EXECUTION DATE SET FOR APRIL 20, 2017

IN THE SUPREME COURT OF ARKANSAS

LEDELL LEE	)	
	)	
Appellant	)	
	)	
vs.	)	**Case No. CR08-160**
	)	
STATE OF ARKANSAS,	)	
	)	
Appellee.	)	

MOTION TO RECALL THE MANDATE AND FOR STAY OF EXECUTION

Mr. Lee respectfully moves under Ark. Sup. Ct. R. 5-3 for the Court to recall its mandate issued in *Lee v. State*, 308 S.W.3d 596 (Ark. 2009), for the reasons set forth in the accompanying memorandum and briefing.

Mr. Lee further moves the Court issue a stay of his execution, pursuant to Ark. Code § 16-90-506. In support of the motion, Mr. Lee states as follows:

1. Ledell Lee is confined under a sentence of death and scheduled for execution on Thursday, April 20, 2017.
2. Under Ark. Code § 16-90-506(a)(1), this Court has the authority to stay the execution of a death sentence in light of "any competent judicial proceeding." A motion to recall the mandate is such a competent proceeding. Ark. Sup. Ct. Rule 5-3(d). The Court will grant a stay when

a case presents a constitutional issue that is "bona fide and not frivolous" but cannot be resolved before the scheduled execution. *Singleton v. Norris*, 964 S.W.2d 366, 372 (Ark. 1998) (opinion on rehearing).

3. Mr. Lee's motion to recall the mandate raises bona fide, meritorious issues under both the Constitution of the United States and the laws of the State of Arkansas.
4. The factual issues identified in Mr. Lee's brief supporting his motion to recall the mandate include a complicated procedural history spanning more than twenty years, expert declarations containing neuropsychological testimony, and fact-intensive inquiries into the extraordinary circumstances that have led to this moment.
5. The interests of justice require this matter receive more careful study and analysis than can reasonably be expected in only two days.

WHEREFORE, Ledell Lee respectfully requests that these Motions be granted; that his execution set for April 20, 2017, be stayed; and that the Court's mandate in *Lee v. State*, 308 S.W.3d 596 (Ark. 2009) be recalled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing document was delivered electronically to the following:

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/s/ Lee Short

IN THE SUPREME COURT OF ARKANSAS

LEDELL LEE	)	
	)	
Appellant	)	
	)	
vs.	)	**Case No. CR108-160**
	)	
STATE OF ARKANSAS,	)	
	)	
Appellee.	)	

APPELLANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO RECALL THE MANDATE

Table of Contents

Page

EXECUTION DATE SET FOR APRIL 20, 2017

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	)	
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vs.	)	**Case No. CR108-160**
	)	
STATE OF ARKANSAS,	)	
	)	
Appellee.	)	

APPELLANT'S MOTION TO RECALL THE MANDATE AND APPEAL OF THE DENIAL OF THE MOTION TO CONDUCT POST-CONVICTION DNA TESTING

COMES NOW appellant, Ledell Lee, by and through counsel, and pursuant to Arkansas Superior Court Rule 5-3(d), Ark. Code § 16-112-206 (2014), *Robbins v. State*, 114 S.W.3d 217 (Ark. 2003), *Lee v. Norris*, 354 F.3d 846 (8th Cir. 2004), and *Lee v. State*, 238 S.W.3d 52 (Ark. 2006), to move this Court to recall its mandate in the above-captioned capital post-conviction appeal. Mr. Lee further moves this Court to reopen the post-conviction proceedings in the case and remand the matter to the Circuit Court of Pulaski County for (1) a new Rule 37 proceeding in which appellant may be represented by new and competent counsel; and (2) DNA testing or an evidentiary hearing on his petition for post-conviction DNA testing filed under Arkansas's Habeas Corpus – New Scientific Evidence Statute

(the "DNA Statute") (codified at Ark. Code Ann. §§ 16-112-201, *et seq.*) or, in the alternative, an order directing the Circuit Court to release the DNA evidence immediately for DNA testing, because Mr. Lee has already satisfied the DNA Statute's requirements in light of undisputed facts in the record.

INTRODUCTION

The guarantee of counsel has been a hollow one for Ledell Lee. Some of the lawyers charged with representing Ledell Lee in his capital trial and appeals were alcoholics, another mentally ill, and still others, riddled by personal conflicts of interest. Remaining counsel abandoned him without conducting any meaningful investigation into his case. As a result of the utter breakdown in counsel, Ledell Lee went through over twenty years of appeals, post-conviction, and habeas without the most basic investigation into his guilt or innocence, mental health, or life history.

This breakdown was disastrous for Mr. Lee. It concealed critical facts that would have long ago warranted relief, and that today require a stay of execution. Mr. Lee has fetal alcohol syndrome, significant brain damage, and intellectual disability (either mild or borderline). He was in special education, and repeated the eighth grade. Mr. Lee was born into a family of crushing poverty, where food was scarce and adult care even rarer. His mother was 16 years-old at the time of his birth, and she drank alcohol and smoked cigarettes throughout her pregnancy.

Ledell was her third child. She had lost a daughter to crib death before having him. She remembers little of Ledell's time as a child because she was absent so often. Ledell was one of seven children and being the second oldest was largely left to fend for himself. His step-father was in the Air Force and was gone for long periods of time. He served in Vietnam, and then later in South Korea. He was stationed out of state in South Dakota and was gone more than he was home.

Before last week, no expert had ever evaluated Mr. Lee's IQ or brain functioning and no investigator had created even a list of his family members. There was no investigation into Mr. Lee's background or possible mitigation. In a case with weak circumstantial evidence and a strong assertion of innocence, no investigator talked with trial witnesses, sought impeachment evidence, or moved in recent years for DNA testing of the available physical evidence.

Despite years of litigation, Ledell Lee has never had a meaningful day in court. No lawyer has previously presented, and thus no court considered, the evidence of his brain dysfunction, fetal alcohol syndrome, or intellectual disability. No lawyer presented a social history of Mr. Lee or the powerful bases that would have supported a life sentence. And there has never been any examination of Mr. Lee's strong claims of innocence.

FACTS AND PROCEDURAL HISTORY

In May, 1993, Mr. Lee was charged by information in Pulaski County, Arkansas, Circuit Court with capital murder under Ark. Code Ann. § 5-10(101)(a)(5) (1987) for the alleged murder of Debra Reese. A trial in October, 1994 resulted in a hung jury. Petition for Writ of Habeas Corpus, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 1 at 3.

Between the first and second trials, Mr. Lee sought removal of two public defenders, Bret Quals and Bill Simpson, because of a conflict of interest after a breakdown in the attorney client relationship. Petition for Writ of Habeas Corpus, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 1 at 3-4. This request was denied by the presiding judge, and ultimately by this Court. *Id.* The Arkansas court left Mr. Quals and Mr. Simpson to handle the guilt phase of the trial, but appointed Dale Adams to handle the penalty phase. *Id.*

Mr. Lee's trial counsel had raised the possibility of mental retardation pre-trial. The Court ordered an evaluation of Mr. Lee at the state hospital as part of a psychiatric evaluation of a sanity evaluation. Mr. Lee declined to participate when he was transported to the State hospital without explanation. He later requested an independent IQ determination, conducted at the Department of Corrections. The judge in response ordered disclosure of Mr. Lee's school records. Tp 234-242. These records were introduced at trial, and those records reflected that he was in

special education, had been held back, and scored extremely low on standardized testing. *See* Ex. No. 1.

Unprepared for trial, Mr. Lee's defense counsel promised in opening statements to present an alibi, but then failed to do so. Tp. 1926. In closing, the State referred to Mr. Lee, an African American defendant charged with the murder of a white woman, as a "hunter" whose "prey were the people of Jacksonville," Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 94-1 at 14-15. Defense counsel did not object. *Id*. Mr. Lee's second trial in October 1995 resulted in conviction and a sentence of death, which this Court affirmed on direct appeal. *Lee v. State*, 942 S.W.2d 231 (1997) ("*Lee I*").

Mr. Lee filed a petition for post-conviction relief in Arkansas state court pursuant to Arkansas Rule of Criminal Procedure 37 (the "first state habeas petition"). In that petition, Mr. Lee alleged a Sixth Amendment violation of his right to conflict-free counsel, as well as grounds for relief that included, among other things, failure to present alibi testimony in the guilt and penalty phases, failure to request the trial judge's recusal based upon his intimate personal relationship with the prosecuting attorney (whom the judge ultimately married), and failure to seek a mistrial when a member of the jury entered the judge's chambers for approximately twenty minutes during jury deliberations. Petition for

Writ of Habeas Corpus, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 1 at 5, 81.

The performance of Mr. Lee's post-conviction counsel, Craig Lambert, during hearings for his first state habeas petition was later characterized by the United States Court of Appeals for the Eighth Circuit as extraordinary and "cause for concern." *Lee v. Norris*, 354 F.3d 846, 848 (8th Cir. 2004). Notably, the state trial judge stated that Mr. Lambert was "not competent to try a case" and told Mr. Lambert he "didn't know you'd just gotten out of rehab. If I had known that, I would not have put you on this case. I would not have done it." *Id.* Counsel for the state also stated the following on the record during the hearing:

> Your Honor, I don't do this lightly, but with regard to [Mr. Lee's counsel's] performance in Court today, I'm going to ask that the Court require him to submit to a drug test. I don't think that he's, he's not, he's just not with us. He's reintroduced the same items of evidence over and over again. He's asking incoherent questions. His speech is slurred. He stumbled in the Court Room. As a friend of the Court, and I think it's our obligation to this Court and to this Defendant that he have competent counsel here today, and I don't—That's just my request of the Court, Your Honor.

Id. The request for testing was denied, and Mr. Lee's first state habeas petition was denied. *Id.* Mr. Lambert represented Mr. Lee on direct appeal and did not raise the issue of his own conflict, and Mr. Lee's case was denied on direct appeal. *Lee v. State*, 38 S.W.3d 334 (Ark. 2001) ("*Lee II*").

After this Court affirmed Mr. Lee's death sentence in *Lee II*, Mr. Lambert was appointed with Jennifer Horan from the Federal Public Defender's office to represent Mr. Lee in federal post-conviction proceedings. Mr. Lambert and Ms. Horan filed a habeas writ in federal court in November of 2001 that also did not raise Mr. Lambert's ineffectiveness. Petition for Writ of Habeas Corpus, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.).

Mr. Lambert's intoxication during the state post-conviction proceedings came up at the federal habeas hearing when the District Court, Judge Howard, *sua sponte* noted in April of 2003 that Mr. Lambert "may have been impaired to the point of unavailability on one or more days" of hearings on Mr. Lee's state habeas proceeding. Order, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 11. Judge Howard stayed the proceedings on the federal habeas petition for the Arkansas trial court to "take appropriate action." After the state filed an interlocutory appeal, the Eighth Circuit affirmed, noting that the circumstances of the case were "truly exceptional." *Lee*, 354 F.3d at 847. The Court noted that the claims raised in the federal petition were exhausted, but the claim regarding the lack of competent representation by Mr. Lambert during state habeas proceedings—not raised in the federal habeas petition drafted by Mr. Lambert—was unexhausted. *Id.* at 849.

