No. 16-02730

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK A. CHRISTESON, Petitioner-Appellant

v.

DON ROPER, Superintendent, Potosi Correctional Center, Respondent.

Appeal from the United States District Court
for the Western District of Missouri,
Western Division, Cause No. 4:04-cv-08004
The Honorable Dean Whipple, District Judge, presiding

BRIEF OF AMICI CURIAE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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RULE 29(C)(1) STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c)(1), amici curiae state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

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INTEREST AND IDENTITY OF AMICI CURIAE AND CONSENT OF THE PARTIES[1]

Undersigned amici, non-profit groups who work to improve the criminal justice system, have an interest in ensuring a criminal defendant's right to counsel in capital federal habeas proceedings. Federal habeas petitioners are entitled not just to a body at counselor's table, but competent and meaningful representation. Nowhere is this right more critical than in the context of capital cases, where life or death is at stake. *Amici* believe the District Court's order here forecloses such representation and sets dangerous precedent. Should it stand, capital post-conviction counsel are precluded from supplying the vigorous advocacy their clients need by the very judiciary who acts as the last mainstay for constitutional review before possible execution.

The Roderick and Solange MacArthur Justice Center at St. Louis. The Roderick and Solange MacArthur Justice Center at St.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), amici state that: party's counsel did not author this brief, in whole or in part; neither a party nor a party's counsel – nor any other person, other than the amici, their members or their counsel – contributed money that was intended to fund preparing or submitting this brief.

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Louis (MJC-STL) is a non-profit, public interest law firm that advocates positive reform of the criminal justice system. MJC-STL is the newest office of the Roderick and Solange MacArthur Justice Center, which also has offices in Chicago (at the Northwestern Pritzker School of Law), New Orleans, and at the University of Mississippi Law School. The Roderick and Solange MacArthur Justice Center was founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. It has led battles against myriad civil rights injustices, including police misconduct, fighting for the rights of the indigent in the criminal justice system, and pursuing compensation for the wrongfully convicted.

National Association for Public Defense. The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators and other support staff who are responsible for executing the constitutional right to effective assistance of counsel, including regularly researching and providing advice to clients in death penalty cases. We are the advocates in jails, in

courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Our collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and other training to its members, including training on the utmost importance of protecting the right to counsel in all phases of capital litigation. Accordingly, NAPD has a strong interest in the issue raised in this appeal.

National Legal Aid & Defender Association. The National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford counsel. For 100 years, NLADA has pioneered access to justice and right to counsel at the national, state, and local level. NLADA serves as a collective voice for our country's public defense providers and civil legal aid attorneys and provides advocacy, training, and technical assistance to further its goal of securing equal justice. The Association pays

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particular attention to procedures and policies that affect the constitutional rights of the accused, both adults and youth.

National Association of Criminal Defense Lawyers. The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case, *Christeson v. Roper*.

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Amici file this brief pursuant to Fed. R. App. P. 29(a). Both parties consent to the filing of this amici curiae brief on behalf of the organizations listed above.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a district court's patent disregard for a deeply mentally impaired defendant's right to meaningful representation in capital federal habeas proceedings. By funding only 6% of defense counsel's request for necessary expert and other resources, the District Court violated the constitution, ignored federal statutory mandates, flouted the Supreme Court's remand order, blocked counsel's ability to satisfy professional and ethical obligations, publicly disclosed contents of previously protected information about defense strategy, and set a very dangerous precedent for our justice system.

The District Court's Order of April 29, 2015 ("the Budget Order") blocked Mr. Christeson's attorneys from developing and presenting evidence from mental health experts necessary to fully litigate his defense to a time bar caused by prior counsel's shameful abandonment of their cognitively disabled client. The Budget Order effectively denied Mr. Christeson's right to counsel under 18 U.S.C.§ 3599 as well as his

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rights to Due Process and Equal Protection in the administration of that statute. If the District Court's Budget Order stands, Mr. Christeson will be denied his right to federal habeas relief and to the investigation and litigation that the Supreme Court specifically ordered on remand because prior counsel abdicated their duties to provide it.

Mr. Christeson's former court-appointed counsel did not even meet with him until more than six weeks after his federal habeas petition was due. *Christeson v. Roper*, 135 S.Ct. 891, 892 (2015). When they finally did file a habeas petition—117 days too late, absent equitable tolling—the District Court dismissed the petition as untimely. *Id.* Current counsel is, therefore, forced to contend with overcoming this time bar on behalf of their cognitively disabled client.

