No. 17-1893

CAPITAL CASE – EXECUTION SCHEDULED FOR APRIL 27, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KENNETH DEWAYNE WILLIAMS,
Petitioner-Appellant,

v.

WENDY KELLEY, Director,
Arkansas Department of Correction,
Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 5:07-cv-00234 SWW, Hon. Susan Webber Wright, U.S.D.J.

APPLICATION FOR CERTIFICATE OF APPEALABILITY

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INTRODUCTION

Petitioner-Appellant Kenneth Williams is intellectually disabled, thus ineligible for execution under the Eighth Amendment. *See Atkins v. Virginia*, 536 U.S. 304 (2002).[1] Prior to current counsel's appointment in the district court on April 11, 2017, no court had addressed the merits of Mr. Williams's claim of intellectual disability because prior counsel had failed to raise it. Current counsel immediately investigated to determine whether Mr. Williams had a meritorious *Atkins* claim and then began litigating the issue, including by filing a habeas petition in federal court. Although the federal pleading is a second-in-time petition, it is not a "second or successive" petition as defined in 28 U.S.C. § 2244(b). Mr. Williams's *Atkins* claim has only now become ripe both because *Atkins* represents a substantive categorical restriction on the state's ability to execute intellectually disabled individuals and because Mr. Williams was represented by conflicted counsel throughout his federal habeas proceedings up until the moment that the Court appointed current counsel two weeks ago. As such, the petition should have been considered by the district court without the need for preapproval by this Court under § 2244.

[1] *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).

Whether via 28 U.S.C. § 2254 or 28 U.S.C. § 2241, federal courts must have some mechanism for considering Mr. Williams's categorical exemption from being executed. Were it otherwise, the inability of an intellectually disabled capital defendant to vindicate his categorical exclusion from being executed in federal court would constitute an unconstitutional suspension of the writ of habeas corpus in violation of Article I, Section 9 of the United States Constitution.

At the very least, the question of whether Mr. Williams is intellectually disabled and the question of whether his second-in-time petition should have been considered on its merits by the District Court are debatable among jurists of reason. This Court should grant a certificate of appealability and consider Mr. Williams's claim. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (setting forth COA standard).

STATEMENT OF THE CASE

Mr. Williams was charged with the capital murder of Cecil Boren in the course of a felony and other crimes, including aggravated robbery and escape in the first degree. According to the indictment, the crimes occurred on October 3, 1999, when Mr. Williams escaped from the Cummins Unit of the Arkansas Department of Correction, where he was serving a life sentence. The underlying felonies for the capital murder charge were aggravated robbery and escape in the first degree.

Trial began on August 28, 2000, in the Circuit Court of Lincoln County, Arkansas. 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. The defense presented several witnesses who testified to Mr. Williams's troubled upbringing, which included an abusive father, absent mother, and frequent hospital visits, as well as his learning difficulties and tendency to be a follower. The defense also called Dr. Mark Cunningham, a clinical and forensic psychologist who conducted an evaluation based on interviews of Mr. Williams and others, records review, and neuropsychological testing. Dr. Cunningham testified, *inter alia*, that Mr. Williams scored a 70 on a full-scale IQ test, which meant his "true" IQ score was between 67 and 75, putting him "right on that borderline between mental retardation and what we call borderline intellectual functioning." Tr. Record at 2151.[2] 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." Tr. Record at 1251-52. Finally, Dr. Cunningham described 19 different "emotionally damaging" factors that he identified in Mr. Williams's

[2] Dr. Cunningham's testimony was given before *Atkins* was decided, and based on an Arkansas statute that presumed a defendant to be mentally retarded only if his IQ was under 65. Ark. Code Ann. § 5-4-618.

history and discussed how these factors affected Mr. Williams's psychological development. Tr. Record at 2152-53.

At the penalty phase charging conference, the defense agreed that the mitigating circumstances listed on the verdict form should not include a reference to Mr. Williams's history of head injuries because defense counsel interrupted Dr. Cunningham's testimony on that issue and no details were given to the jury. As to "mental retardation" as a mitigating circumstance, the defense agreed that, based on Dr. Cunningham's testimony, the verdict form should refer to "borderline mental retardation." Tr. Record at 2202.

