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THIS IS A CAPITAL CASE. EXECUTIONS SCHEDULED APRIL 17, 2017

Nos. CR 92–1385, CR 00–528

and

No. CR 98–657

IN THE ARKANSAS SUPREME COURT

DON WILLIAM DAVIS
and
BRUCE EARL WARD, Movants/Appellants

v.

STATE OF ARKANSAS, Respondent/Appellee

Appeals from the Circuit Courts of Benton and Pulaski County

MOTION TO RECALL THE MANDATE AND FOR STAY OF EXECUTION

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MOTION TO RECALL THE MANDATE

When a defendant's mental state is likely to be at issue, which was in the trials of Don Davis and Bruce Ward, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (emphasis added).

Both Mr. Ward and Mr. Davis have been denied this right. Four separate times, Mr. Ward sought an independent defense expert under *Ake:* twice in 1990 before his trial and twice more in 1997 before a sentencing retrial. Further, this Court has denied Mr. Ward that to which due process and the Eighth Amendment entitled him: an independent *defense* expert specifically to assist with the development of mitigating evidence. *Ward v. State*, 455 S.W.3d 818, 826-27 (Ark. 2015), *cert. denied*, 136 S. Ct. 356 (2015).[1] This Court's rulings have twice denied

[1] Rejecting Mr. Ward's claim that he was entitled to an independent expert to assess his competency during his first trial, this Court concluded that trial counsel had only sought an independent *Ake* expert as to sentencing-phase issues. *Ward v. State*, 455 S.W.3d 303, 312 (Ark. 2015). The Court therefore ruled that neither it nor the trial court had erred in denying Mr. Ward an independent *competency* expert. *Id.* Because Mr. Ward's first death sentence was vacated on other grounds and he was subsequently re-sentenced, the trial court's undisputed denial of a defense mitigating expert for the first trial is moot.

Mr. Davis what due process and the Eighth Amendment entitled him to: an independent *defense* expert to assist with the development of mitigating evidence. *Davis v. State*, 863 S.W.2d 259, 265 (Ark. 1993) ("*Davis I*"); *Davis v. State*, 44 S.W.3d 726, 730-31 (Ark. 2001) ("*Davis II*"). Indeed, a long line of this Court's cases hold that a referral to the state mental hospital satisfies *Ake*. *See, e.g.*, *Ward*, 455 S.W.3d at 826-27; *Branscomb v. State*, 774 S.W.2d 426, 428 (Ark. 1989); *Starr v. State*, 759 S.W.2d 535, 539 (Ark. 1988); *Parker v. State*, 731 S.W.2d 756, 762 (Ark. 1987); *Dunn v. State*, 722 S.W.2d 595, 596 (Ark. 1987); *Wall v. State*, 715 S.W.2d 208, 209 (Ark. 1986); *Pruett v. State*, 697 S.W.2d 872, 876 (Ark. 1985).

The substance of those rulings is now at issue in the United States Supreme Court. On January 13, 2017, the Court granted certiorari to consider the following question:

> When this Court held in *Ake* that an indigent defendant is entitled to meaningful expert assistance for the "evaluation, preparation, and presentation of the defense," did it clearly establish that the expert should be independent of the prosecution?

McWilliams v. Dunn, 137 S. Ct. 808 (2017). Briefing in *McWilliams* is ongoing, with oral argument scheduled for April 24, 2017, and a decision anticipated before the Court's summer recess.

As explained below, Movants set forth "extraordinary circumstances" to

justify the reopening of their cases. *See Robbins v. State*, 114 S.W.3d 217, 222-23 (Ark. 2003); *Ward*, 455 S.W.3d at 820. The Court should recall its mandate not only because its previous rulings were flatly contrary to *Ake*, but also because the Supreme Court will soon decide that question. To execute Don Davis or Bruce Ward before that question is answered would deeply offend "the integrity of the judicial process." *Robbins*, 114 S.W.3d at 222.

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Mental health has been a "significant issue" for both Mr. Ward and Mr. Davis. Through their trials, counsel for each man notified the courts of their client's mental illness and repeatedly and unsuccessfully requested the assistance of independent experts pursuant to *Ake v. Oklahoma*.

Bruce Earl Ward

In 1990, a Pulaski County jury first convicted Mr. Ward of capital murder for the 1989 death of Rebecca Doss at the Jackpot Convenience Store in Little Rock. Prior to this trial, the court sent Mr. Ward to the state hospital for a competency evaluation. Ward Tr. I 129-74. Though counsel repeatedly requested the assistance of an independent expert, the court declined to appoint one. *Id*. The state's doctors, without reviewing any material from the defense or conducting psychological testing, found Mr. Ward competent to proceed. Ex. 5, Report of

Michal Simon and Wendell Hall, December 12, 1989. Following Mr. Ward's first trial, the Arkansas Supreme Court affirmed the conviction of capital murder but reversed the death sentence due to an evidentiary error. *Ward v. State*, 827 S.W.2d 110 (Ark.), *cert. denied*, 506 U.S. 841 (1992). Justice Dudley dissented from the affirmance of the conviction on the ground that the trial judge was not impartial, as evidenced by how he had treated Mr. Ward's trial counsel differently from the prosecution, and concurred in reversing Mr. Ward's sentence of death. *Ward v. State*, 831 S.W.2d 100 (Ark. 1992) (dissent of Dudley, J.).

The trial court held another penalty hearing in 1995. This second jury again sentenced Mr. Ward to death. But no record of his sentencing was available because of the court reporter's negligence. This Court was thus unable to conduct its required review of a sentence of death, and again reversed the sentence. *Ward v. State*, 906 S.W.2d 685 (Ark. 1995).

Prior to a third sentencing hearing, Mr. Ward was again sent to the Arkansas State Hospital after his attorneys reported bizarre behaviors and delusions interfering with their ability to represent their client. *See*, Ward Tr. III 133, Ex. 3, Affidavit of Tammy Harris, May 7, 2006, Ex. 4, Affidavit of Julie Jackson, June 2, 2006. Mr. Ward refused to speak with the same examiners who had met with him before the first trial, including Dr. Simon, who had testified as a state's witness at

the first trial and had described Mr. Ward as "anti-social" and his condition as untreatable. Ex 1. at 36, Report of Dr. William Logan, April 10, 2010 , Ex. 6 Report of Michal Simon and Wendell Hall, October 17, 2997, Ex. 2 Affidavit of Didi Sallings, June 5, 2006; Tr. I 1198-99.

