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the powerful bases that would have supported a life sentence. And there has never been any examination of Mr. Lee's strong claims of innocence.

FACTS AND PROCEDURAL HISTORY

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

Between the first and second trials, Mr. Lee sought removal of two public defenders, Bret Quals and Bill Simpson, because of a conflict of interest after a breakdown in the attorney client relationship. Petition for Writ of Habeas Corpus, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 1 at 3-4. This t, Cir ch Cu0( )10n en3 Tc 0 Tw (32 0 Td (cv)Tj 0 Tc11P <</MCID[r)-1(e(o)-1e 5.63 0 Td [(P)-410.01 T45(c)

African American defendant charged with the murder of a white woman, as a “hunter” whose “prey were the people of Jacksonville,”

> incoherent questions. His speech is slurred. He stumbled in the Court Room. As a friend of the Court, and I think it's our obligation to this Court and to this Defendant that he have competent counsel here today, and I don't—That's just my request of the Court, Your Honor.

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

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

an *Atkins* claim and experts will be needed to present it." Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 18. In his private correspondence, Mr. Lambert urged Ms. Horan to consider a funding structure where the Federal Public Defender's office would agree to finance the experts for appointed state counsel so that they could obtain the necessarily evaluations. *See* Ex. No. 3.

Ms. Horan opposed Mr. Lambert's motion to oppose her withdrawal by disclosing that her close "out of work" personal relationship with Mr. Lambert created an actual conflict with her continued representation of Mr. Lee. Response to Motion to Withdraw as Attorney, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 19. Her contemporaneous notes reflect that she also was concerned with the lack of available counsel in Arkansas who could competently investigate the case given that the small number of qualified attorneys had conflicts. Ex. No. 4. Ms. Horan attempted to recruit the NAACP Legal Defense Fund to take the case, explaining that an *Atkins* claim had been raised, and that his case "also presents the opportunity to set the standard for mental retardation litigation in Arkansas for the death row population here." *Id*.

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

5:01-cv-0377 (E.D. Ark.), ECF No.

chain of custody of the DNA evidence to be tested, or (3) have *pro bono* counsel from the Innocence Project appear *pro hac vice* by telephone, even though Innocence Project counsel was prepared to argue and otherwise make a detailed proffer regarding the State's misrepresentations of fact, law, and DNA science -- all issues central to Mr. Lee's claim of actual innocence and his entitlement to testing under the DNA statute.

LEGAL STANDARD

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

ARGUMENT

For more than twenty years, Ledell Lee has been denied any meaningful assistance of counsel during post-conviction proceedings in both state and federal court. This Court has once recognized the extraordinary deprivation that has befallen Mr. Lee, recalling a previous mandate in *Lee III*. Newly discovered facts demonstrate that, instead of redressing the failings identified in *Lee III*, subsequent Rule 37 counsel have only worsened Mr. Lee's plight. Meritorious claims have gone unlitigated. Necessary filings have been neglected. And the very real probability that Ledell Lee is innocent of the crime for which he may be put to death has gone uninvestigated. Most recently, even though there is *no* dispute that advanced DNA technology could now

directly contradict the only forensic evidence offered by the State against Mr. Lee – and further identify the person who actually committed this brutal crime through a search of the national DNA databanks – the Circuit Court compounded the lapses of his prior counsel, and summarily declined to permit such testing. In ruling that Mr. Lee's motion was untimely filed because his wholly ineffective post-conviction counsel failed to do so on his behalf, the Court failed to give Mr. Lee access to the scientific evidence of innocence that this State's legislature intended under the Statute's plain terms.

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

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

While this Court has recognized that "ordinary claims of ineffective assistance of counsel" would not normally justify recalling a mandate, "the extraordinary circumstances presented in *Lee* [*III*]" stand as an exception to the rule. *Ward v. State*, 455 S.W.3d at 835–36. The performance of Mr. Lee's counsel over the past decade has been nothing more than a continuation of those extraordinary circumstances, resulting in the bar's total failure to provide Mr. Lee even a shred of the representation to which he is entitled under Arkansas law.

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56, 57 (discussing "[n]otable examples of counsel's troubling behavior);

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

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

- Among the other evidence Mr. Coleman and Mr. Glover failed to put on was anything relating to the trial judge's conflict of interest and his extramarital affair with the prosecuting attorney. Compounding the injury to Mr. Lee, Mr. Coleman discredited the argument in briefing to this Court in *Lee IV*, then—despite stating he would

618(a)(1). And yet his previous Rule 37 counsel neither had Mr. Lee examined by an expert in psychiatrics or neuroscience, nor did any investigation into Mr. Lee's medical and social history—either of which would have revealed the serious mental disabilities under which Mr. Lee continues to suffer.

