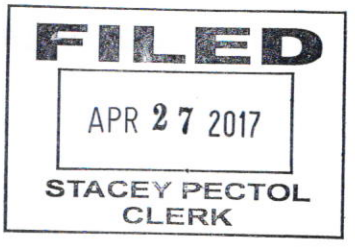
**THIS IS A CAPITAL CASE. EXECUTION SCHEDULED APRIL 27, 2017**

IN T CV-17-349 OURT




KENNETH D. WILLIAMS — Movant/Appellant

v.

STATE OF ARKANSAS, — Respondent/Appellee

**MOTION FOR STAY OF EXECUTION PENDING APPEAL OF THE CIRCUIT COURT OF LINCOLN COUNTY'S DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS**

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Pursuant to Ark. Code Ann. § 16-90-506(a) and *Singleton v. Norris*, 964 S.W.2d 366 (Ark. 1998), Kenneth Williams, by and through undersigned counsel, respectfully moves this Court to stay his scheduled execution. Appellant has filed a notice of appeal from the lower court's denial of his petition for a writ of habeas corpus.[1]

## INTRODUCTION

Mr. Williams is intellectually disabled. The Supreme Court of the United States has held that, at a minimum, Full Scale IQ scores of 75 and below are within the presumptive range for intellectual disability. Mr. Williams has taken six individually administered tests of global intelligence and his composite Full Scale IQ over the course of these six tests is 71.8, well within the intellectual disability range.[2] Mr. Williams's impairments were apparent early in his life and continued throughout the developmental period. He failed the first and third grades, and was in special education for most of his educational career until he ultimately dropped out in the ninth grade. Despite years of special education support and assistance from the more functional members of his family, he failed to progress

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[1] A number of the arguments set forth in this motion have been submitted to this Court previously with the *Motion for a Stay of Execution Pending Petition for Writ of Habeas Corpus in the Circuit Court of Lincoln County*, that was filed with this Court on April 21, 2017. For the ease of the Court, Appellant has included those arguments herein so that this motion is complete.

[2] Mr. Williams was also administered a Comprehensive Test of Nonverbal Intelligence (CTONI), which was also within the range for intellectual disability.

academically and tested well below age-appropriate levels on achievement tests until he left school. Indeed, on the last achievement test he took, when he was 14 years old and his age-mates were in the 9th grade, he tested between the 1st and 3rd grade levels with scores spanning from the 4th percentile to beneath the 1st percentile. He had the brain functioning of an intellectually disabled person and, consistent with his dysfunctional brain, showed deficits in both receptive and expressive communication, functional academics, self-direction, social functioning, and practical living skills throughout the developmental period.

In his Corrected Petition for Writ of Habeas Corpus filed in the court below, Mr. Williams averred that he is ineligible for the death penalty under the Eighth Amendment and Arkansas state law as he is intellectually disabled and was at the time of the offense. In support of this claim, Mr. Williams proffered educational and social service records, declarations from lay witnesses with knowledge of his functioning, and the 2017 opinions of Mark Cunningham, Ph.D. (who evaluated Mr. Williams at the time of trial in 2000), Ricardo Weinstein, Ph.D. (who tested Mr. Williams in 2004, but never scored the IQ results until now), and Daniel Martell, Ph.D. (who evaluated Mr. Williams last week). These materials establish that Mr. Williams satisfies the three diagnostic prongs for intellectual disability: deficits in intellectual functioning ("prong one"), deficits in adaptive functioning ("prong two"), and onset of these deficits before the age of 18 ("prong three").

The evidence proffered in support of his habeas petition, which is only summarized above, constitutes more than enough evidence to establish probable cause and merit an evidentiary hearing. On April 26, 2017, Circuit Judge Jodi Raines Dennis (the "lower court"), who presided over Mr. Williams's habeas corpus proceedings, denied Mr. Williams's habeas petition. The lower court did not address any of the expert reports, lay witness declarations, or records that were described in the petition or provided in the accompanying appendix. Instead, the lower court denied Mr. Williams's habeas petition based solely on the proposition that there was no state judicial forum available for him to raise his claim for relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Williams challenges this finding on appeal and requests a stay of execution pending the appeal's completion.