To meet this most formidable lawyering task, Mr. Christeson's current attorneys requested fair and adequate support for investigative, expert, and other representation expenses. The District Court Order denying Mr. Christeson a hearing on his equitable tolling defense demonstrates the prejudice from the denial of funds necessary to develop available expert evidence supporting that defense. Those resources are necessary for current counsel to demonstrate that Mr.

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Christeson is entitled to constitutional review of his Missouri state court conviction and sentence.

As a matter of law and public policy the District Court's actions cannot be countenanced. Therefore, this Court should set aside such dangerous precedent, which threatens Mr. Christeson's life and the integrity of our justice system, and grant the relief requested by counsel for Petitioner.

ARGUMENT

I. The District Court's Order Denying Necessary Funds Constitutes Effective Denial of Mr. Christeson's 18 U.S.C. § 3599 Right to Capital Habeas Counsel

A. The Federal Statutory Right to Counsel Under 18 U.S.C. § 3599 Requires Much More Than a Warm Body Alone

Of the various mechanisms intended to ensure reliability and fairness in imposition of the death penalty, federal habeas proceedings remain the last mainstay. *See* U.S. CONST., Art. I, § 9, cl. 2; *see also, e.g., Coleman v. Thompson*, 501 U.S. 722, 747 (1991) (the writ of habeas corpus serves as "a bulwark against convictions that violate fundamental fairness") (internal quotation and citation omitted). Thus 18 U.S.C. § 3599 provides for the unquestionable right to appointed counsel in capital cases in federal court – even during post-conviction

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habeas corpus proceedings. *See, e.g.*, *Martel v. Clair*, 132 S.Ct. 1276, 1280 (2012); *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

In creating a *mandatory* statutory right to appointed counsel in capital habeas proceedings in Section 3599, Congress underscored the important role such proceedings play in "promoting fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S. at 859; *see also Slack v. McDaniel*, 529 U.S. 473, 483, (2000). This "right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant's habeas claims." *McFarland*, 512 U.S. at 858; *see also Martel*, 132 S.Ct. at 1285.

Beyond this, Section 3599 expressly provides protections to ensure representation by highly qualified and effective defense teams in capital post-conviction proceedings. For instance, attorney members of the post-conviction team must have significant past experience in both serious felonies and appellate practice. *See* 18 U.S.C. § 3599(c). Such experience should not be compensated at the rate of an intern, much less an entry-level attorney with no habeas experience.

Section 3599 additionally embodies the idea that post-conviction representation requires significant fact and mitigation investigation

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beyond that conducted by prior counsel at the trial or direct appeal stages. *See* 18 U.S.C. § 3599 (g)(2). Retaining services of experts, such as forensic psychologists, medical professionals, and trauma specialists, is also fully contemplated by the express terms of Section 3599. *Id.*

Thus the clear language of Section 3599 seeks to ensure more than a warm body at counsel table during capital post-conviction proceedings in federal court. The statutory right to, and role of, counsel constructed under Section 3599 is one that is robust, contemplating the kind of specialized efforts required in a complex, fact-intensive, science-heavy matter such as Mr. Christeson's.

Here counsel seeks to overcome a habeas petition time bar by way of equitable tolling based on prior counsel's abandonment of a seriously impaired client. The question of Mr. Christeson's mental capacity presents a complicated factual and forensic inquiry, not just a simple legal argument to be won solely by clever lawyers.

In order to demonstrate Mr. Christeson's incompetence to proceed on his own during his earlier habeas proceedings, *see Holland v. Florida,* 560 U.S. 631 (2010), his attorneys must retain experts and specialists in the field of neuroscience, psychology and intellectual

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disabilities. Yet under the Order, the defense team would have to forego the aid of: (a) a mitigation investigator for investigating and generating a psycho-social history of the Petitioner, including an analysis of Mr. Christeson's cognitive impairments; (b) a neuropsychologist for determining Mr. Christeson's neuropsychological functioning; (c) a neuroimaging analyst to aid in determining Mr. Christeson's competence for appreciating his legal rights during the time he was represented by former counsel; (d) an intellectual disabilities specialist for evaluating Mr. Christeson's potential intellectual limitations and disabilities which also would bear upon the question of his competence; and (e) clinical psychologists for evaluating the impact of Mr. Christeson's childhood trauma on his ability to assist his counsel and advance his own legal interests. Section 3599 cannot be interpreted in such a stinting fashion.

It is clear Petitioner's counsel are not aiming to profit off their advocacy in this case. Even if counsel worked completely for free, the $10,000 permitted here would not come close to adequately compensating other necessary members of the defense team. Thus, in denying requested funds, the District Court's Budget Order works to

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constructively deny Mr. Christeson's right to defense representation under Section 3599.