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." ECF No. 8-9 at 46-47. The jury otherwise failed to correctly fill out the penalty phase verdict forms, in that they did not indicate whether they found or did not find the existence of any other mitigating circumstance, including Mr. Williams's "borderline mental retardation." *Id.* at 44-48.

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

the trial court erred in denying Mr. Williams's motion for a directed verdict on the first-degree escape charge, the court determined the error was harmless because the jury had returned guilty verdicts on both the escape charge and the aggravated robbery charge, each of which was pled as an underlying felony to the capital murder charge. *Id*. at 554-58. The court dismissed all other direct appeal claims.

On August 9, 2002, Mr. Williams, through his court-appointed attorney, Jeffrey Rosenzweig, filed a ten-page Rule 37 petition, asserting seven claims.[3] ECF No. 8-45 at 10. Among the claims was an ineffectiveness-of-counsel claim based on trial 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 *Atkins*.

The circuit 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. Tr. 9/8/05 at 136-37.

[3] 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. ECF No. 8-47 at 11.

The Rule 37 court denied each of Mr. Williams's remaining claims on November 21, 2005. ECF No. 8-46 at 16-22 (Findings of Fact and Conclusions of Law). The Arkansas Supreme Court affirmed on March 1, 2007. *Williams v. State*, 251 S.W. 3d 290 (Ark. 2007).

Mr. Rosenzweig continued to represent Mr. Williams in federal habeas proceedings. On September 10, 2007, he filed a petition for habeas corpus relief on behalf of Mr. Williams in this Court. ECF No. 1. The Court denied the petition on November 4, 2008. ECF No. 9 (memorandum opinion and order); ECF No. 10 (judgment). This Court affirmed the denial of relief on July 15, 2010. *Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010). The Supreme Court denied certiorari on March 21, 2011. *Williams v. Hobbs*, 562 U.S. 1290 (2011).

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. He is scheduled to be executed 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 for the appointment of co-counsel from the Federal Community Defender Office for the Eastern District of Pennsylvania (FCDO), noting his competing responsibilities in other capital cases with pending execution dates and Mr. Williams's concurrence with the motion.

ECF No. 26. The district court appointed counsel from the FCDO that same day. ECF No. 27 (appointment order); ECF No. 28 (corrected appointment order).

Counsel from the FCDO began to investigate the case, including whether Mr. Williams had a meritorious claim of intellectual disability. On April 21, 2017, new counsel filed a motion to recall the mandate in the Arkansas Supreme Court as well as a petition for writ of habeas corpus in the Lincoln County Circuit Court, each raising a claim that Mr. Williams is intellectually disabled, thus ineligible to be executed. The Arkansas Supreme Court denied Mr. Williams's motion to recall the mandate on April 26, 2017.[4]

On April 21, 2017, Mr. Rosenzweig filed an ex parte motion to withdraw as counsel. ECF No. 36. On that same date, the district court granted the motion, Doc. 37, and on April 24, 2017, the district court unsealed the motion. ECF No. 38.

On April 25, 2017, Mr. Williams filed a second-in-time habeas petition in the district court, arguing on several grounds that the petition was not successive, along with an extensive appendix of materials supporting his claim of intellectual

[4] On April 24, 2017, the Lincoln County Circuit Court issued an order dismissing the petition for writ of habeas corpus due to technical defects in the filing and stating that the petition should be denied on its merits even if the defects are corrected. Mr. Williams has since refiled the petition in the circuit court in order to cure the technical defects and will be appealing the circuit court's decision to the Arkansas Supreme Court.

disability. On April 26, 2017, the district court issued a final order construing Mr. Williams's second-in-time petition as a second or successive petition subject to 28 U.S.C. § 2244. ECF No. 57. It therefore transferred the petition to this Court. *Id.* Mr. Williams filed a notice of appeal from the district court's final transfer order shortly thereafter. ECF No. 58.

STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253 and Federal Rule of Appellate Procedure 22(b), a habeas petitioner who wishes to appeal from a final order of a district court must obtain a COA for each claim he wishes to present to the Court of Appeals.[5] In *Slack v. McDaniel*, 529 U.S. 473, 483 (2000), the Supreme Court concluded that, "[e]xcept for substituting the word 'constitutional' for the word 'federal,'" this COA requirement is merely "a codification of" the earlier standard for granting a certificate of probable cause, as "announced in *Barefoot v. Estelle*," 463 U.S. 880,

[5] There is disagreement among the courts of appeals as to whether an order dismissing or transferring a pleading on the ground that it amounts to an attempt to file a successive petition is a final, appealable order subject to the COA requirement. *Compare Jones v. Braxton*, 392 F.3d 683, 685-88 (4th Cir. 2004) (dismissal order was final, appealable and subject to COA), *with Marmolejos v. United States*, 789 F.3d 66, 69 (2d Cir. 2015) (correctness of order transferring petition to court of appeals reviewable without COA); *In re Bradford*, 660 F.3d 226, 229 (5th Cir. 2011) (transfer order was appealable collateral order; no COA required); *Spitznas v. Boone*, 464 F.3d 1213, 1218-19 (10th Cir. 2006) (no COA required for court of appeals to determine whether filing was properly treated as successive). We are not aware of any authoritative ruling from this Court, and therefore request that this Court issue COA for the reasons set forth herein.

894 (1983). The COA requirement is meant "to prevent frivolous appeals." *Id.* at 893. COA must be granted if the issue is "debatable among jurists of reason"; "a court could resolve the issue[] [in a different manner]"; or "the question[] [is] adequate to deserve encouragement to proceed further." *Id.* at 893 n.4.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Supreme Court held that the standard for the issuance of a certificate of appealability in an AEDPA case is as follows: "Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 483 (2000)).

In *Miller-El*, the Court emphasized that in order to grant a COA, a court need not be convinced of the ultimate merits. *Miller-El*, 537 U.S. at 327 ("[W]e decide again that when a habeas applicant seeks permission to initiate appellate review of the dismissal of his petition, the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims."); *see also Buck v. Davis*, 137 S. Ct. 759, 773 (2017) ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis.").

Finally, where COA is sought with respect to a district court's procedural rulings, in order to decide whether to grant COA the reviewing court must consider

both whether the procedural rulings are "debatable amongst jurists of reason" and also whether the underlying claims raise a constitutional issue that is similarly debatable. *Slack*, 529 U.S. at 484-85.

A CERTIFICATE OF APPEALABILITY IS WARRANTED

I. The question whether Mr. Williams is intellectually disabled is debatable among jurists of reason.

In *Atkins*, the Supreme Court ruled that the Eighth Amendment categorically bars the execution of intellectually disabled individuals. As the Court put it, "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306.

As such, "[n]o legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014). Persons "facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 2001.

Mr. Williams is a person with intellectual disability. Neuropsychologist Daniel A. Martell, Ph.D. (who evaluated Mr. Williams last week), psychologist Mark D. Cunningham, Ph.D. (who evaluated Mr. Williams at trial), and neuropsychologist Ricardo Weinstein, Ph.D. (who was never asked to complete his evaluation for Rule 37 proceedings), have all evaluated Mr. Williams and concluded that he is intellectually disabled and that he met the definition of intellectual disability at the time of the crime.

In the district court, Mr. Williams submitted reports from each of these three mental health professionals as well as numerous additional items of evidence supporting their diagnoses. Mr. Williams presented a *prima facie* case that he meets the three prongs of the intellectual disability definition: (1) deficits in intellectual functioning/subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) onset before age 18. *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).

A. Significantly subaverage intellectual functioning

Under the classification schemes outlined by the APA and the AAIDD, deficient intellectual functioning is defined as an 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 fall within the intellectual disability range. DSM-5 at 37. *See also*, DSM-IV-TR at 41-42 (IQ scores of 75 and below satisfy prong one of the intellectual disability standard).

Drs. Cunningham, Weinstein, and Martell have evaluated Mr. Williams and found that he satisfies prong one of the intellectual disability diagnosis. In his lifetime, Mr. Williams 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 Nanak, M.A., administered the Wechsler Adult Intelligence Scales – 3rd Edition ("WAIS-III") to Mr. Williams in 1999 when he was 20 years old. A-48. Neuropsychologist Mary Wetherby, Ph.D., administered the WAIS-III, to Mr. Williams in 2000 when he was 21 years old.[6] A-153. Dr. Weinstein administered a WAIS-III and a Comprehensive Test of Nonverbal Intelligence ("CTONI") to Mr. Williams when he was 25 years old.[7] A-145. The timing, results, and Flynn-

[6] Dr. Wetherby tested Mr. Williams one day before his August 23, 2000 trial began.

