UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK A. CHRISTESON, *Appellant/Petitioner*,	:	
	:	No.: 16-2730
v.	:	
	:	DEATH PENALTY CASE
DON ROPER, Superintendent, Potosi Correctional Center, *Appellee/Respondent*.	:	

APPLICATION AND MEMORANDUM FOR CERTIFICATE OF APPEALABILITY AND FOR DIRECT REVIEW

THIS IS A CAPITAL CASE

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I. INTRODUCTION

Appellant/Petitioner Mark A. Christeson, by and through undersigned counsel, hereby moves the Court, pursuant to 28 U.S.C. §2253(c)(1)(A), for a Certificate of Appealability (COA) in order to appeal the final Orders and Judgment of the United States District Court for the Western District of Missouri denying his Fed. R. Civ. P. 60(b) motion to reopen final judgment dismissing his capital habeas corpus application. *Christeson v. Roper*, No. 4:04-cv-8004-DW. In addition, Appellant hereby sets forth the bases for this Court's direct review of the district court's inadequate funding rulings pursuant to undersigned counsel's appointment and respectfully requests a briefing schedule for the appeal from those rulings as of right and without a COA. It is requested that the Court set a briefing

schedule with reference to further scheduling relating to any and all COA issues to be granted in the present proceedings.

The case had returned to the district court from this Court's remand on March 4, 2015 [Case No. 14-3389, ID 4250589], pursuant to the reversal of this Court's October 24, 2014 order (affirming the district court's denial of a motion for substitution of counsel) and remand for further proceedings consistent with the opinion in *Christeson v. Roper*, 135 S.Ct. 891 (2015) (*per curiam*).

Mr. Christeson's case returns to this Circuit Court prematurely. For the third time, Mr. Christeson has come before the Court due to patent violations of the most vital safeguard accorded the capital habeas petitioner seeking constitutional review of a death penalty imposed by a state court, *viz.*, the indigent petitioner's statutory right under 18 U.S.C. §3599 to qualified, conflict-free counsel providing meaningful assistance.

During Missouri's wave of 19 executions spanning late 2013 through early 2016,[1] Mr. Christeson was the only man for whom the State of Missouri secured an

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[1] Missouri executed 18 of those men within the first 22 months of the span (ending in September 2015). As Justice Breyer pointed out in his dissenting opinion in *Glossip v. Gross*, "just three . . . States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014." 135 S.Ct. 2726, 2773 (2015) citing the Death Penalty Information Center (DPIC) online (http://www.deathpenaltyinfo.org/views-executions). In 2014, Missouri matched Texas by carrying out ten executions. In 2015, three States – Texas (13), Georgia (5), and Missouri (5) – accounted for over 82% of the 28 executions carried out.

execution warrant despite the complete absence of federal court review of the constitutionality of his state court judgment.[2] And Missouri persists in

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See DPIC online. During the five years prior to this wave, Missouri had executed just two men.

[2] Missouri had executed 12 men within this span prior to Mr. Christeson's October 29, 2014 execution date. Unlike Mr. Christeson, each of the 19 men Missouri has recently executed had received both substantive review of constitutional claims in state collateral review under Mo. Rule 29.15 and then under federal habeas corpus review pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Mr. Christeson received only the veneer of state collateral review. His trial judge, Hon. David Darnold, was no longer a Missouri judge after losing his re-elecion bid following Mr. Christeson's 1999 conviction in the Vernon County Circuit Court. Yet the recently elected circuit judge whom the voters had chosen to replace Darnold was prevented from hearing Mr. Christeson's post-conviction claims under the normal operation of Missouri Rule 29.15. Instead, the Missouri Supreme Court (by a Nov. 16, 2001 order of Limbaugh, J.), appointed Mr. Darnold as a "Senior Judge" for the single purpose of presiding over Christeson's post-conviction motion. App. 347a. Senior Judge Darnold then disposed of Mr. Christeson's Rule 29.15 motion by signing and dating—without editing—a 170-page order entirely drafted by the Attorney General's Office. *Id.* The Missouri Supreme Court then affirmed that ruling on May 11 2004. *Christeson v. State*, 131 S.W.3d 796 (Mo. 2004). Mr. Christeson's state post-conviction review was flawed by the point of vitiating any federal deference warranted by the fundamental principle of comity. *Jefferson v. Upton*, 560 U.S. 284, 287 (2010). Despite being patently unworthy of federal deference, no federal review, deferential or otherwise, has happened due to original counsel's procedural default. Currently pending in the Supreme Court is a petition for writ of certiorari to the Eleventh Circuit raising this very issue. *Hamm v. Allen*, No. 15-8753 (docketed Mar. 30, 2016). The high Court has requested the record from the lower federal courts and the Court has distributed the petition for its Sep. 26, 2016 conference. The question presented in *Hamm* states, in relevant part where "the postconviction court signed the Alabama Attorney General's 89-page "Proposed Memorandum Opinion" without making a single modification and without striking the word "Proposed" from the caption of its judicial opinion, one business day after receiving it[, . . .] Does federal court deference to a judicial opinion adopted

affirmatively seeking his execution, even during the pendency of the litigation in this Court.[3] Nonetheless, as set forth herein and in Mr. Christeson's most recent proceedings in the Western District of Missouri, there are profound questions as to the constitutionality of his judgment. But these profound questions are *based merely on investigation conducted in relation to the procedural default by his prior counsel*.

To date, Mr. Christeson has obtained *no direct and dedicated investigation* of his prospective constitutional claims yet clear bases for constitutional relief have emerged in the course of undersigned counsel's investigation of the grounds for equitable tolling to overcome the case's procedural default caused over eleven

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under circumstances where there is grave reason to doubt the postconviction court even read it violate AEDPA or the Due Process clause?"

[3] Upon the district court's denial on March 8, 2016 of the Rule 60(b) motion at bar (Doc. 156), Appellee prematurely moved the Missouri Supreme Court on March 18, 2016 to set an execution date, *State v. Christeson*, No. SC82082, whereupon the clerk of that court *sua sponte* entered in the docket "Counsel may wish to review Supreme Court Rule 30.30." Rule 30.30(c) states: "If an execution is stayed, the Court shall set a new date of execution upon motion of the state or upon its own motion. No such motion shall be considered prior to exhaustion of the defendant's right to seek relief in the Supreme Court of the United States following review of the defendant's direct appeal, state post-conviction motion, and federal habeas corpus decision unless the defendant fails to pursue such remedy." After, inter alia, Appellant's motion to strike and Appellee's opposition, Appellee's motion remains pending.

years ago and committed by his originally appointed federal habeas corpus attorneys.

A. Investigation For Equitable Tolling Has Unearthed Meritorious Claims For Habeas Relief Due To The Effects Upon Mr. Christeson's Brain, Nervous System, And Broader Psychological Constitution Resulting From Perhaps Unprecedented Levels Of Victimization, Sexual Exploitation and Complex And Chronic Trauma Inflicted During His Entire Childhood Before His Arrest At The Age Of 18

Undersigned counsel's preliminary and inchoate investigation, stunted by the district court's funding ruling at bar, has nevertheless indicated trial counsel's failure to investigate, develop, and evidence the staggering history of severe sexual trauma, victimization, and exploitation perpetrated chiefly by his main caretakers. The investigation, manifested in dozens of declarations filed under seal in the district court, (Doc. 125-2 thru 125-4), merely begins to evidence the violation of Mr. Christeson's Sixth Amendment right to the effective assistance of counsel.[4] At all times in this investigation since the district court's termination of Mr. Christeson's prior appointed counsel and the substitution by undersigned counsel via an order dated March 17, 2014 (Doc. 110), the record established in the immediately subsequent Rule 60(b) proceedings reflects that Mr. Christeson has given total cooperation and willingness to assist his counsel to the extent he his

[4] This constitutional violation relates to the thirteenth claim in the original habeas petition filed out of time by conflicted counsel. (Doc. 10 at 42-45).

able. (Doc. 125-2 thru 125-4). This is notable given the record's absence of any meaningful steps taken by any of his prior counsel to build trust in order to address the extremely sensitive areas inherent in an investigation of his personal history.

Dating to the months leading to this Court's affirmance on October 24, 2014 of the district court's denial of his substitution of counsel and as manifested in undersigned counsel's Supplemental Briefing ordered by the Supreme Court hours before his execution scheduled for October 29, 2104 at 12:01 a.m. CDT, Mr. Christeson has continually demonstrated his appreciation for this work and his capacity for receiving and reciprocating the decency of others.[5] Further, Mr.

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[5] On October 28, 2014 at approximately 11:00 a.m. CDT, Circuit Justice Alito ordered Supplemental Briefing, to be filed by 1:00 p.m. CDT, "regarding whether the record shows that petitioner has authorized [attorneys Merrigan, Mills, or Perkovich] to move on his behalf for substitution of counsel appointed pursuant to 18 U.S.C. §3599." Order, *Christeson v. Roper*, No. 14-6873.

In this Supplemental Briefing, undersigned counsel submitted as exhibits correspondence prepared by fellow prisoners for Mr. Christeson. A June 18, 2014 letter was quoted at length in the brief to contribute to addressing the Court's request. (Petitioner's Supplemental Briefing at 3-4, (copy attached hereto as Attachment.)). A prisoner law clerk composed and typed the following account on Mr. Christeson's behalf: "My attorneys (Butts and Horwitz) and I also spoke of attorneys Joe Perkovich and Jennifer Merrigan. Attorneys Horowitz [sic] and Butts expressed their opinions that it would not be in my best interest if attorneys Perkovich and Merrigan represented me due to the fact that they were out of State attorneys. Attorneys Horowitz and Butts are afraid I will gets [sic] 'lost in the shuffle of out of State lawyers.' . . .In the short time that I have been in contact with attorneys Perkovich and Merrigan, they have gone out of their way to come and visit with me twice to discuss my case. They have been in constant contact with me by phone and through letters letting me know exactly what is going on and

Christeson's only brother, his brother's wife of many years, and their children have assisted counsel considerably throughout this current effort and steadily demonstrate their support of him,[6] which includes assistance with declarations filed under seal in the district court. (*See* App. 53-60).[7]

Trial counsel's failure even to look into Mr. Christeson's history and thus to begin to identify his pervasive and unrelenting childhood victimization at the hands of, among others, his main caretakers, plainly breaches the attorneys' standard of

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what they are doing on my behalf. In my opinion, it is attorneys Horowitz and Butts that do not have my best interest in mind. If they did they would have filed my Federal Habeas Corpus on time and I wouldn't be having to fight to get the court to allow me to do it now out of time. I truly believe that attorneys Perkovich and Merrigan have shown more passion and concern regarding my case than any attorneys thus far and therefore, I feel it would be in my best interest if they were allowed to represent me."

[6] The following excerpt from a family member's declaration is indicative of the bonds between Mr. Christeson and his brother's family:

Mark is an incredibly important part of my life, as well as the lives of my husband and children. Mark sends his niece and nephews artwork, which they cherish. He also talks to them about staying out of trouble and doing well in school. On the twins' twelfth birthday, they insisted that the family wait to sing happy birthday until Mark was able to call home and sing with them. All three are crazy about their uncle. My 16 year old is especially close to Mark and Mark gives him advice and tries to help him stay on the right path. Mark used drugs at a very early age and he doesn 't want my son to make those kinds of mistakes. Mark wants him to have a better life than Mark had. (App. 57).

[7] With leave of court, Appellant filed several volumes of his Appendix under seal. References herein to "App." concern these records as paginated in those filings. Appellant respectfully requests that those remain under seal in order to protect declarants, some of whom details their own childhood sexual victimization.

care and basic obligation to their capital client.[8] First, his legal father, William,[9] a clinically diagnosed and criminally charged pedophile, began molesting Mark in his infancy, literally upon the baby's arrival from the hospital. This lasted until Mark was eleven, when his father died from a heart attack. As an indication of the level of neglect from the adults in Mark's world, he considered his legal father, William, to be his only protector and source of love as Mark's mother herself apparently suffered from brain damage and intellectual disability and was broadly incapable of taking care of or demonstrating love.

After William Christeson's death, one of Mark's uncles (Jerry Belcher) wanted to secure his custody. (App. 30-31). Had that happened, it appears from undersigned's investigation to date that Mark likely would have settled into circumstances removed from the constant sexual victimization and general exploitation that characterizes his earliest years. But things did not break that way. Instead, Mark's mother—a woman beset with severe mental health problems and,

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[8] In this connection, the profound failure of Mr. Christeson's state post-conviction counsel under Mo. R. 29.15 to develop the foregoing bases for trial counsel ineffectiveness would precipitate federal habeas counsel to invoke *Martinez v. Ryan*, 132 S.Ct. 1209 (2012). *See, e.g.*, *Barnett v. Roper*, No. 3-cv-614-ERW Doc. 361 at 188 (Aug. 18, 2015, E.D. Mo.) (granting habeas relief on ineffective assistance of trial counsel relating to presentation of mitigation evidence, reciting that the district court "conducted an evidentiary hearing, engaged in the relevant analysis, and found Mr. Barnett deserving of relief").

[9] It has emerged that William Christensen's brother, John, was Mark's biological father through an extra-marital liaisons with his sister-in-law.

herself, a lifelong victim of sexual, physical, and psychological abuse—signed away her parental rights to Mark's older cousin, a man 20 years his senior named David Bolin. (App. 180-81).

Upon becoming Mark's guardian, David Bolin would collect social security benefits for that responsibility and, as he appears to have done for decades with numerous children within his extended family, Bolin would have unfettered control of a child to sexually violate at his whim any and every night of that child's life while under his charge. (App. 9, App. 10, App. 59-60). This cousin — "Uncle David", as Mark and the other children were made to call him — crept into the adolescent Mark's bedroom nightly to prey upon him. (App. 47).

Missouri's Department of Family Services ostensibly evaluated and monitored David's home in order to permit Mark to be kept in David's charge. During late-1992 through early-1993, DFS reported based merely on David's word and failed to meaningfully probe the circumstances and environment in which Mark was exploited nightly. (App. 213). As explained in Appellant's opening motion, "David, who had molested other family members, would bed down in Mark's room 'every night,' choosing to sleep with Mark rather than with his own wife." (App. 47.)

This case's hallmark is the failure of the state, society, and family to protect Mark and provide even a modicum of welfare during his entire life before prison, literally from infancy until his arrest for this case in 1998 at the age of 18 years.[10]

In relation to the equitable tolling litigation at bar, the district court has trivialized this and voluminous additional evidence of Mr. Christeson's childhood from undersigned's investigation during 2015, chalking up this mass of evidence as reflecting "a bad childhood," (Doc. 150 at 18), rather than recognizing that the information is vital, in tandem with information from Mr. Christeson's time in

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[10] Mr. Christeson was 18 on the date of the crime for which he was convicted and thus his death was not automatically rendered unconstitutional by the bright-line prohibition against executing any individual who was under 18 years of age on the date of the crime. *Roper v. Simmons*, 543 U.S. 551 (2005). The reasons explicitly justifying the holding in *Simmons* apply with equal force to Mr. Christeson, yet he has never had counsel able to advocate that point in collateral review of his judgment. Perversely, Mr. Christeson was disadvantaged in his prosecution by the youth and vulnerability of his co-defendant, his then 16 year-old cousin Jessie Carter. Jessie was not only below the age cut-off that would be established about four years after his arrest in *State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (2003) (en banc), *aff'd* 543 U.S. 551 (*supra*), extending to minors the Eighth Amendment prohibition in *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting the death penalty for those mildly (and more significantly) intellectually disabled). But due to his apparently moderate intellectual disability it appears that *Atkins* itself also would have readily exempted him from capital punishment. (App. 34-47). To Mr. Christeson's severe detriment, the date of this case enabled the State to exploit Mr. Carter's vulnerability and pressure him, in exchange for a sentence of life without parole, to damningly testify against Mr. Christeson, albeit in a highly inconsistent, dubious, and incredible way.

prison,[11] for the question at the center of the Supreme Court's remand to this Circuit Court.

As explained herein, the district court has failed to carry out the further proceedings that the Supreme Court has ordered in this matter and has committed profound errors requiring several issues to obtain a COA and thereby full briefing and argument in the present proceedings or, alternatively, a remand to the district court for sufficient funding authorization and adequate opportunity for an evidentiary hearing on the equitable tolling criteria.