In order for Section 3599's provisions to have any meaning, they may not be interpreted as requiring counsel to proceed without further in-depth investigation and absent the aid of necessary specialists. Yet the District Court's current Budget Order ensures just that.

B. In the Course of Administering 18 U.S.C. § 3599, District Courts Should Not Undermine the Efforts and Special Role of Defense Counsel

Following the instructions of Section 3599, Mr. Christeson's attorneys obtained leave from the District Court to file their proposed budget documentation *ex parte* and under seal. Nevertheless, the District Court's Budget Order inexplicably revealed confidential and privileged information relating to counsel's legal strategy, and advertised to future litigants and capital post-conviction counsel its strong-arm approach to budgeting post-conviction cases. This entirely denigrates the role of defense counsel, suggesting that their work, strategies, and duty of confidentiality to their client are at the mercy of the court.

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The decision to investigate certain facts, retain particular experts, and pursue individual theories is part of a defense attorney's litigation strategy. This information is, therefore, generally protected from disclosure by the work product doctrine. And such *ex parte* presentations are also fully contemplated by Section 3599. But the Court's *sua sponte* actions here, discounting and laying bare defense counsel's entire case plan in its funding denial Budget Order, disregards this time-honored principle and disrespects the special role and duties of defense counsel.

What is more, the District Court responded to counsel's voluminous and detailed request for funds out-of-hand with a one-and-one-half page summary order that fails to offer any reasoned rationale for how it arrived at the cumulative $10,000 budget. Worse, in an apparent effort to insulate its act of caprice visited upon a mentally-impaired indigent death row inmate, the District Court boldly cited two decisions to suggest its decision is unreviewable on appeal. *See* Budget Order (Doc 122) (citing *In re Carlyle*, 644 F.2d 694 (8th Cir. 2011) and *Rojem v. Workman*, 655 F.3d 1199 (10th Cir. 2011)).

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Notably, however, these cases involved a court's reduction of fee awards subsequent to its determination of the merits of the case. *See id*. Here, the District Court refused to fund Mr. Christeson's capital defense team *before the work was even commenced*. And in so doing, it clearly communicated to both Mr. Christeson and the State of Missouri that defense counsel would not be permitted to conduct the legal and investigative work necessary to obtain federal habeas review.

Such action is especially problematic in a state like Missouri, where the public defender system is already ranked 49th in the country for funding, its director recently filed suit to obtain funds withheld by the executive branch, and the Governor himself has now been conscripted to actually represent an indigent defendant. Matt Ford, *A Governor Ordered to Serve as a Public Defender*, THE ATLANTIC, Aug. 4, 2016, http://www.theatlantic.com/politics/archive/2016/08/when-the-governor-is-your-lawyer/494453/. Section 3599 should be administered in such a way as to protect against further deficiencies in the defender system – not encourage or contribute to them.

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II. Summary Denial of Adequate Funds for Federal Capital Habeas Representation Deprives Death-Sentenced Defendants Due Process and Equal Protection of Law

A. Governmental Processes Must Be More Than Mere Rituals to Satisfy Due Process and Equal Protection Standards Which Require Reason, Rationality, and Even-Handedness

When the federal government constructed a legal process for state inmates to seek federal post-conviction review, it implicitly promised to administer the program in a fair, even-handed, and non-arbitrary way. *See* 18 U.S.C. § 3599; 28 U.S.C. § 2254; *see also Evitts v. Lucy*, 469 U.S. 387, 401 (1985) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause"). The District Court's action gutting Mr. Christeson's right to meaningful assistance by counsel during the federal habeas corpus process also violated due process and equal protection. See Celestine Richards McConville, *The Right to Effective Assistance of Capital Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31 (2003).

Petitioner's statutory right to federal post-conviction review must amount to more than a "meaningless ritual." *Douglas v. California,* 372

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U.S. 353, 358 (1963). This commitment to coherency applies equally to the distribution of representation funds for "financially unable defendants" seeking federal habeas review following the imposition of a death sentence. *See Douglas,* 372 U.S. 353 (although there is no constitutional right to appeal, indigent defendants must be provided with free representation in order to meaningfully access the appellate process).

Indeed, the United States Supreme Court has long condemned conditioning justice system access upon access to funds. For these reasons no "integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant" may be foreclosed because of indigence. *Griffin v. Illinois,* 351 U.S. 12, 18 (1956). But that is exactly what happened here.

Such an obviously arbitrary exercise of power working to gut Section 3599's meaning and rationality – while precluding a full and final check on the appropriateness of Mr. Christeson's death sentence – should not be embraced by this Court. It should set a higher standard and prevent the further spread of these practices across the federal system.

