCUIT COURT - CR91-80-1

STATE OF ARKANSAS APPELLEE

APPELLANT'S MOTION TO RECALL THE MANDATE AND FOR STAY OF EXECUTION. STAY OF EXECUTION GRANTED; MOTION TO RECALL THE MANDATE TAKEN AS A CASE. BRIEFING COMMENCED. BAKER, WOOD, AND WOMACK, JJ., WOULD DENY. SEE **DISSENTING OPINIONS** THIS DATE.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 17TH DAY OF APRIL, 2017.

Stacey Pectol

CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK (W/COPY OF DISSENTING OPINIONS)

CC/ENCLS: SCOTT W. BRADEN
DEBORAH SALLINGS
KELLY FIELDS, SENIOR ASSISTANT ATTORNEY GENERAL
HON. ROBIN F. GREEN, CIRCUIT JUDGE
GOVERNOR ASA HUTCHINSON
WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION
MARK CASHION, WARDEN, VARNER SUPERMAX UNIT
WILLIAM STRAUGHN, WARDEN, CUMMINS UNIT

SUPREME COURT OF ARKANSAS

Nos. CR-92-1385 and CR-00-528

DON WILLIAM DAVIS APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 17, 2017 DISSENTING OPINION.

KAREN R. BAKER, Associate Justice

I dissent from the majority's decision today to take the matter as a case and stay Davis's execution. Davis's mental competency is not at issue and the United States Supreme Court's action in *McWilliams v. Dunn*, 634 F. App'x 698 (11th Cir. 2015) likely has no bearing on Davis's case. The United States Supreme Court can enter a stay in Davis's case if it deems it appropriate. Accordingly, I dissent.

WOOD, J., joins.

SUPREME COURT OF ARKANSAS

Nos. CR-92-1385 & CR-00-528

	Opinion Delivered: April 17, 2017
DON WILLIAM DAVIS APPELLANT	MOTION TO RECALL THE MANDATE AND FOR STAY OF EXECUTION [BENTON COUNTY CIRCUIT COURT NO. CR-91-80-1]
V.	
STATE OF ARKANSAS APPELLEE	
	DISSENTING OPINION.

SHAWN A. WOMACK, Associate Justice

Don William Davis and Bruce Earl Ward ask us to recall the mandates in their capital murder cases and stay their executions.[1] Davis comes to us on what appears to be at least the 29th appellate review of his case (either individually or collectively with other litigants) since the murder of 62-year-old Jane T. Daniel on October 12, 1990. Similarly, Ward appears before this court after an exhaustive list of appeals and after being sentenced to death by three separate juries for the August 11, 1989, murder of 18-year-old Rebecca Lynn Doss. Their argument can be stated concisely: The state and federal courts involved in their cases have grievously misinterpreted the United States Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985). I would deny these motions for three independently

[1] Davis and Ward filed their motions jointly due to the identical legal arguments presented, but this court has chosen to dispose of them separately. As such, I address the history and claims of both movants together.

sufficient reasons. First, our precedent firmly establishes that we have ruled on this precise issue and held their view of *Ake* is wrong. Second, it has not been the practice of this court to grant the extraordinary relief they request in similar circumstances. Third, even if the Supreme Court decides *McWilliams* in precisely the way that the petitioners predict, it is not clear that Davis or Ward will have any avenues for relief.

First, *Ake* held that criminal defendants are constitutionally entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. Petitioners argue that this language requires that the state pay for a psychiatrist assigned exclusively to assist the defense rather than a neutral evaluator. Davis previously argued this same point before the trial court, this court on direct appeal,[2] this court in his petition for postconviction relief,[3] the federal district court, and the United States Court of Appeals for the Eighth Circuit.[4] Ward also made the argument before the trial court, this court during the course of his multiple direct appeals,[5] postconviction petition,[6] and federal habeas action.[7] Notably, we addressed this exact argument in Ward's prior attempts to have us recall his mandate, which became the law of the case.[8] Davis and Ward both assert that their psychiatric evaluations in the state hospital do not meet the *Ake* requirement. This court has consistently held that the state's protocol

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[2] *Davis v. State*, 314 Ark. 257, 265, 863 S.W.2d 259, 269 (1993).

[3] *Davis v. State*, 345 Ark. 161, 170, 44 S.W.3d 726, 731 (2001).

[4] *Davis v. Norris*, 423 F.3d 868, 875 (8th Cir. 2005).

[5] *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992); *Ward v. State*, 321 Ark. 659, 906 S.W.2d 685 (1995); *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999).