The examiners terminated their interview, finding only that Mr. Ward's refusal to cooperate did not appear to stem from an Axis I mental disorder. *Id.* The court again declined to appoint an independent doctor. Thus, Mr. Ward was subjected to a third sentencing proceeding in 1997, after which he was again sentenced to death. The Court affirmed the sentence on direct appeal, *Ward v. State*, 1 S.W. 3d 1 (Ark. 1999), and also the denial of his state post-conviction relief, *Ward v. State*, 84 S.W.3d 863 (Ark. 2002).

1. Mr. Ward's Initial 1990 Trial

Prior to Mr. Ward's 1990 trial, his attorney, Didi Sallings, observed her client become "increasingly and noticeably paranoid." Ex. 2, at 1. He lent almost no assistance to the defense. *Id.* Ms. Sallings represented Mr. Ward at his 1990 trial and on his first direct appeal. Ward Tr. I 345; Ex. 2 at l; *Ward v. State*, 827 S.W.2d 110 (Ark. 1992). She observed a "marked and rapid deterioration" in her client's mental health over the course of the representation. Ex. 2, at 1.

Counsel entered a plea of not guilty by reason of a mental defect, and the court sent Mr. Ward to the State Hospital for two weeks, from November 29 – December 14 or 16. *Ward*, 455 S.W. at 306. The State doctors issued a report finding Mr. Ward competent, and that he did not suffer from an Axis I disorder. *Id.* Counsel requested a competence hearing, which was held on January 18, approximately one month from Mr. Ward's release. The state hospital doctor, Dr. Simon testified that he had reviewed documents from Pennsylvania, either from the police or the DOC, and that he had conducted two interviews with Mr. Ward. *Id*. Though it had been less than two months prior, he could not recall what the first interview was about, but "assumed he had interviewed him." *Id*. The second meeting involved administering tests, including an IQ test and a proverbs test. Dr. Simon had no family information or other mental health history, or school or military records.

Counsel for Mr. Ward repeatedly moved for funding for an independent mental health evaluation under *Ake v. Oklahoma*, 470 U.S. 68 (1985), for the purpose of assessing Mr. Ward's sanity and competence for trial, as well as to develop mitigation evidence for sentencing. Ward Tr. I 38-43. Counsel observed that Mr. Ward had been examined only by state experts and that even those experts did not conduct adequate psychological testing, speak with any relatives of Mr.

Ward, or examine any mitigating diagnoses beyond the issues of sanity and competence. Ward Tr. I 201-08; *see also id.* at 140-44, 157, 171. Counsel argued that evaluation was "inadequate for purposes of mitigation" because the doctors relied solely on documents from the State and failed to conduct adequate interviews and testing. *Id*.

The trial court trivialized the motion, describing the relevance of mental health issues as a "figment of your imagination." *Id.* at 208. It repeatedly chastised counsel, saying "You all have got a $650,000 budget. How you spend it is up to you." *Id.* at 206-07. The court also remarked that "the Court's not going to get into hiring assistant lawyers . . . If we ain't got lawyers that can get prepared, we need to get some." *Id.* at 207. Trial counsel protested that no one in her office had the necessary psychological training, but the court rebuffed her: "[I]f you feel that you should before you try these cases, Didi, you ought not be trying them." *Id.* These remarks resembled other aspects of the circuit court's animus toward the defense. See *Ward v. State*, 831 S.W.2d 100, 102 (1992) (Dudley, J., dissenting) (noting that Judge Lofton failed to "manifest the most impartial fairness in the conduct of the trial").

During the sentencing phase of trial, the prosecution called the state-employed Dr. Simon as a rebuttal witness. Dr. Simon testified that he diagnosed

Mr. Ward with antisocial personality disorder, which he described as a "life-long disorder" that is "resistant to treatment." Tr. I 1198-99.

2. Mr. Ward's 1997 Penalty Phase Retrial

At Mr. Ward's 1997 retrial, counsel were again precluded from obtaining a mental health expert. At the outset of the trial, the court again committed Mr. Ward to the state hospital for evaluation. Ward Tr. III 23. The defense again requested an independent expert and was again denied. Ward Tr. III 89-94, 126.

Three weeks before the re-sentencing, Mr. Ward's counsel moved to stay the trial proceedings. Trial Ward Tr. III at 127- 29; Ex. 3 at 1-2. Mr. Ward's attorney Tammy Harris had just visited with Mr. Ward and wrote that his condition had "deteriorated to the point that he can not or will not cooperate with present counsel and is unable or unwilling to proceed to trial with present counsel." *Id.* at 1; Trial Ward Tr. III at 127. The motion recounted a number of "demands" that Mr. Ward wished to make of the trial court. These included a "full blanket presidential pardon," a new vehicle to replace the motorcycle seized by police at the crime scene, and a cash award of $1,000,000 for each year of his incarceration. Ex. 3 at 1; Trial III 128. The motion referenced additional, but privileged, evidence of Mr. Ward's mental state, which Ms. Harris later revealed. Specifically, Mr. Ward said that people "at the highest levels of government" were trying to kill him, and that

there was a "hit" out on Ms. Harris and her family from which Mr. Ward was trying to protect her. Ex. 3, at 2. Counsel believed that "Mr. Ward was having a pronounced break with reality," and she was "sincerely concerned that he was not competent to proceed." *Id.*

Ms. Harris's co-counsel, Julie Jackson, gathered "elaborate" details from Mr. Ward concerning his belief that the mafia in Pennsylvania "were out to get him and had been after him a long time." Ex. 4 at 1. Ms. Jackson found Mr. Ward's beliefs to be sincere but delusional, and came to understand her client's penchant for delusions after spending a great deal of time with him. *Id.* Mr. Ward's delusions "would not have been obvious from a brief or casual conversation." *Id.*

Though Ms. Harris had already unsuccessfully moved the court for an independent expert under *Ake*, she renewed her motion counsel had filed another motion for an independent mental health evaluation under *Ake v. Oklahoma*, 470 U.S. 68 (1985), which the court again denied. Ward Tr. III 89-94. Counsel explained that a mental condition or emotional disturbance could be used as *mitigating evidence* beyond the issues of whether Mr. Ward was legally insane at the time of the offense or competent to stand trial, and she affirmed that she had

probable cause to believe that access to a defense psychiatrist would produce mitigating evidence. *Id*