1. Mr. Lee demonstrates significantly subaverage general intellectual

5th grade level. Watson Decl. ¶

socially mature beyond the level of a 6 year old." Nat'l Org. on Fetal Alcohol Syndrome, *FASD: What the Justice System Should Know About Affected Individuals*, https://www.nofas.org/wp-content/uploads/2014/05/Facts-for-justice-system.pdf (last visited Apr. 16, 2017).

Mr. Lee's Fetal Alcohol Syndrome exemplifies the Supreme Court's reasoning behind *Atkins*. Individuals with "disabilities in areas of reasoning, judgment, and control of their impulses . . . do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306. The justifications for the death penalty—retribution and deterrence—cannot be served by executing people with intellectual disabilities because they are less culpable and do not commit premeditated crimes. *Id.* at 319. This holds true for individuals with Fetal Alcohol Syndrome. Research shows that individuals with Fetal Alcohol Syndrome, like Mr. Lee, have abnormal frontal lobe development that impairs executive functioning and makes it more difficult to develop the level of culpability for the death penalty. *See* Richard S. Adler, et al.,aS7.14[dw4TJ Ao2.2a4lc 0.08815(A)82o [(i)-2(.57 0 T(l)Ms)-o t12(m)-2(iS10(ol)18(10(306)-10-15(t)4(h)

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

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ascertain even the simplest of patterns, he is unable to function independently. *See id*. ¶ 31. Additionally, Mr. Lee is mild to moderately impaired regarding problem solving. *Id.* ¶ 34. He "performed well below expectations" in problem solving activities. *Id.* Mr. Lee cannot determine salient aspects of a problem or devise solutions, even when given feedback. *Id.* Mr. Lee's inability to solve even simple problems displays his limitations in the skill areas of self-care, home living, use of community resources, self-direction, work, leisure, health, and safety.

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

B. Previous post-

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

Trial counsel appropriately made a motion for funds for a psychiatric expert to assist Mr. Lee in "presenting evidence of factors of [sic] mitigating against imposition of a sentence of death." Tr. at 80. Trial counsel insisted that the expert was necessary to "explore every avenue in order to establish the existence of potentially mitigating factors." *Id.* Trial counsel later abandoned this request, stating that an expert—"someone in mitigation, for some sort of mitigation, mental capacity, that type of thing"—would only be necessary "[d]epending on how the IQ thing comes out." *Id.* at 729. An IQ score is of course important for exploration of intellectual disability, but mental illness and other mitigation in no way hinge on IQ. This conflation and abandonment of Mr. Lee's right to independent and ex parte investigation was deeply defiin48(o)10(n)10(o)10(7(-5( )]TJ .T3(t)1.T3(t)1.T3(t)1.T3(t)1.Tt)1.Tte)6(n) e-2(C0)10(d)1(s)t dennnestig(v)6(e1.T3(t))-15(el)-6
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This evaluation was deficient under *Ake* for two reasons. First, the evaluation aimed to establish competency, not intellectual disability. *Id.* at 155 (evaluating Mr. Lee's "capacity to appreciate the criminality of his conduct"). The aims of evaluations for competency and intellectual disability are different; one can be competent to stand trial and intellectually disabled, or incompetent to stand trial but with average intellectual functions. The Arkansas Supreme Court explained that such capacity evaluations are "obviously not broad enough to cover everything a defendant might raise as a 'mental defect' basis of mitigation." *Coulter v. State*, 304 Ark. 527, 541 (1991). Accordingly, the Eighth Circuit held that a capital defendant like Mr. Lee who receives only a competency examination is deprived of his right to a psychiatric expert for the defense under *Ake*. *Starr*, 23 F.3d 1290.

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

Mr. Lee's previous post-conviction counsel never investigated whether his trial counsel was ineffective in abandoning the request for a psychiatric expert under *Ake*. A brief survey of the trial record makes this information, and thus trial counsel's error, clear. Given what has now

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

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

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

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

Mr. Lee's current counsel recently hired mitigation specialist Elizabeth Vartkessian, Ph.D., who determined that Mr. Glover and Mr. Coleman hired an investigator named Matilda Buchanan, who federal habeas counsel suggested conducted the mitigation investigation. *See* Traverse, *Lee v. Hobbs*, No. 5:01-cv-0377 (E.D. Ark.), ECF No. 94 at 27 (referring to "mounds of valuable mitigation evidence that they had simply ignored," citing to Mr. Lee's letter to state habeas counsel which referenced Ms. Matilda Buchanan's "400 pages of very important investigated [sic] evidence to support my claims").

