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SUPREME COURT OF ARKANSAS

No. CR-98-657

BRUCE EARL WARD PETITIONER V. STATE OF ARKANSAS RESPONDENT	**Opinion Delivered** March 1, 2018 MOTION TO RECALL THE MANDATE [NO. CR-89-1836] PULASKI COUNTY CIRCUIT COURT HONORABLE JOHN B. PLEGGE, JUDGE MOTION DENIED; STAY OF EXECUTION LIFTED.

KAREN R. BAKER, Associate Justice

Petitioner, Bruce Earl Ward, requests this court to recall the mandate from his resentencing in *Ward v. State*, 338 Ark. 619, 622, 1 S.W.3d 1, 3 (1999) (*Ward III*), asserting that he was entitled to an independent defense expert to aid in his defense regarding his competency.

In early 2017, the governor of Arkansas set Ward's execution for April 17, 2017. Subsequently, Ward filed a motion to recall the mandate in this matter and stay of execution until the United States Supreme Court issued its opinion in *McWilliams v. Dunn*, 137 S. Ct 1790 (2017), contending that *McWilliams* had a direct impact on his claim pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985). Ward further asserts that we should overrule our precedent

holding that a competency evaluation at the Arkansas State Hospital satisfies *Ake*. We granted the stay of execution and took the motion as a case.

This is a death-penalty case with a long history before this court. The facts of Ward's underlying case are as follows:

> [O]n August 11, 1989, Little Rock Police Sergeant Michael Middleton was patrolling the area near the Jackpot convenience store on Rodney Parham Drive. Upon pulling into the parking lot, he noticed that the store's clerk was not at her normal work station. He then went into the store to try and locate the clerk. After he had looked through the store and was unable to find the clerk, Middleton called other officers to assist in the search. In the meantime, Middleton began to check outside the store, near the restrooms. He observed Ward walking from the restrooms toward a motorcycle that was parked nearby. Middleton spoke to Ward and told him that he was looking for the store's clerk. Ward told the officer that the clerk was inside the store, stocking. Ward stated that he had just had a cup of hot chocolate with the clerk and that she had given him the key to the restroom. Moments later, Sergeant Scott Timmons discovered [Rebecca] Doss's body lying on the floor of the men's restroom. She had been strangled to death. Ward was arrested and subsequently convicted of the murder.

Ward III, 338 Ark. 619, 622, 1 S.W.3d 1, 3.

In *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992) (*Ward I*), we affirmed Ward's capital-murder conviction for the death of Doss. Although we affirmed Ward's conviction, we reversed and remanded for resentencing based on an evidentiary error. Upon remand, Ward was again sentenced to death. However, we reversed and remanded his sentence for a second time because a transcript of the record from the second sentencing was incomplete. *Ward v. State*, 321 Ark. 659, 906 S.W.2d 685 (1995) (*Ward II*) (per curiam). At his 1997 sentencing, Ward was sentenced to death for a third time. We affirmed his sentence on appeal in *Ward III*. Ward next filed a petition for postconviction relief under Ark. R. Crim. P. 37.5. We affirmed the circuit court's denial of that petition in *Ward v. State*, 350 Ark. 69, 84

S.W.3d 863 (2002) (*Ward IV*). On July 16, 2010, Ward filed a petition to reinvest jurisdiction in the circuit court to consider a petition for a writ of error coram nobis asserting he was incompetent at the time of trial and entitled to a writ of error coram nobis. On September 30, 2010, we summarily denied Ward's petition.

In 2013, Ward next filed motions to recall the mandates from his direct appeal *(Ward I*), resentencing (*Ward III)*, and the denial of postconviction relief (*Ward IV*) based on his mental competency and asserted that this court should overrule its precedent pertaining to *Ake*. In *Ward v. State*, 2015 Ark. 60, 2, 455 S.W.3d 818, 820 (*Ward V*), we denied the motion to recall the mandate in Ward's direct appeal. In *Ward VI*, 2015 Ark. 61, at 2, 455 S.W.3d 303, at 305, we denied Ward's motion to recall the mandate in Ward's resentencing. In *Ward v. State*, 2015 Ark. 62, 1, 455 S.W.3d 303 (*Ward VII*), we denied the motion to recall the mandate in Ward's postconviction matter. Accordingly, we denied all three motions to recall the mandates.

Now before the court, Ward has filed a motion to recall the mandate in *Ward III*, asserting again that Ward was entitled to an independent mental health expert under *Ake*; that this court misinterpreted *Ake*; that *McWilliams* could possibly be a seminal case in this area; and that the court should therefore stay his execution pending resolution of this matter. On April 17, 2017, we took the motion as a case and entered a stay of execution. On June 19, 2017, the Supreme Court issued its opinion in *McWilliams*, and the issue of whether to recall the mandate in Ward's case is now before us. We deny the motion to recall the mandate for the reasons discussed below.

Standard for Recalling the Mandate and the Doctrine of Law of the Case

"The power of an appellate court to recall its mandate, if the circumstances warrant it, is recognized both in federal courts and state courts across the country." *Robbins v. State*, 353 Ark. 556, 563, 114 S.W.3d 217, 221 (2003) (internal citations omitted). This court will recall a mandate and reopen a case only in extraordinary circumstances. *Id.* In *Nooner v. State*, 2014 Ark. 296, at 7–8, 438 S.W.3d 233, 239, we explained our standard for recalling a mandate:

> [O]ur decision in *Robbins* is patently clear that recall of our mandate is an extremely narrow remedy. Indeed, we stated in *Robbins* that recall of our mandate is to be granted only in extraordinary circumstances as a last resort to "avoid a miscarriage of justice" or "to protect the integrity of the judicial process." *See Robbins*, 353 Ark. [556, 563],114 S.W.3d [217, 222 (2003)](quoting *Calderon v. Thompson*, 523 U.S. 538, 558, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), and *Demjanjuk v. Petrovsky*, 10 F.3d 338, 357 (6th Cir.1993)).
>
> Regardless of any inconsistencies in our decisions concerning the mandatory satisfaction of the three *Robbins*[1] factors, what has remained consistent in these cases has been a discussion of the three *Robbins* factors and this court's overarching concern that we will reopen a case only to address an "error in the appellate process," meaning an error that this court made or overlooked while reviewing a case in which the death sentence was imposed. *See, e.g.*, *Engram v. State*, 360 Ark. 140, 147, 148, 200 S.W.3d 367, 369, 370 (2004) (observing that the purpose of recalling the mandate in *Robbins* was to "correct an error in the appellate process" and emphasizing that "the *Robbins* case hinged on the fact that an error was made during this court's review, and the recall of the mandate was intended to give this court an opportunity to address an issue it should have addressed before"). We have also been consistent in considering motions to recall mandates in criminal cases only where the death penalty has been imposed.

