OCTOBER TERM 2016

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

In re KENNETH DEWAYNE WILLIAMS, Petitioner

PETITION FOR WRIT OF HABEAS CORPUS

CAPITAL CASE – EXECUTION SCHEDULED FOR APRIL 27, 2017

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Dated: April 27, 2017

QUESTIONS PRESENTED

Kenneth Williams is innocent of the death penalty; he is intellectually disabled and thus categorically ineligible to be put to death. He comes before this Court with three petitions, not because a lower tribunal disagreed that he is innocent of death, but because no court has agreed to hear the merits of his claim. The first raises the state court's failure to provide a post-conviction forum to prove his innocence of the death penalty. The second raises his inability to persuade the federal courts to hear his claim on habeas corpus. This petition invokes the extraordinary jurisdiction of this Court because the first two traditional avenues for relief have been foreclosed.

In a motion for authorization to file a successive petition, Mr. Williams presented compelling evidence that he is intellectually disabled and will be imminently executed in violation of *Atkins v. Virginia*, 536 U.S. 304 (2002). A panel of the Eighth Circuit denied authorization to file.

This petition for an original writ of habeas corpus presents the following important questions:

1. Should this Court use its power to grant a writ of habeas corpus to a condemned man who has no other available forum to raise his compelling claim of intellectual disability?

2. Does 28 U.S.C. § 2244(b)(2)(B)(ii) permit a habeas petitioner to file a successive habeas petition based on a claim that he is innocent of the death penalty?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Kenneth Williams, was the movant before the United States Court of Appeals for the Eighth Circuit. Mr. Williams is a prisoner sentenced to death and in the custody of Wendy Kelley, Director, Arkansas Department of Correction. Mr. Williams has separately filed petitions for writs of certiorari to the Eighth Circuit and Arkansas Supreme Court.

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PETITION FOR A WRIT OF HABEAS CORPUS

Kenneth Dewayne Williams respectfully petitions for a writ of habeas corpus. He has simultaneously filed petitions with this Court for writs of certiorari.

DECISION BELOW

As of this writing, the Eighth Circuit has not yet issued a decision on Petitioner's application for leave to file a second or successive petition for writ of habeas corpus. Nevertheless, because petitioner's execution is hours away, and because the Clerk has directed undersigned counsel to file the instant petition by 2 p.m., this petition is filed in advance of the ruling below and in anticipation of an adverse decision from the Eighth Circuit. When and if the Eighth Circuit issues a reasoned decision denying Petitioner's application, counsel may seek to file a supplemental pleading with the Court.

STATEMENT OF JURISDICTION

The order of the Court of Appeals denying authorization to file a successive petition was entered on April 27, 2017. The Court has jurisdiction to consider the issues adjudicated in the Court of Appeals pursuant to its authority to grant original habeas relief. 28 U.S.C. §§ 2241(a), 2254(a); Supreme Court Rule 20.4.

SUPREME COURT RULE 20.4 STATEMENT

Rule 20.4 requires an original petition for writ of habeas corpus by a state prisoner (1) to "comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the 'reasons for not making application to the district court of the district in which the applicant is held'"; (2) to "set out specifically how and where the petitioner has exhausted available remedies in the state courts"; (3) to "show that exceptional circumstances warrant the exercise of the Court's

discretionary powers"; and (4) to show "that adequate relief cannot be obtained in any other form or from any other court." Petitioner meets these requirements.

(1) Mr. Williams sought relief in the United States District Court for the Eastern District of Arkansas, where he is held in custody, by filing a habeas petition under § 2241 and alleging that the petition was not successive or subject to § 2244(b). The district court construed the petition as second or successive and transferred the case to the Eighth Circuit. Mr. Williams filed a notice of appeal to the transfer order and sought a certificate of appealability, which the Eighth Circuit is anticipated to deny. Petitioner is seeking certiorari from that denial in a petition being filed on this same date.

