DEATH PENALTY CASE

***** EXECUTION SCHEDULED APRIL 20, 2017 *****

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

LEDELL LEE,

Petitioner,

No. 5:01-cv-00377-DPM

v.

WENDY KELLY, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

Respondent.

MOTION FOR RELIEF UNDER FED. R. CIV. P. 60(b)

Ledell Lee, through his undersigned attorneys, moves for relief under Fed. R. Civ. P. 60(b) from this Court's June 18, 2013, order, ECF No. 115, and December 18, 2013, judgment, ECF No. 128, denying Mr. Lee's writ of habeas corpus. In support of this motion, Lee states the following:

1. Mr. Lee filed a petition for habeas relief in this Court in November 2001. ECF No. 1.

2. In April 2003, Judge Howard, at that time presiding over this proceeding, noted that Mr. Lee's state habeas attorney "may have been impaired to the point of unavailability on one or more days" of hearings on Mr. Lee's state habeas proceeding and stayed proceedings on this federal habeas petition for the Arkansas trial court to "take appropriate action." ECF No. 11. After the state filed an interlocutory appeal, the Eighth Circuit affirmed, noting that the circumstances of the case were "truly exceptional." *Lee v. Norris*, 354 F.3d 846 (8th Cir. 2004).

3. Mr. Lee's second state habeas petition was denied, and that denial was affirmed on appeal. *Lee v. State*, 308 S.W.3d 596 (Ark. 2009). On June 18, 2013, Judge Hendren, then presiding over this proceeding, denied Mr. Lee's petition for habeas relief. ECF No. 115. Judge Hendren entered final judgment on December 18, 2013.

4. Under *Gonzalez v. Crosby*, Rule 60(b) permits relief from a final judgment if a Rule 60(b) motion challenges "not the substance of the federal court's resolution of a claim on the merits, but some *defect in the integrity of the federal habeas proceedings*." 545 U.S. 524, 532 (2005) (emphasis added). Accordingly, a federal habeas court may grant relief under Rule 60(b) where federal habeas counsel's conflict of interest compounded and continued the extraordinary breakdown in counsel that has plagued Mr. Lee through his appeals, creating a lack of confidence in a court's original verdict. *See Christeson v. Roper*, 135 S. Ct. 891, 894 (2015).

5. Here, Mr. Lee's habeas counsel during this proceeding suffered conflicts of interest that prevented Mr. Lee from effectively presenting to this Court his constitutional claims under *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Wiggins v. Smith*, 539 U.S. 510 (2003), as well as his actual innocence claim based on evidence unavailable at trial. These failures were just the latest in the stunning stream of incompetent, conflicted, and intoxicated counsel that have been appointed to Mr. Lee's case. Collectively the breakdown in counsel at every stage, including abandonment and conflict by federal habeas counsel, constitutes a defect in the habeas proceedings. Relief under Rule 60(b) is thus appropriate.

Accordingly, Petitioner requests that the Court grant this motion and grant his petition for habeas relief.

Respectfully submitted,

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Dated: April 18, 2017

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BRIEF IN SUPPORT OF
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I. 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.

II. 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, in which Mr. Lee was represented by four public defenders and in which he presented an alibi defense, resulted in a hung jury. 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. ECF No. 1 at 3-4. This request was denied by presiding judge, and ultimately the Arkansas Supreme 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.* 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," 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. ECF No. 1 at 4.

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. ECF No. 1 at 5, 81.

The United States Court of Appeals for the Eighth Circuit characterized the performance of Mr. Lee's post-conviction counsel, Craig Lambert, during hearings for his first state habeas petition 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 that the judge told Mr. Lee's counsel 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).

After the Arkansas Supreme Court affirmed Mr. Lee's death sentence, 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. ECF No. 1.

Mr. Lambert and Ms. Horan filed a motion amend the habeas petition to include a claim of mental retardation in light of *Atkins v. Virginia* on June 18, 2003. 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 his competency stand to trial. 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. The motion to amend to include *Atkins* was denied without prejudice to renew in view of the Eighth Circuit's remand to state court in March 2004. ECF No. 20.

Mr. Lambert's intoxication during the hearing came to light 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. ECF No. 11. Judge Howard stayed the proceedings on this 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.

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. 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. ECF No. 18, 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. ECF No. 18. Mr. Lambert also privately urged Ms. Horan to reconsider keeping Mr. Lee's case. See Ex. No. 2.

Mr. Lambert stressed that Mr. Lee had a pending claim of exemption for intellectual disability, and that his case was extraordinarily complex, would require a massive investigation. He asked the District Court to deny Ms. Horan's withdrawal motion because "The 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." ECF 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. 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.