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[1]In *Robbins*, we recalled the mandate because (1) Robbins cited to a decision "on all fours legally" with the issue presented, (2) federal court proceedings had been dismissed because of an unexhausted state-court claim, and (3) it was a death-penalty case, which required heightened scrutiny. *Robbins*, 353 Ark. at 564, 114 S.W.3d at 222–23. In making that decision, we noted that there were unique circumstances that made the case "one of a kind, not to be repeated." *Id.*, 114 S.W.3d at 223.

See, e.g., *Maxwell v. State*, 2012 Ark. 251 (per curiam).

Nooner, 2014 Ark. 296, at 8–9, 438 S.W.3d at 239. Accordingly, circumstances requiring this court to recall a mandate occur in extremely limited circumstances.

Next, with regard to the doctrine of law of the case, in *United Food & Commercial Workers International Union v. Wal-Mart Stores, Inc.*, 2016 Ark. 397, 504 S.W.3d 573, we explained the law-of-the-case doctrine:

> [T]he doctrine of law of the case prohibits a court from reconsidering issues of law or fact that have already been decided on appeal. The doctrine provides that a decision of an appellate court establishes the law of the case for trial upon remand and for the appellate court itself upon subsequent review. The doctrine serves to effectuate efficiency and finality in the judicial process, and its purpose is to maintain consistency and to avoid reconsideration of matters once decided during the course of a single, continuing lawsuit.

"As a general rule, we are bound to follow prior case law under the doctrine of stare decisis, a policy designed to lend predictability and stability to the law." *Ward VII*, 2015 Ark 62, at 5, 455 S.W.3d at 833.

I. *The Court Should Recall the Mandate in Ward's Resentencing to Correct a Defect in the Appellate Process*

In Ward's motion to recall the mandate, he asserts that he was denied the assistance of a mental-health expert to evaluate, prepare, and present a defense in violation of *Ake* and urges the court to grant his motion. Ward's argument is two-fold. First, he asserts that the State did not meet the minimum *Ake* requirements, arguing that this court's interpretation of *Ake* is a defect in the appellate process. Second, Ward contends that *McWilliams* clarifies the *Ake* requirements, and he urges this court to recall the mandate from his resentencing, alleging that his case does not comply with *McWilliams*.

First, we review Ward's allegation that there is a defect in the appellate process and that this court's interpretation of *Ake* "falls dramatically short of what *Ake* requires." Ward contends that this court has misinterpreted and erroneously applied the *Ake* standard for thirty years. Ward repeatedly asserts that this court has held that an examination by a "state doctor meets the requirements of *Ake*." Ward reshashes the same arguments he made in *Ward VI*, where we recounted Ward's claims as follows:

> [W]e turn to the facts of Ward's case. At the time of his 1997 sentencing, Ward must have made the threshold showing that his sanity at the time of the offense would be a significant issue and an error occurred in this court's review that requires us to recall the mandate in *Ward III*. The record demonstrates that on February 14, 1997, Ward filed a motion for appropriation of funds for expert assistance pursuant to *Ake*. In Ward's motion, he stated in pertinent part:
>
> > Mr. Ward requests an ex parte hearing on this motion under the authority of *Ake v. Oklahoma*, 470 U.S. 68 (1985). This request is made because defense counsel does not wish to unnecessarily disclose the defense mitigation case.
> >
> > The reasons in support of this motion are set out in the accompanying memorandum.
> >
> > . . . .
> >
> > Counsel for Mr. Ward represents to the Court that she has probable cause to suspect that the utilization of these particular experts will produce mitigating evidence. It is the professional judgment of defense counsel that this information is necessary in order to adequately represent Mr. Ward and that these steps would most certainly be undertaken in the course of representation provided to a similarly situated client in a retained counsel case.
>
> On February 27, 1997, the circuit court denied the *Ake* motion. At the pretrial hearing, Ward stated several times that he was not interested in resentencing and wanted to be released from prison or reinstate the death penalty. Additionally, Ward refused to cooperate in 1996 with the state hospital for a mental evaluation. On October 7, 1997, pursuant to both parties' request, the circuit court ordered Ward to undergo an Act III evaluation. On October 17, 1997, Michael Simon, Ph.D., a forensic psychologist, attempted to conduct an evaluation of Ward and submitted a

report to the circuit court on that same date. The evaluation stated in pertinent part:

> On 10/17/97, a forensic evaluation team consisting of Wendell Hall, MD., Michael I. Simon, PhD., and Maria Gergely, L.C.S.W. made an attempt to evaluate Mr. Ward. He was brought to a conference room to meet with the evaluation team at the Arkansas State Hospital. He was neatly dressed in an, orange jumpsuit. He began the interview by stating, "I cannot comply with the evaluation," He did say his attorneys filed a motion for evaluation and he tried to remove their motion. The court denied them and ordered him to appear for evaluation. He politely informed us "I am competent" . . . "I have a right to remain silent," . . . "I am not going to submit to evaluation." At this point the evaluation was terminated. Thus, in summary, the evaluation could not be completed due to Mr. Ward's unwillingness to participate. There was no evidence to indicate that this unwillingness was due to mental disease or defect. During our brief interview with Mr. Ward, he interacted in a logical, coherent manner and exhibited no signs of psychosis. Thus, in summary, Mr. Ward refused to cooperate with this evaluation and there was no indication that this uncooperativeness was due to any Axis I mental disorder.

At Ward's 1997 resentencing trial, Ward presented several witnesses through video-taped statements. Ward presented testimony of three educators from the Erie, Pennsylvania school system where he attended school. Thomas Ritter, a teacher and guidance counselor, testified that he taught Ward in 1965 and 1966 and was also his guidance counselor in the 1970s. Ritter testified that Ward did not have success in school and that Ward was disruptive, and without provocation was aggressive toward other students, but when Ritter spoke to Ward about this behavior he had a "blank stare . . . there was no comprehension that he did anything wrong." Ritter further testified that he knew something "was basically wrong" with Ward but that he did not refer him to a psychologist because at that time the school system had very limited access to psychologists and based on Ward's testing he had the ability to learn. Ritter also testified that Ward exhibited "hostile behavior . . . bizarre behavior."

L. Catherine Fayenmeyer, a guidance counselor in Wattsburg, Pennsylvania from 1965 to 1975, testified that she met with Ward ten to twelve times over a five-year period and knew Ward well. She testified that Ward came to see her mainly for disciplinary problems. She further testified that Ward did not put forth effort in school and was disruptive in class. Fayenmeyer testified that Ward was very bright but had very few friends and did not engage in any activities at school. She testified that Ward was "exceptional" because he did not need classes for "dull students," but she opined that the opportunity to work one on one with a teacher would have made a significant difference for him.