Ms. Vartkessian has, however, carefully reviewed state habeas counsel's files, which included Ms. Buchanan's materials, but no materials from Ms. Croy. She uncovered no evidence

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

the first time. A preliminary investigation reveals evidence "of some adaptive functioning limitations, a history of family mental illness and disease, as well as experiences of living in extreme poverty, neglect, abuse and familial dysfunction." Vartkessian Decl. ¶ 56. Those findings are elaborated in detail in Ms. Vartkessian's declaration, and include the following findings:

1. Fetal Alcohol Spectrum Disorder (FASD): Dr. Vartkessian noted upon meeting the petitioner, "physical characteristics of FASD . . . includ[ing] small eye openings, eyes that are very far apart, ears that looked pointed and folded over as if there was something biological that happened when he was developing inside the womb, and a smooth and wide philtrum." Vartkessian Decl. ¶ 23. Based on her training and experience, she believes this is indicative of FASD. Her preliminary investigation found corroborative evidence that petitioner's mother, who was 16 years-old when she gave birth to petitioner, consumed alcohol during other pregnancies. *Id*. at ¶ 36. To date, no birth records, medical records of the petitioner during his youth, or prenatal or other medical records of his mother have been obtained.

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

3. Prior IQ scores: During his time at the juvenile detention center, petitioner recalls having taken two IQ tests. Both of these tests would have been given during his "developmental

> (2) Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse or domestic violence; poverty, familial instability, neighborhood environment and peer influence; other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences. . . .);
>
> (3) Educational history (including achievement, performance, behavior and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof and activities[.] . . .).

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

Mr. Lee's counsel simply failed to investigate potential avenues for mitigation. This failure to provide Mr. Lee with competent, conflict free counsel started at his initial trial, continuing into both his Rule 37 and federal habeas proceedings.[5] Mr. Lee has fetal alcohol syndrome, significant brain damage, and intellectual disability (either mild or borderline). He was in special education, and repeated the seventh and eighth grades.

However before last week, no expert had ever evaluated Mr. Lee's IQ or brain functioning and no investigator had even created a list of his family members. Additionally, upon review of Mr. Lee's file, it appears that no one ever in post-conviction or habeas moved for a psychologist or neuropsychologist to evaluate Mr. Lee. Mr. Lee's mitigation case only consisted of very brief pleas for mercy from a few friends and family and the testimony of psychologist Robin Rumph. As stated above, Mr. Lee's counsel also failed to follow standard initial mitigation investigation steps, such as failing to interview his family or to request crucial records relating to his past. Vartkessian Decl. ¶ 29, 42. This failure to conduct a thorough investigation, resulting in superficial knowledge of Mr. Lee's history from a narrow set of

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

Petition for DNA Testing, Exh. XX (Affidavit of Charlotte Word, Ph.D.) (explaining protocols and utility of reexamination of shoes for bloodstains suitable for DNA testing). More than merely raising a due process claim regarding bad faith destruction of the two bloodstains,

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

In his closing arguments during the guilt phase of the guilt phase of trial, the prosecutor

was blood, but that he was unable to conduct further testing to determine the origin of the blood. At Mr. Lee's trial, the State asked the jury to infer that the positive results of the blood testing supported its contention that Mr. Lee had murdered Ms. Reese. Mr. Lee further seeks to test a hair collected at the crime scene and identified by the state's expert at trial as one "intact Negroid head hair," and hair "fragments" also collected from the scene; the jury was told that the state's expert could not include or exclude the defendant as the source of these hairs. This hair and blood evidence was not previously subjected to DNA testing by the State or by Mr. Lee.

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he had an opportunity to have his new counsel – much less a qualified DNA expert – examine the evidence to determine if it is suitable for DNA testing and confirm chain of custody. As such, this is clearly a case where, if Mr. Lee is executed without the opportunity to conduct a simple DNA test on the evidence used to convict him, "a denial of the motion [for DNA testing] would result in manifest injustice." § 16-112-202(10)(B)(iv). The mandate should be recalled with an order directing testing under the DNA statute, or, in the alternative, with instructions to the Circuit Court to conduct a full evidentiary hearing on these issues.