Mr. Lambert and Ms. Horan filed a motion to amend the habeas petition to include a claim of mental retardation in light of *Atkins v. Virginia* on June 18, 2003. *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 13. But after the Eighth Circuit remanded the case to state court, the District Court denied the motion to amend and the *Atkins* claim. *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 20. The motion was denied without prejudice, leaving Mr. Lee's counsel free to renew the motion and pursue the *Atkins* claim.

While the federal district case was proceeding, Mr. Lambert had been hired by the Federal Public Defender's office. Ms. Horan first moved to withdraw later that year from the Eighth Circuit, and then moved on February 26, 2004, to withdraw from the case in District Court. Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF 16. At almost the same time Ms. Horan moved to withdraw, Mr. Lambert's employment with the Federal Public Defender's office was terminated. Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 18; Response to Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 19. On March 15, 2004, Mr. Lambert sought to withdraw from the case because of his conflict, and urged reconsideration of the order permitting withdrawal of the Federal Public Defender's office. Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-

0377 (E.D. Ark.), ECF No. 18. Mr. Lambert also privately urged Ms. Horan to reconsider keeping Mr. Lee's case. *See* Ex. No. 2 (correspondence).

Mr. Lambert stressed that Mr. Lee had a pending claim of exemption for intellectual disability, and that his case was extraordinarily complex, and would require a massive investigation. He asked the District Court to deny Ms. Horan's withdrawal motion because "[t]he Federal Public Defender Office is the only entity in Arkansas with the resources that are necessary to adequately represent Lee in these proceedings—especially since the FPD has raised an *Atkins* claim and experts will be needed to present it." Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 18. In his private correspondence, Mr. Lambert urged Ms. Horan to consider a funding structure where the Federal Public Defender's office would agree to finance the experts for appointed state counsel so that they could obtain the necessarily evaluations. *See* Ex. No. 3.

Ms. Horan opposed Mr. Lambert's motion to oppose her withdrawal by disclosing that her close "out of work" personal relationship with Mr. Lambert created an actual conflict with her continued representation of Mr. Lee. Response to Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 19. Her contemporaneous notes reflect that she also was concerned with the lack of available counsel in Arkansas who could competently investigate the case given that the small number of qualified attorneys had conflicts. Ex. No. 4.

Ms. Horan attempted to recruit the NAACP Legal Defense Fund to take the case, explaining that an *Atkins* claim had been raised, and that his case "also presents the opportunity to set the standard for mental retardation litigation in Arkansas for the death row population here." *Id*.

In light of the conflict, the federal district court appointed new counsel for Mr. Lee on July 28, 2004, including out-of-state attorneys Kent Gipson and William Odle along-side local counsel, Deborah Sallings, who had also been appointed in the Eighth Circuit case. Order, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 27. Ms. Horan sent Ms. Sallings a letter alerting her to the federal court's dismissal of Mr. Lee's motion to file an *Atkins* claim without prejudice to renew after state court proceedings. Ex. No. 6. But as she would explain in her motion to withdraw years later, Ms. Stallings "did not participate in [the Rule 37] proceedings in state circuit or appellate courts," and Ms. Sallings did not pursue the *Atkins* claims. Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 153. Nor did Ms. Sallings become involved in any way with the case preparation or strategy or have a relationship with Mr. Lee. *Id*.

On June 29, 2005, this Court recalled the mandate in *Lee II*, ruling that Rule 37.5 requires qualified counsel and that Mr. Lee's representation by impaired counsel required new proceedings. *Lee v. State*, 238 S.W.3d 52 (Ark. 2006) ("*Lee III*"). The Arkansas Public Defender appointed Arkansas attorneys Gerald

Coleman and Danny Glover to represent Mr. Lee in his new Rule 37.5 proceedings.

As discussed further below, the level of representation by Mr. Coleman and Mr. Glover was grossly incompetent, falling significantly short of even the impaired performance of Mr. Lee's first conflicted counsel. Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 94 at 12-13. They abandoned Mr. Lee, refusing to return Mr. Lee's phone calls or discuss witnesses or claims, and failing to provide him with pleadings. *Id.* at 42-43. They moved for investigators, but never sought any life history investigation of Mr. Lambert. They did no exploration of Mr. Lee's *Atkins* claim or possible mental health issues. They filed an amended petition for post-conviction relief under Arkansas Rule of Criminal Procedure 37 that failed to include the Atkins claim proposed in federal court and relied exclusively on the claims presented by Mr. Lambert.

The circuit court judge held another hearing on August 28, 2007, and subsequently denied Lee's petition and entered findings of fact and conclusions of law on November 21, 2007. For the limited issues in the petition, second Rule 37.5 counsel actually presented less evidence. They failed to preserve the most compelling issue raised: the extramarital affair between the trial judge Chris Piazza

and the prosecuting attorney Melody LaRue.[1] Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 94 at 13. In his intoxicated state, Mr. Lambert had presented five days of testimony. Mr. Coleman and Mr. Glover presented less than half a day, and did not use or present any of the evidence uncovered by their fact investigator. *Id.* at 13; Ex. No. 5 (Notes of Matilda Buchanan).

Mr. Coleman and Mr. Glover continued their dismal representation of Mr. Lee on appeal from the state post-conviction proceedings. The first brief they submitted was rejected as deficient by this court. Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.). Mr. Coleman submitted a second proposed brief that was also rejected as nonconforming. *Id*. This Court then referred defense counsel to the Committee on Professional Conduct, which ultimately sanctioned the lawyers for their performance in Mr. Lee's case. *Lee v. State*, 291 S.W.3d 188, 190 (Ark. 2009). The Court denied the appeal. *Lee v. State*, 308 S.W.3d 596 (Ark. 2009) ("*Lee IV*"). On November 9, 2009, the United States Supreme Court denied certiorari to Lee in connection with the Second Rule 37 petition. *Lee v. Arkansas*, 558 U.S. 1013 (2009).

[1] Judge Piazza cast a long shadow over this case. As described above, he personally intervened to prevent Mr. Lee from receiving appointment of conflict-free counsel on appeal. He then ruled on the substance of his own motion to recuse, calling the motion that Mr. Lee wanted to raise for his recusal "ridiculous." Tp at 1602-03. He undertook these actions at a time when he was married and having an extramarital affair with a prosecutor. The fact that this highly personal conflict would be an important issue in Rule 37.5 litigation likely impacted the willingness of attorneys and investigators to take the case in post-conviction. *See* Ex. No. 4 (notes of Federal Defender); Ex. No. 6 (email of Matilda Buchanan).

Mr. Lee later filed a federal habeas petition, which was ultimately denied by the Eastern District of Arkansas. *Lee v. Hobbs*, No. 5:01-cv-00377JH, 2013 WL 6669843 (E.D. Ark. Dec. 18, 2013). The Eighth Circuit denied Mr. Lee's appeal of the district court's order, *Lee v. Hobbs*, 2014 U.S. App. LEXIS 22121 (8th Cir. 2014), and the United States Supreme Court later denied certiorari. *Lee v. Kelley*, 2015 U.S. LEXIS 6544 (Oct. 13, 2015).

On April 3, 2017, Mr. Lee filed a motion with this Court to recall the mandate in *Lee IV*. The Court denied that motion on April 6, 2017. In the time since that motion was filed, new counsel has been substituted. This motion relies on facts uncovered during an investigation conducted at the direction of new counsel—the first-ever even preliminary investigation into Mr. Lee's mental disabilities, his social history, and his actual innocence investigation into previous counsel's appalling failures of representation.[2]

On April 17, 2017, Mr. Lee filed a Verified Petition for Post-Conviction DNA Testing under Ark. Code Ann. §§ 16-112-201, *et seq*. ("the DNA Petition").

[2] Notably, the motion to recall the mandate, filed by Mr. Lee's former counsel, Mr. Gipson, suggests it was largely copied from federal habeas counsel's prior filings with the U.S. District Court for the Eastern District of Arkansas. *Compare* Appellant's Mot. to Recall Mandate, Lee v. State (herein Motion),at 5 (No. CR08-160) (Ark. Apr. 3, 2017)), *with* Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 94 (herein Traverse) at 61; *compare* Traverse at 10-13, *with* Motion at 6-9; *compare* Traverse at 18, *with* Motion at 5; *compare* Motion at 18-19, *with* Motion to Vacate Judgment, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 116 at 6; *compare* Motion at 19, *with* Motion to Vacate Judgment, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 116 at 4-5; *compare* Motion at 20, *with* Motion to Vacate Judgment, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 116 at 12-13; *compare* Motion, *with* Motion to Vacate Judgment, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 116 at 18-19.

The DNA Petition sought to utilize DNA technology that was not available *to any party* at the time of his 1995 trial to determine whether (as the State alleged at trial) certain "Negroid" hairs found at the crime scene were Mr. Lee's, and whether two blood spots on Mr. Lee's own shoes actually came from the victim; the Petition further alleged that this same newly available DNA technology could not only disprove key pillars of the State's original case against him, but affirmatively prove his innocence by identifying the actual source of the crime scene hairs (and perhaps other items deposited by the perpetrator) through the CODIS DNA database, which was also not in existence at the time of his arrest and trial. The hair and blood evidence sought to be tested was collected by the Jacksonville Police Department at the time of the crime in 1993, admitted into evidence at Mr. Lee's trial in 1995, and in the possession of the Jacksonville Police Department since that time.

On April 18, 2017, the Circuit Court summarily denied Mr. Lee's petition for DNA testing. The Court permitted oral argument on the motion, but did not permit Mr. Lee to (1) offer expert testimony in support of his claim, (2) have *pro bono* counsel from the Innocence Project appear *pro hac vice* by telephone, even though Innocence Project counsel was prepared to argue and otherwise make a detailed proffer regarding the issues of fact, law, and DNA science that are central to Mr. Lee's claim of actual innocence and his entitlement to testing under the

DNA statute, or (3) present evidence regarding Mr. Lee's prior efforts to obtain DNA testing and his prior counsel's failure to pursue those claims on his behalf.

LEGAL STANDARD

This Court is empowered to recall its mandates when "extraordinary circumstances" justify the recall. *See Robbins v. State*, 114 S.W.3d 217, 222 (Ark. 2003). Factors guiding the Court's consideration of a motion to recall the mandate include: "(1) the presence of a defect in the appellate process, (2) a dismissal of proceedings in federal court because of unexhausted state-court claims, and (3) the appeal is a death case that requires heightened scrutiny." *Ward v. State*, 455 S.W.3d 830, 832 (Ark. 2015). These factors are not to be strictly applied, but rather serve as a guide in determining whether to recall a mandate. *Id.*; *Nooner v. State*, 438 S.W.3d 233 (Ark. 2014).