This Court appointed new counsel for Mr. Lee on July 28, 2004, including out of state attorneys Kent Gipson and William Odle with Deborah Sallings as local counsel. ECF No. 27. The District Court ordered the case stayed so that Mr. Lee could return to State court to apply to reopen his state post-conviction proceedings. As she would explain in her motion to withdraw years later, Ms. Sallings "did not participate in [the Rule 37] proceedings in state circuit or appellate courts." 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, the Arkansas Supreme Court recalled the mandate, ruling that Rule 37.5 requires qualified counsel and that Mr. Lee's representation by impaired counsel required new proceedings. The Arkansas Public Defender appointed Arkansas attorneys Gerald Coleman and Danny Glover to represent Mr. Lee in his new Rule 37.5 proceedings.

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. 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, and relied exclusively on the claims presented by Mr. Lambert. For these limited issues, 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] ECF 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).

On remand, Mr. Lee filed an amended petition for post-conviction relief under Arkansas Rule of Criminal Procedure 37. This amended state habeas petition failed to include the *Atkins* claim discussed in the motion to amend the federal petition. The circuit 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. Lee appealed to the Arkansas Supreme Court which affirmed the lower court. *Lee v. State*, 308 S.W.3d 596 (Ark. 2009).

During the above proceedings, on September 18, 2008, the Supreme Court of Arkansas denied a pro se motion of defendant. *Lee v. State*, 2008 Ark. LEXIS 447 (2008), because he was not entitled to accept appointment of counsel and also proceed pro se. 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).

On November 10, 2008, Gary Brotherton was appointed co-counsel for Mr. Lee's federal habeas petition. ECF No. 74. Mr. Brotherton and Mr. Gipson thereafter operated as Mr. Lee's federal habeas counsel for the remainder of his federal habeas proceedings. At first glance, it appears that Mr. Brotherton could have benefited Mr. Lee as counsel. Indeed, on December 4,

[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. 4 (notes of Federal Defender); Ex. No. 6 (notes of investigator Matilda Buchanan).

2008, Mr. Brotherton sent a letter to the head of the Arkansas Public Defender Commission, Didi Sallings, urging her to direct post-conviction counsel to broaden their investigation. ECF No. 94.2, Ex. 13. In fact, this correspondence only previewed the series of missteps Mr. Brotherton would commit over the course of his representation of Mr. Lee: he failed to mention the *Atkins* claim, even though the *Atkins* claim was dismissed without prejudice so that it could be investigated in State Court. *Id*. He also suggested that federal habeas counsel could not intervene because they lacked local counsel. *Id*. In fact, local Arkansas counsel Deborah Stallings was still appointed on the case. ECF No. 153.

On January 26, 2012, they filed a Traverse, seeking a stay under *Rhines v. Weber* to allow Mr. Lee to file a second motion to recall the mandate in state court to reopen the Rule 37.5 case, ECF No. 94. at 5, in order to exhaust the defaulted *Wiggins* claim. They did not raise or discuss *Atkins*, and did not point to any possible evidence that might be uncovered with competent state post-conviction counsel. *Id*. They did no independent investigation. This Court denied Mr. Lee's petition for writ of habeas corpus and Traverse on June 18, 2013. ECF 115.

On December 18, 2013, Judge Hendren denied Lee's Motion to Vacate, Alter or Amend Judgment Pursuant to Rule 59(e). *Lee v. Hobbs*, No. 5:01CV00377JH, 2013 WL 6669843, at *5 (E.D. Ark. Dec. 18, 2013). This Court, in denying the motion under Rule 59(e), stated that Mr. Lee's attorneys did not fail to conduct a reasonable investigation, and denied the claim under *Wiggins*. *Id.* at *3. Mr. Brotherton and Mr. Gipson sought to appeal the denial and filed a petition for certiorari on Mr. Lee's behalf with the United States Supreme Court. Certiorari was denied.

The Eighth Circuit denied Mr. Lee's appeal of this 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 May 24, 2016, Mr. Gipson and Mr. Brotherton moved to withdraw as Mr. Lee's counsel in this case, describing themselves as "ill equipped" to fulfill Mr. Lee's right to have counsel for executive clemency and stay of execution litigation under 18 U.S.C. § 3599(e). ECF No. 148. Remarkably, they did not obtain Mr. Lee's consent for this motion, nor did they seek the agreement of counsel from the Federal Public Defender's office, whose substitution they sought. ECF No. 149.

This Court denied that motion on July 18, 2016, stating that Mr. Lee's long term lawyers "know the case better than any substitution lawyers would," and were "best suited to represent Mr. Lee in clemency and any other ancillary proceedings. ECF. No. 155. The Court stressed that even if local counsel is necessary to pursue proceedings in State court, they should "still be doing the legwork" because the "case is at a critical stage; and Lee needs his long-time lawyers to see it through." *Id*..

It was not until after the Court denied this motion to withdraw that long time counsel Mr. Brotherton explained why he was not up to the task of preparing clemency or ancillary investigation. In a subsequent motion for substitution of counsel, Mr. Gipson sought the appointment of substitute counsel, Lee Short, explaining that Mr. Brotherton had his Missouri law license suspended by the Missouri Supreme Court due to his very serious mental health issues. ECF No. 156. Mr. Brotherton informed the Missouri Supreme Court that he considered himself a threat to his clients. Ex. No. 7. That motion was granted by this Court on August 16, 2016. ECF No. 157. While Mr. Gipson has remained nominally as counsel, in effect, he abandoned Mr. Lee and he has done none of the "legwork" necessary at this "critical stage."

