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SUPREME COURT OF ARKANSAS

No. CR93-988

FRANK WILLIAMS, JR. APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** December 15, 2011 MOTION TO RECALL THE MANDATE MOTION GRANTED.

PAUL E. DANIELSON, Associate Justice

Petitioner Frank Williams Jr. moves this court to recall the mandate of his direct appeal in order to reopen that case. In a separate case submitted this same day, he also moves this court to recall the mandate of his postconviction proceedings in order to reopen those proceedings. In support of his motion to recall the mandate of his direct appeal, he argues: (1) ineffective assistance of direct-appeal counsel is a defect or breakdown in the appellate process and (2) the state of Arkansas will likely execute a mentally retarded individual, which presents a miscarriage of justice. We grant the motion and reverse and remand for new sentencing based not on the specific arguments of Williams, but because there was indeed a breakdown in the appellate process in this death-penalty case.

The procedural facts are these. After being tried by a jury, Williams was found guilty of capital murder of a farmer in Lafayette County and was sentenced to death. *See Williams v. State*, 321 Ark. 344, 902 S.W.2d 767 (1995), *cert. denied*, 516 U.S. 1030 (1995) (*Williams*

I). On appeal, this court affirmed that conviction and sentence. *See Williams*, *supra*. Williams then sought postconviction relief, which was denied by the Lafayette County Circuit Court. *See Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001) (*Williams II*). That denial was then affirmed by this court. *See id*.

Williams next filed a federal habeas corpus petition, which was denied. Williams then, through a pleading filed in the federal district court by the Arkansas Federal Public Defender's Office, sought relief for the first time under *Atkins v. Virginia*, 536 U.S. 304 (2002), claiming that he could not be executed because he was a person with mental retardation. The district court dismissed his motions seeking to alter or amend the judgment, or, in the alternative, for relief from the judgment, on August 16, 2004. However, the court allowed the Arkansas Federal Public Defender's Office to serve as substitute counsel and begin officially representing Williams in his appeal to the United States Court of Appeals for the Eighth Circuit, where the denial of habeas relief and the dismissal of the *Atkins*-based motions as de facto successive habeas petitions were affirmed. *See Williams v. Norris*, 461 F. 3d 999 (8th Cir. 2006), *cert. denied*, 552 U.S. 840 (2007).

On February 24, 2011, Williams moved this court to recall the mandates of our judgments denying Williams relief on both his direct appeal and Rule 37 postconviction relief. This court decided to take the motion as a case on March 17, 2011. We now turn to the merits of his motion to recall the mandate of his direct appeal.

This court will only recall a mandate and reopen a case in extraordinary circumstances. *See, e.g.*, *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003). 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. *Id.* 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. However, in a separate case, this court also found that the intoxication and subsequent impairment of Rule 37.5 counsel constituted a defect in the appellate process that warranted recalling the mandate. *See Lee v. State*, 367 Ark. 84, 238 S.W.3d 52 (2006). Most recently, in *Wooten v. State*, 2010 Ark. 467, ___ S.W.3d ___, we found that the lack of verification of Wooten's Rule 37 petition constituted a defect or breakdown in the appellate process that required a recall of the mandate.

In Williams's direct appeal, the State asked this court to conduct a proportionality review, as we had done in the past. *See Williams I*, *supra*. We stated:

> Comparative proportionality review is not constitutionally mandated in every case where the death sentence is imposed. *Pulley v. Harris*, 465 U.S. 37 (1984). Our Legislature, by enacting recent sentencing procedures, has provided a statutory check on arbitrariness by requiring a bifurcated proceeding where the jury is provided with information on aggravating and mitigating circumstances, and with standards in the use of that information. See Ark.Code Ann. §§ 5-4-103, 5-4-603 -605 (Repl. 1993). Additionally, our review upon appeal includes a review of the aggravating and mitigating circumstances presented to the jury and a harmless error review of the jury's findings. *See* § 5–4–603.

Id. at 352–53, 902 S.W.2d at 772.