(2) On April 21, 2017, Mr. Williams filed a motion to recall the mandate in the Arkansas Supreme Court, a motion asking the Arkansas Supreme Court to authorize a petition for writ of error coram nobis, and a petition for writ of habeas corpus in the Lincoln County Circuit Court, which each raise the same claim presented here. Both courts refused to review the merits of the claim under Arkansas law that forecloses such review. Petitioner is seeking certiorari from those denials in separate petitions being filed on this same date.

(3) Exceptional circumstances warrant the exercise of this Court's discretionary power to issue a writ of habeas corpus for the reasons set forth, *infra*, in the Statement of Facts and Part I of the Reasons for Granting the Writ.

(4) Unless this Court grants one or both of the certiorari petitions referenced in (1) and (2), *supra*, then "adequate relief cannot be obtained in any other form or from any other court."

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the following provisions of the United States Constitution:

Article I, Section 9, Clause 2, of the United States Constitution provides:

> The 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.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Section 2244(b), Title 28 of the U.S. Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in relevant part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
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> ***
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> (3)(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of [§ 2244(b)].
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> ***
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> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF FACTS

A. Procedural History

Kenneth 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. 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 for a prior murder.

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. 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.

The jury, which included an employee of the prison at which Mr. Williams was being housed during trial, 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 did not indicate whether they found or did not find evidence 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). On August 9, 2002, Mr. Williams, through his court-appointed attorney, Jeffrey Rosenzweig, filed a ten-page Rule 37 petition, asserting seven claims for post-conviction relief.[1] 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 v. Virginia*, 536 U.S. 304 (2002).[2]

The Rule 37 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.

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).

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[1] Arkansas law restricts post-conviction petitions to ten pages in length, even in capital cases, and any exhibits attached to the petition count against the page limit. *Sanders v. State*, 98 S.W. 3d 35, 39-40 (Ark. 2003) (finding, in a capital case, that the state post-conviction court abused its discretion when it summarily dismissed and eleven-page petition where the only content on the eleventh page was a certificate of service, although the state post-conviction court did not abuse its discretion in denying the petitioner's motion to file an "enlarged" sixteen-page petition).

[2] Mr. Rosenzweig subsequently filed two supplemental Rule 37 petitions that were similar to one-another, adding two claims not relevant here. The supplemental petitions were accepted by the Rule 37 court. ECF No. 8-47 at 11.

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 the United States District Court for the Eastern District of Arkansas, raising no claims related to Mr. Williams's intellectual disability. The district court denied the petition on November 4, 2008. ECF No. 9 (memorandum opinion and order); ECF No. 10 (judgment). The Eighth Circuit affirmed the denial of relief on July 15, 2010. *Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010). This 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, at 7:00 p.m. 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, 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. Also, on April 21, 2017, counsel from the FCDO filed in the Arkansas Supreme Court a motion to recall the mandate and a petition to authorize a *coram nobis*

proceeding, along with a petition for writ of habeas corpus in the Circuit Court of Lincoln County. These pleadings raised a claim that Mr. Williams is intellectually disabled, thus ineligible to be executed, and each included an extensive appendix of materials supporting his claim. The supporting materials included reports from three specialists finding Mr. Williams to be intellectually disabled, explaining the significance of Mr. Williams's many IQ tests over the years, and documenting his several deficits in adaptive behavior. Each of these pleadings was denied on procedural grounds in the state courts.

On April 25, 2017, Mr. Williams filed a second-in-time habeas petition in the district court, along with the same extensive appendix of materials supporting his claim of intellectual disability he submitted in the state courts.[3] In the petition, Mr. Williams argued that his *Atkins* petition did not constitute a "second or successive" petition within the meaning of 28 U.S.C. § 2244(b), thus he was not obliged to seek authorization from the Eighth Circuit prior to filing his petition. On April 26, 2017, the district court issued an order finding that Mr. Williams's petition did constitute a second or successive petition subject to § 2244(b). The district court thus transferred the petition to the Eighth Circuit.

