THIS IS A CAPITAL CASE. EXECUTION SCHEDULED APRIL 27, 2017

IN THE CIRCUIT COURT OF LINCOLN COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT, WEST

KENNETH WILLIAMS, Petitioner

v. 40CV-17-46

STATE OF ARKANSAS, Respondent

PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner Kenneth Williams is intellectually disabled, and thus ineligible for execution under Arkansas statutory law, Ark. Code § 5-4-618, and under the Eighth Amendment, *see Atkins v. Virginia*, 536 U.S. 304 (2002). However, no court has ever been presented with Mr. Williams's claim of intellectual disability. As a result, he is currently imprisoned under an illegal death sentence set to be carried out within a matter of days. Mr. Williams respectfully requests that this Court issue a writ of habeas corpus, vacate his unlawful capital sentence, and reinvest itself with jurisdiction to resentence him.

BACKGROUND AND PROCEDURAL HISTORY

A. Trial/Direct Appeal.

Kenneth Dewayne Williams was charged with the October 3, 1999 capital murder of Cecil Boren in the course of a felony and other crimes. The jury returned a verdict of guilty on the charges of capital murder, aggravated robbery, and escape in the first degree on August 29, 2000. The penalty phase began the same day. At the sentencing hearing, the defense called Dr. Mark Cunningham, a clinical and forensic psychologist who conducted an evaluation based on interviews with Mr. Williams and third-parties, records review, and neuropsychological testing. Dr. Cunningham testified, *inter alia*, that Mr. Williams achieved a full-scale score of 70 on an IQ test, which meant that his "true" IQ score was between 67 and 75. Trial R. at 2151. He further testified that

other aspects of the neuropsychological testing revealed that Mr. Williams displayed psychological deficits in a number of areas, indicating "brain dysfunction." Trial R. at 1251-52. Finally, Dr. Cunningham described 19 different "emotionally damaging" factors that he identified in Mr. Williams's history and discussed how these factors affected Mr. Williams's psychological development. Trial R. at 2152-53.

The jury sentenced Mr. Williams to death on August 30, 2000. On the verdict form, the jury indicated that "[t]here was some evidence presented to support" that Mr. Williams "experienced family dysfunction which extended from generation to generation," but the evidence was "insufficient to establish that the mitigating circumstance[] probably existed." Trial R. vol. 2, at 500e-500f. The jury did not indicate that it found evidence of any other mitigating circumstance.

The Arkansas Supreme Court affirmed the convictions and sentences on direct appeal. *Williams v. State*, 67 S.W.3d 548 (Ark. 2002) (*Williams-1*).

B. Rule 37 Proceedings.

On August 9, 2002, Mr. Williams, through his court-appointed attorney, Jeffrey Rosenzweig, filed a ten-page Rule 37 petition, asserting seven claims.[1] Among the claims were an ineffectiveness-of-counsel claim based on trial

[1] On May 16, 2005, Mr. Williams filed a Supplement to his Rule 37 Petition, adding two claims. The supplemental petition was accepted by the court.

counsel's failure to submit evidence of mental retardation under § 5-4-618 of the Arkansas Code, which categorically exempts persons qualifying as mentally retarded from the death penalty under state law; and a claim that Mr. Williams was categorically ineligible for the death penalty under the United States Supreme Court's June 20, 2002 decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

This Court granted Mr. Williams's motions for funds to hire an expert and an investigator for purposes of his *Atkins* claim. Mr. Rosenzweig retained psychologist Dr. Ricardo Weinstein as the expert and Mary Paal as a mitigation specialist. However, at an evidentiary hearing held on September 8, 2005, Mr. Rosenzweig informed the court that Mr. Williams would not be pursuing either of the two claims based on his intellectual disability. Rule 37 Record, 9/8/05, at 136-37.

The court denied each of Mr. Williams's remaining Rule 37 claims on November 21, 2005. *See State v. Williams*, Findings of Fact and Conclusions of Law, Nov. 21, 2005. This Court affirmed on March 1, 2007. *Williams v. State*, 251 S.W.2d 290 (Ark. 2007) (*Williams-2*).

C. Federal Habeas Proceedings.

Mr. Rosenzweig continued to represent Mr. Williams in federal habeas proceedings. On September 10, 2007, he filed a petition for writ of habeas corpus

on behalf of Mr. Williams in the United States District Court for the Eastern District of Arkansas.

The district court denied relief on all claims on November 4, 2008. *Williams v. Norris*, Case No. 5:07-cv-00234 SWW, 2008 WL 4820559 (E.D. Ark. Nov. 4, 2008). The Eighth Circuit affirmed the district court's denial of relief on July 15, 2010. *Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010) (*Williams-3*). A petition for rehearing and rehearing en banc were denied that same day.

D. Current Proceedings.

On February 27, 2017, Governor Asa Hutchinson scheduled eight execution dates, including that of Mr. Williams, for a ten-day period in April. Mr. Williams filed a clemency application, which was denied on April 5, 2017. The State has scheduled his execution on April 27, 2017. Prior to the setting of Mr. Williams's execution date, Mr. Rosenzweig had not visited his client for approximately seven years.

On April 11, 2017, Mr. Rosenzweig moved in the United States District Court for the Eastern District of Arkansas for the appointment of co-counsel from the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO") in this matter, noting his competing responsibilities in other capital cases with pending execution dates and Mr. Williams's concurrence with the

motion. *See Williams v. Norris*, No. 5:07-cv-00234-SWW, ECF No. 26 (E.D. Ark. April 11, 2017). The Court appointed counsel from the FCDO that same day.

Concurrent with this filing, Petitioner has filed a Motion for Stay of Execution in the Arkansas Supreme Court, seeking a stay pending this habeas. In addition, Petitioner has filed a Motion to Recall the Mandate with the Arkansas Supreme Court asserting these and additional claims for relief.

ARGUMENT

I. THE CLAIM IS COGNIZABLE.

The Arkansas Code provides that the "writ of habeas corpus *shall be granted* forthwith" by a circuit court judge "to any person who shall apply for the writ by petition showing, by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority. . . ." Ark. Code. § 16-112-102(a), §16-112-103.

While the Arkansas Supreme Court has made clear that habeas corpus is a narrow remedy, it has also established that the remedy is warranted where a prisoner is being held under an unlawful sentence. For instance, in *Smith v. Kelley*, the court granted the writ to a petitioner who challenged his 1984 life sentence, for a rape he committed as a juvenile, under *Graham v. Florida*, 560 U.S. 48 (2010). *Smith v. Kelley*, Case No. CV-16-167, 2016 WL 4919890 (Ark. Sept. 15, 2016). The court explained:

> Unless the petitioner in proceedings for a writ of habeas corpus can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *Smith has made both such showings because he demonstrated that his sentence was illegal.*

Id. at *1 (emphasis supplied).