Beyond this, though, are the meritorious underlying claims of Mr. Christeson's habeas corpus application that have been precluded, to date, by the collapse in his case of the entire §3599 scheme. As the Supreme Court has ruled, Mr. Christeson's former appointed habeas counsel labored under a conflict of interest against him from the moment their deadline to file his petition lapsed. *Christeson*, 135 S.Ct. at 895, citing generally *Martel v. Clair*, 132 S.Ct. 1276 (2012). Mr. Christeson must obtain the meaningful representation that he is guaranteed pursuant to this federal statute. *McFarland v. Scott*, 512 U.S. 849, 859 (1994); *Clair*, 132 S.Ct. at 1280.

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[11] *See, generally*, Doc. 125 at 54-64 ("Petitioner's Severe Deficits And Incapacity Rendered Him Unable To Overcome The Unremitting Victimization And Threats In Prison In Order To Attempt To Overcome The Misconduct And Conflict Of His Attorneys In His Federal Habeas Case").

As mentioned above, the incomprehensibly grim history of Mr. Christeson's childhood contemplates circumstances beyond even the mistreatment of various capital habeas litigants who received from the Supreme Court rulings on claims of trial counsel's failure to present evidence of mitigation stemming from abuse, mistreatment, neglect, and/or trauma. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 361 (2000); *Wiggins v. Smith*, 539 U.S. 510, 526 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010).

In and of themselves, the things done to Mr. Christeson during his entire 18 years before his arrest in 1998 would have animated elemental concerns in any individual sitting in judgment of him on his capital trial. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Lay people, such as judges and officers of the court, know—simply as *people*—that such unrelenting maltreatment visited upon a child is deeply mitigating and provides the basis for any reasonable jury to conclude that punishment other than a death sentence would be appropriate for Mr. Christeson (assuming his culpability as advanced by the State in this case). But scientific and medical fields such as neuropsychiatry, psychology (focusing on effects of traumatic life experiences), and intellectual disability would be able to take this personal history and, in tandem with direct examination of the client, evidence

certain effects on Mr. Christeson of such depredations upon the physical constitution and workings of his brain and nervous system generally.

Well-established knowledge takes the immediate, intuitive force of the kind of victimization inflicted on Mr. Christeson as a child and extends it to direct effects on the working of that individual's brain and nervous system, outlining causal connection between the person's treatment and his capacity to function in society, let alone cope with stress or fraught interpersonal situations. It assists in making sense of even highly out-of-character and otherwise incomprehensible conduct.

B. In 2014, Egregious Attorney Misconduct Of Mr. Christeson's Prior Appointed Attorneys And Mr. Christeson's Utter Reliance Upon Those Attorneys Due To A Lack Of Cognitive Capacity Caused The Supreme Court To Stay Missouri's Execution And To Reverse This Court And Remand The Case For Further Proceedings

As indicated at the outset, this is the third time this Court has had to consider Mr. Christeson's federal habeas corpus action. Once again, it must do so prematurely; the district court has failed to fulfill its basic function in this case and, as a result, precluded the full development and presentation of evidence necessary for it even to address the question the Supreme Court has called for it to adjudge pursuant to the remand to this Court under its January 20, 2015 opinion. *Christeson*, 135 S.Ct. at 892.

1. In 2007, the district court dismissed the initial, untimely petition without resolving Mr. Christeson's conflicted attorneys' inability to litigate equitable tolling by addressing their own misconduct

On April 24, 2007, Mr. Christeson's then-appointed habeas counsel applied to this Court for a COA from the district court's January 31, 2007 order (Doc. 52), dismissing the habeas petition filed on August 5, 2005 as untimely. The petition had been due on April 10, 2005 and thus the original habeas counsel filed their petition 117 days late. *Christeson*, 135 S.Ct. at 892.

In 2007, the district court dismissed the petition after extensive briefing by the respondent and by Mr. Christeson's conflicted attorneys. After Respondent initially advanced the obvious affirmative defense of the petition's untimeliness, on October 17, 2006, the district court ordered briefing on the timeliness question, instructing Mr. Christeson to "state explicitly all events and dates relevant to determining all statute-of-limitations runs, and during it is tolled." (Doc. 42 at 1). In their briefing, Mr. Christeson's conflicted attorneys only argued the timeliness of their filing and zealously defended their miscalculation as the correct approach to the one-year federal statute of limitations under 28 U.S.C. §2244(d). (Doc. 45).

In dismissing the petition, the district court noted, *sua sponte*, that "Christeson does not argue that extraordinary circumstances in this case justify equitable tolling." (Doc. 52 at 3). In the extensive briefing submitted to the district court, Mr. Christeson's conflicted counsel has not mentioned, let alone raised, the

prospect of equitable tolling of the statute of limitations. The extraordinary circumstances they would have had to argue, as the Supreme Court later pointed out, would have been their own misconduct, which "would have required [them] to denigrate their own performance. Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood." *Christeson*, 135 S.Ct. at 894, citing Restatement (Third) of Law Governing Lawyers §125 (1998).

In any case, the district court did not suggest that Mr. Christeson's appointed counsel had labored under a conflict of interest since their April 10, 2005 deadline for timely filing the petition lapsed, nor did the district court ever entertain that Mr. Christeson at least needed other (or even additional) counsel to assess whether any bases for equitable tolling might exist in his case. Had the district court addressed this in 2006 and appointed conflict-free counsel to replace the initial attorneys, new attorneys would have then litigated the matters now before this Circuit Court ten years later. In the actual event, on May 29, 2007 this Court summarily denied conflicted counsel's COA application.

As set forth in the litigation culminating in the Supreme Court stay of Mr. Christeson's execution on October 28, 2014, he had no idea about the fate of his federal habeas litigation in the years between this Court's May 29, 2007 denial of the COA application and May 4, 2014, the date, nearly seven years later, of his

first visit from undersigned counsel (in a consulting capacity at the behest of his initial, conflicted habeas counsel who had solicited the involvement of undersigned counsel in reaction to the Missouri Supreme Court's April 7, 2014 order to show cause why an execution date should not be set for Mr. Christeson). (Doc. 62 at 7). It would later emerge that original habeas counsel never addressed nor explained to Mr. Christeson the closure of his federal habeas case. (Doc. 125 at 66). Further, Department of Corrections records reflect that after this Court's issuance of its mandate on June 28, 2007, the appointed attorneys never again visited him. (*Id.*).

2. In 2014, the district court (a) rejected undersigned counsel's notification of original habeas counsel's conflict of interest against Mr. Christeson, (b) reaffirmed its appointment of the conflicted attorneys, (c) and denied the substitution of conflict-free counsel, which this Circuit Court affirmed but the Supreme Court, after staying Mr. Christeson's execution, reversed

When undersigned counsel first sat down with Mr. Christeson on May 4, 2014, it quickly became apparent that he had no idea that his case had ended long ago. (Doc. 62 at 11). Original habeas counsel's conduct thereafter created professional and ethical obligations for undersigned counsel,[12] precipitating the

[12] As chronicled in the litigation during 2014, original habeas counsel (Messrs. Butts and Horwitz) elected to explicitly litigate against Mr. Christeson's interests in relation to the Missouri Supreme Court's then pending order to show cause for that court not setting his execution date. As the Supreme Court pointed out, "Horwitz and Butts' conventions here were directly and concededly contrary to their client's interest, and manifestly served their own professional and reputational interests." *Christeson*, 135 S.Ct. at 895.

filing in the district court on May 23, 2014 of the *Notice By Friends Of The Court Of Petitioner's Need For Substitution By Conflict-Free Counsel*. (Doc. 62). On May 27, 2014, the district court *sua sponte* redocketed this *Notice* as a motion for appointment and ordered Respondent and initial, conflicted counsel to respond. (Doc. 63). After noting in the redocketing order that undersigned counsel were from Philadelphia and New York, the district court stated it would not appoint out of state counsel to represent Mr. Christeson (because of cost concerns).

On June 3, 2014, undersigned counsel filed a reconsideration motion, arguing that it was inappropriate for the original habeas counsel to comment on their own conflict and offering not to charge the district court for travel fees and expenses. (Doc. 64). After hearing from the conflicted counsel wherein, among other things, they affirmatively misrepresented their communication to their client about submitting to a "mental health/psychological" evaluation, (Doc. 75 at 2), on July 10, 2014, the district court summarily denied the appointment motion and ordered that conflicted counsel (Messrs. Butts and Horwitz) "shall continue to represent Petitioner." (Doc. 78). This Court docketed undersigned's appeal from that order on August 12, 2014 under Appellate Case 14-2896.

On August 15, 2014, Respondent moved to dismiss that appeal (ID: 4186421), and undersigned responded on August 25, 2014 (ID: 4189248). On September 8, 2014, this Court *sua sponte* directed the parties "to address whether

Jennifer Merrigan and Joseph Perkovich have standing to appeal." (ID: 41984280). On September 18, 2014, Petitioner filed the ordered briefing. (ID: 5198965).

On Friday, September 19, 2014, the Missouri Supreme Court entered Mr. Christeson's October 29, 2014 execution warrant.[13] On Monday, September 22, 2014, the undersigned notified this Court of the execution warrant. (ID: 4199215).

On September 29, 2014, Respondent filed his ordered briefing on standing. (ID: 4201404). Mr. Christeson then moved for leave to reply, submitting points and authorities in reply on October 1, 2014 and requesting expedited briefing in light of the pending execution date.[14] At the permission and instruction of the Clerk on October 3, 2014, undersigned counsel refiled, lodging a reply brief of four pages. (ID: 4203182). On October 8, 2014, the Court granted leave and filed the reply. (ID: 4204403). On October 14, 2014, undersigned moved the Court for a remand to the district court for an evidentiary hearing based on new evidence concerning Mr. Christeson's prison circumstances and the observations of fellow

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[13] Two weeks prior, on September 5, the undersigned (Merrigan) entered her limited appearance in the Missouri Supreme Court thereby alerting that court to the pendency of the foregoing litigation in this Circuit Court. *State v. Christeson*, No. SC82082.

[14] The filing was entered in the docket on October 3 with this text: "APLNT HAS NOT BEEN GIVEN LEAVE TO FILE THIS REPLY. The document will be attached to the motion for leave and will be referred to the court for a decision."

prisoners concerning his mental capacity in relation to his legal interests. (ID: 4205606).

On October 15, 2014, this Court entered an unsigned order stating, in its entirety: "The court orders that this appeal be dismissed for lack of jurisdiction because attorneys Merrigan and Perkovich lacked standing in the district court. The motions by Merrigan and Perkovich for remand and for leave to file an ex parte supplemental argument are denied as moot." (ID: 4206579).

The next morning, on October 16, 2014, undersigned (Merrigan) filed her Amended Entry of Appearance in the district court (Doc. 95),[15] for the "limited purpose of moving the Court by her simultaneously filed *Motion By Pro Bono Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel*" (Doc. 96). On Friday, October 17, 2014, the district court entered an order near the close of business denying the substitution motion for lack of jurisdiction, noting that the Circuit Court had not yet entered its mandate. The order also stated the following:

> Assuming, *arguendo*, that the Court has jurisdiction, the Motion is DENIED for the reasons previously stated by the Eighth Circuit, this Court, by Petitioner's counsel [Messrs. Butts and Horwitz], and by Respondent. The Court further finds that Merrigan's duplicative Motion is an attempt to improperly delay the proceedings in this case. Absent an Order from this

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[15] Ms. Merrigan's entry appearance noted that under Prof'l Rule 4-1.2(d)(2) she was able to represent Mr. Christeson in her institutional capacity with the Saint Louis University School Law in a specifically limited scope in order to appeal the denial of the substitution of his counsel. (Doc. 95 at 1 n.1).

> Court or from the Eighth Circuit, Merrigan and Perkovich are prohibited from filing any additional documents in this case. Merrigan may, however, file a notice of appeal of this Order.

(Doc. 97 at 1). That same day, shortly after entry of the district court's foregoing order, this Court formally issued its mandate pursuant to Fed. R. Civ. P. 41(a). (ID: 4207529). Then, still during Friday, October 17, undersigned counsel moved this Court for the now required order instructing the district court to accept the filing of a renewed motion for substitution of counsel. (ID: 4207580).

In the evening of Monday, October 20, 2014, Respondent filed his opposition to undersigned's request for permission to renew the substitution motion. (ID: 4208015). On October 21, 2014, the Court granted undersigned counsel's motion. (ID: 4208543). With that permission from this Court, undersigned immediately filed the renewed substitution motion in the district court. (Doc. 100). In a matter of days, the Supreme Court would stay Mr. Christeson's execution on the basis of the request for review of the decisions on that renewed motion.

On October 22, the district court denied the renewed substitution motion (Doc. 102), and undersigned counsel immediately noticed its appeal (Doc. 103). Undersigned counsel then moved this Court on October 23 for a stay of Mr. Christeson's execution (Appellate Case 14-3389, 4209580).

Late on Friday, October 24, 2014, the Court denied the motion to stay the execution and "further ordered that the district court's order of October 22, 2014, denying the Renewed Motion by Pro Bono Counsel for Substitution of 18 U.S.C. Section 3599 Appointed Counsel is summarily affirmed. (Appellate Case 14-3389, ID: 4209993).

On Monday, October 27, 2014, undersigned counsel filed in the Supreme Court Mr. Christeson's application for a stay of execution and his petition for writ of certiorari to review this Court's order affirming the district court's denial of the renewed substitution motion. (Oct. Term 2014, Case No. 14-6873).

The next day, on October 28, 2014 at approximately 11:00 a.m. CDT, Circuit Justice Alito ordered Supplemental Briefing, to be filed by 1:00 p.m. CDT, "regarding whether the record shows that petitioner has authorized [attorneys Merrigan, Mills, or Perkovich] to move on his behalf for substitution of counsel appointed pursuant to 18 U.S.C. §3599." (Order, *Christeson v. Roper*, No. 14-6873).

In this Supplemental Briefing, undersigned counsel submitted as exhibits correspondence prepared by fellow prisoners for Mr. Christeson simultaneously manifesting his clear desire to have had undersigned counsel substitute for his initially appointed attorneys and also his impairments and incapacity in relation to independently protecting his own legal interests. (*Supra* at n. 5, *see* Attachment).

Late in the night of October 28, minutes before Missouri was set to commence Mr. Christeson's lethal injection, the Supreme Court stayed his execution. On January 20, 2015, the Court published its opinion wherein, by a vote of 7-to-2, it reversed this Circuit Court and remanded the case for further proceedings consistent with the opinion. *Christeson v. Roper*, 135 S.Ct. 891 (2015) (*per curiam*, dissenting opinion by Alito, J., joined by Thomas, J.).

3. *In 2015, the district court side-stepped the remand of this Circuit Court from the Supreme Court's reversal in Christeson v. Roper*

On February 23, 2015, the Supreme Court issued its mandate, causing this Court, by an order of February 26, to vacate its judgment of October 24, 2014 (ID: 4209993), and to reopen the case. (ID: 4248615). The Court than remanded the case to the district court on March 4, 2015. (ID: 4250589, Doc. 109). By an order of March 17, 2015, the district court granted the renewed motion for substitution (Doc. 100), terminated the appointments of original habeas counsel, and ordered that "Petitioner shall now be represented by Jennifer Merrigan and Joseph Perkovich." (Doc. 110). The district court then ordered the parties to submit a proposed scheduling order and Petitioner to "file a proposed budget for the proposed remaining tasks in this case." (*Id.*). Both the jointly proposed scheduling order (Doc. 116), and Mr. Christeson's proposed budget (Doc. 119, filed *ex parte* and under seal), were timely filed in the district court on March 31, 2015.

II. IMMEDIATE CASE BACKGROUND

Mr. Christeson appeals to this Court from the March 8, 2016 order and judgment of the district court (*Christeson*, No. 4:04-cv-8004-DW, Doc. 150), denying his *Rule 60(b) Motion To Reopen Final Judgment Dismissing Habeas Corpus Application As Untimely* (Doc. 125). On April 5, 2016, Appellant timely filed his *Rule 59(e) Motion To Alter Judgment And Authorize Resources For Renewed Rule 60(b)(6) Motion* (Doc. 152), which was denied on June 13, 2016. (Doc. 155). On June 14, 2016, Mr. Christeson noticed this appeal challenging all aspects of the district court's March 8, 2016 order and judgment. (Doc. 156), and this COA application has thus followed.