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B. Because Death is Different, Due Process Generally Demands the Provision of Counsel During Capital Post-Conviction Proceedings

Nearly seventy-five years ago the United States Supreme Court made clear in the infamous Scottsboro Boys Case that meaningful representation in death penalty cases is required as a matter of due process of law given their weighty and unique nature. *See Powell v. Alabama*, 287 U.S. 45 (1932). Regardless of the applicability of the Sixth Amendment, where a defendant faces the possibility of execution, fundamental fairness requires the "guiding hand of counsel at every step in the proceedings against him." *Id.* at 69. Thus in such a case, if a "state or federal court were arbitrarily to refuse to hear a party by counsel," "such refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id.*

In this case, the District Court's denial of proper payment to capital defense counsel, mitigation specialists, and necessary mental health experts during the course of post-conviction litigation, amounted to an arbitrary prohibition on meaningful representation. Such constructive denial of counsel in the face of possible execution denied Mr. Christeson fundamentally fair proceedings and due process of law.

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This is true despite the Supreme Court's more modern right to counsel cases, rooted in the Sixth Amendment, *see Gideon v. Wainwright,* 372 U.S. 335 (1963), and even if Mr. Christeson technically does not currently possess a Sixth Amendment right to counsel. For while the High Court ultimately incorporated Sixth Amendment protections into prosecutions originating in the state courts, it never jettisoned the notion that meaningful access to an attorney in capital cases is a key ingredient for fundamental fairness. The same should hold true even in the post-conviction context.

This is because the Court has held Fourteenth Amendment right to counsel protections are not limited to cases labeled criminal in nature, but extend to a wide range of civil matters too. This point was actually made in *Powell*, where it warned that capricious whims to block counsel in civil litigation violated due process. *Powell*, 287 U.S. at 69 (prohibiting the "arbitrary" refusal of representation "in any case, civil or criminal"). And it has been more fully developed by the Court in later decisions over the decades.

For instance, the Court further expanded on its thinking in *Gagnon v. Scarpelli*, determining defendants in parole and probation

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revocation proceedings – civil matters relating to criminal sentencing – require counsel under appropriate circumstances. 411 U.S. 778 (1973). In describing the kind of case-by-case analysis that must occur in civil right to counsel cases, the Court made clear that provision of counsel must occur when the litigant facing sanction "can fairly be represented only by a trained advocate." *Id.* at 788.

Since its determination in *Gagnon*, the Court has at times declined to find a right to counsel in civil matters relating to the criminal process. And at least one of these cases involved the death penalty. *Murray v. Giarratano,* 492 U.S. 1 (1989). However, in *Giarratano*, a mere plurality of the Court rendered the decision in the context of a class action on behalf of death-sentenced defendants seeking appointment of counsel in state post-conviction proceedings in Virginia. *Id.* And it did so using a blanket rule – rather than case-by-case due process analysis – which has since been rejected by a majority of the court. *Id.* at 10-11.

Indeed, just five years ago the Court applied *Powell*-like individualized consideration in *Turner v. Rogers*, when it found a litigant in civil contempt proceedings should have been provided with

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an attorney before sanctioned with jail time. 564 U.S. 431 (2011); *see also* Mae C. Quinn, *Giving Kids Their Due: Theorizing A Modern Fourteenth Amendment Framework for Juvenile Defense Representation*, 99 IOWA L. REV. 2185, 2210-11 (2014) (describing development over time of Fourteenth Amendment right to counsel in civil cases).

Most importantly here, without regard for its prior determination in *Giaratanno,* the Court in *Turner* flagged two kinds of civil cases in particular where constitutional due process principles called for the provision of counsel. The first is where the government is represented in such proceedings. 564 U.S. at 449. The other is where the proceedings themselves are particularly complex. *Id.* at 444-445.

Both considerations are most salient and significant in Mr. Christeson's case, where the State's representatives are actively seeking to carry out an execution and a man is being forced to fight for his life through the morass of the federal Anti-Terrorism Effective Death Penalty Act (AEDPA). *See* 28 U.S.C. § 2254; *see also* Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law but an Essential Right*, 64 ME. L. REV. 379 (2011) (federal judge lamenting

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the overly-complicated web of law that has developed under the AEDPA but noting the great need for federal review of state criminal cases).

For these reasons alone the District Court's summary rejection of counsel's reasonable request for attorney, investigative and expert fees should be seen as a due process violation that improperly impairs Mr. Christeson's ability to satisfy habeas standards.

