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## Burying Our Mistakes

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## BURYING OUR MISTAKES

JENNIFER MERRIGAN AND JOSEPH PERKOVICH\*

### PROLOGUE

Tuesday, January 31, 2017, at 5:45 p.m. CST: Thirty-six-year-old Mark Christeson sits in a suicide watch cell, at the Eastern Diagnostic, Reception and Correctional Center in Bonne Terre, Missouri. He is due to die in little more than hour. He sits on the telephone with his attorneys, who just learned from the Supreme Court clerk that his last appeal had been denied. Before the prison cuts off the call—without notice—Mark’s counsel try to explain that all of his appeals are finished, and thus he will soon die. Mark does not understand the machinations his lawyers are attempting to explain. But he is worried about how his execution will affect others—his family and his lawyers. He wants his family, especially his brother Billy, sister-in-law, Kathy, and their three children, to know how much he loves them. And he is confused; he cannot understand why there is no way to appeal from the U.S. Supreme Court’s denial or why the governor will not change his mind after already denying clemency. His lawyers are perplexed too. In the two years leading up to this moment, the state and federal courts in Missouri had jettisoned all but a veneer of judicial process, preempting any meaningful review of numerous Constitutional violations. What transpired in that span, and during the preceding decades of his case, made sense really to no one on that final call, but for vastly different reasons.

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\* Jennifer Merrigan and Joseph Perkovich are principal attorneys of the Phillips Black, Inc., a nonprofit, public interest law practice, and are adjunct assistant professors of both the Saint Louis University and Washington University law schools. This essay is a case study of the capital case of Mr. Christeson, whom Missouri executed at the tail end of a wave of twenty executions that occurred between November 2013 and January 2017. This account is from an interested party, counsel for Mr. Christeson during his final years. The authors acted as Mr. Christeson’s pro bono counsel during 2014 and, in 2015, were appointed to represent him, along with associate attorney Kristin Swain, which they did until his execution in 2017. This submission aspires to set forth the basic contours of the case, shedding light on the actual operation of Missouri’s state and federal courts in relation to the condemnation of a native son. See *Rushing To Execution – Ethical Issues and Procedural Barriers in Christeson v. Roper*, ABA DEATH PENALTY DUE PROCESS REVIEW PROJECT, [https://www.americanbar.org/groups/crsj/projects/death\\_penalty\\_due\\_process\\_review\\_project/events\\_meetings.html](https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/events_meetings.html) [<https://perma.cc/QSS4-S62B>].

## INTRODUCTION

The crime in this case was tragic and incomprehensible. The unspeakable events of that winter day in 1998 remain uncertain, enveloped in confusion. The loss of three lives, a mother and her two children, and the enduring grief, trauma, injustice, and pain for those who loved them cannot be measured. On display in this case is the inability of a human endeavor such as the justice system to deliver succor for those forced to survive this kind of horror. For those consigned to surviving an inconceivable human loss, our public institutions are wanting. This reality is only exacerbated in this instance because the actual facts of how this crime transpired, let alone its impetus, are likely to forever remain uncertain and made even more so by the judicial system. As outlined below, the legal proceedings for this case lacked the basic adversarial testing and due process that our system, under law's promise, requires.

The death penalty, under our constitutional law, does not operate to condemn people merely based on the aspects of the crime itself. Instead, our Constitution requires the sentencer to consider the “compassionate or mitigating factors stemming from the diverse frailties of humankind.”<sup>1</sup> At the core of these decisions is the fundamental principle that our system reserves the death penalty for the worst of the worst, those rare individuals who are underserving of mercy.<sup>2</sup>

It is well established that even a “fatalistic and uncooperative” client “does not obviate the need for defense counsel” to conduct mitigation investigation.<sup>3</sup> Mark Christeson was far from uncooperative; as his final attorneys had learned, beginning from the first meeting with him in May 2014, Mark desperately wanted the assistance of counsel and had languished in prison for nearly a decade without any entity or individual—neither the federal courts nor court-appointed counsel—considering his most rudimentary rights. What is more, he desperately needed counsel, because of his profound personal deficits that foreclosed any ability to protect his legal interests within the context of federal habeas corpus procedure. Mark's deficits emerged—rather, his final counsel began to uncover the broad outlines of his disability, cognitive impairments,

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1. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *see also Rompilla v. Beard*, 545 U.S. 374, 377, 393 (2005) (holding that a capital defendant's lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase); *Wiggins v. Smith*, 539 U.S. 510, 536–38 (2003) (explaining that had the jury been confronted with evidence, there was reasonable probability that it would have returned with different sentence); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding defendant was denied his constitutionally guaranteed right to effective assistance of counsel when his attorneys failed to investigate and present substantial mitigating evidence during sentencing phase of capital murder trial).