ARGUMENT

For more than twenty years, Ledell Lee has been denied any meaningful assistance of counsel during post-conviction proceedings in both state and federal court. This Court has once recognized the extraordinary deprivation that has befallen Mr. Lee, recalling a previous mandate in *Lee III*. Newly discovered facts demonstrate that, instead of redressing the failings identified in *Lee III*, subsequent Rule 37 counsel have only worsened Mr. Lee's plight. Meritorious claims have gone unlitigated. Necessary filings have been neglected. And the very real

probability that Ledell Lee is innocent of the crime for which he may be put to death has gone uninvestigated. Most recently, even though there is *no* dispute that advanced DNA technology could now directly contradict the only forensic evidence offered by the State against Mr. Lee – and further identify the person who actually committed this brutal crime through a search of the national DNA databanks – the Circuit Court compounded the lapses of his prior counsel, and summarily declined to permit such testing. In ruling that Mr. Lee's motion was untimely filed simply because his ineffective and impaired post-conviction counsel failed to do so on his behalf, the Court failed to give Mr. Lee access to the scientific evidence of innocence that this State's legislature intended under the Statute's plain terms.

The Circuit Court also applied an incorrect legal standard to the merits of Mr. Lee's claims, holding that Mr. Lee had not shown that the non-DNA evidence at trial was not legally "sufficient" to convict him, and that DNA testing would not be granted because the question of his guilt had already been "determined by a jury." (Order at 4.) That legal-insufficiency requirement is not only found nowhere in the text of the statute; by definition, it creates a virtually insurmountable burden for any post-conviction petitioner who has, of course, already been convicted at trial beyond a reasonable doubt. For it is precisely because DNA testing methods that were *unavailable to the jury* at trial can now

shed new and important light on questions of guilt and innocence that the Legislature passed has allowed prisoners a statutory right of access to post-conviction DNA evidence before they are executed for crimes they may not have committed. Moreover, at no point did the Circuit Court consider Mr. Lee's claims under the test that this Court has actually held to govern the merits of a request for DNA testing: that such testing "is authorized if testing or retesting ***can provide materially relevant evidence that will significantly advance the defendant's claim of innocence***, in light of all the evidence presented to the jury and the evidence presented to the trial court" with the motion. *Johnson v. State*, 356 Ark. 534, 546, 157 S.W.3d 151, 161, 2004 Ark. LEXIS 183, *13 (Ark. 2004) (emphasis supplied).

Any one of these failings would be enough to grant Mr. Lee relief under Rule 37. Taken together, their cumulative effect is precisely the type of extraordinary circumstance for which the only just remedy is recalling the Court's mandate in *Lee IV*.

I. Mr. Lee's Rule 37 proceedings have been plagued by serious defects which undermine the confidence in their results.

While this Court has recognized that "ordinary claims of ineffective assistance of counsel" would not normally justify recalling a mandate, "the extraordinary circumstances presented in *Lee* [*III*]" stand as an exception to the rule. *Ward v. State*, 455 S.W.3d at 835–36. The performance of Mr. Lee's counsel

over the past decade has been nothing more than a continuation of those extraordinary circumstances, resulting in the bar's total failure to provide Mr. Lee even a shred of the representation to which he is entitled under Arkansas law.

This Court is well aware of the course of Mr. Lee's first Rule 37 petition, in which Mr. Lee was represented by Craig Lambert. Although that petition was denied, this Court ultimately recalled the mandate and reopened Mr. Lee's post-conviction proceedings after finding that Mr. Lambert "was impaired by alcohol use during the time that he represented Lee," a fact the court could "not ignore" considering Mr. Lambert's "admi[ssion] to being impaired during Lee's Rule 37 proceeding, an admission that is supported by the record itself." *Lee III*, 238 S.W.3d at 54, 56, 57 (discussing "[n]otable examples of counsel's troubling behavior); *see also Lee v. Norris*, 354 F.3d at 848 (discussing Mr. Lambert's erratic behavior and slurred speech, noting the behavior was extraordinary and created "cause for concern"). Among the claims that Mr. Lambert failed to investigate was "an identifiable claim of ineffective assistance of counsel at the penalty phase, specifically trial counsel's failure to put on any mitigating evidence." *Lee III*, 238 S.W.3d at 57. The Court therefore concluded that Mr. Lee's Rule 37 counsel "did not . . . meet the qualifications of competency required of counsel appointed under Rule 37.5," resulting in a denial of Mr. Lee's statutory right to effective assistance of counsel. *Id*., at 57–58.

Mr. Lee was thereafter afforded substitute counsel for state post-conviction proceedings: Gerald Coleman and Danny Glover, appointed by the Public Defender's Office. But investigation by current counsel has brought to light facts that show that, instead of remedying the incompetent representation from before, Mr. Coleman and Mr. Glover only perpetuated the extraordinary incompetence the Court witnessed in *Lee III*.

- Mr. Coleman and Mr. Glover relied almost exclusively on the transcripts and records from Mr. Lambert's initial Rule 37 representation (which this Court already ruled was extraordinarily deficient in *Lee III*), developing next to zero additional testimony—despite receiving funding for both a mitigation specialist and a guilt-phase investigator.

- Mr. Coleman and Mr. Glover did not direct or pursue *any* investigation into Mr. Lee's social history, leaving uncovered significant mitigation evidence. *See* Ex. No. 7, Decl. of Elizabeth Vartkessian ¶¶ 8–20 (hereinafter "Vartkessian Decl.").

- Mr. Coleman and Mr. Glover failed, despite enormous technical advances in DNA testing, to seek authorization to retest DNA to advance Mr. Lee's claim of actual innocence.

- Mr. Coleman and Mr. Glover presented such little evidence that it was heard in a single day of evidentiary hearings—four days less than the five days of evidentiary hearings that Mr. Lambert presided over in Mr. Lee's first post-conviction proceedings.

- Mr. Coleman and Mr. Glover communicated almost nothing about the status of the case to Mr. Lee, refusing to return Mr. Lee's phone calls or discuss witnesses or claims, and failing to provide him with pleadings. As a result, Mr. Lee filed several *pro se* complaints before the circuit court and this Court, requesting new counsel.

- Despite an explicit ruling from the federal district court in 2004 that an *Atkins* claim would be appropriate to raise in state post-conviction proceedings, *see* Order, *Lee v. Hobbs*, No. 5:01-cv-00377 (E.D. Ark. March 25, 2004), Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 20, and despite federal habeas counsel's urgings to pursue an *Atkins* claim in state court, Mr. Coleman and Mr. Glover failed to even investigate Mr. Lee's possible intellectual disabilities or mental health issues. *See* Vartkessian Decl. ¶ 11, 19 (noting "no evidence of any investigative work" other than the private investigator's inquiry into Mr. Lee's "guilt"). The accompanying declaration of Dr. Dale Watson demonstrates the consequences that have resulted from Mr. Coleman and Mr. Glover's failure, as Dr. Watson—the first neuropsychologist to *ever* evaluate Mr. Lee—has determined Mr. Lee suffers from "significant brain impairments, a neurodevelopmental disorder, a probable Fetal Alcohol Spectrum Disorder, and likely has either borderline or mild Intellectual Disability . . . life-long impairments . . . [that] would have been uncovered at any point since Mr. Lee's trial had a competent psychologist or neuropsychologist evaluated Mr. Lee." Ex. No. 8, Decl. of Dr. Dale G. Watson ¶ 44 (hereinafter "Watson Decl.").

- Among the other evidence Mr. Coleman and Mr. Glover failed to put on was anything relating to the trial judge's conflict of interest and his extramarital affair with the prosecuting attorney. Compounding the injury to Mr. Lee, Mr. Coleman discredited the argument in briefing to this Court in *Lee IV*, then—despite stating he would withdraw and permit another attorney to make the argument in supplemental briefing—stayed on the case and let the argument languish. *See Lee IV*, 308 S.W.3d at 601 n.2. As a result of Mr. Coleman's failure, the Court declined to address the argument.

- On appeal, the briefs Mr. Coleman finally did file in *Lee IV* were facially so deficient that this Court was compelled—on two separate occasions—to report him to the Arkansas Committee on Professional Conduct for possible disciplinary action. *Lee v. State*, 289 S.W.3d 61 (Ark. 2008); *Lee v. State*, 291 S.W.3d 188, 190 (Ark. 2009).

Mr. Coleman and Mr. Glover picked up right where Mr. Lambert left off: providing Mr. Lee representation in name only. When this Court was presented

with Mr. Lee's post-conviction case again, in *Lee IV*, the situation with Mr. Lee's counsel may have looked like it had improved. But any such appearance was only skin-deep: as current counsel has learned and demonstrates below, the extraordinary circumstances that led to this Court previously recalling its mandate have continued unabated since *Lee III*.

II. The facts uncovered by recent investigations—but which could have been discovered by previous Rule 37 counsel—demonstrate the extraordinary nature of the defects in Mr. Lee's prior post-conviction proceedings.

The Court was able to recognize the extraordinary circumstances in *Lee III* because they were problems apparent from the transcripts of proceedings below and papers filed with the courts. The problems that have come to light since—problems that led to the Court being presented with a defect-riddled case in *Lee IV*—persisted instead in prior counsel's failure to do even the minimum investigation required by either the rules of professional ethics, or the Constitution of the United States. As a result, when this Court considered *Lee IV*, it had not even a shred of the facts that competent counsel would have provided. The Court's mandate must be recalled for this case to be reconsidered with all the relevant facts available.

A. Mr. Lee may have intellectual disability that renders him ineligible for the death penalty but previous state post-conviction counsel never investigated his medical or social histories.

Under *Atkins v. Virginia*, 536 U.S. 304 (2002), execution of the intellectually disabled violates the Eighth Amendment. Mr. Lee's IQ score suggests the need to his adaptive functioning to determine if he has intellectual disability. He has Fetal Alcohol Syndrome and significant brain damage and was held back in school and placed in special education. Mr. Lee fulfills the Arkansas statutory criteria to be considered intellectually disabled and thus ineligible for execution under *Atkins*: He has (1) "[s]ignificantly subaverage general intellectual functioning" that onset before age 18, and (2) "a significant deficit or impairment in adaptive functioning" that onset before age 18 with "[a] deficit in adaptive behavior."[3] Ark. Code § 5-4-618(a)(1). And yet his previous Rule 37 counsel neither had Mr. Lee examined by an expert in psychiatrics or neuroscience, nor did any investigation into Mr. Lee's medical and social history—either of which would have revealed the serious mental disabilities under which Mr. Lee continues to suffer.

[3] The statute treats deficits in adaptive behavior as a separate requirement from deficits in adaptive functioning. *Compare* Ark. Code § 5-4-618(a)(1)(A) *with* § 5-4-618(a)(1)(B). However, the Eighth Circuit acknowledges that the adaptive behavior prong "largely duplicates" the adaptive functioning prong. *Sasser v. Hobbs*, 735 F.3d 833, 845 (8th Cir. 2013). Accordingly, this analysis considers deficits in adaptive behavior and functioning together.