C. Tying the Hands of Habeas Attorneys in Capital Cases is Most Shocking and Egregious When the Accused Has Severe Cognitive Impairments

But even if *Powell*'s constitutional due process protections are not implicated in all or even most post-conviction death sentence cases, they most assuredly are triggered when the accused suffers from serious mental deficits. *Powell*'s analysis was deeply informed by the particular vulnerabilities of the litigants before the Court who were seeking a *post hoc* determination and intervention based upon a denial of fundamental fairness.

The Court took great pains to describe the special need of the particular death-sentenced litigants before it, who were facing the possibility of execution while laboring under questionable capacity and

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ability. *Id.* at 71. While the rule might be different in other cases, the Court specifically admonished, where:

> . . . the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

Id. This is just such a case.

Yet, the District Court here did not facilitate meaningful assignment of counsel. It did the opposite. After the United States Supreme Court remanded this case so that competent counsel could meaningfully pursue habeas corpus relief on behalf of Mr. Christeson – a man described by the High Court as having "severe cognitive disabilities" and who needed to "rely entirely on his attorneys" – the District Court stopped the defense team in its tracks. *Christeson,* 135 S.Ct. at 892.

Consistent with the United States Supreme Court's expressed concerns about Petitioner's capacity, counsel sought approval for attorney and paralegal fees, a mitigation specialist, a neuropsychologist, a neuroimaging analyst, and an intellectual

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disabilities specialist in order to investigate, develop, and advance Mr. Christeson's previously abandoned legal claims. But the District Court denied the requested amount, instead allowing for a *total* budget of merely $10,000 for attorney fees and experts – barely 6% of what counsel originally sought in its well-documented and supported *ex parte* proposal. Even if counsel were to provide all services for free, this sum would not cover the cost of a single mitigation investigator ($20,420) or neuropsychologist ($18,080), facts the District Court took pains to highlight when it denied the requested funds. *See* Budget Order (Doc 122).

Such a preemptive fee cap unfairly and improperly restricts the defense team's ability to deliver meaningful legal representation for a mentally disabled client – particularly when facing the already uphill battle of overcoming a time bar caused by the abandonment of prior counsel. *See Holland,* 560 U.S. 631 (equitable tolling may occur if petitioner can show he has been pursuing his rights diligently and some extraordinary circumstance, like attorney misconduct, stood in his way). Under these circumstances, the Court's constructive denial of counsel not only flies in the face of procedural fairness but amounts to a

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substantive denial of due process of law. *See, e.g., Rochin v. California,* 342 U.S. 165 (1952); *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

III. Requiring Capital Post-Conviction Counsel to Proceed without Sufficient Support for Time-Intensive Legal Work, Mitigation Investigation, and Forensic Experts Perpetuates Deficient, Unethical Representation

Amici agree with and fully adopt co-Amici American Bar Association's ("ABA") arguments regarding habeas counsel's professional and ethical duties. We write separately only to emphasize these concerns from the unique perspective of the nation's practicing defense attorneys.

A. Courts Should Not Require Any Lawyer – Let Alone Capital Counsel – to Violate Rules of Professional Responsibility

The severity and finality of the death penalty saddles capital defense counsel with legal and ethical duties significantly broader and greater than those of attorneys in ordinary criminal proceedings. This is especially true in the federal habeas setting, where litigation is well known to be procedurally and factually complex. *See, e.g., Martel*, 132 S.Ct. at 1285; Commentary to Guideline 10.15.1, *ABA Guidelines for the Appointment and Performance of Capital Counsel in Death Penalty*

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Cases, 31 Hofstra L. Rev. 913, 1085 (2003) ("ABA Capital Counsel Guidelines") ("providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy and knowledge"). These enhanced duties apply to investigative, forensic, and legal work.

At the same time counsel must meet heightened investigative and forensic demands presented by capital post-conviction cases, they owe a continuing ethical duty to provide competent representation to clients. *See* MODEL RULES OF PROF'L CONDUCT ("Model Rules"), r. 1.1 (competent representation), r. 1.3 (diligence) and r. 1.4 (communication with client) (AM. BAR ASS'N 2002). Lawyers are subject to disciplinary action should they fail to meet this obligation, and they are responsible for making reasonable efforts to ensure the conduct of non-lawyer defense team members conforms with the professional rules. *See* Model Rules, r. 5.3.

To competently evaluate what claims to raise in a habeas petition, counsel must review voluminous court records, often spanning years if not decades, and be well-versed in what has been described as "some of the most complicated, dynamic, and at times inconsistent bodies of law that exist." Michael Millemann, *Capital Post-Conviction Petitioners'*

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Right to Counsel: Integrating Access to Court Doctrine and Due Process Principles, 48 Md. L. Rev. 455, 487 (1989); *see also* Model Rules, r. 1.1 cmt.