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

This Court should consider the undeniable merits of Mr. Lee's innocence claim in determining whether he has been afforded a full and fair opportunity to prove his innocence with DNA evidence before he is executed. Notably, in its Response to the DNA petition below, the State did NOT deny that the DNA testing Mr. Lee seeks on the hair and blood evidence has the scientific potential to establish his factual innocence. It instead argued that the prosecution's original, largely circumstantial case against him was (in the State's words) so "overwhelming" that DNA testing was *unlikely* to turn out in his favor, and thus, he should be denied the right to have the test conducted at all. That is both incorrect as a factual matter (given that numerous individuals exonerated through DNA testing appeared far more "guilty" based on the evidence at trial than Mr. Lee), and is not a relevant inquiry under the DNA Statute in any event.

Mr. Lee can readily establish what the statute *does* require: that he (1) "identify a theory of defense" consistent with the defense he presented at trial that could establish his actual innocence, and (2) demonstrate that the results "may create new, material evidence" that would

support that theory of defense, and "raise a reasonable probability" that he did not commit the crimes of which he stands convicted. *See* §16-112-202 (6) (theory of defense), and (8)(B) (potential to establish reasonable probability of innocence).

Mr. Lee consistently maintained at trial and since that time that he was not the perpetrator of this heinous crime. His counsel argued that the State had no credible physical or other evidence placing him at the scene, and that he was misidentified by the inconsistent, unreliable eyewitnesses who testified for the State. Moreover, the State has always contended – and the record supports a finding – that a lone African American male was seen entering and exiting the victim's home the day she was killed. The only issue in dispute – at trial, and now – is whether Mr. Lee was that man. Thus, §16-112-202 (6) is easily satisfied. *Cf. e.g.*, *Bieneny v. State*, 504 S.W.3d 588 (Ark. 2016) (petitioner whose defense was that he was accessory, rather than principal, to crime not eligible for DNA testing under statute).

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

Indeed, the testing that Mr. Lee seeks on the root of this hair is so fundamental to the investigation of criminal culpability that it is routinely used by law enforcement to identify and prosecute criminal defendants in the modern era. *See, e.g.*, *State v. Alexander*, 194 So.3d 33 (La. Ct. App. 2nd Cir. 2016) (affirming conviction for murder based principally on DNA profile of defendant obtained from root of hair on victim's corpse, which led to his identification as suspect through CODIS database search); U.S. Dept of Justice, Off. Justice Programs, *What Every Law Enforcement Officer Should Know About DNA Evidence*, at 2 (discussing how DNA from "a single hair" inside victim linked to suspect "provided critical evidence in a capital murder prosecution), *available at* https://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf. Such testing has also been used to exonerate the factually innocent -- including, for example, Innocence Project client Randolph Arledge of Texas, who served more than thirty-two years in prison for a rape and murder he did not commit, before DNA testing conducted on a root of a hair found on clothing in the victim's car yielded a "hit" in CODIS to another convicted felon. Following the hit, Texas prosecutors investigated the new suspect and agreed to Mr. Arledge's immediate release and dismissal of all charges against him. *See* Innocence Project: Randolph Arledge, *available at* https://www.innocenceproject.org/cases/randolph-arledge/ (last visited April 18, 2017).

b. The State's Trial Evidence in No Way Defeats Mr. Lee's Entitlement to DNA Te0 Tw

explains why, despite the obvious brutality of the crime and sympathetic victim, Mr. Lee's first trial *resulted in a hung jury* at the guilt-innocence phase. Thus, for the State to claim that before he is executed, Mr. Lee is not entitled to a simple DNA test – one that could finally put its evidence to the test of modern science – belies the intent of the Legislature in enacting this landmark statute.

There are also important public safety interests to be served by a recall of the mandate to permit DNA testing. If Mr. Lee is actually innocent of Ms. Reese's murder, then the real perpetrator of this brutal crime has not yet been brought to justice. That individual may still be at large, or incarcerated but pending release, and thus putting other members of the public at risk of future violence. The potential for post-conviction DNA testing to identify the real perpetrator of a serious crime is not speculative: in fully 29% of the post-conviction DNA exonerations

disabled and possibly innocent man. A recall of this Court's mandate in *Lee IV* is necessary to prevent final, irreversible, and manifest injustice.

Respectfully submitted,

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