CAPITAL CASE. EXECUTION SET APRIL 24, 2017

IN THE ARKANSAS SUPREME COURT

JACK HAROLD JONES APPELLANT/PETITIONER

VS. CR 96–541 (Direct appeal)
CR 98–1091 (Rule 37 appeal)

STATE OF ARKANSAS APPELLEE/RESPONDENT

MOTION FOR RECALL OF MANDATE
AND MOTION FOR STAY OF EXECUTION

Comes Jack Harold Jones, through his attorney, Jeff Rosenzweig, and for his Motion for Recall of Mandate and Motion for Stay of Execution states:

INTRODUCTION

Jack Harold Jones, who is scheduled to be executed on the evening of Monday, April 24, 2017, hereby moves to recall the mandate in his case and to stay his execution pending the Court's resolution of the request to recall the mandate.

CRITERIA FOR RECALL OF MANDATE

This Court's most recent iteration of the criteria for recall of the mandate is expressed in *Wertz v. State*, 2016 Ark. 249, 4-6 493 S.W.3d 772, 775:

> This court will recall a mandate and reopen a case only in extraordinary circumstances. *Robbins v. State*, 353

> Ark. 556, 114 S.W.3d 217 (2003). To establish the extraordinary circumstances that would warrant the recall of a mandate or the reopening of case, we have enumerated certain factors to be considered, namely (1) the presence of a defect in the appellate process, (2) a dismissal of proceedings in federal court because of unexhausted state-court claims, and (3) the appeal is a death case that requires heightened scrutiny. *Ward v. State*, 2015 Ark. 62, at 2, 455 S.W.3d 830, 832. We have held that **these factors are not necessarily to be strictly applied but rather that they serve as a guide in determining whether to recall a mandate**. *Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233.
>
> [*emphasis added by Jones*]

Although this case does not present an unexhausted claim, *Wertz* notes that the recall criteria are "not necessarily to be strictly applied." This is a death penalty case and there is a glaring defect in the appellate process established in this pleading. This motion gives this Court an opportunity to correct its manifest error in deciding Jones's appeal.

RELEVANT HISTORY OF THE CASE SUPPORTING RECALL OF THE MANDATE.

This issue was litigated at length in Jones's direct appeal. *Jones v. State*, 329 Ark. 629, 47 S.W.2d 339 (1997). The issue also was raised in Jones's federal habeas corpus litigation in the United States District Court for the Eastern District of Arkansas. *Jones v. Norris*, 5:00-cv-00401. There is no reported decision in Jones's federal habeas litigation. Jones was denied a certificate of appealability by the

District Court and the Court of Appeals. Certiorari was denied. *Jones v. Norris*, 549 U.S. 1035, 127 S.Ct. 587 (2006).

In *Jones*, the jury found five aggravating circumstances in sentencing:

> (1) Jones had previously committed another felony involving the use or threat of violence;
>
> (2) in the commission of capital murder, he knowingly created a great risk of death to a person other than the victim;
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> (3) the capital murder was committed for the purpose of avoiding or preventing an arrest;
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> (4) the capital murder was committed for pecuniary gain; and
>
> (5) the capital murder was committed in an especially cruel or depraved manner.

On Part A of Form Two, the mitigating circumstance verdict form, the Jones jury unanimously found that the three mitigating circumstances probably existed:

> (1) Jones cooperated with the police by voluntarily accompanying them to the police department;
>
> (2) he cooperated with the police by giving them a full confession and accepting full responsibility for these offenses; and
>
> (3) he had a turbulent and troubled childhood.

There was also a non-unanimous finding of these mitigating circumstances in Part B:

> (1) Jones suffered from the mental disease or defect of attention-deficit hyperactivity disorder;
>
> (2) Despite his efforts, Jones was continually misdiagnosed and often treated with inappropriate medications;
>
> (3) Jones' parents were often inconsistent in disciplining their children;
>
> (4) His son Chris loves and is dependent on his father; and
>
> (5) Chris would be harmed psychologically if his father were sentenced to death.

Part C of Form Two instructed the jury to check the applicable factors where they believed that there was some evidence presented to support the mitigating circumstances offered, but where they unanimously agreed that it was insufficient to establish that the mitigating circumstances probably existed. Despite the fact that Part C instructed the jury not to check any factors in this section that it had checked in any other section, the jury checked the following factors that it had also checked in Part B:

(1) Jones suffered from the mental disease or defect of attention-deficit hyperactivity disorder;

(2) Despite his efforts, Jones was repeatedly misdiagnosed and treated with inappropriate medications;

(3) Jones's parents were often inconsistent in disciplining their children.