1. Mr. Lee demonstrates significantly subaverage general intellectual functioning that onset before age 18.

First, Mr. Lee's academic performance, his performance on neuropsychological assessments indicating possible brain damage and Fetal Alcohol Syndrome, and his IQ illustrate Mr. Lee's "[s]ignificantly subaverage general intellectual functioning" that onset in childhood. Ark. Code § 5-4-618(a)(1)(A). Mr. Lee's school records reflect that he entered first grade at age 7, suggesting that he had been held back in kindergarten, and scored extremely low on standardized testing. Mr. Lee received poor grades in school, a mix of "below average" and "average" in his first years, despite his advanced age for the year. Ex. No. 1 (school records). Despite being enrolled in special education classes for his entire life, Mr. Lee needed to repeat the 7th and 8th grades. Vartkessian Decl. ¶ 25. He dropped out of school in the 9th grade due to difficulty understanding his school work. *Id.* Mr. Lee explained that, "[e]ven as a special education student he could not do some of the most basic tasks" that other special education students could perform, such as basic division or fractions. *Id.* In other words, at around age 15 or 16, Mr. Lee could not do math that most elementary students have mastered. New testing by a qualified neuropsychologist, Dr. Dale Watson shows that Mr. Lee's academic performance is more than one standard deviation below the mean; Mr. Lee can only perform math tasks at the 5th grade level. Watson

Decl. ¶ 19. These facts make clear that Mr. Lee's intellectual functioning deficits manifested at an early age.

Dr. Watson's examinations of Mr. Lee, in which he conducted 47 different tests and observations, Watson Decl. ¶ 14, show that Mr. Lee has "[s]ignificantly subaverage" functioning in nearly every intellectual area. Ark. Code § 5-4-618(a)(1)(A). For example, Mr. Lee's non-verbal intellectual abilities fall in the range of intellectual disability at the 5th percentile range even without correction. Watson Decl. ¶ 16. Mr. Lee has deficits in "on the spot" reasoning and visual processing, *id.* ¶ 17, along with a "remarkable failure to learn and problem solve." *Id.* ¶ 30. Mr. Lee also exhibits a "striking failure of executive functions to organize his behavior" such that his visual special capacities fall at the 0.01 percentile rank. *Id.* ¶ 24. During a test for visual special capacities, Mr. Lee cannot see the overall object he is supposed to draw; he focuses on the details, distorting them to the point where the drawing is unrecognizable. *Id.*

Furthermore, Dr. Watson characterized Mr. Lee's deficits in both verbal and non-verbal memory and learning as "striking." *Id.* ¶ 20. Mr. Lee has a "poor learning capacity" with indications of moderate memory impairment in the 4th percentile. *Id.* ¶ 22. In recognition tasks, Mr. Lee either was moderately to severely impaired, in the 0.1 percentile, or was severely impaired, at the 0.01

percentile. *Id.* In other words, Mr. Lee's memory ranks as low as 1 out of every 10,000 people.

Dr. Watson's neuropsychological assessments revealed that Mr. Lee's right hemisphere and frontal lobe are dysfunctional. *Id.* ¶ 18. As a result of this brain dysfunction, Mr. Lee has "significant and serious deficits in academic skills, memory abilities, motor functions, social cognition, and executive functions." *Id.* For example, two different memory systems in Mr. Lee's brain malfunction, making it difficult for Mr. Lee to learn new verbal information and then store and retrieve that information. *Id.* ¶ 22. Mr. Lee's performance on a tactual performance test illustrates the brain damage to his right hemisphere. Tasks that involve Mr. Lee's left hand slow him down, indicating a lateralized impairment of the right hemisphere. *Id.* ¶ 27.

During the assessments he conducted, Dr. Watson became "convinced, to a reasonable degree of professional certainty," that Mr. Lee has a neurodevelopmental disorder such as Fetal Alcohol Syndrome. Watson Decl. ¶ 38. Mr. Lee's mother drank continuously throughout her pregnancies. Vartkessian Decl. ¶ 58. The fact that Mr. Lee's mother's "drank and smoked throughout" the time she was pregnant with Mr. Lee, and that her family suffered from a long history of substance abuse, has been confirmed by her sister Dorothy Mackey, who was living with her at the time. Ex. No. 9, Decl. of Dorothy Mackey ¶¶ 5-11

(hereinafter "Mackey Decl."). The likely Fetal Alcohol Syndrome that resulted means that Mr. Lee has intellectually disabled since birth; Mr. Lee's Fetal Alcohol Syndrome contributes to his sub-average intellectual functioning. Watson Decl. ¶ 43. The Supreme Court has acknowledged that Fetal Alcohol Syndrome may cause mental disturbances that can significantly impair cognitive functions. *Rompilla v. Beard*, 545 U.S. 374, 392–93 (2005). In addition to the physical manifestations of Fetal Alcohol Syndrome, such as small eye openings that are very far apart and pointed and folded ears, Vartkessian Decl. ¶ 23; Watson Decl. ¶ 41, Mr. Lee exhibits the cognitive and behavioral effects associated with Fetal Alcohol Syndrome: brain damage, attention and memory problems, difficulty with judgment and reasoning, and learning disabilities. *See* Nat'l Org. on Fetal Alcohol Syndrome, *FASD: What Everyone Should Know*, https://www.nofas.org/wp-content/uploads/2014/08/Fact-sheet-what-everyone-should-know_old_chart-new-chart1.pdf (last visited Apr. 16, 2017). Individuals with Fetal Alcohol Syndrome "have trouble with assessment, judgment, and reasoning," have difficulty understanding cause and effect, and may "never socially mature beyond the level of a 6 year old." Nat'l Org. on Fetal Alcohol Syndrome, *FASD: What the Justice System Should Know About Affected Individuals*, https://www.nofas.org/wp-content/uploads/2014/05/Facts-for-justice-system.pdf (last visited Apr. 16, 2017).

Mr. Lee's Fetal Alcohol Syndrome exemplifies the Supreme Court's reasoning behind *Atkins*. Individuals with "disabilities in areas of reasoning, judgment, and control of their impulses . . . do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. The justifications for the death penalty—retribution and deterrence—cannot be served by executing people with intellectual disabilities because they are less culpable and do not commit premeditated crimes. *Id.* at 319. This holds true for individuals with Fetal Alcohol Syndrome. Research shows that individuals with Fetal Alcohol Syndrome, like Mr. Lee, have abnormal frontal lobe development that impairs executive functioning and makes it more difficult to develop the level of culpability for the death penalty. *See* Richard S. Adler, et al., *A Proposed Model Standard for Forensic Assessment of Fetal Alcohol Spectrum Disorders*, 38 J. Psychiatry & L. 383, 390 (2010). Indeed, far from committing premeditated crimes, individuals afflicted with Fetal Alcohol Syndrome often are impulsive and unable to re-route their actions once they have begun. *Id.*

It would be cruel and unusual indeed to execute a man like Mr. Lee, who the Supreme Court considers less culpable due to his inability to reason and control his impulses. Moreover, the retribution justification is particularly absurd in Mr. Lee's case given that he does not understand that he faces imminent execution; Mr. Lee believes he will be released from prison soon.

Using a standard 5 point margin of error, Mr. Lee's IQ adjusted IQ score of 79 could be as low as 74. Watson Decl. ¶ 15; *see Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014). An IQ of 79 places Mr. Lee in only the 8th percentile. Watson Decl. ¶ 15. Although the DSM-IV-TR defines Mr. Lee's scores as borderline intellectual functioning rather than mild mental retardation, the Eighth Circuit explains that, "[s]imply put, an IQ test score alone is inconclusive of 'significantly subaverage general intellectual functioning.'" *Sasser v. Hobbs*, 735 F.3d at 844 (quoting Ark. Code § 5-4-618). "Under Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical 'IQ score requirement.'" *Id.* In fact, the Eighth Circuit has remanded for an *Atkins* hearing when a defendant alleged an IQ score of 79 and exhibited other deficits in intellectual functioning such as being incapable of graduating high school, just as Mr. Lee was incapable of doing. Vartkessian Decl. ¶ 25; *Sasser v. Norris*, 553 F.3d 1121, 1125–26 (8th Cir. 2009), *abrogated on other grounds by Wood v. Milyard*, 566 U.S. 463 (2012). Mr. Lee's overwhelming deficits in intellectual functioning underscore his intellectual disability, despite his IQ placing him at the 8th rather than 5th percentile.

In fact, IQ is a particularly inaccurate measure of intellectual functioning in individuals with Fetal Alcohol Syndrome. *See* Adler, *supra*, at 403. In intellectually disabled individuals without Fetal Alcohol Syndrome, their IQ tends

to match their levels of intellectual and adaptive functioning. Conversely, individuals *with* Fetal Alcohol Syndrome tend to score higher on IQ tests despite their low levels of intellectual and adaptive functioning. *Id.* at 404. That is, their IQ is not an adequate measure of their intellectual and adaptive functioning. Mr. Lee exemplifies this research. Simply put, his IQ score does not accurately measure his ability to function, which is what the Arkansas statute on intellectual disability concerns.

2. Mr. Lee exhibits significant deficits and impairments in his adaptive functioning, which likely onset before age 18.

Second, Mr. Lee has deficits both in adaptive functioning and adaptive behavior. Mr. Lee cannot effectively "cope with common life demands" and does not "meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Jackson v. Norris*, 615 F.3d 959, 961–62 (8th Cir. 2010) (quoting DSM–IV–TR at 42). To show deficits in adaptive functioning under Arkansas law, a person must exhibit limitations in two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. *Id.* at 962. Moreover, "the Arkansas standard does not ask whether an individual has adaptive strengths to offset the individual's adaptive limitations." *Sasser v. Hobbs*, 735 F.3d at 845.

Mr. Lee demonstrates limitations in many skill areas, all of which he has had since an early age due to his probable Fetal Alcohol Syndrome and brain damage. As stated above, Mr. Lee has limited functional academic skills; he is unable to do basic math problems that appear in everyday settings. *Id.* Moreover, Mr. Lee has difficulty communicating and engaging in social situations due to his lack of focus. Vartkessian Decl. ¶ 25. He often loses track of the conversations he is in. *Id.* Mr. Lee also struggles "to understand and process the tonal qualities and prosody of language," placing him in the 10th percentile. Watson Decl. ¶ 37. He is limited in his "understanding of complex social interactions." *Id.* It is possible that Mr. Lee's boxing injury at a young age, resulting in an "easily visible scar" located above his right eyebrow, contribute to his inability to focus and communicate. Vartkessian Decl. ¶ 22.

Perhaps most importantly, Mr. Lee's disability makes it nearly impossible for him to take care of and live by himself. Dr. Watson observed that Mr. Lee has a "marked inability to reason and analyze in novel problem solving situations and reflects a degree of confusion that is likely to impact his independent functioning." Watson Decl. ¶ 31. During one test, Mr. Lee could not match cards based on basic sorting rules such as color and number. *Id* ¶ 30. If he cannot ascertain even the simplest of patterns, he is unable to function independently. *See id*. ¶ 31. Additionally, Mr. Lee is mild to moderately impaired regarding problem solving.