[7] Dr. Weinstein tested Mr. Williams 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 Mr. Williams fall within the range for intellectual disability.

Moreover, three of Mr. Williams's IQ scores were even lower than the Flynn-corrected scores that are reported above. On Mr. Williams'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 to 110. *See also* Greenspan, S., Olley, J.G., *Variability in IQ Scores*, The Death Penalty and Intellectual Disability, AAIDD (2015) at 145-146 (describing scholarship on this subject). Accounting for this defect in the WAIS-III's norming process, Mr. Williams's 1999, 2000, and 2004 WAIS-III scores are properly reported as 70, 66, and 76. *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*

That Mr. Williams'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 Mr. Williams'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, Mr. Williams had a number of risk factors in his history which heightened both the likelihood that he would be intellectually disabled and the likelihood 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 Mr. Williams 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.

Greenspan, S., Olley, J.G., *Variability in IQ Scores*, The Death Penalty and Intellectual Disability, AAIDD (2015) at 144.

Mr. Williams'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, Mr. Williams 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, Mr. Williams 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 to114.

Additionally, Mr. Williams was administered a number of tests during his academic career which contain IQ approximations that can be used as approximations of intelligence. These tests scored in the intellectual disability range. Report, Daniel Martell, Ph.D., at 20, A-183-84.

Furthermore, Mr. Williams 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. Thus, Mr. Williams's neuropsychological profile, tested over two separate batteries with two separate mental health professionals, reflects the brain impairments of an intellectually disabled person.

B. Deficits in adaptive functioning

As fully explained in the district court, Drs. Cunningham, Weinstein, and Martell have evaluated Mr. Williams 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 to 130; Dec. Ricardo Weinstein, Ph.D., at ¶¶ 25-31, A-147 to 150. Dr. Martell, who has had the opportunity to review the most recent results of the defense investigation, has found that Mr. Williams had significant pre-18 deficits in all three adaptive domains: conceptual, social, and practical. Report of Daniel Martell, Ph.D., at 26-37, A-189-200.

C. Age of onset

Mr. Williams'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.

D. The merits of Mr. Williams's *Atkins* claim are debatable by reasonable jurists.

Mr. Williams is an intellectually disabled person. Drs. Cunningham, Weinstein, and Martell have conducted three separate evaluations of Mr. Williams in 2000, 2004, and 2017, respectively. They considered his functioning in light of current diagnostic standards. Consistent with protocol in a capital case, they conducted retrospective analyses into Mr. Williams's functioning to determine if all three prongs of the diagnosis have been met. They have all concluded that Mr. Williams 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 Mr. Williams as intellectually disabled. Mr. Williams's death sentencing and pending execution date violates the Eighth Amendment, *Atkins*, *Hall*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015), *Moore v. Texas*, 137 S.Ct. 1039 (2017), and Arkansas law.

As this petition makes clear, Mr. Williams's claim that he is intellectually disabled is meritorious; it is certainly debatable among jurists of reason. He has presented evidence from three independent mental health professionals, each of whom confirms this diagnosis. A COA is warranted.

II. The question of whether 28 U.S.C. § 2244(b) is applicable to Petitioner's habeas petition is debatable among jurists of reason.

A. 28 U.S.C. § 2244 is inapplicable to Mr. Williams's petition because it is not "second or successive."

Under AEDPA, habeas petitioners are limited in their ability to file a "second or successive" petition. *See* 28 U.S.C. § 2244(b)(1)-(4). A petitioner seeking to file a second or successive petition must first obtain an order authorizing such filing from the Court of Appeals before he may proceed in the District Court. 28 U.S.C. § 2244(b)(3). And he may obtain such authorization only in certain circumstances. 28 U.S.C. § 2244(b)(1)-(2).[8]

Not all second-in-time habeas petitions are "second or successive" within the meaning of § 2244(b), however. The Supreme Court "has declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007); *see Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998) (holding that habeas petitioner was not required to obtain authorization to file a "second or successive" petition raising a claim of incompetency to be executed

[8] Mr. Williams can, in fact, meet the "second or successive" requirement set forth in § 2244(b). He requests, in the alternative, that the Court grant him permission to file a "second or successive" petition in a separate filing.

pursuant to *Ford v. Wainwright*, 477 U.S. 399 (1986), made ripe by the issuance of an execution warrant).