[6] *Ward v. State*, 350 Ark. 69, 84 S.W.3d 863 (2002).

[7] *Ward v. Norris*, 577 F.3d 925 (8th Cir. 2009).

[8] *Ward v. State*, 2015 Ark. 60, 455 S.W.3d 303; *Ward v. State*, 2015 Ark. 61, 455 S.W.3d 818.

satisfies the requirements of *Ake*. *See, e.g.*, *Branscomb v. State*, 299 Ark. 482, 774 S.W.2d 426 (1989). As Davis demonstrates in his petition, we are in a minority on this issue but by no means alone. *See Woodward v. Epps*, 580 F.3d 318 (5th Cir. 2009); *McWilliams v. Comm'r Ala. Dep't of Corr.*, 634 F. App'x 698 (11th Cir. 2015); *Woodward v. State*, 726 So.2d 524 (Miss. 1997).

Second, even the movants recognize that neither a motion to recall the mandate nor to stay an execution is the appropriate forum to reargue a point of constitutional interpretation that this court has already addressed to exhaustion. The overriding interest in the finality of judgments limits these remedies to exceedingly narrow circumstances. We have looked at requests to recall mandates with such skepticism that we have described some of the rare instances in which we grant the relief as "one of a kind, not to be repeated." *Robbins v. State*, 353 Ark. 556, 564, 114 S.W.3d 217, 223 (2003). Instead of bare restatement of their underlying interpretive claims, then, they argue that the United States Supreme Court's decision to grant certiorari in *McWilliams v. Dunn*, 634 F. App'x 698 (11th Cir. 2015), *cert. granted*, __ U.S. __, 137 S. Ct. 808 (2017), overleaps our high bar and requires us to grant their motions, at least until that case has been argued and decided by Supreme Court.

Movants cannot point to a controlling statement that this court recalls mandates or stays executions due to the speculative outcome of a pending argument before the United States Supreme Court. This is because such precedent does not exist. In *Pickens v. Tucker*, 316 Ark. 811, 875 S.W.2d 835 (1994), this court denied a stay of execution through a per curiam opinion. As the concurrence makes clear, we denied the stay even though an active

petition for certiorari in *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993), was before the Supreme Court and the case involved legal issues similar to the ones in *Pickens*. *Id.* (Brown, J., concurring). In *State v. Earl*, 336 Ark. 271, 984 S.W.2d 442 (1999), we even declined to recall a mandate when the Supreme Court *had already ruled* on the arguably related case, which held that a traffic stop similar to the one in Earl's case violated the Fourth Amendment. *Id.* The majority declined to recall the mandate due to Earl's failure to challenge the disputed rule in the original proceeding, while the dissenting justices argued for recall of the mandate in light of Earl's brisk action following the new Supreme Court precedent. *Id.* Given our reluctance to recall the mandate when we had the conflicting Supreme Court opinion squarely in front of us, I would decline to do so here based solely on reading the tea leaves about how the Court might act in *McWilliams*.

Third, I am convinced that the majority's decision to grant the petition is based on the mistaken assumption that movants' boldly predicted outcome in *McWilliams* will have any impact on their available remedies. It is the rule both generally and in the habeas context that new rules of law announced by the Supreme Court apply to cases still on direct review, but only retroactively in a narrow set of circumstances. *See, e.g.*, *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). Movants can muster only that the question of retroactivity under Arkansas law is "unresolved" and that "[t]his case presents an opportunity for the Court to determine that question." They argue that a favorable outcome in *McWilliams* would not be a new rule, but instead a simple clarification that this state and other jurisdictions adopting a similar view of *Ake* have been in clear violation of the plain language of that opinion. I disagree. If the Supreme Court determines that over 30 years of practice

by this and other states in applying *Ake*'s commands about psychiatric evaluations has been constitutionally inadequate, that is a new rule of constitutional law of the sort not typically applied retroactively.

On a final note, and of no less importance, the majority, in a 4-3 decision, is granting relief to the two individuals who were convicted of murdering Rebecca Lynn Doss and Jane T. Daniel. The petitioners had their day in court, the jury spoke, and decades of appeals have occurred. The families are entitled to closure and finality of the law. It is inconceivable that this court, with the facts and the law well established, stays these executions over speculation that the Supreme Court might change the law. This court has a duty to apply the laws of Arkansas as they exist today. While the Supreme Court could certainly change the law on any given day, that does not mean we can ignore our responsibility and refuse to perform our duty. Today, justice has been denied by the majority.

I dissent.

WOOD, J., joins in this dissent.