EXECUTION SCHEDULED FOR APRIL 24, 2017

IN THE ARKANSAS SUPREME COURT

MARCEL WAYNE WILLIAMS **Movant/Appellant**

v. **No. CR-97-949**

STATE OF ARKANSAS **Respondent/Appellee**

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

Movant/Appellant Marcel Wayne Williams submits this supplemental emergency motion to recall the mandate and for stay of execution. Mr. Williams incorporates all arguments previously made, and in addition, states:

On April 21, 2017, this Court issued a writ of certiorari to the Pulaski County Circuit Court to supplement the record in this case with the jury verdict forms that were missing from the record on direct appeal. The circuit court complied with that order and has now provided the missing forms.

Mr. Williams's motion to recall the mandate should be granted. The Court's review of his death sentence on direct appeal was defective. Simply put, the appellate process broke down for Mr. Williams because the Court failed to fulfill its obligation to properly review the record in deciding the issues presented on appeal. Furthermore, the verdict forms that have not been supplied by the circuit court do not cure this defect because they are also defective. Based on the face of the forms,

it cannot be concluded that the jury properly reviewed mitigation evidence and whether it properly weighed the evidence before sentencing Mr. Williams to death.

On direct appeal, Mr. Williams's argued that there was insufficient evidence to support the imposition of the death penalty. The *Williams* Court noted the standard of review as follows: "[w]e will uphold the jury's verdict if there existed substantial evidence for the jury to find beyond a reasonable doubt that one or more aggravating circumstances exist and that they outweighed any mitigating circumstances." *Williams v. State*, 338 Ark. 97, 108, 991 S.W.2d 565, 570 (1999). The Court additionally acknowledged that the balancing of aggravating and mitigating circumstances is properly the duty of the jury. *Id*. Logically, to make a determination that sufficient evidence supports that jury's finding that aggravating circumstances outweighed mitigating circumstances, the Court had to know what aggravating and mitigating circumstances the jury actually found. *See Anderson v. State*, 353 Ark. 384, 410-11, 108 S.W.2d 592, 609 (2003) ("Without a *signed and filed Form 2*, this court is unable to say that the jury considered any possible mitigating circumstances, much less that it concluded beyond a reasonable doubt that the only aggravating circumstance outweighed any mitigating circumstances found to exist. Accordingly, we reverse and remand for resentencing.") (emphasis added). This Court has never gone outside the record lodged on appeal to make its decisions, and in fact has consistently held that it cannot exercise its appellate jurisdiction in such

a way. *See Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997) ("Without an adequate record, the requirements of Rule 4-3(h) were not satisfied."); *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997) (same); *Jacobs v. State*, 327 Ark. 498, 939 S.W.2d 824 (1997) (same).

Yet, in deciding *this argument raised by Mr. Williams on appeal*, the Court failed to acknowledge that it did not have the jury's written verdict in the record. This failure to notice the absence of the verdict forms necessary for it to make the legal determination that it made—that significant evidence supported the jury's findings that a death sentence was warranted—constitutes a breach of the Court's own duty. In essence, the Court could only speculate as to what circumstances the jury had determined were aggravating and mitigating. Nonetheless, the *Williams* Court determined—without benefit of the jury's actual written verdict—that the jury made no error as to its verdict.

The State has maintained that Mr. Williams's motion to recall the mandate should be denied because of this court's holding in *Nooner v. Norris*, 2014 Ark. 296, 438 S.W.3d 233. The spirit of the State's argument is that because Mr. Williams's case was decided just six months before this Court adopted mandatory automatic review in death cases pursuant to *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999), this Court was under no obligation to review the death-sentencing verdict forms on his direct appeal. While Mr. Williams maintains that the Court did have a

duty to ensure that his death sentence was proper pursuant to Ark. Sup. Ct. R. 4-3(h) (1999), and Ark. Code Ann. § 16-91-113(a), *Nooner* is irrelevant under the facts of Mr. Williams's case.