However, we conducted the review as requested and found no error:

In the present case, the jury unanimously found one aggravating circumstance existed

> beyond a reasonable doubt, namely, Williams had previously committed another felony, an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person. *See* Ark. Code Ann. § 5-4-604(3) (Repl. 1993). The previously committed felony involved circumstances in which Williams threatened a law enforcement officer with a butcher knife, and was the offense for which Williams was currently on parole. In that encounter, Williams pointed an eight-inch knife towards the officer. In recalling the event, the officer said that if he had not moved away from Williams, Williams would have "cut me up and spit me out." The officer recounted that Williams threw down the knife only after the officer drew his revolver. As to mitigating circumstances, Williams offered testimony regarding his deprived socioeconomic background and his dysfunctional family, and expert testimony that he was under the influence of alcohol and marijuana at the time of the murder. A unanimous jury found no mitigating circumstances probably existed at the time of the murder. We find no error.

Id. at 353, 902 S.W.2d at 772.

Unfortunately, that was an erroneous finding by this court. As pointed out by Williams in his proposed brief, the jury in Williams's case erred in marking section D of Form 2, indicating that no evidence of mitigation was offered, where evidence was clearly presented. This court has previously reversed a death sentence and remanded for resentencing based upon the same error. *See, e.g.*, *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Form 2, which was completed by the jury gave four options:

> A. ( ) We <u>unanimously</u> find that the following mitigating circumstance(s) probably existed at the time of the murder:
>
> . . . .
>
> B. ( ) <u>One or more</u> members of the Jury believed that the following mitigating circumstance(s) probably existed, but the jury did not unanimously agree:

. . . .

C. ( ) There was some evidence of the following mitigating circumstances, but the Jury unanimously agreed that they did not exist at the time of the murder:

(Check applicable circumstances and specify any additional ones.)

( ) The capital murder was committed while Frank Williams was under extreme mental or emotional disturbance.

( ) The capital murder was committed while Frank Williams was acting under unusual pressures or influences or under the domination of another person.

( ) The capital murder was committed while the capacity of Frank Williams to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse.

( ) The youth of Frank Williams at the time of the capital murder.

( ) Other: (Specify in writing.)

D. ( ) There was no evidence of any mitigating circumstance.

The Williams jury erroneously marked subsection D, despite the fact that Williams had offered unrebutted evidence in mitigation through Mary Pat Carlson, a licensed professional counselor, regarding the fact that he grew up in a dysfunctional family with substance abuse as a primary area of dysfunction and that he came from a violent background where his parents would get into physical altercations with one another under the influence. Additionally, evidence was presented that he was functioning with a low I.Q., understanding

things in society about as well as a nine or ten year old.[1] Carlson opined that Williams was alcohol dependent, abused cannabis, and had an antisocial behavior problem. Carlson further opined Williams was under the influence of both alcohol and marijuana on the night of the murder. It was her testimony that, physiologically, he was not able to appreciate the criminality of his conduct and conform it to the requirement of the law.

While the evidence presented may or may not have established that a mitigating circumstance "probably existed" for the murder, it was certainly offered for that purpose. If the jury did not believe that the evidence presented rose to the level of mitigating evidence, it should have marked subsection C of Form 2. The jurors did not check Form 2 C; nor did they mark any of the proposed mitigators to show that some evidence was offered to support them. While each juror was polled generally on whether his or her verdict was a death sentence, there was no polling of the jury regarding any mitigating circumstance.

As we held in *Anderson, supra*, the manner in which the jury completed Form 2 D allows us only to conclude that the jury eliminated from its consideration all evidence presented of mitigating circumstances and sentenced Williams to death solely based on the aggravating circumstance, which is reversible error. This error was obviously not discovered during Williams's direct appeal, which constitutes a defect or breakdown in the appellate process in this death-penalty case requiring heightened scrutiny. Because of these unique

[1]While mental retardation/mental capacity was not fully developed as a possible mitigating factor, the disposition of this case will provide an opportunity for a full hearing on the mental-retardation/mental-capacity issue.

circumstances, we find we must recall the mandate and reopen Williams's direct appeal. Additionally, we must reverse the death sentence and order resentencing.

Motion to recall mandate granted. Death sentence reversed and remanded for resentencing.

Special Justice STEVEN W. QUATTLEBAUM joins in this opinion.

CORBIN, J., not participating.