****CAPITAL CASE****
EXECUTION OF KENNETH WILLIAMS SCHEDULED FOR APRIL 27, 2017

Nos. 16-8922 & 16A1044

In the
Supreme Court of The United States

KENNETH D. WILLIAMS,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

OPPOSITION TO APPLICATION FOR STAY OF EXECUTION AND CERTIORARI

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To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:[1]

Introduction

As previously explained in responses to various petitions recently filed by condemned Arkansas inmates, this Motion and Petition by Petitioner Kenneth Williams, represents another dilatory and piecemeal-litigation tactic designed to delay his lawful execution. Since February, Williams has been scheduled for execution this evening for the cold-blooded murder of Cecil Boren nearly two decades ago. His conviction and death sentence have been examined in complete rounds of direct and collateral review in state court and federal *habeas corpus* proceedings. *Williams v. Norris*, No. 5:07cv00234 SWW, 2008 Westlaw 4820559 (E.D. Ark. Nov. 4, 2008), *aff'd by Williams v. Norris*, 612 F.3d 941, 959 (8th Cir. 2010), *cert. denied sub nom. Williams v. Hobbs*, 562 U.S. 1290 (2011).

On April 25, 2017, in his federal *habeas corpus* proceeding, which has been final since 2008, Williams filed a new petition raising a claim for relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Williams,* 5:07cv00234 SWW, Doc. No. 45. He also filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b)(6), seeking to litigate a new claim of juror misconduct, which he faults his previous federal habeas counsel for failing to adequately litigate. *Williams,*

[1] Due to time constraints, Respondent submits this document in opposition to the application for a stay, and if the Court decides to immediately review Petitioners' anticipated petition for a writ of certiorari, Respondent submits the arguments contained herein in opposition to certiorari.

5:07cv00234 SWW, Doc. No. 39. The district court concluded that both filings constituted unauthorized, second or successive *habeas corpus* petitions and transferred them to the Court of Appeals for the Eighth Circuit. *Id.,* Doc. No. 57. That Court filed the matter as an application for authorization to file a successive *habeas corpus* petition and docketed it under USCA case number 17-1892.

In an obvious and continuing attempt to overwhelm the courts with last-minute filings containing claims that could have been asserted years ago in both state court and in his original habeas-corpus proceedings, Williams then filed in the Court of Appeals, in addition to the transferred proceedings in No. 17-1892: 1) a notice of appeal and request for certificate of appealability from the order transferring the petition that raised the *Atkins* claim; 2) a related motion for stay of execution in No. 17-1893; 3) an application for authorization to file a second or successive petition raising the *Atkins* claim in No. 17-1896; and 4) a motion for stay of execution in the same. As of this writing, the Court of Appeals has not ruled in these matters, but Williams has filed the instant application in this Court, seeking an original writ. He asks this Court to consider his *Atkins* claim as an original matter because he failed to litigate it in his many previous filings. He also apparently asks this Court to review the question of whether his successive petition request should have been granted under 28 U.S.C. § 2244(b)(2)(B)(ii) for his *Atkins* claim, under the theory that he is actually innocent of the death penalty.

Petitioner wrongly suggests that this Court should stay his imminent executions to resolve his second or successive claim that he is ineligible for

execution because he is intellectually disabled, a claim he presented, but then abandoned, in state court proceedings and failed to raise in his first *habeas corpus* proceeding under 28 U.S.C. § 2254. Petitioner has had many years in which to litigate this issue, and ultimately elected not to do so until two months after his execution was scheduled in February. He lacks any likelihood of success on the merits of his claim, and faces procedural obstacles to the claim as well. Both the writ and the stay application should be denied.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 2101(f), 28 U.S.C. 1257(a), and Supreme Court Rule 23.

Background

A. Williams's escape from prison and murder of Cecil Borden.

On September 15, 1999, Williams was sentenced to life without parole for the December 13, 1998 capital murder of Dominique Herd, the attempted capital murder of Peter Robertson, kidnapping, aggravated robbery, theft, and arson. He was sent to the Cummins Unit of the Arkansas Department of Correction (ADC) that same day.

Less than two weeks later, on September 26, 1999, Williams told Eddie Gatewood, a friend who visited him at the Cummins Unit, that he could not serve a life term and solicited Gatewood's help to escape. During that visit, Williams asked Gatewood to find him some clothes, a dress, and a wig, and asked Gatewood to leave

them out on the highway close to the prison. A week later, on October 3, 1999, Williams escaped from prison while on a release from his barracks for a morning "religious call."