C.J. Wortham, an education specialist in the City of Erie, Pennsylvania in the 1960s and 1970s and who was also part of the Civil Air Patrol Program, worked with Ward for approximately a year and a half when Ward was a cadet in the program. Wortham testified that Ward did well in the structured Civil Air Patrol program and was good with outdoor work and compassing. He also testified that Ward was good with adults, but had emotional problems dealing with his peers and life in general. Wortham testified that he recommended to Ward's family that they seek psychiatric help for Ward. He also testified that Ward got "into trouble" when alcohol was present.

Next, the deposition of Dr. Anthony Cillufo, a psychologist, was read into the record as part of Ward's 1997 sentencing. Dr. Cillufo testified that on April 22, 1977, he conducted a three-hour interview of Ward at the Erie County jail. He testified that he conducted a battery of tests and an extensive clinical interview with Ward, including talking with Ward about his life history, family relationships, and sexual history. Dr. Cillufo diagnosed Ward as an anxious, shy, alienated man of average intelligence, with a propensity for acting violently as part of a mixed personality disorder. He further testified that Ward had features of social personality or explosive personality as well as passive/aggressive and paranoid disorders, and a secondary diagnosis of alcoholism. Further, Dr. Cillufo testified that Ward could possibly have had some early history of minimal brain dysfunction and a slight possibility of neurological damage as Ward had reported fainting spells or blackouts. Dr. Cillufo testified that his main diagnosis was mixed personality disorder.

Ward also presented testimony from Tom Devine, an attorney at the Pulaski County Public Defender's Office. Devine testified that he had known Ward for twelve and a half years and Ward made paintings and drawings for him.

Gary Wayne Brossett had testified at Ward's first trial, and his testimony was also read into the record during Ward's 1997 sentencing. Brossett testified that he was a nursing student at Arkansas Children's Hospital in 1989 and was working at Joubert's, a local tavern. Brossett testified that Ward was at Joubert's on the night of Doss's murder and that Ward drank a few beers and played some pool and left the tavern around midnight.

Having reviewed Ward's presentation of evidence at the 1997 sentencing, we turn to Ward's argument in his motion to recall the mandate regarding an alleged *Ake* violation. In asserting that this court should recall the mandate on this point, Ward relies primarily on a report from Dr. William Logan, a forensic psychiatrist. Logan's forty-one-page report regarding Ward's 1997 sentencing can be summarized as follows. Logan diagnosed Ward with "schizophrenia, paranoid type, as evidenced by a preoccupation with persecutory and grandiose delusional ideas, and occasional

hallucinations and disorganized thinking." Dr. Logan examined Ward on October 22, 2008. Dr. Logan completed a three-hour examination on Ward at the Varner Supermax Unit. According to his report, Dr. Logan reviewed IQ evaluations performed on Ward in 1972, a presentence report performed in 1977, several documents compiled in connection with Ward's prior arrest in Pennsylvania in 1977, Ward's military records, a questionnaire completed by Ward's mother in 1977, Ward's medical history compiled after his 1989 arrest in Arkansas, evaluations performed by Dr. Simon, affidavits from Ward's prior counsel describing his behavior during his 1990 trial and two resentencing hearings, Ward's competency hearing, and various filings and pleadings made by both the State and Ward during his trial and sentencing hearings.

In his report, Dr. Logan described Ward as a heavyset man with poor grooming. He described Ward as having "fair thought organization when giving information about his family and childhood," but noted that "[a]s he began to discuss his legal situation his thought processes deteriorated markedly." Dr. Logan described Ward's "persistent and grandiose delusions" that he "was the target of a conspiracy between officials in Pennsylvania, someone he knew in Canton, Texas and various Arkansas government entities including the governor's office and the State and Federal Public Defenders." According to Dr. Logan, Ward's delusions "do not compromise his intellectual capacity in terms of his intelligence and orientation," but that his understanding of his conviction and sentence are "irrational and delusional." For example, Dr. Logan stated that Ward expressed his belief that "he will never be executed, but rather be exonerated and leave prison a free man to achieve great success." According to Dr. Logan, Ward attributes this belief to "revelations from God."

Dr. Logan's report also described delusions reported by Ward, including his belief that Joe Biden "got Nick Trenticosta (a former attorney of Mr. Ward's) on his case and also has a connection to his current attorney." Ward also reported that he "can see the future including future disasters and future events." He also believes his father is part of the Illuminati and that the Illuminati are trying to help him. According to Dr. Logan's report, Ward described visions of a large black dog that jumps into people and possesses them and that Ward reported hearing his deceased father's voice from a chair. Ward also described his belief that others are jealous of him because of his talent and power and that some of the other prisoners are demons under a spell from the State because they do not complain. Ward stated that he "also has been the victim of a laxative curse." During the interview, Ward reported that the "unholy Alliance in Pennsylvania told him to give up his powers or suffer the consequences."

Dr. Logan diagnosed Ward as having schizophrenia, paranoid type. Dr. Logan gave his opinion that Ward was not competent to be executed. Dr. Logan's specific

report regarding the 1997 sentencing was as follows:

> Competency to Stand Trial in the 1997 Penalty Phase Hearing
>
> Mr. Ward adamantly opposed any attempt by his then attorney, Ms. Tammy Harris to present mitigation testimony that might result in a life sentence. He resisted an effort to assess his competency. Mr. Ward's decisional competency was never addressed. He wanted an outright dismissal of the charges and compensation. Despite his bizarre behavior, the case was allowed to proceed. Subsequently, it has been revealed Mr. Ward's actions were the direct consequences of delusional beliefs that resulted from his Paranoid Schizophrenia, a mental disease.
>
> Consequently, it is my opinion with a reasonable degree of medical certainty that at the 1997 Penalty Phase proceeding, Mr. Ward suffered from Paranoid Schizophrenia. It is my further opinion that the delusions characteristic of this mental disease prevented him from having an ability to understand rationally the proceedings against him and from having the ability to assist effectively in his own defense.

In reviewing Dr. Logan's report, we note that Dr. Logan's evaluation was performed in 2008 and was not part of the record in Ward's 1997 sentencing. Further, Dr. Logan's report discrediting years of data and evaluation is based on his one visit with Ward in 2008. In any event, Dr. Logan's report is of limited support for Ward's argument that a fundamental breakdown in the appellate process occurred in Ward's 1997 sentencing regarding Ward's *Ake* argument because it was not part of the record reviewed by this court.

Next, the record demonstrates that on October 17, 1997, Ward was afforded the opportunity to have his "competency and criminal responsibility" evaluated by psychologists at the state hospital. Although Ward was unwilling to participate, Dr. Simon reported that "there was no evidence to indicate that this unwillingness was due to mental disease or defect." Ward asserts that this evaluation is unreliable and he should be afforded an independent evaluation. 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. *Branscomb v. State*, 299 Ark. 482, 774 S.W.2d 426 (1989); *Dunn v. State*, 291 Ark. 131, 722 S.W.2d 595 (1987); *Wall v. State*, 289 Ark. 570, 715 S.W.2d 208 (1986). In other words, the defendant does not have a constitutional right to search for a psychiatrist of his personal liking or to receive funds to hire his own but is entitled to access to a competent psychiatrist and the examination afforded to Ward satisfied that right. Although Ward requests that we overrule our precedent holding that a competency evaluation at the Arkansas State

Hospital satisfies *Ake*, we decline to overrule this precedent.