Likewise, the Arkansas Supreme Court has held that habeas corpus is the appropriate vehicle for petitioners challenging the legality of a sentence of life without parole for a crime committed as a juvenile under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). *See, e.g., Hobbs v. Gordon*, 434 S.W.3d 364 (Ark. 2014); *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013). In *Hobbs*, the court expressly rejected the State's argument that, because petitioner's *Miller* claim was "based on the manner in which the sentence was imposed, not an allegation that the sentence was illegal on its face," the claim was "not cognizable in habeas." *Hobbs*, 434 S.W.3d at 367-68. Instead, recognizing that the writ of habeas corpus is a remedy that may be invoked "when no other effective means of relief is at hand," the court determined that claims based on the illegality of a prisoner's sentence "are cognizable and are appropriate for the writ of habeas corpus." *Id.* at 369 (quoting *Haller v. Ratcliffe*, 221 S.W.2d 886, 887 (1949)).

The same rationale applies here. The Arkansas statute governing intellectual disability, Ark. Code § 5-4-618, bars the execution of a "person with mental retardation." Furthermore, *Atkins* categorically prohibits the execution of a person

with intellectual disability under the Eighth Amendment. *See Atkins*, 536 U.S. at 321. As detailed below, Mr. Williams qualifies as intellectually disabled. As such, Mr. Williams was categorically exempt from the death penalty at the time of his sentencing, and he remains categorically exempt today. Mr. Williams's capital sentence is therefore illegal and he is entitled to habeas relief from this Court. *See, e.g., Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) ("A conviction or sentence imposed in violation of a substantive rule [of the Eighth Amendment] is not just erroneous but contrary to law and, as a result, void," so that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule.").

II. THE PETITION IS RIPE FOR REVIEW.

While Mr. Williams has been intellectually disabled at least as of the age 18, he only last week began receiving the effective legal assistance necessary to allow him to assert his claim of categorical ineligibility for the death penalty.

On August 8, 2002, a few months after the United States Supreme Court had decided *Atkins*, Mr. Williams's post-conviction counsel, Mr. Rosenzweig, filed a timely Rule 37 petition on Mr. Williams's behalf. Among other claims, the petition alleged: "Williams is mentally retarded under the decision of the United States Supreme Court in *Atkins v. Virginia* and the Eighth Amendment from which

it flows, the death penalty is prohibited." A-76.[2] He moved for, and the trial court granted, funds to retain an expert in assessing intellectual disability. The court allowed $10,000 to retain Dr. Ricardo Weinstein, granted additional funds for an *Atkins* investigator, and signed an order allowing Dr. Weinstein to enter the prison for an evaluation. A-84 to A-90.

Dr. Weinstein met with Mr. Williams and administered tests on May 20 and 21, 2004. He has no recollection and no record of discussing his evaluation with Mr. Rosenzweig, and his test results remained unscored until he was asked to score them in 2017. He never told Mr. Rosenzweig that he had ruled out a diagnosis of intellectual disability. He never completed his work on the case. Report of Ricardo Weinstein, Ph.D., April 18, 2017, A-138.

Without further exploration of the *Atkins* issue, Mr. Rosenzweig abandoned the claim. The court had granted him adjournments in contemplation of amendment following his *Atkins* investigation, but he amended the petition on May 16, 2005, without adding any specific details to the *Atkins* claim. *See* Rule 37 Record at 66. At a hearing on the Rule 37 motion held on September 8, 2005, he told the court that:

> Claims One[3] and Two, we are not going to pursue in this matter. That deals with the retardation issue. And this was propounded and

[2] "A-" refers to the appendix to this petition.

[3] Claim One had alleged that trial counsel was ineffective for not arguing that Mr. Williams satisfied Arkansas statutory criteria for intellectual disability.

> investigated in good faith. And there, in fact, was testimony in the trial record about borderline mental issues. But after -- and the Court did authorize full testing of Mr. Williams. And after that testing was done, it was -- we have decided not to pursue that -- those two claims. So Claims One and Two would not be pursued at this time.

A-92 to 93; *see also* A-95(reiterating withdrawal of *Atkins* claim in Proposed Findings of Fact and Conclusions of Law). The Rule 37 court determined that the *Atkins* claim had been abandoned. A-96.

The claim that Rule 37 counsel abandoned was a meritorious, life-saving claim. Neuropsychologist Daniel A. Martell, Ph.D. (who evaluated Mr. Williams this week), Dr. Cunningham, and Dr. Weinstein, have all evaluated Petitioner and concluded that he is intellectually disabled and that he met the definition of intellectual disability at the time of the crime. If counsel had asked Dr. Weinstein to score his test results, complete his review of the records, and form an opinion, Dr. Weinstein would have told him that Mr. Williams is intellectually disabled. A-151. Similarly, if counsel had contacted the trial expert, Dr. Cunningham, in 2004, shared Dr. Weinstein's test results, and asked him to form an opinion, Dr. Cunningham would also have told him that Mr. Williams is intellectually disabled. A-134. Indeed, in 2000, Dr. Cunningham recognized that the IQ test administered to Petitioner at that time was in the range typically associated with intellectual disability (then referred to as mental retardation). Trial R. at 2150-52. However, at that time, research into the role of the Flynn effect (*i.e.*, the spurious inflation of

IQ scores due to outdated norms) was not widely appreciated and Dr. Cunningham was not aware of it at that time. The Flynn effect has since been widely accepted by the scientific community and diagnosticians assessing the presence or absence of intellectual disability must correct for it when interpreting IQ test scores. *See* Claim III(B)(1) (describing the Flynn effect and IQ testing in the context of *Atkins*). Before the age of 18, Petitioner received IQ scores that were inflated by the Flynn effect and slightly above the range of scores typically associated with the diagnosis of intellectual disability. The presence of pre-18 intellectual impairments as measured by IQ testing is an element of intellectual disability. Once Petitioner's pre-18 scores are corrected for the Flynn effect, they support rather than controvert the presence of pre-18 intellectual deficits. Because of the advances in the study of IQ testing, Dr. Cunningham did not recognize that these scores were inflated in 2000, but would have recognized and corrected for this inflation in 2004.

Accordingly, had Mr. Rosenzweig asked Dr. Cunningham to make an intellectual disability determination in 2004, Dr. Cunningham would have diagnosed Petitioner as intellectually disabled. A-97, A-107, A-134.

Yet Mr. Rosenzweig, who has been the only legal representative acting on behalf of Mr. Williams from his initial filing for post-conviction review in state court until last week, failed to do any of this. As a result, this habeas petition, and

the Motion to Recall the Mandate filed concurrently in the Supreme Court, represent Mr. Williams's first opportunity to obtain a judicial determination of his *Atkins* claim.

