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

REPLY IN SUPPORT OF MOTION TO RECALL THE MANDATE AND MOTION FOR STAY OF EXECUTION

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INTRODUCTION

Movants' request to this Court is simple: delay the execution for just two months to await the Supreme Court's decision in *McWilliams v. Dunn* and then determine what application, if any, to Movants' cases would yield a fair, constitutional, and just result. The State loses nothing by this request, except a few months of time to insure that any execution is appropriate and just. Yet even as the Supreme Court examines a ruling virtually identical to those made here, the State objects to the prospect of a fair and just result.

Instead, the State insists that it must proceed with its overcrowded and extraordinarily rushed execution schedule. And the reason for the State's haste has nothing to do with the merits of the case, or the likely impact *McWilliams* will have on Arkansas law. Rather, the State's haste is based upon the expiration date of one of the drugs it plans to use to kill Mr. Davis and Mr. Ward.

Yet even the State concedes that this Court has the power to do what is fair and just. And what is fair and just here is to grant relief, or at least a stay, to await the decision in *McWilliams*. Neither the State, nor the Court, has a legitimate interest in executing a person who was unconstitutionally denied the ability to develop and present mental health mitigation evidence through the assistance of an independent mental health expert.

ARGUMENT

I. RECALLING THE MANDATE IS AN APPROPRIATE REMEDY IN THESE CASES.

The State insists that recall of the mandate is a narrow and extraordinary remedy. Davis Response at 3; Ward Response at 11. Movants do not dispute that premise. But the circumstances here are extraordinary and compelling: both men asked the trial court and this Court to provide them a *defense* expert to assess their mental condition for the purpose of developing mitigating evidence; both men have been denied that right at every turn; both men were sentenced to death by ill-informed juries who heard nothing of Mr. Davis's likely brain damage or Mr. Ward's paranoid schizophrenia; and both men stand to be executed within the coming days, even while the United States Supreme Court is likely to vindicate the right that both men have claimed and to establish that this Court's denial of that right 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) (standard on federal habeas review).

The State in no way counters any of these arguments. Instead, it largely relies on the claim that the outcome of *McWilliams* is "speculative." *See, e.g.*, Davis Response at 4, 11; Ward Response at 15. On this basis, the State urges the imminent executions of two men, as opposed to supporting a stay for the short

amount of time required to put an end to the supposed "speculation." And, while denigrating Movants for seeking a stay of their executions "simply to await a decision," Davis Response at 4, the State makes no mention of its own reason for resisting the stays, which is "simply" that the State's current batch of the sedative midazolam will expire before the end of this month.

This Court has repeatedly recognized that it possesses the inherent authority to correct error in the appellate process to "avoid a miscarriage of justice." *Nooner v. State*, 438 S.W.3d 233, 239 (Ark. 2014) (quoting *Robbins v. State*, 114 S.W.3d 217, 222 (Ark. 2003)). Here, the State asks this Court to sign off on the execution of two men who claim to have been sentenced to death in violation of their constitutional rights, only to have the United States Supreme Court vindicate their claims mere weeks after they have been put to death. It is difficult to imagine a case in which the need to "avoid a miscarriage of justice" is stronger, or in which the integrity of the judicial process is more at stake.

Importantly, this is not a case such as *Williams v. State*, in which this Court recalled a direct-appeal mandate only to later declare its recall to have been in error because the Court had correctly applied the law as it existed at the time of the direct appeal. *Nooner*, 438 S.W.3d at 241 (overruling *Williams v. State*, 2011 WL

6275536 (Ark. Dec. 15, 2011)).[1] Here, the law is settled: *Ake* entitles the defendant to an independent expert to support the defense when mental health is at issue.[2] The Supreme Court's expected decision in *McWilliams* will not establish new law; it will make clear that Alabama, and this Court,[3] have been applying *Ake* in an unconstitutional manner. It will then be incumbent on this Court to remedy its error. In the words of then-Chief Justice Hannah dissenting from this Court's refusal to recall the mandate in *Nooner*: "For many years, . . . this court *erroneously applied the law*. . . . Thus, *the fault lies with this court, and we must*

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[1] Even under these circumstances, three of the seven justices dissented from the Court's refusal to recall the mandate.

[2] *See, e.g., 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).