## PROCEDURAL HISTORY

Kenneth Dewayne Williams was charged with the October 3, 1999 capital murder of Cecil Boren in the course of a felony and other crimes. During the penalty phase of proceedings, trial counsel called Dr. Mark Cunningham, a clinical and forensic psychologist who evaluated Mr. Williams and found extensive evidence of brain dysfunction. However, counsel did not claim that Mr. Williams was categorically ineligible for the death penalty under § 5-4-618 of the Arkansas Code, which bars the execution of the mentally retarded. The jury sentenced Mr.

Williams to death on August 30, 2000. This Court affirmed the convictions and sentences on direct appeal. *Williams v. State*, 67 S.W.3d 548 (Ark. 2002) (*Williams-1*).

On August 9, 2002, Mr. Williams, through his court-appointed attorney, Jeffrey Rosenzweig, filed a Rule 37 petition. Among the claims were 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, and a claim that Mr. Williams was categorically ineligible for the death penalty under the United States Supreme Court's June 20, 2002, decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Ex. 1, A-76.[3] The Circuit Court granted Mr. Williams's motions for funds to hire an expert and an investigator for purposes of his *Atkins* claim. Ex. 1, A-84-90. Mr. Rosenzweig retained psychologist Dr. Ricardo Weinstein as the expert and Mary Paal as a mitigation specialist.

Dr. Weinstein met with Mr. Williams and administered tests on May 20 and 21, 2004. He has no recollection and no record of discussing his evaluation with Mr. Rosenzweig, and his test results remained unscored until he was asked to score them in 2017. He never told Mr. Rosenzweig that he had ruled out a diagnosis of intellectual disability. He never completed his work on the case. Ex. 1, A-138

[3] "A-" refers to the appendix to the Petition for Writ of Habeas Corpus, attached hereto as Exhibit 1.

(Dec. of Ricardo Weinstein, Ph.D., April 18, 2017).

Without further exploration of the *Atkins* issue, Mr. Rosenzweig informed the court on September 8, 2005 that he would not be pursuing either of the two claims based on his client's intellectual disability. Ex. 1, A-92 to 93; *see also* Ex. 1, A-95 (reiterating withdrawal of *Atkins* claim in Proposed Findings of Fact and Conclusions of Law). The Rule 37 court determined that the *Atkins* claim had been abandoned. Ex. 1, A-96.

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

Mr. Rosenzweig continued to represent Mr. Williams in federal habeas proceedings. On September 10, 2007, he filed a petition for writ of habeas corpus on behalf of Mr. Williams in the United States District Court for the Eastern District of Arkansas. The district court denied relief on all claims on November 4, 2008. *Williams v. Norris*, Case No. 5:07-cv-00234 SWW, 2008 WL 4820559 (E.D. Ark. Nov. 4, 2008). The Eighth Circuit affirmed the district court's denial of relief on July 15, 2010. *Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010) (*Williams-3*). A petition for rehearing and rehearing en banc were denied two months later.

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. Governor Hutchinson has scheduled Mr. Williams's execution on April 27, 2017.

On April 11, 2017, Mr. Rosenzweig moved in the United States District Court for the Eastern District of Arkansas for the appointment of co-counsel from the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO") in this matter, noting his competing responsibilities in other capital cases with pending execution dates and Mr. Williams's concurrence with the motion. *See Williams v. Norris*, No. 5:07-cv-00234-SWW, ECF No. 26 (E.D. Ark. April 11, 2017). The court appointed counsel from the FCDO that same day.

Mr. Williams filed his Corrected Petition for Writ of Habeas Corpus on April 25, 2017. On April 26, 2017, Circuit Court Judge Jodi Raines Dennis ("lower court") denied Mr. Williams's petition for habeas corpus. Mr. Williams filed a Notice of Appeal on April 26, 2017.