III. MR. WILLIAMS IS CATEGORICALLY INELIGIBLE TO BE EXECUTED BECAUSE HE IS INTELLECTUALLY DISABLED.

In *Atkins*, the United States Supreme Court held that it violates the Eighth Amendment to the United States Constitution to execute a prisoner with intellectual disability. This Court has similarly held that "[i]t is a violation of the Eighth Amendment's protection from cruel and unusual punishment to execute a person who is mentally retarded. [] Arkansas law likewise prohibits a death sentence for anyone who is mentally retarded at the time of the crime." *Miller*, 362 S.W. at 276 (citations omitted). Petitioner is a person with intellectual disability. Neuropsychologist Daniel A. Martell, Ph.D. (who evaluated Mr. Williams this week), psychologist Mark D. Cunningham, Ph.D. (who evaluated Petitioner at trial), and neuropsychologist Ricardo Weinstein, Ph.D. (who was never asked to complete his evaluation for Rule 37 proceedings but has now done so), have all evaluated Petitioner and concluded that he is intellectually disabled and that he met the definition of intellectual disability at the time of the crime.

Atkins referred to the prevailing clinical definitions as helpful in the task of determining whether an individual should be exempted from the death penalty. *Atkins*, 536 U.S. at 308 n.3, 317. The Supreme Court cited the definition for

intellectual disability established by the American Association on Mental Retardation, which has since been renamed the American Association on Intellectual and Developmental Disabilities ("AAIDD").[4] The Supreme Court also cited the definition contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders - 4th Edition - Text Revision ("DSM-IV-TR"), which was the most significant diagnostic guide for mental health practitioners in the United States at the time of the Supreme Court's opinion. The DSM-IV-TR has since been replaced by the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition ("DSM-5").

Although *Atkins* left to each state the task of formulating the definition of intellectual disability, states do not have "unfettered discretion to define the full scope of the constitutional protection." *Hall*, 134 S. Ct. at 1998; *Moore*, 137 S. Ct. at 1052-53 (same). "The medical community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time . . . current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Id.* at 1053

[4] *Atkins* referred to this diagnosis as mental retardation, which was the most current name at the time. Since *Atkins* was decided, the diagnosis of mental retardation has been renamed to intellectual disability. In *Hall*, the Supreme Court acknowledged this change in nomenclature and referred to the diagnosis of mental retardation as intellectual disability. *Hall v. Florida*, 134 S.Ct. 1986 (2014). Accordingly, this petition uses the term intellectual disability.

(quoting DSM-5 at 7). Accordingly, *Atkins* and its progeny do not "license disregard of current medical standards." *Moore*, 137 S. Ct. at 1049.

Pursuant to the definitions set forth by the APA and the AAIDD and endorsed by the Supreme Court in *Atkins*, *Hall*, and *Moore*, there are three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning ("prong one"), (2) deficits in adaptive functioning ("prong two"), and (3) onset before age 18 ("prong three"). *See* DSM-5 at 33; *Intellectual Disability: Definition, Classification, and Systems of Supports – 11th Edition*, American Association on Intellectual and Developmental Disabilities (2010) ("AAIDD-2010") at 5; *Atkins*, 536 U.S. at 307 n.3 (enumerating the criteria for a diagnosis of intellectual disability as set forth by the AAIDD and the APA).

Consistent with these diagnostic standards and the directives of *Atkins* and its progeny, a capital defendant in Arkansas is entitled to *Atkins* relief if he or she satisfies the three prongs detailed above. The Arkansas Statutory Code § 5-4-618 defines intellectual disability as follows:

> (a)(1) As used in this section, "mental retardation" means:
>
> (A) Significantly subaverage intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifesting in the developmental period, but no later than age eighteen (18) years of age; and
>
> (B) A deficit in adaptive behavior.

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

Although the Arkansas statutory law on intellectual disability includes a fourth prong: "a deficit in adaptive behavior" Ark. Code Ann. § 5-4-618(a), this condition is included in a prong two finding and thus is satisfied if prong two has been met. *Jackson v. Norris*, 615 F.3d 959, 966 (8th Cir. 2010) (indicating that "a deficit in adaptive behavior" is included within the definition of "a significant deficit or impairment in adaptive functioning manifesting in the developmental period"). A capital defendant is similarly entitled to *Atkins* relief if he "can prove [intellectual disability] *either* (a) at the time of committing the crime *or* (b) at the time of presumptive execution." *Sasser*, 735 F.3d at 846 (citing *Miller*, 362 S.W.3d at 276; *see also id.* ("Arkansas may not execute an individual who sufficiently proves he met all four prongs of the Arkansas [intellectual disability] standard at *either* relevant time, even if the individual lacks proof he satisfied the standard at *both* relevant times") (emphasis in original).

As set forth below, Petitioner meets the criteria for intellectual disability under the Eighth Amendment and Arkansas law.

A. Deficits in Intellectual Functioning.

The scores on IQ tests that Petitioner has taken over his lifetime meet the diagnostic standard for deficient intellectual functioning as established by the

AAIDD, the APA, and the Supreme Court of the United States in *Atkins* and its progeny.

1. The Diagnostic Standard.

Under the classification schemes outlined by the APA and the AAIDD deficient intellectual functioning is defined as an intelligence quotient ("IQ") of approximately 70 with a confidence interval derived from the standard error of measurement ("SEM") taken into consideration. Because a 95% confidence interval on IQ tests generally involves a measurement error of 5 points, at a minimum, scores up to 75 also fall within the mental retardation range. The DSM-5 states:

> Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally + 5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70 ± 5).

DSM-5 at 37. *See also*, DSM-IV-TR at 41-42 (indicating that IQ scores of 75 and below satisfy prong one of the intellectual disability diagnosis). Similarly, the AAIDD stated in 2002:

> The 2002 AAMR System indicates that the SEM is considered in determining the existence of significant subaverage intellectual functioning (see above boxed statement). In effect, this expands the operational definition of mental retardation to 75, and that score of 75 may still contain measurement error.

Mental Retardation: Definition, classification, and systems of support (10th Ed.), American Association on Mental Retardation (2002) ("AAIDD-2002") at 58-59.

See also AAIDD-2010 at 36 (finding the consideration of the standard error of measurement or "SEM" and reporting an IQ score with a confidence interval deriving from the SEM to be critical considerations in the appropriate use of IQ tests).

However, both the AAIDD and the APA have rejected fixed cutoff points for IQ in the diagnosis of intellectual disability and mandated that any test score must be considered in the context of clinical judgment and adaptive functioning. In its 2010 Guidelines, the AAIDD made clear that:

> It is clear from this significant limitations criterion used in this *Manual* that AAIDD (just as the American Psychiatric Association, 2000) *does not* intend for a fix cutoff point to be established for making the diagnosis of ID. Both systems (AAIDD and APA) require clinical judgment regarding how to interpret possible measurement error. Although a fixed cutoff for diagnosing an individual as having ID is not intended, and cannot be justified psychometrically, it has become operational in some states [citation omitted]. It must be stressed that the diagnosis of ID is intended to reflect a clinical judgment rather than an actuarial determination. A fixed point cutoff score for ID is not psychometrically justifiable.

AAIDD-2010 at 40 (emphasis in original).