Even with the aid of investigators and mitigation specialists, analyzing the facts of capital post-conviction cases is an enormous task. Yet the District Court's award compensates counsel for barely 55 hours of legal work.[2] Any capital attorney or judge knows capital post-conviction proceedings require significantly more manpower than can be generated in 55 hours. In fact, the undersigned amici alone have spent that amount of time preparing this brief for the Court.

And of course, beyond all of this, capital counsel cannot meet their ethical duty to capital defendants in post-conviction proceedings without the aid of qualified members of a complete defense team, including mitigation specialists and other experts. Thus, the District Court order put Petitioner's counsel in an impossible position.

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[2] This is calculated from the rate of compensation in death penalty cases as of March 2015 (when the budgeting briefing was submitted to the District Court): $180 per hour. *See* http://www.ca8.uscourts.gov/cja-information (last visited 8/3/2016).

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Without the requisite funds, counsel cannot afford to satisfy their obligations to conduct an extensive capital mitigation investigation, announced in Supreme Court precedent and ABA guidelines. At the same time, they cannot afford *not* to meet those unambiguous professional and ethical obligations. In such instances, a conflict of interest may arise whereby counsel are forced to choose between working on a case, or paying overhead. *See* Lawrence Fox, *Capital Guidelines and Ethical Duties: Mutually Reinforcing Responsibilities*, 36 Hofstra L. Rev. 775, 780-81 (2008).

B. Pressing Forward Without Funds in a Capital Post-Conviction Matter is Inconsistent with Professional Standards Established by the ABA

The critical need for not just qualified capital counsel but qualified capital defense *teams* in the post-conviction setting is also delineated in various ABA guidelines. *See, e.g., ABA Capital Counsel Guidelines*, 31 Hofstra L. Rev. at 921; *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008) (the "Supplemental Guidelines").

Such teams must consist of no fewer than two qualified attorneys, an investigator, and a mitigation specialist, with "at least one [team]

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member qualified by training and experience to screen . . . for the presence of mental or psychological disorders or impairments" – all of whom should be fully and fairly compensated. Guideline 4.1, *ABA Capital Counsel Guidelines*, 31 Hofstra L. Rev. at 952; Guideline 9.1, *Supplemental Guidelines*, 36 Hofstra L. Rev. at 680, 686.[3]

As noted by our co-amici, the Supreme Court has long referred to the ABA's Guidelines as "well-defined norms" for capital defense teams and "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 522, 524 (2003); *see also Rompilla v. Beard*, 545 U.S. 374 (2005). Yet counsel here have been asked to proceed without regard for professional standards in this life or death case.

Mitigation specialists in particular, like the ones requested by counsel here, are critical members of capital post-conviction defense teams. *See* Guideline 4.1, *ABA Capital Counsel Guidelines*, 31 Hofstra

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[3] The commentary to Guideline 4.1 states: "It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence." *ABA Capital Counsel Guidelines*, 31 Hofstra L. Rev. at 955.

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L. Rev. at 952; Mark E. Olive and Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 Hofstra L. Rev. 1067, 1076-77 (2008); Emily Hughes, *Mitigating Death*, 18 Cornell J. L. & Pub. Pol'y 337 (June 2009). Thus their retention is not a mere suggestion – it is the professional norm by which counsel's effectiveness and reasonableness is measured. *Rompilla*, 545 U.S. at 387. Their assistance is especially important where, as here, counsel enters late after prior counsel's abandonment of the client.

Further, where a capital defendant's mental health or intellectual capacity is at issue, the use of medical and scientific experts is essential. *See, e.g., Brumfield v. Cain*, 135 S.Ct. 2269, 2275-79 (2015) (relying heavily on hard science, including medical evidence and expert reports, in remanding for *Atkins* hearing regarding capital petitioner's intellectual functioning); *Hall v. Florida*, 134 S. Ct. 1986, 1993 (2014) ("That this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability is unsurprising . . . In determining who qualifies as intellectually disabled, it is proper to consult the medical community's

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opinions."); *Rompilla*, 545 U.S. at 381. Given this necessity, the ABA Guidelines mandate that one member of the defense team *must* have specialized training on various mental health and psychological issues. Guideline 5.1, *Supplemental Guidelines*, 36 Hofstra L. Rev. at 683.

Yet here the District Court's Budget Order arbitrarily and without explanation denied funds necessary to support these critical members of the defense team, expecting counsel to abdicate professional norms while seeking to assist their cognitively impaired client.