On February 27, 2017, the Governor of Arkansas, Asa Hutchinson, announced his intention to execute Mr. Lee on April 20, 2017. At the same time, Governor Hutchinson announced his intention to execute seven other death row inmates during the month of April, 2017. No inmate facing a sentence of death in the state of Arkansas has been executed since 2005.

While Mr. Gipson remained nominally as counsel until his recent substitution by Cassandra Stubbs, ECF No. 161, Mr. Gipson in effect abandoned Mr. Lee and he has done none of the "legwork" necessary at this "critical stage." Mr. Short agreed to step in at the eleventh hour because of Mr. Brotherton's conflict, at the Court's request. *See Lee v. Hutchinson*, 4:17-CV-194 DPM (E.D. Ark. April 5, 2017 Hearing) Transcript 356-57 (Court noting that Mr. Lee became involved because "I roped you in, as I recall."). Mr. Lee was extremely surprised when Governor Hutchinson set Mr. Lee's execution date for February 27, 2017. *Id* at 358. Governor Hutchinson had previously set several cases for execution, all of which were stayed, and Mr. Lee's case had not been in the previous group.

In the compressed time since notice of execution, Mr. Short worked largely alone to represent Mr. Lee in his clemency proceeding, his lawsuit challenging clemency, his lawsuit challenging lethal injection, all of which have required an extraordinary amount of time. *Ledell Lee v. Asa Hutchinson, et al*, No. 4:17-cv-194-DPM (civil lawsuit regarding clemency due process violations); *Ledell Lee v. Asa Hutchinson*, et al., No. 4:17-cv-179-KGB (lethal injection civil lawsuit). Mr. Gipson did not prepare the clemency petition, did not sign the federal lawsuits, and did not appear as counsel in either federal action on behalf of Mr. Lee.[2] In light of

[2] Although Mr. Gipson assisted with Mr. Lee's recently denied motion to recall the mandate, filed with the Arkansas Supreme Court, a careful review of that pleading suggests it was largely copied from federal habeas counsel's prior filings with this Court. *Compare* Ex. 8

Mr. Gipson's abandonment, and the lack of prior investigation into the case, undersigned counsel Mr. Short sought the substitution of attorney Cassandra Stubbs for Mr. Gipson. ECF No. 160. This Court granted Ms. Stubbs permission to appear pro hac vice in this case on April 14, 2017 and granted the motion for substitution on April 17, 2017. ECF Nos. 159, 161.

On April 15, 2017, the Eastern District of Arkansas entered an order staying Mr. Lee's execution, along with several others, because of problems with the execution drug midazolam. *See* Prelim Inj. Order, *McGehee et al. v. Hutchinson*, No. 4:17-cv-179-KGB (E.D. Ark. Apr. 15, 2017), ECF No. 54. The State appealed to the Eighth Circuit, which dissolved the preliminary injunction entered by the district court. *McGehee et al. v. Hutchinson*, No. 17-1804 (8th Cir. Apr. 17, 2017). The Circuit Court of Pulaski also entered a temporary order staying all executions pending a preliminary hearing set on Tuesday, April 18, 2017, regarding another of the execution drugs, later non-suited. *See* TRO, *McKesson Med.-Surgical Inc. v. State of Arkansas*, No Civ. 17-1921 (Ark. Cir. Apr. 15, 2017). The Arkansas Supreme Court vacated the Circuit Court's temporary restraining order on Monday, April 17, 2017. *Arkansas v. Griffen*, No. CV-17-299 (Ark. Apr. 17, 2017).

III. ARGUMENT

A. Rule 60(b) Permits the Court to Reopen Its Judgment

Rule 60(b)(6) permits a court to reopen a judgment for the presence of "some defect in the integrity of the federal habeas proceedings," or "any other reason that justifies relief," upon a showing of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 n.2, 532-35

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at 5 (Appellant's Mot. to Recall Mandate, Lee v. State, (No. CR08-160) (Ark. Apr. 3, 2017)), *with* ECF No. 94 at 61; *compare* Ex. 8 at 10-13, *with* ECF No. 116 at 6-9; *compare* Ex. 8 at 18, *with* ECF No. 116 at 5; *compare* Ex.8 at 18-19, *with* ECF No. 116 at 6; *compare* Ex. 8 at 19, *with* ECF No. 116 at 4-5; *compare* Ex. 8 at 20, *with* ECF No. 116 at 12-13; *compare* Ex. 8 at 20-22, *with* ECF No. 116 at 18-19.

(2005). Extraordinary circumstances may include a wide range of factors, which include "the risk of injustice to the parties" and "the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988).

Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice in a particular case and should be liberally construed when substantial justice will thus be served." *See Klapprott v. United States*, 335 U.S. 601, 615 (1949); *see also MIF Realty v. Rochester Associates*, 92 F.3d 752, 755 (8th Cir. 1996) ("Rule 60(b) is to be given a liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice.") (citations and quotation marks omitted); *Thompson*, 580 F.3d at 444 (granting Rule 60(b)(6) motion in capital habeas case); *Radack v. Norwegian Am. Line Agency, Inc*., 318 F.2d 538, 542 (2d Cir. 1963) (Rule 60(b)(6) "gives the district court a grand reservoir of equitable power to do justice in a particular case"); *Lasky v. Continental Products Corp*., 804 F.2d 250, 256 (3d Cir. 1986) ("[T]he Rule should be liberally construed for the purpose of doing substantial justice . . . ."); *Johnson Waste Materials v. Marshall* 611 F.2d 593, 600 (5th Cir. 1980) (Rule 60(b)(6) allows "[c]ourts to do justice in hard cases").

Courts may therefore consider "any . . . factor that is relevant to the justice of the order under attack." *Lasky*, 804 F.2d at 256; *accord Thompson*, 580 F.3d at 442 ("[D]ecision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors . . . .") (citation omitted); *Ungar v. Palestine Liberation Organization*, 599 F.3d 79, 83-84 (1st Cir. 2010) ("decision to grant or deny [Rule 60(b)(6)] relief is inherently equitable in nature," and requires "a holistic appraisal of the circumstances" for which "hard-and-fast rules generally are not compatible"). These factors include the underlying merits of a

claim, which may constitute extraordinary circumstances justifying relief under Rule 60(b)(6). *Buck*, 137 S. Ct. at 780.

1. Mr. Lee's State Proceedings Were Plagued by a Complete and Total Breakdown in Counsel.

The domino effect of Mr. Lee's incompetent counsel—plagued by severe conflicts of interest and substance abuse problems—resulted in a complete and total breakdown in Mr. Lee's counsel during his state proceedings, and later culminated in his federal habeas proceedings in a manner that is a disgrace to the legal profession and calls into question the integrity of the entire proceedings.

Mr. Lee's trial counsel were conflicted, and then at every stage after of Mr. Lee's proceedings, his lawyers' performance shocks the conscience. Collectively, they utterly failed to even begin a meaningful inquiry of his meritorious claims, instead relying on the tainted and limited work of prior counsel without ever conducting their own independent investigation or litigation. The cumulative effect of these prejudices represents truly extraordinary circumstances:

1. Despite testimony by Mr. Lee's trial counsel Bill Simpson and Brett Qualls indicating they stopped working on the case after Mr. Lee filed a complaint against them, Judge Piazza forced defense counsel to proceed to trial;

2. Craig Lambert, appointed to represent Mr. Lee in state Rule 37 post-conviction proceedings, was found to be grossly intoxicated during these proceedings, ultimately resulting in the Arkansas Supreme Court's decision to recall its mandate;

3. Mr. Lambert represented Mr. Lee on direct appeal, failing to raise his own ineffectiveness;

4. Despite these obvious conflicts of interest, Mr. Lambert was appointed with Jennifer Horan from the Federal Public Defender's office to represent Mr. Lee in federal post-conviction proceedings. Unsurprisingly, their petition did not raise Mr. Lambert's ineffectiveness;

5. Citing a conflict of interest, Ms. Horan's motion to withdraw from the case was granted, although Mr. Lambert urged Ms. Horan to reconsider, arguing that "The

Federal Public Defender Office is the only entity in Arkansas with the resources to adequately Lee in proceedings";

6. Ms. Horan's contemporaneous notes indicate she was concerned that there was no competent available counsel in Arkansas, which perhaps explains why out-of-state attorneys Kent Gipson and William Odel were appointed as substitute counsel;

7. At the same time, Deborah Sallings was appointed as local counsel, yet years later admitted she was not involved in any case preparation or strategy, in any way;

8. In Mr. Lee's second Rule 37.5 proceedings, state habeas counsel Mr. Coleman and Mr. Glover fell short of the performance of Mr. Lee's initial impaired counsel, failing to investigate any issues beyond those already presented in the initial petition, *see* Ex. 9, State's Response to DNA Motion, at 3-4 (pointing out that Mr. Lee's second Rule 37 petition raised the same claims as his initial petition).

Mr. Gipson and Mr. Brotherton, therefore, represented Mr. Lee at a pivotal stage in his proceedings. After the gross failures of counsel at every stage in Mr. Lee's proceedings—including trial, direct appeal, state habeas, and federal habeas—Mr. Gipson and Mr. Brotherton had the unique and critical opportunity to make things right.

2. Mr. Lee's Federal Habeas Counsel Had Personal Conflicts Which Prevented Their Pursuit of Meritorious Claims.

After observing prior counsel's abject failures to represent Mr. Lee, Mr. Gipson and Mr. Brotherton were on notice of the need to ensure Mr. Lee received assistance from counsel who were devoid of any conflict of interest. Indeed, they were appointed pursuant to 18 U.S.C. § 3599(a)(2)'s requirement that "one or more attorneys" be appointed to represent indigent defendants in their federal habeas proceedings and "proceedings for executive or other clemency as may be available to the defendant." Yet investigation reveals that Mr. Lee's federal habeas counsel had personal conflicts which prevented their pursuit of meritorious claims, claims that were left undeveloped due to state habeas counsel's incompetence and which have significant merit.