Also on April 26, Mr. Williams filed a notice of appeal from the district court's transfer order. He then filed a motion in the Eighth Circuit seeking a certificate of appealability on his claim that he is categorically ineligible to be executed due to his intellectual disability.[4] As of this writing, the Eighth Circuit has not yet issued a decision on Petitioner's application for leave

[3] Mr. Williams also filed a motion pursuant to Federal Rule of Civil Procedure 60(b), not at issue here, alleging that the jury that convicted him committed multiple forms of misconduct. That motion was denied.

[4] Although he did not believe it necessary, Mr. Williams also filed a motion for authorization to file a second or successive petition in the Eighth Circuit out of an abundance of caution.

to file a second or successive petition for writ of habeas corpus. Nevertheless, because petitioner's execution is hours away, and because the Clerk has directed undersigned counsel to file the instant petition by 2 p.m., this petition is filed in advance of the ruling below and in anticipation of an adverse decision from the Eighth Circuit. When and if the Eighth Circuit issues a reasoned decision denying Petitioner's application, counsel may seek to file a supplemental pleading with the Court.

B. The Facts Demonstrate that Mr. Williams Is Intellectually Disabled under *Atkins* and That the Eighth Amendment Forbids His Execution.

Pursuant to the definitions set forth by the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities and endorsed by this Court in *Atkins*, *Hall v. Florida*, 134 S. Ct. 1986 (2014), and *Moore v. Texas*, 137 S. Ct. 1039 (2017), there are three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/subaverage intellectual functioning ("prong one"), (2) deficits in adaptive functioning ("prong two"), and (3) onset before age 18 ("prong three"). *See Diagnostic and Statistical Manual of Mental Disorders* (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).

Under the classification schemes outlined by the APA and the AAIDD deficient intellectual functioning is defined as an intelligence quotient ("IQ") of approximately 70 with a confidence interval derived from the standard error of measurement ("SEM") taken into consideration. Because a 95% confidence interval on IQ tests generally involves a measurement

error of 5 points, at a minimum, scores up to 75 also fall within the mental retardation range. The DSM-5 states:

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

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

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

Mental Retardation: Definition, classification, and systems of support (10th Ed.), American Association on Mental Retardation (2002) ("AAIDD-2002") at 58-59. *See also* AAIDD-2010 at 36 (finding the consideration of the standard error of measurement or "SEM" and reporting an IQ score with a confidence interval deriving from the SEM to be critical considerations in the appropriate use of IQ tests).

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

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

AAIDD-2010 at 40 (emphasis in original).

Similarly, the DSM-5 states that "[c]linical training and judgment are required to interpret [IQ] test results and assess intellectual performance." DSM-5 at 37. This is the case, in part, because "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks," and an individual's adaptive functioning may be far lower than his or her IQ score suggests. *Id.* Accordingly, "clinical judgment is needed in interpreting the results of IQ tests." *Id.*

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

Consistent with the AAIDD and APA's diagnostic criteria, in Hall, this Court 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").

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

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

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

Hall, 134 S. Ct. at 2001.

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 tested Mr. Williams, but 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. *See* A-6, A-47, A-60, A-75.

In the courts below, Mr. Williams submitted reports from each of these three mental health professionals as well as numerous additional items of evidence supporting their diagnoses. Drs. Cunningham, Weinstein, and Martell have evaluated Petitioner and found that he satisfies prong one of the intellectual disability diagnosis. In his lifetime, Petitioner has been administered a total of seven intelligence tests. Mr. Williams received a composite IQ score of 71.8 on the six comprehensive tests of global intelligence that he was administered. All three experts concluded that Petitioner fell within the range of sub-standard intelligence consistent with a diagnosis of intellectual disability.

Additionally, Mr. Williams was administered a number of tests during his academic career which contain IQ approximations. These tests scores are all in the intellectual disability range.

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

received scores ranging from kindergarten to second grade levels, which ranged one to three years behind his age-mates. As time passed, he failed to develop intellectually and academically while his classmates left him behind. Petitioner was re-tested in February 1989 (9 years, 11 months), when his age-mates were in the 4th grade; he tested at the 1st and 2nd grade levels. This trend continued throughout his school career.

