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CINDY GLOVER, CIRCUIT CLERK
LINCOLN COUNTY, ARKANSAS

*****THIS IS A CAPITAL CASE*****

EXECUTION SCHEDULED FOR APRIL 27, 2017

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

KENNETH WILLIAMS

PETITIONER

vs.

No. 40CV-17-46

**WENDY KELLEY, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION**

RESPONDENT

**MEMORANDUM IN RESPONSE TO
CORRECTED PETITION FOR WRIT OF HABEAS CORPUS**

Respondent, Wendy Kelley, Director, Arkansas Department of Correction (ADC), by and through counsel, Leslie Rutledge, Attorney General, Nicholas Bronni, Deputy Solicitor General, and Kathryn Henry, Assistant Attorney General, submits the following memorandum in opposition¹ to Kenneth Williams' Petition for Habeas Corpus (Ark. Code Ann. § 16-112-101 *et seq.*):

¹ Respondent notes that the Arkansas Rules of Civil Procedure do not apply in postconviction habeas proceedings. *See Baker v. Norris*, 369 Ark. 405, 415 n.2, 255 S.W.3d 466, 472 n.2 (2007). Under the Arkansas habeas statute, the responsive pleading or answer is denoted the "return" and is not required unless the Court first finds that the petition "show[s], by affidavit or other evidence, probable cause to believe [the petitioner] is detained without lawful authority[.]" Ark. Code Ann. § 16-112-103(a)(1). Respondent believes, therefore, that he is not required to file a formal return until that determination is made. This memorandum is offered to facilitate the Court's preliminary probable cause determination. In the event the Court disagrees and determines that the Arkansas Rules of Civil Procedure apply to these proceedings, Respondent respectfully requests that the court consider this memorandum a responsive pleading under Ark. R. Civ. P. 12 (2016).

Introduction

Petitioner Kenneth Williams is scheduled to be executed in two days for the cold-blooded capital murder of Cecil Boren. Williams killed Boren after escaping from the Cummins Unit of the ADC, and, in an effort to evade capture, later killed motorist Michael Greenwood during a high-speed chase with police. He committed these offenses only 18 days after being convicted of the capital murder of Dominique Herd and being sentenced to life imprisonment without parole for that crime. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

Now, with just two days before his scheduled execution, Williams has filed a Corrected Petition for Writ of Habeas Corpus pursuant to Ark. Code Ann. § 16-112-101 *et seq.*² In the petition, Williams contends that this Court has jurisdiction to grant a writ of habeas corpus because he is a person whose execution is prohibited under *Atkins v. Virginia*, 536 U.S. 304 (2002). Accordingly, Petitioner asks this Court to issue the writ, vacate his capital-murder sentence, and reinvest itself with jurisdiction to resentence him. (Pet. at 1). But his *Atkins* claim is not cognizable in state habeas corpus proceedings, and, in any event, it is meritless. This entire

² Williams previously filed a Petition for writ Writ of habeas corpus pursuant to Ark. Code Ann. § 16-112-101 *et seq.* on Friday, April 21, 2017, in which he set for the exact argument he advances in his corrected petition. This Court dismissed the petition for failure to comply with the procedural requirements of the habeas statute *and* because the petition was meritless. Williams's newly filed petition is identical to his original one except for the two procedural deficiencies that he corrected—naming the proper party and attaching his judgment and commitment order.

Lincoln County action is nothing more than an attempt by Williams to delay imposition of his lawfully imposed sentence and to overburden the Court with a last-minute claim that is both dilatory and meritless. Therefore, the petition must be denied.

Applicable Standards

Arkansas Code Annotated § 16-112-103(a)(1) provides, in pertinent part, that “[t]he writ of habeas corpus shall be granted forthwith . . . 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[.]” As a general matter, the “writ of habeas corpus will only be issued if the commitment [is] invalid on its face, or the committing court lacked jurisdiction.” *Cleveland v. Frazier*, 338 Ark. 581, 587, 999 S.W.2d 188, 191 (1999). Consequently, courts will not “go beyond the face of the commitment order to determine its validity.” *Id.*; *see also Wallace v. Willock*, 301 Ark. 69, 72, 781 S.W.2d 484 (1989) (holding that habeas review is “limited to finding error on the face of the convictions.”). In light of these narrow grounds for relief, the writ will not be issued to correct irregularities or errors that occurred in trial-court proceedings because the remedy in those circumstances is a direct appeal, when available, and the writ does not serve as a substitute for post-conviction relief pursuant to Arkansas Rule of Criminal Procedure 37. *See, e.g., Meny v. Norris*, 340 Ark. 418, 420, 13 S.W.3d

143, 144 (2000)(per curiam). Under these standards, the petition must be denied for failure to state a cognizable claim.

1. Williams's Crimes, the Trial, and 16 Years of Review

A. The Crimes

On September 15, 1999, before he murdered Cecil Boren, Williams was sentenced to life without parole for the December 13, 1998, capital murder of Dominique Herd, the attempted capital murder of Peter Robertson, kidnapping, aggravated robbery, theft, and arson in Jefferson County. He was sent to the Cummins Unit of the Arkansas Department of Correction (ADC) that same day. On September 26, 1999, less than two weeks after his first capital-murder conviction, Williams told Eddie Gatewood, a friend who visited him at the Cummins Unit, that he could not serve a life term and solicited Gatewood's help to escape. During that visit, Williams asked Gatewood to find him some clothes, a dress, and a wig, and asked Gatewood to leave them out on the highway close to the prison.

One week after his visit with Gatewood, on October 3, 1999, Williams escaped from the Cummins Unit. Cummins's Warden Warren Dale Reed received a call about 7:15 p.m. on October 3rd from his chief of security, Captain Donald Tate, telling him that Williams was missing. Major Wendell Taylor, the unit's tracker, immediately began a "drag around the compound" using dogs to try to

pick up Williams's scent. However, because too much time had passed since Williams's escape that morning, the dogs were unable to pick up Williams's scent. Emergency notifications were commenced.

The ADC determined that Williams had been released from his barracks that morning at 7:27 on a "religious call." This opportunity allowed Williams to access the area where the slop tanks for the kitchen were kept. Slop tanks are devices used to hold, cook, and transport slop to hogs outside the prison. The 500-gallon slop tanks, unfortunately, were large enough to conceal a man. The primary tank had a grating welded over the top opening to prevent this very type of access. However, the alternate slop tank was in use due to a flat tire on the primary tank trailer. Regrettably for Cecil Boren and his family, the secondary tank had no grate over the opening. Williams hid himself in the secondary tank and was carried outside the prison confines when the tank was taken from the prison by the ADC.

Once outside the prison, Williams jumped from the tank in transit and hid in a ditch. He hid there for some time because a local farmer testified to seeing a man running across Highway 65 away from the prison around 9:42 that morning. The ADC later found Williams's tracks headed toward Highway 65, in the direction of Cecil and Genie Boren's home. Williams's prison shirt imprinted with his name

and prison number was found a few months later hanging on a tree limb one mile from the Boren home, substantiating his path.

Williams made it to the Boren home sometime on the morning of his escape. Earlier that morning, Genie Boren had gone to church, leaving her husband Cecil at home working in the yard. When she returned home sometime after noon, she found he was no longer there. She called Kay McLemore, who lived about a mile from them. Genie was frantic because her husband was not home and their house had been ransacked. Kay drove over. The women discovered that all the Boren's firearms were gone, except a muzzleloader. Kay went outside and began to look and call for Cecil. She found Cecil near a bayou not far from the house. Cecil was lying face down without shoes or socks. He was dead. Williams had shot Cecil seven times. Scrape marks on his body revealed that his body had been dragged to that location, and that he actually had been shot closer to his home as evidenced by a pool of blood nearer his home. The investigation at the Boren home further revealed that Williams had taken Cecil's truck, wallet, and other valuables and that some clothing had been taken, and that a number of firearms were missing.

Around 11:00 that morning, Williams showed up at Eddie Gatewood's house asking for a map. Williams was driving Cecil's truck. Gatewood testified at Williams's trial that Williams told him he had killed a person to get the truck.

The next day, on October 4, 1999, Cecil's truck was spotted in Lebanon, Missouri, by police officer Dennis Mathis. Officer Mathis attempted to stop the truck. Williams initially pulled over, but drove off before Officer Mathis could approach him. A high-speed chase commenced involving multiple police units covering roughly 60 miles. Speeds ranged as high as 120 miles per hour. Williams was only stopped when he struck a water truck that was turning left in front of him. Williams struck the truck in the cab. The driver, Michael Greenwood, was ejected and killed. Although Williams's truck was disabled by the collision, he continued to flee on foot before being apprehended.

More than 114 personal items belonging to Cecil and Genie Boren were removed from Cecil's truck, including the firearms stolen from their home. At the time of his arrest, Williams was wearing Cecil's coveralls and two of Cecil's rings.