The trial court had ample evidence to justify the request. In addition to the information counsel supplied him about Mr. Ward's delusions (which Mr. Ward himself then affirmed in court), he also had the entirely of the record from Mr. Ward's initial trial. At his first resentencing, his attorneys introduced video depositions of teachers and counselors who knew Mr. Ward during his youth and who portrayed him as a young man with serious psychological issues. Thomas Ritter, Mr. Ward's Sixth Grade Teacher, testified that Mr. Ward had mental and emotional problems, had to be referred to a psychologist, and needed therapeutic interventions that were not provided to him. Ward Tr. II 863. He recalled that Mr. Ward engaged in bizarre behavior; and specifically remembered that Mr. Ward ate flies at school and did not seem to understand that there was anything wrong with the behavior. *Id.* Ms. Warthman, who supervised Mr. Ward in the civilian air patrol in 1971, testified that Mr. Ward had emotional problems when she supervised him and that she had informed Mr. Ward's family that he needed psychiatric help. *Id.* Also before the trial court was the deposition testimony of Dr. Anthony Cillufo, a Pennsylvania psychologist who evaluated Mr. Ward in 1977. *Id.* at 864-87. Dr. Cillufo testified that Mr. Ward had features of a paranoid disorder at the time of his

evaluation. *Id*. at 872. He also noticed indications of neurological damage (*Id.* at 873)—a particularly significant finding given that trial counsel had discovered (and informed the trial court) that Mr. Ward had suffered from a high fever for an extended period of time during childhood, which is known to cause neurological damage and complications. Notably, these aspects of Mr. Ward's presentation were of sufficient concern that Dr. Cillufo recommended that Mr. Ward undergo further evaluation. *Id*. at 873.

The trial court denied the motion to stay the trial date, but it again ordered Mr. Ward to be evaluated by both the state psychologist and psychiatrist who had seen him in 1989 and found him sane and competent and testified against him. Ward Tr. III 130, 133-34. Mr. Ward, in turn, refused to cooperate with the state examiners, declined to answer any questions, and made clear that the triggering motion was counsels' rather than his own. *Id*. at 133; Ex. 6 The examiners did not expressly find Mr. Ward competent or sane, but wrote that their "brief interview" with the defendant did not indicate that his uncooperativeness was itself due to a mental disorder. Ex. 6; cf. *Rees v. Peyton*, 384 U.S. 312, 313 (1966) ("Psychiatrists selected by the State who sought to examine Rees at the state prison found themselves thwarted by his lack of cooperation, but expressed doubts that he was insane.").

Mr. Ward's mental condition proved to be a significant issue at the penalty phase retrial. Although trial counsel was deprived of the tools necessary to adequately present the defense, they nevertheless sought to avoid the death penalty on the grounds that Mr. Ward suffered from a "mental or emotional disturbance." Tr. III 434-37, 541-46. Counsel offered the same videotaped statements that they had presented during the first retrial. Thus, teacher Thomas Ritter explained that Mr. Ward was disruptive in school or aggressive toward other students but would have a "blank stare" with "no comprehension that he had done anything wrong," and also that something was "basically wrong" with Mr. Ward but that the school did not have the capacity to assess or address it. Ward Tr. III 510, Ex. 1 at 35. A guidance counselor described Mr. Ward as "exceptional" because he was "bright" but did not perform well in school; she opined that Mr. Ward has mental problems and would have benefitted from one-on-one assistance that the school did not offer. *Id.* Mr. Ward's supervisor from the Civil Air Patrol Program, in which Mr. Ward was a cadet, said he had emotional problems dealing with his peers, and that she recommended to Mr. Ward's family that they seek psychiatric help for him. *Id.* at 511. The defense also presented the videotaped testimony of Dr. Cillufo, who described the findings he reached when he evaluated Mr. Ward in 1977. *Id.*

Much of the State's closing focused on contesting Mr. Ward's claims of mental or emotional disturbance, and on arguing that any mental condition that Mr. Ward did have was aggravating rather than mitigating. *Id*. at 533-34. Ultimately, at least one of the jurors found that Mr. Ward suffered from a mitigating "mental or emotional disturbance." *Id*. at 558. The jury nevertheless sentenced Mr. Ward to death. *Id*. at 559.

3. Post-conviction Procedural History.

Mr. Ward's death sentence was affirmed in state post-conviction and on federal habeas corpus. See *Ward v. State*, 84 S.W.3d 863 (Ark. 2002); *Ward v. Norris*, 577 F.3d 925 (8th Cir. 2009), *cert. denied*, 559 U.S. 1051 (2010). Mr. Ward's competence has been called into question over the course of many legal proceedings. See, e.g., *Ward*, 577 F.3d at 942 (Melloy, J., dissenting) (noting "compelling evidence" of mental deterioration before the 1990 trial and after Mr. Ward was examined at the state hospital); Logan Report, Ex. 1 (previous habeas counsel stating it was "obvious . . . that Mr. Ward was delusional" and that Mr. Ward was paranoid "to the point that counsel has difficulty engaging in meaningful dialogue with him about the case."). Those proceedings include the initial trial, when defense counsel noticed that her client had become "increasingly and noticeably paranoid" as the trial approached (Ex. 2 at 1) and documented her

client's history of mental illness, only for Judge Lofton to brush aside counsel's concerns as a "figment of your imagination." *Id.* at 208. A similar motion was denied on re-sentencing in 1997. Ward Tr. III 89-94, 126.

In 2013, Mr. Ward moved this Court to recall the mandates from his first trial and his final resentencing. *See See Ward*, 455 S.W.3d 303; *Ward*, 455 S.W.3d 818. He supported those motions with an evaluation from forensic psychiatrist William S. Logan, M.D., who had evaluated Mr. Ward in prison, reviewed previous evaluations and documents relevant to his mental health, and diagnosed Mr. Ward with "schizophrenia, paranoid type, as evidenced by a preoccupation with persecutory and grandiose delusional ideas, and occasional hallucinations and disorganized thinking." Ex. 1 at 33. Dr. Logan additionally found Mr. Ward was mentally incompetent during his initial trial as well as the 1997 resentencing. *Id*. at 40-41.

Dr. Logan criticized the state hospital examinations as incomplete because of the limited scope of information that the state doctors considered:

> Prior to his 1997 resentencing, Mr. Ward refused all cooperation with the two examiners who had seen him in 1989, and with whom the trial court consulted after Attorney Harris moved to stay the proceedings and obtain a mental health evaluation. The resulting report found no evidence that Mr. Ward was incompetent, but noted his refusal to cooperate. As Mr. Ward was incommunicado, the examiners found no evidence that his refusal to cooperate itself stemmed from a mental disease or defect. The examiners, however, never explored with Mr.

