Case 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

PROTECTIVE APPLICATION TO FILE A SECOND OR SUCCESSIVE PETITION PURSUANT TO 28 U.S.C. § 2244

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Applicant-Petitioner, Kenneth Williams, through counsel, respectfully applies for an order authorizing the United States District Court for the Eastern District of Arkansas to consider a second habeas corpus petition pursuant to 28 U.S.C. § 2244(b)(3)(A) and Eighth Circuit Rule 22B, because he is intellectually disabled and thus categorically ineligible for the death penalty.

INTRODUCTION

Mr. Williams files this instant Motion in the abundance of caution. He does not believe he needs permission to file the instant Petition for Writ of Habeas Corpus because he believes it is not successive. Should this Court deny Mr. Williams's pending Application for Certificate of Appealability from the United States District Court for the Eastern District of Arkansas's denial of Mr. Williams's Petition for Writ of Habeas Corpus, No. 5:07-cv-00234 SWW, Mr. Williams asks this Court to authorize him to file a second or subsequent § 2254 petition in the district court.

This Court may authorize a second or subsequent § 2254 petition if "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 "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for the

constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A)&(B).

This Court should authorize Mr. Williams to file a successive petition pursuant to § 2244(b)(2)(A) in light of *Moore v. Texas*, 137 S.Ct. 1039 (2017). *Moore* is a new rule of constitutional law, and because, as explained below, it is substantive in nature, it is retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 351-352 (2004).

Alternatively, this Court should permit Mr. Williams's to file a second petition because his proposed second § 2254 petition will establish that the factual predicate for the claim could not have been discovered through the exercise of due diligence, because his attorney was operating under a conflict of interest, and the facts underlying the claim establish by clear and convincing evidence that he is intellectually disabled and thus, but for the constitutional error, no reasonable factfinder could have sentenced him to death. §2244(b)(2)(B).

For these reasons, Mr. Williams herein makes a *prima facie* showing that his claim falls within the scope of § 2244(b)(2), which is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Woods v. United States*, 805 F.3d 1152,1153 (8th Cir. 2015).

PROCEDURAL HISTORY

On August 29, 2000, Mr. Williams was convicted of capital murder for the killing of Cecil Boren in the course of a felony and other crimes. The next day, an Arkansas jury sentenced Mr. Williams to death. 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 initiated state post-conviction proceedings. Among the claims raised was a claim that Mr. Williams was categorically ineligible for the death penalty under the United States Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). On September 8, 2005, Mr. Williams post-conviction counsel informed the court that he would not be pursuing the claim based on *Atkins*. The state post-conviction court denied Mr. Williams's post-conviction petition on November 21, 2005. The Arkansas Supreme Court affirmed the state post-conviction court on March 1, 2007. *Williams v. State*, 251 S.W.2d 290 (Ark. 2007).

On September 10, 2007, Mr. Williams filed a petition for writ of habeas corpus in the United States District court for the Eastern District of Arkansas. On November 4, 2008, the district court denied relief on all claims. *Williams v. Norris*, Case No. 5:07-cv-00234 SVW, 2008 WL 4820559 (E.D. Ark. Nov. 4, 2008). This Court affirmed the district court's denial of relief on July 15, 2010.

Williams v. Norris, 612 F.3d 941 (8th Cir. 2010). A petition for rehearing and rehearing en banc were denied, and the Supreme Court denied certiorari on March 21, 2011. *Williams v. Norris*, 562 U.S. 1290 (2011).

On April 25, 207, Mr. Williams filed a Motion for Relief from Judgment pursuant to Federal Rule of Civil Procedure 60(b) and an Amended Petition for Writ of Habeas Corpus in the United States District court for the Eastern District of Arkansas. Case No. 5:07-cv-00234 SVW (E.D. Ark. April 25, 2017). Those motions included accompanying Motions to Stay Execution. *Id.* The district court denied the Amended Petition and Motions. *Id*. at D.I. 57 (E.D. Ark. April 26, 2017). On April 26, 2017, Mr. Williams filed, in this Court, an Application for Certificate of Appealability from the district court's order..