B. The Trial

A Lincoln County jury subsequently found Williams guilty of theft of property and the capital murder of Cecil Boren. At sentencing, evidence of Williams's two prior crime sprees was introduced. The first involved the kidnapping and aggravated robbery of Sharon Hence. On December 5, 1998, Hence was using an ATM machine in Pine Bluff when Williams got into her car, pulled a gun, and demanded that she get more money out of the machine. When Hence was unable to do so, Williams ordered her to drive away. As they drove

around Pine Bluff, Williams rifled through Hence's purse and threatened to shoot her if she had a wreck. Eventually, Hence stopped the car on a dead-end street. Williams ordered her to give him all of her jewelry, empty her pockets, mercifully, allowed her to get out of the car. Hence's car was later found burning roughly two and one-half blocks away from Williams's apartment. Hence unwaveringly identified Williams as the man who kidnapped, robbed, and terrorized her. After an August 26, 1999, jury trial in Jefferson County, Williams was convicted of arson, kidnapping, aggravated robbery, and theft of property. He was sentenced to respective terms of six, ten, five, and five years in prison, to be served consecutively.³

The jury also heard the aggravating evidence of another crime spree that occurred on December 13, 1998. That day, Peter Robertson and Dominique Herd, both students at the University of Arkansas at Pine Bluff, borrowed a friend's car to go to church and to eat at the local Bonanza Steak House. Upon exiting the restaurant, Kenneth Williams approached the couple, briefly talked with them, and then pulled a gun and forced them into their car. Williams sat in the back seat of the car and directed Robertson where to drive. He first made them go to a bank ATM to withdraw \$70 from Robertson's account. Williams also attempted to

³ Williams's convictions and sentences were affirmed by the Arkansas Court of Appeals in *Williams v. State*, No. CACR 00-432, 2000 WL 1745216 (Ark. Ct. App. Nov. 29, 2000).

withdraw money from Herd's account, however, in her terror, she could not remember her P.I.N. code, so Williams directed Robertson to drive off.

During the drive, Williams continued to tell the terrified couple that they would be fine and directed them to drive around town –seemingly, while Williams figured out what he would do next. Eventually, he directed them down a dead-end street and made the couple get out of the car. Williams then lifted Herd's dress and pulled down her underwear and forced Robertson to take a picture of her.

Williams then directed the couple to drive to another dead-end street, get out of the car, climb a fence, go behind a shed, and kneel down. Williams initially got into the car and pulled off; however, he backed up, asked Herd for her purse, and then asked, "Where did you say you were from again?" Herd answered, "Dallas," and Robertson answered, "New Jersey." Williams responded, "I don't like the niggers from Dallas anyway," and shot the couple, emptying the gun in the process. Williams left them there to die. Quite miraculously, however, Robertson was able to make it to the road where a passing car picked him up and took him to a house where he was able to call the police. Robertson survived the shooting, but Herd died from a gunshot to her head. Just as he had done with Hence, Williams torched and abandoned the car.

Robertson identified Williams both in a photo line-up and at trial as the man who had kidnapped, terrorized, robbed, and shot him and Herd. On September 14,

1999, a Jefferson County jury convicted Williams of the capital murder of Herd, the attempted capital murder of Robertson as well as kidnapping, aggravated robbery, theft, and arson.⁴ Williams was sentenced to life imprisonment without the possibility of parole. Just 18 days later, Williams escaped the Cummins Unit of the ADC, murdered Cecil Boren, and led police on a high-speed chase resulting in Michael Greenwood also being killed.

C. 16 Years of Review

On August 30, 2000, a jury convicted Williams of the capital-felony murder of Cecil Boren, as well as theft of property. Williams was sentenced to death on the capital-murder conviction and received 40 years' imprisonment on the theft conviction. Williams, through counsel, appealed to the Supreme Court of Arkansas, raising 12 points on appeal.

Williams argued: (1) that the circuit court abused its discretion by ordering that he appear at trial wearing prison garb, shackles, and handcuffs; (2) that two of the jurors seated on his jury, Brenda Patrick and LaRhonda Washington, should have been removed by the circuit court for cause; (3) that the circuit court erred by admitting evidence that Williams was apprehended in Missouri following a high speed chase that resulted in a traffic fatality; (4) that the State presented insufficient evidence to prove that he committed first-degree escape, which was

⁴ His convictions for those crimes were affirmed by the Arkansas Supreme Court in *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001).

one of the two felonies that the State relied on in prosecuting Williams for capital-felony murder; (5) that the State presented insufficient evidence to support his capital-murder conviction; (6) that the jury impermissibly ignored mitigation evidence it was bound to consider; (7) that the circuit court erred by denying his motion for funds to hire a corrections expert; (8) that the circuit court erred by admitting victim-impact evidence during the penalty phase, and that it was improperly used; (9) that it was error to submit Ark. Code Ann. §5-4-604(5) (Repl. 1997) as an aggravating factor because there was no evidence that the appellant committed the murder to avoid arrest, (10) that it was error to submit Ark. Code Ann. §5-4-604(4) (Repl. 1997) as an aggravating factor because there was no evidence that Williams caused multiple deaths during the same criminal episode; (11) that Ark. Code Ann. § 5-4-604(2) and Ark. Code Ann. § 5-4-604(5) are unconstitutionally duplicative; and (12) that the circuit court erred by denying Williams's motion for mistrial based on the seating of an alternate juror for the penalty phase of trial. In a February 21, 2002, opinion, the Arkansas Supreme Court rejected all of his appellate claims and affirmed Williams's conviction and death sentence. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

Jeff Rosenzweig was appointed on May 16, 2002, to represent Williams in his Rule 37.5 proceedings.⁵ (R. 37 R. 4). On August 9, 2002, Williams filed a postconviction petition pursuant to Rule 37.5 of the Arkansas Rules of Criminal Procedure, arguing (1) that Williams's trial counsel was ineffective for failing to submit evidence of mental retardation for finding under Ark. Code Ann. §5-4-618; (2) that Williams was mentally retarded, and, therefore, the death penalty was prohibited under *Atkins v. Virginia*; (3) that his trial counsel was ineffective for failing to object to improper victim-impact evidence; (4) that his trial counsel was ineffective for failing to object to a biased juror; (5) that his trial counsel was ineffective for failing to properly object to the jury failure to consider mitigating evidence; and (6) that his trial counsel was ineffective for failing to introduce the supporting documentation of the expert mitigation evidence. (R. 37 R. 7-16). Williams then filed a supplement to the petition, in which he added the claim that

⁵ Interestingly, although representing Williams since the inception of his Rule 37 proceeding, through federal court proceedings, lethal injection challenges, and in clemency just last month, Rosenzweig does not represent Williams in any of the belatedly filed litigation alleging mental retardation under *Atkins*. Indeed, in a recent motion to withdraw from Williams's federal case, Rosenzweig averred that he initially had accepted help in Williams's case from the Pennsylvania Federal Defender as co-counsel because of his involvement in representing other death sentenced inmates with simultaneously set execution dates. After learning what the Pennsylvania Office proposed to file on Williams's behalf, however, Rosenzweig could not "endorse the accuracy" of the pleadings and moved to withdraw in the federal proceedings. *Williams v. Norris*, E.D. Ark. No. 5:07cv00234, ECF No. 36.

his rights were violated by the requirement that he wear prison clothing and be shackled in front of the jury, as well as placement of several uniformed officers in his immediate vicinity and, to the extent that the issue was not adequately preserved, that he received ineffective assistance as to the claim. (R. 37 R. 63).

Prior to his Rule 37 hearing, the circuit court granted Williams's motion for funds to hire an expert on the question of whether Williams was mentally retarded and authorized expenditure of \$10,000 to hire Dr. Ricardo Weinstein of Encinitas, California for that purpose. (R. 37 R. 31). The court also granted Williams's motion for funds to hire an investigator for mental-retardation issue and related issues. (R. 37 R. 36). At the beginning of the September 8, 2005, Rule 37 hearing, Williams's Rule 37 counsel informed the court that,

Claims One and Two, we are not going to pursue in this matter. That deals with the retardation issue. And this was propounded and 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. And I wanted just to let the Court—let the Court know.

(R. 37 R. 137). The abandonment was based upon I.Q. testing done on Williams in conjunction with the Rule 37 proceeding, which concluded that Williams had an adjusted I.Q. of 78, placing him well outside the mentally retarded range. (Pet. at A-145, A-179). In its order denying Rule 37 relief, the court noted the abandonment of those two claims. (R. 37 R. 116).