## ARGUMENT

### I. The Lower Court Erred Because Mr. Williams Presented a Cognizable Claim for Habeas Corpus Relief.

The lower court did not rule on the merits of Mr. Williams's *Atkins* claim. Citing *Engram v. State*, 200 S.W.3d 367 (2004), the lower court found that there was no state judicial forum in which Mr. Williams could raise his *Atkins* claim. Opinion, *Williams v. Kelley*, No. CV 40CV 17-46-5, 4/26/17 (attached as Exh. 1).

Issues concerning statutory interpretation are reviewed de novo. The denial of postconviction relief is reviewed under the clearly erroneous standard. *Girley v. Hobbs*, 445 S.W.3d 494 (Ark. 2014). Under either standard, the lower court's order should be reversed.

As an initial matter, the *Engram* Court did not deny habeas relief on the ground that habeas was an inappropriate forum for petitioner's claim. Rather, it held that the particular petitioner *in that case* could not challenge his sentence in habeas because he had failed to obtain a ruling from the trial court regarding his mental disability under state law, meaning "the sentence of death was not invalid." 200 S.W.3d 367, 375 (Ark. 2004). Critically, the *Engram* Court reached this holding by relying on the testimony of the State's trial expert, who affirmatively concluded that Engram was *not*, in the parlance of that time, mentally retarded. 200 S.W.3d at 371-72. Here, no such finding was ever made, and Mr. Williams has since submitted substantial evidence documenting significant intellectual and

adaptive deficits, including reports from three well-qualified experts in the field declaring that he is, in fact, intellectually disabled. Hence, unlike in *Engram*, there is no evidence supporting a conclusion that Mr. Williams's sentence of death was "not invalid" when imposed.

In any event, *Engram* is completely at odds with this Court's more recent jurisprudence interpreting the right to habeas corpus. In a series of decisions issued since 2013, the Court has held that habeas relief is the appropriate avenue for individuals challenging mandatory life imprisonment sentences under *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S. Ct. 2455 (2012). *See, e.g., Smith v. Kelley*, 2016 Ark. 307 (2016); *Hobbs v. Gordon*, 434 S.W.3d 364 (Ark. 2014); *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013). For instance, in *Kelley*, the Court granted the writ to a petitioner who challenged his life sentence for a rape he committed as a juvenile, explaining that habeas is warranted where a prisoner is being held under an unlawful sentence:

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

*Kelley*, 2016 Ark. at *2 (internal citations omitted) (emphasis supplied).

Likewise, in *Hobbs*, the Court expressly rejected the State's argument that, because petitioner's *Miller* claim was "based on the manner in which the sentence

was imposed, not an allegation that the sentence was illegal on its face," the claim was "not cognizable in habeas." *Hobbs*, 434 S.W.3d at 367-68. Instead, recognizing that the writ of habeas corpus is a remedy that may be invoked "when no other effective means of relief is at hand," the court determined that claims based on the illegality of a prisoner's sentence "are cognizable and are appropriate for the writ of habeas corpus." *Id.* at 369 (quoting *Haller v. Ratcliffe*, 221 S.W.2d 886, 887 (1949)).

The same rationale applies here. The Arkansas statute governing intellectual disability, Ark. Code § 5-4-618, bars the execution of a "person with mental retardation." Furthermore, the Supreme Court's holding in *Atkins* categorically prohibits the execution of a person with intellectual disability under the Eighth Amendment. *See Atkins*, 536 U.S. at 321. As detailed below, Mr. Williams is intellectually disabled.

Mr. Williams was categorically exempt from the death penalty at the time of his sentencing, and he remains ***categorically*** exempt today. *See, e.g., Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016) ("A conviction or sentence imposed in violation of a substantive rule [of the Eighth Amendment] is not just erroneous but contrary to law and, as a result, void," so that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule."). The claim is not one of trial error or ineffective assistance, in which a reviewing court must assess

the nature of the claimed error and its prejudicial effect at trial. Rather, it is a claim that a prisoner is simply exempt from a particular punishment. Just as Mr. Williams could not be executed if he were to prove that the crime occurred a week before his eighteenth birthday – even if the documents and evidence were disputed – Mr. Williams cannot be executed if he is intellectually disabled as the Eighth Amendment defines that concept in concert with prevailing professional norms. *Moore v. Texas*, 137 S. Ct. 1039, 1048-49 (2017); *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014). Mr. Williams's capital sentence is therefore illegal and he is entitled to habeas relief.