Once outside the prison, on the morning of October 3, Williams reached the home of Cecil and Genie Boren. Earlier that morning, Genie Boren had gone to church, leaving her husband Cecil at home working in the yard. When she returned sometime after noon, she found her home had been ransacked and that Cecil was missing. She contacted a neighbor and she and the neighbor began frantically searching for Cecil. During their search, they discovered that all the Boren's firearms were gone, except a muzzleloader. The neighbor eventually discovered Cecil's lifeless body—lying face down without shoes or socks—near a bayou not far from the Boren's home. Cecil had been show seven times and scrape marks on his body revealed that his body had been dragged to the location where it had been found. The subsequent investigation established that Williams had shot Cecil closer to the house, and that Williams had stolen Cecil's truck, wallet, other valuables, and the missing firearms.

Around 11:00 that morning, Williams showed up at Eddie Gatewood's house asking for a map. Williams was driving Cecil's truck. Gatewood testified at Williams's trial that Williams told him he had killed a person to get the truck.

The next day, on October 4, 1999, Cecil's truck was spotted in Lebanon, Missouri, by police officer Dennis Mathis. Officer Mathis attempted to stop the truck. Initially, Williams pulled over, but drove off before Officer Mathis could

approach him. A high-speed chase began involving multiple police units covering roughly 60 miles. Speeds went as high as 120 miles per hour. Williams was only stopped when he struck a water truck that was turning left in front of him. Williams struck the truck in the cab, and the truck's driver, Michael Greenwood, was ejected and killed. Although the truck Williams stole was disabled by the collision, he continued to flee on foot before being apprehended.

More than 114 personal items belonging to Cecil and Genie Boren were removed from Cecil's truck, including the firearms stolen from their home. At the time of his arrest, Williams was wearing Cecil's coveralls and two of Cecil's rings.

B. Williams's trial for the capital murder of Cecil Borden

At trial, Arkansas was unable to link the .22 caliber fragments taken from Cecil's body to the firearms found in Williams's possession at the time of his arrest. However, there was testimony that the fragments likely came from one of six manufacturers, including Ruger. Importantly, Cecil owned a Ruger .22 caliber semi-automatic pistol, it was taken from his house the day of his murder, and, although the gun was never found, a clip to a Ruger .22 automatic *was* found in the truck when Williams was arrested. The jury was free to conclude that Williams shot and killed Cecil with his stolen Ruger pistol and disposed of the weapon in his flight from Arkansas but kept the ammunition for use with the remaining stolen weapons. At trial, Williams did not claim that he was intellectually disabled, and after hearing this evidence, a jury found Williams guilty of theft of property and capital murder.

At his sentencing, evidence of two prior crime sprees was introduced, and on August 30, 2000, a jury convicted Williams of the capital-felony murder of Cecil Boren and theft. Williams was sentenced to death on the capital-murder conviction and received 40 years' imprisonment on the theft conviction.

1. *Williams's kidnapping and aggravated robbery of Sharon Hence.*

In the sentencing phase of Williams's trial, the jury heard evidence that on December 5, 1998, Williams kidnapped and robbed Sharon Hence. According to the record, Hence was using an ATM machine in Pine Bluff when Williams got into her car, pulled a gun, and demanded that she get more money out of the machine. When Hence was unable to do so, Williams ordered her to drive away. As they drove around Pine Bluff, Williams rifled through Hence's purse and threatened to shoot her. Eventually, Hence stopped the car on a dead-end street. Williams ordered her to give him all of her jewelry, empty her pockets, and, thankfully, allowed Hence to get out of the car. Hence's car was later found burning roughly two and one-half blocks away from Williams's apartment. At Williams's subsequent August 1999 jury trial for arson, kidnapping, theft, and robbery, Hence identified Williams as the man who had kidnapped, robbed, and terrorized her. He was convicted of arson, kidnapping, aggravated robbery, and theft of property. He was sentenced to respective terms of six, ten, five, and five years in prison, to be served consecutively.[2]

[2] Williams's convictions and sentences were affirmed by the Arkansas Court of Appeals in *Williams v. State*, No. CACR 00-432, 2000 WL 1745216 (Ark. Ct. App. Nov. 29, 2000).

2. Williams's cold-blooded murder of Dominique Herd and attempted murder of Peter Robertson

The jury also heard evidence that in December 1998, Williams kidnapped Peter Robertson and Dominique Herd, two students at the University of Arkansas at Pine Bluff, and murdered Herd. On December 13, 1998, Robertson and Herd had borrowed a friend's car to go to church and eat at the Bonanza Steak House. Upon exiting the restaurant, Williams approached the couple, briefly talked with them, and then pulled a gun and forced them into their car. Williams sat in the back seat of the car and directed Robertson where to drive. He first made them go to a bank ATM to withdraw $70 from Robertson's account. Williams also attempted to withdraw money from Herd's account, but in her terror, Herd could not remember her P.I.N., so Williams directed Robertson to drive off.

During the drive, Williams continued to tell the terrified couple that they would be fine and directed them to drive around town. Eventually, Williams directed them down a dead-end street and made the couple get out of the car. Williams then lifted Herd's dress and pulled down her underwear and, horrifically, forced Robertson to take a picture of her.