On April 26, 2017, the Arkansas Supreme Court issued orders denying, *inter alia*, Mr. Williams's Motions for Recall of the Mandate. *Williams v. Arkansas*, Nos. CR 01-364, CR 06-511 (Ark. April 24, 2017).[1] Mr. Williams has a pending Corrected Petition for Writ of Habeas Corpus in Lincoln County Arkansas Circuit Court, which was filed on April 25, 2017.[2] No. 40CV-17-46 (Lincoln Cty. Cir. Ct. April 25, 2017).

[1] Those orders are attached at A-246-47.

[2] The Lincoln County Circuit Court issued an Order related to Mr. Williams's initial Petition for Writ of Habeas Corpus. That Order is attached at A-215. The order identified facial flaws with Mr. Williams's Petition so it was refiled.

ARGUMENT

I. THIS COURT SHOULD GRANT MR. WILLIAMS PERMISSION TO FILE A SUCCESSIVE PETITION IN LIGHT OF *MOORE V. TEXAS*

Mr. Williams's intellectual disability claim relies on *Moore v. Texas*, 137 S.Ct. 1039 (2017), which is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]" 28 U.S.C. § 2244(b)(2)(A). *Moore* held 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). *Id*. at 1053.

The rule announced in *Moore* is new. *See id.* at 1057-58 (Roberts, C.J. dissenting: "Today's decision departs from this Court's precedents, followed in *Atkins* and [*Hall v. Florida*, 134 S.Ct. 1986 (2014)], establishing that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not medical assessment of clinical practice."). The rule announced in *Moore* is of constitutional dimension – specifically the Eighth Amendment's protection of human dignity and against cruel and unusual punishments. *Id.* at 1053.

Finally, the rule announced in *Moore* was made retroactive to cases by the Supreme Court that was previously unavailable. The Supreme Court in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), reaffirmed Justice O'Connor's

plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), as the proper framework for analyzing retroactivity in cases on federal review. *Id*. at 728-29. Relying on *Schriro v. Summerlin*, 542 U.S. 348 (2004), the Court that explained courts must give retroactive effect to new substantive rules of constitutional law, because substantive rules are not subject to *Teague's* general retroactivity bar. *Id.* Substantive rules include "constitutional determinations that place particular conduct or persons covered . . . beyond the State's power to punish." *Schriro*, 542 U.S. at 351-52 (citations omitted). The *Schriro* Court explained that "such rules apply retroactively because they necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Id.* (citations and quotations omitted).

Moore is a new substantive rule. It substantively expanded the Eighth Amendment's protections of intellectually disabled persons. It expanded the rules announced in *Atkins* and *Hall* by requiring that the "medical community's current standards supply a constraint on States' leeway" when making *Atkins* determinations. *Moore*, 137 S.Ct. at 1053; *compare id. with Ortiz v. United States*, 664 F.3d 1151, 1168-69 (8th Cir. 2011) (explaining that "while the mental health community [may] ignore[] an individual's strengths when looking at adaptive functioning [,] . . . presumably as a function of its role in providing support and services to impaired individuals[,] . . .[t]he law makes a holistic view of an

individual, recognizing that few reported problems may not negate an inmate's ability to function in other ways.") (brackets in original) (citations and quotations omitted).

Thus, after *Moore*, the category of intellectually disabled individuals now categorically ineligible for the death penalty has expanded, to include those, who, like Mr. Williams, fall within the *Atkins* prohibition on the execution of the intellectually disabled, given current medical community standards. *Moore* has a clear substantive effect.

Moore is retroactive because it is a substantive rule. In *Tyler v. Cain*, 533 U.S. 656 (2001), the Supreme Court explained that the statutory term "made" in § 2244(b)(2)(A) is synonymous with "held" and that an explicit statement of retroactivity is not necessary because a rule can be "made" retroactive by the combination of holdings in two cases. *Id*. at 666 (majority); *id.* at 668-69 (O'Connor, J. concurring);[3] *id.* at 672-73 (Breyer, J. dissenting).

Justice O'Connor, endorsed by the four dissenting justices, explained that "if we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on

[3] Justice O'Connor wrote separately, in language endorsed by the four dissenting justices and that the majority did not dispute, to explain that a new substantive rule of constitutional law has been "made" retroactive on collateral review. *Tyler*, 533 U.S. at 668-69.

collateral review." *Tyler*, 533 U.S. at 668-69 (O'Connnor, J., concurring.). "The Supreme Court's cases concerning the constitutionality of executing mentally retarded provide a paradigmatic example of the 'retroactivity by logical necessity' described by Justice O'Connor [in *Tyler*.]" *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003) (finding the rule announced in *Atkins* retroactive).