Id. ¶ 34. He "performed well below expectations" in problem solving activities. *Id.* Mr. Lee cannot determine salient aspects of a problem or devise solutions, even when given feedback. *Id.* Mr. Lee's inability to solve even simple problems displays his limitations in the skill areas of self-care, home living, use of community resources, self-direction, work, leisure, health, and safety.

Had Mr. Lee's previous Rule 37 counsel performed even a modicum of the investigation that is reasonably expected of capital habeas counsel, they would have discovered what current counsel found: Mr. Lee likely fulfills the Arkansas statutory criteria to be considered intellectually disabled, and thus cannot be executed under *Atkins*.

B. Previous post-conviction counsel never investigated trial counsel's abandonment of a request for a psychiatric evaluation under *Ake*.

Mr. Lee's intellectual disabilities are relevant not only to whether he is eligible for execution under *Atkins*, but also as mitigating evidence at the penalty phase. When intellectual disabilities may be a significant factor for an indigent defendant at trial, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and *assist in evaluation, preparation, and presentation of the defense*." *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (emphasis added); *see Starr v. Lockhart*, 23 F.3d 1280, 1288 (8th Cir. 1994) (applying *Ake* when defendant's mental condition is "his strongest argument in mitigation for sentencing purposes). Mr. Lee's trial counsel requested

a private psychiatrist to perform an *Ake* evaluation for mitigation purposes, but later abandoned that request. Tr. at 729. A cursory glance at the trial record would have revealed to previous post-conviction counsel that Mr. Lee never received the psychiatric expert that he was constitutionally entitled to under *Ake*.

It is ineffective assistance of counsel to fail to request an independent mental health expert to assist in the preparation of the defense in the fact of red flags warrant such assistance. *See Saranchak v. Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 593 n.9 (3d Cir. 2015), *cert. denied sub nom. Saranchak v. Wetzel*, 136 S. Ct. 1494 (2016). Here there were numerous red flags of the need for mental health expert issue: Mr. Lee's facial features, history of head injuries, school records, the history of seizures and intellectual disabilities in Mr. Lee's family, and Mr. Lee's concrete and rigid thinking.

Trial counsel appropriately made a motion for funds for a psychiatric expert to assist Mr. Lee in "presenting evidence of factors of [sic] mitigating against imposition of a sentence of death." Tr. at 80. Trial counsel insisted that the expert was necessary to "explore every avenue in order to establish the existence of potentially mitigating factors." *Id.* Trial counsel later abandoned this request, stating that an expert—"someone in mitigation, for some sort of mitigation, mental capacity, that type of thing"—would only be necessary "[d]epending on how the IQ thing comes out." *Id.* at 729. An IQ score is of course important for

exploration of intellectual disability, but mental illness and other mitigation in no way hinge on IQ. This conflation and abandonment of Mr. Lee's right to independent and ex parte investigation was deeply deficient and prejudicial. The judge invited counsel to submit a reasonable request, "If you need something, just let me know. If it is within reason, I'll grant it." *Id.* Despite this near guarantee of funding from the judge, and even though Mr. Lee never did receive an IQ test—an essential mitigating factor, *id.* at 228—Mr. Lee's trial counsel did not return to the judge to re-request funds for a psychiatric expert.

Instead of receiving a psychiatric expert to assist in his defense, Mr. Lee only received a brief evaluation by a state hospital official that was shared with the prosecution. *Id.* at 155-59. This evaluation was deficient under *Ake* for two reasons. First, the evaluation aimed to establish competency, not intellectual disability. *Id.* at 155 (evaluating Mr. Lee's "capacity to appreciate the criminality of his conduct"). The aims of evaluations for competency and intellectual disability are different; one can be competent to stand trial and intellectually disabled, or incompetent to stand trial but with average intellectual functions. The Arkansas Supreme Court explained that such capacity evaluations are "obviously not broad enough to cover everything a defendant might raise as a 'mental defect' basis of mitigation." *Coulter v. State*, 304 Ark. 527, 541 (1991). Accordingly, the Eighth Circuit held that a capital defendant like Mr. Lee who receives only a

competency examination is deprived of his right to a psychiatric expert for the defense under *Ake*. *Starr*, 23 F.3d 1290.

Second, this evaluation was shared with the State. *Ake* makes clear that the psychiatric expert must "assist in evaluation, preparation, and presentation of the *defense*." 470 U.S. at 83. A joint mental health expert cannot fulfill *Ake*'s mandate. The psychiatric expert under *Ake* must be able to "present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses." *Id.* at 82. Of course, because a joint psychiatric expert is just as much the State's psychiatric witness, such a person cannot be a defense expert under *Ake* unless they were able to cross-examine themselves. The Supreme Court currently is considering this exact issue—the right to an independent psychiatrist under *Ake*. *McWilliams v. Dunn*, 137 S. Ct. 808 (2017). In fact, this Court recently stayed two executions and took the motion to recall the mandate of the case to evaluate this argument. *Ward v. Arkansas*, No. CR-98-657.

Mr. Lee's previous post-conviction counsel never investigated whether his trial counsel was ineffective in abandoning the request for a psychiatric expert under *Ake*. A brief survey of the trial record makes this information, and thus trial counsel's error, clear. Given what has now been discovered about Mr. Lee's intellectual disability, there is "a reasonable probability" that an independent psychiatric expert would have aided in his defense, and that the "denial of expert

assistance" rendered the trial unfair. *Little v. Armontrout*, 835 F.2d 1240, 1244 (8th Cir. 1987) (en banc). It is therefore inexcusable that Mr. Lee's previous post-conviction counsel neglected to discover that trial counsel failed to use constitutionally-endowed resources to uncover critical mitigating information, and thus potentially spared Mr. Lee a death sentence. The error was prejudicial because it deprived Mr. Lee of the ability to uncover and present the kind of mitigation evidence regarding his family history, FASD, and intellectual disability that is presented in the affidavits of Dr. Watson and Dr. Varkessian. *See infra*.

C. Mr. Lee's previous counsel failed to conduct any meaningful investigation into mitigating evidence.

1. There is no indication that the investigators hired by Mr. Glover and Mr. Coleman conducted any mitigation investigation.

Recent review of counsel's files reveals that Mr. Lee's Rule 37 counsel never pursued any meaningful investigation into mitigating evidence, despite representations to the contrary.

Mr. Lee's current counsel recently hired mitigation specialist Elizabeth Vartkessian, Ph.D., who determined that Mr. Glover and Mr. Coleman hired an investigator named Matilda Buchanan, who federal habeas counsel suggested conducted the mitigation investigation. *See* Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 94 at 27 (referring to "mounds of valuable mitigation evidence that they had simply ignored," citing to Mr. Lee's letter to state habeas

counsel which referenced Ms. Matilda Buchanan's "400 pages of very important investigated [sic] evidence to support my claims").

Ms. Vartkessian has, however, carefully reviewed state habeas counsel's files, which included Ms. Buchanan's materials, but no materials from Ms. Croy. She uncovered no evidence that Ms. Buchanan pursued any meaningful mitigation investigation, whatsoever. Indeed, "Ms. Buchanan's own notes" indicate that she believed "she was responsible for the 'guilt' phase investigation," and not the penalty phase. Vartkessian Decl. ¶ 19. Nor has a review of federal habeas counsel's files revealed any indication that they believed anyone other than Ms. Buchanan conducted a meaningful mitigation investigation, much less that federal habeas counsel was in possession of that evidence. Ms. Vartkessian has therefore concluded that no one has "conducted even the most basic of social history investigation." Vartkessian Decl. ¶ 20.

Ms. Vartkessian also inquired into efforts by Lisa Croy, who was allegedly hired by Mr. Glover and Mr. Coleman to conduct a mitigation investigation, apparently receiving $6,880.22 in payment for her efforts. During a phone interview with Ms. Croy, she indicated that she was only on the case for a short period, a few weeks before the hearing. She remembered that Mr. Lee's mother was nice, and did not recall looking into Mr. Lee's intellectual disability. Mr. Lee's current counsel has not identified any documentation relating to Ms. Croy's

investigation in state habeas counsel's files. The apparent absence of any mitigation investigation by Ms. Croy is not surprising considering recent revelations that the Arkansas Public Defender Commission decided they would no longer use Ms. Croy's mitigation services out of converns there were "inaccuracies" in her "billing practice," and that "the quality of the work being conduct [by Ms. Croy] did not meet the standards" that the Executive Director of the Arkansas Public Defender Commission believes are "necessary for a meaningful defense and mitigation case. Ex. No. 10, Parrish Decl. ¶ 4.

2. No court has considered the significant mitigation evidence recently uncovered by Mr. Lee's counsel.

The significance of federal habeas counsel's misrepresentation is incredibly striking when viewed in light of current counsel's recent efforts to conduct a mitigation investigation for the first time. A preliminary investigation reveals evidence "of some adaptive functioning limitations, a history of family mental illness and disease, as well as experiences of living in extreme poverty, neglect, abuse and familial dysfunction." Vartkessian Decl. ¶ 56. Those findings are elaborated in detail in Ms. Vartkessian's declaration, and include the following findings:

1. Fetal Alcohol Spectrum Disorder (FASD): Dr. Vartkessian noted upon meeting the petitioner, "physical characteristics of FASD . . . includ[ing] small eye openings, eyes that are very far apart, ears that looked pointed and folded over as if there was something biological that happened when he was developing inside the womb, and a smooth and wide philtrum." Vartkessian

Decl. ¶ 23. Based on her training and experience, she believes this is indicative of FASD. Her preliminary investigation found corroborative evidence that petitioner's mother, who was 16 years-old when she gave birth to petitioner, consumed alcohol during other pregnancies. *Id*. at ¶ 36. To date, no birth records, medical records of the petitioner during his youth, or prenatal or other medical records of his mother have been obtained.

2. Deficits in intellectual functioning: Some of Mr. Lee's school records were included in the trial record, indicating that he was transferred to a juvenile detention facility. Vartkessian Decl. ¶ 42. Although requesting these records is a "standard initial mitigation investigation step," a review of prior counsel's files indicates "this has never been done before." *Id.* Nor does Mr. Lee "recall anyone ever asking him to sign releases for his records, another sign of a dramatic departure from standard practice." *Id.* The school records also highlighted Mr. Lee's placement in special education classes, being held back twice (and possibly a third time in Kindergarten), and low grades. Yet prior counsel's files are devoid of any record that anyone investigated these potential deficits in intellectual functioning.

3. Prior IQ scores: During his time at the juvenile detention center, petitioner recalls having taken two IQ tests. Both of these tests would have been given during his "developmental period" and will be critical evidence (if they were individualized, standardized IQ tests required by clinicians) to support his intellectual disability claim. A bare-bones, minimal mitigation investigation required counsel to obtain these IQ scores, and yet there is no indication they were requested.