Williams then directed the couple to drive to another dead-end street, get out of the car, climb a fence, go behind a shed, and kneel down. Williams initially got into the car and departed. But Williams then backed up, asked Herd for her purse, and asked, "Where did you say you were from again?" Herd answered, "Dallas," and Robertson answered, "New Jersey." Williams responded, "I don't like the niggers from Dallas anyway," and shot the couple, emptying the gun in the process.

Williams left them there to die. Miraculously, Robertson survived the shooting and was able to call the police. Herd died from a gunshot to her head. After fleeing the murder scene, Williams—as he had with Hence's car—torched and abandoned the victims' car.

Robertson identified Williams both in a photo line-up—and at trial—as the man who had kidnapped, terrorized, robbed, and shot both him and Herd. On September 14, 1999, a jury convicted Williams of the capital murder of Herd, the attempted capital murder of Robertson, kidnapping, aggravated robbery, theft, and arson.[3] Williams was sentenced to life imprisonment without the possibility of parole. Just 18 days later, Williams escaped from prison, murdered Cecil Boren, and led police on a high-speed chase that killed Michael Greenwood.

C. Williams's direct and collateral review proceedings.

By continuously raising and strategically withdrawing frivolous and purportedly newly-discovered claims, Williams has successfully evaded justice for *more than a decade-and-a-half*.

1. *Williams's proceedings on direct review*.

Williams appealed his conviction and death sentence to the Arkansas Supreme Court. He raised twelve different claims, including arguing that: (1) the state circuit court abused its discretion by ordering that he appear at trial wearing prison garb, shackles, and handcuffs; (2) two of the jurors seated on his jury, Brenda

[3] Williams's convictions for those crimes were affirmed by the Arkansas Supreme Court in *Williams v. State*, 343 Ark. 591, 36 S.W.3d 324 (2001).

Patrick and LaRhonda Washington, should have been removed for cause; (3) the state circuit court erroneously admitted evidence that Williams was apprehended in Missouri following a high speed chase that resulted in a traffic fatality; (4) there was insufficient evidence to prove that Williams committed first-degree escape, which was one of the two felonies that the State relied on in prosecuting Williams for capital-felony murder; (5) there was insufficient evidence to support his capital-murder conviction; (6) the jury ignored mitigation evidence; (7) the state circuit court erred by denying his motion for funds to hire a corrections expert; (8) the state circuit court erred by admitting victim-impact evidence during the penalty phase, and that it was improperly used; (9) it was error to submit Ark. Code Ann. §5-4-604(5) (Repl. 1997) as an aggravating factor because there was no evidence that the appellant committed the murder to avoid arrest, (10) it was error to submit Ark. Code Ann. §5-4-604(4) (Repl. 1997) as an aggravating factor because there was no evidence that Williams caused multiple deaths during the same criminal episode; (11) Ark. Code Ann. § 5-4-604(2) and Ark. Code Ann. § 5-4-604(5) were unconstitutionally duplicative; and (12) the state circuit court erred by denying Williams's motion for mistrial based on the seating of an alternate juror for the penalty phase of trial.

In a February 21, 2002 opinion, the Arkansas Supreme Court rejected Williams' claims and affirmed his conviction and death sentence. *Williams v. State*, 347 Ark. 728, 67 S.W.3d 548 (2002).

2. *Williams's state collateral proceedings*

In state collateral proceedings, Williams was appointed counsel and pursued claims that (1) his trial counsel was ineffective for failing to submit evidence of intellectual disability under Ark. Code Ann. §5-4-618; (2) he is intellectually disabled and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304; (3) his trial counsel was ineffective for failing to object to improper victim-impact evidence; (4) his trial counsel was ineffective for failing to object to a biased juror; (5) his trial counsel was ineffective for failing to properly object to the jury's failure to consider mitigating evidence; (6) his trial counsel was ineffective for failing to introduce the supporting expert mitigation evidence; and (7) his rights were violated by the requirement that he wear prison clothing and be shackled in front of the jury, as well as placement of several uniformed officers in his immediate vicinity and, to the extent that the issue was not adequately preserved, that he received ineffective assistance as to the claim. (PCR. 7-16, 63).[4]

Prior to his state postconviction hearing, the state circuit court granted Williams's motion for funds to hire an expert on the question of whether Williams was intellectually disabled and authorized expenditure of $10,000 to hire Dr. Ricardo Weinstein of Encinitas, California for that purpose. (PCR. 31). The court also granted Williams's motion for funds to hire an investigator for that claim and related issues. (PCR. 36). At the beginning of the September 8, 2005 state collateral review hearing, Williams's postconviction counsel informed the court that,

[4] The state trial and postconviction records were submitted per Habeas Rule 5 in the district court in *Williams v. Kelley*, No. 5:07CV00234-SWW (E.D. Ark.), ECF No. 8.