## II. Mr. Williams Is Intellectually Disabled.

The lower court's error is compounded by the strength of Mr. Williams's *Atkins* claim. As developed at length in the Corrected Petition for Writ of Habeas Corpus and its appendices, filed in the lower court, as well as in the Motion to Recall the Mandate filed on April 21, 2017 with this Court, Mr. Williams is a person with intellectual disability. *See* Motion to Recall the Mandate, Claim III. He has taken seven intelligence quotient ("IQ") tests. The scores for five of these seven are squarely within the intellectual disability range. The remaining two, which score slightly above the range typically associated with intellectual disability, are tainted by various types of unreliability and do not undermine a finding of intellectual disability. Mr. Williams has also shown significant adaptive

deficits cutting across all domains of functioning, which have been apparent since early childhood. 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 concluded that he is intellectually disabled and that he met the definition of intellectual disability at the time of the crime.

Pursuant to the definitions set forth by the American Psychiatric Association ("APA") and the American Association on Intellectual and Developmental Disabilities ("AAIDD") and endorsed by the Supreme Court in *Atkins* and its progeny, there are three issues underlying finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning ("prong one"), (2) deficits in adaptive functioning ("prong two"), and (3) onset before age 18 ("prong three"). *See* APA, Diagnostic and Statistical Manual of Mental Disorders – 5th Edition ("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); *Hall*, 134 S. Ct. at 1994 (same); *Moore*, 137 S. Ct. at 1045 (same).

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

> (a)(1) As used in this section, "mental retardation" means:
>
> > (A) Significantly subaverage intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifesting in the developmental period, but no later than age eighteen (18) years of age; and
> >
> > (B) A deficit in adaptive behavior.
>
> (2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

Although the Arkansas statutory law on intellectual disability includes a fourth requirement: "a deficit in adaptive behavior," Ark. Code Ann. § 5-4-618(a), this condition is included in the second finding and is also satisfied if the second requirement has been met. *See Jackson v. Norris*, 615 F.3d 959, 966 (8th Cir. 2010) (indicating that "a deficit in adaptive behavior" is included within the definition of "a significant deficit or impairment in adaptive functioning manifesting in the developmental period").

As briefly summarized here, and set forth in extensive detail in Mr. Williams's Petition for Writ of Habeas Corpus and his Motion to Recall the Mandate, Mr. Williams meets the criteria for intellectual disability under both the AAIDD and APA standards, as well as under Arkansas law.

### A. Deficits in 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 also fall within the mental retardation range. DSM-5 at 37.

However, both the AAIDD and the APA have rejected fixed cutoff points for IQ in the diagnosis of intellectual disability and mandated that any test score must be considered in the context of clinical judgment and adaptive functioning. AAIDD-2010 at 40. Similarly, the DSM-5 states that "[c]linical training and judgment are required to interpret [IQ] test results and assess intellectual performance." DSM-5 at 37. This is the case, in part, because "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks," and an individual's adaptive functioning may be far lower than his or her IQ score suggests. *Id.* Accordingly, "clinical judgment is needed in interpreting the results of IQ tests." *Id.*

Consistent with the AAIDD and APA's diagnostic criteria, in *Hall*, the Supreme Court of the United States held that because the SEM is "a statistical fact,

a reflection of the inherent imprecision of the test itself," at a minimum, full-scale IQ scores of 75 or below will establish the diagnosis of intellectual disability if the other two prongs are met. *Hall*, 134 S. Ct. at 1995, 2001. *See also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (IQ score of 75 was "squarely in the range of potential intellectual disability"). The Supreme Court has similarly held that the diagnosis of intellectual disability in the *Atkins* context cannot employ hard cutoffs and must be considered in the context of clinical judgment and adaptive functioning. *Hall*, 134 S. Ct. at 2001. Hence, "[u]nder Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical 'IQ score requirement.'" *Sasser*, 735 F.3d at 844 (citing *Anderson v. State*, 163 S.W.3d 333, 355-56 (Ark. 2004)). It is "legal error to read a strict 'IQ score requirement'" into an *Atkins* analysis; instead courts reviewing *Atkins* claims must consider *all* evidence of intellectual functioning "rather than relying solely on [a defendant's] test scores." *Id.* at 847.