A. The District Court's Budget Order Denied Adequate Funding For Appellant's Representation, Especially Regarding The Indispensable Role Of Experts And Specialists

As directed by the court, counsel submitted a proposed budget outlining the expected fees and costs necessary to the competent development of a Rule 60(b) Motion. (Doc. 119). The 60(b) Motion required counsel to develop two separate prongs: the abandonment and malfeasance of prior counsel and Mr. Christeson's capacity for diligence. As to both prongs, counsel requested funds for attorney and investigator hours. As to the latter, counsel requested funds to obtain experts, whose involvement would be critical to assessing Mr. Christeson's cognitive impairments and their impact on his ability to diligently protect his interests and

rights. *See* Doc. 122. First, counsel requested funds to obtain a full neuropsychological battery of Mr. Christeson. *Id*. Neuropsychology studies the relationship between the brain and behavior. Behavioral deficits, such as those observed in Mr. Christeson, including failure to meet developmental milestones and impaired scholastic, occupational and/or social functioning may suggest compromised brain anatomy or neurophysiology.

As discussed *infra*, upon meeting with Mr. Christeson, undersigned counsel immediately observed that he exhibited\impairments.[16] Prior habeas counsel had apparently also initially recognized such impairments. In their initial budget, filed on July 28, 2004, they had requested, and received, funding for a neuropsychological evaluation of Mr. Christeson. (Doc. 8). However, they

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[16] Even from undersigned counsel's very first filing in Mr. Christeson's behalf in May 2014 in the district court as "Friends of the Court" – nearly a year before initiation of the Rule 60(b) proceedings in the district court – it was noted that he appeared to have severe cognitive impairments limiting his capacity for diligence. (Doc. 62 at 21-22). This assertion came, in part, from special education school records that indicated that despite receiving an Individualized Education Program ("IEP") and being enrolled in special education classes, Mr. Christeson still had failed many classes;[16] records revealing rampant sexual abuse and incest in the family, including that Mr. Christeson's father was a diagnosed pedophile who regularly slept with his infant son. (Doc. 62 at 21-22). After the district court denied the substitution motion, Mr. Christeson took an appeal and then asked the Circuit Court to remand the case for further proceedings pursuant to newly collected and proffered declarations from prisoners who had been housed with Mr. Christeson for decades and had observed his inability to understand the legal process and communicate with other prisoners about his case, as well as his severe recurring headaches and difficulty with memory and recall.

inexplicably failed to contact a neuropsychologist (or any other expert or investigator) prior to filing the initial, woefully late habeas petition. In addition to counsel's observations, a partial neuropsychological battery, conducted in 2014, revealed significant deficits in memory, comprehension, and intellectual functioning and indicated the need for a full neuropsychological battery.[17]

The partial battery also revealed that Mr. Christeson had a Full Scale IQ of 74[18], placing him in the fourth percentile of the population."[19] Such an IQ score would certainly impact Mr. Christeson's ability to communicate with his counsel and navigate the procedural complexities of habeas corpus. However, to assess the full extent of his limited IQ and cognitive deficits, counsel requested funding to obtain the services of an expert in the areas of intellectual disabilities. The work of the intellectual disabilities specialist would incorporate observational evidence reflecting Mr. Christeson's abilities in conceptual, practical and social domains,

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[17] In order to obtain a comprehensive neuropsychological assessment, counsel also requested funds to obtain brain imaging. Doc. 122.

[18] The scores contained herein have been normed or adjusted for the Flynn effect. Generally, the Flynn effect refers to "overly high scores due to out-of-date test norms." (App. 136.)

[19] Taken in conjunction with his special education records, Mr. Christeson may be legally Intellectually Disabled, and thus legally excluded from execution. However, counsel have not been granted the resources to properly investigate and develop this claim.

also known as "adaptive functioning."[20] Given his low IQ, understanding Mr. Christeson's adaptive functioning would be critical to assessing his ability to diligently assert his rights in a legal context.

Counsel requested the assistance of these experts in order to assess Mr. Christeson's impairments and limitations, and evaluate his capacity to diligently pursue his rights, in the face of attorneys who abandoned and deceived him.

The district court, without explanation, denied Appellant funds for each of the experts. Without addressing the needs of the case, Mr. Christeson's impairments or the counsel's duties under *Holland v. Florida*, the court held that the "requested amounts are not reasonably necessary to pursue and file a Rule 60(b) motion." (Doc. 122 at 2). However, the court left open the possibility of further funding in the event of an evidentiary hearing, directing that "if the Court orders an Evidentiary Hearing relating to issues of the Rule 60(b) motion, then Petitioner shall submit a Proposed Evidentiary Hearing Budget within fourteen days of the order." Doc. 122 at 2 (internal citations omitted).

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[20] "Adaptive behavior/functioning refers to a person's ability to deal with the everyday demands of life." (App. 117.) *See* Schalock, R.L., Borthwick-Duffy, S. A., Bradley, V. J., Buntinx, W. H.E., Coulter, D. L. Craig, E. M. et al. (2010). *Intellectual disability: Definition, classification, and systems of supports* (11th ed). Washington, DC: American Association on Intellectual and Developmental Disabilities, p. 4; American Psychiatric Association (2013). *Diagnostic and statistical manual of mental disorders* (5th ed.). Washington: Author, p. 37.

B. Despite The Constructive Denial Of Counsel Chiefly Due To The Denial Of Indispensable Experts And Specialists, Appellant Submitted Ample Evidence And Argument To Establish Grounds For Equitable Tolling And For An Evidentiary Hearing

Mr. Christeson proffered hundreds of witness declarations and life history records in the district court collectively detailing extreme and long time impairments as well as his history of sexual abuse and trauma. These declarations discuss the pervasive incest in the family and discuss the ways in which Mark himself was sexually victimized by multiple family members during his childhood.

Counsel also obtained preliminary expert reports, which evidenced Mr. Christeson's impairments and limited capacity for diligence, entitling him to a hearing, and establishing the right to funding in order to obtain full testing and evaluation. In each of the affidavits, the expert identified red flags in Mr. Christeson's history which indicated impairment, the implications of those impairments on his capacity for diligence, and any further investigation, evaluation, and testing necessary for a comprehensive assessment of his disabilities and impairments. As discussed below, each expert preliminarily concluded that Mr. Christeson's impairments would severely limit or preclude his capacity to diligently pursue his rights. However, each expert assessment required further development in order to yield an opinion to a reasonable degree of certainty about Mr. Christeson's capacity for diligence. Counsel obtained a preliminary report from Dr. Dale Watson, a forensic neuropsychologist with over 28 years of

experience. Dr. Watson found that Mr. Christeson was "impaired in a range of areas", including attention and memory, with an IQ in the potentially intellectually disabled range. (App. 142-43). However, he found that a full neuropsychological battery and adaptive deficit assessment was necessary to fully answer the present inquiry. (App. 141). Counsel also obtained a preliminary report from Dr. James Patton, an intellectual disabilities forensics specialist, with 43 years of experience working in the field of intellectual/educational disabilities. Dr. Patton reviewed a limited number of records and declarations and concluded that Mr. Christeson exhibits deficits in the key areas of adaptive functioning. In order to determine the extent of those deficits, a complete adaptive functioning assessment must be obtained. (App. 120). Finally, counsel obtained a preliminary report from clinical psychologist Dr. Victoria Reynolds, who specializes in the assessment and treatment of the impact of traumatic life experiences, including childhood sexual and physical abuse, adult rape, military sexual trauma and exposure to combat. In her preliminary report, Dr. Reynolds discussed the impact of Mr. Christeson's long term sexual victimization on his neurological development and behavior. She opined that "trauma-based brain and biological changes can interfere with an adult's ability to take care of himself, advocate, take initiative and establish and sustain connection to others upon whom he must rely in a caretaker role." (App. 131). Because Mr. Christeson experienced "incomparably profound and prolonged

childhood abuse of every sort, from sexual abuse and exposure to violence to serious emotional neglect at the hands of his caretakers" a full trauma assessment was required. *Id.* Such an assessment "would permit an evaluation of his exposure to traumatic life experiences as well as his responses and understanding of those experiences." (App. 132).

Taken together, the documentary evidence submitted with the Rule 60(b) Motion establishes that Mr. Christeson suffered from impairments that crippled his capacity for diligence, per *Holland v. Florida*, in the face of his attorneys' abandonment. At the very least, they met the threshold standard entitling to a hearing and triggering the court's provisional funding order. This undertaking is at the very center of the Supreme Court's remand yet was categorically frustrated in the district court's management of the further proceedings pursuant to the high Court's judgment and opinion. Because jurists of reason would find this at least debatable, a COA should issue.

III. STANDARD FOR ISSUING A CERTIFICATE OF APPEALABILITY

Appellant's prior habeas counsel have been adjudged to have operated under a conflict of interest against him due to their failure to timely file his initial habeas corpus petition in 2005. *Christeson*, 135 S.Ct. at 894. The district court has denied Appellant's motion to reopen his habeas application closed due to that default. (Doc. 150 at 21, denying Rule 60(b)(6) motion). Thus, Appellant must now show

that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), *quoted in Khaimov v. Crist*, 297 F.3d 783, 785 (8th Cir. 2002).

Title 28 U.S.C. §2253(c)(2) generally provides that a COA should issue "only if the applicant has made a substantial showing of the denial of a constitutional right." In *Miller-El v. Cockerell*, 537 U.S. 322, 338 (2003), the Supreme Court explained that §2253(c)(2) does not "require petitioner to prove before the issuance of a COA, that some jurist would grant the petition for habeas corpus." If that were the standard, a COA would be almost never issued and the right of appeal rendered meaningless. Instead, a petitioner satisfies the standard simply "by demonstrating that jurist of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327; citing *Slack*, 529 U.S. at 484. The question thus is whether the issue now before this Court is debatable; the current proceeding decidedly must *not* aim to resolve that debate. *Miller-El*, 537 U.S. at 342 (discussing underlying constitutional claim, the "question is the debatability . . . not the resolution of the debate").

Moreover, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Slack*, 529 U.S. at 338.

The issues presently before this Court are not merely "debatable" and surely "deserve encouragement to proceed further" (*infra*), for which a COA should be issued. Finally, when, as here, the death penalty is at stake, "the nature of the penalty is a proper consideration in determining whether to issue a COA." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

IV. ISSUES WARRANTING CERTIFICATE OF APPEALABILITY OR REQUIRING APPELLATE REVIEW WITHOUT ONE

The district court erroneously denied reopening Mr. Christeson's federal habeas corpus application. Under the governing legal standard (*supra*), the district court's order requires this Court to order a Certificate of Appealability in relation to several discrete issues set forth below. In addition, Appellant has set forth the bases for this Court's direct review of the district court's inadequate funding rulings pursuant to undersigned counsel's appointment. Below, Appellant respectfully requests a briefing schedule for the appeal from those funding rulings as of right and without a COA.

A. The District Court's Finding That Original Habeas Counsel Did Not Commit Serious Attorney Misconduct Despite Their Record Of Abandonment When They Defaulted His Case Requires Full Appellate Briefing And Review

The district court opted to avoid the record of original habeas counsel's abandonment rather than address it. The court selectively concerned itself with only the activity of the conflicted attorneys after their abandonment created their conflict of interest against Mr. Christeson. But that post-default activity is precluded from consideration as activity ostensibly done on their client's behalf, somehow speaking to the attorneys' prior conduct. (Doc. 150 at 14-17).

1. In ruling that Appellant had not met his showing of serious instances of attorney misconduct, the district court relied upon the conflicted attorneys' actions after the default of their petition and ignored the stark record of abandonment presented to the Supreme Court in 2014 and relied upon in its remand of these proceedings

The Supreme Court is clear about why conflicted counsel's explanation of their own appointment cannot be credited in interpreting the record of their conduct. The Court pointed out that during the substitution litigation, the district "court's principal error was its failure to acknowledge Horwitz and Butts' conflict of interest. Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for 'serious instances of attorney misconduct.'" *Christeson*, 135 S.Ct. at 894, quoting *Holland*, 560 U.S. at 651-52. The Court explained that conflicted counsel cannot be relied on to "denigrate their own performance," and thus "cannot reasonably be expected to make such an argument,

which threatens their professional reputation and livelihood." *Id.* citing Restatement (Third) of Law Governing Lawyers §125 (1998).

But the district court has continued to insist that Horwitz and Butts' account of their own performance is to be relied on. The district court leans heavily on what it has deemed to be the *factual* similarities between this case and the events involved in *Lawrence v. Florida*, 549 US. 327 (2007), a case in which the petitioner/appellant had argued that "his counsel's mistake in miscalculating the limitations period entitle[d] him to equitable tolling." (Doc. 150 at 11, quoting *Lawrence*, 549 U.S. at 336). *Lawrence* has no legal bearing upon the questions at bar but is invoked by the district court because it concerns a case where the lawyers who had defaulted that petitioner's habeas case had done so as a result of their miscalculation of their deadline. In this vein, the district court gives decisive weight to conflicted counsel's explanation, submitted to the court in the substitution litigation during 2014 (Docs. 63, 73), "that they did not abandon Christeson and had a legal basis for their calculation of the deadline." (Doc. 150 at 16, n.6). Specifically, the district court's rationale relies heavily on a seven-point itemization of the specific filings by original counsel made after their late petition, *after their abandonment and the creation of their conflict of interest by having failed to timely file the petition* for Mr. Christeson. (Doc. 150 at 15-16).

The district court's determination sits at odds with the Supreme Court's in this case. The high Court explicitly ruled out consideration of the subsequent activity by original counsel as irrelevant to the question of their abandonment. The Supreme Court noted that in denying the substitution motion in 2014, the district court reasoned "that appointed counsel continued to represent Christeson in litigation challenging the means of his execution." *Christeson*, 135 S.Ct. at 895. The high Court explained, that "[w]hether Horwitz and Butts had currently 'abandoned' Christeson is beside the point: Even if they were actively representing him in some matters, their conflict prevented them from representing him in this particular matter." *Id.*, quoted, in part, in *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016) (staying execution to permit appointment of counsel to develop incompetency claim). Thus, the Supreme Court has already ruled on the element of the record the district court primarily advances in the order at bar in support of its construal of original counsel's conduct. The conflict of interest not only prevented the original attorneys from representing Mr. Christeson in related litigation, it legally foreclosed any role in representing him in the habeas case that the district court has explicitly relied on as the evidence disproving abandonment.

Further, the district court alludes to Appellant's "serious accusations" that original counsel "engaged in a 'self-interested cover-up' to hide their untimely filing." (*Id.* at 16). The district court finds that the "serious accusations are not

supported by actual facts, but by speculation and conjecture." (*Id.*). But the district court does not describe the given speculation and conjecture.

Actually, Appellant has continued to rely upon the record also before the Supreme Court in 2014 that manifests a stark factual record of abandonment. The district court fills the decisive void in original counsel's record with explanations by the conflicted attorneys in which they had cast themselves as having been engaged throughout Mr. Christeson's habeas case when the only evidence of that engagement at the time the petition deadline lapsed is their own retrospective account. That account lies at odds with the record, the same record that moved the Supreme Court, at the outset of its analysis, to identify the stark bases for abandonment. But the district court studiously sidestepped that record on this remand. By original counsel's own admission, they had "failed to meet with Christeson until more than six weeks *after* his petition was due." 135 S.Ct. at 892 (record citations omitted). Further, the Supreme Court stated:

> There is no evidence that they communicated with their client at all during this time. They finally filed the petition on August 5, 2005—117 days too late. They have since claimed that their failure to meet with their client and timely file his habeas petition resulted from a simple miscalculation of the AEDPA limitations period (and in defending themselves, they may have disclosed privileged client communications). But a legal ethics expert, reviewing counsel's handling of Christeson's habeas petition, state in a report submitted to the District Court: "[I]f this was not abandonment, I am not sure what would be."

Id. (record citations omitted).

The district court turned the clear evidence of original counsel's abandonment on its head, reasoning that when the lawyers met with Mr. Christeson for the first time more than six weeks after their deadline for filing his petition, that meeting should be seen as an indication of their engagement as his agents because it "was ten weeks before they filed the Petition [117 days belatedly]." (Doc. 150 at 15). This analysis defies any practical sense given the simple fact that, however the one-year deadline for filing the petition may be calculated, the one year span for a capital habeas petition is a very compressed time. The idea that the attorneys were acting as the petitioner's agent but failing to event contact him for more than a year after the date of their motion for appointment exceeds any credulous account of this area of legal work. Further to this point, the standard of care certainly does not contemplate a delay of such a length before first engaging the client. In fact, the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15—Investigation, *reprinted in* 31 Hofstra L. Rev. 913, 1023 (2003), contemplates that "immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client . . ."