On appeal to the Arkansas Supreme Court, Williams raised the following claims: (1) that his trial counsel was ineffective for failing to make a timely objection during the sentencing testimony of a family member of the victim; (2) that his trial counsel was ineffective for failing to challenge for cause LaRhonda Washington, a potential juror who was ultimately seated on the jury; (3) that his trial counsel's conduct was deficient in not requesting to view the verdict forms that were examined by the circuit court and in failing to object to the manner in which the jury had completed Form 2, Section C, of the verdict forms; (4) that his counsel was ineffective for failing to introduce documentary evidence that his expert witness relied upon in developing his PowerPoint presentation used during his testimony at trial; (5) that the issue of whether he should have been restrained at trial was decided by the Arkansas Supreme Court under an erroneous standard, and therefore seeking to relitigate the claim; and (6) that the circuit trial court abused its discretion in denying his request for an investigator in order to pursue the possibility of juror bias or misconduct. The Arkansas Supreme Court affirmed the denial of relief on March 1, 2007. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

Williams then filed his petition for writ of habeas corpus in the District Court for the Eastern District of Arkansas on September 10, 2007. In that petition, he raised the following seven grounds for relief: (1) that his Eighth Amendment

rights were violated by the refusal to provide funds for or permit the presentation of mitigation evidence that the ADC bore some responsibility for the events causing Boren's death; (2) that the circuit court improperly permitted certain victim impact evidence and, to the extent the argument was defaulted by trial counsel, counsel was ineffective; (3) that trial counsel was ineffective for failing to properly object to a biased juror; (4) that trial counsel was ineffective for failing to properly object to the jury's failure to consider mitigating evidence; (5) that trial counsel was ineffective for failing to introduce the supporting documentation of mitigation evidence; (6) that Williams's due-process rights were violated by being required to stand trial shackled, in prison attire, and with numerous uniformed guards around him, and to the extent trial counsel defaulted the argument, he was ineffective; and (7) that his Sixth Amendment rights were violated by the denial of funds for an investigator to probe issues of juror bias and misconduct. The district court denied his petition in its entirety in a November 4, 2008 order. *Williams v. Norris*, No. 5:07cv00234, ECF No. 10, 2008 WL 4820559 (E.D. Ark. Nov. 4, 2008).

Williams appealed, and the Eighth Circuit addressed each of the seven issues as to which the district court denied relief. It affirmed the denial of relief in a July 15, 2010 opinion. *Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010). Williams subsequently filed a petition for writ of certiorari in the Supreme Court, and that

petition was denied on March 28, 2011. *Williams v. Norris*, 562 U.S. 1290 (2011), E.D. Ark. No. 5:07cv00234, ECF No. 25. He is seeking relief under Fed. R. Civ. P. 60(b) now in federal district court.

2. The Instant Petition

A. Williams Misinterprets Arkansas Habeas Corpus Law The Arkansas Supreme Court has long held that an *Atkins* claim is not available in state habeas corpus. *E.g.*, *Engram v. State*, 360 Ark. 140, 154, 200 S.W.3d 367, 375 (2004); *see also Coulter v. State*, 365 Ark. 262, 268, 227 S.W.3d 904, 908 (2006) (citing *Engram*'s holding barring the availability of state habeas to pursue an *Atkins* claim). This precedent is binding, and Petitioner presents no authority on which this Court may disregard it.

Unless a petitioner in proceedings for a writ of habeas corpus can show that the circuit court lacked jurisdiction over the cause or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. *E.g.*, *Jefferson v. Kelley*, 2017 Ark. 29, at 3, 509 S.W.3d 626, 628.

Contrary to Petitioner's assertion, this Court's opinion in *Hobbs v. Gordon*, 2014 Ark. 225, 434 S.W.364, does not render cognizable "any claim based on the legality of a prisoner's sentence" when "no other effective means of relief is at hand." (Pet. at 5-6). In *Gordon*, the mandatory life-without-parole sentence Gordon received for capital murder was an illegal sentence under *Miller v.*

Alabama, 567 U.S. 460 (2012), because he was 17 at the time of his crime. *Gordon*, 2014 Ark. 225, at 8, 434 S.W.3d at 369. Those facts—his age and sentence—could be gleaned from the face of the judgment and could be verified by a birth certificate attached to the habeas petition, as was the case in *Gordon*. Indeed, the Arkansas Supreme Court reaffirmed in *Gordon* that a petitioner must plead facial invalidity or lack of jurisdiction over the cause, and affirmatively show by affidavit or otherwise—at the outset—probable cause to believe he is unlawfully detained. *Id.*, 2014 Ark. 225, at 7, 434 S.W.3d at 368.

Williams’s interpretation of *Gordon* is absurd. It would transform the “extraordinary remedy” of habeas into an ordinary remedy allowing virtually any illegal-sentence challenge to be pursued through the writ. It would open habeas proceedings to those death-row prisoners claiming insanity to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), prisoners who contend they were incompetent to proceed at trial, and the list goes on. *Gordon* did not announce or intend that result.

A claim pursuant to *Atkins* involves neither the facial validity of the judgment nor the circuit court’s jurisdiction. A court cannot determine whether a person is mentally retarded under *Atkins* from the face of a judgment or from an affidavit attached thereto. It is not akin to age, where a birth certificate attached to the petition leaves undisputed that a judgment is illegal on its face. Rather, mental

retardation allegations under *Atkins* involve (unless they are frivolous or implausible) evaluation by experts and testimony at a judicial proceeding, followed by a legal determination. And it is subject to dispute before and after that determination is made.

Moreover, Arkansas already provides an opportunity to litigate an *Atkins* claim, by allowing for a pretrial finding under Ark. Code Ann. § 5-4-618. Thus, even under Williams's inaccurate reading of *Gordon*, an *Atkins* claim still would not be cognizable in state habeas because it is not a situation in which "no other effective means of relief is at hand." (Pet. at 6). There was an opportunity for Williams to pursue a finding at trial, and Williams did not do so. There was another opportunity for Williams to pursue that remedy in postconviction proceedings through a claim under *Strickland v. Washington*, 466 U.S. 668 (1984). Williams, in fact, raised an *Atkins* claim, but after investigation and evaluation, abandoned it.

Williams does not get an *Atkins* hearing through the procedure of state habeas corpus on the eve of execution to try to demonstrate that he is mentally retarded. Habeas is not a substitute for the pretrial proceeding that Williams elected *not* to invoke, or the Rule 37 proceeding at which he obtained funds to litigate the issue and, after testing, *elected* to withdraw the claim. Considering that he waited to try to revive his abandoned claim only after he was scheduled for

execution, it seems apparent his goal is to intentionally frustrate the effort to enforce a facially and legally valid judgment, not to vindicate a legitimate cognizable claim.

Simply put, the relief that Williams seeks—that this Court issue a writ of habeas corpus based on *Atkins*—is not a claim on which habeas relief can issue. *See Engram*, 360 Ark. at 154, 200 S.W.3d at 375. Thus, he has not established probable cause for issuance of the writ, and his petition should be dismissed.

B. Even if Williams’s claim was cognizable in state habeas, he is not a person with mental retardation, so he still has not established probable cause to issue the writ. There is no state consensus for identifying mental retardation. Therefore, Arkansas’s procedures under the statute satisfy the requirements of *Atkins*, and there is no need for this Court to create a new and unique procedure to litigate abandoned *Atkins* claims.

States may be justified in concluding that those who lie at the margins of the clinical definitions do not necessarily fit the category of mentally retarded persons about whom there is national consensus for Eighth Amendment purposes. *See Atkins*, 536 U.S. at 317 (noting serious disagreement about which offenders are retarded and leaving it to the States to develop appropriate ways to enforce the constitutional restriction). To be entitled to an exemption from the death penalty on grounds of mental retardation under the Arkansas standard, Williams must

show that he suffered from mental retardation at the time of his capital crime. That requires that he prove three things: (1) “[s]ignificantly subaverage general intellectual functioning ... manifest [ing] ... no later than ... age eighteen (18),” (2) “accompanied by significant deficits or impairments in adaptive functioning manifest[ing] ... no later than ... age eighteen (18)[,],” and (3) “[d]eficits in adaptive behavior.” *See* Ark. Code Ann. §5-4-618(a)(1)(A) and (B). Williams cannot (and has not) made that exacting showing.

To begin with, psychological testing performed on Williams on May 24, 1999, prior to his trial for the Boren murder, by examiners David Nanak and Dr. William Cochran revealed that Williams had a Full Scale I.Q. of 74; however, they deemed the score a “minimum estimate” due to Williams’s lack of effort during the evaluation. The report included the following:

It is felt that this assessment may be an underestimate of Mr. Williams’ current functioning level and capabilities. Throughout the testing situation, he spent most of his time slouching in the chair, supporting his head with one hand while using the other hand to manipulate objects. Quite often he would give quick “I don’t know” responses without even reflecting on the questions being posed of him. About a third of the way into the testing situation he asked if he had to complete the tests, and again it was explained to him that this was a court ordered assessment and that I had to make a report back to the court. I explained to him that if he refused to take the testing that would be reported back to the judge.

TEST RESULTS AND INTERPRETATION: Mr. Williams attained a WAIS-III Full Scale IQ of 74, which would suggest Borderline intellectual functioning. He attained a verbal I.Q. of 76 and a Performance I.Q. of 75 with both scores falling into the same

classification range. Again, it is felt that because of his low motivation, quick “I don’t know” responses, and scatter throughout the testing that this is considered a minimum estimate and that at least Low Average intellectual potential may exist for this individual.