This Court has in the past explained that *Atkins*-based claims of intellectual disability should be treated similarly to *Ford*-based claims of incompetency for purposes of the second or successive bar in § 2244(b). *Nooner v. Norris*, 499 F.3d 831, 833 n. 2 (8th Cir. 2007) ("Because the parties have assumed an *Atkins*-based mental retardation claim should be treated the same as a *Ford*-based incompetency claim, for purposes of this case, we assume, without deciding, the two claims should be treated similarly"); *id.* at 834 ("In both *Martinez-Villareal* and *Panetti*, the Supreme Court held the statutory bar on second or successive applications does not apply to *Ford*-based incompetency claims filed *after* the state has obtained an execution warrant. For the limited purpose of the statutory bar on second or successive applications found in § 2244(b)(2), we cannot think of any statutory reason why this holding cannot be extended to *Ford*-based incompetency and *Atkins*-based mental retardation claims filed *before* the state has obtained an execution warrant") (emphasis in original); *see also Clayton v. Luebbers*, 780 F.3d 903, 904 (8th Cir. 2015) (referring to the petitioner's "second-in-time" habeas petition raising a *Ford*-based claim and an *Atkins*-based claim); *but see Goodwin v. Steele*, 814 F.3d 901, 903 n.1 (8th Cir. 2014) (finding that claim raised under *Hall v. Florida* was barred by the relitigation prohibition in § 2244(b)(1) where a claim

of intellectual disability pursuant to *Atkins* had been raised and denied in the petitioner's initial habeas petition); *Davis v. Norris*, 423 F.3d 868, 878-79 (8th Cir. 2005) (attempt to raise an *Atkins* claim for the first time on habeas appeal the functional equivalent of a second or successive habeas petition).

Last week, a divided panel of this Court denied an argument regarding the ripeness of *Atkins* claims at the time of execution that is similar to the one being raised here by Mr. Williams. *Davis v. Kelley*, No. 04-2192 (8th Cir. April 17, 2017). While the argument recently rejected by the Court in *Davis* is similar to the one being raised here, *Davis* is nonetheless distinguishable insofar as the petitioner there "failed to provide a single attachment, document, or factual allegation about his current mental abilities." *Davis*, slip op. at 8. As set forth above, three independent mental health professionals now diagnose Mr. Williams as intellectually disabled within the meaning of *Atkins*.

To the extent that *Davis* is nonetheless controlling, it was wrongly decided for the reasons set forth herein and explained in the dissenting opinion. *Davis*, slip op. at 10-21. Specifically, this Court's decisions that analogize *Atkins* claims to *Ford* claims do so with good reason. *Atkins* held that "the Constitution 'places a *substantive* restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 536 U.S. at 321 (quoting *Ford*, 477 U.S. at 405) (emphasis added). *Atkins*, like *Roper v. Simmons*, 543 U.S. 551 (2005), which barred the

execution of individuals who committed their crimes as juveniles, serves as a restriction on the execution of sentence for a class of people. *Roper*, 543 U.S. at 559 (noting that *Atkins* bars "the *execution* of a mentally retarded person") (emphasis added); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015) ("The question here is whether Brumfield cleared AEDPA's procedural hurdles, and was thus entitled to a hearing to show that he so lacked the capacity for self-determination that it would violate the Eighth Amendment to permit the State to impose the law's most severe sentence, [] *and take his life as well*. That question, and that question alone, we answer in the affirmative.") (citation and quotation marks omitted) (emphasis added).