The jury then filled out the forms requisite to sentence Jones to death. In CR 96–541 this Court repudiated its own precedents in order to avoid reversing the death verdict. *Jones v. State*, 329 Ark. 629, 47 S.W.2d 339 (1997).

This issue may be broken down into several components:

- ❑ *First*, was what happened to Jones error under Arkansas law?
- ❑ *Second*, what was and is Arkansas law on harmless error in the penalty phase of a capital murder prosecution?
- ❑ *Third*, does Arkansas's arbitrary treatment of Jones violate the United States and Arkansas Constitutions.

THIS COURT ERRED IN *JONES* AND SUBSEQUENTLY RECOGNIZED ITS ERROR, LEAVING *JONES* AN ARBITRARY ANOMALY IN THIS COURT'S JURISPRUDENCE.

It is clear that at the time of Jones' trial and appeal that inconsistent mitigation findings were error. In affirming Jones's death sentence, this Court relied on

Wainwright v. State, 302 Ark. 371, 790 S.W.2d 420 (1990), holding that "Although the jury may have been inconsistent on this factor, it was clear in unanimously finding that three aggravating circumstances existed at the time appellant committed the murder."

The reliance on *Wainwright* was erroneous. In several cases in the interim between *Wainwright* and *Jones*, this Court had held otherwise: In *Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995), this Court was clear that inconsistent findings in the mitigation section of the verdict forms constitute error. An almost identical error happened in Jones' case. Other cases for the same proposition that harmless error analysis could not be applied when a jury found mitigation and in effect at the time of Jones's trial and/or appeal are *Greene v. State*, 317 Ark. 350, 878 S.W.2d 384 (1994), and *Kemp v. State*, 324 Ark. 178, 919 S.W.2d 943 (1996).

These cases had at least implicitly overruled *Wainwright* and indisputably were the law at the time of Jones' trial and appeal. Furthermore, the non-harmlessness of inconsistent penalty findings remains Arkansas jurisprudence today, leaving *Jones* an arbitrary and capricious anomaly.

Initial Arkansas post-*Furman* jurisprudence was that error in the penalty phase of a capital trial mandated relief. For example, in *Williams v. State*, 274 Ark. 9, 12-13, 621 S.W.2d 686, 687-688 (1981), this Court held:

> In a death case we are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three. Hence, following the practice adopted in *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977), cert. den. 434 U.S. 894, 98 S.Ct. 272, 54 L.Ed.2d 180 (1977), we direct that the sentence be reduced to life imprisonment without parole unless the Attorney General requests within 17 days that the case be remanded for a new trial.

That was the law until the General Assembly enacted Act 412 of 1987, codified as Ark. Code Ann. § 5-4-603(d) and (e), which provided as follows:

> (d) On appellate review of a death sentence, if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason and if the jury found no mitigating circumstances, the Arkansas Supreme Court shall conduct a harmless error review of the defendant's death sentence. The Arkansas Supreme Court shall conduct this harmless error review by:
>
> (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and
>
> (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt.
>
> (e) If the Arkansas Supreme Court concludes that the erroneous finding of any aggravating circumstances by the jury would not have changed the jury's decision to impose the death penalty on the defendant, then a simple majority of the court may vote to affirm the defendant's death sentence.

Despite *Wainwright* it was clearly understood Arkansas law at the time of

Jones's trial and appeal that harmless error analysis was possible in Arkansas *only if the jury were to find no mitigating circumstances*:

- ❑ "This court can perform the statutory harmless error analysis in the penalty phase only if 'the jury found no mitigating circumstances.'" *Greene v. State*, 317 Ark. 350, 358, 878 S.W.2d 384, 389 (1994).
- ❑ "Moreover, this court can perform the harmless error analysis in Ark.Code Ann. § 5-4-603(d) (Repl.1993) only if the jury found no mitigating circumstances." *Willett v. State*, 322 Ark. 613, 628, 911 S.W.2d 937, 945 (1995).
- ❑ "We can perform the statutory harmless error analysis in the penalty phase only if jury found no mitigating circumstances." *Kemp v. State*, 324 Ark. 178, 203, 919 S.W.2d 943, 955 (1996).

Then in *Jones*, although this Court conceded that it had often expressed the exclusivity of the harmless error doctrine to the § 5-4-603 criteria, it decided to "clarify" those holdings and discovered that it had the right to conduct harmless error analysis in other situations.