(See Pet. at A 49-50).

In addition, Williams’s Rule 37 counsel had Williams’s I.Q. tested in conjunction with that proceeding, and unequivocally abandoned a mental retardation claim after the results of the testing were provided to him. By Williams’s own submissions in his motion to recall the mandate case, his adjusted I.Q. score at the time of the Rule 37 proceeding was a 78, (see Pet. at A-145, A-179), placing him well above the cut-off for mental retardation and fully explaining postconviction counsel’s reason for withdrawing the claim in Rule 37.

Williams is a prolifically dangerous and violent criminal, and the records in his previous cases establish that he is not mentally retarded. For example, on August 26, 1999, just over a month before escaping the Cummins unit and murdering Cecil Boren, a Jefferson County jury convicted Williams of arson, kidnapping, aggravated robbery, and theft of property for his December 5, 1998, crimes against Sharon Hence. At that trial, Williams testified in his own defense. Williams’s testimony from that trial, *Williams v. State*, No. CACR 00-432, is attached hereto as Exhibit A. He explained that, in December 1998, he was working a full-time job and paying his own bills. (Exhibit A at 217-18). He denied committing the crimes, testified that he was at home when the robbery occurred,

and he recalled in detail his purported alibi during the time period of those crimes. (Exhibit A at 219-34). A review of his testimony from that trial reveals that Williams was coherent, well-spoken, thoughtful, and recalled specific details evidencing linear thinking and intelligence.

In his trial for the capital murder of Cecil Boren, Williams filed several *pro se* pleadings, including a Motion for Recusal and a Motion for Dismissal of Court Appointed Counsel. T.R. at 118-24. Moreover, two months before trial, Williams's experienced criminal-defense attorneys Dale Adams and John Cone filed a "Motion to Allow Defendant to Participate at Trial As Co-Counsel and Memorandum Brief in Support Thereof." T.R. at 312. In that motion, Williams's attorneys demonstrated extraordinary confidence, not only in Williams's ability to assist in his own defense, but to actually assist them in defending himself in a complex capital-murder trial. The follow is an excerpt from that motion:

Based on the nature and circumstances of this case, it is expected that this will be an extended and complex trial. Further, it appears that most, if not all, of the evidence which will be presented in this matter lies within the Defendant's personal knowledge and in many instances, the clarification of such evidence may lie within his exclusive knowledge.

T.R. at 312. Further, the mitigating-circumstances form submitted to the jury at sentencing in this case contained a mitigating circumstance that: "Kenneth D. Williams suffers from borderline mental retardation." T.R. at 500(c)-500(g). The jury did not check the box for that mitigator. T.R. at 500(c)-500(g). Thus, the jury

did not conclude that the evidence presented was sufficient to establish that Williams suffered from borderline mental retardation.

A plethora of post-trial and post-rule 37 evidence confirms that Williams is not exempt from execution under *Atkins*. Prior to the Rule 37 proceeding, Williams vigilantly acted to protect his rights in in federal court. *See Jackson v. Norris*, 2016 WL 1740419 (E.D. Ark. 2016) (utilizing pro se pleadings to find no intellectual disability under *Atkins*.) Acting *pro se*, Williams filed on February 14, 2001, a petition under 42 U.S.C. 1983, alleging the denial of medical attention. (A copy of that *pro se* petition is attached to hereto as Exhibit B). He was denied relief in the United States District Court. Williams then filed a timely appeal to the United States Court of Appeals for the Eighth Circuit, which affirmed the denial of relief. *Williams v. Byus*, 79 F. App'x 242, 243 (8th Cir. 2003).

In addition, as demonstrated in Williams's clemency petition filed with the Arkansas Parole Board on March 14, 2017, he has studied and become a minister during his time on death row. (A copy of Williams's clemency petition is attached hereto as Exhibit C). He has written several articles, which have been published in a variety of publications. (Exhibit C at 4-12). He has obtained numerous certificates upon the completion of religious training, as well as a "Masters Degree in Religion" and an honorary "Doctor of Divinity" from the Universal Life Church. (Exhibit C at 13-21). He also has created board games called "Gang Proof,"

“Bully Proof,” and “Drug Proof,” with the “hope that young persons who read [his] writing and play these games will be warned off the path that [he] took in his earlier years.” (Exhibit C at 3).

In Williams’s clemency proceeding, an audio-recording (a copy of which is being filed as Exhibit D), demonstrates that Williams spoke to the Parole Board for more than an hour, giving a sophisticated and theologically literate presentation. In that presentation, he quoted scripture from the Old Testament and New Testament, understood and extracted themes of redemption from those passages, applied them to his own life, and communicated those tenets into a plea for mercy from the Board.

Williams’s Condensed Health Services Encounter obtained from the Arkansas Department of Correction, which is being filed separately under seal as Respondent’s Exhibit E, demonstrates that Williams is acclimated to, and functions well in, his current environment and that he performs extremely complex tasks. For example, on February 12, 2016, when visited by the mental-health staff, Williams “discussed [with staff] doing his taxes from the books he sold.” (Exhibit E at 29). In several other mental-health visits, Williams relayed that he is “working on his autobiography.” (Exhibit E at 31-33).

He also has been pursuing his rights in unrelated state-court actions. On April 22, 2016, Williams filed a *pro se* Petition to Establish Paternity in Jefferson

County Circuit Court Case No. 35DR-16-397. (A redacted copy of that petition is attached as Exhibit F). Because he apparently had difficulty with service of process on the defendant in that case, he wrote on June 29, 2016, a coherent, well-reasoned letter explaining his struggle and requesting assistance in locating an address for the defendant. (A redacted copy of that letter is attached as Exhibit G). Williams subsequently obtained service on the defendant in that case, and on January 23, 2017, he wrote a letter to the circuit court clerk with the following request:

Petitioner request that a paternity test be ordered, that Ms. Johnson make available [D.J.], the son Petitioner believes is his biological son. Petitioner request this be done soon as possible, consider he is a death row prisoner without any remaining appeals.

(A redacted copy of Williams's January 23, 2017, letter is attached as Exhibit H).

This letter, written only three months ago, shows Williams's persistence in asserting and protecting his rights, as well as thoughtful planning relating to the exhaustion of his appeals and his recognition that his execution date is imminent. The evidence demonstrates that Williams clearly is not a person with mental retardation. Thus, he has not established probable cause for issuance of the writ, and his petition should be denied.

Conclusion

Williams's claim is not cognizable. His petition should be denied for that reason alone. In the alternative, Williams is not a person whose execution is prohibited under *Atkins v. Virginia*, 536 U.S. 304 (2002).

WHEREFORE, the State respectfully requests that this Court deny Williams's Corrected Petition for Writ of Habeas Corpus.

Respectfully submitted,

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Attorney General

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Kathryn Henry, certify that on the 25th day of April, 2017, I electronically filed the foregoing document with the Clerk of the Court using the eFlex system which shall send notification of such filing, which is deemed service, to:

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/s/ Kathryn Henry
KATHRYN HENRY

EXHIBIT INDEX

- Respondent's Exhibit A: Kenneth Williams's testimony from *Williams v. State*, No. CACR 00-432
- Respondent's Exhibit B: *Pro se* Petition Under 42 U.S.C. § 1983 February 14, 2001
- Respondent's Exhibit C: Williams's Clemency Petition
- Respondent's Exhibit D: March 31, 2017, Audio Recording of Williams's Clemency Hearing (*Filed Conventionally Under Separate Cover*)
- Respondent's Exhibit E: Williams's Condensed Health Services Encounter Forms – Arkansas Department of Correction (*Filed Separately Under Seal*)
- Respondent's Exhibit F: *Williams v. Johnson*, Jefferson County Case No. 35DR-16-397, *Pro Se* Petition to Establish Paternity filed April 22, 2016
- Respondent's Exhibit G: *Williams v. Johnson*, Jefferson County Case No. 35DR-16-397, Letter from Williams dated June 29, 2016
- Respondent's Exhibit H: *Williams v. Johnson*, Jefferson County Case No. 35DR-16-397, Letter from Williams dated January 23, 2017

1 without consent, restrain Sharon Hence so as to interfere
2 substantially with her liberty for the purpose of facilitat
3 ing the commission of a felony or flight thereafter. And
4 finally, with regard to offense, count number three, havir
5 to do with arson being the charge, the defendant specificall
6 moves the Court for a directed verdict stating that the Stat
7 failed to make a prima facie showing that the defendar
8 started a fire or caused an explosion with the purpose c
9 destroying or otherwise damaging a motor vehicle that was th
10 property of Sharon Hence.