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

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

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

Consistent with the level of delay shown while Mr. Williams was in school, he had academic impairments as an adult. Given his neuropsychological impairments, the stunted academic functioning described above is to be expected. His cognitive deficits in executive functioning, memory, and attention impaired his ability to understand and learn.

Petitioner also had a number of risk factors in his history which heightened the likelihood that he would be both intellectually disabled and that his IQ would drop during his lifetime.

Those risk factors included, *inter alia*, a head injury during the developmental period, hospitalization for viral meningitis, poverty, childhood physical abuse, childhood exposure to trauma, impaired parenting, and childhood instability.

Furthermore, Petitioner has been subjected to two full batteries of neuropsychological testing in 2000 by Dr. Wetherby, and again, in 2004 by Dr. Weinstein. As noted above, the DSM-5 recognizes that neuropsychological testing is more comprehensive than a single IQ score. Both batteries reflected the presence of brain impairments, *i.e.*, brain dysfunction, including significant impairments in his executive functioning, abstract thinking, attention, and memory. These impairments are in the higher levels of cognitive functioning and provide a neuropsychological profile that is typical of the intellectually disabled. *See* A-68-A69. Accordingly, Petitioner's neuropsychological profile, tested over two separate batteries with two separate mental health professionals, reflects the brain impairments of an intellectually disabled person.

Drs. Cunningham, Weinstein, and Martell also analyzed Petitioner's 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* A-69-A72; A-24-A39. 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. A100-A111.

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 eight and nine). This history began in early childhood and continued up until his incarceration for the instant case.

REASONS FOR GRANTING THE WRIT

I. Mr. Williams' Case Presents Exceptional Circumstances That Warrant the Exercise of This Court's Original Habeas Jurisdiction.

This case presents several exceptional circumstances. First, Mr. Williams's evidence of intellectual disability is substantial and largely undisputed. As set forth in the Statement of Facts, Mr. Williams has been examined by three different highly qualified mental health experts – before trial, during state post-conviction proceedings, and after the pending execution warrant was issued. Each of these experts has opined that Mr. Williams suffers from intellectual disability as defined by current medical standards. Their opinions are supported by, inter alia, extensive childhood records demonstrating Mr. Williams's lifelong impairments, including his failing the first and third grades, his perennially low scores on tests of intellectual and adaptive functioning, and his placement in special education classes throughout his school years. And although the state disagrees with the expert opinions, it has not produced any expert opinion that attempts to refute the three reporting experts.

Second, Mr. Williams's claim of intellectual disability has never been adjudicated by any court, and the state and federal courts have both refused to address it, as set forth in the accompanying certiorari petitions.

Third, Mr. Williams's imminent execution presents an exigent circumstance requiring this Court's intervention, without which Mr. Williams will be executed contrary to the Eighth Amendment.

Fourth, in *Felker v. Turpin*, 518 U.S. 651, 661-62 (1996), this Court held that the availability of original habeas jurisdiction in this Court preserves Article III's grant of appellate jurisdiction over the lower federal courts. This petition asks the Court to consider whether a prisoner's innocence of the death penalty, by virtue of intellectual disability or otherwise, satisfies the gatekeeping requirement of 28 U.S.C. § 2244(B)(2)(B)(ii) for the filing of a second or successive petition for writ of habeas corpus, and thus, whether AEDPA preserved the "miscarriage of justice" exception recognized in *Sawyer v. Whitley*, 505 U.S. 333 (1992). That question divides the courts of appeals, and more importantly, this Court cannot reach the question by certiorari or appeal. The exercise of original habeas jurisdiction would aid the Court in exercising the appellate authority provided to it by Article III, § 2 with respect to this critical question.

II. This Court Should Resolve the Circuit Split and Establish That 28 U.S.C. § 2244(b)(2)(B)(ii) Permits a Habeas Petitioner to File a Successive Habeas Petition Based on a Claim That He Is Innocent of the Death Penalty.