Here, Mr. Williams raised the issue[1] of whether there was sufficient evidence "to support the imposition of the death penalty." *Williams*, 338 Ark. at 108, 991 S.W.2d at 570. Unlike in *Nooner*, the sufficiency of the evidence to support the imposition of death was squarely before the *Williams* Court on direct appeal. Significantly, the *Williams* Court indicated in its opinion that it had reviewed that issue and concluded that the jury did not err in finding the aggravating circumstances outweighed the mitigating circumstances. Yet, the Court could not possibly have adequately legally reviewed that issue because it did not have before it any evidence of the jury's sentencing verdict. There simply was no jury verdict in the record—

[1] The *Williams* Court correctly did not address preservation. Mr. Williams was not obligated to object at the trial below to raise this issue for review because the Court had years before determined that the erroneous completion of the sentencing forms in a death case involves a matter essential to the consideration of the death penalty and establishes an exception to the plain-error rule under *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). *See, e.g.*, *Camargo v. State*, 327 Ark. 631, 940 S.W.2d 464 (1997); *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995).

much less in the briefs on appeal—upon which the Court could base its decision. As such, these are just the type of "extraordinary circumstances" contemplated by the Court in motions to recall the mandate. *See Wertz v. State*, 2016 Ark. 249, 493 S.W.3d 772. The appellate court was obligated to properly review the issue raised on appeal and although it maintained that it did so in its opinion, it could not have properly did so without benefit of the record of the jury's actual decision.

Exacerbating this error is the fact that subsequent courts denied Mr. Williams relief based partly on the erroneous conclusion of the Arkansas Supreme Court that there was no error in the jury's determination that a death sentence was warranted. *See Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009). Thus, the *Williams* Court's failure to properly review the written verdict forms on direct appeal insulated this issue from any later judicial review.

Turning now to the actual sentencing verdict forms that have recently been lodged, Form 1 shows that the jury found three aggravating circumstances: (1) that Mr. Williams had previously committed another violent felony; (2) that the capital murder was for pecuniary gain; and (3) that it was committed in an especially cruel or depraved manner. Form 1 is signed by the jury foreperson in the blank provided for his signature. Form 2, dealing with mitigating circumstances, is not completed. While one box is checked—that the jury unanimously found that Mr. Williams had accepted responsibility for his conduct and admitted his participation in the crime—

the jury foreman did not sign in the blank provided for his signature. Forms 3 and 4 are completed as required, including signatures were indicated.

Based on these forms, which were not included in the record when the Arkansas Supreme Court reviewed Mr. Williams's case in 1999, the jury in Mr. Williams's case failed to comply with the legal requirements to sentence him to death. There is simply no evidence that the jury finished completing Form 2. While one mitigating circumstance is checked, the form is unsigned. It is impossible to discern the jury's findings as to mitigating circumstances. The Form 2 the jury submitted fails to make any final conclusions. The fact that one box is checked may mean that the jury found that mitigating circumstance. It may mean that they began to fill out Form 2 and changed course. It is just as likely that in addition to failing to sign the form, the jury also failed to check other boxes. Without finality to the form with a signature, Form 2 gives no guidance on what the jury actually concluded as to possible mitigation.

Arkansas Code Annotated section 601(a) provides that "it is the intent of the General Assembly to specify *the procedures and standards* pursuant to which a sentencing body *shall conform* in making a determination as to whether a sentence of death is to be imposed upon a conviction of capital murder." (Emphasis added.) Additionally, Ark. Code Ann. § 5-4-603(a) makes clear that the jury must return "written findings." *See also Willett v. State*, 322 Ark. 613, 911 S.W.2d 937 (1995)

(errors related to mitigating circumstances cannot be cured by jurors appearing in open court and orally confirming their death verdict).[2] Both statutory provisions were in effect at the time of Mr. Williams's trial for capital murder. Moreover, as noted earlier, this Court in *Anderson v. State*, 353 Ark. at 410-11, 108 S.W.3d at 609, recognized that an unsigned and unmarked Form 2 constituted "no written proof that the jury considered any mitigating circumstances" and that it was unable to determine that the jury considered possible mitigating circumstances, much less that

