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

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**No.CR06-511**

**IN THE ARKANSAS SUPREME COURT**

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KENNETH D. WILLIAMS — Movant/Appellant

v.

STATE OF ARKANSAS, — Respondent/Appellee

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# MOTION FOR STAY OF EXECUTION PENDING PETITION FOR WRIT OF HABEAS CORPUS IN CIRCUIT COURT OF LINCOLN COUNTY

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Deborah Anne Czuba
Arkansas Bar # 2008271
Supervising Attorney
Capital Habeas Unit
Federal Defender Services of Idaho
702 W. Idaho St.
Boise, Idaho 83702
(208) 331-5530
Deborah_A_Czuba@fd.org
*Counsel of Record*

Shawn Nolan (*pro hac* sought)
Pennsylvania Bar # 56535
James Moreno (*pro hac* sought)
PA Bar. # 86838
Federal Community Defender Office
601 Walnut St., Suite 545-W
Philadelphia, PA 19106
(215) 928-0520
Shawn_Nolan@fd.org
James_Moreno@fd.org

*Attorneys for Kenneth Williams*

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. Mr. Williams was intellectually disabled at the time of his crime, and he remains intellectually disabled today as he awaits his imminent execution. Yet no court has ever been presented with a claim that he is categorically ineligible to receive the death penalty. Thus, Mr. Williams has filed a Petition for Habeas Corpus in the Lincoln County Circuit Court seeking relief on the ground that he is currently imprisoned under an illegal death sentence set to be carried out within a matter of days. *See* Ex. 1, Petition for Writ of Habeas Corpus. Mr. Williams's claim poses a significant constitutional question: whether a death-sentenced prisoner who makes a convincing showing that he is intellectually disabled and categorically exempt from the death penalty may be executed simply because the claim appears for the first time, through no fault of the prisoner, at or near the time of his scheduled execution. A stay is necessary to allow this important claim to be heard before his sentence is carried out.

## 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.[1] 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

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

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 (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.

Concurrent with this filing and the Petition for Habeas Corpus filed in Lincoln County Circuit Court, Mr. Williams has filed a Motion to Recall the Mandate and for Writ of Error Coram Nobis with this Court, asserting a claim of intellectual disability under the Eighth Amendment as well as additional claims for relief.

## ARGUMENT

### I. Mr. Williams Presents a Cognizable Claim for Habeas Corpus Relief.

This Court has made clear that, although habeas corpus is a narrow remedy, the remedy 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*.

*Smith v. Kelley*, 2016 Ark. 307 (2016), at *2 (internal citations omitted) (emphasis supplied).

In *Smith*, the Court granted the writ to a petitioner who challenged his 1984 life sentence, for a rape he committed as a juvenile, under *Graham v. Florida*, 560 U.S. 48 (2010). Likewise, this Court has held that habeas corpus is the appropriate vehicle for petitioners challenging the legality of a sentence of life without parole for a crime committed as a juvenile under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). *See, e.g.*, *Hobbs v. Gordon*, 434 S.W.3d 364 (Ark. 2014); *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013). In *Hobbs*, the Court expressly rejected the State's argument that, because petitioner's *Miller* claim was "based on the manner in which the sentence was imposed, not an allegation that the sentence was illegal on its face," the claim was "not cognizable in habeas." *Hobbs*, 434 S.W.3d at 367-68. Instead, recognizing that the writ of habeas corpus is a remedy that may be

invoked "when no other effective means of relief is at hand," the court determined that claims based on the illegality of a prisoner's sentence "are cognizable and are appropriate for the writ of habeas corpus." *Id.* at 369 (quoting *Haller v. Ratcliffe*, 221 S.W.2d 886, 887 (1949)).

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

As developed at length in the attached Petition for Writ of Habeas Corpus and its appendices, as well as in the Motion to Recall the Mandate filed concurrently with this Motion in this Court, Mr. Williams is a person with intellectual disability. *See* Petition for Writ of Habeas Corpus, Claim III; 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 this 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, Petitioner has been administered a total of seven intelligence tests. The Wechsler Intelligence Scales for Children – Revised ("WISC-R") was given at the ages of 8, 9, and 12 in conjunction with school evaluations. Psychological examiner David Nanack, M.A., administered the Wechsler Adult Intelligence Scales – 3rd Edition ("WAIS-III") to Petitioner in 1999 when he was 20 years old. 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

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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[2]** |
|---|---|---|---|---|
| 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.