Despite these clear factors clearly militating against any idea that original counsel were performing as Mr. Christeson's agent, the district court insists on giving full credit to their own account even though the high Court had pointed out

that it was manifestly in the service of "their own professional and reputation interests." *Christeson*, 135 S.Ct. at 895. As the following explanation of the record reflects and the Supreme Court has already explained, even active representation of Mr. Christeson carried out after the creation of their conflict against him cannot be used to explain the record's indication of their abandonment at the time his petition was due to be filed.

2. Correct analysis of the record and the law provides that the conflicted attorneys filed Mr. Christeson's petition out of time because they had abandoned him until six weeks after they had defaulted his action and had incurred a conflict against him from the date they defaulted his habeas corpus application

The existing, actual record is plain: original counsel simply made no contact with Mr. Christeson at all—not even a perfunctory letter of introduction—prior to their first meeting held over six weeks after his one-year statute of limitations had run out. Those attorneys held that meeting on May 27, 2005, (i) more than a year after the conclusion of Mr. Christeson's state collateral review on May 11, 2004 by the Missouri Supreme Court's denial of rehearing from its April 13, 2004 affirmance of the trial court's dismissal of the Mo. Rule 29.15 motion, *State v. Christeson*, 131 S.W.3d 796, (ii) more than a year after the motion for appointment of original counsel filed on May 14, 2004 (Doc. 3), and (iii) nearly 11 months after the district court's July 2, 2005 appointment of the original attorneys (Doc. 5). The original attorneys followed the district court's July 2, 2004 order with entries of

their appearances later that month, their submission of a proposed budget on July 28, 2004 (per the July 2 order), and then simply nothing else before filing over a year later, on August 5, 2005, their anemic habeas petition (Doc. 10).

When considering the foregoing timetable of the original attorneys' abandonment, it must be kept in mind that a one-year statute of limitations is in question. §2244(d)(1). The plain operation of that limitations period actually commences *before* the conclusion of state collateral review, after the direct review became final, and runs until the properly filed state litigation ends. *See generally Artuz v. Bennett*, 531 U.S. 4 (2000).

In Mr. Christeson's case, over 31 days had run off the one-year period before the period was statutorily tolled by the filing of his state collateral review motion on November 15, 2001 (*see* Doc. 52 at 1-2). Thus, the remaining 11 months of the one-year period resumed running on the aforementioned May 11, 2004 conclusion of the state collateral review in the Missouri Supreme Court.

Since the original habeas attorneys first offered their *post hoc* and self-interested arguments for a unique manner of calculation of the statutory period,[21] the basic fact that they filed a petition due under a 12-month limitations period

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[21] The original attorneys were forced to fashion an explanation upon the district court's call for briefing on the matter on October 17, 2006, over 14 months after they belatedly filed the petition.

almost 15 months after both the date of conclusion of state collateral review (upon the May 11, 2004 denial of rehearing from the state supreme court) and also the filing date of the motion seeking their appointment (May 14, 2004) has cast a large and dark shadow over all of their dissembling with respect to calculating a due date. Yet the district court has credited their submissions and effectively ignored Mr. Christeson's and the related findings of the Supreme Court.

Indeed, the very motion for appointment itself should put to rest the idea that original counsel had studiously calculated their approach to Mr. Christeson's deadline. The two-page appointment motion of May 14, 2004 included essentially no legal analysis except the following obviously important point: "In *Snow v. Ault*, 238 F.3d 1033, 1033-36 (8th Cir. 2001), the Eighth Circuit ruled that under the AEDPA the time for filing [Christeson's] habeas corpus petition will commence running when rehearing is ruled out." (Doc. 3 at 2). Mr. Christeson's state public defender, Mr. William Swift, drafted and filed this nominally *pro se* motion for his client in order to transition his representation to the lawyers the district court would soon thereafter appoint as original counsel (Butts and Horwitz).

Is there a reasonable explanation for original counsel entirely rejecting the legal point of *Snow v. Ault* as posited in the motion to appoint them? Would any conceivable notion of their standard of care include jettisoning that analysis and electing to file a petition roughly 1/3 of a year later than the date that resulted from

the established, standard manner of calculation in the federal circuit at that time—an approach to which the attorneys on every other capital habeas case in the state since the advent of AEDPA had successfully adhered?[22] The district court has embraced original counsel's incredible explanation even after the Supreme Court had put to rest the matter of those attorneys' interests in Mr. Christeson's habeas case by illuminating the distorting and untenable consequences from pressing conflicted attorneys' into a corner, pitting their reputations and livelihoods against the interests of their nominal client. *Christeson*, 135 S.Ct. at 895. If the Supreme Court's reasoning needs any further evidence in support, a helpful source is the writing of Mr. Butts to Appellant to inform him that the Missouri Supreme Court had entered an order to show cause as to why Mr. Christeson should not be executed. In that April 15, 2014 letter, Mr. Butts stated:

> the **request by the State of Missouri** [sic] **does not mean that an execution date will be set in your case anytime in the near future**. As you

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[22] *See supra* at n. 2, discussing the fact that Mr. Christeson is the only petitioner to have his application defaulted for untimeliness. In the order at bar, the district court cited *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000), for the proposition that "confusion about the applicable statute of limitations does not warrant equitable tolling." (Doc. 150 at 16). In *Kreutzer*, the petitioner's counsel relied upon the district court's capacity to manage its docket and to grant an extension for filing the petition. The circuit court ruled that equitable tolling would be necessary in order to find the petition timely and the appellate court found that it was "not appropriate in this case." *Id.* The district court had denied relief upon review of petitioner's claims but the circuit court simply affirmed the denial on the basis of the petition's untimeliness. *Id.* at 464.

> are no doubt aware, counsel for most of the other *Zink* [lethal injection federal] litigation plaintiffs have received similar requests within the past few days. It appears that **the State of Missouri** [sic] **is doing nothing more than administratively reviewing all of the capital cases** pending in the state.

(Doc. 64 at 4-5) (emphasis added). Eight days after the date of that letter, Missouri carried out the execution of Butts and Horwitz's other capital client, Mr. William Rousan, pursuant to an execution warrant entered upon the Missouri Supreme Court's show cause order for Rousan entered several months prior.

In this task of interpreting the record of original counsel's abandonment, the late Justice Scalia's affinity for Ockham's razor comes to mind;[23] the most compelling answer to the present question of attorney misconduct is the simplest and clearest one from the stark record. As his honor and his brethren agreed in Mr. Christeson's case, the record before the Court in late 2014 permitted one conclusion: the original lawyers dropped their appointment right after securing it, doing nothing in the case, not even establishing any form of contact with their nominal client, for ten months until, six weeks after they defaulted his case, they finally introduced themselves.

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[23] *See Day v. McDonough*, 547 U.S. 198, 217 (2006) (dissenting opinion, Scalia, J., submitting that "Ockham is offended by today's decision, even if no one else is[,]" in arguing against the "novel regime that the Court adopts today" and for retention of the forfeiture rule for unpleaded limitations defenses under the Federal Rules of Civil Procedure when a state fails to raise a defense of untimeliness in a habeas case.

The district court's insistence on relying upon the conflicted attorneys' representations, even after the remand, borders on the mystifying. During 2014 when the substitution of the conflicted attorneys was litigated in the district court, that court accepted the lawyers' self-serving representations. But any conceivable viability of that tack was flatly put to rest in the Supreme Court's treatment of the matter. The Court saw their assertions of a mere garden-variety miscalculation as the product of their conflict against their nominal client and found that their "contentions here were directly and concededly contrary to their client's interests, and manifestly served their own professional and reputation interests." *Id.*

3. The district court erred in not finding attorney abandonment from the record before it and full appellate review of this error is now required

The district court ruled that the requisite "extraordinary circumstances" for equitable tolling of the statute of limitations under *Holland*, 560 U.S. at 650, were absent on this record. As the foregoing has explained, the district court is incorrect and thus the "debatability" of this ruling, for the purposes of determining whether to grant a COA, is very clear. *Miller-El*, 537 U.S. at 342. In Appellant's case, it is clear that debatability among jurists of reason, so long as that figurative pool of jurists includes Supreme Court justices, dictates full appellate review in this Court.

B. The District Court's Rejection Of The Supreme Court's Remand By Its Refusal To Evaluate Appellant's "Severe Cognitive Disabilities" And To Determine Their Consequences For Equitable Tolling Requires Full Appellate Briefing And Review

Instead of conducting the central inquiry required of the district court in the remanded proceedings, the court ignored the entire examination of Mr. Christeson's mental disabilities and impairments. The district court merely alluded to the nature of the further proceedings called for in the Supreme Court's opinion, finding, in passing, that Appellant "did not need to be solely reliant on original counsel." (Doc. 150 at 19). In effect, the district court rejected the enterprise on remand, trivializing the central questions that motivated the Supreme Court to stop an execution hours before its scheduled time and to summarily reverse this Court's affirmance of the lower court's denial of the substitution of counsel necessary to litigate the question of equitable tolling. As the Fifth Circuit has recently acknowledged, in order for the Supreme Court to have taken these dramatic measures, it had to conclude that the equitable tolling litigation, under the terms described in *Christeson*, would not be a "wholly futile enterprise." *Battaglia*, 824 F.3d at 474, quoting *Cantu-Tzin v. Johnson*, 162 F.3d 295, 296 (5th Cir. 1998), citing *Christeson*, 135 S.Ct. at 895. Dismissively, the district court offered in its ruling that it "is unwilling to dispense with or mitigate the reasonable diligence inquiry for a category of offenders such as alleged rapists." (Doc. 150 at 19). But

that reasoning cannot allow the court to bypass the explicit issue of Appellant's disabilities. *Christeson*, 135 S.Ct. at 892.

1. Appellant developed extensive evidence showing Mr. Christeson's profound disabilities and his resulting inability to ascertain, protect, and pursue his legal interests. That undertaking is at the very crux of the Supreme Court's remand and Appellant carried it out despite the district court's denial of meaningful resources for his representation.

In his Rule 60(b) Motion, Mr. Christeson set forth ample evidence of his cognitive impairments. Though the district court refused to grant Mr. Christeson a hearing or the resources necessary to fully develop this claim, he was able, through lay and expert witness affidavits, as well as contemporaneous life history records, to establish that he suffers from severe cognitive impairments. Those impairments, as the Supreme Court noted based on only preliminary information gathered while Mr. Christeson was under an execution warrant, "lead him to rely entirely on his attorneys." *Christeson*, 135 S.Ct. at 893.

a. As established in the Rule 60(b) Motion, Mr. Christeson is severely impaired in cognition and executive functioning.

The preliminary testing and investigation undertaken by counsel in the Rule 60(b) Motion establish that Mr. Christeson may qualify under the DSM as intellectually disabled. Mr. Christeson has a family history of intellectual disability

and cognitive and adaptive deficits.[24] Mr. Christeson's biological mother, Linda Christeson, biological father, Johnny Christeson, maternal grandmother, Edna Raymo, and maternal great uncle, Charles Raymo, were all at least mildly intellectually disabled. (App. 23).

Mr. Christeson's biological father, Johnny Christeson, had a Full Scale IQ of 65 and was diagnosed as mentally retarded. (App. 23, App. 677, App. 672, App. 696-97).[25] He was functionally illiterate his entire life, reading at a second grade level and doing arithmetic at a kindergarten level, and never attended school beyond the fourth grade. (App. 676-77). Johnny also exhibited extreme deficits in adaptive functioning. (See App. 642) (reporting Global Assessment of Functionality (GAF) score of 55, denoting impairments in social and occupational functioning.)[26] Due in part to his adaptive deficits, in 1987, he was diagnosed with Dependent Personality Disorder. (App. 677). Additionally, he suffered from organic mental and psychological disorders. In 1985, he was diagnosed with

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[24] Because genetic disorders are frequently the source of intellectual disability, family history is often probative of intellectual disability.

[25] This score has not been reevaluated for the Flynn Effect and would actually be lower. *See also* n.27.

[26] The Global Assessment of Functioning (GAF) is a numeric scale (0 through 100) used by mental health clinicians and physicians to subjectively rate the social, occupational, and psychological functioning of adults, e.g., how well or adaptively one is meeting various problems-in-living. *See* DSM-IV-TR at 34.

schizophrenia (App. 681), and later with schizoaffective disorder (App. 657, 680), and he was also diagnosed with Mixed Organic Brain Syndrome (App. 678).

Mr. Christeson's biological mother is also severely mentally limited. As a child, Linda Christeson was diagnosed as mentally retarded and placed in special education. (App. 59). Witnesses describe Linda as "retarded," "dumb," and "slow." (App. 16, App. 22, App. 65). "Linda was very slow and mentally she was not her age. Her body was her age but her mind was not." (App. 65). She could not write. (App. 16, App. 22). She could "read but she can't comprehend. She can read a sentence out loud, but she can't tell you what it means." (App. 22). According to Mark's cousin, David:

> When I took guardianship of Mark she didn't really understand what the guardianship papers meant. We read through them, and they said that she couldn't see him. But then she would ask when she could come and visit him. Or she would want to take him out alone, which she wasn't allowed to do.

(App. 22). She was incapable of planning or of managing money. (App. 22). "She got Social Security checks but then she would go out and spend them all at once. She would then call sobbing, begging for grocery money or money for a bill. She couldn't plan. She didn't know how." (App. 22). Linda Christeson also could not follow instructions or basic directions. Johnny Christeson's wife recalled:

> She asked me to help her make a cake one day. So I got the box, read the directions with her and started to make it. But when my back was turned, she thought that the cake mix was too thick. So she poured milk into it. And my

> oldest daughter, she took one bite. We put it out for the dogs. And the dogs wouldn't even eat it.

(App. 65-66).

Linda Christeson exhibited other significant deficits in the areas of practical adaptive functioning. "Anything that a person has to take care of, she couldn't do it. She would go out shopping and spend all her money on nonsense. She couldn't deal with consequences." (App. 86). She did not do dishes or clean her house. (App. 23). She would hang up her dirty underpants on the mailboxes. (App. 16, App. 23). The postal worker for her area refused to bring the mail and so another family member had to take the underpants down. The underpants were extremely soiled and "crusty." (App. 16). "Linda would also boil her used maxi pads and then hang them up to dry so that she could reuse them. She would then use the pot that she boiled them in to make beans for the kids." (*Id.*). Sometimes, she even used the same water to boil hot dogs. (App. 23).

She was not able to clean herself. Her cousin recalled that Linda "had lice really bad - you could see them jumping around. My dad dumped kerosene on her head to kill them and then my mom cut her hair off." (App. 16). Her husband used to shave Mark's head in order to keep him from getting lice. (*Id.*). She "was sloppily dressed, not clean, hair never combed. Linda was always dirty, she was a messy woman." (App. 110).

IQ testing revealed that Mr. Christeson IQ score consistent with Mr. Christeosn's family history. Preliminary testing revealed an IQ score of 74, placing Mr. Christeson in the fourth percentile in the population and indicating deficits in general intellectual functioning.[27]

The limited neuropsychological testing also establishes that Mr. Christeson suffers from debilitating neurological impairments inhibiting his ability to diligently pursue his rights. His verbal comprehension and working are in the Borderline range and are normative weaknesses. His relative strengths in perceptual reasoning and processing speed are Low Average, making even his greatest strengths normative weaknesses."[28] (App. 137). His FSIQ score of 74 reflects a "difficulty understanding and processing information." (*Id.*). Thus, even had his counsel not actively worked to deceive him, it is still unlikely that he possessed the intellectual capacity to understand what was happening in his case and process the implications.

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[27] The scores contained herein have been adjusted for the Flynn effect. Generally, the Flynn effect refers to "overly high scores due to out-of-date test norms." (App. 136.)

[28] "Normative weakness" denotes an ability that is statistically lower, at least one standard deviation, than other same-aged peers on normative tests and rating scales. "Borderline range" denotes abilities between one and two standard deviations below the norm.