The retroactivity of *Moore* is further evidenced by the fact that the *Moore* itself was a case on collateral review. The Supreme Court will not announce a new rule of constitutional law on collateral review unless that rule applies retroactively. *See Teague v. Lane*, 489 U.S. 288, 300 (1989) ("[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."); *id.* at 316 (holding that creation of new rule in habeas case requires that rule be "applied retroactively to *all* defendants on collateral review") (emphasis in original); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ("Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions."), *abrogated on other grounds by Atkins*, 536 U.S. 304; *see also Graham v. Collins*, 506 U.S. 461, 466 (1993) ("Because this case is before us on Graham's petition for a writ of federal habeas corpus, 'we must determine, as a threshold matter, whether granting him the relief he seeks would create a 'new rule'' of constitutional law. ") (quoting *Penry*, 492 U.S. at 313); *Saffle v. Parks*,

494 U.S. 484, 487-88 (1990) ("As he is before us on collateral review, we must first determine whether the relief sought would create a new rule under our holdings in *Teague* [] and *Penry* []. If so, we will neither announce nor apply the new rule sought by Parks unless it would fall into one of two narrow exceptions [to nonretroactivity].").[4]

This Court recently stated in *Davis v. Kelley*, No. 04-2192 (8th Cir. April 17, 2017), that *Moore* and its predecessor *Hall* discussed purely procedural issues, and that those issues were unrelated to *Davis* because Mr. Davis did not allege any failure by Arkansas to "follow contemporary medical standards." *Id.*, slip op. at *5.

The first ground provided in *Davis* is inconsistent with *Hall* and *Moore*. Both of those decisions concern whether states may arbitrarily "restrict qualification of an individual as intellectually disabled," *Moore*, 137 S. Ct. at 1044, consistent with the Eighth Amendment and *Atkins*. Because *Atkins* is a substantive rule that excludes a category of people from execution, the manner in which

[4] Although in *Moore* the Supreme Court reviewed the collateral judgment of a state court rather than a federal habeas court, this distinction is of no import, as the Court has held that new substantive rules of federal constitutional law must be applied retroactively in both state and federal collateral proceedings. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague*'s conclusion establishing the retroactivity of new substantive rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts.").

intellectual disability is defined is not, however, a "purely procedural" issue. As the Court noted in *Hall*, the question presented and decided in *Hall* and *Moore* "is how intellectual disability must be defined in order to implement . . . *Atkins*." *Hall*, 134 S. Ct. at 1993. This is a matter of substance, not just procedure: "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality." *Id.* at 1999.

As to the second ground in *Davis*, Mr. Williams, unlike Mr. Davis, does "allege that Arkansas uses out-of-date medical guides or otherwise fails to follow contemporary medical standards." *Davis*, slip op. at 5.

Arkansas fails to follow contemporary medical standards, and failed to do so in this very case. As the Arkansas Attorney General argued this week to the Circuit Court of Lincoln County, Arkansas, Mr. Williams's only opportunity to litigate a substantive *Atkins* claim was pretrial under Ark. Code Ann. § 5-4-618. *Williams v. Kelley*, No. 40CV-17-46, Mem. in Response to Corrected Pet., at 18 (Lincoln County Cir. Ct. April 25, 2017)

The claim was available to Mr. Williams at trial based on Ark. Code Ann §5-4-618, which includes in its definition of "mental retardation" a rebuttable presumption of "mental retardation when a defendant has an intelligence quotient

of *sixty-five (65)* or below." *Id.* (emphasis added).[5] This is contrary to contemporary medical community standards. In *Hall*, the Supreme Court, relying on contemporary medical standards, held that at 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. Furthermore, current diagnostic standards 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. *Id*.