[2] 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.).

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. 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 the sixth time Mr. Williams was given 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. Petitioner's last school-age achievement test was a Peabody Individual Achievement Test ("PIAT-R"), which was administered when he was 14 years and 8 months old, and his age-mates would have been in the 9th grade. 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 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.

## III. A Stay of Execution Is Warranted in These Circumstances.

A stay of execution is warranted here because Mr. Williams presents the same set of extraordinary circumstances that this Court found warranted a stay in *Singleton*.

First, Mr. Williams's habeas claim involves a "*bona fide* constitutional claim" of "public significance." *Singleton*, 964 S.W.2d at 369. Specifically, the habeas petition poses the question whether an intellectually disabled capital prisoner may be executed simply because his claim went unasserted in earlier proceedings through no fault of his own. *Atkins* and its progeny proscribe the execution of a person with intellectual disability under the Eighth Amendment. *See Atkins*, 536 U.S. at 321; *see also Moore* , 137 S. Ct. at 1048; *Hall*, 134 S. Ct. at 1992. Yet no court has ever squarely addressed the particular question posed by Mr. Williams. Moreover, habeas corpus is a "competent judicial proceeding" under § 16-90-506(a)(1) of the Arkansas Code; Mr. Williams has explained, above, that his *Atkins* claim is cognizable on habeas because he is categorically exempt from execution, and therefore, his sentence exceeds that which the law allows.

Second, Mr. Williams's claim only recently became "ripe for decision, " *see Singleton*, 964 S.W.2d at 368, because his attorney inexplicably abandoned the claim in the Rule 37 proceedings without determining whether or not his client met

criteria for a life-saving diagnosis of intellectual disability. In 2017, with the aid of newly appointed counsel, the expert who had evaluated Mr. Williams at Rule 37 counsel's request in 2004-05, Dr. Weinstein, scored his test results for the first time, reviewed other materials, and rendered a diagnosis of intellectual disability. *See* Ex. 1, A138-52 (Dec. Ricardo Weinstein, Ph.D., 04/18/2017). The expert who testified at trial, Dr. Cunningham, and an expert who evaluated Mr. Williams this week, Dr. Martell, concur with the diagnosis. *See* Ex. 1, A-97-137 (Report, Mark Cunningham, Ph.D); A-164-201 (Report of Daniel Martell, Ph.D., 04/20/2017). Accordingly, the habeas petition in the Circuit Court, and the Motion to Recall the Mandate filed concurrently in this Court, represent Mr. Williams's first meaningful opportunity to obtain a judicial determination of the *Atkins* claim. Mr. Williams argues in both pleadings that his counsel's ineffective assistance deprived him of any earlier opportunity to raise the claim.

Finally, given the imminent nature of Mr. Williams's scheduled execution on April 27, 2017, "the likelihood of a decision by the Circuit Court and a meaningful appeal to this court occurring before execution appear to be exceedingly remote." *Singleton*, 964 S.W.2d at 368.

## 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 petition for writ of habeas corpus.

Respectfully submitted:


Deborah Anne Czuba
Arkansas Bar # 2008271
Supervising Attorney
Capital Habeas Unit
Federal Defender Services of Idaho
702 W. Idaho St.
Boise, Idaho 83702
(208) 331-5530
Deborah_A_Czuba@fd.org
*Counsel of Record*

Shawn Nolan (*pro hac* sought)
PA Bar # 56535
James Moreno (*pro hac* sought)
Pennsylvania Bar # 86838
Capital Habeas Unit
Federal Community Defender Office
Eastern District of Pennsylvania
Curtis Center, Suite 545W
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
Shawn_Nolan@fd.org
James_Moreno@fd.org

*Attorneys for Appellant*


Dated: April 21, 2017

## CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 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