> Claims One and Two, we are not going to pursue in this matter. That deals with the retardation issue. And this was propounded and investigated in good faith. And there, in fact, was testimony in the trial record about borderline mental issues. But after—and the Court did authorize full testing of Mr. Williams. And after that testing was done, it was—we have decided not to pursue that—those two claims. So Claims One and Two would not be pursued at this time. And I wanted just to let the Court—let the Court know.

(PCR. 137). The state circuit court noted the abandonment of those two claims in its order denying Rule 37 relief. (PCR. 116). The Arkansas Supreme Court affirmed the denial of relief on March 1, 2007. *Williams v. State*, 369 Ark. 104, 251 S.W.3d 290 (2007).

3. *Williams's initial federal habeas proceedings*

On September 10, 2007, Williams filed a petition for writ of habeas corpus in the Eastern District of Arkansas. In that petition, he raised seven separate claims that: (1) his Eighth Amendment rights were violated by the refusal to provide funds for or permit the presentation of mitigation evidence that the ADC bore some responsibility for the events causing Boren's death; (2) the state circuit court improperly permitted certain victim-impact evidence and, to the extent the argument was defaulted by trial counsel, counsel was ineffective; (3) trial counsel was ineffective for failing to properly object to a biased juror; (4) trial counsel was ineffective for failing to properly object to the jury's failure to consider mitigating evidence; (5) trial counsel was ineffective for failing to introduce the supporting documentation of mitigation evidence; (6) Williams's due-process rights were violated by being required to stand trial shackled, in prison attire, and with

numerous uniformed guards around him, and, to the extent trial counsel defaulted the argument, he was ineffective; and (7) his Sixth Amendment rights were violated by the denial of funds for an investigator to probe issues of juror bias and misconduct. On November 4, 2008, the district court denied his petition in its entirety. *Williams v. Norris*, No. 5:07cv00234, ECF No. 10, 2008 WL 4820559 (E.D. Ark. Nov. 4, 2008).

Williams appealed, and the Eighth Circuit addressed each of the seven issues as to which the district court denied relief. On July 15, 2010, it affirmed the district court's decision denying relief. *Williams v. Norris*, 612 F.3d 941 (8th Cir. 2010). Williams subsequently filed a petition for writ of certiorari, which was denied on March 28, 2011. *Williams v. Norris*, 562 U.S. 1290 (2011), E.D. Ark. No. 5:07cv00234, ECF No. 25.

D. Williams's recent dilatory and piecemeal filings

On February 27, 2017, Arkansas Governor Asa Hutchinson scheduled Williams' execution for April 27, 2017. Williams then waited—nearly two months—until April 21, 2017, to launch his most recent individual claims. His filings are little more than an obvious and continuing attempt to overwhelm the courts with last-minute filings containing claims that could have been raised long ago.

1. *Arkansas Supreme Court*

On April 21, Williams asked the Arkansas Supreme Court to recall its 10-year-old postconviction mandate so that he could raise a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), as well as claims of juror and prosecutorial misconduct. He alternatively attempted to invoke the state remedy of error-coram-

nobis relief. On the night of April 24, 2017, he also filed a second motion to recall the mandates of both his direct and postconviction cases in the Arkansas Supreme Court so that he could challenge his jury's consideration of mitigating evidence. The Arkansas Supreme Court denied his claims on April 26, 2017.

On that same date that he filed his first motions in the Arkansas Supreme Court, Williams also filed a petition for writ of habeas corpus in state circuit court and a motion in the Arkansas Supreme Court to stay his execution pending that state habeas corpus proceedings. In both of those petitions, he argued that his *Atkins* claim is a basis for state-habeas-corpus relief. Both those motions have been denied, and shortly before this filing, Williams appealed the denial to the Arkansas Supreme Court and asked again for a stay.

2. *Federal Habeas proceedings*

On April 24, 2017, Williams filed four pleadings in his long-closed federal habeas case, *Williams v. Kelley*, (E.D. Ark.) 5:07-CV-00234-SWW. Those pleadings include: (1) Docket No. 39, a motion for relief under Rule 60(b)(6), (2) Docket No. 40, a motion for a stay based on the 60(b)(6) motion, (3), Docket No. 45, a petition for habeas-corpus relief, and (4) Docket 46, a motion for a stay of execution based on the habeas petition. The district court transferred all of these pleadings to the Court of Appeals for the Eighth Circuit. *Williams v. Kelley*, No. 17-1892 (8th Cir.) (filed Apr. 26, 2017).[5] They remain pending as of this filing.

[5] In addition to the transferred proceedings discussed in this Response, *Williams v. Kelley,* No. 17-1892, Williams separately filed: 1) a notice of appeal and request for certificate of appealability from the order transferring the petition that raised an

This Response pertains to the Petition and Motion to Stay apparently related to the pending, last-minute federal court filings involving the successive *Atkins* claim. The Petition and Motion to Stay should be denied.