[3] *See, e.g., Ward v. State*, 455 S.W.3d 818, 826-27 (Ark. 2015) ("[W]e 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."); *Branscomb v. State*, 774 S.W.2d 426, 428 (Ark. 1989) ("We have concluded that a psychiatric examination given by the state hospital is sufficiently independent of the prosecution."); *Parker v. State*, 731 S.W.2d 756, 762 (Ark. 1987) ("[D]efendant's right to an examination under *Ake* v. *Oklahoma*, 470 U.S. 68 (1985) was adequately protected by the examination at the state hospital, an institution which has no part in the prosecution of criminals."); *Dunn v. State*, 722 S.W.2d 595, 596 (Ark. 1987) (same); *Wall v. State*, 715 S.W.2d 208, 209 (Ark. 1986).

correct our errors." *See Nooner*, 438 S.W.3d at 251 (Hannah, C.J., Danielson, J., and Hart, J., dissenting) (emphasis added).

The State also argues that the imminent execution dates faced by the Movants do not "alter the calculus in favor of recalling the mandates." Davis Response at 11. Yet, as this Court recognized in *Robbins*, "[t]here is no question but that the death penalty is *a unique punishment* that demands *unique attention* to procedural safeguards." *Robbins*, 114 S.W.3d at 220 (emphasis added).

II. MOVANTS' CASES IMPLICATE *MCWILLIAMS*, WHICH WILL DETERMINE WHETHER *AKE* CLEARLY DICTATED A RIGHT THAT BOTH MEN WERE DENIED AT TRIAL.

According to the State, the relief sought by movants is unwarranted because *McWilliams* is not "on all fours." Davis Response at 11; Ward Response at 15. As an initial matter, the State fundamentally misapprehends the right being claimed by Mr. Ward and Mr. Davis. As to Mr. Ward, the State repeatedly miscasts the issue as competency to stand trial (Ward Response at 1, 4, 8-11) – a question that Mr. Ward does not press in this motion.[4] To the contrary, the right that Mr. Ward claims is the same one that the Supreme Court is considering in *McWilliams*:

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[4] The State makes no such claim as to Mr. Davis and does not dispute that, at trial, Mr. Davis requested the appointment of an independent expert to follow up on the findings of the court-appointed experts and assist the defense in developing and presenting mental health mitigating evidence.

whether *Ake* guarantees an independent expert to assist in the development of mitigating evidence for the sentencing phase of trial. There is no question that Mr. Ward asked the trial court for an independent expert *to assist with mitigation*. Tr. III 89-94, 126. And there is no question that the trial court denied him that right; *id.*; *see also Ward v. State*, 455 S.W.3d 818, 827 (Ark. 2015) (declining to disturb "the circuit court's failure to provide an independent psychiatrist to develop mitigating evidence during sentencing").

The State insists that the expert opinion and other evidence proffered by Mr. Ward does not prove that he was incompetent to stand trial, and that the state hospital examiners found otherwise. But the issue is not whether Bruce Ward was incompetent; it is whether a non-state expert, such as Dr. Logan, could have helped his counsel to develop mitigating evidence based on the defendant's mental health and background. There is certainly no question that a mental disorder, such as a diagnosis of schizophrenia, is a mitigating circumstance, or that it could rebut the prosecution's argument that Mr. Ward had no mitigation at all. *See* Tr. III 533-34; *Hill v. Lockhart*, 28 F.3d 832, 844-47 (8th Cir. 1994) (counsel ineffective for failing to develop evidence of schizophrenia); *Pruitt v. Neal*, 788 F.3d 248, 272-76 (7th Cir. 2015) (same); *Prowell v. State*, 741 N.E.2d 704, 714-15 (Ind. 2001) (same).

The State also insists that *McWilliams* is only about the standard of review applicable in federal habeas corpus proceedings. Davis Response at 2-3; Ward Response at 14. This is incorrect. *McWilliams* is about the meaning of *Ake*, pure and simple. The petition for certiorari noted that the petitioner had suffered serious head injuries as a child, and that a doctor appointed by the court had determined that the defendant suffered brain damage and personality change as a result. Petition for Certiorari in *McWilliams v. Dunn,* U.S. No. 16-5294, at i, 3-4, 6-7 (filed Feb. 27, 2017), available at 2016 WL 7972451. Counsel sought to follow up on that report by requesting the appointment of a defense expert, who could help the defense prepare and present evidence about the impact of those injuries on the defendant's behavior, and to consider the powerful anti-psychotic medicines that had been prescribed for the defendant. *Id.* at 7-9. Yet, just as in the cases before this Court, the trial court refused, insisting that the defense proceed only with the benefit of the court-appointed expert who shared his testing and opinions with the prosecution and the court, as well as the defense. *Id.*

McWilliams asks the Supreme Court to decide whether these facts complied with the holding in *Ake,* or whether *Ake* required the state to provide an indigent defendant with an expert *independent of the prosecution* who would provide "meaningful assistance" for the evaluation, preparation, and presentation of the defense. *Id.* at i. The Supreme Court granted certiorari on that question. This is

the identical question, on very similar facts, presented by both Mr. Davis and Mr. Ward. The State's effort to portray the case as simply a matter of federal procedure, rather than as a substantive ruling about the very meaning of *Ake*, fails.