There is a split in the circuits regarding whether § 2244(b)(2)(B)(ii) permits a §2254 habeas petitioner to file a successive petition based on a claim that he is innocent of the death penalty. The holdings of the Fifth, Seventh, and Eleventh Circuits, are in conflict with holdings of the Sixth and Ninth Circuits, and the decision of the Eighth Circuit will necessarily deepen this divide. This Court should grant Mr. Williams's petition for a writ of habeas corpus to decide whether a petitioner's innocence of the death penalty enables the petitioner to file a second or successive petition for relief on the basis of a constitutional claim that, "if proven and viewed in light of the evidence as a whole," § 2244(b)(2)(B)(ii), would establish such innocence.

A "prisoner 'otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence.'" *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013)

(quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). This fundamental miscarriage of justice exception to procedural bars is "'grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons'" and has "survived AEDPA's passage." *McQuiggin*, 133 S. Ct. at 1931-22 (quoting *Herrera*, 506 U.S. at 404).

A fundamental miscarriage of justice occurs when the petitioner is actually innocent of the crime, *see Schlup v. Delo*, 513 U.S. 298, 324-27 (1995), or is ineligible for the death penalty, *Sawyer v. Whitley*, 505 U.S. 333 (1992). Under *Schlup*, a petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'" by establishing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Under *Sawyer*, a petitioner must show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 335. Stated differently, a petitioner must demonstrate that he is "innocent of the death penalty." *Id.* at 345.

This Court recently reaffirmed that "[w]e have applied the miscarriage of justice exception to overcome various procedural defaults," including, among other defaults, "'successive' petitions asserting previously rejected claims" and "'abusive petitions asserting in a second petition claims that could have been raised in a first petition." *McQuiggin*, 133 S. Ct. at 1931-32. Thus, the miscarriage of justice exception would seemingly excuse any procedural bar to a habeas petitioner, such as Mr. Williams, who raises a claim of innocence of the death penalty due to intellectual disability in a second or successive petition, provided that the petitioner makes a claim based on facts, which if proven and viewed in light of the evidence as a

whole in district court, would establish by clear and convincing evidence that he is intellectually disabled.

However, AEDPA's statutory language regarding second or successive petitions states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant *guilty of the underlying offense*." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). The circuit courts have split on whether this statutory subsection allows a habeas petitioner to overcome AEDPA's procedural bars and file a second or successive petition on the basis that he is innocent of the death penalty under the standard from *Sawyer*.

The Fifth, Seventh, and Eleventh Circuits have held that § 2244(b)(2)(B)(ii) (and the corresponding provision for federal prisoners in § 2255(h)(1)) only allows circuit courts to authorize the filing of second or successive petitions when a habeas petitioner's claim asserts innocence of the offense, rather than innocence of the sentence, even for petitioners sentenced to death. *See In re Hill*, 715 F.3d 284, 297 (11th Cir. 2013) ("Given the plain and unambiguous language in the statute, this Court repeatedly has held that federal law does not authorize the filing of a successive application under § 2244(b)(2)(B) based on a sentencing claim even in death cases."); *In re Webster*, 605 F.3d 256, 258-59 (5th Cir. 2010) ("[T]here is no reason to believe that Congress intended the language 'guilty of the offense' to mean 'eligible for a death sentence.' . . . [Congress] elected to couch § 2255(h)(1), as well as § 2244(b)(2)(B)(ii), in the markedly different, unmistakable terms of guilt of the offense."); *Hope v. United States*, 108 F.3d 119, 120 (7th Cir.1997) ("We conclude that a successive motion under 28 U.S.C. § 2255

(and presumably a successive petition for habeas corpus under section 2254, governing habeas corpus for state prisoners, which has materially identical language) may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence.").