> Ward the reason for his decision not to cooperate or offered an explanation for his non-participation. The examiners did not solicit information from his attorneys or the court records about his communication deficits, his difficulty understanding legal procedures or his illogical requests of his attorney. There was no inquiry as to the reasoning behind Mr. Ward's efforts to thwart the collection of mitigating evidence that could be used to advocate for a life sentence.

Id. at 36.

Dr. Logan also disagreed with the state doctor's diagnosis of antisocial personality disorder, and he explained that Mr. Ward's mental health history reveals numerous signs of an ongoing psychotic illness and deteriorating condition. Mr. Ward's observed inability to function appropriately at school, for example, is itself "consistent with a diagnosis of schizophrenia and indicative of the individual's limited social skills and poor performance in achievement-related activities." *Id*. at 37. Likewise, Dr. Cillufo observed in his 1977 report in Pennsylvania that Mr. Ward's "violent actions are the result of a mixed personality disorder," with features of antisocial, explosive, passive-aggressive and paranoid personality disorders, and also that Mr. Ward acted as an isolated loner among his peers, suffered from fainting spells and blackouts as a child, and may have neurological damage that contributed to his impulsive behavior. *Id*. at 37-38. A Pennsylvania prison evaluation from the same year stated that Mr. Ward's answers to the evaluator's questions had "a paranoid flavor about them," and the prison's

intake summary noted Mr. Ward's longstanding social isolation. *Id.* at 38. These decades-old observations are consistent with developing schizophrenia, Dr. Logan observed, and they necessitated additional inquiry and evaluation. *Id.*

Mr. Ward moved to recall the mandate, arguing that he was entitled to the assistance of a defense expert who would have assisted trial counsel in asserting Mr. Ward's incompetence for trial, and, as relevant here, in developing mitigating evidence for sentencing, in his 1990 and 1997 trials. This Court denied both motions. With regard to the 1990 trial, this Court declined to recall the mandate for two reasons. As to trial counsel's request for an independent competence evaluation, this Court held that trial counsel did not specifically cite the issue of competence as a basis for seeking funding under *Ake*, and, alternatively, that "Ward was examined at the state hospital; therefore, the requirements of *Ake* were satisfied." *Ward*, 455 S.W.3d at 312. With regard to the 1997 resentencing, this Court agreed that trial counsel squarely sought the relief in question: an independent defense expert to aid in the development of mitigating evidence; nevertheless, the Court again declined to overrule its precedent "that a competency evaluation at the Arkansas State Hospital satisfies *Ake*." *Ward*, 455 S.W.3d at 826-27.

Don William Davis

Mr. Davis was charged with the October 12, 1990, shooting death of Jane Daniel in the Circuit Court of Benton County, Arkansas. Shortly after arraignment, the court issued an order pursuant to § 5-2-305 of the Arkansas Code, which requires that a defendant undergo a mental examination if there is "reason to believe that the mental disease or defect of the defendant will or has become an issue in the cause." Ark. Code Ann. § 5-2-305(B). Specifically, the court ordered that Mr. Davis be examined by Dr. Travis Jenkins, a psychiatrist at the Ozark Guidance Center, for purposes of determining "whether or not there are reasonable grounds to believe the defendant to be presently insane or that he was insane at the time of the alleged offenses." *See* Ex. 9, Order, 3/8/91.

Dr. Jenkins met with Mr. Davis on March 13, 1991, for approximately 70 minutes. Tr. 3439. He did not review any records, conduct any tests, or speak to any third parties familiar with Mr. Davis's life history. On March 14, 1991, Dr. Jenkins sent a one-page letter to Circuit Judge Keith stating his opinion that Mr. Davis was "competent to stand trial and fit to proceed." *See* Ex. 10, Letter from Dr. Jenkins to Judge Keith, 3/14/91. According to Dr. Jenkins, there was no evidence that Mr. Davis was psychotic at the time of the evaluation or at the time of the alleged offenses. Dr. Jenkins did diagnose Mr. Davis with Attention-Deficit Hyperactivity Disorder (ADHD) and noted that this "could have contributed to the

commission of the alleged offenses." *Id.* However, he concluded that ADHD "does not constitute a psychosis of any sort" and is "not a mental disorder or defect to the degree of criminal irresponsibility." *Id.*

After receiving Dr. Jenkins's letter, Mr. Davis filed a motion requesting a full and complete examination and observation in the Arkansas State Hospital for at least 30 days by a qualified psychiatrist. According to Mr. Davis, such evaluation was "warranted in order to present mitigation circumstances," including but not limited to "the fact that Defendant was under extreme mental or emotional disturbance, that the Defendant was acting under unusual pressure or influences or that the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse." Ex. 11, Motion for Psychiatric Examination, filed March 26, 1991, at 3-4. On April 1, 1991, the State informed the court that it joined Mr. Davis in requesting a further evaluation. *See* Ex. 12, Letter from David Clinger to Judge Keith, dated April 1, 1991.

On April 8, 1991, the trial court granted the joint motion, specifying that the report of the Arkansas State Hospital was to include, *inter alia*, "[a]n opinion as to whether the alleged conduct of the Defendant was committed while he was under extreme mental or emotional disturbance or while he was under unusual pressures

or influences." Ex. 13, Order for Examination, April 8, 1991, ¶ 2(E).

John R. Anderson, Ph.D., a staff psychologist with the Arkansas State Hospital, submitted a report some two and a half months later. *See* Ex. 14, Forensic Report of June 27, 1991. Dr. Anderson concluded that "Mr. Davis was able to appreciate the criminality of his conduct at the time of the alleged crime, and was able to conform his conduct to the requirements of the law at the time of the alleged crime." *Id.* at 5. Notably, while the report documented findings of childhood abandonment and neglect, learning disabilities, and severe alcohol and substance abuse from a young age continuing through to the time of the alleged crime, it included no indication that these findings could be used in support of mitigating circumstances. Rather, the report simply stated that "it is the examiner's opinion and recommendation to the court Mr. Davis be found responsible for his behavior at the time of the alleged crime." *Id*. The report did not address the questions raised by the trial judge. It offered no opinion on whether Mr. Davis was under an extreme mental or emotional disturbance or was acting under unusual pressures or influences. The answers to these questions were important because, although they would not negate Mr. Davis's criminal responsibility, they would serve as mitigating circumstances that would likely persuade one or more jurors to vote for a life sentence. *See Kenley v. Armontrout*, 937 F.2d 1289, 1303–09 (8th

Cir. 1991) ("The fact that [a] report rules out a mental disease or defect and incompetency does not mean it rules out lesser but potentially mitigating conditions and disorders.").