Mr. Lee's federal habeas counsel was appointed under 18 U.S.C. § 3599(a)(2), which provides that indigent defendants in federal post-conviction proceedings are "entitled to the appointment of one or more attorneys and the furnishing of such other services." 18 U.S.C. § 3599(a)(2). The U.S. Supreme Court has recognized courts' concomitant responsibility to "ensure that the defendant's statutory right to counsel was satisfied throughout the litigation," requiring the appointment of new counsel if the appointed lawyer "developed a conflict" with the client. *Martel v. Clair*, 565 U.S. 648, 661 (2012). And the U.S. Supreme Court has noted that a "'significant conflict of interest' arises when an attorney's 'interest in avoiding damage to his own reputation'" precludes the attorney's ability to pursue the client's meritorious claims. *See Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (quoting *Maples v. Thomas*, 565 U.S. 266, 287 (2012)). Where counsel appointed under 18 U.S.C. § 3599 suffered a conflict of interest during a federal habeas proceeding that precluded presentation of constitutional claims, reopening the judgment so that conflict-free counsel may properly investigate those claims is appropriate. *See Pruett v. Stephens*, 608 F. App'x 182, 186 (5th Cir. 2015).

Here, Mr. Lee's federal habeas counsel suffered from a litany of conflicts of interest which obstructed their pursuit of Mr. Lee's most meritorious claims, resulting in a serious risk of injustice. Mr. Lee's initial federal habeas counsel, Mr. Lambert, was the same attorney who represented Mr. Lee in the initial state habeas proceeding. After Mr. Lambert was said to be "not competent to try a case" by the state habeas judge and his ability to represent Mr. Lee was called into question by the state's attorney, 354 F.3d at 848, Mr. Lambert was ultimately removed from representing Mr. Lee in this case. His successors, however, fared no better, and failed to cure Mr. Lambert's initial failings. Although it is unclear who was at the helm of the remainder of Mr. Lee's federal habeas proceedings, one thing is clear: neither Mr. Gipson nor Mr. Brotherton

were "qualified legal counsel" under § 3599, in that their personal conflicts of interest prevented the exploration of meritorious claims and caused a breakdown in the attorney-client relationship.[3]

Recent developments suggest that Mr. Brotherton may have had a long history of serious mental illness which may have affected his ability to represent his clients for some time. In June 2016, Mr. Brotherton petitioned the Missouri Supreme Court to "voluntarily surrender his license to practice law in this state" after advising the court that "he suffers from bipolar disorder and anxiety." No. SC95767 (Mo. 2016). In his petition, Mr. Brotherton informed the Missouri Supreme Court that he considered himself a threat to his clients. Ex. No. 8, Brotherton Report and Recommendation. Although it is unclear how long Mr. Brotherton suffered from this serious mental illness, his complete failure to develop Mr. Lee's claims beyond Mr. Lambert's initial investigation suggests it has plagued him for some time. Mr. Brotherton's mental health issues presented a clear conflict of interest between his natural desire to conceal any personal failings in order to continue his practice, and his ethical obligation to his client to provide competent representation. *See* Mo. Rules of Professional Conduct § 4-1.1.

There is a substantial risk that Mr. Brotherton's history of mental illness, and conflicting personal interest in concealing its effects, undermined Mr. Lee's federal habeas proceedings. Although it is unclear the extent to which this conflict infected the underlying proceedings, the record suggests that the impact may have been significant. First, as discussed further *infra*, federal habeas counsel failed to renew Mr. Lee's initial motion to introduce an *Atkins* claim, preventing its inclusion in his federal habeas petition. Second, federal habeas counsel misrepresented the scope of the investigation into Mr. Lee's *Wiggins* claim, leading to its denial.

[3] As discussed above, appointed local counsel Ms. Sallings has admitted she did not participate in the proceedings, effectively abandoning Mr. Lee.

These failures and misrepresentation to this Court prejudiced Mr. Lee by denying him, at minimum, the fair opportunity to have his constitutional claims under *Wiggins* and *Atkins* be fairly reviewed by this Court before those claims were foreclosed by the one-year statute of limitation on claims imposed by § 2254.