Because of this substantive restriction, Mr. Williams's ability to vindicate his constitutional right not to be executed simply cannot be precluded by § 2244(b). *See In re Hill*, 715 F.3d 284, 304-05 (11th Cir. 2013) (Barkett, J., dissenting) ("I cannot see how any procedural hurdle, even AEDPA's bars to filing a second or successive habeas application, can be constitutionally enforced when doing so will eviscerate the constitutionally-protected right that a juvenile, mentally retarded, or insane offender has not to be executed."); *cf. In re Webster*, 605 F.3d 256, 260 (5th Cir. 2010) (Weiner, J., concurring) ("I continue to harbor a deep and unsettling conviction that, albeit under Congress's instruction which ties

our judicial hands so illogically, we today have no choice but to condone just such an unconstitutional punishment.").

Refusing to bar a second-in-time habeas petition that raises an *Atkins* claim as a potential execution date nears as second or successive under § 2244(b) makes even more sense in light of the particularities of Arkansas law. The Arkansas statute governing intellectual disability, Ark. Code Ann. § 5-4-618, as interpreted by the Arkansas Supreme Court, precludes "the execution of an individual who can prove mental retardation *either* (a) at the time of committing the crime, *or* (b) at the presumptive time of execution." *Sasser v. Hobbs*, 735 F.3d 833, 846 (8th Cir. 2013) (citing *Miller v. State*, 362 S.W. 3d 264, 276 (Ark. 2010)) (emphasis in original). Thus, "[u]nder *Atkins* and Ark. Code Ann. § 5-4-618(b), Arkansas may not execute an individual who sufficiently proves he met all four prongs of the Arkansas mental retardation standard at *either* relevant time, even if the individual lacks proof he satisfied the standard at *both* relevant times.") *Id.* (emphasis in original). Because, as a matter of Arkansas law, the question of whether a person is intellectually disabled *at the time of execution* is relevant, the question must necessarily be answered once an execution date actually becomes potentially imminent.

This issue of timing may be significant, as "intellectual disability is by no means static in every case." *Lee v. Kelley*, No. 17-1840, slip. op at 5-6 (8th Cir.

April 20, 2017) (Kelly, J., concurring); *see also id.* at 6 ("[O]ur case law has recognized that a diagnosis of intellectual disability is not always stable. For instance, in *Sasser v. Hobbs* (*Sasser II*), we explained that 'timing of proof' matters for an *Atkins* claim because an individual's intellectual disability can improve over time, and because an individual 'may have better evidence of his condition at one point in life than another.' 735 F.3d 833, 846 (8th Cir. 2013)").

Mr. Williams's case provides an additional important reason why the claim of intellectual disability he is raising in this petition is now ripe for the first time: he has at all times prior to this month been represented by the same attorney during both state and federal post-conviction proceedings. As noted above, attorney Rosenzweig alone represented Mr. Williams in both state and federal court until the appointment of the FCDO on April 11, 2017.

Mr. Rosenzweig failed to perform the adequate investigation that is required of effective counsel in a capital case before deciding that he would not pursue a claim of intellectual disability in this case. On August 8, 2002, a few months after the Supreme Court decided *Atkins*, 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." ECF No. 8-45 at 12. 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. Weinstein, granted additional funds for an *Atkins* investigator, and signed an order allowing Dr. Weinstein to enter the prison for an evaluation. ECF No. 8-45 at 34, 39, 40.

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. *See* Dec. Ricardo Weinstein at ¶¶ 2-3, A-138-40.[9] He never told Mr. Rosenzweig that he had ruled out a diagnosis of intellectual disability. He never completed his work on the case. *Id.*

Without further exploration of the *Atkins* issue, Mr. Rosenzweig abandoned the claim. The Rule 37 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* ECF No. 8-45 at 67.[10] At a hearing on the Rule 37 motion held on September 8, 2005, he told the court that:

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[9] References to the appendix filed in the District Court are cited as A-___.

[10] Two pages of Mr. Rosenzweig's amended petition appear to be missing from the copy of the state court record that was filed electronically with the District Court. The pages do appear in the state court record, however.

> Claims One[11] 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.

ECF No. 8-47 at 13-14; *see also* ECF No. 8-45 at 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. ECF No. 8-46 at 16.

The claim Rule 37 counsel abandoned was a meritorious, life-saving claim. 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. *See* Dec. Ricardo Weinstein at ¶ 34, 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. *See* Dec. Mark Cunningham at 38, A-134.