[2] In its supplemental response, the State maintains that any error in the foreman not signing Form 2 was resolved by the circuit court's polling of the jurors and cites *Robbins v. State*, 356 Ark. 225, 149 S.W.3d 871 (2004), as support. Importantly, the Form 2 in *Robbins*, attached to the opinion, clearly shows the signature of the foreman. *Id*. Further, at the time of Mr. Williams's appeal, the precedent on this issue was *Willett* as noted above, not the later decided *Robbins*. Lastly, this Court distinguished *Robbins* in *Anderson v. State*, 357 Ark. 180, 223-24, 163 S.W.3d 333, 359-60 (2004), noting that the *Anderson* jury was only polled generally as to whether the his or her verdict was a death sentence. This did not cure a Form 2 problem. *Id*. Likewise, the transcript in the Mr. Williams's case shows the same—the individual jurors were not polled as to Form 2, they were only polled as to their general death verdict. R. 1116-17.

it had concluded beyond a reasonable doubt that aggravating circumstances outweighed mitigating ones.

Likewise, precedent indicates that the signature of the foreman on the verdict form is essential in even non-death criminal cases. *See Dixon v. State*, 2011 Ark. 385 (per curiam) ("Dixon's record was deficient in that it did not include the jury-verdict forms signed by the foreman."); *Ray v. State*, 342 Ark. 180, 183, 27 S.W.3d 384, 386 (2000) ("The trial court read all three verdict forms because all three verdict forms were signed."); *Curtis v. State*, 279 Ark. 64, 66, 648 S.W.2d 487, 489 (1983) ("In returning the verdict of guilty, the foreman signed that form."); *Young v. State*, 170 Ark. 1194, 282 S.W. 676, 677 (1926) ("on the bottom of each page is a verdict in proper form signed" by the foreman); *Fox v. State*, 156 Ark. 428, 246 S.W. 863, 865 (1923) (noting that the statute in effect at the time required the jury verdict form be signed by the foreman).

The lack of signature on Form 2 casts doubt as to the veracity and reliability of the crucial mitigation findings in this case. Importantly, although the forms used in Mr. Williams's case have been updated, even today Form 2 still requires the jury foreperson's signature. The Form 2 used in Mr. Williams's case gave the jurors four categories to choose from—A, B, C, or D—depending on the jury's unanimity in its decision on whether mitigating circumstances existed. Within each category were several options as to mitigating circumstances, including a section for the jury to fill

in its own. Below the four A, B, C, and D categories is a signature line for the foreman, which still exists on a slightly modified Form 2 today. It cannot be said that the foreman's signature is superfluous; it is a fatal defect in the verdict form.

Thus, on the record now before this Court, it would be impossible to conclude exactly what the jury found as to mitigation evidence and whether it properly weighed the evidence before sentencing Mr. Williams to death. Perhaps more significantly, it was impossible for the *Williams* Court in 1999 to do so. It had only before it a partial record; it made its decision without consideration of the complete sentencing verdict forms and without consideration of the incomplete sentencing verdict forms that actually exist.

For these reasons, Mr. Williams respectfully requests the following relief. Due to the *Williams* Court's defective review on appeal, the direct-appeal must be recalled. The *Williams* Court's decision that the death verdict was warranted was not based on a review of the jury's written verdict. Moreover, based on the now-lodged verdict forms, it is impossible to determine whether the jury considered the possible mitigating circumstances, much less that it concluded beyond a reasonable doubt that the aggravating circumstances outweighed mitigating circumstances.

Therefore, Mr. Williams is entitled to have his death sentence reversed and remanded for a new sentencing. At the very least, based on the arguments presented

by counsel, a stay of execution should be granted so that the Court can take this matter as a case and order full briefing.

Dated: April 22, 2017

Respectfully submitted,

/s/ Scott W. Braden
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2017, I filed the foregoing Motion with the Clerk of Court via the eFlex electronic filing system, which shall send notification to counsel for Appellee.

/s/ Scott W. Braden
SCOTT W. BRADEN