On the other hand, the Ninth Circuit has held that "[w]e interpret the AEDPA's amendments to §2244(b) to permit a petitioner, in a successive petition, to establish that he is ineligible for the death penalty." *Thompson v. Calderon*, 151 F.3d 918, 923 (9th Cir. 1998) (en banc). The court reasoned that "the need to cover non-capital habeas petitions best explains the slight difference in wording between the *Sawyer* 'actual innocence' standard and § 2244(b)(2)(B)(ii)."[5] *Id.* at 923-24; *see id.* at 924 n.4 ("We disagree with the Seventh and Eleventh Circuit decisions rejecting a petitioner's claim of innocence of the death penalty as not cognizable under § 2244(b)(2)(B)." (citing *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997) and *In re Medina*, 109 F.3d 1556, 1565-66 (11th Cir. 1997)).

Without addressing the statutory text of § 2244(b)(2)(B), the Sixth Circuit has allowed a petitioner to seek authorization for leave to file a second or successive petition under *Sawyer* after the enactment of AEDPA. *See In re Byrd*, 269 F.3d 585 (6th Cir. 2001) (en banc). Separate from *Byrd*, the Sixth Circuit later noted "[t]he circuits are split as to whether § 2244(b)(2)(B)(ii) bars a petitioner from proving that, but for an error, a jury would not have

[5] There is good reason to interpret the language of § 2244(b)(2)(B)(ii) as imprecise. This Court has recognized AEDPA's poor drafting. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (observing that "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting"). For example, § 2244 apparently prohibits "second or successive habeas corpus application[s]" that raise claims "presented in a prior application," 28 U.S.C. § 2244(b)(1), but permits "second or successive" applications raising claims "not presented in a prior application" under certain circumstances, § 2244(b)(2), makes little sense, given that, by definition, a "'successive petition' raises grounds identical to those raised and rejected on the merits on a prior petition." *Kuhlmann v. Wilson*, 477 U.S. 436, 444 n.6 (1986).

imposed an aggravating factor warranting the death penalty," but had no occasion to resolve the issues itself. *Ross v. Berghuis*, 417 F.3d 552, 557 n.4 (6th Cir. 2005).

The Fourth and Tenth Circuits, also without deciding the issue, have recognized that circuits are split on the issue. *See LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (noting "there is a split among the . . . circuits that have addressed the question," but not resolving the "difficult question because even assuming § 2244(b)(2)(B)(ii) does encompass challenges to a death sentence," the petitioner's claim would fail); *Wright v. Angelone*, 151 F.3d 151, 164 n.8 (4th Cir. 1998) ("[W]e note that other circuit courts narrowly have interpreted the [] language in § 2244(b)(2) to require that habeas petitioners demonstrate actual innocence of the underlying crime to file a successive habeas petition on the basis of newly discovered evidence.").

This circuit split merits this Court's attention. In one concurring opinion, Judge Weiner of the Fifth Circuit noted "the absurdity of [AEDPA's] Kafkaesque result: Because [a petitioner] seeks to demonstrate only that he is constitutionally ineligible for the death penalty—and not that he is factually innocent of the crime—we must sanction his execution." *Webster*, 605 F.3d at 259 (Weiner, J., concurring).[6] In dissent from the Eleventh Circuit's rejecting the existence of any *Sawyer* exception in § 2244(b)(2), Judge Wilson remarked that this circuit split is "of exceptional importance," noting "we need Supreme Court guidance." *In re Hill*, 777 F.3d 1214, 1227 (11th Cir. 2015)(Wilson, J., dissenting). The dissent noted that "the Courts of Appeals are now divided on the question of whether *Sawyer*'s holding that an inmate can be innocent of the death penalty survived AEDPA's gatekeeping provisions," and that "the Supreme Court itself

[6] In *Webster*, just as in this case, "three physicians independently concluded that Webster is mentally retarded," and Judge Weiner concluded that "[i]f the evidence that Webster attempts to introduce here were ever presented to a judge or jury for consideration on the merits, it is virtually guaranteed that he would be found to be mentally retarded." *Id.*

[has] indicated . . . that *Sawyer*'s 'miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.'" *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 558 (1998)). In an earlier opinion where the Eleventh Circuit held that "post–AEDPA, there is no *Sawyer* exception to the bar on second or successive habeas corpus petitions for claims asserting 'actual innocence of the death penalty,'" *In re Hill*, 715 F.3d 284, 301 (11th Cir. 2013), another dissenting opinion noted "[t]he perverse consequence of such an application of AEDPA is that a federal court must acquiesce to, even condone, a state's insistence on carrying out the unconstitutional execution of a mentally retarded person," *id.* at 302 (Barkett, J., dissenting). Such a perverse consequence is again at issue here.