Mr. Rosenzweig could not raise Mr. Williams's *Atkins* claim in federal court, given that he had abandoned that claim in state court, without alleging his own ineffectiveness. But "[a]dvancing such a claim would have required [counsel]

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

to denigrate [his] own performance. Counsel cannot reasonably be expected to make such an argument, which threatens [his] professional reputation and livelihood." *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (citing Restatement (Third) of Law Governing Lawyers § 125 (1998)); *see also id.* ("[A] 'significant conflict of interest' arises when an attorney's 'interest in avoiding damage to [his] own reputation' is at odds with his client's 'strongest argument—*i.e.*, that his attorneys had abandoned him.'") (quoting *Maples v. Thomas*, 132 S. Ct. 912, 925 n.8 (2012)) (alteration in original). Because Mr. Rosenzweig's conflict of interest spanned the entirety of Mr. Williams's federal habeas proceedings up until two weeks ago, Mr. Williams's claim of intellectual disability has only recently become ripe.

B. 28 U.S.C. § 2241 provides an alternative basis for providing habeas relief.

Under 28 U.S.C. § 2241(c)(3), the writ of habeas corpus shall extend to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." Although "the typical route is generally § 2254, a state prisoner may bring an action under § 2241 or § 2254." *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir. 2000); *but see Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (§ 2254 is the only vehicle by which a person in state custody may

raise challenges to the validity of his conviction or sentence or to the execution of his sentence); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) (same).[12]

Section 2241 is independent of § 2254, and is an appropriate vehicle for an "attack on the execution of [the state prisoner's] sentence." *Montez*, 208 F.3d at 865 (citing *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811-12 (10th Cir. 1997)). § 2255, unlike § 2254, contains an "exclusivity provision" which precludes federal prisoners from seeking habeas relief under § 2241. *Thomas v. Crosby*, 371 F.3d 782, 806 (11th Cir. 2004) (Tjoflat, J., concurring). That provision states: "An application for writ of habeas corpus [under § 2241] in behalf of a prisoner who is authorized to apply for relief pursuant to this section [§ 2255] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion [under § 2255.]" *Id.* (brackets in original); *see also* § 2255(e).

If § 2241 were read to be subsumed by § 2254, the same interpretation would apply to § 2255, and the exclusivity clause found in § 2255(e) would be

[12] There is a circuit split as to whether § 2241 is available to a state prisoner to attack the execution of his sentence. *Compare Coady v. Vaughn*, 251 F.3d 480, 484-85 (3d Cir. 2001) (§ 2241 is unavailable to state prisoners); *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001) (same); *James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (same); *Moore v. Reno*, 185 F.3d 1054 (9th Cir. 1999) (same); and *Walker v. Obrien*, 216 F.3d 626, 633 (7th Cir. 2000) (same) *with McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811-12 (10th Cir. 1997) (§ 2241 is available to state prisoners); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998) (same).

superfluous. *Id*. at 807. "[I]t is a cardinal and long-revered canon of statutory construction that Congress is not to be presumed to have done a vain thing, namely, using superfluous language." *U.S. ex rel Harlan v. Bacon*, 21 F.3d 209, 212 (8th Cir. 1994); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."). Since § 2255's exclusivity provision must be given legal effect, the absence of a similar provision in § 2254 also must have significance: whereas a federal prisoner has a single vehicle for relief (except as discussed below), a state prisoner may generally avail himself of either the § 2254 or § 2241 remedy.

If Mr. Williams has properly brought his claims under § 2241, then the requirements for second or successive habeas petitions contained in § 2244(b) are inapplicable to this petition. Those requirements only restrict petitions "*under* section 2254." 28 U.S.C. § 2244(b)(1), (b)(2) (emphasis added). Other provisions of § 2244 regulate any "application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court" and therefore apply to state prisoners under § 2241 and § 2254 alike. *See id.* § 2244(c), (d)(1).

Despite § 2255(e)'s "exclusivity clause," the Seventh Circuit in *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015), permitted a death sentenced federal

prisoner to bring an *Atkins* claim under § 2241. The *Webster* court found that § 2255(e) permits an application for a writ under § 2241, because, despite the exclusivity language of § 2255(e), it also contains a "savings clause" to the "exclusivity clause," allowing for litigation pursuant to § 2241 if "it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." *Webster*, 784 F.3d at 1135 (quoting § 2255(e)).