In denying Mr. Williams's *Atkins* claim, the Circuit Court of Lincoln County, Arkansas, rejected that claim by applying a hard cutoff point for IQ, and without considering clinical judgment or adaptive functioning. *Order* at 2-3, No. 40CV-17-46 (Lincoln Cty. Cir. Ct. April 25, 2017) (A-215). The circuit court also rejected Mr. Williams's *Atkins* claim by declining to apply the *Flynn* effect to his IQ scores. *Id.* at 3. But as this Court noted in *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013), contemporary medical standards consider it "the best practice[] in the diagnosis of mental retardation to recognize the Flynn effect." *Id*. at 840 (brackets in original) (quotations omitted). Thus, in denying Mr. Williams's *Atkins* claim,

[5] According to the State, the only claim available to Mr. Williams in Rule 37 proceedings – a claim that trial counsel was ineffective for failing to raise § 5-4-618 at trial, was also subject to the same limitations, even after *Atkins* was decided. Mem. in Response to Corrected Pet., at 18 (A-215)

the state court failed to follow contemporary medical standards. This is contrary to *Moore*, which has clear substantive effect on Mr. Wililams's claim.

Mr. Williams has made a *prima facie* showing that *Moore* is retroactive on collateral review.

II. MR. WILLIAMS CAN ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT HE IS INTELLECTUALLY DISABLED AND THUS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY

This Court, in a pre-AEDPA case, explained that the proper "actual innocence" exception to the bar against successive § 2254 petitions includes actual innocence of the death penalty. *Fairchild v. Norris*, 21 F.3d 799, 801 (8th Cir. 1994) ("we must review the evidence to determine whether Fairchild has proved by clear and convincing evidence that no reasonable juror could have found him eligible for the death penalty under accepted Eighth Amendment principles."). Although 28 U.S.C. § 2244(b)(2)(B)(ii) requires that the applicant present a *prima facie* case that "no reasonable factfinder would have found the applicant guilty of the underlying offense," *id.*, courts have interpreted "the underlying offense" provision to include an applicant's ineligibility for the death penalty. *Thompson v. Calderon*, 151 F.3d 918, 923-24 (9th Cir. 1998) (en banc); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding "any fact that increases the [maximum] penalty for a crime . . . must be . . . proved beyond a reasonable doubt.)

In *Atkins*, the Supreme Court ruled that the Eighth Amendment categorically bars the execution of intellectually disabled individuals. "[T]o impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Hall*, 134 S. Ct. at 1992. *Moore* mandates that "[t]he medical community's current standards supply [a] constraint on States' leeway" in enforcing *Atkins*. *Moore*, 137 S.Ct. at 1050. Accordingly, *Atkins* and its progeny do not "license disregard of current medical standards." *Id.* at 1049.

Mr. Williams is intellectually disabled. The Supreme Court of the United States has held that, at a minimum, Full Scale IQ scores of 75 and below are within the presumptive range for intellectual disability. Mr. Williams has taken six individually administered tests of global intelligence and his composite Full Scale IQ over the course of these six tests is 71.8, well within the intellectual disability range. *See* Supplemental Dec. Mark Cunningham, Ph.D., 4/24/17, at 3 (attached as Exhibit A). Mr. Williams's impairments were apparent early in his life and continued throughout the developmental period. He failed the first and third grades, and was in special education for most of his educational career until he ultimately dropped out in the ninth grade. Consistent with Mr. Williams's brain dysfunction, he has shown deficits in both receptive and expressive communication, functional academics, self-direction, social functioning, and practical living skills throughout the developmental period.

Moore cited the definition for intellectual disability established by the American Association on Intellectual and Developmental Disabilities ("AAIDD") and the definition contained in the American Psychiatric Association's ("APA") Diagnostic and Statistical Manual of Mental Disorders – 5th Edition - Text Revision ("DSM-5"). *Moore*, 137 S.Ct. at 1048-49.

Pursuant to the definitions set forth by the DSM-5 and the AAIDD, 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* 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. As set forth below, Mr. Williams meets the criteria for intellectual disability under the Eighth Amendment and *Moore*.

- **Deficits in Intellectual Functioning.**

The scores on IQ tests that Mr. Williams has taken over his lifetime meet the diagnostic standard for deficient intellectual functioning as established by the AAIDD, the APA, endorsed by *Moore*.

  - **The diagnostic standard.**

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.

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.