IV. Summarily Stopping Capital Counsel from Doing their Jobs as Ordered by the United States Supreme Court Amounts to a Callous Abuse of Discretion that Threatens the Integrity of the Entire Justice System

Beyond the constitutional, statutory, and ethical infirmities described above, the District Court's Order denying sufficient funds to capital post-conviction counsel in this case presents serious concerns for the larger system of justice.

A. The Budget Order Demonstrates Disrespect for Supreme Court Determinations

First, the District Court's apparent disregard for the concerns expressed by the United States Supreme Court is deeply troubling. It is true that Article III judges, appointed for life, enjoy a certain level of independence as decision-makers. But they must act with due deference

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to determinations of courts of review – and the United States Supreme Court in particular. It would be dangerous indeed to allow federal trial courts to ignore directives of the highest court in this country, particularly when they serve as the final check on unreliable executions. *See Hutto v. Davis,* 454 U.S. 370, 375 (1982) ("unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be").

B. The District Court's Budget Order Discourages Lawyer Involvement in the Most Challenging Cases

Second, as suggested above, the District Court's actions here have at least a two-fold chilling effect on future representation of death eligible clients. On one hand it discourages capital counsel from conducting the types of investigations necessary in post-conviction cases due to the fact that, while necessary, such investigations are prohibitively expensive. As a result, the quality of representation in capital habeas proceedings will further suffer.

On the other hand, the Budget Order will likely dissuade experienced and qualified attorneys from taking on capital post-conviction cases. A post-conviction capital case imposes a significant

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burden on counsel – emotionally, physically and intellectually. Attorneys will be even less likely to take on these more demanding cases if they expect, given the court's treatment of budgeting requests, that they will have to bear the bulk of financial burden alone.

Decades ago, the ABA warned about this phenomenon its 1989 Capital Counsel Guidelines:

> Unreasonably low fees not only deny the defendant the right to effective representation . . . . They also place an unfair burden on skilled criminal defense lawyers, especially those skilled in the highly specialized capital area. These attorneys are forced to work for next to nothing after assuming the responsibility of representing someone who faces a possible sentence of death. Failure to provide appropriate compensation discourages experienced criminal defense practitioners from accepting assignments in capital cases (which require counsel to expend substantial amounts of time and effort).

Commentary to Guideline 10.1, *ABA Capital Counsel Guidelines* (1989), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989guidelines.authcheckdam.pdf.

More recently, studies have concluded the risk is all too real. For example, the ABA Capital Counsel Guidelines cited several studies which demonstrated an increasing reluctance by experienced counsel to

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take on capital cases in light of cost concerns. *See* Commentary to Guideline 9.1, *ABA Capital Counsel Guidelines*, 31 Hofstra L. Rev. at 986. One of those studies, out of Texas, showed that, "more and more experienced private criminal attorneys" were refusing to accept appointments in capital cases at least in part because of "the lack of compensation for counsel fees and experts/expenses and the enormous pressure that they feel in handling these cases." *Id.* (citing The Spangenberg Group, *A Study of Representation in Capital Cases in Texas* (1993)).

Similarly, a survey of Mississippi attorneys appointed to represent indigent capital defendants found that 82% would "either refuse or be very reluctant to accept another appointment because of financial considerations." Commentary to Guideline 9.1, *ABA Capital Counsel Guidelines*, 31 Hofstra L. Rev. at 986 (citing Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 Ala. L. Rev. 1, 31 n.148 (1992)); *see also Capital Guidelines and Ethical Duties*, 36 Hofstra L. Rev. at 779-80 (under-compensating lawyers and non-lawyers would impede ability to

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secure their services, "leaving only those desperate for work – but unqualified to handle it – willing to accept these engagements.").

Amici do not question the importance of pro bono work as part of an attorney's practice. It may be that the Criminal Justice Act, of which Section 3599 is a component, is not intended as an "attorney's full-employment act." *In re Carlyle*, 644 F.2d at 699. But lawyers still need to be fairly compensated. More than this, it is surely unreasonably unfair to expect of non-attorney members whose assistance on capital habeas cases are mandated by counsel's professional standard of care. And in order to do their jobs competently and effectively, capital attorneys need access to the necessary investigative and expert services for capital post-conviction proceedings. Without this assurance, even fewer qualified attorneys will be willing to take on such matters.