Academic subtests reflect exactly the kind of impairments that one would expect to see in an individual with an IQ of 74. Comprehension subtests underscored Mr. Christeson's inability to understand and process the written word. (App. 140). Mr. Christeson scored 81 in the Sentence Comprehension subtest, placing him in the 10th percentile and 84 in the Reading Comprehension subtests, placing him in the 14th percentile. (App. 139-140). On these tests, he consistently scored in the low average range, "demonstrating impaired executive functioning." (App. 140).

Preliminary testing also revealed significant impairments in areas of executive functioning, which includes the mental processes that enable us to plan, focus attention, remember instructions, and multi-task. Impairments in executive functioning may profoundly limit an individual's ability to organize and act on information. Thus, an individual with damaged or impaired executive functioning would be unable to properly calculate a multi-step deadline, let alone form a plan of action in the event his agents had betrayed his interests and missed such a deadline.

Testing also revealed significant deficiencies in the executive areas of memory and attention. (App. 140). Portions of the Weschler Memory Scale were administered revealing significant deficits in recall. In the first part of the test, Mr. Christeson listened to a paragraph and then was asked to report everything he

could recall. (App. 140). His score was in the 24th percentile. In the second part of the test conducted just thirty minutes later, he was asked to again recall what he could about the paragraph. His score for the second part was in the 16th percentile, the bottom of the low average range. (App. 140). These testing scores are also consistent with his gross inability to comprehend and process information.

Testing also revealed significant impairments in attention. A test that measure attention span indicated a 72.71% chance that he suffers from a significant problem with attention and focus.[29] This kind of neurological inability to stay focused and attentive makes it mentally impossible for him to stay on track in merely obtaining a rudimentary understanding of any single procedural question in his case. Of course, capital habeas procedure is not a matter of a single question, rather it consists of overlapping matrices of complex questions. This, combined with his extreme impairments in cognition and comprehension, simply made it

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[29] According to the preliminary expert affidavits obtained by counsel, the complex sexual, physical, and emotional abuse suffered by Mr. Christeson could be a contributor to his cognitive functioning. However, a clinical assessment and review of social history records by a neuropsychologist would be required to understand the interaction of his social history with his impairments. Likewise, brain imaging, for which counsel requested funding, could help determine whether Mr. Christeson suffers from in utero exposure to neurotoxins, including alcohol and to determine whether head injuries caused lasting brain damage. His functioning, as currently assessed, suggests the imaging would be appropriate.

impossible for him to carry out even the first steps toward the level and kind of diligence required by the district court.

Mr. Christeson's school records are reflective of these deficits and make clear that his inability to process information and effectively communicate have been long time struggles. In elementary school, Mark was assessed as special needs and administered an Individualized Education Plan (IEP). He was placed in special education in 1990, where he remained through high school, until his arrest at age 18. Despite his placement in remedial classes, he still received primarily failing grades.

Achievement records placed Mr. Christeson in the lowest percentiles. In the 7th grade, his highest achievement test score placed him in the 15th percentile for language arts, with his remaining scores in the single digits, including a score in the first percentile—the very lowest percentile of the population—for Social Studies/Civics, perhaps the closest subject area to law.[30] In March 1992, while he was in the 7th grade, Mark received an IEP Notice of Placement "for learning disabilities services related to the area of written language." (App.188). "Mainstreaming in regular classroom for written language was rejected due to Mark's lack of success when this was attempted." *Id*. The placement apparently

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[30] Remaining scores as follows: Reading 9, Science 4.

did not help, however, and Mark continued to receive low and failing grades in the 8th grade. (App. 174.) His achievement scores continued to fall. Mark scored in the 2nd percentile in Reading and in the 9th percentile in Language Arts.[31] *Id*. IQ scores administered in the 8th grade reflect that Mark had a full-scale IQ score of 82 and 79.[32] (App. 190, .201).

High school records reflect that Mark continued to struggle. In the 9th Grade, he continued to receive mainly C's and D's, with an F in English, (App. 172), and scored in the 5th percentile in Reading. (App. 174).[33] The following year, his reading achievement score dropped even further, to the 3rd percentile and he received a D- in Language Arts. (App. 172). In the 11th and 12th grades he continued to receive barely passing grades despite his enrollment in vocational and remedial classes and special education. (*Id.*). Two IQ tests administered in 1996 revealed a full scale IQ of 76.[34] In 1998, at the age of 18, Mark was arrested for the underlying crime.

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[31] Remaining scores as follows: Math, 3, Science 23, Social Studies 2. (App. 274)

[32] *See supra*, n.27.

[33] Remaining scores as follow: Math 7, Science 22, Social studies 11. (App. 274.)

[34] *See supra*, n.27. Counsel sought funding for a full neuropsychological evaluation and intellectual disability assessment in order to understand the marked deterioration Mr. Christeson exhibited in achievement and IQ scores during his adolescent years. *See* Doc. 119 and 122.

b. Counsel proffered ample evidence of Mr. Christeson's marked deficits in adaptive functioning.

According to a preliminary assessment obtained by counsel in Rule 60(b) proceedings, Mr. Christeson exhibits marked deficits in adaptive functioning. "Adaptive behavior/functioning refers to a person's ability to deal with the everyday demands of life." (App. 117.) In assessing Mr. Christeson's capacity to understand his legal situation and act in accordance with his own interests, two areas of adaptive functioning are especially important: receptive/integrative language and written expression. (App. 118). The former refers to the ability to understand abstract meaning in speech and writing ("receptive language"), the ability to communicate with others ("expressive language"), and the ability to integrate the two ("integrative language") (App. 121). As discussed above, Mr. Christeson's testing and achievement scores show marked deficits in these areas.

The preliminary assessment found that "Multiple sources suggest that Mr. Christeson displayed significant problems in the area of receptive language and integrative language." (App. 121). For example, prisoners with whom Mr. Christeson was incarcerated "indicate that he had significant difficulties in understanding/comprehending what people would say to him, especially related to legal matters." (App. 121). Counsel obtained declarations from many of these prisoners, detailing Mark's impairments and his inability to understand his case. According to prisoner Edward Burgdorf, who has been a law clerk within the

Missouri Department of Corrections for 15 years and has known Mr. Christeson since 2008:

> Mark cannot seem to understand any of the issues surrounding his case. He has absolutely no clue about anything legal. Everything is confusing to him. When I try to talk to him about his case, I have to re-explain myself quite a bit. Mark is an oversized kid that needs to be sat down and talked to like one. Things seem to go in one ear and out the other. He is slow on certain things and very absent minded. He is not fully there. I would break something down for him real simple and then he just blanks and forgets; he then comes back with that little kid look hoping for more help. On a scale from one to ten on the ability to comprehend, Mark is a two. He's dumb when it comes to anything legal, and I don't say this to be rude. Like I said above, Mark thought he was still in his "appeal period," but it turns out that they were over and he had no understanding of this. He really needs for things to be drummed into his head.

(App. 99).

Jonathon French also was a prisoner at the Potosi Correctional Center and a close friend of Mr. Christeson. When Missouri began executing men on a monthly basis starting in November 2013, he became concerned Mr. Christeson could be nearing an execution warrant and attempted unsuccessfully to engage him about his case:

> Mark only talked about his trial and he had virtually nothing ever to say about any proceedings after his trial. Mark could remember the first names of his trial attorneys but did not have any recollection of their last names. When I asked, Mark could not recall the names - first or last - of his appellate lawyers and his Rule 29.15 Motion lawyers.
> . . .
> I came to the conclusion that he just did not have what it took mentally to understand his legal situation. I cannot think of another inmate I have met in the past twenty years with less capacity to understand his situation.

(App. 104).

William Harrison is also a prisoner at Potosi Correctional Center and is the volunteer law clerk in Protective Custody, where Mark has been housed. He also attempted to assist Mark with his case.

> Each time that I spoke to Mark it was clear that he did not understand his legal case. Mark is slow and easily confused about legal matters. He was not able to understand me when I explained things to him about his case. When I explained something about his case, I might initially think that he understood. But then he would come right back and ask me the same thing again and I would realize that he did not understand at all. I was never clear whether he could not remember from one conversation to the next, or whether the information did not compute. He also had a difficult time communicating about his case. For example, when I asked him to write something for me related to his case, his writings were jumbled and did not make sense. I would have to rewrite them to make sense.

(App. 107).

Many other prisoner observed Mark as childlike; his "thought process was childlike. I would often give advice to Mark and explain things to him. This was difficult because he would lose focus really quick, and you would have to explain whatever it was all over again." (App. 712; *see also* App. 827).

> Mark is a kid, he has a kid's mentality. Life stopped for him at a young age, he just didn't advance. He never matured. His whole life he was like a child. He needed a mom and a dad to instruct him. But people in prison are not here to be your mom or dad. There are not people here to parent you. Mark has trouble concentrating on things. He is simple. He does not have the education to get himself out of a wet paper bag. He trips over his own shoes."

(App. 706. *See also,* App. 852-53 ("he is stuck with the sophistication of a six or seven year old, stuck there in how he interacts with people here."). One prisoner recalled that Mark

> would believe anything you said to him with a straight face. One time we told him that Arkansas was the rice capital of the world after we all saw a news report that just said that Arkansas, per capita, was the rice capital of the United States. Mark didn't understand for himself and believed us. He'd repeat constantly that Arkansas is the rice capital of the world.

(App. 837).

To the other prisoner's at Potosi, Mark's impairments were clear, as was his inability to understand his case. (*See* App. 796 ("Mark definitely was the type of person who needed extra help. Without question. You needed to break things down for him, step by step. Like we say in Texas, he is not the sharpest knife in the drawer. Even when you break things down for him, he still might not get it. It might not sink in. You would have to repeatedly explain things to him. I remember I would have to remind him about the simplest things, like to be up in time for count - things that everybody in prison should know.); App. 814 ("Mark would ask me questions. It showed that he had zero grasp of legal concepts. He'd ask me something, and I'd explain it to him, then he'd ask the same thing over and over again. And these were questions that didn't seem to have any point to them, honestly.") App. 717 ("Mark is a most tragic case. He is a child, not a bright one at that, in a very adult situation. He cannot possibly understand what is happening to him other than the fundamental gravity of what the state intends to do to him.") App. 715-16 ("Mark had no capacity to understand the most basic issues. He could not explain anything about his case or his situation in court. I do not think he can

absorb the difference between state and federal court let alone that there are fixed procedures for federal habeas corpus. I don't think he even grasps procedures in courts in general. It is all one big mysterious power over his life. He seems to have no sense of how the court process works and that there are steps or a sequence to how the courts make decisions and how one court reviews what the prior court did in one way or another.")))[35].

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[35] Prisoners who were housed with Mr. Christeson during the late filing of his petition and litigation of its timeliness recalled that Mr. Christeson had no idea what was going on. "He said he hadn't gotten information back on his case. That's really all he ever said about his case– that he was waiting to hear back about it. […] I think he had no idea that his appeals had been dismissed back then. He would just say I'm waiting to hear back from the court." App. 705. *See also* App. 713 ("He believed that his case was in the courts and that he was represented by the court-appointed lawyers."); App. 730. Another former cellmate recalled that "Mark believed the court had put really good lawyers on his case and that he would hear about his appeals soon. It is plain to me that he had absolutely no idea that his appeals were over. He even believed that he still had appeals going on." App. 734. A 'jailhouse lawyer' at Potosi—and former would-be predator of Mr. Christeson—observed that " Because of his low mentality, he's easily misguided. Mark's not with it. The only indication he got from his lawyers back then, around '05, was that they were doing what they need to be doing. Through the years I've been around him, especially back in '04, '05, or so, it was clear that Mark had know idea about what his lawyers were actually doing or if they abandoned him." App. 814. *See also* App. 817-18. ("Mark Christeson was my cellie one time when I was in Ad Seg. That means we spent every day, all day locked down together in the cell. According to records, it was in 2007. He never talked about his case. He didn't say what court he was in and he never saw his attorneys while I was in the cell with him. He never got called out for a visit."); App. 763.

Mr. Christeson's deficits in reflective and integrative language impaired his ability to understand his legal proceedings and protect and advance his legal interests. Specifically, "Mr. Christeson's problems in comprehending what was said to him and in being able to integrate what he had heard into some meaningful communication with his defense team would severely limit his ability to understand his legal situation, interact appropriately with his defense team, and therefore to understand the need for, let alone to take, any corrective action to the facts related in his defense." (App. 121).[36]

In addition to his language deficits, Mr. Christeson displays deficits in the adaptive area of written expression. Written expression "is the act of putting ideas of feelings on paper or some other surface … It is a complex task act that requires the integration of many abilities, especially those relating to ideation, syntax, semantics, spelling, capitalization, and punctuation." (App. 122). According to the preliminary adaptive functioning assessment, Mr. Christeson's school records "clearly indicate that he had significant difficulty in the area of writing." (App.

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[36] This preliminary finding is sufficient to establish that Mr. Christeson did suffer from deficits in adaptive functioning. However, Mr. Patton determined that a "thorough assessment of Mr. Christeson's language abilities is warranted. This assessment should examine his receptive, expressive, and integrative language abilities. A thorough review of school records is needed. In addition, interviews with individuals who knew Mr. Christeson when he was growing up and those who knew him during the time in question is also indicated. The administration of formal assessments in the area of language should also be considered." (App. 122).

122).[37] Deficits in this area would "clearly limit his ability to express in writing any concerns or questions he might have wanted to share with his attorneys via letter or other type of written correspondence – without assistance from others." (App. 122).

From an early age, Mark exhibited adaptive deficits in the areas of executive functioning. Mark's cousin David Bolin, who raised him from the age of 13-18, observed Mark's difficulties with recall and inability to follow multi-step directions.

> Mark could not figure out complicated things. He could follow rules as long as they were one step. For example, when I asked him to dig railroad ties out, Mark would always cut them off from the top. Every time, I would have to remind him that you have to go in from the bottom. Mark could not follow two-step instructions . . . He had trouble remembering basic things. For example, when he went to school he would leave his books at home. He would leave his coat at home in the winter.

(App. 21).

A classmate described Mark as "'dingy.' He was not very bright. And he was not all there. One minute you would be talking to him and he would be fine, the next minute it seemed like he didn't know who he was." (App. 90.) Adaptive deficits in executive functioning would, as discussed above, make it impossible for

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[37] Mr. Christeson's "school district determined that, at a minimum Mark suffered from considerable learning disabilities. It is common that deficits identified as learning disabilities are actually related to intellectual disability." (App. 122).

Mr. Christeson to understand the multi-step deadline in his case or formulate a remedial plan. In conjunction with his deficits in the areas of language, it is impossible that he could have diligently protected his own rights.

Taken together, this evidence manifests the impossibility that Mr. Christeson, himself, could have proved the misrepresentations of his counsel to uncover the defaulted status of his case and navigated the complex landscape of habeas corpus to somehow overcome the betrayal of his appointed attorneys.

c. Mr. Christeson's family history of seizure disorder and symptoms of seizures are consistent with his symptomology and impairments.

Undersigned counsel also provided evidence that their client and his family suffered seizures and seizure disorders. (App. 55, 58). Because Mr. Christeson was denied adequate funding, he has not yet been thoroughly evaluated for the presence of seizures. However, numerous prisoners described symptomology consistent with seizures and seizure disorder. At times he would "stare off… it was like he wasn't even in the room with you… These seizure episodes usually lasted two or three days at least. It was like talking to a wall." (App. 747). Many prisoners observed Mark "space out" or "drift off." (App. 804, App. 832. *See also,* App. 735, ("Mark would space out all the time. I thought it might be something medical. I always asked him if he was on medication or if he used to be on medication. It was like he would drift off to another planet usually for a minute or two, sometimes

longer. It happened maybe every few weeks or so, sometimes more often. When he would snap out of it he would be disoriented and groggy. He never knew what was going on."); App. 855, ("Mark would space out a lot too. When I was talking to him, he would just suddenly not be paying attention at all… He wouldn't even be able to see my hands moving an inch in front of his face. He would be gone for 5, 10, sometimes 15 minutes.)). One of Mark's former cellmates recalled one particularly salient memory of a seizure:

> We were playing cards and the TV was on. I remember I was waiting for Mark to play, and we sat there through two commercial breaks. Finally the third commercial break was coming up and Mark still hadn't played. I waved my hands in front of his face and said his name. Finally I grabbed his leg. He came to like he was having a seizure, his whole body sort of shook. Afterwards, he was exhausted, drained. I told him he should lie down and I left the cell. We couldn't even finish playing cards. I came back 15 minutes later to check on him, and he was still just sitting there.