> In sum, we do not find merit in Ward's assertions. Whether Ward contends that he was not competent to stand trial at the 1997 sentencing or that his sanity at the time of the offense was at issue, based on the record before us, we do not find that there was a breakdown in the appellate process in *Ward III*. Ward was afforded his constitutionally guaranteed evaluation pursuant to *Ake*, and the record does not support Ward's contention that any breakdown occurred. Ward simply failed to make a threshold showing that his sanity at the time of the offense or his competence to stand trial were significant factors. While the record demonstrates that Ward filed the *Ake* motion, Ward did not make an argument that the state hospital evaluation was inadequate or present any evidence that would support his argument that there was a breakdown in the appellate process. Likewise, we reject Ward's contention that the circuit court's failure to provide an independent psychiatrist to develop mitigating evidence during sentencing, and this court's subsequent failure to discover and reverse that decision, resulted in a breakdown of the appellate process. Accordingly, we deny Ward's request that we recall the mandate on his first point.

Ward VI, 2015 Ark. 61 at 7-15, 455 S.W.3d at 823-27.

In reviewing Ward's claims, we recognize that we addressed Ward's arguments in his current motion to recall the mandate regarding *Ake* and its requirements in *Ward VI*. Today, he continues to make the same arguments he made in 2015 when this court addressed those issues and denied the motion. "The doctrine of the law of the case provides that the 'decision of an appellate court establishes the law of the case for the trial upon remand and for the appellate court itself upon subsequent review.' *Washington v. State*, 278 Ark. 5, 7, 643 S.W.2d 255 (1982) (citing *Mayo v. Ark. Valley Trust Co.*, 137 Ark. 331, 209 S.W. 276 (1919)). Although we noted in *Washington* that the doctrine is not inflexible and does not absolutely preclude correction of error, *id.* (citing *Ferguson v. Green*, 266 Ark. 556, 557, 587 S.W.2d 18 (1979)), we have also held that the doctrine prevents an issue raised in a prior appeal from being raised in a subsequent appeal 'unless the evidence materially varies between the two

appeals.' *Fairchild v. Norris*, 317 Ark. 166, 170, 876 S.W.2d 588 (1994). We adhere to this doctrine to preserve consistency and to avoid reconsideration of matters previously decided. *Id*. Significantly, the doctrine extends to issues of constitutional law. *Id*.; *Findley v. State*, 307 Ark. 53, 818 S.W.2d 242 (1991)." *Kemp v. State*, 335 Ark. 139, 142–43, 983 S.W.2d 383, 385 (1998).

Here, there is neither an allegation for correction of an error nor of evidence that materially varies from Ward's prior motion to recall the mandate of his resentencing in *Ward VI.* Ward merely reargues the merits of his former challenges to this court's interpretation of *Ake*. We previously considered and rejected Ward's arguments. Accordingly, pursuant to the law-of-the-case doctrine, we hold that Ward's arguments provide no basis for granting Ward's motion to recall the mandate in his resentencing.

Further, as we explained in *Ward VI*, the United States Supreme Court in *Ake* held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide access to a psychiatrist's assistance on this issue, if a defendant cannot otherwise afford one. *Ake*, 470 U.S. at 74. The Supreme Court held:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, 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. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Ake, 470 U.S. at 83.

Pursuant to *Ake*, Ward must make a threshold showing that his sanity is likely to be a significant factor in his defense. This determination is made on a case by case basis. *See Pyland v. State*, 302 Ark. 444, 790 S.W.2d 178 (1990). In *Ward VI*, we held that Ward failed to meet this standard. Accordingly, based on our discussion above, we do not find merit in Ward's argument that this court has misinterpreted *Ake*.

Next, with regard to Ward's argument that *McWilliams* altered or expanded the standards required by *Ake*, this argument is without merit. In *McWilliams*, the Court did not alter or change the requirements of *Ake*. The United States Supreme Court held:

> We turn to the main question before us: whether the Alabama Court of Criminal Appeals' determination that McWilliams got all the assistance that *Ake* requires was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).
>
> McWilliams would have us answer "yes" on the ground that *Ake* clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. He points to language in *Ake* that seems to foresee that consequence. See, e.g., 470 U.S., at 81, 105 S.Ct. 1087 ("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" (emphasis added)).
>
> We need not, and do not, decide, however, whether this particular McWilliams claim is correct. As discussed above, *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." *Id.*, at 83, 105 S.Ct. 1087. As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 8–35 (describing

> practice in capital-active jurisdictions); Tr. of Oral Arg. 40 (respondent conceding that "this issue really has been mooted over the last 30–some–odd years because of statutory changes"). It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake*'s most basic requirements.
>
> The dissent calls our unwillingness to resolve the broader question whether *Ake* clearly established a right to an expert independent from the prosecution a "most unseemly maneuver." *Post*, at 1801 – 1802 (opinion of ALITO, J.). We do not agree. We recognize that we granted petitioner's first question presented—which addressed whether *Ake* clearly established a right to an independent expert—and not his second, which raised more case-specific concerns. See Pet. for Cert. i. Yet that does not bind us to issue a sweeping ruling when a narrow one will do. As we explain below, our determination that *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense," 470 U.S., at 83, 105 S.Ct. 1087 is sufficient to resolve the case. We therefore need not decide whether *Ake* clearly established more. (Nor do we agree with the dissent that our approach is "acutely unfair to Alabama" by not "giv[ing] the State a fair chance to respond." Post, at 1808. In fact, the State devoted an entire section of its merits brief to explaining why it thought that "[n]o matter how the Court resolves the [independent expert] question, the court of appeals correctly denied the habeas petition." Brief for Respondent 50. See also id., at 14, 52 (referring to the lower courts' case-specific determinations that McWilliams got all the assistance Ake requires).)

McWilliams, 137 S. Ct. 1790, 1799–801.

Simply put, *McWilliams* did not answer the question that Ward was relying on in seeking relief in this motion. *McWilliams* did not establish new law. In sum, this case is the same one he presented in *Ward VI*, and *McWilliams* does not develop new law or change the standard pursuant to *Ake*. Based on our review of the record and the discussion above, Ward has failed to meet the standard for this court to recall the mandate in his resentencing. Therefore, the motion is denied.

Motion denied; stay of execution lifted.[2]

WOOD and WOMACK, JJ., concur.

KEMP, C.J., and HART, J., dissent.