4. Poverty: Numerous studies have proven that poverty affects a child's intellectual development. *See e.g., Children and Poverty*¸ The Effects of Poverty on Children, Vol. 7, No. 2 (1997), www.princeton.edu/futureofchildren/publications/docs/07_02_03.pdf (last visited April 17, 2017). Dr. Vartkessian has only scratched the surface of the depth of poverty in petitioner's household in his formative years. While his mother had money for gambling and his grandmother had funds for alcohol, the children lacked the basics. The scarcity and rationing of food is an indicator of the level of poverty in the petitioner's household. Vartkessian Decl. ¶¶ 32-33, 35-36, 40. The first physical examination the petitioner remembers was done while in juvenile detention. *Id*. at ¶ 41. A full investigation is needed to develop how the lack of necessary resources

for food, heat, medical care and other necessaries adversely affected petitioner's intellectual development.

5. Possible traumatic brain injury: Petitioner has an "easily visible scar" located above his right eyebrow that he reports he received while boxing. *Id*. at ¶ 22. Dr. Vartkessian also noted petitioner's inability to focus, loss of words, and losing track in a conversation. *Id*. at ¶¶ 25, 27. The presence of the scar on his face/head, reported history of boxing and inability to focus/communicate are all red flags for a possible brain injury. Intellectual disability can be caused by a brain injury. Further investigation is needed to determine whether petitioner has a brain injury which caused or is co-occurring with intellectual disability.

6. History of family mental illness: Petitioner's family reports that his older brother is mentally ill, *id*. at ¶ 28, and Dr. Vartkessian, based upon her training and experience, noted that petitioner's mother displayed signs of mental illness, *id*. at ¶ 47. Because genetic factors are involved in mental illness, when one family member is affected, other close relatives may be at increased risk. *See Harper's Practical Genetic Counseling*, 6th ed., 2004. For example, there is a 2-3% risk that a person in general population has bipolar disorder, but if one parent has bipolar disorder, a child's risk is 15%. If a parent and sibling have bipolar disorder, the risk is 20%. *Id*. Thus, an adequate mitigation investigation into petitioner's co-occurring mental disorders which affects his intellectual functioning and his adaptive functioning requires an investigator to obtain medical records of first and second degree relatives at a minimum. Ms. Vartkessian was informed by Mr. Lee's mother that no mitigation investigator had ever met with petitioner's mother, no one had asked her about her family history, or asked her to sign a release to obtain her medical records.[4] Vartkessian Decl. ¶ 48.

7. Miscellaneous: Other preliminary facts require further investigation. The family lived adjacent to a large drainage pipe exposing them to sewage and other waste presents the possibility of environmental toxins which could affect brain and intellectual development. *Id*. at ¶ 34. Also, the absence of petitioner's mother and lack of care for petitioner raises issues of possible Reactive Attachment Disorder (RAD). RAD "significantly impairs young

[4] A recent phone interview with Ms. Croy indicates that she may have met with Mr. Lee's mother, but in this conversation Ms. Croy merely indicated that she remembered her as being nice. She did not convey the substance of their conversations.

> children's abilities to relate interpersonally to adults or peers and is associated with functional impairment across many domains of early childhood." DSM-V, p. 267.

Certainly, the initial findings from this investigation reveal that Mr. Lee has been severely prejudiced by his counsels' repeated failures to take basic steps to conduct a mitigation investigation.

Wiggins v. Smith, 539 U.S. 510 (2003), provides that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989) p. 93) (internal quotation marks and emphasis omitted). This duty is of the utmost importance in the capital punishment context. *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir.1995) (quoting *Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir.1994) ("'Given the severity of the potential sentence and the reality that the life of [the defendant] was at stake,' we believe that it was [counsel's] duty . . . to collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial.").

The Supreme Court has looked to ABA standards as "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. at 524 (internal quotation marks omitted). The 2003 ABA Guidelines for the Appointment and Performance of

Counsel in Capital Cases require far beyond the mitigation investigation Mr. Lee received:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless has first conducted a thorough investigation with respect to both phases of the case . . . .
>
> Counsel needs to explore: (1) medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, prenatal and birth trauma, malnutrition, developmental delays and neurological damage);
>
> (2) Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse or domestic violence; poverty, familial instability, neighborhood environment and peer influence; other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences. . . .);
>
> (3) Educational history (including achievement, performance, behavior and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof and activities[.] . . .).

ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases, ¶ 10.7 (2003) pp. 80-83 (quotation marks and footnotes omitted).

Mr. Lee's counsel simply failed to investigate potential avenues for mitigation. This failure to provide Mr. Lee with competent, conflict free counsel started at his initial trial, continuing into both his Rule 37 and federal habeas

proceedings.[5] Mr. Lee has fetal alcohol syndrome, significant brain damage, and intellectual disability (either mild or borderline). He was in special education, and repeated the seventh and eighth grades.

However before last week, no expert had ever evaluated Mr. Lee's IQ or brain functioning and no investigator had even created a list of his family members. Additionally, upon review of Mr. Lee's file, it appears that no one ever in post-conviction or habeas moved for a psychologist or neuropsychologist to evaluate Mr. Lee. Mr. Lee's mitigation case only consisted of very brief pleas for mercy from a few friends and family and the testimony of psychologist Robin Rumph. As stated above, Mr. Lee's counsel also failed to follow standard initial mitigation investigation steps, such as failing to interview his family or to request crucial records relating to his past. Vartkessian Decl. ¶ 29, 42. This failure to conduct a thorough investigation, resulting in superficial knowledge of Mr. Lee's history from a narrow set of sources, would have warranted relief. *See Wiggins*, 539 U.S. at 516. Relief would also be warranted due to counsel's failure to uncover evidence of the petitioner's dysfunctional upbringing, brain damage and borderline intellectual disability. *See Williams v. Taylor*, 529 U.S. 362, 395-96, 416 (2000); *see also Kenley v. Armontrout*, 937 F.2d 1298, 1303 (8th Cir. 1991)

[5] On direct appeal, Mr. Lambert represented Mr. Lee and did not raise the issue of his own ineffectiveness. Additionally, Mr. Lambert, working with co-counsel, filed a habeas writ in federal court in November of 2001. The writ also failed to raise Mr. Lambert's ineffectiveness.

(finding that counsel's failure to present available family and expert mitigating evidence of the defendant's medical, psychological and psychiatric history demonstrated ineffective assistance of counsel.).

The *Wiggins* failure in this case becomes truly extraordinary when considered together with the evidence an adequate investigation would have revealed: Mr. Lee's severe intellectual disability and evidence that he could be actually innocent of the murder charge on which he was convicted.

D. Advances in DNA testing can now prove that Mr. Lee is actually innocent—but previous post-conviction counsel never requested DNA testing of any of the blood or hair evidence from Mr. Lee's initial trial. And the Circuit Court relied on that error to summarily deny his plainly meritorious petition for DNA testing.

1. Despite the State's heavy reliance on the limited, non-DNA forensic testing performed at Mr. Lee's trial, post-conviction counsel never sought DNA testing to put the State's allegations – and their own client's longtime claim of innocence – to the test of definitive DNA science.

Just like with the neuropsychological testing by Dr. Watson, prior counsel should have—but did not—conduct any testing of the hair and blood evidence that was so critical to the State's case in Mr. Lee's initial trial. Unlike the neuropsychological testing, however, DNA testing would do more than just demonstrate Mr. Lee is ineligible for the death penalty: it would demonstrate he is actually innocent. In 1995, Mr. Lee's jury was told that none of the rudimentary tests available at that time (serology and hair microscopy) could definitively tie

Mr. Lee to the crime or crime scene – yet the prosecutor repeatedly asked the jury to infer that the presence of "Negroid" hairs that appeared "consistent" with Mr. Lee's at the scene, and small spots of "human blood" on his shoes, were powerful evidence of his guilt. Yet prior counsel never put any of the State's dubious claims to the test of modern DNA science – even though Arkansas passed a statute permitting DNA testing in cases like Mr. Lee's over a decade ago. Because Mr. Lee has maintained his innocence for more than two decades; was denied minimally competent counsel to present that claim for DNA testing and have an expert appointed on his behalf; and the evidence he seeks to test satisfies each and every one of the statute's requirements, this Court should recall the mandate and order a meaningful evidentiary hearing on these claims, or in the alternative, simply direct the court to enter an order for DNA testing.

Mr. Lee has petitioned the Pulaski County Circuit Court for an order directing forensic DNA testing of biological evidence collected during the investigation of the murder of Debra Reese pursuant to Arkansas's Habeas Corpus – New Scientific Evidence Statute (the "Statute") (codified at Ark. Code Ann. §§ 16-112-201, et seq.), and the Due Process and Cruel and Unusual Punishment Clauses of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. *Lee v. State*, No. CR 93-1249. This probative biological evidence in the custody and control of the Jacksonville Police Department since 1993 may now

be able to provide—through the use of modern, cutting edge DNA testing technologies—confirmation of the veracity of Mr. Lee's innocence claim.

At the time of his arrest, at trial, and to this day, Mr. Lee has denied involvement in the murder of Debra Reese. At trial, the State introduced no confession and no physical evidence that directly tied Mr. Lee to the murder of Ms. Reese. None of the lifted prints from the crime scene matched the defendant, and no DNA evidence was presented to the jury. To strengthen the weak circumstantial evidence, the State introduced "Negroid" hair found in Ms. Reese's home, and evidence of two "small spot[s]" of human blood found on Mr. Lee's Converse tennis shoes at the time of his arrest, which could not be further typed to determine their potential source(s).

Notwithstanding an extremely bloody crime scene, however, no other blood was discovered anywhere on Mr. Lee's clothes. Even more remarkably, despite the fact that the State alleged that Mr. Lee had worn *this very pair of shoes* to bludgeon Ms. Reese to death – leaving the scene spattered with blood on the walls and floor – the State never explained how Mr. Lee could have possibly committed this close-range, brutal murder yet left the rest of his tennis shoes wholly untouched with the victim's blood. As the Court's decision in *Lee I* explained:

> When Lee was arrested and taken into custody on the day of the murder, among the items police seized from him was a pair of Converse tennis shoes he was wearing. Kermitt Channell, a serologist with the State Crime Lab, examined the shoes and observed what he

> believed to be a small spot of blood on the sole of the left shoe, and another spot on the tongue of the right shoe. Channell performed what he termed a "Takayama test" on the shoes, which confirmed the presence of blood, but consumed the entire sample, thus removing the opportunity for independent analysis by the defense.

942 S.W.2d at 234. Channell testified at trial that he performed the confirmatory blood test on the shoes in accordance with established laboratory guidelines, but acknowledged that he had not contacted the prosecutor or the defense counsel in advance to inform them that the sample on the shoes could be consumed. *Id.* at 235.