Similarly, the DSM-5 states that "[c]linical training and judgment are required to interpret [IQ] test results and assess intellectual performance." DSM-5 at 37. This is the case, in part, because "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks," and an individual's adaptive functioning

may be far lower than his or her IQ score suggests. *Id.* Accordingly, "clinical judgment is needed in interpreting the results of IQ tests." *Id.*

Furthermore, the DSM-5 emphasizes the value of neuropsychological testing when determining whether deficits in intellectual functioning exist because "[i]ndividual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score." DSM-5 at 37.

Consistent with the AAIDD and APA's diagnostic criteria, in *Hall*, the Supreme Court of the United States held that because the SEM is "a statistic fact, a reflection of the inherent imprecision of the test itself," at a minimum, full-scale IQ scores of 75 or below will establish the diagnosis of intellectual disability if the other two prongs are met. *Hall*, 134 S. Ct. at 1995, 2001. *See also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (IQ score of 75 was "squarely in the range of potential intellectual disability").

The Supreme Court has similarly held that the diagnosis of intellectual disability in the *Atkins* context cannot employ hard-cutoffs and must be considered in the context of clinical judgment and adaptive functioning:

> Intellectual disability is a condition, not a number. *See* DSM-5 at 37. Courts must recognize, as does the medical community, that the IQ test is imprecise. This is not to say that an IQ test score is unhelpful. It is of considerable significance, as the medical community recognizes. But in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores

> the same studied skepticism that those who design and use the tests do, and understand that an IQ score represents a range rather than a fixed number.

Hall, 134 S. Ct. at 2001.

Consistent with the directives of *Atkins*, *Hall*, and *Brumfield*, "[u]nder Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical 'IQ score requirement.'" *Sasser*, 735 F.3d at 844 (citing *Anderson v. State*, 163 S.W.3d 333, 355-56 (Ark. 2004)). It is "legal error to read a strict 'IQ score requirement'" into an *Atkins* analysis; instead courts reviewing *Atkins* claims must consider *all* evidence of intellectual functioning "rather than relying solely on [a defendant's] test scores." *Sasser*, 735 F.3d at 847.

IQ scores must also be corrected for the Flynn Effect. The Flynn Effect reflects a well-established finding that the average IQ score of the population increases at a rate of .3 points per year or 3 points per decade. Accordingly, best practices require that any IQ score be corrected downwards at a rate of .3 points per year since the test was normed. *See User's Guide: Mental Retardation, Definition, Classification and Systems of Supports*, 10th Ed., AAIDD (2007) ("AAIDD-2007"), at 20-21; AAIDD-2010 at 37 (same); *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports*, AAIDD (2012) ("AAIDD-2012") at 23 (same); The Death Penalty and Intellectual Disability,

AAIDD (2015) ("AAIDD – 2015") at 160-166 (same); DSM-5 at 37 (recognizing the Flynn Effect's ability to affect test scores).

The AAIDD and APA also mandate that inflation of IQ scores arising from prior administrations of intelligence tests or the "practice effect" also be taken into consideration when interpreting IQ testing. *See, e.g.,* AAIDD-2010 at 38; DSM-5 at 37.

2. Petitioner Has Deficits in Intellectual Functioning.

Drs. Cunningham, Weinstein, and Martell have evaluated Petitioner and found that he satisfies prong one of the intellectual disability diagnosis. In his lifetime, Petitioner has been administered a total of seven intelligence tests. The Wechsler Intelligence Scales for Children – Revised ("WISC-R") was given at the ages of 8, 9, and 12 in conjunction with school evaluations. Psychological examiner David Nanack, M.A., administered the Wechsler Adult Intelligence Scales – 3rd Edition ("WAIS-III") to Petitioner in 1999 when he was 20 years old. A-48. Neuropsychologist Mary Wetherby, Ph.D., administered the WAIS-III, to Petitioner in 2000 when he was 21 years old.[5] A-153. Dr. Weinstein administered a WAIS-III and a Comprehensive Test of Nonverbal Intelligence ("CTONI") to Petitioner when he was 25 years old.[6] A-145. The timing, results, and Flynn-

[5] Dr. Wetherby tested Petitioner one day before his August 23, 2000 trial began.
[6] Dr. Weinstein tested Petitioner during state post-conviction proceedings in May 2004.

corrected scores of the intelligence testing administered to Mr. Williams are detailed on the table below.

KENNETH WILLIAMS – INTELLIGENCE TESTING

Date	**Age (year-months)**	**IQ Test**	**Full Scale IQ Score**	**Full Scale IQ Score Corrected for Flynn Effect**
10/87	8-7	WISC-R	84	79.5
2/89	10-11	WISC-R	80	75*
8/91	12-5	WISC-R	82	76*
5/99	12-3	WAIS-III	74*	73*
8/00	21-5	WAIS-III	70*	68.5*
5/04	25-3	WAIS-III	81	78
5/04	25-3	CTONI	68*	65*

*Indicates score in the IQ range commonly associated with intellectual disability.

The norms for the WISC-R, WAIS-III, and CTONI were generated in 1972, 1995, and 2000, respectively. The 95% confidence interval for the WISC-R is ± 6.25, which extends a finding of approximately two standard deviations below the mean to scores of 76 and below. Accordingly, five of the seven intelligence tests administered to Petitioner fall within the range for intellectual disability.

Moreover, three of Petitioner's IQ scores were even lower than the Flynn-corrected scores that are reported above. On Petitioner's WAIS-III scores, the Flynn-related inflation was compounded by inflation related to an error in the normative data for the WAIS-III. In an attempt to correct for shortcomings in the norming of the Wechsler Adult Intelligence Scales – Revised ("WAIS-R"), which was caused by an absence of very low-functioning (i.e. severely intellectually disabled) subjects in the normative sample, too many severely low functioning subjects were included in the normative data of the WAIS-III. As a result, the WAIS-III produced IQ scores that were 2.34 points too high. Report, Mark Cunningham, Ph.D., at 13-14, A-109-110. *See also* AAIDD-2015 at 145-146 (describing scholarship on this subject). Accounting for this defect in the WAIS-III's norming process, Petitioner's 1999, 2000, and 2004 WAIS-III scores are properly reported as 70, 66, and 76. *See id.* A table accounting for the 2.34 point correction made for the error in the WAIS-III's norming process is set forth below.

KENNETH WILLIAMS – INTELLIGENCE TESTING

Date	**Age (year-months)**	**IQ Test**	**Full Scale IQ Score**	**Full Scale IQ Score Corrected for Flynn Effect and WAIS-III Sampling Error**
10/87	8-7	WISC-R	84	79.5
2/89	10-11	WISC-R	80	75*
8/91	12-5	WISC-R	82	76*

5/99	12-3	WAIS-III	74*	70*
8/00	21-5	WAIS-III	70*	66*
5/04	25-3	WAIS-III	81	76
5/04	25-3	CTONI	68*	65*

*Indicates score in the IQ range commonly associated with intellectual disability

That Petitioner's testing history began with a slightly higher score of 79.5 and regressed to scores in the intellectual disability range at the ages 10, 12, and 21 does not undermine Petitioner's *Atkins* claim, but provides further support for it. "[I]individuals with mild mental retardation 'often are not distinguishable from children without Mental Retardation until a later age.'" *Sasser*, 735 F.3d at 848. IQ scores are comparisons against test takers of the same age. Accordingly, the scores of intellectually impaired children frequently begin at a relatively higher level and then regress as they are left behind by their more functional age-mates. *See* Report, Mark Cunningham, Ph.D., at 17, A-113. Additionally, Petitioner had a number of risk factors in his history which heightened the likelihood that he would be both intellectually disabled and that his IQ would drop. *See* Section C, *infra* (describing risk factors for intellectual disability including, *inter alia*, head injury during the developmental period, hospitalization for viral meningitis, poverty, childhood physical abuse, childhood exposure to trauma, impaired parenting, and childhood instability).