RHONDA K. WOOD, Justice, concurring. Although I concur in the majority's decision to deny Ward's motion to recall the mandate, I write separately to highlight an ongoing problem in our appellate process. As the majority explains, in 2015, we denied Ward's fourth motion to recall the mandate on the same issue. *Ward v. State*, 2015 Ark. 61, 455 S.W.3d 818 (*Ward VI*). On April 12, 2017, Ward filed this motion to recall the mandate alleging there was an error in the appellate court process. More specifically, he alleged that in his prior appeal this court had misinterpreted *Ake* and had failed to provide him with sufficient relief under that case. *Ake v. Oklahoma*, 470 U.S. 68 (1985). However, we definitively decided that same issue in *Ward VI*, and as the majority points out, our holding in *Ward VI* is law of the case.

Ward's only other argument in his April 2017 motion to recall the mandate was that the United States Supreme Court might in the future conclude that *Ake* meant something different that we did in *Ward VI*. He, therefore, asked us to recall the mandate, not on a legal error, but on the possibility of a future error in the appellate process. That was not a

[2]Although we lift the stay of execution in this case, we note that in *Ward v. Hutchinson*, CV-17-291, on April 14, 2017, we entered a stay of execution.

cognizable ground under our precedent. Even when he pled no appellate error, this court decided to take the motion as a case, rather than deny his motion outright.

The fundamental problem I see in our process is that this court will entertain motions to recall the mandate on virtually any issue, even ones that address duplicative issues which are clearly bound by law of the case. We should exercise our discretion to entertain motions to recall mandates more sparingly in the future. Arkansas applies motions to recall the mandate the most liberally of any state in the country.[1] Consequently, in our criminal court system, final never really means *final*.

WOMACK, J., joins.

[1] *See* Rule 12.9 Washington Rules of Appellate Procedure (providing for recall of the mandate limited to instances of inadvertent mistake of fraud and filed within a reasonable time); *State v. Wade*, 138 P.3d 168 (Wash. 2006) (explaining appellate court may only recall the mandate to correct an inadvertent mistake as improperly recalling it to reconsider the merits impacts the stability of the courts); *State v. Taylor*, 1 S.W.3d 610, 611 (Mo. Ct. App. 1999) (recalling the mandate "is limited to consideration of the claim that federal constitutional rights have been infringed when the lawyer acting for the accused on appeal has been ineffective by constitutional standards"); *Chapman v. St. Stephens Protestant Episcopal Church*, 138 So. 630 (Fla. 1932) (explaining the mandate may not be recalled once the term during which it was issued has ended) (citing *Lovett v. State*, 11 So. 176 (Fla. 1892)); In Re Amendments to Florida Rules of Judicial Admin. & Florida Rules of Appellate Proc.; *White v. State*, 195 So. 479 (Miss. 1940) (holding court can recall the mandate when inadvertently issued); *Horton v. State*, 88 N.W. 146 (Neb. 1901) (explaining ability to recall the mandate ends when the term it was issued in ends); *Lindus v. Northern Ins. Co. of New York*, 438 P.2d 311 (Ariz. 1968) (allowing recall in situations of fraud or mistake of fact); Rule 41 of the Rules of the District of Columbia Court of Appeals (providing a motion to recall the mandate must be filed within 180 days); *Thompson v. Nickle*, 239 P. 649 (Okla. 1925) (recalling the mandate only when issued through inadvertence or mistake); *Jackson v. State*, 688 S.E. 2d 351(Ga. 2010) (permitting recall for mistake or fraud); *Coulter v. Schofield*, 32 Haw. 426 (1932) (recall only before term ends); and Kentucky Criminal Rules 60.02 (recall for fraud in final judgment).

JOHN DAN KEMP, Chief Justice, dissenting. Petitioner Bruce Earl Ward moves this court to recall the mandate from his resentencing in *Ward v. State*, 338 Ark. 619, 1 S.W.3d 1 (1999) (*Ward III*) (affirming his death sentence). The majority has denied Ward's motion to recall the mandate. For the reasons set forth in this dissent, I would grant the motion.

Ward argues that this court should recall the mandate in *Ward III*, 338 Ark. 619, 1 S.W.3d 1, to correct a defect in the appellate process. Ward contends that he was unconstitutionally deprived of any meaningful assistance of a mental-health expert in violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *McWilliams v. Dunn*, 582 U.S. ___, 137 S. Ct. 1790 (2017). Ward asserts that this court's precedent—that compliance with Arkansas Code Annotated section 5-2-305 (Supp. 1989) and that providing a state examination satisfies the constitutional requirement of *Ake*—does not comport with the Court's holding in *McWilliams*, 582 U.S. ___, 137 S. Ct. 1790. Ward maintains that his motion to recall the mandate should be granted on this basis. I agree.

I. Ake *and* McWilliams

A. *Ake*

The Supreme Court of the United States held in *Ake*, 470 U.S. 68, that when a defendant "has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a state provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ake*, 470 U.S. at 74, 105 S. Ct. 1087. This "preliminary showing" includes that (1) the defendant is an

"indigent defendant," 470 U.S. at 70, 105 S. Ct. 1087; (2) his "mental condition" was "relevant to . . . the punishment he might suffer," 470 U.S. at 80, 105 S. Ct. 1087; and (3) his "sanity at the time of the offense . . . was seriously in question." 470 U.S. at 70, 105 S. Ct. 1087. Once that preliminary showing is made, 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, 470 U.S. at 83, 105 S. Ct. 1087 (emphasis added).

Courts in other jurisdictions have split over their interpretation of the requirements articulated in *Ake*. The Eleventh Circuit noted that

> [i]n some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*. *See Miller v. Colson*, 694 F.3d 691, 697–99 (6th Cir. 2012) (discussing the split amongst Sixth Circuit decisions that address whether a neutral mental health expert satisfies *Ake*), *cert. denied*; *Granviel v. Lynaugh*, 881 F.2d 185, 191–92 (5th Cir. 1989) (holding that *Ake* is met when the government provides a defendant with neutral psychiatric assistance), *cert. denied*. Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*. *See United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (holding that a defendant is entitled to independent, non-neutral psychiatric assistance); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process."). However, the United States Supreme Court has thus far declined to resolve this disagreement among the circuits. *See Miller*, 694 F.3d at 697 n. 6; *Granviel v. Texas*, 495 U.S. 963, 110 S. Ct. 2577, 109 L.Ed.2d 758 (1990) (denying certiorari). As a result, the State's provision of a neutral psychologist would not be "contrary to, or involve[ ] an unreasonable application of, clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1).

McWilliams v. Comm'r, 634 Fed. App'x 698, 705–06 (11th Cir. 2015) (per curiam).