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

21; AAIDD-2010 at 37 (same); *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports*, AAIDD (2012) at 23 (same); *The Death Penalty and Intellectual Disability*, AAIDD (2015) at 160-166 (same); DSM-5 at 37 (recognizing the Flynn Effect's ability to affect test scores).

In his lifetime, Appellant has been administered a total of seven intelligence tests. The Wechsler Intelligence Scales for Children – Revised ("WISC-R") was given at the ages of 8, 9, and 12 in conjunction with school evaluations. Psychological examiner David Nanack, M.A., administered the Wechsler Adult Intelligence Scales – 3rd Edition ("WAIS-III") to Appellant in 1999 when he was 20 years old. Neuropsychologist Mary Wetherby, Ph.D., and Dr. Weinstein administered WAIS-III's to Mr. Williams in 2000 and 2004, respectively. Dr. Weinstein also administered the Comprehensive Test of Nonverbal Intelligence to him in 2004. The timing, results, and Flynn-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 and WAIS-III Sampling Error[4] |
|---|---|---|---|---|
| 10/87 | 8-7 | WISC-R | 84 | 79.5 |
| 2/89 | 10-11 | WISC-R | 80 | 75* |
| 8/91 | 12-5 | WISC-R | 82 | 76* |
| 5/99 | 12-3 | WAIS-III | 74* | 70* |
| 8/00 | 21-5 | WAIS-III | 70* | 66* |
| 5/04 | 25-3 | WAIS-III | 81 | 76 |
| 5/04 | 25-3 | CTONI | 68* | 65* |

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

The norms for the WISC-R, WAIS-III, and CTONI were generated in 1972,

[4] On Mr. Williams's scores between 1999 and 2004, 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 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. *See* Ex. 1, A-109-110 (Report, Mark Cunningham, Ph.D.). *See also* 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. *See* Ex. 1, A-109-110 (Report, Mark Cunningham, Ph.D.).

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. Thus, five of the seven intelligence tests administered to Mr. Williams fall within the range for intellectual disability. And the two that would place Mr. Williams outside of that range are not reliable. The first is a score from a test administered when Mr. Williams was only 8 years old, and it is widely recognized that "individuals with mild [intellectual disability] 'often are not distinguishable from children without Mental Retardation until a later age.'" *Sasser*, 735 F.3d at 848. The second outlier score came on Mr. Williams's sixth administration of a "Wechsler scales" test, and it is well established that multiple administrations of the same test or of different Wechsler scales produce an artificial inflation, or "practice effect," on an IQ test. *See, e.g.,* AAIDD-2010 at 38; DSM-5 at 37. That the score was inflated is further supported by the results of his last test, which was not a Wechsler scale test, and which put him firmly in the intellectual disability range. *See* Ex. 1, A-106-114 (Report, Mark Cunningham, Ph.D., at 10-18).

Furthermore, Mr. Williams has been subjected to two full batteries of neuropsychological testing in 2000 by neuropsychologist Mary Wetherby, Ph.D., and again, in 2004 by Dr. Weinstein. The DSM-5 directs that neuropsychological testing is more comprehensive than a single IQ score. *See* DSM-5 at 37. 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* Ex. 1, A-146 (Dec. Ricardo Weinstein at ¶ 23). Accordingly, 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.

Based on the forgoing, Drs. Cunningham, Weinstein, and Martell have each found that Mr. Williams satisfies prong one of the intellectual disability diagnosis. *See* Ex. 1, A-106-114 (Report of Mark Cunningham, Ph.D.); A-144-47 (Dec. Ricardo Weinstein, Ph.D., 04/18/2017); A-178-89 (Report of Daniel Martell, Ph.D., 04/20/2017).