Reasons for Denying a Stay and Writ of Certiorari

A stay of execution is an equitable remedy that must take into account the movant's delay in seeking a stay, and also whether he or she has demonstrated a strong likelihood of success on the merits. *See Hill v. McDonough*, 547 U.S. 573 (2006). Applicants seeking a stay must meet all the elements of a stay, including showing a significant possibility of success on the merits. In *Hill*, this Court held that a pending lawsuit does not entitle a condemned murderer to a stay of execution as a matter of course, and that the State and crime victims have a profound interest in the timely implementation of a valid and final death sentence. *Id.* at 583-84. Instead, courts must "apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)); *see also*, *e.g.*, *Gomez v. United States Dist. Ct. for the Northern Dist. of Calif.*, 503 U.S. 653, 654 ("A court may consider the last-minute

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Atkins claim, No. 17-1893; 2) a related motion for stay of execution in *Williams v Kelley*, No. 17-1893 (8th Cir.); 3) an application for authorization to file a second or successive petition raising the *Atkins* claim in case *Williams v Kelley*, No. 17-1896 (8th Cir.); and 4) a motion for stay of execution in *Williams v Kelley*, No. 17-1896 (8th Cir.).

nature of an application to stay execution in deciding whether to grant equitable relief."). Because this case involves both unreasonable delay on Williams's part, and because he fails to demonstrate a substantial likelihood of success on the merits, the instant motion for a stay should be denied.

A. Williams' use of "piecemeal litigation" and dilatory litigation tactics is sufficient reason by itself to deny a stay.

This Court does "not in the least condone, but instead condemn[s], any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack time to give them the necessary consideration before the scheduled execution. A court may resolve against such a petitioner doubts and uncertainties as to the sufficiency of his submission." *Sawyer v. Whitley*, 505 U.S 333, 341 n.7 (1992). Williams's motion should be denied for this reason alone. There are additional considerations further indicating the unreasonable delay present in this case weighing against the entry of a stay. *See Hill*, 547 U.S. at 583-84 (instructing that the Court "apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring an entry of a stay.") (citation and quotation omitted). That Williams waited till the eve of his scheduled execution to bring his claims is reason alone to deny a stay.

A stay of executions is not justified because Petitioner has not demonstrated that his claim warrants this Court's review, much less that there is a significant possibility that this Court would reverse the Arkansas Supreme Court.

B. The AEDPA informs this Court's consideration of original habeas corpus actions and counsels against Williams's request for relief from his sentence.

It is unquestioned that the Antiterrorism and Effective Death Penalty Act ("the AEDPA") has not repealed this Court's authority to entertain original habeas petitions. *E.g., Felker v. Turpin*, 518 U.S. 651, 660 (1996). However, the Court has acknowledged that § 2244(b)(3)(E) precludes it from reviewing, by appeal or petitioner for writ of certiorari, a judgment on an application for leave to file a second habeas petition in district court. *Id.* at 661. And, while § 2244(b)(3)'s gatekeeping system for second petitions does not apply to this Court's consideration of original habeas petitions, since it applies to applications "filed in the district court[,]" *id.* at 662, the restrictions on repetitive and new claims imposed by § 2244(b)(1) and (2) "apply without qualification to any "second or successive habeas corpus application under section 2254." *Id.* (internal quotations and citations omitted). Consequently, in *Felker* this Court held that "[w]hether or not [it is] bound by these restrictions, they certainly inform [its] consideration of original habeas petitions." *Felker*, 518 U.S. at 664.

These restrictions, along with the standards in Sup. Ct. R. 20.4(a) counsel against Williams's effort to obtain review of his untimely and patently meritless successive claim. *Williams* has indicated that his reason for not making application to the district court is because he failed to raise his *Atkins* claim in available proceedings, and that his claim has not qualified for a second application under § 2244(b). The original writ here should not operate merely as an end-run around

AEDPA's provisions that serve as a restraint on a prisoner's "abuse of the writ." Further, to justify the grant of a writ here, Williams must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. *Id.* at 665. "These writs are rarely granted." *Id.*