11 THE COURT: The Court will deny your motions.

12 (The following proceedings resumed in open court, to wit:)

13 THE COURT: Does the State rest?

14 MR. BROWN: Yes, sir.

15 THE COURT: Mr. Kizer, are you ready to proceed?

16 MR. KIZER: Yes, sir, with the proviso about the motio
17 I made.

18 THE COURT: Yes.

19 MR. KIZER: Thank you, your Honor. I would call th
20 defendant, Kenneth Williams. Mr. Williams, would you have
21 seat right up there, please.

22 KENNETH WILLIAMS

23 having been called at the instance of counsel for the defendar
24 and after having been duly sworn, testified as follows, to wit:

25 DIRECT EXAMINATION



1 BY MR. KIZER:

2 Q State your name for the record, please.

3 A Kenneth Williams.

4 Q How old are you, Mr. Williams?

5 A Twenty years old.

6 Q Where do you currently reside?

7 A Cummins.

8 Q That's in the Arkansas Department of Correction. Is that
9 right?

10 A Yes, sir.

11 Q Are you the same Kenneth Williams who has a previous felon
12 conviction, one for battery in the second degree and one for
13 escape in the first degree?

14 A Yes, sir.

15 Q When did you receive those convictions?

16 A October of '95.

17 Q And in what county?

18 A Saline County.

19 Q Are you in the Department of Correction based on those
20 charges?

21 A Yes, sir.

22 Q Was there a period of time in late 1998 when you were out of
23 the Department of Correction and you were living here in Pigeon
24 Bluff?

25 A Yes, sir.

Section 1

Section 2

Section 3

1 Q Let's go into a little bit of your background. Where were
2 you born?
3 A I born in Pine Bluff, Arkansas.
4 Q Have you lived here, essentially, your whole life?
5 A Yes, sir.
6 Q Do you have relatives here?
7 A Yes, sir.
8 Q I think your father lives in Pine Bluff. Is that right?
9 A Yes, sir.
10 Q Where does your mom live?
11 A She stays in Kansas City, Missouri.
12 Q The period of time when you were living here in Pine Bluff in
13 late 1998, did you have your own apartment?
14 A Yes, sir.
15 Q Where was that located?
16 A It was 2207 West 18th.
17 Q And there's been reference made to that being across the
18 street from SEARK college. Is that correct?
19 A That's correct.
20 Q To orient the jury, what part of SEARK college is it across
21 from?
22 A I'd say about the office.
23 Q The administration offices?
24 A Yes.
25 Q You know there are two entrances to get into SEARK. One

1 them is toward 28th Street. The other one is back the other
2 direction going north.

3 A The North.

4 Q The north entrance. When you turn off of Hazel Street, how
5 far do you have to go to reach these apartments?

6 A I'd say a half a block.

7 Q Okay. And these apartments, if I'm not mistaken --

8 MR. KIZER: May I approach the witness, your Honor?

9 THE COURT: You may.

10 MR. KIZER CONTINUING:

11 Q Why don't you turn around so that we can show the ladies and
12 gentlemen on the board. This is Hazel (INDICATING). What street
13 is this that the apartments are on?

14 A West 18th.

15 Q Okay. And SEARK is here (INDICATING). I think you said
16 about a half a block is where those apartments are.

17 A Yes.

18 Q Aren't they configured like this (INDICATING)?

19 A Yes.

20 Q Okay. Would you put an "x" at the approximate location where
21 your apartment was?

22 A (Witness did as requested)

23 Q So you are right there on the corner?

24 A Right.

25 Q Is that the first apartment that you reach when you come in?

1 the parking lot?

2 A Yes.

3 Q And is the parking lot in this general area (INDICATING)?

4 A That's right.

5 Q Okay. You can have a seat. Was your apartment on the bottom
6 floor or the top floor?

7 A It was on the bottom.

8 Q Who did you live there with?

9 A Well, I lived -- really lived by myself, but my girl friend
10 was staying with me, Tanisha Johnson, and my home boy Oliver
11 Logan, he'll stay about three nights out of a week.

12 Q Okay. Is Oliver Logan a friend of yours?

13 A Yes, he is.

14 Q How long have you known him?

15 A About five or six years.

16 Q Did you meet him at school or some place around Pine Bluff?

17 A Yeah, I met him through his brother.

18 Q Okay. Were you working in December of 1998?

19 A Yes, I was.

20 Q Where were you working?

21 A I was working for Scott Systems.

22 Q Was that a part-time job or full-time job?

23 A It was full time.

24 Q Who was paying your expenses at the apartment?

25 A I was.

1 Q Did you have an automobile?
2 A Yes, I had just got a automobile.
3 Q What type of automobile?
4 A A Delta 88.
5 Q An Oldsmobile?
6 A Yes, sir.
7 Q What year model was it?
8 A I wasn't for sure.
9 Q Okay. It's an older automobile, is it not?
10 A Yes.
11 Q In December of 1998, was it running?
12 A Was it what? Was it running?
13 Q Could you operate it?
14 A No.
15 Q What was the problem with it?
16 A The transmission was messed up.
17 Q Where did you have it parked?
18 A Right in -- directly in front of my apartment.
19 Q Okay. How long before December the 5th, 1998, how long ha
20 it been before you were able -- since you were last able to driv
21 that car?
22 A Well, once I bought it, it -- the transmission was messed up
23 I was just going to put a transmission in it myself.
24 Q So were you ever able to drive it?
25 A No, I wasn't.

1 Q On December the 5, 1998, I believe we've established that wa
2 a Saturday. Did you normally work on Saturdays?
3 A We used to, but we had stopped.
4 Q Okay. Were you working or did you have to go to work on the
5 day?
6 A No, sir.
7 Q Would you tell the ladies and gentlemen of the jury what
8 happened on that particular day?
9 A Yes, sir, I can. Well, December the 5th, 1998, I was at home
10 along with my girl friend Kanisha Johnson and my room mate, Olive
11 Logan. Kanisha left about, I'll say, around 9 to 10. She left to
12 go to work. I got up, like, 45 or 50 minutes after she did. Once
13 I got up, I took me a shower, got dressed and fixed me breakfast.
14 I normally go see my daughter on Saturday. So that's where I put
15 my mind to go. It was around 12 when I walked out the door, but
16 before I walked out the door, my telephone rung. I answered the
17 telephone, and Andrew Griffin was on the phone. He asked me where
18 was Wesley Evans at. I told him he was probably upstairs at home.
19 He, like, "Well, come meet me in the circle over here by this
20 vacant house. I got something to show y'all." I was, like, "All
21 right," 'cause I'm coming that way anyway to go see my little
22 daughter. So I hung the phone up; I was walking out the door. And
23 I opened the door up, Wesley was standing there.
24 Q Wesley who?
25 A Wesley Evans.

1 Q Okay.

2 A He was standing at the door. I shut the door behind me. He
3 asked me, "What's up?" I said, "Anthony wanted us to meet him in
4 the circle drive by the vacant house. He's got something to show
5 us." He said, "All right." So we started walking down West 18th
6 across Hazel and went in the circle drive. Once we got in the
7 circle drive, we passed by the vacant house. And Andrew pulled up
8 on the side of us in a black Mercedes Benz. We walked up to the
9 car where was he. He said, "Get in." I got in the back seat and
10 Wesley got in the front seat.

11 Q Okay. Let me stop you. Where did Wesley Evans live?

12 A He lived in the same apartment with his sister that I was
13 staying in.

14 Q Do they live upstairs or downstairs?

15 A Upstairs.

16 Q Did they live on the same side of the apartment that you did?

17 A Yes.

18 Q Did you know Wesley prior to this date?

19 A I met him after -- when I moved out there.

20 Q Okay. How long had you lived in these apartments prior to
21 December the 5th?

22 A I think I moved out there in October.

23 Q In what month?

24 A October.

25 Q Was Wesley living there then?

1 A Yes.

2 Q Who was Wesley living with?

3 A His sister, Leslie Evans.

4 Q Leslie?

5 A Yes.

6 Q When you got the phone call from Andrew Griffin, did you
7 recognize his voice?

8 A Yes.

9 Q How do you know Andrew Griffin?

10 A I met him through Wesley.

11 Q And how long had you known him?

12 A Who, Wesley?

13 Q No, Andrew.

14 A Not very long.

15 Q Okay. Would it have been since you moved into the apart
16 ments?

17 A Yes.

18 Q Well, when you saw him over on Circle Drive, if I'm not
19 mistaken, Circle Drive is -- this is across Hazel (INDICATING)
20 There is a line of houses here (INDICATING), but isn't it over
21 this way (INDICATING)?