(App. 856).

Like many prisoners at Potosi, Mark was also frequently heavily medicated. Many of the death sentenced prisoners were put on medication, specifically Klonopin, when they arrived at the prison. (App. 785; App. 804). It was known among prisoners that it was easy to obtain the medications from the prison. (App. 787). "Everyone at Potosi was medicated, people would seek out psychotropic drugs. The med staff would just put people on medications. I would say 60-70% of inmates were drugged. […] The DOC's policy is to drug inmates in order to mask symptoms and emotions." (App. 806).

Seizures symptoms include headache, visual aura, confusion, or loss of consciousness. Mr. Christeson has a chronic history of severe headaches. (*See* App. 100)) ("They were terrible migraines to the point where you could tell by looking at his face. . . He got these migraines twice a week. They were 'head banging,' to the point where all he could do was try to sleep. He could not handle light.). *See also* (App. 832, 865).

Mr. Christeson's neuropsychological testing is consistent with seizure disorder. As discussed, *infra*, Mark exhibits significant impairments in executive functioning. Executive functioning is mediated by the frontemporal lobes; seizure disorders interrupt executive functioning.

Seizure disorders were prevalent in the Christeson family. Mark's biological father, Johnny Christeson, had a long history of seizures, as documented in mental health records as early as 1979. (App. 696). The type and duration of seizures varied; lasting between five minutes and an hour. (App. 69). Medical records reflect that during a seizure, Johnny would go rigid, lose consciousness, and sometimes bleed from the mouth. (App. 696). He sometimes felt "an aura," a seizure coming on, while driving, and would pull over to the side of the road. (App. 69). Following one seizure, neighbors "found him sitting on the highway." *Id*. Police once found him in that state, and arrested him for possession of illegal drugs, which turned out to be properly prescribed medications. *Id*. If he felt an

aura, sometimes "he would go off in the woods and sit by a tree" and was sometimes found in the woods following a seizure. *Id.* Despite the various medications such as Dilantin and Phenobarbital prescribed to control the seizures (*See, e.g.*, App. 657), he continued to suffer from occasional seizures (*See, e.g.*, App. 620), and the anti-convulsants he took for the remainder of his life required constant monitoring in part due to changes in his neuroleptics (antipsychotic medications). (App. 657).

Appellant's brother, Billy Christeson, has two children who experience seizures. Billy's oldest son, Appellant's nephew, began to experience partial complex seizures when he was a teenager. The seizures would manifest in different ways; at times he would appear "lifeless," other times he would involuntarily make noises such as "clucking or racing noises." (App. 57-58). His mother recalled that:

> One night I was awoke by a police officer who found him unconscious in the middle of the street. (He also has a sleeping disorder for which he takes Klonopin). The ambulance came and picked him up. He was paralyzed on the right side of his body for 4-5 hours.

These seizures can last between 15-20 minutes, causing the nephew to lose time before and after, frequently with no memory of what has occurred. *Id.* "Loud noises, stress, and heat will trigger them. It changes his attitude completely. He becomes agitated and it is hard for him to listen." (App. 55).

Billy Christeson's oldest daughter also suffers from seizures. For her, they began at age 3 and continued until about age 16. Recently, at the age of 18, she had

another seizure. The family believes that the recent seizure was brought on by the stress of pregnancy. (App. 58). This is not uncommon. Executive function monitors stressful situations.

Bill Christeson, Mark's biological uncle, exhibited symptoms consistent with seizures, "including withdrawal almost to the point of being mute." (App. 503).

Over time, seizures disorders often mimic psychiatric disorders in their symptomology.

> In recent times, especially with the unraveling of cerebral circuitry for the expression of emotions, notably with a fuller understanding of the limbic lobe and the role of such structures as the hippocampus and the amygdala in emotional behaviors, a biological interpretation of many behaviors previously thought of as socially driven becomes possible. Epilepsy very often relates to chronic neurophysiological changes in such limbic structures, and its relation to religiosity provides an opportunity to explore in more detail the neurobiology of such behavioral predispositions.

Trimble, M. and A. Freeman (2006). "An investigation of religiosity and the Gastaut-Geschwind Syndrome in patients with temporal lobe epilepsy." Epilepsy & Behavior 9(3): 407-414. Thus, it is not uncommon for temporal lobe seizures to present as bipolar and psychotic disorders. Johnny Christeson, for example, was diagnosed with both seizure disorder NOS and schizoaffective disorder.

d. Mr. Christeson has a history of head injuries, consistent with his cognitive impairments.

Counsel also proffered evidence of Mr. Christeson's history of head injuries, extending from childhood into his incarceration. Multiple family witnesses recall

that Linda would "beat Mark. She would hit him so hard in the head. I remember one time walking in on her giving him a bath and punching him in the head with her hand. I called her out of there and told her to cut it out. She spent a lot of time in the bath with her son." (App. 17). (*See also*, App. 79) ("Linda would beat Mark in the head too. He had been beat in the head a lot. Billy never got a beating. But Mark- whenever she would reprimand him, she'd beat him in the head. It was because she didn't want Mark.") Multiple family witnesses also recall that Mr. Christeson was a "daredevil" and "rambunctious." (App. 21). "He would ride bikes into walls. He liked to do stunts on his bikes. He would jump his bikes." *Id*.

Approximately one year after arriving at Potosi, in November 2000, Mark was brutally attacked by two prisoners in the kitchen in a violent assault causing his hospitalization. (App. 862). Mark lost consciousness and suffered various head contusions above his left eye and the right side of his head and lacerations to his left eyebrow requiring stitches. He also sustained multiple lacerations to his mouth and inner lips. At some point during the attack, he lost consciousness. Mr. Chriesteson was admitted to the infirmary and placed on 23-hour observation. He was then transferred to Protective Custody, for his own safety, where he was to stay indefinitely but lasting at least 18 months.[38]

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[38] According to the prison's handbook, "A Protective Custody Unit is housing that provides separation of offenders from the general population of the

e. The continued victimization and sexual trauma to which Mr. Christeson has been subjected in prison, has further limited his ability to diligently pursue his rights.

In his Rule 60(b) Motion, Mr. Christeson proffered prison records and prisoner declarations detailing the prevalent violence and sexual trauma to which Mr. Christeson was subjected in prison. Described by prisoners as "hell on earth" (App. 732), Potosi Correctional Center was initially populated with the "worst of the worst from the old Walls" prison in Jefferson City. (App. 720, App. 721). Along with a stark history of violence, prisoners entering Potosi from the Walls also brought with them institutional gangs and an established prison hierarchy. At the top of the hierarchy was an organization known as the Booty Bandits, a well-known group of black prisoners in the Missouri DOC who sexually preyed on, raped, and groomed young white inmates entering the prison. (App. 840, 720, App. 740, App. 795; *see also* App. 841, App. 826, 850; App. 750-51,App. 729, App. 827). Young prisoners arriving at the prison "were the most vulnerable" to this type of attack because they "did not understand prison, did not know how to protect themselves." (App. 720). Thus, "Gang rape, five or six black prisoners assaulting a white prisoner, took place on a regular basis." (App. 720. *See also*

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facility. If an offender can provide information which verifies the need for separation from other offenders, or if staff has reason to believe the offender's safety may be jeopardized, the offender may be housed in a Protective Custody Unit."

App. 737, 751, 738, 736). In recent years, a prison gang known as "Family Values" has emerged as a new band of predators, enforcing rules and imposing harsh and sexual punishment for the violation of those rules. (App. 765; *see also* App. 861, App. 852).

When faced with such violence, sexual or otherwise, the rules of prison society dictate that a prisoner must fight. If he fails to fight, he becomes "a victim. Losing the fight ain't bad, as long as you fought." (App. 830; *see also* App. 787). Once a prisoner is labeled a victim, that label sticks with him and the consequences are severe. First, that prisoner loses the respect of other prisoners in the prison. App. 830 ("If you give in once, you're a lame. Once you're a lame, you're always a lame.") Loss of respect leads to loss of rights over property and person. (App. 830 ("Your cell gets robbed when you're at rec and worse.") Once labeled as "a lame" a prisoner's options are limited, you can 'be somebody's girlfriend, go into PC, or kill yourself.' App. 830).

In the prison hierarchy, Mark Christeson "was bottom of the barrel, the lowest of the low." (App. 765). There were several factors that put Mark at the bottom of Potosi's food chain. Coming onto death row at the age of 19 for a crime involving children made Mark a target in the prison. (*See* App. 709, App 795, App. 707, App. 820). Because of his crime, Mark would have had a difficult time finding protection. (App. 830).

Additionally, Mark's personal history increased his susceptibility to the rampant sexual violence in prison. His ongoing victimization as a child combined with his lack of experience in a prison setting made him particularly vulnerable. When faced with extreme violence in prison, Mark did not fight back. As one of Mark's former cellmates observed, "For people like Mark who come in here and just get nothing but more trauma, I don't think there is any reason to think that they are going to become functioning adults. They end up being stuck as kids. Mark is still a kid when you get down to it." (App. 848. *See also* App. 813, App 808, App. 847).

The brutal predator/prey conditions were made even more difficult for Mark due to his significant cognitive impairments. Multiple prisoners observed Mark as "gullible," "not very educated," "slow," "not real bright," "easily manipulated," and "his feelings are hurt easily." (App. 736, App 710, App. 719, App. 832, 837; *see also,* App. 797. *See also* App. 726 ("Mark was scared. You could tell by his body language and how he walked around. He was looking around and over his shoulder."), App. 850 ("Mark was taken advantage of on a daily basis. Predators of various degrees gamble with him. They'd sit down to play cards and everybody would be in on it except Mark. Guys would line up to take advantage of him. Everybody's running a scam in here. Mark clearly didn't understand that. Guys would negotiate to see who got to run their scam on him first.")).

Mark quickly gained a reputation at Potosi as "vulnerable" (App. 710), "prey and marginalized" (App. 709, a "target," App. 787), an "outcast," (App. 804), and a "girl" (App. 827). Sensing weakness, predatory inmates extorted Mark. His inability to stand up for himself opened him up to further victimization. (App. 706, 707. *See also* App. 726; App. 796).

Mark also sexually assaulted shortly after arriving at Potosi. Like many other young white prisoners, he was raped by another prisoner and sold on the yard to a member of the Booty Bandits. (*See* App. 706 ("Other prisoners took advantage of Mark sexually before we celled together.")). Mark was sold to a death row prisoner named Sam Smith. Smith was on death row for brutally attacking and stabbing another prisoner 19 times to death at "The Walls," a maximum security prison in Jefferson City. Smith owned Mark, meaning he would rape him, and Mark was known on the yard as Smith's boy. Smith would also turn mark out to other prisoners, or make him have sex with them.

After Smith's execution, Mark continued to be exploited sexually on the yard. Prisoners in general population "wanted to dope Mark up to have sex with him." (App. 857). One prisoner in particular, JW, was infamous for pressing Mark. JW was known for preying on the "weakest white guys who, to put it bluntly, weren't all there." (App. 709). JW began by pulling Mark out to play cards and Mark mistakenly believed the two were friends, but it quickly changed. (App. 710).

JW "was obsessive about his pursuit [of Mark]. It was to the point that it sidelined the other dozens of predators on the camp that would have taken his place in targeting Mark in order to press him, in the end, for the main things prisoners pursue here: money and sexual violation." (App. 710). As the pursuit continued, it became clear that JW wanted to claim Mark "for monetary and sexual purposes. Mark got very scared as this escalated and became very unmistakable, even to Mark, who did not grasp more subtle but routine exchanges between people here." App. 710. Eventually, Mark was able to change housing units, moving to the other side of the camp, but JW followed him and the unrelenting assault intensified. (App. 711).

Mark's inability to stand up for himself led to a decade of sexual and physical abuse. (App. 810, App. 825-826). Eventually, the unrelenting sexual predation and lack of protection in general population led Mark to check in to the Hole and Protective Custody. (App. 725). When a prisoner requests a transfer into PC, he is placed in Administrative Segregation, or the Hole, while he is waiting for a bed. (App. 725). A prisoner can spend months in the Hole waiting for a bed in PC. (App. 745-746). Being in the Hole significantly limits a prisoner's ability to work on his legal case. Prisoners in long-term administrative segregation end up heavily medicated. Those in short-term segregation frequently do not have their

property. (App. 774). Without their property, prisoners cannot work on their legal cases.

Though prisoners seeking protection were sent to the Hole, frequently, however, there was none to be found there. (App. 791 *See also* App. 726). In the early 2000's, "Mark was put in the Hole with a prisoner who felt very strongly about Mark's case and about Mark. He beat him every day, for weeks. Beat him badly. Mark was black and blue but that was not going to stop him. I have to give it to Mark, though, he never said anything about the beatings. He didn't complain to the guards." (App. 852). Had Mark reported it, he would have exposed himself to further brutality.

Recently, several prisoners have been killed in administrative segregation throughout the Missouri DOC.[39] On October 14, 2015, Daniel Wilson was killed by another prisoner in the Hole at Potosi Correctional Center. Wilson was serving

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[39] In less than three years, three convicted sex offenders were beat to death by other prisoners at Jefferson City Correctional Facility. Jose T. Benitez was killed at JCCC on July 16, 2013. He was serving a 25-year sentence for first degree statutory sodomy. http://www.abc17news.com/news/homicide-under-investigation-in-cole-county/21017752; Mark Melton was beat to death by his cellmate on August 9, 2014. Melton was serving a sentence for attempted first-degree sodomy. http://fox2now.com/2014/08/26/missouri-inmate-dies-after-being-beaten/; Daniel P. Skipper was killed by his cellmate on February 16, 2014. Skipper was serving a sentence for statutory rape and sodomy.

a life sentence for killing his 7 month old son.[40] Because his crime involved a child, Wilson was particularly vulnerable to attack. (App. 790. *See also* App. 861, 852).

Once a prisoner was finally transferred to PC, he still was not safe. (App. 851, App. 741-742, App. 805, App. 847). In fact, checking into PC can render a prisoner even less safe. Once an inmate has checked in for protection, he is stigmatized as "weak, "a lame," "a check-in." (App. 715, App. 791). Inmates in PC are seen as "the dogs that lose. Everything in prison is fight or flight. In PC guys are all in flight mode." (App. 786). This means that not only are prisoners unsafe in PC, but they are in even more danger if they returned to general population. "If you are perceived as weak, other prisoners press you and take things from you. It can be hard to come out of PC." (*Id*.).

Even the staff and correctional officers look down on prisoners in PC. "The COs here always call the PC guys 'girls.' When PC comes out to rec, the guards will say things to us like, 'time to get off the yard, the girls are coming now.'" (App. 715, App. 742, App. 831).

Mark himself was labeled early on as a "PC girl." (App. 711). Even when he would return to general population, Mark spent the majority of his time in his cell.

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[40] http://www.stltoday.com/news/local/crime-and-courts/st-louis-dad-pleads-guilty-in-killing-of-son/article_21593d0a-5cbe-11e0-a3be-0019bb30f31a.html

(App. 712, App. 793). Even when it was boiling hot in the cells, Mark would stay inside. There were too many places throughout the prison where predators could get at him. (App. 713).

The law library posed similar problems for Mark. There were too many "blind spots" - places where predators could get to him, unwatched and unchecked. (App. 726).

> The library at Potosi was a death trap. This was a reason guys would avoid the library. It was very small. There was a female librarian who sat in an office away from where the library materials were and she couldn't see what would be going. There was no security there. The only thing she could do if she was even aware of an assault was push the panic button and wait until someone would respond.

(App. 841-42. *See also* App. 712 ("For people like Mark, going places in the prison is always challenging. There are threats everywhere. Some places just aren't captured by the cameras. The law library has those places. In the law library, you could very easily be cornered. A guy from our wing even got stabbed on his way to rec."), *see also* App. 797 ("The library has a sign-in desk. Then there's a foyer area. The general leisure library is out in the open. If you take a left, the computer lab is in the open but it's isolated. Unless the librarian hears something, they're not going to know if you are being assaulted. They're usually sleeping anyway. I don't remember a librarian who wasn't sleeping. Check out is another choke point. Everybody's got to go through there. It's where the predators hang out. If they're going to get to you, that's one of the places they can do it.")).

Mark's cognitive impairments, including his low IQ, severe memory and attention deficits, and limitations in communications and social adaptive functioning, made it impossible to actually make use of the prison law library or access information through the law clerks.