These defects create a serious risk of injustice on their own, but they have been exacerbated by appointed counsel's ongoing conflicts despite its responsibility to represent Mr. Lee in "all available post-conviction process," including "proceedings for executive or other clemency as may be available." 18 U.S.C. § 3599(e). The record is clear that Mr. Gipson and Mr. Brotherton have never sought to develop any of Mr. Lee's potential claims for clemency relief as required by the statute. They instead requested to be withdrawn from the case in May 2016, a request that was denied out of concern that the case was at a "critical stage" and that Mr. Lee "needs his long-time lawyers to see it through." ECF No. 155. The Court only granted counsel's motion to withdraw Mr. Brotherton as counsel after learning that his "mental health issues" had recently led to his suspension by the Missouri Supreme Court. ECF No. 156, 157. Mr. Lee Short was thereafter appointed as co-counsel to Mr. Gipson, who has effectively abandoned the case since his motion to withdraw from the proceedings was denied in July 2016. ECF No. 148. He has also obstructed attempts by other counsel of Mr. Lee to gather evidence in support of Mr. Lee's various claims, including delaying the investigation of a mitigation specialist to identify mitigating evidence. Vartkessian Decl. ¶ 9.

3. The Cumulative Effect of Mr. Lee's Breakdown in Counsel Has Resulted in Severe Prejudice.

The serious and ongoing defects in Mr. Lee's appointed federal habeas counsel has only exacerbated the well-recognized failings of his trial, direct appeal, and state habeas counsel, creating truly remarkable circumstances requiring relief. The Eighth Circuit first recognized that

the circumstances of Mr. Lee's federal habeas petition were "truly exceptional" due to the incompetence of his initial state post-conviction counsel, who prepared and filed Mr. Lee's federal habeas petition. *Lee v. Norris*, 354 F.3d at 849. Happenings since the Eighth Circuit's decision have only driven Mr. Lee's case farther outside the bounds of "ordinary" habeas litigation, as subsequent counsel's performance has compounded to work a shockingly high level of prejudice against Mr. Lee. Viable, meritorious, substantive grounds for relief from his state conviction have never been investigated, much less presented to a habeas court—all because Mr. Lee has been repeatedly denied competent representation.[4]

These extraordinary failures of state habeas counsel, when combined with federal habeas counsel's conflicts of interest which prevented them from correcting Mr. Lambert's failures in this proceeding, made it impossible for Mr. Lee to pursue his underlying constitutional claims—claims that, as demonstrated below, have real merit. When the ineffective assistance of habeas counsel precludes the consideration of trial counsel's ineffectiveness, habeas counsel's failure "directly implicates the reliability of" the previous habeas determination. *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1120 (E.D. Mo. 2013). And "significant" conflicts of interest, such as an attorney's "interest in avoiding damage to his own reputation," likewise implicate the reliability of proceedings involving that attorney. *Christeson*, 135 S. Ct. at 894; *see also Pruett*, 608 F. App'x at 186. Habeas counsel's failings here are far beyond "de minimis" or "typical"—they are

[4] In three decisions issued since Mr. Lee first filed his § 2254 petition, the Supreme Court has explicitly endorsed reopening a judgment where ineffective post-conviction counsel during state habeas proceedings forecloses later review of meritorious claims. In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court ruled that ineffectiveness of post-conviction counsel could create cause for a court to re-open claims that were not fully litigated before. The Court expanded its *Martinez* ruling in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), and applied it retroactively just this year in *Buck v. Davis*, 137 S. Ct. 759 (2017). The deprivation of Lee's state post-conviction counsel here is far more egregious than in any of the three cases where the Court extended procedural relief for ineffective assistance in a habeas case.

extraordinary. These circumstances justify reopening this Court's judgment so that Mr. Lee's claims can be considered on the merits.

A capital case requires the "high regard for truth that befits a decision affecting the life or death of a human being." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Given the egregious and extraordinary factual circumstances surrounding Mr. Lee's original habeas proceedings and the resultant failure of any court to consider Mr. Lee's constitutional claims, reopening the judgment is appropriate to prevent final, irreversible, and manifest injustice.

B. No Court Has Fully Reviewed Several Meritorious Claims Left Undeveloped By Counsel.

The claims below show the extent of the prejudice caused by Mr. Lee's federal habeas counsel, illustrating what competent post-conviction counsel should have raised in earlier proceedings; they are not asserted as new grounds for relief.

i. No Court has Fully Reviewed Mr. Lee's Meritorious Claim That He Is Intellectually Disabled under *Atkins v. Virginia*.

Execution of the intellectually disabled violates the Eighth Amendment. *Atkins v. Virginia*, 536 U.S. 304 (2002). Federal habeas counsel was aware of the possibility that Mr. Lee was intellectually disabled, and even filed a motion to amend Mr. Lee's habeas petition to include an *Atkins* claim. ECF No. 13. This motion was denied without prejudice on the grounds that any potential *Atkins* claim should first be litigated in Mr. Lee's ongoing state habeas proceedings, which the Court contemporaneously remanded. ECF No. 20.

This was the extent of federal habeas counsel's efforts in relation to Mr. Lee's undeveloped *Atkins* claim. Despite later urging state post-conviction counsel to broaden their investigation, ECF No. 94.2, Ex. 13, Mr. Brotherton made no mention of the *Atkins* claim which was the subject of federal counsel's motion to amend. Nor did federal habeas counsel take

notice of the obvious fact that state post-conviction counsel never explored or raised Mr. Lee's potential intellectual disability. Instead, counsel stood idly by as Mr. Lee's *Atkins* claim—which recent investigation suggests is meritorious—lay dormant, undeveloped in state court, and never revived in federal court.