22 A Yes, this way (INDICATING).

23 Q Okay. How long did it take you to walk over there?

24 A Probably not even five minutes.

25 Q And when you were walking over there, was anyone with you?

1 A Yes, Wesley was.

2 Q Okay. When you got to that area, were you going anywhere i
3 particular?

4 A Well, yes, to meet him.

5 Q I know, but did you have an arranged place?

6 A Yes, to go see my little daughter.

7 Q No, I mean arranged place to meet Andrew.

8 A By the vacant house.

9 Q Okay. And when he pulled up, did you recognize him in th
10 automobile?

11 A Not right off until I walked up to the car where he was at

12 Q Did you recognize the automobile?

13 A No.

14 Q Had you ever seen Andrew with a Mercedes?

15 A No.

16 Q What color was it?

17 A It was black.

18 Q How many doors did it have?

19 A Four.

20 Q Did you ask him where he got the Mercedes?

21 A No, I didn't ask him. Wesley asked him.

22 Q Were you told?

23 A He was, like, "Don't worry about it. Just ride," you kno
24 what I'm saying.

25 Q Did you get in?

1 A Yes, I got in.
2 Q What happened next?
3 A After that, we drove off and Wesley asked him what he had to
4 show us. At that time, he pulled out this little old black pocket
5 book looking deal and asked us did we want to buy this jewelry
6 Wesley looked at it.
7 Q Okay. Let me stop you for a second. How did Wesley even
8 know that Andrew had anything to show you?
9 A 'Cause I told him. I said he had something to show us.
10 Q Was that your reason for going over there in the first place?
11 A Going over where?
12 Q To Circle Drive?
13 A Yes.
14 Q Okay. When you saw that -- scoot up closer. There you go
15 When you saw this black thing that you've just described to us
16 what did you see next?
17 A Well, he opened it up and there was some jewelry inside of
18 it.
19 Q What type of jewelry?
20 A Wedding ring -- well, rings and a watch and a bracelet.
21 Q Did y'all have a conversation about the jewelry?
22 A Yes.
23 Q Was it ever discussed where the jewelry came from?
24 A No.
25 Q Was there a discussion about what was to be done with the

1 jewelry?

2 A Yes.

3 Q What did you understand was to be done with it?

4 A Wesley was going to sell it for Andrew.

5 Q At any point, did you end up with any of that jewelry?

6 A Yes.

7 Q How did you end up with it?

8 A Wesley put it in the trunk of my car and he said he was going
9 to pay me to keep it there 'cause he didn't want his sister to
10 know about it. So I was, like, all right, it's cool.

11 Q How did it get in the trunk of your car?

12 A He put it there.

13 Q I mean, how did y'all make it over to that place?

14 A We rode over there in the car and dropped Wesley off with the
15 jewelry.

16 Q What happened next?

17 A After we dropped him off with the jewelry, me and Andrew went
18 to Little Rock.

19 Q And what was the purpose of going to Little Rock?

20 A To go to the Battle of the Bands.

21 Q Battle of the what?

22 A Battle of the Bands.

23 Q What is that event?

24 A It's, like, competing -- bands competing and stuff like that.

25 Q You mean like school bands?

1 A Yeah.

2 Q Marching band type things?

3 A Yes.

4 Q Okay. Where was that held in Little Rock?

5 A I think on Roosevelt, if I'm correct, if I can remember what
6 sheet it was.

7 Q Was there any band in particular you were going to see?

8 A No, we didn't even go there, you know what I'm saying. The
9 was our plan to go to the Battle of the Bands but there was too
10 many cars, and we didn't go. We just rode by it.

11 Q Who drove the Mercedes to Little Rock?

12 A He drove up there.

13 Q Did you stay in Little Rock?

14 A About four hours.

15 Q Where were you?

16 A Where were we?

17 Q In Little Rock?

18 A Well, at Barnes Park.

19 Q Did you stay there all night?

20 A No, we stayed in Little Rock, like, four hours. Once we left
21 Little Rock, we went to Conway, Arkansas. Went over to this guy's
22 house that he knows. We stayed over there till dark time. Once
23 we left Conway, we went to southwest Little Rock. Once we got to
24 southwest Little Rock, we went over to this female's house that I
25 know and went and picked her up and rode around about an hour

1 After we got through running around, we went back over to her
2 house and stuff. We went in. Then I went in the den and started
3 watching a movie. She put a movie on for me. I watched about two
4 movies. And her and Andrew went in the back room, and I fell
5 asleep. I don't know how long I stayed over there 'cause I fell
6 asleep. The next thing I know, he woke me up. He asked me did
7 know my way back to Pine Bluff. I, like, "Yeah, I know my way
8 back to Pine Bluff." He was, like, "If you want to, you can take
9 the car and go back to Pine Bluff, but if you don't want to, you
10 can stay up here and chill with me, but I'm going to stay up here
11 for a few days." I was, like, "All right." He, like, "When you
12 get back, tell Wesley to have that money for me and stuff."
13 was, like, "All right." He gave me the key, and he told me once
14 I get there, to get out of the car, you know what I'm saying.
15 was, like, "All right." So I got the keys. I went and got in the
16 car. I drove the car all the way back to Pine Bluff.

17 Q Where did you go when you got back to Pine Bluff?

18 A Well, I had to use the bathroom. It was late. I didn't want
19 to just go to nobody's house knocking on the door to use the
20 bathroom. So I went home in the car to the apartments.

21 Q Where did you park the car?

22 A I parked it in backwards by the staircase.

23 Q Which way is the staircase from your apartment?

24 A It's about right there (INDICATING).

25 Q Okay. Did you leave -- what did you do with the keys to the

1 car?

2 A I left them in the car.

3 Q What time was it when you got back from Little Rock?

4 A About 12:40, around 12:40 at night.

5 Q So it would be early morning, after midnight?

6 A Yeah, after midnight.

7 Q Okay. When did you see the Mercedes again?

8 A Well, once I got out of it, then I went in the house, you
9 know what I'm saying. I talked to Wesley first. He came up to
10 where I was at. He asked me where was Andrew at. I told him
11 Andrew was going to stay in Little Rock for a few days, but he'll
12 be back later to get the money from him. He was, like, "All
13 right, 'I already sold two of the rings any way." He was, like
14 let me give you a few dollars to keep them in the trunk of your
15 car 'cause I don't want my sister to know about it. I'm, like
16 all right. So I let him put them in the trunk of my car. Then
17 told him I was going to help him sell the jewelry too so we can
18 on and get off of them. At that time, I went in the house to use
19 the bathroom, change clothes and fix me something to eat.
20 stayed in the house about 15 to 20 minutes. When I came back out
21 I looked around and I didn't see Wesley. I didn't see the car
22 nowhere. So I assume Wesley got in the car and left. I went back
23 in the house. I was fixing to use the phone and stuff. Then like
24 30 minutes passed by. Then I heard somebody pull up was playing
25 loud music. So I assumed it was him, and I opened the door and

1 looked out. He was just pulling up. And I went out there to the
2 car where he was at and told him to go park the car before he get
3 pulled over. He was like, "All right. I just want to see how I
4 ride." So I went back in the house, and he drove the car
5 toward the dead end. And like five minutes later -- I mean, five
6 minutes later, he came knocking on the door and I let him in.
7 Once I let him in, we sat down and started talking. He asked
8 what all we did in Little Rock.

9 Q Let me ask you this: Did you see the car again after that

10 A No.

11 Q Did you know where the car had been taken to?

12 A I didn't know the exact place that he parked it at. I know
13 he -- I told him to get out of it and he went and parked it.
14 know he came back like five minutes later.

15 Q Did you see the car out in the parking lot when he came back

16 A No.

17 Q Did you in any way agree with him or assist him or any other
18 person with burning that car the next morning?

19 A No.

20 Q Did you burn the car yourself?

21 A No, I didn't burn the car.

22 Q At some point, did you show jewelry to Greg Rhea?

23 A Yes, I tried to sell him some.

24 Q Was it the same jewelry you have been telling us about?

25 A Yes, sir.

1 Q How long after this day -- the next day is Sunday the 6th,
2 guess it was. How long after that was it that you attempted to
3 sell the jewelry to Greg Rhea?

4 A Probably three or four days.

5 Q Do you remember talking to the detectives in this case?

6 A Yes, sir.

7 Q And did you give them consent to go and search your house?

8 A Well, first, I told them no, you know what I'm saying. Then
9 he like -- "We are going to attempt to get a search warrant." Then
10 he left out of the room, and I was sitting in the little room with
11 stuff. Then he came back in there. He was like, "Why don't you
12 give us consent to search your house? You feel like you got
13 something to hide." I like, "No, I don't got nothing to hide,
14 just like that. He said, "Well, why you don't give us consent?"
15 I said, "'Cause I don't want you going all through my stuff and
16 messing it up," just like that. Then the dude grabbed me talking
17 about, "You got something to hide?" I'm like, "No, I don't got
18 nothing to hide." I told him to get his damn hands off me. Then
19 then I told him, "Yeah, you can go on and search my house, man."