III. WHETHER *MCWILLIAMS* IS APPLIED RETROACTIVELY TO FEDERAL HABEAS CORPUS CASES IS IRRELEVANT.

The State's next argument is that recalling the mandate is inappropriate because the decision in *McWilliams* will not apply retroactively and thus will not affect the finality of the judgments in the Movants' cases. Davis Response at 7-11; Ward Response at 14. The State's invocation of the federal non-retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989), is misguided. First, this Court is not bound by *Teague*. Nothing in *Teague* "constrained the authority of the States to provide remedies for a broader range of constitutional violations than are redressable on federal habeas." *Danforth v. Minnesota*, 552 U.S. 264, 275 (2008). This Court has never adopted *Teague* as the measure of retroactivity, and indeed, the question of whether and when this Court will retroactively apply Supreme Court precedents remains unresolved. *See Kelley v. Gordon*, 465 S.W.3d 842, 845-46 (Ark. 2015) (retroactively applying *Miller v. Alabama*, 132 S. Ct. 2455 (2012), out of "fundamental fairness" because a separate prisoner had already obtained such relief; holding that "the Eighth Amendment's ban on cruel and unusual punishment outweighs the factors favoring finality"). This case presents

an opportunity for the Court to determine that question, and thus, yet another reason to stay the Movants' executions to permit further review.

Second and more fundamentally, Movants do not seek a "new rule" of criminal procedure to which the *Teague* or any other doctrine would deny "retroactive" effect. A rule is "new" under *Teague* when it "breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. at 301. A favorable decision in *McWilliams* would not be a "new" rule. The question presented in *McWilliams* is whether *Ake* itself clearly established the right to an independent mental health expert to aid in the defense. An affirmative answer to that question would simply mean that this Court has been denying to Movants and similarly situated defendants a right that was clearly established in 1985. *See Williams v. Taylor*, 529 US 362, 390 (2000) (Stevens, J.) ("This Court's precedent 'dictated' that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim.")*; see also id.* at 413 (O'Connor, J). Movants seek not to impose a "new obligation" on the State, but only to hold the State to an obligation that it has been violating ever since the Supreme Court established it.

IV. MR. WARD AND MR. DAVIS WERE BOTH DENIED THE ASSISTANCE OF A DEFENSE MENTAL HEALTH EXPERT REQUIRED BY *AKE*.

The State offers the unremarkable observation that a defendant has no right to "shop" for a favorable expert or to select the particular expert "of his own choosing." *See* Ward Response at 12-14; Davis Response at 2, 7. That is not the right being claimed. Messrs. Ward and Davis were not denied the right to "shop" for their chosen expert; they were denied all access to *any* expert who would report and consult solely with the defense, as opposed to the court and the state, in order to "assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985). Due process requires nothing less. *Ake*'s plain language entitles the indigent defendant, upon a showing that his mental state is likely to be an issue at trial, to a defense expert who will help develop the defense's mitigating evidence, that is, "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id.* at 83. The expert must not only be "competent" but also available to "present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82.

It is true, but beside the point, that both defendants presented *some* mental health evidence: Mr. Ward offered the video testimony of a psychologist who had examined him two decades earlier in Pennsylvania, and Mr. Davis presented a

psychologist, appointed as a court expert, who had spent 70 minutes with him to assess issues of sanity and competency. Neither defendant had what the law requires – a defense evaluation and consultation to develop mitigating evidence. In Mr. Davis's case, that evidence would have included, among other things, a neuropsychological evaluation to assess him for organic brain damage. *See* Ex. 19, 20 (reports of Drs. Marr and Martell). And in Mr. Ward's case, the evidence would have encompassed long-term paranoid delusions and hallucinations and a history – from childhood – of bizarre behavior warranting psychological intervention, regardless of whether he was competent to stand trial. Ex. 1 (report of Dr. Logan). By denying each defendant a defense expert, the trial courts squelched the efforts of each defendant to offer a fully-developed case for life.