Mr. Lee is a textbook case of an individual with intellectual disabilities: He suffers from fetal alcohol syndrome, has brain damage, was held back in school, and was placed in special education. Mr. Lee therefore 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."[5] Ark. Code § 5-4-618(a)(1).

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. Ex. No. 2. 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. *Id*. Despite being enrolled in special education classes for his entire life, Mr. Lee needed to repeat the 7th and 8th grades. ECF No. 162, Ex. No.

[5] 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 (herein 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. ECF No. 162, Ex. No. 3 (herein 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. *Id.* ¶ 27. Tasks that involve Mr. Lee's left hand slow him down, indicating a lateralized impairment of the right hemisphere. *Id.*

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 likely fetal alcohol syndrome that resulted means that Mr. Lee has been intellectually disabled since birth; Mr. Lee's fetal alcohol syndrome contributes to his subaverage intellectual functioning. Watson Decl. ¶ 43. The U.S. 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 (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.*

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 833, 844 (8th Cir. 2013). "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.

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.* If he cannot ascertain even the simplest of patterns, he is unable to function independently. *See id.* 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.

Mr. Lee fulfills the Arkansas statutory criteria to be considered intellectually disabled, and thus cannot be executed under *Atkins*. Absent any explanation from Mr. Gipson or Mr. Brotherton as to why they failed to investigate or consider this meritorious claim, there is a significant risk that Mr. Lee's *Atkins* claim was abandoned purely due to federal counsel's incompetence, perhaps fueled by Mr. Brotherton's long-standing mental illness. Because Mr. Lee's direct and state habeas counsel did not present any evidence of Mr. Lee's clear intellectual disability, and his federal habeas counsel, due to its conflicts of interest, failed to present his meritorious *Atkins* claim, Mr. Lee has been precluded from receiving "a full and fair evidentiary hearing" regarding his intellectual disability. *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007) (quoting *Townsend v. Sani*, 372 U.S. 293, 312 (1963)).

ii. No Court Has Ever Fully Reviewed the Prejudice Arising From Counsel's Failure to Conduct a Meaningful Mitigation Investigation.

a. A Review of State and Federal Habeas Counsel's Files Suggests Federal Habeas Counsel Misrepresented State Habeas Counsel's Mitigation Investigation, Resulting in Prejudice to Mr. Lee.

Federal habeas counsel woefully misrepresented the mitigation investigation conducted by Mr. Coleman and Mr. Glover during Mr. Lee's second state habeas proceedings. Federal habeas counsel claimed that Mr. Glover and Mr. Coleman "obtained funding for investigative services to develop a *Wiggins* claim," and conducted an investigation which "uncovered voluminous evidence supporting a *Wiggins* claim." ECF No. 94 at 12. Similarly, in counsel's Motion to Vacate, Alter or Amend Judgment Pursuant to Rule 59(e), counsel represented that

Mr. Coleman and Mr. Glover "obtained funding for a mitigation specialist, who invested a great deal of time and effort developing a compelling mitigation case" and discovered "extensive mitigating evidence." ECF No. 116, at 7-8. Yet nowhere—in any of the federal pleadings—did federal habeas counsel describe the nature of this alleged "copious evidence to mitigate Mr. Lee's punishment" which had been uncovered by state habeas counsel. ECF No. 94 at 26.

This Court relied on those representations when it concluded that Mr. Lee did not have a viable claim that his state habeas counsel was ineffective for failure to conduct a mitigation investigation as required by *Wiggins*. ECF No. 127 at 6. The Court presumed that state habeas counsel simply made a "tactical decision" not to utilize this alleged cache of mitigation evidence, noting that federal habeas counsel had "offered nothing that would overcome this presumption," much less "proffered any of the evidence developed by the mitigation specialist . . . or even so much as alluded to the nature of it." *Id.*

If this supposed mitigation evidence existed, why was it never offered to the Court? Recent review of counsel's files reveals a reason—it appears there simply wasn't any mitigation evidence or related investigation results to present. Mr. Lee's current counsel has learned that—in direct conflict with prior counsel's representation to the contrary—federal habeas counsel greatly exaggerated the extent of state habeas counsel's mitigation investigation, possibly relating in significant misrepresentations to this Court. Mr. Lee's current counsel recently hired mitigation specialist Elizabeth Vartkessian, Ph.D., who has been unable to get in touch with Ms. Matilda Buchanan, who federal habeas counsel suggested conducted the mitigation investigation. *See* 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").[6] Indeed, Kent Gipson was unable to even provide Ms. Vartkessian with a working phone number for Ms. Buchanan; the man who answered the phone number provided by Mr. Gipson "stated that he had had the number for 14 years." Vartkessian Decl. ¶ 9.

Ms. Vartkessian has, however, carefully reviewed state habeas counsel's files, including Ms. Buchanan's materials. 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.