20 Q Did you go with them when they went?

21 A I told them as long as I can go, I'll sign the form.

22 Q And did you sign the form?

23 A Yes, I signed the form.

24 Q Did y'all go to the house?

25 A Yes.

1 Q Is that when the items that the officer was telling us about
2 were found when you were with him?

3 A Yes.

4 Q Do you have any idea -- State's Exhibit 5 is the toy pistol
5 Do you have any idea where that came from?

6 A Well, I don't play with toy pistols. It was in my house. I
7 was in my trash can. I know my girl friend, she have a little
8 boy. I don't remember seeing it myself, though, but, like I said,
9 she got a little boy, and I assume he was playing with the thing.

10 Q How about the Farmers Insurance or evidence of insurance?

11 A Well, just to be honest about it, I can't recall putting that
12 in my medicine cabinet. I ain't saying I didn't, but I can't
13 recall putting it there. I don't remember putting it there.

14 Q Did you take anything else out of the Mercedes?

15 A No.

16 Q Did you take, specifically, the radar detector?

17 A No, it wasn't no radar.

18 Q How about anything out of the trunk?

19 A No, just the jewelry.

20 Q Did you ever look in the trunk?

21 A No.

22 Q At some point you were charged with an aggravated robbery and
23 kidnapping. Is that correct?

24 A That's correct.

25 Q Did you do that?

1 A No, I didn't rob her.

2 Q The robbery, according to the information that is taken from
3 the photograph which is State's 1, took place or started, at
4 least, sometime shortly after 10 o'clock that morning. Were you
5 at 28th and Catalpa at that time?

6 A I was at 2207 West 18th.

7 Q That's your apartment?

8 A That's right.

9 MR. KIZER: Your Honor, may I look at the exhibits?

10 THE COURT: Yes.

11 MR. KIZER CONTINUING:

12 Q Do you have any idea whose photograph this is in the
13 automobile with Ms. Hence that's contained in State's Exhibit 1?

14 A It's not me.

15 Q Have you ever had any kind of scarring or any type of
16 discoloration, whatever you want to call it, associated with your
17 left eye?

18 A No, I never had a scar on my eye or in my eye or around
19 eye.

20 MR. KIZER: Your Honor, may I ask him to present himself
21 in front of the jury so they can see?

22 THE COURT: You may.

23 MR. KIZER: Will you come this way, please? Why don't
24 you stand in the middle so they can see? (Witness did as
25 requested)

1 MR. KIZER CONTINUING:

2 Q Have you ever had any scarring around your eye itself?

3 A No.

4 Q Have you ever had any scarring in the pigment or the white
5 portion of your eye?

6 A Never.

7 Q Do you have anything like that now?

8 A No, I don't.

9 MR. KIZER: That's all the questions, as far as the
10 presentation goes, I have, your Honor. May he return?

11 THE COURT: He may.

12 MR. KIZER CONTINUING:

13 Q You didn't ask any questions of Andrew Griffin about where he
14 got that car?

15 A Well, once Wesley asked him who car -- where he got the car
16 from, he was, like, "Don't worry about. Just ride." I got the
17 impression just ride, you know what I'm saying, not to be asking
18 questions. That's why I never did.

19 Q But you had never seen him with that car before?

20 A No, I couldn't say it wasn't his. I couldn't say it wasn't
21 his parents'. I didn't just know. I didn't just stereotype him
22 as having a stolen car either.

23 Q What about the jewelry? Did that not cause you to ask a few
24 questions that here is somebody wanting you to sell some women's
25 jewelry?

1 A Yes, I can say that.

2 Q Did you tell Greg Rhea that you got the jewelry from a drug
3 dealer or from crack heads?

4 A I said drug dealer.

5 Q Or crack head. Which one did you say?

6 A Drug dealer.

7 Q Did you tell him that you did?

8 A Yes.

9 Q That wasn't the truth, was it?

10 A No.

11 Q Did you take the jewelry to be appraised at the mall?

12 A Yes, I did.

13 Q What happened to the remainder of the jewelry? There is only
14 one piece of jewelry that's been introduced. Were you able to
15 sell the other piece?

16 A We -- like I said, I didn't get a chance to sell none of the
17 'cause I tried to sell it to him, but he didn't want any. Wesley
18 was sold -- was selling the other. He sold about three or four
19 rings or something like that, you know what I'm saying.

20 Q After you took the jewelry to be appraised, what did you do
21 with it?

22 A Carried it back to the car and put it in my trunk.

23 Q Was that the holding place for the jewelry?

24 A Yes.

25 Q Are you the man in that picture?

1 A Which picture?
2 Q State's Exhibit 1?
3 A No, I'm not the man in that picture.
4 Q Do you know who that man is?
5 A I can barely see the picture really.
6 Q Are you saying you couldn't make out who it is?
7 A I can't make out who it is 'cause it's too dark.
8 Q That's State's Exhibit 1. That's the only one that shows
9 that last one there (INDICATING).
10 A No.

11 MR. KIZER: Pass the witness, your Honor.

1 CROSS-EXAMINATION

2 BY MR. BROWN:
3 Q You testified that Oliver Logan lives with you or lived with
4 you, correct?
5 A Yes, sir.
6 Q You said he lived with you three nights a week?
7 A He stay over there about three nights a week.
8 Q Which nights are those normally?
9 A He -- just any night he feel like that.
10 Q No particular pattern or anything?
11 A No particular night.
12 Q You told Mr. Kizer you worked at Scott Systems. Where
13 Scott Systems?
14 A It's on 17th, West 17th.

1 Q How close is that to your house?
2 A Like a mile, one mile.
3 Q How did you get to work every day?
4 A How?
5 Q Yes.
6 A Well, my uncle usually come pick me up.
7 Q Did you ever walk?
8 A No, my uncle usually come pick me up.
9 Q Could you walk to Scott Systems?
10 A Yes, you could.
11 Q How would you walk from there? What route would you take?
12 A What route would I take?
13 Q Yeah.
14 A The road.
15 Q Which road?
16 A I don't just know the name of the roads.
17 Q Could you take 18th and get there?
18 A No.
19 Q How come?
20 A Because it's a dead end.
21 Q Is there a ditch back there?
22 A Yes.
23 Q Could you cross the ditch and get to Scott Systems?
24 A I wouldn't do it.
25 Q But could you do it?

1 A Yes.

2 Q And be right at Scott Systems?

3 A Yeah.

4 MR. BROWN: May I approach, your Honor?

5 THE COURT: You may.

6 MR. BROWN CONTINUING:

7 Q Is there -- the road goes on down this way, correct?

8 A Correct.

9 Q There is a crossing road, right?

10 A Right.

11 Q And there is a building down here?

12 A Right.

13 Q At the time you lived at this apartment and worked at Scot

14 Systems, was this building under construction?

15 A Yes.

16 Q Did you ever walk by this building?

17 A As far as going to work?

18 Q Going anywhere?

19 A No, it's a dead end, no.

20 Q So you never noticed the building at all?

21 A Yeah, I worked at the building.

22 Q You worked at the building?

23 A Yes.

24 Q What did you do at that building?

25 A Heating and air.

1 Q So you knew the building was there?
2 A Yeah, I knew it was there.
3 Q Thank you. Andrew Griffin, how do you know Andrew Griffin
4 A I met him through Wesley.
5 Q How old is Andrew Griffin?
6 A How old is he?
7 Q Yeah.
8 A I don't know.
9 Q How long have you known him?
10 A About a month, less than a month. I've seen him, like
11 twice, three times out of a month.
12 Q And December 5th, '98, he called you that morning?
13 A Yeah.
14 Q And told you what?
15 A He told me what -- he asked me where was Wesley at, and
16 told him he was probably upstairs at home.
17 Q And you went and saw Andrew Griffin that day?
18 A Did I go see Andrew Griffin?
19 Q Yes.
20 A Yeah, I met him.
21 Q Where did you see him at?
22 A I met him in the circle.
23 Q You saw him physically?
24 A Yeah.
25 Q And that's Andrew Griffin you saw?

1 A Yeah.

2 Q So if the record reflects that he was in prison from Septe
3 ber 11, 1998, until March 30th, '99, that would be incorrect?

4 A It depends. There is more than one Andrew Griffin.

5 Q Okay. Describe your Andrew Griffin.

6 A Dark skin, slim, about 5'9 to 5'10.

7 Q How do you distinguish your Andrew Griffin?

8 A What do you mean by that?

9 Q Anything about him particularly is memorable to you?

10 A Yeah.

11 Q What?

12 A Dark skin, slim build. He had a low haircut. That's about
13 it.

14 Q Is your -- the Andrew Griffin you are talking about, is he
15 here today?

16 A Not that I see.

17 Q Where does your Andrew Griffin live?

18 A I don't know where he live.

19 Q Did he work anywhere?

20 A I don't know where he worked, if he did.

21 Q You told Mr. Kizer that you saw the license plate on the
22 Mercedes. Am I wrong -- am I incorrect about that?

23 A Could you state that again?

24 Q Did you see the license plate on the Mercedes?

25 A No.

1 Q You didn't?

2 A No.

3 Q Then why would you park it backwards when you brought it bac'
4 to your apartment?

5 A 'Cause that's just the way that I parked the car.

6 Q Did you park your other car like that?

7 A Yes, it's parked that same way.

8 Q But you didn't tell us that before?

9 A Nix.

10 Q Would it be because the license plate on the Mercedes Ben
11 says "benz benz"? Would that be a factor?

12 A No.

13 Q You testified Mr. Evans brought the car back to your apart
14 ment with the music up loud. You told him to go park it before i
15 get pulled over. Well, why were you afraid he would get pulle
16 over?