Significantly, the Court, in 1997, denied Mr. Lee's claim for due process relief on appeal because "Lee has made no showing that the blood evidence on the shoes possessed any exculpatory value before it was destroyed." *Id*. Yet at no time during the last two decades did post-conviction counsel for Mr. Lee ever retained a DNA expert to examine the shoes and determine if any traces of the original blood spots – or other blood on the shoes ---might not have been "destroyed" for DNA purposes. Since today's STR-DNA testing requires significantly smaller quantities of biological material than the serology tests conducted in 1993-95, and DNA analysts frequently detect traces of blood or other biological material that serologists do not, post-conviction counsel's failure to so investigate DNA testing on the shoes was patently unreasonable. *See* Petition for DNA Testing, Exh. 7 (Declaration of Charlotte Word, Ph.D.) (explaining protocols

and utility of reexamination of shoes for bloodstains suitable for DNA testing). More than merely raising a due process claim regarding bad faith destruction of the two bloodstains, then, postconviction counsel could and should have sought expert assistance in determining whether any blood, hair, or other evidence remained in a condition suitable for DNA testing to prove Mr. Lee's innocence.

That lapse is particularly galling given the fact that the hair evidence featured prominently in the State's trial case, yet DNA testing that could generate the hair donor's profile only became available after trial. Donald E. Smith, a criminalist, testified for the State as an expert witness with respect to hair evidence retrieved from the crime scene. Specifically, he analyzed one "intact Negroid head hair" and several Negroid hair fragments. Tp. 688. He also indicates the intact hair has a root present. Tp. 690. ("And I saw some clearing of the pigments because from the root to the shaft there sometimes gets a clearing of this pigmentation. That's not apparent if you don't have roots.") At the time of the trial in 1995, Mr. Smith said "hair is not a science so precise that you can define a hair as uniquely coming from an individual, saying that no other individual has hair like another person." Tp. 685. After an examination of these hairs, Mr. Smith concluded that he found nothing that was inconsistent with Petitioner's hair but that he couldn't identify them as coming from the defendant. Tp. 690.

In her closing arguments during the guilt phase of the guilt phase of trial, the prosecutor emphasized the importance of the identification of some Negroid hair fragments consistent with the defendant's and in contrast to the Caucasian head hairs of Debra Reese and her husband. Tp. 773. The prosecutor acknowledged the defendant's clothes had no blood on it three hours after the crime but emphasized two pinpoints of blood found at the same time on the defendant's tennis shoes that, she argued, "puts the defendant at the scene." Tp. 773, 795. The blood and hair evidence were thus an essential part of the State's case identifying the defendant as the perpetrator of the murder, and postconviction counsel's failure to do any investigation into advances that permit DNA testing these items since 1995 is inexcusable.

2. Arkansas' DNA testing statute was designed precisely for cases like Mr. Lee's -- in which advanced technology unavailable at trial can "raise a reasonable possibility that [he] did not commit the crime" -- and the Circuit Court erred in summarily denying his statutory right to prove his innocence with DNA evidence before he is executed.

There is no question that today's advanced DNA testing methods can provide definitive answers to the questions that could not be resolved by the State's experts at trial. Indeed, this previously-unavailable testing could now demonstrate that the blood on the shoes was *not* Ms. Reese's, and that the numerous hairs of African American origin found at the scene were *not* Mr. Lee's. Further, if a sufficient quantity of "root" (tissue) material is present on the hairs, and a DNA

profile is obtained that excludes Mr. Lee as the source, the profile can be searched in the national CODIS DNA databank and potentially identify Ms. Reese's actual killer, who may still be at large and a threat to others. Importantly, although the exculpatory potential of a DNA databank "hit" to a known offender as the source of the hair featured prominently in Mr. Lee's petition for DNA testing (and is supported by caselaw in other jurisdictions), the Circuit Court made no mention whatsoever of this argument in summarily denying the testing.

Mr. Lee began seeking DNA testing in 1996 – years before Arkansas even had a statute on the books to provide indigent prisoners with access to DNA testing. But he had no funds, scientific expertise, or qualified counsel to pursue and present this claim on his behalf. Nor has he had an opportunity to have his new counsel – much less a qualified DNA expert – examine the evidence to determine if it is suitable for DNA testing and confirm chain of custody. As such, this is clearly a case where, if Mr. Lee is executed without the opportunity to conduct a simple DNA test on the evidence used to convict him, "a denial of the motion [for DNA testing] would result in manifest injustice." § 16-112-202(10)(B)(iv). The mandate should be recalled with an order directing testing

under the DNA statute, or, in the alternative, with instructions to the Circuit Court to conduct a full evidentiary hearing on these issues.

a. Although the Statute requires Mr. Lee to establish only that favorable DNA test results would "raise a reasonable probability" that he did not commit the crime, the evidence he seeks to test is so central to the perpetrator's identity that it could prove Mr. Lee's actual innocence beyond any doubt.

This Court should consider the merits of Mr. Lee's DNA testing claim in determining whether he has been afforded a full and fair opportunity to prove his actual innocence before he is executed. Notably, in its Response to the DNA petition below, the State did NOT deny that the DNA testing Mr. Lee seeks on the hair and blood evidence has the scientific potential to establish his factual innocence. Nor did it deny that the same testing Mr. Lee seeks to conduct was unavailable at Mr. Lee's trial, but is now regularly utilized by state and federal law enforcement to investigate and prosecute such crimes. It instead argued that the prosecution's original, largely circumstantial case against him was (in the State's words) so "overwhelming" that DNA testing was *unlikely* to turn out in his favor, and thus, he should be denied the right to have the test conducted at all. That is both incorrect as a factual matter (given that numerous individuals exonerated through DNA testing appeared far more "guilty" based on the evidence at trial than Mr. Lee), and is not a relevant inquiry under the DNA Statute in any event. For its part, the Circuit Court failed to apply or even note the test adopted by this Court in

Johnson, *supra* -- whether "new, material evidence" from a DNA test could "significantly advance" Mr. Lee's claim of innocence – and asked only whether, absent any forensic evidence at all, the State had presented legally "sufficient proof" to sustain his conviction. That test was invented by the Circuit Court out of whole cloth, and has no support in the statute's text or history.

Mr. Lee can readily establish what the statute and this Court's precedents *do* require: that he (1) "identify a theory of defense" consistent with the defense he presented at trial that could establish his actual innocence, and (2) demonstrate that the results "may create new, material evidence" that would support that theory of defense, and "raise a reasonable probability" that he did not commit the crimes of which he stands convicted. *See* §16-112-202 (6) (theory of defense), and (8)(B) (potential to establish reasonable probability of innocence).

Mr. Lee consistently maintained at trial and since that time that he was not the perpetrator of this heinous crime. His counsel argued that the State had no credible physical or other evidence placing him at the scene, and that he was misidentified by the inconsistent, unreliable eyewitnesses who testified for the State. Moreover, the State has always contended – and the record supports a finding – that a lone African American male was seen entering and exiting the victim's home the day she was killed. The only issue in dispute – at trial, and now – is whether Mr. Lee was that man. Thus, §16-112-202 (6) is easily satisfied. *Cf.*

e.g., *Bieneny v. State*, 504 S.W.3d 588 (Ark. 2016) (petitioner whose defense was that he was accessory, rather than principal, to crime not eligible for DNA testing under statute).

Most fundamentally, the DNA requested has the scientific potential to prove the truth of Mr. Lee's innocence claim. As set forth in the uncontested Affidavit of Charlotte Word, Ph.D, in his Petition, and in the accompanying authorities, the testing he seeks uses advanced STR and mitochondrial DNA technology that was unavailable to any party at the time of trial. And the potential materiality of exculpatory DNA results is apparent, because the testing can: (1) show that the blood on Petitioner's shoes was not Mr. Lee's; (2) show that the "Negroid" hairs found at the crime scene came from someone other than Mr. Lee, and (3) if an STR-DNA profile is obtained from the root of the "intact" hair (as the State's expert said was present when he examined the root), and Mr. Lee is not the source, that STR-DNA profile can be searched in the CODIS DNA database, and potentially identify Ms. Lee's actual killer.

Indeed, the testing that Mr. Lee seeks on the root of this hair is so fundamental to the investigation of criminal culpability that it is routinely used by law enforcement to identify and prosecute criminal defendants in the modern era. *See, e.g.*, *State v. Alexander*, 194 So.3d 33 (La. Ct. App. 2nd Cir. 2016) (affirming conviction for murder based principally on DNA profile of defendant obtained

from root of hair on victim's corpse, which led to his identification as suspect through CODIS database search); U.S. Dept of Justice, Off. Justice Programs, *What Every Law Enforcement Officer Should Know About DNA Evidence*, at 2 (discussing how DNA from "a single hair" inside victim linked to suspect "provided critical evidence in a capital murder prosecution), *available at* https://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf. Such testing has also been used to exonerate the factually innocent -- including, for example, Innocence Project client Randolph Arledge of Texas, who served more than thirty-two years in prison for a rape and murder he did not commit, before DNA testing conducted on a root of a hair found on clothing in the victim's car yielded a "hit" in CODIS to another convicted felon. Following the hit, Texas prosecutors investigated the new suspect and agreed to Mr. Arledge's immediate release and dismissal of all charges against him. *See* Innocence Project: Randolph Arledge, *available at* https://www.innocenceproject.org/cases/randolph-arledge/ (last visited April 18, 2017).

Remarkably, despite the possibility of a DNA databank "hit" to a known offender as the source of the "Negroid" hair at the scene featured prominently in Mr. Lee's petition for testing below, the Circuit Court never once mentioned – much less analyzed the merits of – his claim that such a result could wholly exculpate him. Nor did the Court address any of the decisions from other states

recognizing a petitioner's entitlement to have such evidence considered under virtually identical DNA statutes. For example, in *Powers v. State*, 343 S.W.3d 36, 55 (Tenn. 2011), the Supreme Court of Tennessee held that, in determining whether a petitioner had satisfied his burden of showing a "reasonable probability" that exculpatory DNA results would establish actual innocence, "the trial court should postulate whatever realistically possible test results would be most favorable to [the] defendant," including whether "the non-matching DNA profile on the [evidence to be tested] would match the profile of a prior offender contained in a DNA database." Surely, this Court should not permit Mr. Lee to be executed unless and until he is given a similar opportunity to prove his innocence with the use of previously-unavailable DNA databanks.

b. The State's Trial Evidence in No Way Defeats Mr. Lee's Entitlement to DNA Testing That Can Wholly Exculpate Him.

The Circuit Court adopted the State's contention in its Response to the petition that DNA testing does not have the *potential* to provide new, material evidence of Mr. Lee's innocence in light of the other, non-DNA evidence offered against him at trial, particularly the eyewitness testimony offered by the State. That conclusion is deeply flawed, for at least two reasons.