Section 2254, by contrast, does not contain either an exclusivity clause or a savings clause – because, of course, there is no exclusivity clause from which to save it. *See Thomas*, 371 F.3d at 806 (Tjoflat, J. concurring) ("the absence of such an exclusivity provision in § 2254 indicates that § 2241 relief is available to prisoners who also qualify for § 2254 relief.")

The *Webster* court noted that § 2255 motions are available to prisoners who claim the right to be released on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States." *Webster*, 784 F.3d at 1138 (quoting § 2255(a)). The *Webster* court further noted that "the Constitution itself forbids the execution of certain people: those who satisfy the criteria for intellectual disability that the Court has established, and those who were below the age of 18 when they committed the crime." *Webster*, 784 F.3d at 1139. Because § 2255's procedural rules barred Webster from bringing a motion under that section, it would be "Kafkaesque" and "would (or could) lead to an

unconstitutional punishment[]" if Webster was not permitted to file under § 2241. *Id.*

If this Court finds that § 2244 bars Mr. Williams from bringing a motion under § 2254, which it should not, barring Mr. Williams from bringing an *Atkins* claim pursuant to § 2241 would be "Kafkaesque" and would lead to an unconstitutional punishment – executing an intellectually disabled man.[13] Although this Court in *Singleton* held that § 2254 was the only means by which a state prisoner could attack the execution of his sentence, it was not faced with the situation that could theoretically apply here – a state prisoner who alleges he is constitutionally ineligible for the execution of his sentence (the death penalty) and is barred from litigating that claim under § 2254. *See Singleton*, 319 F.3d at 1023 (finding "Singleton's petition is not 'second or successive' . . . and is not barred."). Thus, the *Singleton* court did not have to "take into account the fact that a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence." *Webster*, 784 F.3d at 1139.

Because § 2254 does not contain an exclusivity provision, and because Mr. Williams has established a *prima facie* case that he is constitutionally ineligible for

[13] If Mr. Williams is permitted to proceed via § 2241, he would not be subject to § 2244(b)'s rules governing second or successive habeas corpus petitions.

the death penalty, if this Court finds that he is barred under § 2254, which it should not, it should permit him to proceed via § 2241.

C. Failure to permit Mr. Williams to proceed under either § 2254 or § 2241 would result in an unconstitutional suspension of the writ.

Article 1, Section 9, Clause 2 of the United States Constitution directs that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Should the Court decline to consider Mr. Williams's ineligibility for execution either pursuant to § 2254 or § 2241, it would constitute an unconstitutional suspension of the writ. *See Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (Suspension Clause "ensures that . . . the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance that is itself the surest safeguard of liberty.") (quotation marks and citation omitted).

D. The question of whether a second-in-time habeas petition raising an *Atkins* claim is barred by 28 U.S.C. § 2244(b) is debatable by reasonable jurists.

It is an empirical fact that the procedural question as to whether an *Atkins* claim raised in a second-in-time habeas petition may properly be barred by 28 U.S.C. § 2244(b) is debatable by reasonable jurists. As set forth above, judges from this Court and the Eleventh Circuit have each issued dissenting opinions on this very question. Whether the merits of this question will ultimately be resolved

in Mr. Williams's favor on appeal is irrelevant at this stage; the only question for this Court in considering a COA application is whether reasonable jurists might debate the question. That answer is necessarily yes. The District Court erred in treating Mr. Williams's petition as second or successive. At a minimum, the question is reasonably debatable and deserves encouragement to proceed further.

CONCLUSION

For the foregoing reasons, the Court should grant a certificate of appealability in this case, consider Mr. Williams's appeal following full briefing and oral argument, and remand to the district court for an evidentiary hearing on Mr. Williams's claim that he is categorically ineligible to be executed due to his intellectual disability.

Respectfully submitted,

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Dated: April 26, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A), insofar as a concurrently filed motion seeks the Court's permission to file this application overlength. This document contains 7,915 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). This document also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Word 2010, in 14-point Times New Roman font. I further certify that this document has been scanned for viruses using Symantec Endpoint Protection and found to contain no known viruses.

/s/ Shawn Nolan
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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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