C. The Practice of Denying Critical Funding to Capital Defense Teams, if Uncurbed, Will Result in Unreliable Outcomes and Execution of the Innocent

Third, as noted, death penalty cases are critically different from non-capital cases due to the severity and finality of capital punishment. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 357 (1977) ("[D]eath is a different kind of punishment from any other which may be imposed in

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this country . . . in both its severity and its finality."). Yet embrace of the District Court's approach here will tragically expand the risk of error leading to possible wrongful executions.

Failure to obtain post-conviction relief can result in wrongful execution. Indeed, rates of exoneration among capital defendants is far higher than for any other category of criminal convictions due in large part to the greater attention and resources devoted to death penalty cases before *and after* conviction. Samuel R. Gross, et al., *Rate of false conviction of criminal defendants who are sentenced to death*, 111 PNAS, no. 20, May 20, 2014, at 7230-7235 (estimating that 4.1% of defendants sentenced to death from 1973 through 2004 were the result of erroneous convictions).

Yet Missouri executes individuals at a rate higher than nearly every other state. *See* Tracy L. Snell, Bureau of Justice Statistics, *NCJ 248448 Capital Punishment, 2013 – Statistical Tables* (in the 2014 calendar year, Missouri tied Texas for most executions – 10 – nearly a third of all executions carried out that year). This should be no surprise given that Missouri public defenders are among the worst resourced in the country. *See, e.g., Barrett v. Nixon*, No. 16AC-CC00290 (Mo. 19th

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Cir. Ct., filed July 13, 2016) (lawsuit by the Missouri Public Defender Commission alleging Missouri Governor Nixon improperly withheld necessary funds from the Office of State Public Defender).[4]

In sum, the need for well-resourced capital representation (including the need for investigative, expert and other services in aid of the defense) has been long recognized and reflected in statutes, law and ABA standards – and for good reason. They reflect the truth that habeas proceedings cannot promote "fundamental fairness in the imposition of the death penalty" without the aid of competent, effective representation. *Martel*, 132 S.Ct. at 1285.

D. The Trend of Denying Funding to Capital Defense Teams Fosters Disrespect for an Already Discredited Criminal Justice System

Finally, when indigent capital defendants are denied effective counsel in collateral proceedings, it is not just the individual defendants

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[4] *See also* Rachel Lippmann, *Despite positive reputation, Missouri's juvenile justice system has serious systemic problems*, ST. LOUIS PUBLIC RADIO (Oct. 5, 2015) (in 2009, Missouri ranked 49th in the country for public defender funding), http://news.stlpublicradio.org/post/despite-positive-reputation-missouris-juvenile-justice-system-has-serious-systemic-problems#stream/0.

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who suffer. The justice system as a whole is victimized when courts fail to ensure just compensation for capital post-conviction defense teams.

What Justice Stewart wrote forty years ago rings just as true today: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

By brusquely denying Petitioner's budget as excessive, and cutting the award for fees and expenses by over 90%, the District Court impeded counsel's ability to provide effective representation so severely as to constitute constructive denial of counsel in seeking to overcome a time bar caused by prior incompetent counsel. As a result, the District Court blocked Mark Christeson's final chance at obtaining a first look at constitutional violations stemming from his trial and sentencing. When death is on the line, such opportunities for review cannot be so curtly denied.

It is not possible to maintain the integrity and fairness of capital punishment, and habeas proceedings generally, if district court judges

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continue to interfere with representation in this manner with no check on their abuse of discretion. This is especially true in a case such as this, where: (1) there has been clear abandonment by prior habeas counsel; (2) Petitioner has never had the opportunity for full habeas review of his conviction and capital sentence; and (3) the matter was originally tried by lawyers in a state ranked second to last for defense funds. *See* Derwyn Bunton, Op-Ed. *When the Public Defender Says, 'I Can't Help,'* N.Y. TIMES, Feb. 19, 2016, http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?_r=0.

As Missouri's criminal justice system contends with the findings of two recent United States Department of Justice investigations and its indigent defense system is seen as a mockery, the District Court's Budget Order represents a dangerous precedent which places these interests at grave risk. *See, e.g.,* John Pfaff, Op-Ed., *A Mockery of Justice for the Poor*, N.Y. TIMES, Apr. 29, 2016; *see also* Christine Byers, *Feds Accuse St. Louis Family Court of Rights Violations and Racial Bias,* ST. LOUIS POST DISPATCH, Aug. 1, 2015.

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CONCLUSION

For all these reasons, as a matter of law and public policy, this Court should set aside the District Court's Budget Order so as to discourage constructive denial of counsel in this and future capital post-conviction cases in the federal court system. Further, it should grant the relief requested by counsel for Petitioner.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font, size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2016, I electronically filed the foregoing amici curiae brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the Court's CM/ECF system.

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