Indeed, this Court's own reasoning in *McQuiggin* reveals the tension evident between the equitable exception of *Sawyer* and the language of § 2244(b)(2). The Court first recognizes that "[w]e have applied the miscarriage of justice exception to overcome various procedural defaults," including, "'abusive petitions asserting in a second petition claims that could have been raised in a first petition," *McQuiggin*, 133 S. Ct. at 1931-32, but then later notes that "Section[] 2244(b)(2)(B) . . . reflect[s] Congress' will to modify the miscarriage of justice exception with respect to second-or-successive petitions," *id.* at 1934.

Even if the language of § 2244(b)(2) does not encompass *Sawyer*'s miscarriage of justice exception for innocence of the death penalty, this Court should still grant Mr. Williams's petition to establish that this equitable remedy of habeas corpus still exists independently of the statutory language of AEDPA. *See McQuiggin*, 133 S. Ct. at 1937 (Scalia, J., dissenting) ("Actual innocence" has, until today, been an exception only to judge-made, prudential barriers to habeas relief, or as a means of channeling judges' statutorily conferred discretion not to apply a

procedural bar. Never before have we applied the exception to circumvent a categorical statutory bar to relief."). The writ of habeas corpus is "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" and "[t]he scope and flexibility of the writ - its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Id.* at 291. Thus, a federal court retains authority to "to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence," and doing so "comports with the values and purposes underlying AEDPA." *Calderon*, 523 U.S. at 557-58; *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal."). An interpretation of AEDPA as foreclosing this Court's habeas jurisdiction would thus bring the constitutionality of the statute into question under the Suspension Clause. U.S. Const. art. I, §9, cl. 2. *See Boumediene v. Bush*, 553 U.S. 723, 785 (2008).

The circuit split on whether the *Sawyer* exception to the bar on second or successive habeas petitions has survived AEDPA's enactment and can be read consistently with § 2244(b)(2)(B) should be resolved by this Court. The Court may decide this matter pursuant to its authority to issue original writs of habeas corpus. *See* 28 U.S.C. §§ 2241(a), 2254(a); *Felker*, 518 U.S. at 662 (holding § 2244(b)(3)(E) does not eliminate jurisdiction over original writs of habeas corpus). Indeed, if § 2244(b)(3)(E) were construed not only to bar review of orders denying authorization but also to prohibit determination of the scope of gatekeeping jurisdiction,

then it would improperly shield such decisions from review and risk violating the Suspension Clause and Exceptions Clause. *See Felker*, 518 U.S. at 667 (Souter, J., concurring) ("[S]hould [it] later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open. The question could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard.").

The State of Arkansas is seeking to execute an intellectually disabled man who has never been afforded any forum to litigate the merits of his *Atkins* claim. This Court should resolve this important circuit split to afford Mr. Williams the opportunity to seek the substantive relief he is due under the Eighth Amendment, or, at a minimum, ensure that Arkansas's violation of the Eighth Amendment in executing Mr. Williams is conducted in accordance with the proper procedure due under AEDPA.

This Court should set argument on this question and grant the writ.

CONCLUSION

The petition for a writ of habeas corpus should be granted, or, alternatively, transferred the case to the district court for a hearing and determination.

Respectfully submitted,

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Dated: April 27, 2017

VERIFICATION

I, Shawn Nolan, counsel of record for Petitioner Kenneth Dewayne Williams, hereby verify under penalty of perjury that the facts and allegations set forth in the foregoing Petition for Writ of Habeas Corpus are true and correct to the best of my personal knowledge and belief. I am authorized to provide this verification by Mr. Williams and pursuant to 28 U.S.C. § 2242.

4/27/17
Date

Shawn Nolan