On appeal to the Supreme Court, McWilliams argued that "*Ake* clearly established that *a State must provide an indigent defendant with a qualified mental health expert retained specifically for*

the defense team, not a neutral expert available to both parties" (emphasis added). *McWilliams*, 137 S. Ct. at 1799. The Court asserted that

> [a]s a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 8–35 (describing practice in capital-active jurisdictions); Tr. of Oral Arg. 40 (respondent conceding that "this issue really has been mooted over the last 30–some–odd years because of statutory changes"). It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake*'s most basic requirements.

McWilliams, 137 S. Ct. at 1799–80.

B. Arkansas Law Interpreting *Ake*

Since the Supreme Court's *Ake* decision in 1985, this court has interpreted *Ake* to mean that when a psychiatrist examines a defendant at the state hospital, as provided by statute,[1] the *Ake* requirements have been satisfied. *See Ward v. State*, 2015 Ark. 61, 455

[1] Arkansas Code Annotated § 5-2-305 provides the statutory procedures that are to be followed when the defense of mental disease or defect is raised. The statute provides in pertinent part:

> (a) Whenever a defendant charged in circuit court:
>
> (1) Files notice that he intends to rely upon the defense of mental disease or defect, or there is reason to believe that mental disease or defect of the defendant will or has become an issue in the cause; or
>
> (2) Files notice that he will put in issue his fitness to proceed, or there is reason to doubt his fitness to proceed, the court, subject to the provisions of §§ 5-2-304 and 5-2-311, shall immediately suspend all further proceedings in the prosecution. . . .
>
> (b)(1) Upon suspension of further proceedings in the prosecution, the court shall enter an order:
>
> (A) Directing that the defendant undergo examination and observation by one or more psychiatrists at a local regional mental health center. . . .; or
>
> (B) Appointing at least one (1) qualified psychiatrist to make an examination and report on the mental condition of the defendant; or
>
> (C) Directing the Director of the Arkansas State Hospital to examine and report upon the mental condition of the defendant; or

S.W.3d 818 (*Ward VI*) (holding that a competency evaluation at the Arkansas State Hospital satisfied *Ake*); *Creed v. State*, 372 Ark. 221, 224, 273 S.W.3d 494, 497 (2008) (stating that "a defendant's right to examination under *Ake* is protected by an examination by the state hospital as provided by" Arkansas statute); *Dirickson v. State*, 329 Ark. 572, 953 S.W.2d 55 (1997) (holding that a defendant's right to examination under *Ake* is protected by an examination by the state hospital as provided by Arkansas Code Annotated section 5-2-305); *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992) (holding that a review by the state hospital is sufficient under *Ake* and that a defendant is not entitled to a second opinion); *Day v. State*, 306 Ark. 520, 524, 816 S.W.2d 852, 854 (1991) (stating that a defendant's right to

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> (D) Committing the defendant to the Arkansas State Hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty (30) days, or such longer period as the court determines to be necessary for the purpose.
>
> . . . .
>
> (c) Upon completion of an examination at a local regional mental health clinic or center pursuant to subsection (b) of this section or in lieu of such an examination, the court may enter an order providing for examination pursuant to subsections (b)(2) or (3) of this section and may further order the defendant committed to the Arkansas State Hospital for further examination and observation if the court determines that commitment and further examination and observation are warranted.
>
> (d) The report of the examination shall include the following:
>
> (1) A description of the nature of the examination;
>
> (2) A diagnosis of the mental condition of the defendant;
>
> (3) An opinion as to his capacity to understand the proceedings against him and to assist effectively in his own defense;
>
> (4) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the conduct alleged; and
>
> (5) When directed by the court, an opinion as to the capacity of the defendant to have the culpable mental state that is required to establish an element of the offense charged.

Ark. Code Ann. § 5-2-305 (Supp. 1989).

an examination under *Ake* is protected by an examination by the state hospital); *Branscomb v. State*, 299 Ark. 482, 774 S.W.2d 426 (1989) (holding that a psychiatric examination given by the state hospital satisfied the requirements in *Ake*).

C. *McWilliams*

The Court recently interpreted *Ake* in *McWilliams*, 582 U.S. ___, 137 S. Ct. 1790. On January 13, 2017, the Court granted a petition for writ of certiorari in *McWilliams v. Comm'r*, 634 Fed. App'x at 705–06, to answer 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?

The Court heard oral argument and subsequently issued its *McWilliams* opinion in June 2017. Because the Court granted McWilliams's petition for writ of certiorari on this issue, this court granted Ward's motion for stay of execution and took his motion as a case.

In *McWilliams*, Dr. John Goff, a neuropsychologist with Alabama's state hospital, examined McWilliams, who had been convicted of capital murder by an Alabama jury. Two days before the sentencing hearing, Dr. Goff filed his report. The report stated that McWilliams attempted to appear "emotionally disturbed and exaggerat[ed] his neuropsychological problems," *McWilliams*, 582 U.S. at ___, 137 S. Ct. at 1796, but also "that he had some genuine neuropsychological problems." *Id*. Dr. Goff stated in the report that McWilliams's issues were compatible with the head injuries that McWilliams had suffered as a child. The report stated that McWilliams's neurological deficit "could be related to his 'low

frustration tolerance and impulsivity'" and "organic personality syndrome." *Id.* The day before the sentencing hearing, McWilliams's defense counsel received some updated records indicating McWilliams was taking an assortment of psychotropic medications. *Id.*

At the sentencing hearing, defense counsel moved for a continuance to review the information. The court denied the motion to continue the hearing but allowed defense counsel until mid-afternoon to review the material. Defense counsel then moved to withdraw from the case and again moved for a continuance. The court denied both motions and sentenced McWilliams to death. The court ruled that even if McWilliams's mental-health issues rose to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this mitigating circumstance. *Id.* at ___, 137 S. Ct. at 1797.

McWilliams appealed to the Alabama Court of Criminal Appeals and argued that the circuit court had denied him the right to meaningful expert assistance as required by *Ake*. The Alabama Court of Criminal Appeals disagreed and held that the State had satisfied the *Ake* requirements by allowing Dr. Goff to examine McWilliams. *McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991). The Alabama Supreme Court affirmed. *Ex parte McWilliams*, 640 So.2d 1015 (Ala. 1993). McWilliams subsequently sought federal habeas relief, and the federal district court denied the petition. McWilliams appealed to the Eleventh Circuit, which affirmed. *McWilliams*, 634 Fed. App'x 698.

On appeal, the Court examined whether the *Ake* requirements had been met in McWilliams's case and stated:

> [N]o one denies that the conditions that trigger application of *Ake* are present. McWilliams is and was an 'indigent defendant,' 470 U.S., at 70, 105 S. Ct. 1087. See *supra*, at 1794. His "mental condition" was "relevant to . . . the punishment he might suffer," 470 U.S., at 80, 105 S. Ct. 1087. See *supra*, at 1794–1795. And, that "mental condition," *i.e.*, his "sanity at the time of the offense," was "seriously in question." 470 U.S., at 70, 105 S. Ct. 1087. See *supra*, at 1794–1795. Consequently, the Constitution, as interpreted in *Ake*, required the State to provide McWilliams with "*access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.*" 470 U.S. at 83, 105 S. Ct. 1087.