On September 13, 1991, Mr. Davis moved the court for funds to employ an independent psychiatric expert. *See* Ex. 15, Motion for Funds for Employment of an Independent Psychiatric Examiner, Sept. 13, 1991. In support thereof, Mr. Davis noted that the State Hospital evaluation had revealed several factors regarding his mental condition, including but not limited to ADHD, alcohol abuse, and Psychoactive Substance Abuse, and argued that "further exploration and explanation of these factors is important to mitigating factors in any sentencing hearing which may occur." *Id.* ¶ 9. On October 15, 1991, Mr. Davis filed an amendment to his motion, specifically requesting that approximately $2,000 be granted for funds to employ Dr. John N. Marr, a clinical psychologist. *See* Ex. 16, Defendant's Amended Motion for Funds for Employment of an Independent Psychiatric Examiner, Oct. 15, 1991. In the meantime, counsel contacted the State Hospital and spoke to a social worker who had participated in Mr. Davis's evaluation. Ex. 17, Affidavit of Jack Martin, May 3, 1994, ¶ 3.The social worker advised counsel that, "it was the opinion of the evaluators that neither alcohol nor drug abuse mitigated violent behavior," and that the same was true for factors such

as child abuse or neglect and ADHD. *Id.* ¶ 4.

Mr. Davis's trial commenced January 28, 1992, and the jury rendered a verdict of guilty on the capital murder charge on March 6, 1992. The entire penalty phase was conducted in a single day, on March 9, 1992. The State called no witnesses, relying on the guilt phase evidence to establish aggravating circumstances. The defense called just five witnesses. The first was Dr. Jenkins, the court-appointed psychologist who had conducted a 70-minute interview of Mr. Davis prior to trial for the sole purposes of determining whether he was competent to stand trial and whether he was psychotic at the time of the alleged offense. Dr. Jenkins conducted no further examination of Mr. Davis prior to his penalty testimony, reviewed no records, and spoke to no third party witnesses. The sum of Dr. Jenkins' mitigating evidence was that Mr. Davis suffered from ADHD, which "can cause people to get into situations through their impulsivity and poor judgment more quickly than perhaps someone without the disorder." Tr. 3442. The second defense witness was a counselor employed at a local hospital who testified that, while in jail awaiting trial, Mr. Davis had gone on a six-day hunger strike and suffered depression. Finally, three members of Mr. Davis's family testified about his parents' abandoning him as a baby and continued neglect of him throughout his childhood, as well as briefly touching on Mr. Davis's behavioral

and learning difficulties growing up. The jury sentenced Mr. Davis to death on March 9, 1992.

This Court affirmed the conviction and sentence on direct appeal. *Davis I*, 863 S.W.2d at 265. As relevant here, the Court rejected Mr. Davis's claim that *Ake* required an independent mental health expert to aid in the penalty phase defense. The Court reasoned that *Ake* does not entitle a defendant "to choose a psychiatrist of his personal liking or to shop around to find one who will support his insanity defense." *Id.* (quoting *Sanders v. State*, 824 S.W.2d 353, 356 (Ark. 1992)). Therefore, the Court held, the trial court "did not err in refusing to approve funding of a private psychiatric evaluation for Davis after approving two previous evaluations." *Id.* The Court adhered to its ruling on Mr. Davis's Rule 37 appeal. *Davis II*, 44 S.W.3d at 730-31. Rejecting Mr. Davis's claim that he required an independent expert to prepare his penalty phase defense, the Court suggested that Dr. Jenkins' and the Hospitals' reports provided evidence that was relevant to mitigating circumstances "such as ADHD, psychoactive substance abuse, and antisocial personality disorder." *Id.* at 731 ("This testimony was available for consideration by the jury in the sentencing phase, and the issue was reached on direct appeal.").

The federal courts rejected Mr. Davis's claim on habeas corpus review.

Affirming the United States District Court's denial of relief, the Eighth Circuit held that this Court's rulings were not "contrary to … or an unreasonable application of, clearly established Federal law" – specifically, that *Ake* did not clearly entitle Mr. Davis to expert assistance beyond that provided by Dr. Jenkins. *See Davis v. Norris*, 423 F.3d 868, 874-77 (8th Cir. 2005) ("*Davis III*"). Judge Bye dissented. He observed that Dr. Jenkins' cursory 70-minute evaluation yielded only preliminary conclusions, that the examination did not meaningfully search for or assess mitigating evidence, and that Dr. Jenkins was not a defense expert and was equally available to all parties without the benefit of private consultation. *Id.* at 885 (Bye, J., dissenting). The mere fact that Dr. Jenkins' threadbare conclusions were "available for consideration by the jury in the sentencing phase" did not satisfy *Ake*, the dissent reasoned. *Id.* (quoting *Davis II*, 44 S.W.3d at 731). Judge Bye observed that *Ake* clearly and plainly entitled Mr. Davis to a partisan defense expert:

> The examination Davis received from Dr. Jenkins does not come close to satisfying the requirements of *Ake*. To fulfill the requirements of due process, *Ake* contemplates an expert who, following a full and thorough examination, works side by side with the defendant and defense counsel to build a defense strategy. It assumes the expert will be available to provide information regarding the defendant's mental condition and assist defense counsel in presenting the information effectively. Under *Ake*, the expert must be available to assist in anticipating and rebutting the prosecution's case. In other words, the expert serves as a "basic tool" much like defense counsel.

Id.

This motion follows, subsequent to the Supreme Court's decision to resolve whether *Ake* clearly established the right that Mr. Davis has been asserting all along.

ARGUMENT

I. MOVANTS' CLAIM IS COGNIZABLE ON A MOTION TO RECALL THE MANDATE.

The Court has the inherent authority to recall its mandate and reopen a case under the appropriate "extraordinary circumstances." *Robbins*, 114 S.W.3d at 223; 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 v. State*, 438 S.W.3d 233, 239 (Ark. 2014) (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*, 455 S.W.3d at 821; *Engram v. State*, 200 S.W.3d 367, 369-70 (Ark. 2004). The Court does not require strict satisfaction of the three familiar *"Robbins* factors" – that is, 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 – and indeed, the Court has never fully delineated

the circumstances that might justify recall of the mandate. *Ward*, 455 S.W.3d at 820-21; *Robbins*, 114 S.W.3d at 222. 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 (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)).