Indeed, the AAIDD has indicated that the decline in test scores is typical of intellectually disabled children generally and a particularly prominent phenomenon in children who grew up in poverty and dysfunction as Petitioner did:

> [I]n children from more advantaged families, the effects of brain-based risk factors, such as executive dysfunction, in lowering intelligence are lessened by good parental or other environmental supports. In children who are disadvantaged, the effect of brain-based impairments in lowering intelligence may be increased over time due to the effects of disorganized and nonsupportive environments.

The Death Penalty and Intellectual Disability, AAIDD (2015) ("AAIDD-2015") at 144.

Petitioner's score of 78 on a WAIS-III administered by Dr. Weinstein when he was 25 years old does not undermine a prong one finding either. At the time of testing, Petitioner had taken four prior Wechsler tests and one prior WAIS-III. Multiple administrations of the same test, or multiple administrations of different Wechsler scales produce an artificial inflation of tested IQ or "practice effect" on an IQ test. That the score was inflated is further supported by the results of the CTONI, which was administered along with the WAIS-III. On the CTONI, Petitioner received a score of 68 that Flynn-corrects to 65, both of which are firmly in the intellectual disability range. Report, Mark Cunningham, Ph.D., at 10-18, A-106-114.

Additionally, Petitioner was administered a number of tests during his academic career which contain standard scores that are approximations of

intelligence. These tests scored in the intellectual disability range. Report, Daniel Martell, Ph.D., at 20, A-183-84.

Furthermore, Petitioner has been subjected to two full batteries of neuropsychological testing in 2000 by Dr. Wetherby, and again, in 2004 by Dr. Weinstein. As noted above, the DSM-5 recognizes that neuropsychological testing is more comprehensive than a single IQ score. Both batteries reflected the presence of brain impairments i.e. brain dysfunction, including significant impairments in his executive functioning, abstract thinking, attention, and memory. These impairments are in the higher levels of cognitive functioning and provide a neuropsychological profile that is typical of the intellectually disabled. *See* Dec. Ricardo Weinstein at ¶ 23, A-146. Accordingly, Petitioner's neuropsychological profile, tested over two separate batteries with two separate mental health professionals, reflects the brain impairments of an intellectually disabled person.

B. Petitioner Had Significant Deficits in Adaptive Functioning During the Developmental Period.

Petitioner showed significant adaptive deficits from a very early age. He failed the first and third grades, was in special education for the vast majority of his academic career, and eventually dropped out in the 9th grade. He had significant impairments in reading, writing, math, both receptive and expressive communication, and his ability to self-direct. He was quiet, socially, withdrawn, and easily influenced by others. Finally, consistent with these behavior problems

and a probable cause of them, he had a dysfunctional brain. Throughout his life, Petitioner's broken brain has deeply impaired his fundamental ability to make decisions, cope with stressors, retain information, learn, keep focus, and control his impulses.

The AAIDD has defined adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and performed by people in order to function in their everyday lives." AAIDD-2002 at 73. The DSM-5 described adaptive deficits as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5 at 37. The focus in an adaptive behavior analysis is on *typical* performance, not *maximal* performance. AAIDD-2010 at 47.

The adaptive deficits prong is satisfied if there is a significant limitation in any one of the following three types of adaptive behavior: conceptual, social or practical; or in the composite of the individual's adaptive functioning. AAIDD-2010 at 43; DSM-5 at 37.[7] Skills included in the conceptual realm are: functional academics; language; reading and writing; money concepts; and self-direction. The social realm encompasses skills and characteristics like: interpersonal responsibility; self-esteem; gullibility; naivete; following rules; obeying laws; and

[7] AAIDD-2002 also employs the three domain system used in AAIDD-2010. The DSM-IV-TR indicates that the adaptive deficits prong is satisfied if there are significant limitations in any two of the following skills areas: functional academics, self-direction, communication, social, leisure, use of community services, health, safety, personal care, home living, and work.

avoiding victimization. The practical realm refers to skills such as: activities of daily living; instrumental activities of daily living; occupational skills; use of money; and maintaining safe environments. DSM-5 at 37; AAIDD-2010 at 44.

As it is expected that strengths co-exist with weaknesses, analysis of adaptive behavior is based on the presence of weaknesses, not the absence of strengths. "[S]ignificant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD-2010 at 47. The Supreme Court has recognized that "intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Brumfield*, 135 S. Ct. at 2281 (quoting AAIDD-2002). Accordingly, in *Moore*, the Supreme Court found unconstitutional the Texas Criminal Court of Appeal's attempt to overcome deficits with perceived adaptive strengths because "the medical community focuses the adaptive functioning inquiry on adaptive *deficits*." *Moore*, 137 S. Ct. at 1050 (citing AAIDD-2010, DSM-5, and AAIDD-2002 with approval).

Extensive lay-witness evidence, records, testing, and expert analysis confirm that Petitioner suffered from significant adaptive deficits before the age of 18 in all three domains recognized by the AAIDD and the DSM-5, and in four out of eleven skill areas of the DSM-IV-TR.

1. Conceptual Domain

a. General Conceptual Functioning

From very early on in the developmental period, Petitioner was described as slow and "mentally challenged." He was easily influenced by others, and he had few, if any, problem solving skills. He was impulsive, hyperactive, had deficits with attention, self-direction and staying on task, could not cope with change or unusual situations, and had little mental flexibility. One observer noted "[h]e just didn't seem to understand or grow up like other boys." Dec. Michelle Gibson at ¶ 5, A-10. *See also* Dec. Yolanda Williams A-1; Dec. Felicia Williams, A-4; Dec. Pamela Thomas, A-11; Report, Joe Ann Bock, M.Ed., 10/14/87, A-24; Dec. Tonnea Williams at ¶ 13, A-15.

Petitioner's school career was abysmal. He was evaluated for special education services in October 1987 when he was eight years old and in the second grade. Despite being one year older than his classmates, his teacher expressed concern because of:

> Kenneth's difficulties with reading, spelling, math, receptive language, ability to remember material presented visually and verbally, and poor listening skills. She further noted that Kenneth's classroom performance also affected [illegible] inadequate self-concept, difficulty with peer relationships, distractibility, short attention span, stubborn behavior, and attention-getting antics.

