No. 17-1893

CAPITAL CASE – EXECUTION SCHEDULED FOR APRIL 27, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

KENNETH DEWAYNE WILLIAMS,
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 is currently scheduled to be executed on April 27, 2017, at 7:00 p.m. Mr. Williams respectfully requests from this Court a stay of execution pending consideration of his application for certificate of appealability (COA). That application seeks a COA regarding Mr. Williams's claim that he is intellectually disabled, thus categorically ineligible to be put to death. In support of Mr. Williams's claim, Mr. Williams has proffered declarations from three independent mental health professionals that he is a person with intellectual disability. Neuropsychologist Daniel A. Martell, Ph.D. (who evaluated Mr. Williams last week), psychologist Mark D. Cunningham, Ph.D. (who evaluated Mr. Williams at trial), and neuropsychologist Ricardo Weinstein, Ph.D. (who was never asked to complete his evaluation for 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 claim for relief.

MR. WILLIAMS IS ENTITLED TO A STAY OF EXECUTION

1. 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.

2. 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 application, Mr. Williams has put forth a substantial claim of intellectual disability. As shown in the application, Mr. Williams can demonstrate that 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 to be executed. *Atkins v. Virginia*, 536 U.S. 304 (2002).

3. Mr. Williams has also demonstrated a significant possibility that his habeas petition is procedurally proper. As set forth in Mr. Williams's COA application, although this claim is being raised in a second-in-time habeas petition, it was properly filed in the district court without seeking preauthorization from this Court for several reasons. Specifically: 1) claims of intellectual disability constitute a substantive restriction on the state's power to execute a class of citizens, thus they cannot be waived and become ripe when an execution warrant is signed; 2) prior to current counsel's appointment on April 11, 2017, Mr. Williams

was at all times during his initial state and federal post-conviction proceedings represented by an ineffective lawyer who suffered from a debilitating conflict of interest, thus making it impossible for Mr. Williams to have raised this claim earlier; 3) to the extent 28 U.S.C. § 2254 does not provide an avenue for habeas relief, 28 U.S.C. § 2241 necessarily does; and 4) a failure to consider Mr. Williams's categorical-exclusion claim under both § 2254 and § 2241 would constitute an unconstitutional suspension of the writ of habeas corpus under Article I, Section 9 of the Constitution. Because Mr. Williams's petition is both meritorious and procedurally proper, there is a strong possibility that he will succeed on the merits of his claim.

4. 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 v. Texas*, 137 S.Ct. 1039, 1048 (2017).

5. 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).

6. Finally, Mr. Williams has not unreasonably delayed the assertion of his rights. Undersigned counsel was appointed just over two weeks 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 this 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 for certificate of appelability, Mr. Williams respectfully requests that the Court stay his execution pending its consideration of his meritorious claim for relief.

Respectfully submitted,

/s/ Shawn Nolan

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Dated: April 26, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A). This document contains 1,272 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
SHAWN NOLAN

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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