The library at Potosi Correctional Center consists of computers and a prisoner clerk. Years ago, the DOC removed the books from the library and replaced them with computers. (App. 705-06, 796, 813). If you didn't know how to use computers you couldn't do any legal research. *Id*. Mark had no experience with computers before coming to prison. Having attended special education in the 1980's and early 1990's and finishing high school less than a year before he was arrested, Mark did not receive training or courses in computers, save for two typing classes. (App. 160-61. *See also* App. 743). Additionally, the prison does not offer prisoners training on how to use the computers or the books. (App. 714).

The law clerks and librarians are also unhelpful. "If you don't know what you're doing, you're lost. The librarians can't help you at all. They just point you to the computer.…the law clerks' employment contract says they can't help anyone. All they can do is show you the computer. It's useless." (App. 813, App. 713-14). Clerk's are frequently untrained. (*See* App. 764). Librarians are rarely in the library at all, spending the majority of their time in their office. (App. 730-31, *see also* App. 764). There is also high turn over among the librarians. (App. 714).

At some point, Potosi enacted a rule prohibiting prisoners, even clerks, from helping other prisoners with their cases. (App. 764).

There is no confidentiality with the law clerks. As discussed infra, the lack of confidentiality would have made it incredibly dangerous for Mark to seek any assistance in the library. (*See* App 725 ("Mark should have been scared to have the law clerks bring him anything because the wrong person could get information about his case. Inmates with cases like Mark are scared of other people reading their stuff."); *see also* App. 803; App. 818; App. 788, App. 714).

Mark's frequent placement in the Hole and PC also severely restricted his access to the law library and legal materials. "In Ad Seg you can't request a phone call with your attorney. Your attorney has to call to request and set-up a legal call. You cannot go to the library. You could make a written request for a specific case and it could be delivered to the cell but you would have to know exactly what to look for." (App. 823. *see also* App. 705, App. 725). The law clerks who did come around "don't have any experience to help you. They can't answer questions." (App. 801). Additionally, in the Hole, prisoners cannot call their attorneys but must wait for their attorneys to call them.

Access to the legal library is also severely restricted for PC prisoners. Prisoners would frequently have to choose between going to recreation, eating, or going to the law library. (App. 742, App. 730-731, App. 733). Prisoners who knew

Mark, knew that he was not able to utilize the law library. (App. 792). Thus, for a prisoner like Mark, there simply was no access to legal assistance.

f. Mr. Christeson's limitations significantly impaired his capacity to understand his legal case and advance his interests.

Despite the denial of adequate resources, counsel marshaled abundant evidence of Mr. Christeson's cognitive limitations and adaptive deficits. The evidence, and preliminary findings of the experts, firmly establish that these limitations would have grossly impaired his capacity to interact and communicate with his counsel, understand his legal case, and protect and advance his legal interests. Dr. James Patton concluded that,

> My provisional and partial review of his case suggests that Mr. Christeson would have had profound limitations in understanding his legal proceedings and effectively communicating with counsel. From the standpoint of his adaptive functioning, Mr. Christeson appears to have grossly lacked the mental capacity to have understood his legal interests in federal habeas corpus litigation. Further, Mr. Christeson's background information suggests that, had he understood those legal proceedings to any substantial extent, he would have lacked the basic capacity for determining reasonable steps to take from prison in order to protect his legal interests and the wherewithal to act on his own behalf in this vein.

(App. 121).[41]

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[41] Dr. Patton's findings are preliminary. Because Mr. Christeson was denied adequate funding, a comprehensive assessment could not be obtained. It is Dr. Patton's "professional opinion that a comprehensive assessment is needed in this case to determine the levels of performance that Mr. Christeson displayed in key areas that relate significantly to his ability to ascertain the performance of his

These findings are consistent with his neuropsychological testing:

> Mr. Christeson is impaired in a range of areas. His IQ is in the intellectually disabled range. However, it is clear that Mr. Christeson's low IQ would impair his ability to think critically about his case, to understand whether his attorneys are acting in his interest, and to protect and advance his own legal interests.
> Likewise, Mr. Christeson's impaired memory and problems with attention would make it difficult to undertake these tasks. Calculating deadlines based on complicated legal procedures would likely be beyond his reach. Similarly, understanding court documents, making plans, and taking action on those plans would be very difficult for Mr. Christeson.

(App. 143).

These preliminary expert findings are further evidence substantiating the Supreme Court's observation that Mr. Christeson "appears to have severe cognitive disabilities that lead him to rely entirely on his attorneys." *Christeson*, 135 S. Ct. at 892.

2. The district court totally disregarded the central inquiry for these remanded proceedings, instead insisting that a standard "reasonable diligence inquiry" must apply to Mr. Christeson regardless of the Supreme Court's own ruling in his case

The district court's rulings on the issue of Mr. Christeson's diligence in relation to his appointed attorneys' serious misconduct disregards the Supreme Court's remand. (Doc. 150 at 18-21). The court's further proceedings were studiously contrary to that remand. The district court ignored the mass of evidence

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former appointed attorneys, evaluate that performance, and intervene on his own behalf in response to his attorneys' actions." (App. 121).

that Appellant presented despite its centrality for the explicit inquiry that the Supreme Court requires.

As outlined immediately above, on remand, Appellant had supplied voluminous evidence substantiating, in considerable detail, the nature and severity of several interrelated and compounding disabilities, limitations, and deficits. Under this remand, the fundamental undertaking for the district court had been to consider Mr. Christeson's disabilities and his resulting reliance upon the appointed counsel who had abandoned him and then labored under a conflict against him in the subsequent years.

Based on a limited record generated in the 2014 litigation leading up to and during an execution warrant, the Supreme Court recognized that Mr. Christeson "appears to have severe cognitive disabilities that lead him to rely entirely on his attorney." *Christeson*, 135 S.Ct. at 892. This reliance, the Supreme Court deemed, was legally relevant to the matter of whether Appellant had been aware of the dismissal of his habeas case many years prior. *Id.* This awareness is the predicate to a further inquiry into reasonable diligence. *Christeson* plainly contemplates analysis of Appellant's disabilities and general capacity in relation to the notion of "reasonable diligence" posited in *Holland*, 560 U.S. at 653. *Christeson* recognizes the direct relevance of Appellant's ability—or inability—to pursue his legal

interests in relation to AEDPA and under the circumstances of his imprisonment and attorney abandonment.

In addition, as several circuit courts have recognized, a petitioner's inability to understand and protect his own legal interests control the inquiry in applicable cases, such as Appellant's. *Schmid v. McCauley*, __ F.3d __, 2016 WL 3190670, *1 (7th Cir. Jun. 8, 2016) (Easterbrook, J., joined by Posner, J. and Rovner, J.),[42] citing *Christeson*, 135 S.Ct. 891, for proposition "that a prisoner's mental disability in conjunction with abandonment by counsel may justify the appointment of new counsel to explore the question whether the disability tolls the period of limitations." *Schmid* also relied on *Davis v. Humphreys*, 747 F.3d 497, 499-500 (7th Cir. 2014) (Easterbrook, J.) (petitioner's inability to understand and protect his own legal interests can, in light of *Holland*, warrant tolling of the habeas statute of limitations), *collecting cases Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011), *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010); *Riva v. Ficco*, 615 F.3d 35, 40 (1st Cir. 2010). Furthermore, prior to the *Holland* decision, three more circuit courts—including this Court—had held the same as *Davis*. *See Bolarinwa v. Williams*, 593 F.3d 226, 231 (2d Cir. 2010); *Hunter v. Ferrell*, 587 F.3d 1304, 1309-10 (11th Cir.

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[42] *Schmid* concerned the application of 18 U.S.C. §3006A(a)(2)(B) and, while invoking *Christeson*, recognized that §3599 uses the same standard. *Schmid*, 2016 WL 3190670, *2.

2009); *Nichols v. Dormire*, 11 F. App'x 633, 634 (8th Cir. 2001) (unpub. *per curiam*).

3. The district court contravened the Supreme Court's opinion and (a) this Circuit Court should grant the COA in order to obtain full briefing and argument or (b) these proceedings should be remanded again to the lower court with instructions for its compliance with the high Court's opinion

The legal question in this COA application is simply whether it is "debatable" that the district court was incorrect. *Slack*, 529 U.S. at 484. Here the Court need not look further than the Supreme Court jurisprudence *in this case* remanding it for, inter alia, findings and conclusions concerning Mr. Christeson's apparent mental disabilities and correlated reliance upon his appointed counsel. *Christeson*, 135 S.Ct. at 892.

In addressing the renewed substitution motion that the district court denied by an order on October _, 2014 and that this Court affirmed on October 24, 2014, the Supreme Court relied on a comparatively very limited record of Mr. Christeson's mental health and capacity in finding that he "appears to have severe cognitive disabilities." As set forth above, the district court determined not to address in any meaningful way the voluminous and highly material evidence amassed and presented during the Rule 60(b) proceedings. In the context of the Supreme Court's adjudication of the substitution motion in *Christeson* and the record developed, despite the absence of meaningful funding, in the Rule 60(b)

proceedings, the record before this Court strongly establishes that reasonable "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 37 U.S. at 327; citing *Slack*, 529 U.S. at 484.

C. The District Court's Refusal To Grant An Evidentiary Hearing Requires Full Appellate Briefing And Review Or A Direct Remand To The District Court For Such A Hearing

The foregoing sub-sections have explained that, despite the district court's constructive denial of counsel by its grossly inadequate funding authorization, Appellant has made the necessary showing to obtain equitable tolling of his statute of limitations. Appellant's case, at this point, poses the highly unusual record of a district court flouting the factual findings of the Supreme Court of the United States, findings that are properly determinative of the outcome on remand, which concerns original counsel's misconduct and Mr. Christeson's disabilities. Those findings should be dispositive in the analysis on remand but that is not the reception they received.[43] Thus, for the issuance of a COA on the equitable tolling

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[43] In fact, the existing record of attorney abandonment plainly forecloses the district court's findings to the contrary of the Supreme Court's. Given the Supreme Court's findings, the only way the district court could have fashioned a conceivable way forward to its conclusion to deny equitable tolling would have been by taking more evidence to add to the existing record. Any remotely conceivable chance of modifying, in some as of yet unknown way, the factual record relevant to this question would need an evidentiary hearing to permit the introduction of evidence to somehow contradict the existing record.

issues, Appellant has easily surpassed the threshold of mere "debatability." *Miller-El*, 537 U.S. at 342.

In Appellant's extensive showing in the district court, he also established *a fortiori*, that when the court denied equitable tolling, it compounded that mistake by abusing its discretion in denying an evidentiary hearing to receive additional evidence to be built upon the evidence Appellant had been able to collect and present in his Rule 60(b) briefing.

Appellant's extensive argument and expansive submissions in support of the Rule 60(b) motion warranted an evidentiary hearing. The district court was required to hold such a hearing in order to permit the development and presentation of further evidence toward establishment of the grounds for equitable tolling and thus the reopening of Appellant's long-closed habeas case. *Crawford v. Norris*, 363 Fed.Appx. 428, 430 (8th Cir. 2010) (in §2254 proceedings, evidentiary hearing is required where factual allegations may entitle petitioner to relief under the applicable standard); *Newton v. Kemna*, 354 F.3d 776, 785 (8th Cir. 2004); *Johnston v. Luebbers*, 288 F.3d 1048, 1059 (8th Cir. 2002).

Given the district court's denial of the Rule 60(b) motion based only upon the supporting submissions made in the remanded proceedings, the district court acutely abused its discretion in denying the hearing request. *See Newton*, 354 F.3d at 785 (8th Cir. 2004). At that juncture, in order for Appellant to have had the

opportunity, to which he is entitled, to overcome the district court's erroneous ruling, a hearing was obviously necessary and deserved, given the very substantial record that Appellant created in the remanded proceedings despite the constructive denial of his right to counsel (as set forth herein). *See Johnston*, 288 F.3d at 1059.

The debatability of the district court's decision on the extraordinary circumstances of attorney abandonment is a matter of the court being glaringly incorrect and leaving little, if any, room for debate about its error.[44] Thus, the debatability of the decision to deny a hearing in light of that determination leaves even less to the imagination about debatability: in the context of the district court's ruling on the evidence and argument submitted in Appellant's briefing, any jurist of reason should find that, while denying Appellant's motion to reopen his case the court was incorrect to also deny an evidentiary hearing. *See Khaimov*, 297 F.3d at 785, quoting *Slack*, 529 U.S. at 484.

Given the starkness of this central element of the case, judicial economy may warrant a direct remand to the district court in order to conduct an evidentiary

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[44] Given the decisive weight that the seven Supreme Court justices—six of whom, including the Chief Justice, remain on the Court while the seventh, the late Associate Justice Scalia, will be replaced—placed on the record's reflection of the *prima facie* abandonment by Mr. Christeson's original counsel, the only conceivable way the district court could hope to overcome those findings would be to hold an evidentiary hearing where some heretofore unavailable explanation could, hypothetically, be put forward.

hearing. Logically, the record warrants an evidentiary hearing even more emphatically than it justifies an ultimate ruling finding equitable tolling. As submitted above, however, the grant of a COA and eventually the reversal of the district court's incorrect determinations on the equitable tolling questions is the necessary result in this appellate litigation.

D. Appellant Is Entitled To Review Of The District Court's Constructive Denial Of Appellant's Statutory Right To Counsel And Does Not Need A COA

1. The district court's rulings on funding have constructively denied Mr. Christeson's statutory right to the meaningful assistance of counsel in these proceedings

As the Fifth Circuit has recently explained, the federal courts must apply §3599 so that the contemplated right to counsel is, in fact, "meaningful" at least to the extent the petitioner may have his interests and particular claims presented and advocated for. *See Battaglia*, 824 F.3d at 475. On this remand, the district court's budget order (Doc. 122, the "Budget Order"), denied, in effect, Mr. Christeson's statutory right to counsel. This constructive denial resulted from the court's authorization of a small fraction of the proposed budget for preparation and presentation of Appellant's Rule 60(b) motion. (*Id.*). The district court did not remedy this constructive denial before denying the Rule 60(b) motion. Specifically, Appellant repeatedly sought an evidentiary hearing to secure the opportunity to develop and present further evidence of the matters under

contemplation in the remanded proceedings. (Docs. 125 at 77, 146 at 48). In issuing the grossly inadequate Budget Order, the district court did explicitly contemplate ordering an evidentiary hearing upon an initial showing by Appellant to justify such further proceedings. (Doc. 122 at 2, n.1). The district court further noted that the occasion of a hearing would require further budgeting determinations. However, the court ultimately denied the Rule 60(b) motion and the requested hearing. (Doc. 150 at 21-22). The court's problematic rationale relating to its funding decisions is set forth below.

a. Budget Order

In relation to the appointment of Mr. Christeson's current counsel upon remand from this Court, the district court again frustrated Appellant's statutory right to counsel and, consequently, the Supreme Court's ruling. *Compare Wilbur* v. *City of Mount Vernon*, 989 F.Supp.2d 1122, 1124 (W.D. Wash. 2013) (finding systemic deprivation of counsel due to municipal policymakers' "deliberate choices regarding the funding, contracting, and monitoring of the public defense system," and ordering increased resources for indigent defense services from municipalities).[45]

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[45] The Missouri Supreme Court also recently faced this concern from a systemic standpoint in the Missouri State Public Defender System's crisis of resources and held that "a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a

Per the court's order, on March 31, 2015, undersigned counsel filed extensive budget briefing (Doc. 119), *ex parte* and under seal (Doc. 118)). The briefing detailed the particular need for various experts and investigations, in addition to the need for counsel to conduct the litigation. (Doc. 119). By a docket entry on April 20, 2015, the district court granted as unopposed the motion to proceed *ex parte* and under seal and ostensibly considered the filing accordingly. However, on April 29, 2014, the district court entered an order on the proposed budget in the public docket, unceremoniously disclosing all categories of the itemized budget and their corresponding amounts reflecting the general substance of the confidential information that the court had ruled was appropriate for consideration *ex parte* and sealed. (Doc. 122).

The Budget Order stated the total requested amount of "approximately $161,000" and enumerated the request for attorney and paralegal fees, a mitigation investigator, a neuropsychologist, a neuroimaging analyst, and an intellectual disabilities specialist. (*Id.*)[46]

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defendant." *Missouri Pub. Defender Comm'n* v. *Waters*, 370 S.W.3d 592, 607 (Mo. 2012). Surely it contravenes the principles under *Waters* when a judge, via the terms of an appointment, undermines the ability of the indigent petitioner's appointed counsel to provide effective representation.