### B. Mr. Williams Had Significant Deficits in Adaptive Functioning During the Developmental Period.

The AAIDD has defined adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and performed by people in order to function in their everyday lives." AAIDD-2002 at 73. The DSM-5 describes adaptive deficits as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5 at 37. Under the ASIDD-2010 and DSM-5,

adaptive deficits are demonstrated if there is a significant limitation in any one of the following three types of adaptive behavior: conceptual, social or practical; or in the composite of the individual's adaptive functioning. AAIDD-2010 at 43; DSM-5 at 37. Skills included in the conceptual realm are: functional academics; language; reading and writing; money concepts; and self-direction. The social realm encompasses skills and characteristics like: interpersonal responsibility; self-esteem; gullibility; naivete; following rules; obeying laws; and avoiding victimization. The practical realm refers to skills such as: activities of daily living; instrumental activities of daily living; occupational skills; use of money; and maintaining safe environments. DSM-5 at 37; AAIDD-2010 at 44. The Diagnostic and Statistical Manual of Mental Disorders - 4th Edition - Text Revision ("DSM-IV-TR"), indicates that the adaptive deficits prong is satisfied if there are significant limitations in any two of the following skills areas: functional academics, self-direction, communication, social, leisure, use of community services, health, safety, personal care, home living, and work.

Extensive lay-witness evidence, records, testing, and expert analysis confirm that Mr. Williams suffered from significant adaptive deficits before the age of 18 in all three domains recognized by the AAIDD and the DSM-5, and in four out of eleven skill areas of the DSM-IV-TR: functional academics, self-direction, communication, and social/interpersonal skills. *See* Petition for Writ of Habeas

Corpus, Claim III.B; Motion to the Recall Mandate, Claim III.B.

For instance, Mr. Williams's school career was abysmal. In 1987, when Mr. Williams was in the second grade, his teacher completed a formal test of adaptive behavior and reported significant weaknesses in academics, intellect, attention, impulse control, anger control, social conformity, sense of persecution, aggressiveness, and excessive resistance. Ex. 1, A-24 (Report of Joe Ann Bock, M.Ed., 10/14/87). He was found to have learning disabilities in reading, listening, listening comprehension, and spelling. As a result, he was provided with special education services. *Id.* Nevertheless, Mr. Williams continued to flounder academically. Formal adaptive testing was administered again in 1989, which reflected deficits in spelling, written expression, and math calculation and produced a "profile . . . suggestive of poor academic achievement and a tendency toward social withdrawal." Ex. 1, A-35 (Report, Kenneth Robinson, M.S., 02/01/89). Mr. Williams's academic troubles persisted until he eventually dropped out in the 9th grade. *See, e.g.,* Ex. 1, A-119-20 (Report, Mark Cunningham, Ph.D.); A-63 (Evaluation/Programming Conference Decision-Form, Helen Maurer, undated); A-46 (Report, Emily Wagner, M.S., 08/07/91); A-59 (Post-Release Recommendations, Helen Maurer, 07/02/90).

School achievement tests further document Mr. Williams's academic struggles. He was assessed on the Wide Range Achievement Test – Revised

("WRAT-R") when he was 12 years, 5 months old, and his age-mates were in the 7th grade. At that time, he was assessed as at least four years behind in each subject. Ex. 1, A-45. Appellant's last school-age achievement test was a Peabody Individual Achievement Test ("PIAT-R"), which was administered when he was 14 years and 8 months old, and his age-mates would have been in the 9th grade. Ex. 1, A-47. His scores are listed in the table below.

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

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

As a child, Mr. Williams was also impulsive, hyperactive, had deficits with attention, self-direction and staying on task, and he could not cope with change or unusual situations. School officials described him as impulsive, acting out, and having poor decision making skills. Ex. 1, A-28 (Report, Joe Ann Bock, M.Ed., 10/14/87). Indeed, even after five years of special education, with years of

support, youth services records still described him as impulsive, lacking coping skills, and someone who "will need a very structured setting with individual attention." Ex. 1, A-61 (Alexander Youth Services, Post-Release Recommendations, 1992). He showed these same deficits in the home, requiring frequent redirection in order to complete simple tasks and help from same-age peers to use community resources. Ex. 1, A-4 (Dec. Felicia Williams); A-22 (Dec. Dwon Buckley at ¶ 5).