Movants' case presents just such a grave an unforeseen contingency: a strong argument that the Court clearly and plainly erred in denying a claim of constitutional right under Supreme Court precedent, coupled with the Supreme Court's announced intention to decide whether the precedent in question clearly and plainly dictated the right being claimed. It is likely that the Supreme Court will answer the question affirmatively and hold that *Ake* entitles the defendant to an independent expert to support the defense when mental health is at issue. The majority of lower courts have so held. *Compare Jones v. Ryan*, 583 F.3d 626, 638 (9th Cir. 2009); *Schultz v. Page*, 313 F.3d 1010, 1016 (7th Cir. 2002); *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003); *Szuchon v. Lehman*, 273 F.3d 299, 317-18 (3d Cir. 2001); *United States v. Barnette*, 211 F.3d 803, 824-25 (4th Cir. 2000); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990); *Morris v. State*, 956 So.2d 431, 447-48 (Ala. Crim. App. 2005) (all so holding), *with Woodward v. Epps*, 580 F.3d 318, 332 (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, 529 (Miss. 1997) (denying that *Ake* requires an independent defense expert).

If the Supreme Court adopts the majority view, it will mean that the right to an independent expert was "clearly established" by *Ake* for purposes of federal habeas corpus review under 28 U.S.C. § 2254(d)(1). That expected holding will establish not only that this Court erred by ruling otherwise on Movants' previous appeals, but that the error was objectively unreasonable. *See Williams v. Taylor*, 529 U.S. 362, 409-11 (2000). Put differently, the anticipated holding in *McWilliams* will establish that this Court's reading of *Ake* was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). An error so palpable exceeds the showing needed to recall the mandate. It is necessarily "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.

McWilliams justifies recall of the mandate for a second and related reason: appellate courts widely permit that remedy when the court's previous decision conflicts with an intervening decision of the United States Supreme Court upholding the rights of the accused. *E.g.*, *State v. Whitfield*, 107 S.W.3d 253, 264-

65 (Mo. 2003); *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997); *United States v. Skandier*, 125 F.3d 178, 182-83 (3d Cir.1997). The Court's opinion in *State v. Earl*, 984 S.W.2d 442 (Ark. 1999), supports such a recall of the mandate. After this Court affirmed Earl's narcotics conviction, the Supreme Court issued an opinion disapproving the type of traffic stop that had led police to search Earl's vehicle. *See Earl*, 984 S.W.2d at 442; *Knowles v. Iowa*, 525 U.S. 113 (1998). The Court declined to recall its mandate, but not because it rejected the premise that an intervening Supreme Court decision could justify such relief – a premise endorsed at length by three justices. *Earl*, 984 S.W.2d at 443-44 (Brown, J., dissenting; joined by Imber and Thorton, J.J.). Rather, the Court observed that Earl had not objected to the search; Earl had asserted the error only "after the *Knowles* case was decided and after our court's mandate was issued." *Id.* at 442.

Earl, then, suggests that an intervening and dispositive Supreme Court case is an "exceptional circumstance" to justify relief on a preserved claim of error. *Id.* at 443 (Brown, J., dissenting). "[S]imple fairness requires it." *Id.* at 444. Subsequent cases confirm that the Court declined to recall its mandate solely because Earl's error was unpreserved. *See Engram*, 200 S.W.3d at 370-71; *Robbins*, 114 S.W.3d at 222. That is not the case for Movants' claim, which has been argued orally and by motion in the trial court and rejected by this Court on

the merits. *See Ward*, 455 S.W.3d at 826-27; *Davis I*, 863 S.W.2d at 265; *Davis II*, 44 S.W.3d at 730-31.

II. *AKE V. OKLAHOMA* ENTITLED MOVANTS TO AN INDEPENDENT MENTAL HEALTH EXPERT TO BUILD A PENALTY PHASE DEFENSE.

By denying an independent mental health expert, the circuit court denied to Mr. Ward and Mr. Davis one of the "basic tools of an adequate defense." *Ake*, 470 U.S. at 77-80. When a defendant places his or her mental state at issue, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. The Constitution guarantees expert assistance not only when a defendant's competence or sanity are at issue but also when his mental condition may be "a significant factor at the sentencing phase." *Id.* at 86.

Quite beyond a joint expert who reports to all parties and the Court, a mentally ill defendant who faces the ultimate punishment requires his own expert to help build his own defense:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process

> requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Id. at 84. Although *Ake* was clear that an indigent defendant does not have the right to an expert of his choosing, *id.* at 83, it was equally clear that the expert must become a member of the defense team – not only by evaluating the defendant, but also to "present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82. The defense expert must "translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand." *Id.* at 80.

The clearly-established right to a *defense* expert was disclaimed by the Eleventh Circuit in the now-pending *McWilliams* case. On habeas review, the Eleventh Circuit ruled that *Ake* entitled the defense only to a "competent" expert who then examines the defendant. *McWilliams v. Comm'r Ala. Dept. of Corr.*, 634 F. Appx. 698, 705-06 (11th Cir. 2015). That question is now before the Supreme Court, which agreed to consider whether *Ake* clearly established the very right now being asserted by Mr. Ward and Mr. Davis.

As the merits briefing in *McWilliams* points out, *Ake* observed that a mental health expert working exclusively for the defense was essential to the proper functioning of the adversarial process: "By organizing a defendant's mental

history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them." *Id.* at 81 (emphasis added). A shared expert simply does not suffice: "The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution." *United States v. Sloan*, 776 F.2d 926, 928-29 (10th Cir. 1985). *See* Petitioner's Br. in *McWilliams v. Dunn*, U.S. No. 16-5294, at 22-23, 26-27 (filed Feb. 27, 2017), available at 2017 WL 836523.

The facts and circumstances of *Ake* make plain the defendant's entitlement to an independent expert. *See id.* at 25-26 (per Petitioner's Brief in *McWilliams*). In *Ake*, the defendant was evaluated by neutral mental health professionals who worked for the state hospital, and those evaluations were presented as evidence at trial and sentencing. *Ake*, 470 U.S. at 71-73. The trial court denied the defendant's request for expert assistance based on *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), in which "neutral psychiatrists" had examined the defendant and this Court found that no additional expert assistance was necessary. *Ake*, 470 U.S. at 84-85. In reversing and ordering a new trial, the Court rejected a neutral evaluation of this kind as insufficient to meet the requirements of due process. *Id.* at 86-87. In

light of the Court's "increased commitment to assuring meaningful access to the judicial process," *id.* at 85, an indigent defendant is entitled to an independent expert to assist the defense, including in trial preparation, *id.* at 83-85.