IQ scores must also be corrected for the Flynn Effect. The Flynn Effect reflects a well-established finding that the average IQ score of the population increases at a rate of .3 points per year or 3 points per decade. Accordingly, best practices require that any IQ score be corrected downwards at a rate of .3 points per year since the test was normed. *See User's Guide: Mental Retardation, Definition, Classification and Systems of Supports*, 10th Ed., AAIDD (2007) ("AAIDD-2007"), at 20-21; AAIDD-2010 at 37 (same); *User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports*, AAIDD (2012) ("AAIDD-2012") at 23 (same); The Death Penalty and Intellectual Disability, AAIDD (2015) ("AAIDD – 2015") at 160-166 (same); DSM-5 at 37 (recognizing the Flynn Effect's ability to affect test scores).

The AAIDD and APA also mandate that inflation of IQ scores arising from prior administrations of intelligence tests or the "practice effect" also be taken into consideration when interpreting IQ testing. *See, e.g.*, AAIDD-2010 at 38; DSM-5 at 37.

- **Mr. Williams has deficits in intellectual functioning.**

Drs. Cunningham, Weinstein, and Martell have evaluated Mr. Williams and found that he satisfies prong one of the intellectual disability diagnosis. In his lifetime, Mr. Williams has been administered a total of seven intelligence tests. The Wechsler Intelligence Scales for Children – Revised ("WISC-R") was given at the ages of 8, 9, and 12 in conjunction with school evaluations. Psychological examiner David Nanak, M.A., administered the Wechsler Adult Intelligence Scales – 3rd Edition ("WAIS-III") to Mr. Williams in 1999 when he was 20 years old. A-48.[6] Neuropsychologist Mary Wetherby, Ph.D., administered the WAIS-III, to Mr. Williams in 2000 when he was 21 years old.[7] A-153. Dr. Weinstein administered a WAIS-III and a Comprehensive Test of Nonverbal Intelligence ("CTONI") to Mr. Williams when he was 25 years old.[8] A-145. The timing, results, and Flynn-corrected scores of the intelligence testing administered to Mr. Williams are detailed on the table below.

[6] References to the appendix being filed concurrently with this petition are cited as A-___.

[7] Dr. Wetherby tested Mr. Williams one day before his August 23, 2000 trial began.

[8] Dr. Weinstein tested Mr. Williams during state post-conviction proceedings in May 2004.

KENNETH WILLIAMS – INTELLIGENCE TESTING

Date	**Age (year-months)**	**IQ Test**	**Full Scale IQ Score**	**Full Scale IQ Score Corrected for Flynn Effect**
10/87	8-7	WISC-R	84	79.5
2/89	10-11	WISC-R	80	75*
8/91	12-5	WISC-R	82	76*
5/99	12-3	WAIS-III	74*	73*
8/00	21-5	WAIS-III	70*	68.5*
5/04	25-3	WAIS-III	81	78
5/04	25-3	CTONI	68*	65*

*Indicates score in the IQ range commonly associated with intellectual disability.

The norms for the WISC-R, WAIS-III, and CTONI were generated in 1972, 1995, and 2000, respectively. The 95% confidence interval for the WISC-R is ± 6.25, which extends a finding of approximately two standard deviations below the mean to scores of 76 and below. Accordingly, five of the seven intelligence tests administered to Mr. Williams fall within the range for intellectual disability.

Moreover, three of Mr. Williams's IQ scores were even lower than the Flynn-corrected scores that are reported above. On Mr. Williams's WAIS-III

scores, the Flynn-related inflation was compounded by inflation related to an error in the normative data for the WAIS-III. In an attempt to correct for shortcomings in the norming of the Wechsler Adult Intelligence Scales – Revised ("WAIS-R"), which was caused by an absence of very low-functioning (i.e. severely intellectually disabled) subjects in the normative sample, too many severely low functioning subjects were included in the normative data of the WAIS-III. As a result, the WAIS-III produced IQ scores that were 2.34 points too high. Report, Mark Cunningham, Ph.D., at 13-14, A-109 to 110. *See also* AAIDD-2015 at 145-146 (describing scholarship on this subject). Accounting for this defect in the WAIS-III's norming process, Mr. Williams's 1999, 2000, and 2004 WAIS-III scores are properly reported as 70, 66, and 76. *Id*. A table accounting for the 2.34 point correction made for the error in the WAIS-III's norming process is set forth below.