Mr. Williams's deficits in the realm of communication are documented by his scores on the Peabody Picture Vocabulary Test – Revised ("PPVT-R"), a measure of receptive language, which was administered to Mr. Williams at the ages of 8, 9, 11 and 14. He received standard scores of 59, 42, 58, and 57, which were all at or below the first percentile and reflect age equivalents of well below his chronological age at the time of each testing. A-184 (Report of Daniel Martell, Ph.D., 04/20/2017). His scores are listed in the tables below.

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

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

The forgoing represents just a sample of the extensive evidence of Mr. Williams's adaptive deficits, which are discussed in more detail in the Petition for Habeas Corpus and Motion to Recall the Mandate, and documented in the expert opinions of Drs. Cunningham, Weinstein, and Martell. *See* Ex. 1, A-115-30 (Report, Mark Cunningham, Ph.D.); A147-50 (Dec. Ricardo Weinstein, Ph.D., 04/18/2017); A-189-200 (Report of Daniel Martell, Ph.D., 04/20/2017).

**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.

Furthermore, although etiology is not necessary for a diagnosis of intellectual disability, there are a number of causal risk factors that correlate with intellectual disability and confirm the age of onset in Mr. Williams's case. These risk factors have been established by the AAIDD. *See* AAIDD-2010 at 59-60. The Supreme Court has recognized these risk factors and noted that "[c]linicians rely on such factors as cause to explore the prospect of intellectual disability further ... ." *Moore*, 137 S. Ct. at 1051. As detailed in the Petition for Writ of Habeas Corpus and the Motion to Recall the Mandate, many of these factors are present in Mr. Williams's social, medical, and mental health history, including: a family history of intellectual impairment, potential brain injury during the developmental period, parental smoking and maternal illness, family poverty, and impaired parenting. *See* Petition for Writ of Habeas Corpus, Claim III.C; Motion to Recall the Mandate, Claim III.C.

**D. Conclusion.**

Mr. Williams is an intellectually disabled person. Drs. Cunningham, Weinstein, and Martell have conducted three separate evaluations of Mr. Williams. They considered his functioning in light of current diagnostic standards. Consistent with protocol in a capital case, they conducted retrospective analyses of

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. Mr. Williams's death sentence and pending execution date violate the Eighth Amendment, *Atkins*, *Hall*, *Moore*, and Arkansas law.

## CONCLUSION

As it did in *Singleton*, the Court should "grant the stay of execution for the limited purpose of resolving this singular issue of public importance." *Singleton*, 964 S.W.2d at 369.

WHEREFORE, Mr. Williams respectfully requests that the Court stay his scheduled execution pending the full and fair litigation of his appeal from the denial of his petition for writ of habeas corpus.

Respectfully submitted:

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Dated: April 26, 2017

## CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2017, I served this Motion, including Exhibit 1 and the appendix thereto, on counsel for the State by requesting that the Clerk of this Court place a copy in the Attorney General's box, and by email service on the Attorney General at oag@ArkansasAG.gov.

/s/ Deborah Anne Czuba
Deborah Anne Czuba

# EXHIBIT 1

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

KENNETH WILLIAMS
Inmate # 957 PETITIONER

V. No. CV 40CV 17-46-5

WENDY KELLEY, Director,
Arkansas Department of Correction RESPONDENT

**ORDER DISMISSING CORRECTED PETITION FOR WRIT OF HABEAS CORPUS**

On this day comes on for consideration the Corrected Petition for Writ of Habeas Corpus filed on April 25, 2017. From examination of the pleading and review of the applicable law, the Court finds as follows:

**HISTORY**

On August 30, 2000, the petitioner, Kenneth Williams, was convicted of capital murder and was sentenced to death. He previously filed a petition for writ of habeas corpus on April 21, 2017. This Court dismissed the petition on April 24, 2017. The next day, Williams filed a corrected petition, curing two procedural deficiencies.

**CLAIM**

Williams alleges that he is intellectually disabled and that this renders his death sentence illegal and prohibits his execution.

