

No. ____
Related Case Nos. 17-1892 & 17-1893

CAPITAL CASE – EXECUTION SCHEDULED FOR APRIL 27, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KENNETH DEWAYNE WILLIAMS,
Applicant-Petitioner

v.

WENDY KELLEY, Director,
Arkansas Department of Correction,
Respondent

MOTION FOR STAY OF EXECUTION

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Dated: April 26, 2017

INTRODUCTION

Petitioner Kenneth Williams respectfully requests from this Court a stay of execution pending consideration of his Application to File a Second or Successive Petition Pursuant to 28 U.S.C. § 2244 in the United States District Court for the Eastern District of Arkansas. That motion seeks authorization from this Court to file a successive habeas petition based on the United States Supreme Court's recent decision in *Moore v. Texas*, 137 S.Ct. 1039 (2017), and because Mr. Williams can prove by clear and convincing evidence that he is intellectually disabled. Mr. Williams meets the *Moore* and medical community standards for a person with intellectual disability. Neuropsychologist Daniel A. Martell, Ph.D. (who evaluated Mr. Williams last week), psychologist Mark D. Cunningham, Ph.D. (who evaluated Mr. Williams at trial), and neuropsychologist Ricardo Weinstein, Ph.D. (who was never asked to complete his evaluation for state post-conviction 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.

Mr. Williams now seeks a stay of execution so that this Court can review his meritorious claims for relief.

MR. WILLIAMS IS ENTITLED TO A STAY OF EXECUTION

The standards for a stay of execution are well-established. Relevant considerations for granting a stay include the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Nooner v. Norris*, 491 F.3d 804, 808 (8th Cir. 2007). All three factors weigh strongly in Mr. Williams's favor.

First, Mr. Williams's motion presents a "significant possibility of success on the merits." *Hill*, 547 U.S. at 584. As set forth in his motion, and accompanying petition, Mr. Williams has put forth substantial claims of intellectual disability. As shown in the motion, Mr. Williams can prove by clear and convincing evidence he meets all three prongs to a finding of intellectual disability: (1) deficits in intellectual functioning/ subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) onset before age 18. A person who suffers from intellectual disability is categorically ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

Mr. Williams has also met the necessary requirements for this Court to authorize him to file a successive habeas petition based on the substantive rule announced in *Moore* that "[t]he medical community's standards supply one

constraint on States' leeway" in applying the test for intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Moore*, 137 S.Ct. at 1053. If this Court grants Mr. Williams Application to File a Second or Successive Petition, there is a strong likelihood that Mr. Williams will ultimately succeed on the merits of his claims for relief.

Second, the balance of harms weighs in Mr. Williams's favor. The harm to Mr. Williams of being put to death without ever receiving a hearing to determine whether he is intellectually disabled cannot be overstated. By contrast, the State's sole interest in securing Mr. Williams's imminent execution is that its current batch of the sedative midazolam will expire before the end of this month. But a State's interest in exhausting its supply of lethal injection drugs cannot outweigh the interest of Mr. Williams and the public in ensuring that a person with an intellectual disability not be put to death. *Moore*, 137 S.Ct. at 1048.

As the Supreme Court in *Atkins* explained: "[t]hose mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes. Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. Therefore, "[n]o legitimate penological purpose is served by executing a person with intellectual disability. To do so

contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.” *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

Finally, Mr. Williams has not unreasonably delayed the assertion of his rights. Undersigned counsel was appointed only ___ days ago, on April 11, 2017. Prior to undersigned counsel’s appointment, Mr. Williams former counsel, Jeff Rosenzweig, alone represented Mr. Williams in state and federal post-conviction proceedings. In state court, Mr. Rosenzweig inexplicably abandoned an *Atkins* claim. Mr. Rosenzweig failed to raise an *Atkins* claim in federal court, and as the Supreme Court has recognized “[a]dvancing such a claim would have required [counsel] to denigrate [his] own performance. Counsel cannot reasonably be expected to make such an argument which threatens [his] professional reputation and livelihood.” *Christeson v. Roper*, 135 S.Ct. 891, 894 (2015). Undersigned counsel has acted with all due haste in bringing the instant motion before this Court mere days after his appointment and has not “unreasonably delayed” the assertion of his rights.

WHEREFORE, for the foregoing reasons and those explained in his Application to File a Second or Successive Petition Pursuant to 28 U.S.C. § 2244, Mr. Williams respectfully requests that the Court stay his execution pending its consideration of his meritorious claims for relief.

Respectfully submitted,

/s/ Shawn Nolan

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April 26, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A). This document contains 880 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). This document also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Word 2010, in 14-point Times New Roman font. I further certify that this document has been scanned for viruses using Symantec Endpoint Protection and found to contain no known viruses.

/s/ Shawn Nolan
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CERTIFICATE OF SERVICE

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

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Eighth Circuit Court of Appeals

PRO SE Notice of Docket Activity

The following was filed on 04/26/2017

Case Name: Kenneth Williams v. Wendy Kelley

Case Number: 17-1896

Docket Text:

MOTION for stay of execution, filed by Petitioner Mr. Kenneth Dewayne Williams w/service 04/26/2017. [4529454] [17-1896]

The following document(s) are associated with this transaction:

Document Description: motion

Notice will be mailed to:

Notice will be electronically mailed to:

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