Justice Rehnquist's dissent erases any conceivable doubt about *Ake*'s dictate, as McWilliams also argues. *See* 2017 WL 836523 at 27-28 (petitioner's brief). Justice Rehnquist dissented precisely because he disagreed with the Court's holding that the Due Process Clause required the provision of an expert who would assist in "evaluation, preparation, and presentation of the defense," as the majority had held. *Id.* at 92 (Rehnquist, J., dissenting). In his view, "all the defendant should be entitled to is one competent opinion," *id.*, and "not to a defense consultant," *id.* at 87. If the majority meant only that a defendant was entitled to a neutral expert, Justice Rehnquist would have had no reason to dissent. *Contra Ward*, 455 S.W.3d at 826 ("However, we have recognized that a defendant's rights are adequately protected by an examination at the state hospital, an institution that has no part in the prosecution of criminals.").

1. Mr. Ward's mental condition was significant factor at his trial pursuant to *Ake v. Oklahoma*, and he was entitled to a defense expert to aid in the development of mitigating evidence.

Mr. Ward's mental condition was a "significant factor" from the very

beginning of his case, and remained such through his 1997 resentencing. *Ake*, 470 U.S. at 82. Prior to both the1990 trial, counsel entered a plea of not guilty by reason of mental disease or defect and the court ordered that he be committed to the Arkansas State Hospital. Ward Tr. I 8. Subsequently, counsel made several motions – orally and in writing – for an independent expert, emphasizing that the state doctors did no psychological testing and no evaluation relevant to mitigation. Ward Tr. I 38-43, 69-70, 171-71, 202-206. Counsel notified the court that mental health was going to be an issue at trial, but no one in their office was trained in psychology or psychiatry. *Id*. at 206-08. The trial court refused to grant counsel an independent expert.

In the 1997 resentencing, mental health was again a significant issue. Prior to trial, counsel again requested a mental health evaluation for their client and the court again committed Mr. Ward to the state hospital. Ward Tr. III at 8, 23. Counsel again requested funds for a mental health expert to assist the defense in preparing their case in mitigation. *Id*. at 89-94. Prior to the trial, she requested a stay in order to obtain a mental health evaluation because Mr. Ward was mentally deteriorating and floridly delusional. *Id*. at 128-29. The court refused to order an evaluation by an independent doctor. Instead, it sent Mr. Ward to the very doctor who had testified against him in his first trial.

None of the evaluations in the 1990 and 1997 commitments met the standard under *Ake*. In neither commitment did the state doctors review materials from the defense regarding Mr. Ward's individual and family mental health history. Nor did the doctors conduct *any* mitigation investigation or assist the defense with their penalty phase strategy and presentation. The court was well aware of the need for such investigation, having heard the video testimony at the second trial from a teacher, psychologist and military supervisor, who had observed psychological or mental issues in Mr. Ward at very different moments in his life. The military supervisor and teacher had each recommended to Mr. Ward's parents that they seek psychological help for their son. Further, they did not conduct psychological testing or interview Mr. Ward about his history, both of which were indicated by the prior testimony. In the 1990 evaluation, state doctors allegedly interviewed Mr. Ward, but could not recall the content of the interview less than two months later. In 1997, Mr. Ward refused to speak with the interviewers and they concluded, without apparent reason, that his refusal was not due to his delusional state. Ward Tr. III 133-34. Nor was there any relationship, communication or privilege between the defense counsel and the state doctors to facilitate any assistance or consultation with investigation and presentation of mental health evidence.

Such evidence existed, but counsel were unable to discover and present it due to their client's mental illness. Mr. Ward suffers from anosognosia, or a lack of awareness of his mental illness. Anosognosia is a key feature of schizophrenia. It is a "symptom of schizophrenia itself rather than a coping strategy." *See* DSM V at 15. Thus, schizophrenics, by virtue of their mental illness lack awareness of their own mental illness. Instead, counsel's efforts to investigate Mr. Ward's mental illness actually fed into his delusions. Were the court to have granted Mr. Ward's counsel an independent expert, to review his family history as well as his own admitted delusions, such an expert would have assisted counsel in understanding schizophrenia in order to better work with their client. For example, an independent expert could assist the defense in understanding that Mr. Ward's demands, for example, for a "full presidential pardon," were not the demands of a sane or a difficult client, but the delusions of a paranoid schizophrenic. An independent expert could have helped to develop this information and present it to a jury, as Dr. Logan has done in the post-conviction setting of this case. There is no question that Mr. Ward was deprived of this vital assistance.

Far from providing such assistance to Mr. Ward, the trial court's ruling, and this Court's affirmance, left him saddled with a his refusal to cooperate with a psychologist at the state mental hospital. That same psychologist, Dr. Michael

Simon, ***had testified as a state's witness against Mr. Ward during his first trial*** and described him as "anti-social," with a "life-long" disorder that is "resistant to treatment." *See* Tr. I 1198-99. There is no plausible sense in which Mr. Ward was provided an expert who would "assist in evaluation, preparation, and presentation *of the defense*." *Ake*, 470 U.S. at 83 (emphasis added).

2. Mr. Davis's mental condition was significant factor at his trial, and he was entitled to an independent mental health expert under *Ake v. Oklahoma.*

In Mr. Davis's case, there is no question that the defendant's mental condition was a "significant factor" at trial. *Ake,* 470 U.S. at 82. Trial counsel asserted a defense of insanity or diminished capacity, which led the trial court to order two evaluations. The first such evaluation diagnosed possible attention deficit hyperactivity disorder, which counsel ultimately presented as mitigation. Tr. 3442. Far from satisfying the trial court's obligations under *Ake – see Davis II*, 44 S.W.3d at 731 – the defendant's evidence triggered them. Indeed, the trial court explicitly sought (but failed to obtain) the answers to questions that were solely relevant to the capital sentencing proceedings. *See* Ex. 13 (ordering an opinion "as to whether the alleged conduct of the Defendant was committed while he was under extreme mental or emotional disturbance or while he was under unusual

pressures or influences").

Neither is there any question that Mr. Davis lacked a defense expert. Dr. Jenkins was selected by the trial court. Ex. 9. He was ordered not to assist the defense, but rather, to evaluate the defendant and report his findings to the court. *Id.* The stated purpose of the referral was to aid *the court* in deciding whether there were "reasonable grounds to commit the defendant to the State Hospital for observation and examination." *Id.* Dr. Jenkins reported to the court as requested and invited the court make whatever further inquiries it wished to. Ex. 10. The State Hospital played a similarly inquisitorial role. It was ordered to evaluate Mr. Davis's competency and criminal responsibility and to report those findings to the court. Ex.13. Psychologist Dr. Anderson did just that, recommending that the court find Mr. Davis to be criminally responsible for his alleged crime. Ex. 14 at 5.