First, it is now well established that subjective assessments of the apparent strength of the State's case can be, and often are, later rebutted by objective DNA

science. One study of written court decisions from the records of more than 200 post-conviction DNA exonerations, for example, found that in fully 47% of the cases, it was found that one or more courts had earlier commented on a later exonerated defendant's apparent guilt; and in 10% of the cases, courts had characterized the evidence against these factually innocent defendants as "overwhelming." Brandon Garrett, CONVICTING THE INNOCENT 201-02 (2011)

Second, the trial evidence against Mr. Lee was far from "overwhelming." No physical evidence placed him at the scene. Latent fingerprints analyzed from the scene were not Mr. Lee's. Arrested less than three hours after Ms. Reese's murder, wearing the same clothing that the State alleged he had used to commit the murder, Mr. Lee's shirt, pants, and fingernails were wholly devoid of precisely the kind of inculpatory forensic evidence—namely, any traces of the victim's blood—that would certainly have been shed all over her killer in this close-range, violent struggle that left "spattered" blood all over her walls and floors. The three eyewitnesses who testified that they believed Mr. Lee was the man they saw leaving and/or near the crime scene gave contradictory and at times irreconcilable accounts of the man's clothing, route, and appearance; they also gave inconsistent

statements as to the time at which these identifications occurred in relation to the crime itself. [7]

The Circuit Court found that even with wholly exculpatory DNA results showing that Mr. Lee was not the source of the "Negroid" hairs from the scene, and that not a single trace of the victim's blood is anywhere on his clothes and shoes, "the trial record would still contain the testimony of three eyewitnesses who placed the defendant at the victim's home or nearby at the time of the murder." Order at 4. Reliance on lay eyewitness testimony to defeat a claim for DNA testing is particularly inappropriate given what is now widely known among courts and scholars about the fallibility of eyewitness testimony – particularly where, as with the State's two key eyewitnesses against Mr. Lee, the identifications are made by persons of a different race than the suspect.[8]

Well-reasoned Supreme Courts in other states have discussed this body of knowledge in detail. *See, e.g., State v. Henderson*, 208 N.J. 208, 232-34 (2011)

[7] One witness, Mr. McCullough, said the person he identified as Mr. Lee came to his house to borrow tools. They talked for 10-15 minutes, face-to-face. He is positive that this person was not wearing a jacket, positive that he had no ball cap on, and says he believed he was wearing a short-sleeved shirt. Mr. Gomez, on the other hand, said the man he saw entering and leaving Ms. Reese's house was wearing a ball cap and dark jacket. But, Mr. Gomez admits he was taking Vicodin for pain at this time. Still another witness, Ms. Pruitt, who did not claim to have seen Mr. Lee at or near the victim's home, but only in the general area where the crime occurred, at trial said she wasn't sure about the clothing but, at another hearing testified she believed he had on a red plaid shirt. She admittedly was a daily marijuana user, and initially reported seeing Mr. Lee at 11am –*before* the murder even occurred.

[8] *See, e.g., State v. Henderson,* 208 N.J. 208, 232-34 (2011); *Comm. v. Walker,* 625 Pa. 450, 461-64 (2014).

(discussing extensive social science research and data from DNA exonerations regarding risk of error in eyewitness identification testimony, including cross-racial identification); *Comm. v. Walker*, 625 Pa. 450, 461-64 (2014) (same). Similarly, there is now extensive data showing the role that eyewitness misidentification has played in wrongful convictions of persons later exonerated through DNA science. For example, a recent comprehensive study of data from the first twenty-five years of DNA exonerations reported that fully 72% of the exonerations involved eyewitness misidentification as a contributing factor. *See* West & Meterko, *DNA Exonerations 1989-2014: Review of Data and Findings from the First Twenty-Five Years*, 79 Alb. Law Rev. 717, 730-31 (2015-16). Moreover, fully one-third of the DNA exoneration cases involved – as in Mr. Lee's case – misidentifications of an innocent defendant by two or more witnesses. *See id.*

The fact that Mr. Lee's conviction was premised almost entirely on contradictory, weak eyewitness identifications by lay people who believed they saw Mr. Lee at the scene, or merely (as the Court put it) simply "nearby," may explain why, despite the obvious brutality of the crime and highly sympathetic victim, Mr. Lee's first trial *resulted in a hung jury* at the guilt-innocence phase. Thus, for the State to claim that before he is executed, Mr. Lee is not entitled to a

simple DNA test – one that could finally put its evidence to the test of modern science – belies the intent of the Legislature in enacting this landmark statute.

There are also important public safety interests to be served by a recall of the mandate to permit DNA testing. If Mr. Lee is actually innocent of Ms. Reese's murder, then the real perpetrator of this brutal crime has not yet been brought to justice. That individual may still be at large, or incarcerated but pending release, and thus putting other members of the public at risk of future violence. The potential for post-conviction DNA testing to identify the real perpetrator of a serious crime is not speculative: in fully 29% of the post-conviction DNA exonerations documented over a twenty-five year period (1986-2014), the same DNA testing that exculpated a wrongly convicted defendant was used to directly identify a known alternate suspect in the crime(s). *See* West & Meterko, *DNA Exonerations 1989-2014: Review of Data and Findings from the First Twenty-Five Years*, 79 Alb. Law Rev. 717, 730-31 (2015-16). Tragically, many of these individuals had committed still more violent crimes while the innocent defendants were wrongly incarcerated: sixty-eight of these perpetrators went on to commit at least 142 additional violent crimes—including 34 homicides and 77 rapes. *See id.* at 731.

Finally, because Mr. Lee's claim under the DNA Statute is the vehicle through which he seeks access to critical forensic evidence that could form a basis

for a petition for post-conviction relief based on actual innocence under Arkansas law, such access is required to ensure that he is provided with fundamentally fair post-conviction proceedings and to ensure that he is not subjected to cruel and unusual punishment, under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.. *See, e.g., Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308 (2009); *Newton v. City of New York*, 779 F.3d 140 (2nd Cir. 2015).

3. Mr. Lee's petition for testing is timely, because there is no dispute that he requests access to DNA testing that was not available at trial, and which is "substantially more probative" than the serology and microscopic hair analysis used by the State to convict him.

The Circuit Court also committed plain error in holding that Mr. Lee's petition is untimely. The Court based its holding on its conclusion that the advanced STR- and mitochondrial DNA technology Mr. Lee seeks to utilize "has been available for some years prior to the Defendant's Motion." (Order at 3.) But this Court has already rejected the Circuit Court's interpretation of the statute, holding that there is in fact no time limitation in which a defendant must file for testing after a new method of DNA testing becomes available. Instead, the relevant inquiry is whether, upon filing, the technology at issue constitutes a significant advance over whatever technology was actually utilized and available at trial or other testing proceedings.

Unlike some states, the Arkansas legislature did not incorporate a strict time limitation in its DNA statute. Instead, Ark. Code Ann. § 16-122-202(10)(B) makes clear that a defendant can rebut a presumption against timeliness (for any motion not made within thirty-six (36) months of the date of conviction) by satisfying *any* of five separate, enumerated grounds. *See also Carter v. State*, 2015 Ark. 57 (2015).

Here, Mr. Lee clearly satisfies ground (iv) of subsection (10)(B) – "[t]hat **a new method of technology that is substantially more probative than prior testing** is available." (emphasis added). That is true both as to the requested DNA testing of blood and the hair evidence. As to the evidence of tiny quantities of blood on the tennis shoes, Mr. Lee satisfied this test by proffering an uncontested expert affidavit of Dr. Charlotte Word demonstrating that at the time of Mr. Lee's trial in 1995, today's advanced methods of STR DNA analysis were unavailable. Exh.2 at ¶ 3, 8-11(Word aff). As to the hair evidence, Mr. Lee satisfied this test by Dr. Word's affidavit stating that Mitochondrial DNA testing was not available to either the State or Mr. Lee in 1995. *See* Exh. 2, Word aff. at ¶8.

Significantly, the court below acknowledged that there is "a new method of technology that is substantially more probative than testing available in the early 90's." Order at p. 3. That should have been the end of the trial court's analysis because this finding met the precise requirements of the statute. Nevertheless, the

court below added a novel requirement not found in the statute. According to the trial court, Mr. Lee's proof failed because this new method of technology "has been available for some years prior to the Defendant's Motion, and the Defendant has not given a satisfactory explanation for the delay in the petition." Order at p. 3.

Not only was this requirement not mandated by statute, it was also foreclosed in *Carter v. State*, where this Court held in similar circumstances:

> Despite the State's assertion to the contrary, the statute imposes no time limitation for rebutting a presumption against timeliness. *See* Ark. Code Ann. § 16-112-202(10)(B). We hold that the circuit court erred in finding that Carter failed to meet the timeliness requirement of section 16-112-202(10).

Carter v. State, 2015 Ark. 57, *7. For these reasons, the trial court erred in finding that the defendant did not rebut the presumption of untimeliness in raising this issue.

Nor does Ark. Code Ann. § 16-112-202(2)(A) have any application here. Ark. Code Ann. § 16-112-202(2)(A) permits a motion for DNA testing if the "specific evidence to be tested was not previously subjected to testing and the person making the motion under this section did not . . . [k]nowingly and voluntarily waive the right to request testing of the evidence in a court proceeding commenced on or after August 12, 2005[.]" The blood and hair evidence at issue here have not been previously subjected to testing. Ledell Lee has consistently and persistently asserted his innocence and requested that his counsel pursue all

available options to demonstrate his innocence. Moreover, neither he nor his counsel have ever in any court waived his right to request testing. Simply appearing in a Rule 37 hearing and not raising this issue at that time does not demonstrate a knowing and voluntary waiver. Additionally, at the hearing in the Court below, the State presented no testimony or affidavit, and otherwise made no showing of a knowing and voluntary waiver by Mr. Lee.

In the alternative, given Mr. Lee's difficulties communicating with his visibly drunk post-conviction lawyer and the other well-documented lapses by his assigned counsel over the previous two decades, Mr. Lee can also demonstrate "good cause" to rebut the presumption of untimeliness pursuant to § 16-122-202(10)(B)(v). Mr. Lee sought vigorously to challenge all the State's evidence against him, but those efforts were thwarted by the deficient performance of post-conviction counsel. The court below erred by not providing an evidentiary hearing at which Mr. Lee could present evidence showing "good cause" to rebut a presumption against timeliness. For similar reasons, and because of the undisputed potential of DNA evidence to establish Mr. Lee's factual innocence, "a denial of the motion would result in a manifest injustice," yet another independent basis for this Court to find the petition timely. *See* § 16-122-202(10)(B)(iii).

CONCLUSION

In *Lee III*, the Court recalled its earlier mandate condemning Ledell Lee to die, because his post-conviction counsel had been too drunk to do his job. We know today that the attorneys who followed after *Lee III* came no closer to doing theirs. Thanks to their extraordinary failure to even begin investigating Mr. Lee's background, the State is poised to execute an intellectually disabled and possibly innocent man. Equally troubling, it is poised to do so without giving that man access to DNA evidence that could prove, beyond any doubt, the truth of his longstanding claim of innocence. A grant of DNA testing or a remand for an evidentiary hearing on Mr. Lee's motion for DNA testing and a recall of this Court's mandate in *Lee IV* is necessary to prevent final, irreversible, and manifest injustice.

This the 19th day of April, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 19, 2017, I electronically filed the foregoing document using the ECF system which will send notification of such filing to counsel of record.

/s/*Lee Short*
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