This explains why federal habeas counsel did not make any effort to describe the mitigation investigation conducted by state habeas counsel, or its findings. The investigation simply was never done. It therefore appears that federal habeas counsel falsely represented to this Court that state habeas counsel directed a mitigation investigation resulting in significant findings.

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[6] An independent investigation by Mr. Lee's current counsel reveals that state habeas counsel hired Lisa Croy, a mitigation specialist, who was paid $6,880.22. 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 federal habeas counsel's files, much less in state habeas counsel's files.

b. Federal Habeas Counsel's Representation of State Habeas Counsel's Mitigation Investigation Caused This Court to Improperly Deny Mr. Lee's *Wiggins* Claim.

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.[7] 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

[7] 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.

> 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 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.

Because federal habeas counsel mischaracterized the scope of the mitigation investigation conducted by state habeas counsel, Mr. Lee's viable claim under *Wiggins v. Smith*, 539 U.S. 510 (2003), was never fully presented or considered by this Court. *Wiggins* 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 Court has looked to ABA standards as "guides to determining what is reasonable." *Wiggins*, 539 U.S. at 524 (2003). 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 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 his federal habeas proceedings.[8] Over the past two decades, Mr. Lee's counsel has failed to investigate concealed critical facts that would have long ago warranted relief. 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,

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

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) (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.).

Federal habeas counsel's apparent misrepresentations regarding the mitigation investigation conducted by state habeas counsel led this Court to improperly deny Mr. Lee's clearly meritorious *Wiggins* claim, on the belief that the mitigation investigation results were not presented due to a reasonable "tactical decision" by state habeas counsel. ECF No. 127 at 6. Mr. Lee therefore requests that this Court provide him with relief from that judgment.

iii. Newly Discovered DNA Evidence Indicates Mr. Lee May Be Innocent.

The risk of manifest injustice is particularly high in this case, as modern technological advances have given Mr. Lee a renewed chance to demonstrate he is actually innocent of the murder charge for which he is set to be executed in just four days. Newly available DNA testing,

not present during Mr. Lee's original criminal trial, will demonstrate Mr. Lee's actual innocence.

Mr. Lee has petitioned the Pulaski County, Arkansas, 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.[9] This probative biological evidence currently in the custody and control of the State 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 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 evidence of "small spot[s]" of blood found on Mr. Lee's Converse tennis shoes at the time of his arrest. Notwithstanding an extremely bloody crime scene, however, no other blood was discovered on Mr. Lee's clothes. According to the Arkansas Supreme Court,

> 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.

Lee v. State, 942 S.W.2d 231, 234 (Ark. 1997). Channell testified at trial that he performed the

[9] A hearing on this motion has been scheduled on April 18, 2017 at 1:30pm.

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 700-01. Significantly, the Arkansas Supreme Court denied relief because "Lee has made no showing that the blood evidence on the shoes possessed any exculpatory value before it was destroyed." *Id.* at 701.

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 his closing arguments during 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. Tp. 773, 795. The blood and hair evidence were an essential part of the State's case identifying the defendant as the perpetrator of the murder.

Mr. Lee has sought an order in Pulaski County, Arkansas, Circuit Court to test residual biological evidence on Converse tennis shoes in the custody of the State seized from the defendant on the day of the crime. The State's expert testified that this biological evidence found on the shoes was blood, but that he was unable to conduct further testing to determine the origin of the blood. At Mr. Lee's trial, the State asked the jury to infer that the positive results of the blood testing supported its contention that Mr. Lee had murdered Ms. Reese. Mr. Lee further seeks to test a hair collected at the crime scene and identified by the state's expert at trial as one "intact Negroid head hair," and hair "fragments" also collected from the scene; the jury was told that the state's expert could not include or exclude the defendant as the source of these hairs. This hair and blood evidence was not previously subjected to DNA testing by the State or by Mr. Lee.

Today's advanced DNA testing methods will 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 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.

In light of his two decades old innocence claim, Mr. Lee can readily identify a theory of defense consistent with the "not guilty" plea presented at trial that could establish his actual innocence. He consistently maintained at trial and since that time that he was not perpetrator of this crime, and the DNA testing requested would disprove critical State evidence tending to show that he was the perpetrator. With respect to the current testing, 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.

IV. CONCLUSION

The conflicts of interest resulting in incompetent representation by Mr. Lee's previous post-conviction counsel should be enough, on its own, for the Court to grant Mr. Lee relief from the prior, procedurally suspect habeas judgment. But these conflicts, coupled with the very real probability that Mr. Lee could be put to death for a crime he did not commit, risks undermining public confidence in the judiciary and offending even the most basic notions of due process.

For the foregoing reasons, Mr. Lee requests that the Court grant this motion and grant his petition for habeas relief.

Respectfully submitted,

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Dated: April 18, 2017

CERTIFICATE OF SERVICE

On April 18, 2017, I electronically filed the foregoing document using the ECF system which will send notification of such filing to counsel of record.

/s/ Cassandra Stubbs