Just as neither psychologist was a defense expert, neither one provided an "appropriate examination" to develop mitigating evidence for the penalty phase of trial. *Ake*, 470 U.S. at 83. Dr. Jenkins spent all of 70 minutes evaluating Mr. Davis. Conducting a cursory "mental status examination," Dr. Jenkins interviewed no witnesses, performed no psychological testing, and reviewed no materials from Mr. Davis's background. Tr. 3439; Ex. 10. More importantly, Dr. Jenkins did not specifically search for or develop mitigating evidence. He did not account for any

documents describing Mr. Davis's troubled background, including a report from the Buckner Boys Ranch that described possible sexual abuse. *See* Ex. 18 (Defense Trial Exhibit 19 – Records from Bucker Boys Ranch), at 4 (describing an "alleged homosexual seduction by an older man"). Dr. Jenkins diagnosed ADHD, but only for the purpose of observing that the disorder did not undermine Mr. Davis's criminal responsibility for the offense – i.e., that Mr. Davis was not criminally insane. *See* Ark. Code Ann. § 5-2-305 ("criminal responsibility examination"). Dr. Jenkins' evaluation "does not come close to satisfying the requirements of *Ake*." *Davis III*, 423 F.3d at 885 (Bye, J., dissenting). "To fulfill the requirements of due process, *Ake* contemplates an expert who, following a full and thorough examination, works side by side with the defendant and defense counsel to build a defense strategy." *Id.*

The State Hospital examination was similar. Dr. Anderson concluded that Mr. Davis was competent for trial and not legally insane. Ex. 14 at 4-5. Although Dr. Anderson diagnosed anti-social personality disorder and substance abuse, he did not connect these diagnoses to the offense or otherwise explain why or how they were mitigating. *Id.* at 4-5. Far from mitigating, the Hospital report offered damaging evidence against Mr. Davis's character, including a finding of "very likely" psychopathic features. *Id.* at 4. *See Lear v. Cowan*, 220 F.3d 825, 829 (7th

Cir. 2000) (evidence of "'antisocial personality disorder' or 'characterological disorder of the asocial type,'… strikes us as fancy language for being a murderer"); *Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir. 2010) ("This evidence is potentially aggravating as it suggests that Suggs has antisocial personality disorder, which is a trait most jurors tend to look disfavorably upon [and] is not mitigating but damaging.") (quotations omitted). The Hospital report offered no opinions whatsoever about mitigation.

What is more, the psychologist Mr. Davis sought at trial, Dr. Marr, would have performed all of the mitigating tasks that Drs. Jenkins and Anderson omitted. Dr. Marr's affidavit states that he would have interviewed Mr. Davis's friends and family, administered a series of psychological tests, and completed a neuropsychological examination in light of Mr. Davis's history of head injuries and the traumatizing effects of chronic neglect and abandonment by his parents. Ex. 19 ¶¶ 4-5. Head injuries are a "clear markers for organic brain damage." *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012); *Frierson v. Woodford*, 463 F.3d 982, 991 (9th Cir. 2006) (multiple childhood head injuries are a "red flag of possible brain damage"). Mr. Davis was born with the umbilical cord wrapped around his neck, and thus suffered possible birth asphyxia. Dr. Marr also would have investigated and built upon Mr. Davis's history of sexual abuse during his

confinement in juvenile detention, his learning disabilities, poor performance in school, drug/alcohol abuse, impulsivity, and lack of treatment for his ADHD – thereby documenting why Mr. Davis's condition was mitigating and the relation it bore to the offense. Ex. 19 ¶¶ 3-5; Ex. 18 at 3-4.

Neuropsychologist Dan Martell, Ph.D., likewise reports that Mr. Davis should undergo further evaluation. *See* Ex. 20 (Report of Apr. 10, 2017). Mr. Davis displays numerous risk factors for neurobehavioral abnormality, including maternal alcohol abuse, the umbilical cord complication at the time of birth, a history of head injury, and poisoning from oil-based paints. *Id.* at 2-3. Dr. Martell describes evidence indicating "left hemisphere brain damage involving both the frontal and temporal lobes," based on Mr. Davis's abnormal speech patterns, learning disability, reading disorder, ADHD, and test results. *Id.*at 4-5. Additional risk factors for psychological and behavioral abnormalities include parental abandonment and sexual abuse as a child. *Id.* at 8-10.

Such testimony would have aided the defense. Jurors, after all, recognize 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." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 251-52 (2007) (quotation omitted).

III. THE COURT SHOULD STAY MOVANTS' EXECUTIONS PENDING THE SUPREME COURT'S CONSIDERATION OF *MCWILLIAMS*.

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 question presented by Movants is the same one being considered by the United States Supreme Court: whether *Ake* clearly established a defendant's right to an independent expert when the defendant's mental state is likely to be an issue at trial. The movants' claim is not frivolous, and indeed, it is supported by the plain language of *Ake* and the majority of lower courts to consider the question. *See* Arguments I-II, above.

Moreover, the question cannot be definitively resolved until after the date scheduled for the executions of Mr. Ward and Mr. Davis. Briefing is not yet complete in *McWilliams*, and the Supreme Court will not hear oral arguments until April 24, with a decision to follow weeks or months later. The movants have not unreasonably delayed their claim. Undersigned counsel face numerous execution dates in the coming weeks and have worked hurriedly and frantically on behalf of

their several clients. Further, the profound mental illness of Mr. Ward – which has severely deteriorated under the conditions that the State has imposed over the decades of his imprisonment – has presented considerable obstacles to advancing this litigation. Mr. Davis's lead habeas counsel (Alvin Schay) died in 2016, his second habeas counsel (Deborah Sallings) has labored under an exclusively *pro bono* appointment, and the Arkansas Federal Defender was appointed only recently, on March 20, 2017. *See Davis v. Kelley*, No. 01-5118 (W.D. Ark.), Order of March 20, 2017 (ECF #45). The Court should stay both executions, which would otherwise extinguish Movants' meritorious and timely claim.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Movants-Appellants respectfully request that the Court recall its mandates, that it stay the executions currently scheduled for April 17, 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:

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2017, I filed the foregoing Motion to Expand Page Limit with the Clerk of Court via the eFlex electronic filing system, which shall send notification to Jennifer L. Merritt, counsel for Appellants.

/s/ Scott Braden
Scott Braden