KENNETH WILLIAMS – INTELLIGENCE TESTING

Date	**Age (year-months)**	**IQ Test**	**Full Scale IQ Score**	**Full Scale IQ Score Corrected for Flynn Effect and WAIS-III Sampling Error**
10/87	8-7	WISC-R	84	79.5
2/89	10-11	WISC-R	80	75*
8/91	12-5	WISC-R	82	76*

5/99	12-3	WAIS-III	74*	70*
8/00	21-5	WAIS-III	70*	66*
5/04	25-3	WAIS-III	81	76
5/04	25-3	CTONI	68*	65*

That Mr. Williams's testing history began with a slightly higher score of 79.5 and regressed to scores in the intellectual disability range at the ages 10, 12, and 21 does not undermine Mr. Williams's *Atkins* claim, but provides further support for it. "[I]individuals with mild mental retardation 'often are not distinguishable from children without Mental Retardation until a later age.'" *Sasser* 735 F.3d at 848. In any event, given the IQ test results set forth above, it is necessary to consider the other prongs of the *Atkins* inquiry. *Moore*, 137 S. Ct. at 1050 ("we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits."); *Hall*, 134 S. Ct. at 1995 (Florida cutoff invalid because it took "an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence.").

- **Mr. Williams Had Significant Deficits in Adaptive Functioning During the Developmental Period.**

Mr. Williams showed significant adaptive deficits from a very early age. He failed the first and third grades, was in special education for the vast majority of his academic career, and eventually dropped out in the 9th grade. He had significant impairments in reading, writing, math, both receptive and expressive communication, and his ability to self-direct. He was quiet, socially, withdrawn, and easily influenced by others. Finally, consistent with these behavior problems and a probable cause of them, he had a dysfunctional brain. Throughout his life, Mr. Williams's broken brain has deeply impaired his fundamental ability to make decisions, cope with stressors, retain information, learn, keep focus, and control his impulses.

The AAIDD has defined adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and performed by people in order to function in their everyday lives." AAIDD-2002 at 73. The DSM-5 described adaptive deficits as "how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." DSM-5 at 37.

The adaptive deficits prong is satisfied if there is a significant limitation in any one of the following three types of adaptive behavior: conceptual, social or practical; or in the composite of the individual's adaptive functioning. AAIDD-

2010 at 43; DSM-5 at 37.[9] Skills included in the conceptual realm are: functional academics; language; reading and writing; money concepts; and self-direction. The social realm encompasses skills and characteristics like: interpersonal responsibility; self-esteem; gullibility; naivete; following rules; obeying laws; and avoiding victimization. The practical realm refers to skills such as: activities of daily living; instrumental activities of daily living; occupational skills; use of money; and maintaining safe environments. DSM-5 at 37; AAIDD-2010 at 44.

As it is expected that strengths co-exist with weaknesses, analysis of adaptive behavior is based on the presence of weaknesses, not the absence of strengths. "[S]ignificant limitations in conceptual, social or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." AAIDD-2010 at 47. The Supreme Court has recognized that "intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Brumfield*, 135 S. Ct. at 2281 (quoting AAIDD-2002). Accordingly, in *Moore*, the Supreme Court found unconstitutional the Texas Criminal Court of Appeal's attempt to overcome deficits with perceived

[9] AAIDD-2002 also employs the three domain system used in AAIDD-2010. The DSM-IV-TR indicates that the adaptive deficits prong is satisfied if there are significant limitations in any two of the following skills areas: functional academics, self-direction, communication, social, leisure, use of community services, health, safety, personal care, home living, and work.

adaptive strengths because "the medical community focuses the adaptive functioning inquiry on adaptive *deficits*." *Moore*, 137 S. Ct. at 1050 (citing AAIDD-2010, DSM-5, and AAIDD-2002 with approval).

Extensive lay-witness evidence, records, testing, and expert analysis confirm that Mr. Williams suffered from significant adaptive deficits before the age of 18 in all three domains recognized by the AAIDD and the DSM-5, and in four out of eleven skill areas of the DSM-IV-TR. *See Exhibit A* (Petition).