**LAW**

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 an initial matter, a habeas petitioner must plead either the facial invalidity or the lack of jurisdiction and make a showing, by affidavit or other evidence, of

probable cause to believe he is illegally detained. *Abernathy v. Norris*, 2011 Ark. 335 (per curiam); *Birchett v. State*, 303 Ark. 220, 795 S.W.2d 53 (1990) (per curiam). A writ of habeas corpus is limited in scope. The petitioner must prove that he is detained without lawful authority. *Kozal v. Board of Correction*, 310 Ark. 648, 810 S.W.2d 154 (1992).

**DISCUSSION**

The petitioner has the burden to establish the basis for a finding that a writ of habeas corpus should issue. *Quezada v. Hobbs*, 2014 Ark. 396, 441 S.W.3d 910 (per curiam). Arkansas Code Annotated § 5-4-618 addresses the procedure for resolving a claim that a criminal defendant is ineligible for a sentence of death due to mental retardation, also called intellectual disability. Petitioner Williams acknowledges in his corrected petition that he did not utilize the procedure in § 5-4-618, but that the issue of his intellectual functioning was raised at his 2000 trial as a mitigating circumstance. The jury returned a sentence of death. The conviction and sentence were affirmed on direct appeal. *Williams v. State*, 67 S.W.3d 548 (Ark. 2002). Multiple unsuccessful challenges have been pursued on behalf of Mr. Williams.

Williams asks the Court to rule that he is intellectually disabled, issue a writ of habeas corpus declaring his death sentence illegal under *Atkins v. Virginia*, 526 U.S. 304 (2002), and order resentencing. The Arkansas Supreme Court has 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). In *Engram*, the appellant argued that *Atkins* obligated the Supreme Court of Arkansas to re-open his direct appeal or provide a collateral state remedy to consider his claim that he was retarded and, therefore, not subject to execution. The Supreme Court of Arkansas concluded that the state statutory procedure found in § 5-4-618, which Engram did not invoke at his trial, satisfies the constitutional procedural requirements for resolving a claim of intellectual disability. It further

concluded that there was no state judicial forum in which Engram (whose direct and collateral review cases were over) could belatedly raise an *Atkins*-type claim or challenge the statutory procedure that he altogether failed to invoke. *Id.* at 148-55, 200 S.W.3d at 370-75. Based on this Court's review of the applicable law, Williams's corrected petition for writ of habeas corpus, and the respondent's memorandum response, Williams has failed to state a viable claim for habeas corpus relief.

**INEFFECTIVE ASSISTANCE**

Petitioner also seemingly seeks relief by alleging, with respect to his claim of intellectual disability, ineffective assistance of his trial counsel, appellate counsel and the attorney who filed his Rule 37 Petition. It appears he expects the Court to opine that all of his previous attorneys were ineffective because Courts have refused to accept his theory that he should be able to litigate his claim of intellectual disability belatedly, and apparently in any forum he chooses. A petition for writ of habeas corpus is not a substitute for post-conviction relief, nor does it provide an opportunity to retry a case. *Wesson v. Hobbs*, 2014 Ark. 285 (per curiam); *Friend v. Norris*, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam). Williams's claim of ineffective assistance of counsel is not cognizable in a habeas petition.

**REQUEST FOR HEARING**

When probable cause for issuance of the writ is not shown by affidavit or other evidence, a hearing is not required, even when the allegations are ones that are cognizable in a habeas proceeding. *Philyaw v. Kelley*, 2015 Ark. 465, 477 S.W.3d 503 (2015). Petitioner has failed to state probable cause for issuance of the writ because he has not presented a viable claim. Therefore, his request for a hearing is denied.

**RULING**

The allegations raised by the petitioner do not establish probable cause that the trial court lacked jurisdiction or that the commitment is invalid on its face. The trial court had personal jurisdiction over the petitioner and jurisdiction over the subject matter, thus, had the authority to render the judgment.

The requested relief is denied, and the petition is hereby **DISMISSED.**

IT IS SO ORDERED, this 26 day of April, 2017.

Jodi Raines Dennis

JODI RAINES DENNIS
CIRCUIT JUDGE
40CV-17-46-5