[46] The order specified the costs proposed for (A) a mitigation investigator ($20,420) for investigating Mr. Christeson's cognitive impairments and pointing to medical explanations of same; (B) a neuropsychologist ($18,080) for determining

The district court denied the requested amount as excessive but, with unmistakable emphasis, "approve[d] a total budget of $10,000 for the investigation, preparation, filing, and briefing of a Rule 60(b) motion." (Doc. 122 at 2, emphasis in original.)[47] For further clarity, the court specified that this

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his neuropsychological functioning via a battery of standardized neuropsychological tests and review of essential background information and records, including material from the mitigation investigation; (C) a neuroimaging analyst ($17,500) for conducting imaging to determine whether extensive history of head traumas and pervasive family and personal history of seizures suggestive of observable damage is, indeed, observable and for interpreting how any observable damage would bear upon client's reliance upon counsel to perform pursuant to standard of care and not to defraud him, *supra*; and (D) an intellectual disabilities specialist ($6,500) for evaluating his special education records and assessments, prior testing, and other indicia strongly suggestive of profound intellectual limitations and disabilities that would bear upon his capacity in relation to his post-conviction proceedings.

[47] The district court cited *In re Carlyle*, 644 F.3d 694, 699-700 (8th Cir. 2011) (Riley, C.J.); *Rojem* v. *Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011). *In re Carlyle* is perhaps *sui generis* in our jurisprudence. In reviewing a Criminal Justice Act voucher of a §3599 attorney (Ms. Carlyle) that the district court (Whipple, J.) had dramatically reduced in relation to clemency proceedings (wherein Governor Nixon *granted* clemency to a condemned man, *see Clay v. Bowersox*, Case No. 11-8016, ID 3804863 (8th Cir. Jun. 6, 2011)), Chief Justice Riley converted into an appeal the CJA attorney's letter query about her voucher. This appeal did not obtain any further briefing before publication of the resulting opinion wherein the Chief Judge offered that the "CJA does not confer appellate jurisdiction over Carlyle's appeal. As others have recognized, the non-adversarial nature of the CJA voucher process, which is wholly *ex parte*, evidences an administrative act not a judicial decision." *In re Carlyle*, 644 F.3d at 699 (citing *United States v. French*, 556 F.3d 1091, 1093 (10th Cir. 2009), citing others)). In contrast, the funding determinations currently at bar do not raise any issue of non-payment of vouchers and, for the reasons set forth here, are clearly reviewable by this Court and without the issuance of a COA.

"$10,000 includes any and all attorney/paralegal fees, any and all expert/specialist fees, expenses, and costs." (*Id.*) The flat figure is less than 1/16 of the amounts advanced in Appellant's reasoned budget filing.

In a footnote, the district court also explained that, "'[a]fter the [Rule 60(b)] motion briefing . . . if the Court orders an Evidentiary Hearing relating to issues of the Rule 60(b) motion, then Petitioner shall submit a Proposed Evidentiary Hearing Budget within fourteen (14) days of the order." (*Id.* at 2, n.1, citing Doc. 120, at ¶4.) The district court eventually denied Appellant's request for an evidentiary hearing, (Doc. 150 at 20-21), thus resolving the question of whether the initial funding deprivation would be remedied by the recognition that Appellant's submissions with the Rule 60(b) motion more than justified the granting of a hearing and, with that, authorization for greater funding to engage experts and specialists and otherwise provide resources for Mr. Christeson's representation.

In rejecting Appellant's proposed budget figures, the district court ignored the proffered reasons for the specified experts and specialists and ignored the detailed explication of the need to "investigate and file a Rule 60(b) motion." *Christeson*, 135 S. Ct. at 895. The "total" figure, a flat $10,000, was set absent *any reasoning* as to the district court's arrival at that amount as an adequate figure to ensure that Mr. Christeson receives the representation and resources contemplated

under the statute and the high Court's remand.[48] *See* 18 U.S.C. §3599; *Christeson*, 135 S.Ct. at 895; *see also Clair*, 132 S.Ct. 1276. The district court failed to explain which resources were excessive or unnecessary and why. Unfortunately, in light of the court's order, the funding in question has dictated whether Mr. Christeson, through his counsel, may have a meaningful chance to overcome the duly noted, "host of procedural obstacles to having a federal court consider his habeas petition." *Christeson*, 135 S.Ct. at 895.

In the district court's order denying the motion and, with it, the request for an evidentiary hearing, the court faulted undersigned counsel for not seeking

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[48] As a reference point, §3599 statutorily guarantees up to $7,500 for costs "for investigative, expert, and other reasonably necessary services" in connection with counsel's appointed representation under that section. 18 U.S.C. §3599(g)(2). Counsel must obtain court authorization for costs exceeding $7,500, which is routinely granted in federal courts throughout the country. As discussed in Mr. Christeson's proposed budget, the investigator and expert costs needed to develop Mr. Christeson's bases for equitable tolling far outstrip that default figure. But applying that $7,500 against the district court's $10,000 "total" budget authorization for the present motion would leave $2,500 for attorney expenses or fees. At the then applicable Criminal Justice Act rate of $180/hour for capital post-conviction appointments, using all of that remaining $2,500 for fees, for example, would permit less than fourteen (14) attorney hours for the present motion to vacate the judgment dismissing a capital habeas petition. The Supreme Court contemplated that Mr. Christeson's motion would be challenging, even assuming the availability of adequate resources. For the undersigned, allocating patently inadequate funding provides only a Hobson's choice masking the constructive denial of his statutory right to counsel. *See Clair*, 132 S.Ct. at 1283. The district court's lumping of all funding into one flat sum and failure to differentiate and explain its ruling relating to attorneys' fees, costs, and most critically, expert services, abdicates the judicial role at this stage in Mr. Christeson's proceedings. (Doc. 125 at 8-16).

reconsideration of the budget authorization or an interlocutory appeal. (Doc. 150 at 20). However, in light of the Budget Order's explicit forecasting of augmented funding upon the granting of an evidentiary hearing, a sufficient showing—such as the one actually made in these proceedings—should have engaged that provision in the Budget Order and effectively resolved the issue, albeit inefficiently. More to the point, the emphasis with which the court ordered "a total budget of $10,000" for all fees and costs associated with the entire work-up did not suggest that the court needed more proof, beyond the extensive briefing initially submitted with the proposed budget, in order to correct its position on this matter. Nonetheless, the denial of the Rule 60(b) motion ripened this matter for appellate review.

b. Denial of Rule 60(b) Motion

In denying the Rule 60(b) motion, the district court further explained why reconsideration of the Budget Order would have been unavailing. In the court's view "no amount of money would change the fact that original counsel simply miscalculated AEDPA's one-year deadline." (*Id.*). As explained above, the district court's unwavering position is at odds with the law of the case and with the record of original counsel's conduct. Among other facts, original counsel's failure to meet or otherwise having *any* initial contact with Mr. Christeson for more than a year after the motion for their appointment does not support the view that they were

calculating deadlines (with wild inaccuracy or otherwise) instead of interviewing their client and taking even the first substantial steps in his case.

The decision specifies the length of Mr. Christeson's motion and reply ("77 pages" and "49 pages", respectively) and that the pleadings include "numerous facts and arguments about Christeson's family history and his alleged mental impairments, and are accompanied by numerous declarations and exhibits." (Doc. 150 at 21.) In effect, this rhetorically justifies withholding meaningful funding from Mr. Christeson rather than to demonstrate the necessity for adequate resources in order to deliver for the benefit of this court the kind of evidence necessary to determine the equitable tolling issues that precipitated the remand of the case in the first place. Further, the decision alludes to the declarations and exhibits only to make the point that its lack of funding has not effectively denied the right to counsel; the court has otherwise completely elided the substance and implications of the record developed by counsel in their *de facto* pro bono role under their nominal appointment. The decision completely ignores the substance of the declarations by several experts explaining the considerable issues apparent, at first blush—and at first blush only because no funding was available to retain and instruct these experts—and that warrant full exploration.

The district court deemed "risible" the argument that funding at less than one sixth the amount estimated for investigative and expert services alone (*viz.*,

excluding *any* attorney time), does not satisfy Mr. Christeson's right to representation. (*Id.*). The court's appointment of conflict-free counsel and token funding has fulfilled Mr. Christeson's statutory right in name only in this capital habeas case in which the prior counsel of record—appointed for nearly eleven years before their Supreme Court-caused termination—entirely ignored investigation or expert evaluation. The Budget Order firmly ensured that Mr. Christeson would continue to receive no specialist or expert assistance despite the unambiguous purpose of this remand to develop and present for adjudication the extent and equitable implications of Mr. Christeson's "severe cognitive impairments." *Christeson*, 135 S.Ct. at 892.

The district court has been recalcitrant in the face of the Supreme Court's rebuke, having now denied in effect—the right to counsel—what it had repeatedly expressly denied in its rulings prior to the high Court's stay of execution on October 28, 2014. The question of whether the Court is perpetuating the deprivation of Mr. Christeson's right to counsel is not laughable, however, as the decision has submitted.

The court's decision is far from humorous in faulting undersigned counsel's self-help in the manner of personally investigating, over the course of many hundreds of unfunded hours, the client's personal and family history that would provide—if Mr. Christeson ever were to receive adequate funding for specialists

and experts—the requisite foundation for the proper evaluation and reporting of Mr. Christeson's capacity in relation to the applicable equitable tolling analysis. Instead, the decision points to counsel's actions undertaken without compensation to justify the court's wholesale deprivation of adequate funding.

At bottom, the Supreme Court recognized that the remanded proceedings would not be "futile" – futility would have obviated any need for conflict-free counsel. 135 S.Ct. at 895, citing *Clair*, 132 S.Ct. at 1288-89. Had the Supreme Court taken a dim view of the Rule 60(b) undertaking currently at bar, it could have disposed of the case in late October 2014 without halting the State of Missouri on the eve of its scheduled execution and then, months later, summarily reversing the Eighth Circuit Court of Appeals by a seven-justice majority.

Mr. Christeson has been denied resources for experts to conduct the work indispensable to the Supreme Court's remand. What is more, the district court used his counsel's efforts to overcome this obstruction by substantiating the need for these resources through self-help (*i.e.*, many hundreds of unfunded hours of investigation and research and writing) as argument that the district court has *not* deprived him of his federal statutory right. This rationale is not merely circular; it is captious.

2. The funding determinations regarding "the authority of appointed counsel" obtain direct review without need for a COA

The district court's funding determinations concern Mr. Christeson's entitlement to counsel pursuant to §3599 and thereby its accompanying scope of "the authority of appointed counsel." *Harbison v. Bell*, 556 U.S. 180, 183 (2009). Thus, this Court may consider the district court's determinations "without a certificate of appealability." *Edwards v. Roper*, 688 F.3d 449, 462 (8th Cir. 2012), citing *Harbison*; *see also United States v. Obasi*, 435 F.3d 847, 852 (8th Cir. 2006) (recognizing funding determinations under §3006A are subject to reversal upon showing of prejudice), quoting *United States v. Bledsoe*, 674 F.2d 647, 668 (8th Cir. 1982), citing *United States v. Valverde*, 846 F.2d 513, 517 (8th Cir. 1988).

More broadly, funding determinations impacting an indigent party's "collateral challenge to a conviction or sentence" are subject to appellate review. *See, e.g., United States v. Abreau*, 202 F.3d 386, 388 (1st Cir. 2000) (reversing and remanding for violation of §3006A requirement to consider funding application *ex parte*), citing *United States v. Manning*, 79 F.3d 212, 218-19 (1st Cir. 1996) (reviewing denial of expert services at trial); *United States v. Mateos-Sanchez*, 864 F.2d 232, 239-40 (1st Cir. 1988) (reviewing denial of travel expenses for interviewing potential witnesses); *see also United States v. Bloomer*, 150 F.3d 146, 149 (2d Cir. 1998) (construing judicial review of §3006A determinations), citing *United States v. Smith*, 987 F.2d 888, 890-92 (2d Cir. 1993) finding error in failure

to appoint psychiatrist); *United States v. Labansat*, 94 F.3d 527, 529-30 (9th Cir. 1996) (reviewing denial of funding motion on ground that lack of expert deprived party the effective assistance of counsel).

It is requested that the Court set a briefing schedule with reference to further scheduling relating to any and all COA issues to be granted in the present proceedings. Alternatively, Appellant respectfully requests the Court to directly remand the case to the district court with instructions to authorize adequate funding for Appellant's representation, especially regarding authorization for experts and specialists.

E. The District Court's Denial Of Appellant's Rule 60(b) Motion Advancing An Equitable Tolling-Based Challenge Of The Dismissal Of His Time-Barred Habeas Petition Requires Full Appellate Briefing And Review

Fed. R. Civ. P. 60(b)(6) provides the means to challenging the closure of a habeas corpus petition under 28 U.S.C. §2254 that has been dismissed as time-barred. *Gonzalez v. Crosby*, 545 U.S. 524, 535-36 (2005). As noted in *Christeson*, 135 S.Ct. at 895-96, *Gonzalez* provides that a claim for relief under Rule 60(b) can reopen such a final judgment. 546 U.S. at 535-36. To secure such relief requires the petitioner to "demonstrate both the motion's timeliness and, more significant here, that "'extraordinary circumstances' justif[y] the reopening of a final judgment." *Christeson*, 135 S.Ct. at 896, quoting *Gonzalez*, at 535 (quoting

Ackermann v. United States, 340 U.S. 193, 199 (1950)). the petitioner must "show extraordinary circumstances.

As *Christeson* has indicated, the original habeas counsel's conflict against Appellant persisted until the termination of their appointment and the district court's substitution of undersigned counsel as Mr. Christeson's attorneys. Pursuant to the district court's briefing schedule, Appellant submitted his Rule 60(b) motion and the motion's ultimate denial precipitated this COA application. Timeliness, thus, is not an issue in relation to review of the district court's denial of the motion.

In contrast, the district court's conclusion that Appellant "failed to show extraordinary circumstances that would warrant equitable tolling *or relief under Rule 60(b)*," (Doc. 150 at 17), presents the question for purposes of whether this Court should grant a COA to allow full briefing and review.

Appellant has argued, and the district court has adopted, the understanding that the "extraordinary circumstances" inquiry for equitable tolling in this case is effectively identical to the "extraordinary circumstances" inquiry for purposes of Rule 60(b) analysis:

> In effect, this particular 'extraordinary circumstances' inquiry [for equitable tolling] subsumes the ultimate question of the motion: Does Mr. Christeson possess the factual bases to establish grounds for equitable tolling of the AEDPA limitations period? The same 'extraordinary circumstances' entitling him to reopen his case also establish his entitlement to equitable tolling.

Doc. 125 at 20-21).

Thus, the reasons for granting a COA in relation to the denial of the Rule 60(b) motion are effectively the same as those applicable to a COA grant for the district court's denial of equitable tolling due to its finding of no attorney misconduct in relation to the abandonment of conflicted counsel at the time of the petition deadline. Similarly, the COA debatability analysis applicable to the "extraordinary circumstances" of the attorney misconduct is tantamount to the analysis for Rule 60(b) purposes. *Khaimov*, 297 F.3d at 785 ("jurists of reason would find it debatable whether the district court was correct in its procedural ruling"), quoting *Slack*, 529 U.S. at 484.

V. CONCLUSION

For the foregoing reasons, (1) a certificate of appealability should issue with respect to the above-specified issues that require a COA in order to obtain full appellate review; (2) a briefing schedule should issue regarding the appellate issue set forth in IV.D [49] concerning direct review of the district court's funding orders; and/or (3) alternatively, the Court should remand the case to the district court to conduct an evidentiary hearing after authorizing adequate funding for Appellant's representation under 18 U.S.C. §3599.

Respectfully submitted,

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August 16, 2016

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[49] Sub-section D. is titled "Appellant Is Entitled To Review Of The District Court's Constructive Denial Of Appellant's Statutory Right To Counsel And Does Not Need A COA" and is found at 89-99.

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2016, the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing and its viewing and downloading are thereby provided to all counsel of record by cooperation of the CM/ECF system.

s/Joseph J. Perkovich
JOSEPH J. PERKOVICH