Under *Atkins v. Virginia,* 536 U.S. 304 (2002), it is state law that governs a federal court's resolution of a habeas petitioner's claim that he is mentally retarded and, therefore, ineligible for the penalty of death. Because there is no state consensus for identifying mental retardation, states may be justified in concluding that those who lie at the margins of the clinical definitions do not necessarily fit the category of mentally retarded persons about whom there is national consensus for Eighth Amendment purposes. *See Atkins,* 536 U.S. at 317 (noting serious disagreement about which offenders are retarded and leaving it to the States to develop appropriate ways to enforce the constitutional restriction). Under Arkansas law, it is Williams's burden to show by a preponderance of the evidence that he suffered from mental retardation at the time of his capital crime. To establish mental retardation, he must prove three things: (1) "[s]ignificantly subaverage general intellectual functioning ... manifest [ing] ... no later than ... age eighteen (18)," (2) "accompanied by significant deficits or impairments in adaptive functioning manifest[ing] ... no later than … age eighteen (18)[,]" and (3) "[d]eficits in adaptive behavior." *See* Ark. Code Ann. §5-4-618(a)(1)(A) and (B). Even at this late date, Williams cannot establish that he meets the criteria for mental

retardation under Arkansas law. Consequently, his last-minute request for a writ from this Court (petition at page 23) or, in the alternative, a transfer of this action back to the district court should promptly be rejected.

To begin with, this Court has recognized that the level of intellectual functioning that is associated with mental retardation is generally represented by I.Q. scores that are statistically significant—that is, scores that are two standard deviations (of 15 points each) below the mean score of 100, which equates to a score of approximately 70 or below. *See Hall v. Florida*, 134 S. Ct. 1986, 1998-1999 (2014); *Sasser v. Hobbs*, 735 F.3d 833, 843 (8th Cir. 2013). Earned I.Q. scores on standardized tests, however, can contain a margin of error ("SEM") of approximately +/-5 points. *Hall*, 134 S.Ct. at 1995-1996. Thus, in *Hall*, this Court held that a state may not define significantly subaverage intellectual functioning with a strict ceiling of 70 for earned I.Q. scores because such a restriction does not account for the possibility that, due to the SEM, a person with an earned score as high as 75 may have a true I.Q. of 70 or below and thereby satisfy the intellectual functioning prong of the mental retardation/intellectual disability standard. *Hall*, 134 S.Ct. at 1994.

By Williams's own submissions, his I.Q. scores generally place him outside the score for intellectual disability, as recognized in *Hall*. (Williams's Appendix at A-21, A-67). Williams has taken the liberty of adjusting his I.Q. scores downward for the so-called Flynn Effect, which posits that I.Q. scores should be adjusted downward to account for the rise in I.Q. scores as a testing instrument becomes

outdated. Nothing in *Atkins* suggests that I.Q. test scores must be adjusted to account for the Flynn Effect in order to be considered reliable evidence of intellectual functioning. The Flynn Effect, moreover, is not universally accepted. *See, e.g., Hooks v. Workman,* 689 F.3d 1148, 1170 (10th Cir. 2012) ("*Atkins* does not mandate an adjustment for the Flynn Effect. Moreover, there is no scientific consensus on its validity."); *Richardson v. Branker,* 668 F.3d 128, 152 (4th Cir. 2012) (noting that *Atkins* does not require that the Flynn effect be accounted for in determining intellectual disability); *Pruitt v. Neal*, 788 F.3d 248, 267 & n.2 (7th Cir. 2015) (noting conflicting testimony over the validity of the Flynn Effect). Even with the adjustment made for the disputed Flynn Effect, the majority of Williams's scores fall above the score of 75 which this Court recognized in *Hall* may satisfy the intellectual functioning prong of the mental retardation/intellectual disability. Williams admits, moreover, that his average adjusted I.Q. score is 71.8. (Petition at 11). This score, in fact, place him squarely in the "low to mid borderline range" of intellectual functioning and is inconsistent with a diagnosis of mental retardation. *See Jones v. Johnson*, 171 F.3d 270, 276 (5th Cir.) *cert. denied* 527 U.S. 1059 (1999) (borderline intelligence does not constitute mental retardation).

Williams recognizes that his I.Q. scores are a potential barrier to a finding of mental retardation/intellectual disability. Thus, he instead turns the focus of his petition to his alleged deficits in adaptive functioning. (*See* Petition at page 9). The Diagnostic and Statistical Manual of Mental Disorders—Fifth Edition ("DSM-5") recognizes that deficits in intellectual functioning are characterized by deficits in

"reasoning, problem solving, abstract thinking, judgment, academic learning, and learning from experience." According to the DSM-5, however, these deficits are to be "confirmed by both clinical assessment **and individualized, standardized intelligence testing**." DSM-5 at 33 (emphasis added). Thus, although Williams would prefer this Court disregard his above-the-cut I.Q. scores and focus on his alleged adaptive deficits, the DSM-V continues to recognize that valid I.Q. scores are a required tool in the assessment of intellectual functioning. Williams's scores, even when adjusted, simply do not support a finding of mental retardation/intellectual disability. In addition, extensive evidence shows that Williams's assertion of adaptive deficits is highly overstated.