Report, Joe Ann Bock, M.Ed., 10/14/87, A-24. His teacher completed a Burks Behavior Rating Scale, which is a formal test of adaptive behavior, and reported

significant weaknesses in academics, intellect, attention, impulse control, anger control, social conformity, sense of persecution, aggressiveness, and excessive resistance. He was found to have learning disabilities in reading, listening, listening comprehension, and spelling. As a result, he was provided with special education services. *Id.*

Despite special education support, Petitioner continued to flounder academically. Petitioner was reevaluated in February 1989. His teachers reported "poor achievement in all subject areas." Report, Kenneth Robinson, M.S., 2/1/89, A-35. Formal adaptive testing was administered again and reflected deficits: "significant to very significant ratings on his profile seem to be suggestive of poor academic achievement and a tendency toward social withdrawal." *Id.* Petitioner was found to have deficits in spelling, written expression, and math calculation. He continued in special education. *Id.*

Despite the level of support he was receiving, Petitioner failed the 3rd grade, received special educational support for the majority of his academic career, and was assigned at times to a self-contained classroom. School officials variously described Petitioner as "functioning in the low range of intelligence, and significant academic weakness in Math Calculations, Reading Recognition, and Spelling," and "continu[ing] to work below grade level." It was reported that he "will need continued help in special education. He is very limited in his education

ability. He should enroll in a non-graded class because he does not seem to have the skills needed to compete." Evaluation/Programming Conference Decision-Form, Helen Maurer, undated, A-63; Report, Emily Wagner, M.S., 8/7/91, A-46; Post-Release Recommendations, Helen Maurer, 7/2/90, A-59. He was consistently behind in his academic development and eventually dropped out in the 9th grade. *See, e.g.,* Report, Mark Cunningham, Ph.D., at 23-24, A-119 to 120.

Family members confirmed Petitioner's difficulties with academics. Despite receiving assistance from his siblings and mother and being one and two years older than his grade-mates, he was unable to learn the material. His sister Felicia Williams described Petitioner's struggles with his schoolwork: "[h]e had trouble learning things, remembering things. He tried to understand what I was showing him but it just didn't click. It was frustrating for him." Dec. Felicia Williams, A-4. *See also* Dec. Yolanda Williams at ¶ 2, A-1; Report, Mark Cunningham, Ph.D., at 24, A-120 (Petitioner's mother reported that Petitioner was slow and "could not remember things from one day to the next"). His mother Patricia Williams, who is intellectually impaired herself, described his difficulties to mitigation specialist Cassandra Belter:

> I though Ken was a slow learner, like me. What I mean by that is he didn't seem to know anything. He couldn't keep up. I was aware he struggled with reading, but I wasn't able to help because I am not really able to read too well myself. So I couldn't help him. [His sister] Yolanda tried to help him but it was really hard. He just didn't understand things.

Dec. Cassandra Belter at ¶ 10, A-1.

Consistent with these academic deficits, Petitioner was developmentally delayed before he went to school. His mother Patricia Williams indicated that he had took longer than normal to "potty train" and has frequent accidents as a result. He did not walk until one and a half years old, and "struggled with simple things, like how to get dressed." Dec. Cassandra Belter at ¶ 7, A-7 (describing mitigation specialist Cassandra Belter's conversation with Patricia Williams).

The neuropsychological batteries administered by Drs. Wetherby and Weinstein reflected the presence of conceptual impairments. Both neuropsychologists concluded that Petitioner suffered from deficits in executive functioning/abstract thinking, attention, and memory, which impaired Petitioner's ability to make good decisions, solve problems, deal with novel situations, focus, stay on task, learn, and retain information. All of these impairments implicate the conceptual domain. *See* Report, Mary M.C. Wetherby, Ph.D., 8/22/00, A-153; Report, Mark Cunningham, Ph.D., at 24-25, A-120 to 121.

b. Functional Academics

Petitioner was consistently behind in his academic development. When Petitioner initially received achievement testing in October 1987 (8 years, 7 months old), he was in the second grade, but should have been in the third grade based on his age. Nevertheless, he received scores ranging from kindergarten to

second grade levels, which ranged 1 to 3 years behind his age-mates. As time passed, he failed to develop intellectually and academically while his classmates left him behind. Petitioner was re-tested in February 1989 (9 years, 11 months), when his age-mates were in the 4th grade; he tested at the 1st and 2nd grade levels. This trend continued throughout his school career. In 1991, he was assessed on the Wide Range Achievement Test – Revised ("WRAT-R") when he was 12 years, 5 months old, and his age-mates were in the 7th grade. At that time, he was assessed as at least four years behind in each subject, as shown in the table below.

WRAT-R STANDARD SCORES AND GRADE EQUIVALENTS
(Age 12 years, 5 months; age-mates in the 7th grade)

Subtest	**Standard Score** *Mean* = 100; *SD* = 15	**Grade Equivalent**
Reading (Word Recognition)	62	Below 3rd Grade
Spelling	62	Below 3rd Grade
Arithmetic	56	Beginning of 3rd Grade

Petitioner's last school-age achievement test was a Peabody Individual Achievement Test ("PIAT-R"), which was administered when he was 14 years and 8 months old, and his age-mates would have been in the 9th grade. His scores are listed in the table below.

PIAT-R STANDARD SCORES, PERCENTILE RANKS,
AND GRADE EQUIVALENTS
(Age 14 years, 8 months; age-mates in the 9th grade)

Subtest	**Standard Score** *Mean* = 100; *SD* = 15	**Percentile Rank**	**Grade Equivalent**
Mathematics	Below 65	Below 1st	1.8
Reading Recognition	65	1st	2.2
Reading Comprehension	74	4th	3.3
Spelling	69	2nd	3.4
General Information	Below 65	Below 1st	2.6

Consistent with the level of delay shown while Mr. Williams was in school, he had academic impairments as an adult. Dr. Wetherby administered a WRAT-R to Petitioner during her August 2000 evaluation. At 21 years old, he received scores the scores of an 8/9, 12, and 13-year-old on Arithmetic, Spelling, and Reading. Consistent with his impairments in higher level thought, his best score – Reading – was on a test of word-recognition, which only required him to read words off of a page. Report, Mark Cunningham, Ph.D., at 28, A-124.

Given his neuropsychological impairments, the stunted functional academic functioning described above is to be expected. His cognitive deficits in executive functioning, memory, and attention impaired his ability to understand, learn, and retain the materials discussed above.

c. Self-Direction

Petitioner was impulsive, hyperactive, had deficits with attention, self-direction and staying on task, and he could not cope with change or unusual situations. School officials described him as impulsive, acting out, and having poor decision making skills. In October 1987 (when Petitioner was 8 years old), the evaluator conducting Petitioner's psychological evaluation stated that "[a] highly structured, consistent approach to the management of Kenneth's behaviors is essential to a successful program ... Activities should be planned for short, intense periods of time. Rewards and encouragement should be given freely and spontaneously." Report, Joe Ann Bock, M.Ed., 10/14/87, A-28. He was thought to be uncontrollable in class and in his juvenile dependency placements, and dependency records noted his "lack of behavioral control." *See, e.g.,* Child's Plan. DHS-CYS, 12/13/90, A-60. Indeed, even after five years of special education, with years of support, youth services records still described him as impulsive, lacking coping skills, and someone who "will need a very structured setting with individual attention." Alexander Youth Services, Post-Release Recommendations, 1992, A-61. He showed these same deficits in the home, requiring frequent redirection in order to complete simple tasks and help from same-age peers to use community resources. Dec. Felicia Williams, A-4; Dec. Dwon Buckley at ¶ 5, A-22.