But once Jack Jones was denied a resentencing, this Court then reverted back to its previously established reading of the statute and reasserted its support the proposition that harmless error analysis may occur only within the confines of § 5-4-

603:

- ❑ *Greene v. State*, 335 Ark. 1, 23, 977 S.W.2d 192, 202 (1998):

> We have no choice but to reverse the jury's finding of a 'prior violent felony.' Although the jury also found that the 'especially cruel and depraved manner' aggravating circumstance existed, we may not conduct harmless-error review in this case because the jury found mitigating circumstances to exist. Ark. Code Ann. § 5-4-603(d)(Repl.1997)

- ❑ *Hill v. State*, 331 Ark. 312, 321, 962 S.W.2d 762, 766 (1998):

> Under Ark.Code Ann. § 5-4-603(d) (Repl.1997), this court conducts a harmless-error review if the jury finds no mitigating factors.

- ❑ *Jones (Larry) v. State*, 340 Ark. 390, 400-401, 10 S.W.3d 449, 455 (2000):

> On appellate review of a death sentence, if the Arkansas Supreme Court finds that the jury erred in finding the existence of any aggravating circumstance or circumstances for any reason and if the jury found no mitigating circumstances, the ... Court shall conduct a harmless error review of the defendant's death sentence. The ... Court shall conduct this harmless error review by: (1) Determining that the remaining aggravating circumstance or circumstances exist beyond a reasonable doubt; and (2) Determining that the remaining aggravating circumstance or circumstances justify a sentence of death beyond a reasonable doubt. Ark.Code Ann. § 5-4-603(d) (Repl 1997).

Robbins v. State, 356 Ark. 225, 149 S.W.3d 871 (2004), does not diminish Jones's argument here. In *Robbins*, this Court applied a harmless error analysis supposedly to contradictory findings. Robbins has an important factual distinction which is crucial. The alleged error in *Robbins* was that there was a clear marking of a mitigating circumstance in Part A of Form 2 and a whited-out checkmark of the same circumstance in Part C. Any contradiction between the two was resolved when the *Robbins* jury had explicitly affirmed in open court that it was unanimous in Part A. [1]

Furthermore, the decision of this Court in *Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233 and similar cases deal with another issue, which is the issue of error when the jury wrongly asserts that no mitigation was presented — not the issue of contradictory findings.

ARKANSAS'S ARBITRARY TREATMENT OF THE INCONSISTENCY IN JONES'S PENALTY PHASE VIOLATES THE UNITED STATES AND ARKANSAS CONSTITUTIONS.

Although it is true that states are free to establish harmless error analysis in penalty phases, see e.g. *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441 (1990), Fourteenth Amendment guarantees of due process and equal protection require that

[1] Robbins's death sentence was later reduced to life without parole by the Craighead Circuit Court on mitigation grounds, but not this precise issue.

Jones not be treated differently from other similarly situated persons and that state law entitlements be treated consistently. In *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229 (1980), the United States Supreme Court made this clear as a matter of federal constitutional law:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek v. Jones,* 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935; *Greenholtz v. Nebraska Penal Inmates*, supra ; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484.
>
> In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

The *Jones* jury committed error under Arkansas law in making contradictory penalty phase findings. This Court's appellate treatment of this error in Jones's case violated the State's own laws and this Court's own precedents, leaving *Jones* stranded between numerous other cases going the other way both before and after. This irregular and aberrant treatment is a violation of Jones's rights of due process and equal protection by making a one-time and unsupportable exception to case law. Because this is a death penalty case, the Eighth Amendment is also implicated. Furthermore, the anomalous treatment of Jones violates his cognate state constitutional rights of due process (Art. 2 § 8), equal protection (Art. 2 § 9) and protection against cruel and unusual punishments. (Art. 2 § 3).

MOTION FOR STAY OF EXECUTION

This Court must stay Jones's execution while it considers the recall of mandate. Jones will be irreparably harmed if a stay is not granted. The claim is bona fide and not frivoulous and cannot be resolved before the execution date. Further, if the Court does not grant relief on this petition, it is appropriate to for the Court to take this matter "as a case" with plenary briefing.

WHEREFORE, Jones prays that the Court recall the mandate and grant a stay of execution and all other relief to which he is entitled.

JACK HAROLD JONES

/s/ Jeff Rosenzweig

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CERTIFICATE OF SERVICE

I hereby certify that I have delivered an email copy to the following this 23rd day of April, 2017: Darnisa Johnson, Deputy Attorney General and Rebecca Kane and Brooke Gasaway, Assistant Attorneys General.

/s/ Jeff Rosenzweig

JEFF ROSENZWEIG