- **Age of Onset**

Mr. Williams's deficits originated in the developmental period. He received two full scale IQ scores in the intellectually disabled range before the age of 18. He also has a documented history of adaptive impairments that spans multiple areas of multiple functioning and includes two formal measures of adaptive functioning (administered at ages 8 and 9).

- **Mr. Williams Is Intellectually Disabled.**

Mr. Williams is an intellectually disabled person. Drs. Cunningham, Weinstein, and Martell have conducted three separate evaluations of Mr. Williams in 2000, 2004, and 2017, respectively. They considered his functioning in light of current diagnostic standards. Consistent with protocol in a capital case, they conducted retrospective analyses into Mr. Williams's functioning to determine if all three prongs of the diagnosis have been met. They have all concluded that Mr.

Williams is intellectually disabled and that he was intellectually disabled at the time of the crime. Moreover, in 2004, had Drs. Cunningham and Weinstein been provided with the background materials they have had access to for their analyses today, they would have diagnosed Mr. Williams as intellectually disabled. Mr. Williams's death sentencing and pending execution date violates the Eighth Amendment, *Atkins*, *Hall*, *Brumfield*, and *Moore*. Mr. Williams has presented a *prima facie* case of possible merit that he can establish by clear and convincing evidence that he is intellectually disabled.

As required by § 2244(b)(2)(B), the factual predicate for this claim could not have been discovered by the exercise of due dilligence because Mr. Williams state post-conviction counsel, Jeffery Rosenzweig, was ineffective, and also represented Mr. Williams in federal habeas proceedings, which gave rise to an irreconcilable conflict of interest. Mr. Rosenzweig alone represented Mr. Williams in state and federal proceedings until the appointment of undersigned counsel fourteen days ago on April 11, 2017.

During state post-conviction proceedings, Mr. Rosenzweig inexplicably abandoned an *Atkins* claim. Raising Mr. William's *Atkins* claim in federal court requires an explanation for why Mr. Rosenzweig abandoned this meritorious claim in state court. But "[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). Because Mr. Rosenzweig's actual conflict of interest spanned the entirety of Mr. Williams federal habeas proceedings up until two weeks ago, Mr. Williams could not have raised the claim until now. Thus, Mr. Williams has made a *prima facie* showing that § 2244(B)(2)(b) is satisfied. This Court should grant Mr. Williams authorization to file a second § 2254 petition in district court.

III. THIS COURT SHOULD CERTIFY THE IMPORTANT QUESTIONS RAISED IN THIS MOTION TO THE UNTIED STATES SUPREME COURT TO OBTAIN DEFINITIVE RULINGS IN LIGHT OF OF 2244(b)(3)(E)'S BAR AGAINST REVIEW OF THIS COURT'S RULING

This Court has jurisdiction under 28 U.S.C. § 2244 to address in the first instance whether Mr. Williams is permitted to file a successive habeas petition to challenge his eligibility for the death penalty under *Atkins* and *Moore*. §2244(b)(3)(E) states that the decision by this Court as to whether to authorize Mr. Williams 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." *Id.*

In *Felker v. Turpin*, 518 U.S. 651, 667, Justice Souter, joined by Justices Stevens and Breyer, explained that § 2244(b)(3)(E) "does not necessarily foreclose all of [the Supreme Court's] appellate jurisdiction" because circuit courts have the

authority to certify questions to the Supreme Court pursuant to 28 U.S.C. § 1254(2).

Whether the "actual innocence" exception to the bar against successive § 2254 petitions includes actual innocence of the death penalty, whether *Moore* has retroactive effect, and whether unreviewable decisions (including decisions denying authorization to file second or successive petitions) are binding precedent are vital questions to be determined by the Supreme Court. Pursuant to 28 U.S.C. § 1254(2) and 28 U.S.C. § 2201(a), Mr. Williams respectfully asks this court to certify these questions to the United States Supreme Court.

WHEREFORE, because Mr. Williams has presented *prima facie* claims that the requirements of 28 U.S.C. § 2244(b)(2)(A)&(B) are satisfied, he respectfully requests that his application be granted and that he be authorized to file a second 28 U.S.C. § 2254 petition in the District Court.

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 5,936 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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