Prior to his trial for the Boren murder, Williams was examined by David Nanak and Dr. William Cochran. They determined that Williams had a Full Scale I.Q. of at least 74. However, they deemed the score a "minimum estimate" due to Williams's lack of effort during the evaluation. The report included the following:

> It is felt that this assessment may be an underestimate of Mr. Williams' current functioning level and capabilities. Throughout the testing situation, he spent most of his time slouching in the chair, supporting his head with one hand while using the other hand to manipulate objects. Quite often he would give quick "I don't know" responses without even reflecting on the questions being posed of him. About a third of the way into the testing situation he asked if he had to complete the tests, and again it was explained to him that this was a court ordered assessment and that I had to make a report back to the court. I explained to him that if he refused to take the testing that would be reported back to the judge.
>
> TEST RESULTS AND INTERPRETATION: Mr. Williams attained a WAIS-III Full Scale IQ of 74, which would suggest Borderline intellectual functioning. He attained a verbal I.Q. of 76 and a Performance I.Q. of 75 with both scores falling into the same

> classification range. Again, it is felt that because of his low motivation, quick "I don't know" responses, and scatter throughout the testing that this is considered a minimum estimate and that at least Low Average intellectual potential may exist for this individual.

This report was attached to Williams's appendix in the Eighth Circuit at A-48-A-51. In 2004, Williams's state collateral counsel also had Williams's I.Q. tested in conjunction with that proceeding, and unequivocally abandoned a mental retardation claim after the results of the testing showed the Williams was not intellectually disabled. By Williams's own submissions his adjusted I.Q. score at the time of the state collateral proceeding was a 78, (*see* Williams's Appendix at A-67), placing him well above the cut-off for mental retardation and fully explaining postconviction counsel's reason for withdrawing the claim.[6]

Williams's claim is also belied by his prolific criminal record. For example, on August 26, 1999, just over a month before escaping the Cummins unit and murdering Cecil Boren, a jury convicted Williams of arson, kidnapping, aggravated robbery, and theft of property for his December 5, 1998, crimes against Sharon Hence. At that trial, Williams testified in his own defense. He explained that, in

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[6] In a recent motion to withdraw from Williams's federal case, Williams's lawyer since 2004, Jeff Rosenzweig averred that he initially had accepted help in Williams's case from the Pennsylvania Federal Defender as co-counsel because of his involvement in representing other death sentenced inmates with simultaneously set execution dates. Subsequent to their appointment, the Pennsylvania Federal Defender has filed numerous pleadings in numerous courts, alleging that Williams is mentally retarded/intellectually disabled under *Atkins*. After learning what the Pennsylvania Office proposed to file on Williams's behalf, however, Rosenzweig could not "endorse the accuracy" of the pleadings and moved to withdraw in the federal proceedings. *Williams v. Norris*, E.D. Ark. No. 5:07cv00234, ECF No. 36.

December 1998, he was working a full-time job and paying his own bills. *Williams v. State*, No. CACR 00-432, at 217-18. He testified at trial that he did not commit the crimes and he recalled in detail his purported alibi during the time period of those crimes. *Williams v. State*, No. CACR 00-432, at 219-34. A review of his testimony from that trial reveals that Williams was coherent, well-spoken, thoughtful, and recalled specific details evidencing linear thinking and intelligence.

The record in this case similarly belies Williams' claims. For instance, in his trial for the capital murder of Cecil Boren, Williams filed several *pro se* pleadings, including a Motion for Recusal and a Motion for Dismissal of Court Appointed Counsel. T.R. at 118-24. Moreover, two months before trial, Williams's experienced criminal-defense attorneys, Dale Adams and John Cone, filed a "Motion to Allow Defendant to Participate at Trial As Co-Counsel and Memorandum Brief in Support Thereof." T.R. at 312. In that motion, Williams's attorneys demonstrated extraordinary confidence, not only in Williams's ability to assist in his own defense, but to actually assist them in defending himself in a complex capital-murder trial. The follow is an excerpt from that motion:

> Based on the nature and circumstances of this case, it is expected that this will be an extended and complex trial. Further, it appears that most, if not all, of the evidence which will be presented in this matter lies within the Defendant's personal knowledge and in many instances, the clarification of such evidence may lie within his exclusive knowledge.

T.R. at 312.

Further, the mitigating-circumstances form submitted to the jury at Williams' sentencing in this case contained a mitigating circumstance that:

"Kenneth D. Williams suffers from borderline mental retardation." T.R. at 500(c)-500(g). The jury did not check the box for that mitigator. T.R. at 500(c)-500(g). Thus, the jury did not conclude that the evidence presented demonstrated that Williams suffered from "borderline mental retardation."

A plethora of post-trial and post-state collateral review evidence likewise confirms that Williams is not intellectually disabled. Prior to his state collateral proceeding, Williams vigilantly acted to protect his rights in in federal court. *See Jackson v. Norris*, 2016 WL 1740419 (E.D. Ark. 2016) (utilizing pro se pleadings to find no intellectual disability under *Atkins*.) Acting *pro se*, Williams filed a petition under 42 U.S.C. 1983, alleging the denial of medical attention by Arkansas prison authorities. He was denied relief in the district court, and he appealed to this court, which also denied relief. *See Williams v. Byus*, 79 F. App'x 242, 243 (8th Cir. 2003).