582 U.S. at ___, 137 S. Ct. at 1798 (emphasis added).

The Court stated that Alabama had complied with *Ake*'s requirement of providing McWilliams with access to a competent psychiatrist who had conducted a mental-health examination but that the psychiatrist *had not assisted* in McWilliams's defense. The Court stated,

> *Ake* does not require just an examination. Rather, it requires the State to provide the defense with "access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense."

McWilliams, 582 U.S. at ___, 137 S. Ct. at 1800 (emphasis added). The Court specifically stated that "Alabama *met the examination portion* of this requirement by providing for Dr. Goff's examination of McWilliams" but that Alabama failed to meet the *three parts of assistance* required by *Ake*. *Id.* at 1800.

The Court specifically elaborated on what is required of a psychiatrist's assistance to the defense:

> But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense *evaluate Goff's report or McWilliams' extensive medical records and translate that data into a legal strategy*. Neither Dr. Goff nor any other expert *helped the defense prepare and present arguments* that might, for example, have explained that McWilliams'

> purported malingering was not necessarily inconsistent with mental illness . . . . Neither Dr. Goff nor any other expert *helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing* himself.

582 U.S. at ___, 137 S. Ct. at 1800–01 (emphasis added). The Court emphasized that "Alabama here did not meet even *Ake*'s most basic requirements," *id.* at 1800, and held that "[s]ince Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming McWilliams's conviction and sentence was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'" *Id.* at ___, 137 S. Ct. at 1801.

Based on the Court's recent holding in *McWilliams*, I must conclude that Arkansas is in the same position as Alabama. Arkansas has incorrectly held for decades that a competency evaluation at the state hospital is sufficient under *Ake*. However, in *McWilliams*, the Court states that this view is a "plainly incorrect" reading of *Ake* and that more than a mental-health examination provided by the State satisfies *Ake*'s constitutional requirements. *Id.* at ___, 137 S. Ct. at 1799–1800. The Court states that a competent psychiatrist must also provide assistance in the forms of evaluation, preparation, and presentation to the defense. For the reasons set forth below, Ward lacked that mental-health expert assistance throughout his case.

II. *Analysis of* Ake *and* McWilliams *in Ward's Case*

A. Preliminary Showing of "Conditions That Trigger *Ake*"

Ward meets the threshold requirements that trigger *Ake*. The Court stated in *McWilliams* that a preliminary showing of "conditions that trigger *Ake*" includes that (1) the defendant is an

"indigent defendant"; (2) his "mental condition" was "relevant to . . . the punishment he might suffer"; and (3) his "sanity at the time of the offense . . . was seriously in question." *McWilliams*, 582 U.S. at ___, 137 S. Ct. at 1798.

First, the circuit court determined that Ward was indigent. The record reveals that the circuit court stated in its April 6, 1990 order that Ward had been previously adjudicated indigent and ordered the Pulaski County Treasurer to pay for penalty-phase witnesses to assist in his defense.

Second, Ward's mental condition was relevant to his possible punishment. Here, Ward was charged with capital murder, and the prosecution sought the death penalty. Pursuant to Arkansas Code Annotated section 5-4-605(1), (3) (1987), the jury could hear two mitigating factors relating to Ward's mental condition at the time of the offense. Those two mitigating factors included that the murder "was committed while the defendant was under extreme mental or emotional disturbance" and "was committed while the defendant was acting under unusual pressures or influences." *See* Ark. Code Ann. § 5-4-605(1), (3). Before trial, the circuit court denied Ward an *Ake* expert by denying his January 19, 1990 motion for appropriation of funds for expert assistance, and Ward was forced to rely on noncontemporaneous evidence of his mental condition from decades earlier. This evidence included testimony from a psychologist who examined him in 1977, school guidance counselors from the 1960s and 1970s, and a coworker in the 1970s from the Civil Air Patrol.

Third, Ward's sanity at the time of the offense was "seriously in question." The record is replete with questions that defense counsel raised concerning Ward's mental health. Defense

counsel notified the court of Ward's mental-defect defense, requested competency evaluations, requested an *Ake* expert for sentencing, requested an ex parte hearing on his *Ake* motion, argued that an *Ake* expert was necessary for mitigation purposes, and requested a continuance based on counsel's inability to represent Ward because of Ward's mental-health issues.

B. *Ake* Mental-Health Factors

Having established that the threshold criteria have been met in Ward's case, the key issue is whether Ward's mental-health expert conducted "an appropriate [1] *examination* and assist[ed] in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense." *McWilliams*, 582 U.S. at ___, 137 S. Ct. at 1800.

1. Examination

In *McWilliams*, the Court stated that it "was willing to assume that Alabama met the *examination* portion of [the *Ake* requirements] by providing Dr. Goff's examination of McWilliams." 582 U.S. at ___, 137 S. Ct. at 1800 (emphasis added). Similarly, in Ward's case, the examination requirement was satisfied. The record reflects that the circuit court ordered Ward's commitment, and he stayed in the Arkansas State Hospital from November 29, 1989, to December 14 or 16, 1989. During that time, Drs. Michael Simon and O. Wendell Hall met with Ward and found him competent to proceed. On December 14, 1989, the physicians filed their report with the circuit court and found that Ward "did not lack the capacity to appreciate the criminality of his conduct."

In 1997, Ward's defense counsel moved to stay the proceedings and requested a mental-health examination after defense counsel reported Ward's bizarre behavior and his purported delusions. Counsel stated that Ward's mental condition "ha[d] deteriorated to the point that he cannot or will not cooperate with present counsel." After denying his *Ake* motion on February 27, 1997, the circuit court ordered Ward to undergo an Act III evaluation, but the physicians terminated their interview with him because he refused to cooperate.

2. Assistance: Evaluation, Preparation, and Presentation

But as the *McWilliams* Court notes, *Ake* requires more than just a state mental-health examination. *Ake* also requires that Ward "receive[ ] the assistance of a mental health expert . . . to effectively *'assist in evaluation, preparation, and presentation of the defense*.'" *McWilliams*, 582 U.S. at ___, 137 S. Ct. at 1799 (emphasis added). These "other three parts," *id*. at 1800, of a mental-health expert's assistance include (1) an evaluation of a report or medical records and a translation of that data into a legal strategy; (2) preparation that includes helping the defense "prepare and present arguments" relating to the defendant's mental health; and (3) presentation that includes helping "the defense prepare direct or cross-examination of any witnesses" and testifying for the defense. *Id*. at ___, 137 S. Ct. at 1800–01.