Neither is there merit in the State's denial that Mr. Ward's mental state was at issue in his final penalty trial. *See* Ward Response at 13 (arguing that Mr. Ward "never made a preliminary showing that his sanity would be a factor at his trial"). In fact, Mr. Ward's trial attorneys detailed his disturbed thinking at length, asked the court for a mental health expert to assist with mitigating evidence, and ultimately presented a mental health penalty-phase defense – albeit an attenuated one because the trial court offered no experts beyond the state psychologist who had testified *against* Mr. Ward at the first trial. *See* Motion at 8-10, and sources cited. The trial court was also aware of the mitigating evidence presented during

earlier proceedings, including evidence of Mr. Ward's bizarre behavior in elementary school, his documented and unmet need for psychiatric help, the multiple unanswered requests to his family for psychiatric help, and the mental health diagnoses from Pennsylvania authorities. *Id.* at 10-11. The State insists that its own examiners found no Axis I mental disorder. Response at 9. The views of the State's examiners do not defeat Mr. Ward's right to prove otherwise through his own expert, and to have the benefit of an expert's assistance to his counsel in preparing and presenting the evidence. "Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view." *Ake*, 470 U.S. at 84.

V. MOVANT ACTED WITH DILIGENCE IN BRINGING THEIR MOTION, AND THE PASSAGE OF TIME SINCE THEIR CONVICTIONS WEIGHS IN THEIR FAVOR.

The State claims that Movants have engaged in dilatory tactics, stating that the *McWilliams* case has been pending before the Supreme Court for "more than a year." Ward Response at 1; *see also* Davis Response at 12. In fact, the petition for certiorari in *McWilliams* was not granted until January 13, 2017. *See McWilliams v. Dunn*, 137 S. Ct. 808 (Mem) (Jan. 13, 2017).

Furthermore, as explained in the Motion, counsel for both clients have been laboring under the severe time constraints created by the issuance of multiple warrants within a matter of days. Counsel for Mr. Davis also represent two of the

other men facing execution. Counsel have diligently acted to advance the respective interests of Messrs. Davis and Ward while carrying out their responsibilities in pending federal district court litigation affecting their rights, along with the other men for whom the governor signed execution warrants this month. Counsel have been responsible for preparing their clemency applications and hearings, as well as federal court litigation for all four men.[5]

Lastly, the State argues that the lapse of time since Movants' convictions "bears some consideration in the endeavor of evaluating extraordinary circumstances." Davis Response at 11. The lapse of time, however, weighs in Movants' favor. Both Mr. Ward and Mr. Davis requested independent mental

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[5] On March 28, counsel initiated two multi-plaintiff challenges, *Lee v. Hutchinson*, 4:17-cv-00194 and *McGehee v. Hutchinson*, 4:17-cv-00179, in the United States District Court of the Eastern District of Arkansas. Both challenges concern, *inter alia*, the failure of the Governor, Department of Correction, and Board of Probation and Parole to promulgate clear rules, adhere to existing statutes and rules, or to disclose to the plaintiffs rules and policies regarding the State's intention to twice nightly execute eight men over ten days. (For example, despite months of requests, undersigned counsel have been unable to ascertain the time that the state intends to kill their clients or the length in duration of the warrant.) Both suits have been the subject of multi-day hearings in the district court. *Lee v. Hutchinson*, 4:17-cv-00194 (hearing from April 4-6); *McGehee v. Hutchinson*, 4:17-cv-00179 (hearing commenced on April 11, 2017 and continuing as of this filing). The latter suit has generated over 1,000 pages of discovery pertaining to the scheduled executions, most of which had never been accessed by Plaintiffs or their counsel.

health experts years ago, and repeatedly. They pursued their rights on appeal and in post-conviction proceedings. The State of Arkansas has repeatedly rebuffed those efforts. The fact that the United States Supreme Court seems poised to confirm the existence of a right the State has denied them for so many years is a reason to wait, not a reason to rush to execution.

VI. AT A MINIMUM, THIS COURT SHOULD STAY THE EXECUTIONS TO ALLOW MOVANTS TO SEEK A PETITION FOR CERTIORARI FROM THE UNITED STATES SUPREME COURT.

Both movants present a meritorious claim of constitutional right, the clarity of which will soon be amplified by the United States Supreme Court in *McWilliams*. Thus, even if the Court elects not to take these motions as a case and recall its mandates, it should at least grant both prisoners a stay of execution pending their forthcoming petitions for writ of certiorari in the Supreme Court. *See Ward v. State*, Case No. 15-832 (Formal Order dated Oct. 14, 2015) (granting stay of execution pending petition for writ of certiorari following denial of motion to recall mandate). The Court has authority to stay the execution of a death sentence in light of its "inherent judicial power." *Singleton v. Norris*, 964 S.W.2d 366, 367-69 (1998).

CONCLUSION

WHEREFORE, Movants 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 14th day of April, 2017, I filed the foregoing Reply in Support of Motion to Recall the Mandate and for Station of Execution with the Clerk of Court via the eFlex electronic filing system, which shall send notification to Jennifer L. Merritt, counsel for Appellee.

/s/ Scott Braden
Scott Braden