In addition, as demonstrated in Williams's clemency petition filed with the Arkansas Parole Board on March 14, 2017, Williams studied to become (and ultimately became a minister) during his time on death row. He has written several articles, which have been published in a variety of publications. He has obtained numerous certificates upon the completion of religious training, as well as a "Masters Degree in Religion" and an honorary "Doctor of Divinity" from the Universal Life Church. He has created board games called "Gang Proof," "Bully Proof," and "Drug Proof." In his clemency proceeding, Williams also spoke to the Parole Board for more than an hour, giving a sophisticated and theologically literate presentation, in which he admitted his guilt and sought to honor his victims. In

that presentation, he quoted scripture from the Old Testament and New Testament, understood and extracted themes of redemption from those passages, applied them to his own life, and communicated those tenets into a plea for mercy from the Board.

Williams's Condensed Health Services Encounter Form—obtained from the Arkansas Department of Correction—further demonstrates that Williams is acclimated to, and functions well in his current environment and that he performs extremely complex tasks. For example, on February 12, 2016, when visited by the mental-health staff, Williams "discussed [with staff] doing his taxes from the books he sold." In several other mental-health visits, Williams relayed that he is "working on his autobiography."

He also has been pursuing his rights in unrelated state-court actions. On April 22, 2016, Williams filed a *pro se* Petition to Establish Paternity in Jefferson County Circuit Court Case No. 35DR-16-397. Because he apparently had difficulty with service of process on the defendant in that case, he wrote on June 29, 2016, a coherent, well-reasoned letter explaining his struggle and requesting assistance in locating an address for the defendant. Williams subsequently obtained service on the defendant in that case, and on January 23, 2017, he wrote a letter to the circuit court clerk with the following request:

> Petitioner request that a paternity test be ordered, that Ms. Johnson make available [D.J.], the son Petitioner believes is his biological son. Petitioner request this be done soon as possible, consider he is a death row prisoner without any remaining appeals.

This letter, written only three months ago, shows Williams's persistence in asserting and protecting his rights, as well as thoughtful planning relating to the exhaustion of his appeals and his recognition that his execution date is imminent. The evidence demonstrates that Williams is not a person with mental retardation.[7]

In the end, *Atkins* recognized that, among other things, the intellectually disabled may "face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes that they did not commit, [and] their lesser ability to give their counsel meaningful assistance." *Atkins*, 536 U.S. at 305. None of this is a concern with Williams. Indeed, when apprehended in Missouri after Cecil Boren's murder, he requested an attorney, which led to the suppression of his pre-trial statements in the Boren murder. (T.R. at 580-81, 587, 735-39). And, as stated by counsel in the "Motion to Allow Defendant to Participate at Trial As Co-Counsel and Memorandum Brief in Support Thereof," his trial attorneys thought Williams capable enough to actively assist in his own defense of that case.

Atkins also noted it was probable that capital punishment could serve as a deterrent only when murder is the result of premeditation and deliberation, and

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[7] The referenced clemency application, articles, religious certificates, board games, audio recording of Williams's plea for clemency, *pro se* petition to establish paternity, and letters all are a matter of public record and were attached to the State's response to Williams's Motion to Recall the Mandate and Motion for Stay of Execution Concerning Jurors' Failure to Consider Mitigating Evidence filed in *Williams v. State*, Arkansas Supreme Court Nos. CR 01-364 and CR 06-511. The condensed health service encounter form referencing taxes and autobiography was filed in the case under seal. All of this information can be provided to this Court upon request.

that exempting the intellectually disabled from the death penalty would not affect "'the cold calculus that precedes the decision' of other potential murderers." *Atkins,* 536 U.S. at 319 (quoting *Gregg v. Georgia,* 428 U.S. 153, 186 (1976)). This Court added: "Indeed that sort of calculus is at the opposite end of the spectrum from behavior of [intellectually disabled] offenders." *Id.* Williams's behavior in planning his escape from prison strongly suggests that he is not a stranger to cold calculation. He carefully planned and premeditated his escape, made his way to the Boren household, and after murdering Cecil Boren, deliberately stole his truck in order to put greater distance between himself and the prison.

Accordingly, Petitioner's Motion to Stay and Petition for Writ of Certiorari should be denied.

Conclusion

For the foregoing reasons, the application for a stay and the petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ Lee Rudofsky

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April 27, 2017

Nos. 16-8922 & 16A1044

KENNETH D. WILLIAMS,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I did on the 27th day of April, 2017, send electronically from Little Rock, Arkansas, a copy of the foregoing. All parties required to be served have been served electronically.

/s/ Lee Rudofsky