As in *McWilliams*, the three *Ake* assistance factors were not satisfied in Ward's case. First, the record is devoid of any evidence that either Simon or Hall helped Ward's defense counsel evaluate their mental-health report, which consisted of "findings . . . [from] (1) [h]istorical data from outside sources; (2) [m]edical history, physical and neurological

examinations; (3) [l]aboratory and other physical studies; [and] (4) [p]sychological assessment by staff psychologist [sic]." *Ward v. State*, 2015 Ark. 60, at 2, 455 S.W.3d 303, 305 *(Ward V)*. Nor is there any evidence to suggest that either Simon or Hall helped translate this data into a legal strategy for the defense. Second, Ward's defense counsel lacked a mental-health expert to assist the defense in preparing and presenting its specific arguments concerning Ward's fluctuating mental-health status. Third, Ward did not have the assistance of a mental-health expert to prepare direct examination or to testify *for the defense*. In fact, Simon testified for the State.

Thus, I would hold that, like the Alabama courts in *McWilliams*, this court did not meet *Ake*'s most basic requirements in Ward's case. Like the Alabama courts, this court has repeatedly held that the *Ake* requirements are met when the State provides a competent psychiatrist who examines the defendant. But *McWilliams* simply requires more.

III. *Law-of-the-Case Doctrine and* Ward VI

A. Law-of-the-Case Doctrine

The majority relies on the law-of-the-case doctrine and agrees with the State's argument that Ward now presents in his motion to recall the mandate the issues that he presented in *Ward VI*. The majority states that "pursuant to the law-of-the-case doctrine, we hold that Ward's arguments provide no basis for granting Ward's motion to recall the mandate in his resentencing." I disagree.

The Supreme Court has held that when a decision would undoubtedly work a "manifest injustice," the law of the case doctrine does not apply. *Agostini v. Felton*, 521 U.S.

203, 236 (1997); *see also Arizona v. California*, 460 U.S. 605, 618, n.8 (1983). Further, when an intervening decision has clarified the controlling rules of law, or when the rule stated in the prior decision was a "'manifest misapplication' of the law resulting in 'substantial injustice,'" the law-of-the-case doctrine does not apply. *People v. Jurado*, 131 P.3d 400, 414 (Ca. 2006).

The application of the law-of-the-case doctrine in Ward's case is misplaced because the Court held in *McWilliams* that the constitutional right to access to a competent mental-health expert requires more than simply an examination of the defendant at the state hospital by the State. The Court's holding in *McWilliams* must be followed by this court. To hold otherwise would be a "manifest injustice" contemplated by the Court in *Agostini*, 521 U.S. 203. Simply put, this court should not continue to rely on the law-of-the-case doctrine when its longstanding precedent is clearly wrong.

B. *Ward VI*

I disagree with the majority's contention that, in *Ward VI*, Ward failed to make a threshold showing that his sanity at the time of the offense was likely to be a significant factor at trial. In *Ward VI*, the court held that "the defendant does not have a constitutional right to search for a psychiatrist of his personal liking or to receive funds to hire his own but is entitled to access to a competent psychiatrist and the examination afforded to Ward satisfied that right." 2015 Ark. 61, at 14, 455 S.W.3d at 827. In *Ward VI*, this court simply relied on its previous interpretations of *Ake* and did not fully analyze the "preliminary showing" of

competency iterated in *Ake* and *McWilliams*. In short, this court incorrectly decided *Ward VI* by relying on erroneous precedent.

Moreover, in *Ward VI*, this court overlooked an important tenet in *Ake*:

> *When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success*.

Ake, 470 U.S. at 82–83, 105 S. Ct. at 1096 (emphasis added). A majority of state courts hold that an ex parte hearing is required. 3 Criminal Procedure § 11.2(e) (4th ed.). In Arkansas, this court has recognized "the appropriate rule" of allowing a defendant to make an ex parte showing to the circuit court when the defendant's sanity is likely to be a significant factor in his or her defense. *Wall v. State*, 289 Ark. 570, 572, 715 S.W.2d 208, 209 (1986).

In this instance, the circuit court denied Ward an opportunity to present additional evidence of his mental condition when it denied his request for an ex parte hearing before his third sentencing hearing. On February 14, 1997, Ward moved the circuit court for an order authorizing certain defense expenditures to hire an expert to assist him in presenting mitigating factors. Ward stated that he made the request "because defense counsel does not wish to unnecessarily disclose the defense mitigation case" to the State. He further stated, "Only a skilled professional with appropriate supporting experts and information can determine the existence of any mental disease or defect which may mitigate in this case." He also requested an ex parte hearing to make a requisite showing for an *Ake* expert. The circuit court denied Ward's motion for an ex parte hearing in its February 27, 1997 order, and

Ward's case proceeded to his third resentencing trial in the Pulaski County Circuit Court. Thus, in my view, the circuit court's denial of Ward's motion for an ex parte hearing runs afoul of *Ake*, and Ward should not be penalized for failing to establish a showing for an *Ake* expert.

IV. *Ward's Motion to Recall the Mandate*

This court will recall a mandate and reopen a case only in extraordinary circumstances. *Wertz v. State*, 2016 Ark. 249, 493 S.W.3d 772. To ensure that our discretionary act is not exercised arbitrarily, this court recognizes three relevant factors to consider when it has been presented with a motion to recall the mandate in a death-penalty case: (1) the presence of a defect or breakdown 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 requiring heightened scrutiny. *See id.*; *see also Roberts v. State*, 2013 Ark. 57, 426 S.W.3d 372. While we do consider these factors, strict satisfaction of all three factors is not required because this court has the inherent authority to recall its mandate in extraordinary circumstances. *See Nooner v. State*, 2014 Ark. 296, 438 S.W.3d 233.

Two of relevant mandate factors are satisfied in this case. First, a "presence of a defect or breakdown in the appellate process" exists because Ward did not get the requisite meaningful assistance of a competent psychiatrist to the defense as contemplated by *McWilliams* in its interpretation of *Ake*. Second, Ward's case is a "death case requiring heightened scrutiny." Ward filed motions for appropriation of funds for mental-health expert assistance in January 1990, August 1992, and February 1997. The circuit court denied each

of those motions. In my view, this court's heightened scrutiny of a death case warrants granting Ward's motion because the Court's holding in *McWilliams* further clarified the holding in *Ake*. Because this court repeatedly applied a flawed interpretation of *Ake* to Ward's case on direct appeal from his 1997 resentencing, this court should recall the mandate from his resentencing in *Ward III*, 338 Ark. 619, 1 S.W.3d 1.

V. *Conclusion*

For the foregoing reasons, I would grant Ward's motion to recall the mandate in his 1997 resentencing. *See Ward III*, 338 Ark. 619, 1 S.W.3d 1. Accordingly, I would not lift the stay of execution.

HART, J., joins this opinion.

Jennifer Horan, Federal Defender, by: *April Golden* and *Scott W. Braden*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., for appellee.