That he did not progress in this area is hardly surprising. This behavioral profile is consistent with his brain-based impairments in executive functioning and attention. His brain dysfunction led to poor self-direction.

d. Communication

Petitioner was administered the Peabody Picture Vocabulary Test – Revised ("PPVT-R"), a measure of receptive language, at the ages of 8, 9, 11 and 14. He received standard scores of 59, 42, 58, and 57, which were all at or below the first percentile and reflect age equivalents of well below his chronological age at the time of each testing. His scores are listed in the tables below.

PPVT-R STANDARD SCORES, PERCENTILE RANKS, AND AGE EQUIVALENTS

Date and Age	**Standard Score** *Mean* = 100; *SD* = 15	**Percentile Rank**	**Age Equivalent (Mental Age)**
10/14/87 8 years, 7 months	59	Below 1st	5 years, 6 months
2/1/89 9 years, 11 months	42	Below 1st	4 years, 10 months
4/25/90 11 years, 2 months	58	Below 1st	6 years, 6 months
10/29/93 14 years, 8 months	57	Below 1st	7 years, 8 months

Lay witnesses also reported deficits in expressive communication as well. Petitioner had poor speech as a child, which included a stutter and, separate and

apart from that impairment, an inability to put his thoughts into words. Michelle Gibson, a neighbor, recalled his communication deficits: "He just really had a hard time forming sentences and having conversations. We called him K-Dub as a nickname because of the way he talked. He could not move the conversation forward at all. He would see something and make like gibberish parts of the words about what he was seeing. It was cute in a way, but he was way too old for the gibberish." Dec. Michelle Gibson at ¶ 2, A-9. *See also* Dec. Felicia Williams, A-4 (describing Petitioner's speech impairments); Dec. Yolanda Williams at ¶ 8, A-1 (same); Tonnea Williams at ¶ 2, A-13(same).

2. Social Domain

As noted *supra*, formal adaptive testing administered to Petitioner in 1987 and 1989 indicated significant deficits in the social domain. He was uncommunicative and socially withdrawn. His sister Felicia Williams indicated:

> Peedy [Kenneth] was real quiet. ... Coming up Peedy was a hard kid to talk to. It wasn't easy to get him to open up or to get him to tell you how he was feeling or what was going on with him. You had to pull stuff out of him.

Dec. Felicia Williams, A-4. *See also* Dec. Pamela Thomas (describing Petitioner as socially withdrawn); Dec. Yolanda Williams at ¶ 4, A-1 (same).

Petitioner was also a follower, gullible, and someone who was easily influenced by others. School and placement staff described him as overly susceptible to peer pressure and likely to be lured into engaging in disruptive

"acting out" behavior. *See, e.g.,* General Programmatic Objectives, Alexander Youth Services, 4/7/92, A-61; Report, Mark Cunningham, Ph.D., at 31-32, A-127-28. His sister Felicia describes his tendency to be socially victimized: "He was always with a crowd. He just wanted people to hang out with. He was a follower. He didn't care who he was with or what they were doing. He did things to fit in. He'd take the blame for other kids." Dec. Felicia Williams, A-4. Tonnea Williams, a staff member at one of Petitioner's juvenile placements, described his social impairments:

> Kenneth did not have solid friendships. He had a very difficult time connection with his peers. In his mind he thought he had friends, and he just smiled and went along with whatever they were doing, but I don't think they were friends to him. They mostly got him into trouble.

Dec. Tonnea Williams at ¶ 11, A-14.

Growing up, he was heavily influenced by his cousins and his brother, James Williams, Jr., who were involved in criminal activity. Yolanda Williams describes this:

> Kenneth was a follower growing up. If our cousins were into something, he'd just go along with it. But he followed our brother James the most, who is about two years older.

Dec. Yolanda Williams at ¶ 7, A-1. *See also* Dec. Felicia Williams, A-4 (describing Petitioner's susceptibility to influence); Dec. Pamela Thomas, A-11 (same). That petitioner would look up to James, Jr., is significant. James

Williams, Jr., had an intellectual disability-level IQ and was likely intellectually disabled himself. *See* Section C, *infra* (describing the Williams family history of intellectual impairments).

3. Practical Domain

Petitioner also had pre-18 deficits in the practical domain. As discussed above, Petitioner was delayed in reaching developmental milestones which, in addition to implicating conceptual deficits, also constituted deficits in self-care. He had difficulties learning to use the bathroom, to walk, and get dressed. Later in his childhood and adolescence, he was poorly groomed and "had a terrible smell about him all the time." Dec. Michelle Gibson at ¶ 3, A-9. As noted above, Petitioner also needed assistance using money, buying things in a store, cashing checks, and doing his chores. In addition to being conceptual deficits, they also constitute deficits in the practical domain. *See* Dec. Cassandra Belter at ¶ 7, A-7; Dec. Michelle Gibson at ¶¶ 3-5, A-9-10; Dec. Felicia Williams, A-4-5; Dec. Dwon Buckley at ¶ 5, A-22.

4. Expert Analyses

Drs. Cunningham, Weinstein, and Martell have evaluated Petitioner and analyzed his adaptive functioning. Drs. Cunningham and Weinstein have found that he had significant pre-18 adaptive deficits in the conceptual and social domains as defined by the AAIDD and the DSM-5. They have further found the

presence of significant limitations in the skill areas of functional academics, self-direction, communication, and social/interpersonal skills. *See* Report, Mark Cunningham, Ph.D., at 19-34, A-115-30; Dec. Ricardo Weinstein, Ph.D., at ¶¶ 25-31, A-147-50. Dr. Martell, who has had the opportunity to review the most recent results of the defense investigation, has found that Petitioner had significant pre-18 deficits in all three adaptive domains: conceptual, social, and practical. Report, Daniel Martell, Ph.D., at 26-37, A-189-201.

C. Age of Onset

Petitioner's deficits originated in the developmental period. He received two full scale IQ scores in the intellectually disabled range before the age of 18. He also has a documented history of adaptive impairments that spans multiple areas of functioning and includes two formal measures of adaptive functioning (administered at ages 8 and 9). This history began in early childhood and continued up until his incarceration for the instant case.

Furthermore, although etiology is not necessary for a diagnosis of intellectual disability, there a number of causal risk factors that correlate with intellectual disability and confirm the age of onset in Petitioner's case. These risk factors have been established by the AAIDD. *See* AAIDD-2002 at 127; AAIDD-2010 at 59-60. The Supreme Court has recognized these risk factors and noted that "[c]linicians rely on such factors as cause to explore the prospect of intellectual

disability further ... ." *Moore*, 137 S. Ct. at 1051. Listed below, many of these risk factors are present in Petitioner's social, medical and mental health history.