17 A Well, 'cause once I left southwest Little Rock, Andrew tol
18 me once I get to Pine Bluff to get out of the car.

19 Q Why?

20 A Why? Whatever reason. I don't know.

21 Q Didn't you find that curious, Mr. Williams?

22 A I figured it was hot. So --

23 Q Here's a man you don't know very well.

24 A Right.

25 Q Don't know where he lives.

1 A Right.

2 Q Don't know where he works. Gives you a 1997 Mercedes Benz
3 What kind of shape was it in, Mr. Williams?

4 A It was in good shape.

5 Q It was phat, wasn't it?

6 A Yeah.

7 Q Cell phone in it?

8 A Yeah.

9 Q Chrome wheels?

10 A Yeah.

11 Q It was phat. And you weren't the least bit curious about
12 where it come from?

13 A I didn't never ask.

14 Q You never told Mr. Kizer that Mr. Evans, after you got the
15 Mercedes, ever went inside your house, correct?

16 A Yes, he went inside my house.

17 Q Now you remember he went inside. When did he go inside your
18 house?

19 A He went inside my house after I told him to go -- go get out
20 of the car before he get pulled over.

21 Q He went inside your house?

22 A He left when he got out of the car, came back like five
23 minutes later, knocked on the door and came in.

24 Q Did he have anything with him?

25 A With him?

1 Q Yes.

2 A No, not that I recall.

3 Q Mr. -- your Mr. Griffin never got inside your house, did he

4 A Nope.

5 Q What did you make per hour? How long had you worked at Scot

6 Systems by this time?

7 A I'd say six or seven months.

8 Q What did you make per hour?

9 A Well, my regular salary was seven dollars an hour, but -

10 work different scale jobs.

11 Q What was your regular take-home pay?

12 A About three something.

13 Q Three something an hour?

14 A Well, like I said, it depends because we work at differen

15 places. Some months --

16 Q Did you get paid every week or every two weeks?

17 A Every week.

18 Q So it was three what per week, Mr. Williams?

19 A Three something. It's different.

20 Q Didn't have a car?

21 A Say what?

22 Q You didn't have a car?

23 A Did I --

24 Q You had no car that ran, I mean? I'm sorry.

25 A Nope. I had -- my girl friend had a car.

1 Q How did you get around?
2 A My girl friend had a car.
3 Q Did she work?
4 A Yes, she work.
5 Q How did she get around? You had her car?
6 A We worked the same hours.
7 Q Where did y'all work?
8 A She worked at Taco Bell and I worked at Scott Systems.
9 Q She always gives you a ride?
10 A Yes. And I have friends who have cars, you know what I'
11 saying.
12 Q Mr. Williams, what was the jewelry appraised for when you ha
13 it appraised?
14 A I don't remember.
15 Q You don't remember?
16 A No.
17 Q Was it more than a hundred dollars?
18 A I don't remember.
19 Q Was it more than two hundred?
20 A I don't remember.
21 Q Nothing at all. Where did you have it appraised at?
22 A Some jewelry store in the mall.
23 Q And you don't remember any numbers at all?
24 A No, that was about eight months ago. I don't -- no, I don'
25 remember that.

1 Q Do you remember what jewelry you had?
2 A I had a watch, bracelet and I think one of the rings.
3 don't know. I'm not for sure.
4 Q You started to testify, before Mr. Kizer cut you off, i
5 wasn't a radar detector. What was it?
6 A I had a tape player in the back of my car.
7 Q It wasn't a metal detector?
8 A No, it wasn't a metal detector. It was a tape player.
9 Q It wasn't a radar detector. I'm sorry.
10 A No.
11 Q How did your tape recorder look?
12 A Like a tape player.
13 Q Is it a big one or small one?
14 A It's about like this (INDICATING).
15 Q So if Mr. Rhea said it was a radar detector, he was wrong?
16 A Say what, now?
17 Q If Mr. Rhea testified it was a radar detector, he was wrong
18 A He said that's what he thought it was.
19 Q So he was wrong about that?
20 A He didn't never say that it was.
21 Q All right, Mr. Williams. Mr. Williams, isn't it true the
22 you went to that ATM machine, you saw this black woman drive up i
23 her black Mercedes Benz, brand new, and you said, "She's got t
24 have some money. This is my target"? Is that not true?
25 A That's not true.

1 Q Didn't you open that door and sit in that car? Mr. Williams
2 you didn't plan to shoot her. You just wanted to rob her. Isn'
3 that true?
4 A That's not true.
5 Q Mr. Williams, you were never going to harm her. You need
6 some money to make ends meet. You thought she would have so
7 money. Is that not correct?
8 A That's not correct.
9 Q Wouldn't it be a good place to start with people with money
10 to catch them at the ATM machine?
11 A I don't know. I work.
12 Q Why did you tell Detective Plunkett you had nothing to
13 with it at all?
14 A Well, because at first I wasn't under oath, and second c
15 all, I didn't want to have nothing to do with it. That's why
16 told him that.
17 Q So you said you lied. You admit that?
18 A Yes, I do admit that.
19 Q Did you tell him you wiped your prints off the car?
20 A Nope, I ain't tell him that.
21 Q He lying about that part?
22 A Yes, he's straight lying about that.
23 Q Didn't you make Ms. Hence drive through town and find a saf
24 spot to put the car off so you could get out and get away?
25 A No, I didn't.

1 Q So Ms. Hence did not see you in her car that day?
2 A She didn't see me.
3 Q She saw your twin?
4 A She didn't see me.
5 Q Who did she see, Mr. Williams?
6 A I don't know who she saw.
7 Q Your testimony is you remember perfectly at 10 o'clock
8 Saturday morning, December 5th, you were at home?
9 A Perfect.
10 Q No doubt in your mind?
11 A No doubt in my mind.
12 Q When did that become clear in your mind where you were at
13 What time?
14 A Well, 'cause once I got charged with it, I started thinking
15 about what all I was doing that day.
16 Q When did you get charged with this?
17 A When did that get charged?
18 Q Yes.
19 A The sixteenth.
20 Q So 11 days later, it became crystal clear exactly where I was
21 December 5th at 10 o'clock, correct?
22 A Incorrect.
23 MR. BROWN: No further questions, your Honor.
24 MR. KIZER: That's all the questions I have of this
25 witness.

1 THE COURT: You may stand down and return to your seat

2 MR. KIZER: May we approach for just a moment?

3 THE COURT: Pardon?

4 MR. KIZER: May we approach for just a moment?

5 THE COURT: Yes.

6 (Counsel approached the bench)

7 MR. KIZER: As I mentioned to the Court, I need a moment
8 to go visit with Mr. Logan. If I need to put him on, it'll
9 be very brief.

10 THE COURT: I heard everything after you put him on
11 What did you say first?

12 MR. KIZER: I'll either put him on and it'll be very
13 brief or I won't put him on, but I need a moment to talk with
14 him.

15 THE COURT: What's a moment?

16 MR. KIZER: Well, he's downstairs. That's the only
17 it's going to take at least five minutes because he's
18 downstairs. I've got to go get an officer and all of that
19 sort of stuff.

20 THE COURT: Okay.

21 (Conclusion of bench conference)

22 THE COURT: Ladies and gentlemen, we'll need to take
23 recess. Let's be back in the courtroom at a quarter until 2
24 The jury may go into the jury room, if you will like. There
25 might be some coffee.

1 (Whereupon, a brief recess was taken; the following proceedings
2 resumed, to wit:)

3 THE COURT: You may proceed, Mr. Kizer.

4 MR. KIZER: Thank you, your Honor. Defense calls as its
5 next witness Oliver Logan. He was sworn in this morning.
6 your Honor.

7 THE COURT: He was sworn this morning.

8 MR. KIZER: He was already sworn.

9 OLIVER LOGAN

10 having been called at the instance of counsel for the defense and
11 after having been duly sworn, testified as follows, to wit:

12 DIRECT EXAMINATION

13 BY MR. KIZER:

14 Q Would you state your name, please?

15 A Oliver Logan.

16 Q Mr. Logan, when I was sitting back talking with you a while
17 ago, I realized how softly you speak, and these ladies and gentlemen
18 men need to hear you, okay?

19 A Okay.

20 Q If they don't hear you, there is no reason for you to be
21 here. So get up closer to the microphones. That's for the court
22 reporter. And project your voice. Okay.

23 You are Oliver Logan. Is that correct?

24 A Yes, sir.

25 Q How old are you?