Heredity. Petitioner's family history contains evidence of intellectual impairment. Petitioner's mother Patricia Williams was evaluated in October 1991 and received an IQ score of 68 on a Slosson Intelligence Test – Revised. She also received achievement test scores in the impaired range – with scores at or between the 3rd and 5th grade level. She was similarly described as exhibiting "very limited" intellectual/cognitive and educational skills, and as being unable to function at more than "a very concrete level." Report, R.V. Benz, M.S., 10/8/91, A-53.

Petitioner's brother James Williams, Jr., was evaluated in 1992 when he was 15 years old. He obtained a WISC-R Full Scale IQ score of 76, which Flynn-corrects to a 70; and achievement scores in the bottom 4th percentile, which reflected a grade equivalent of 4.2. Report, Paul Deyoub, Ph.D., 2/18/92, A-56. He received special education services beginning in middle school. Dec. James Williams, Jr., at ¶ 6, A-17.

Petitioner's maternal grandfather, James Buckley, was described as "real slow" and having a "learning disability" and "learning problems." He was further described as spending hours at a time sitting in the same spot near the railroad

tracks, and was eventually institutionalized for his impairments. Report, Mark Cunningham, Ph.D., at 35, A-131.

Potential brain injury during the developmental period. When he was four years old, Petitioner was hospitalized for viral meningitis, which carries a risk of brain damage. Petitioner also had a history of pre-18 head injuries spanning from 1993 (age 14) to 1995 (age 16). He was consistently described as having a small stature, and his 1989 psychological evaluation noted that he had poor coordination and muscle strength. "Both of these physical symptoms are consistent with and red flags for brain damage." Report, Mark Cunningham, Ph.D., at 36, A-132.

Additionally, Petitioner was also the victim of physical abuse during childhood – a risk factor for childhood brain damage. Petitioner's father, James Williams, Sr., was a violent and abusive man with a raging substance abuse problem. James, Sr., would come home drunk and high. He routinely beat Petitioner and his siblings – at times with a belt, at times by throwing them against the wall. Petitioner was less socially sophisticated than his siblings and less able to avoid the beatings, so he was a frequent target for the abuse. Felicia Williams describes this dynamic:

> I knew [James, Sr.'s] expectations and did my best not to get under his skin. He was more lenient with me. Ken had a harder time understanding what my dad wanted or how to avoid setting him off. He didn't get it and he got beat more because of that.

Dec. Felicia Williams, A-4 to 5; Dec. Yolanda Williams, A-2 (describing James, Sr.'s abusive behavior); Dec. James Williams, A-18 (same).

Parental smoking and maternal illness. Patricia Williams smoked during her pregnancy with Petitioner, which is a risk factor for abnormal fetal brain development. She also had a tumor the "size of a fist" in her abdomen when she was pregnant with Petitioner. Dec. Cassandra Belter at ¶ 3, A-6.

Family poverty. There is a correlation between poverty and poor brain and adaptive functioning. As noted above, children who grow up in poverty are more likely to experience drops in IQ as they grow older. They are also statistically less likely to experience health brain development. They are more likely to be malnourished and have poor nutrition; to be exposed to lead, pesticides, and other neurotoxins; and to have parents who are less able to provide supports which would compensate for a child's brain impairments. All of these issues impact intellectual and adaptive development.

Petitioner grew up in poverty. "Their homes were roach and rat infested. The poverty was sufficiently severe that their utilities were frequently turned off and they did not have enough to eat." Report, Mark Cunningham, Ph.D., at 36, A-132. Petitioner was also consistently described as being of small stature, which is consistent with malnourishment in addition to brain impairments. Petitioner's neighbor Michelle Gibson describes the Williams household:

> The house was very very dirty always. I don't think there was any running water. The smell of the house and the way Kenneth smelled I can still remember easily. There was feces in the house in buckets and in all kinds of places and I think they just peed wherever. I don't think I was in there more than a few times. But Ken had a terrible smell about him all the time. If he was at the door you could know it was him before you saw him and you really could smell the house from the street. It was very sad.

Dec. Michelle Gibson at ¶ 3, A-11.

Impaired parenting. There is also a relationship between impaired parenting and intellectual disability. Patricia Williams was an impaired parent. Whether from her intellectual deficits, the stress of an abusive husband, the economic demands of raising a family without the assistance of James, Sr., or all three, she showed "an inability to parent properly." Letter, Patrick Slaughter, January 1992, A-65. She provided little guidance to Petitioner and was largely absent because of her work schedule. He was left without guidance or supervision. Petitioner was removed from her custody at various times and spent much of his late childhood and adolescence in either juvenile placement or foster care. Even while Petitioner was in foster care, his mother struggled with the minimal requirements of parenting. She frequently failed to show up at the supervised visits that were arranged while Petitioner was in foster care and failed to complete her parenting classes. Not surprisingly, because of her intellectual impairments, she failed to retain the instructions given in those classes. Letters, Patrick Slaughter, L.C.S.W., dated 8/6/91, 1/15/92, A-64, A-65.

D. Petitioner Is Intellectually Disabled.

Petitioner is an intellectually disabled person. Drs. Cunningham, Weinstein, and Martell have conducted three separate evaluations of Petitioner in 2000, 2004, and 2017, respectively. They have considered his functioning in light of current diagnostic standards. Consistent with protocol in a capital case, they conducted retrospective analyses into Petitioner's functioning to determine if all three prongs of the diagnosis have been met. They have all concluded that Petitioner is intellectually disabled and that he was intellectually disabled at the time of the crime. Moreover, in 2004, had Drs. Cunningham and Weinstein been provided with the background materials they have had access to for their analyses today, they would have diagnosed Petitioner as intellectually disabled. Petitioner's death sentencing and pending execution date violates the Eighth Amendment, *Atkins*, *Hall*, *Brumfield*, *Moore*, and Arkansas law. Petitioner's death sentence should be vacated and he should be resentenced to life. Petitioner is also entitled to an evidentiary hearing so that he may present evidence on the forgoing *Atkins* claim.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of habeas corpus, vacate his unlawful capital sentence, and reinvest itself with jurisdiction to resentence him.

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April 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 2017, I served a copy of this Petition and Petitioner's Appendix on counsel for the State by causing it to be hand-delivered to Attorney General Leslie Rutledge at 323 Center Street, Suite 200, Little Rock, AR 72201, and by sending it by email to oag@ArkansasAG.gov.

/s/ Deborah Anne Czuba
Deborah Anne Czuba

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I hereby certify that, on April 21, 2017, I served a copy of the foregoing on counsel for the State by causing it to be hand-delivered to Attorney General Leslie Rutledge at 323 Center Street, Suite 200, Little Rock, AR 72201, and by sending it by email to oag@ArkansasAG.gov.

/s/ Deborah Anne Czuba
Deborah Anne Czuba