2. *Roper v. Simmons*, 543 U.S. 551, 568–69 (2005).

3. *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (per curiam).

brain injuries, and extraordinary trauma and related ailments—during what would become the final thirty-two months of his life.

In October 2014, the U.S. Supreme Court stayed Mr. Christeson's execution minutes before Missouri was set to carry it out and, in January 2015, the high Court summarily reversed the Eighth Circuit Court of Appeals, leading to its remand to the Western District of Missouri for further proceedings.<sup>4</sup> In the aftermath of these dramatic and rare events, the lower federal courts' disdainful deprivation of expert services for Mr. Christeson constructively denied his right to representation under the federal statute that the Supreme Court had enforced in his very case, under 18 U.S.C. § 3599.<sup>5</sup> The Supreme Court had overturned the Eighth Circuit by a vote of seven to two in order to permit conflict-free counsel to adduce evidence of Mark's "severe cognitive disabilities," yet his final counsel were systematically denied the use of the experts necessary to take information from the records and from the scores of witnesses who had observed Mark—vital, multi-generational factors of his life, from infancy to adolescence and through the second half of his life, which he spent at the Potosi Correctional Center in Mineral Point, Missouri.

#### I. BACKGROUND<sup>6</sup>

Many aspects of Mark's life demanded mercy. He was born into a family with a multi-generational history of pervasive incest and pedophilia. Sixteen of the men in his family, spanning generations, committed sex crimes against children. Many of Mark's relatives had been civilly committed, arrested, diagnosed, or forced to register due to sexual offenses against children. Eventually, however, each victimizer was allowed to return to the family. Records reflect that Mark's own "father,"<sup>7</sup> William, complained in mandated counseling, imposed after being diagnosed and criminally charged as a pedophile, that he much preferred to sleep with Mark, his one-year-old son, then

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4. Christeson v. Roper, 135 S. Ct. 891, 896 (2015).

5. 18 U.S.C. § 3599 (2012) (providing expert testimony upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant).

6. In the course of Mr. Christeson's representation subsequent to the Supreme Court's remand, his counsel conducted scores of witness interviews and extensive, multigenerational records collection. This amassed evidence of severe predation upon Mark, as a child, was only exacerbated upon his entry, as a teenager, to the Potosi Correctional Center in Mineral Point, Missouri—the home of Missouri's death sentenced prisoners—where he was preyed upon, mercilessly sexually exploited, and traded among powerful prisoners. The following section is based on these witness interviews and records collection. *See generally* Rule 60(b)(6) Motion to Reopen Final Judgment Dismissing Habeas Corpus Application as Untimely at 27–41, Christeson v. Roper, No. 4:04-cv-08004-DW (W.D. Mo. Aug. 28, 2015), ECF No. 125.

7. Mark loved his father, William, who was perhaps the closest thing to a caretaker he ever experienced in his childhood. William was married to Mark's mother, Linda. Mark, however, was conceived from a liaison between Linda and William's brother, John. Thus, biologically, the man Mark knew as his father was his uncle, and one of Mark's uncles was actually his biological father.

his wife. Despite the exploitation Mark suffered from William, Mark understood his father to be the most reliable caretaker and source of affection in the vulnerable and marginal childhood he spent mainly in rural Missouri, interrupted by temporary migrations to the California desert for seasonal agricultural work. Mark's mother suffered her entire life from severe mental health problems, including schizophrenia and intellectual disability, and also sexually preyed upon her young son. During Mark's infancy and early childhood, family members repeatedly caught his mother putting his penis in her mouth.

After the death of his father when Mark was twelve years old, an adult cousin took custody of Mark after his mother acquiesced to her poor mental health and to the cousin's perennial desire to take charge of the children throughout the family. The state of Missouri's family services department endorsed the arrangement. Thus, Mark spent his adolescence with his extended family, or clan, living on an unincorporated piece of land in southern Missouri, where the state's eyes were not prying.

Subsisting in Saint James, Missouri from gasoline-powered generators supplying electricity to old school buses and shacks, Mark and the other children in his family were simply passed around from pedophile to pedophile, exposed from a very early age to extreme sexual violence by their caretakers, who also gamed the family services system for compensation from, in effect, exploiting these children. During Mark's adolescent years, his replacement caretaker, his adult cousin whom he and other children called "Uncle," spent his nights in Mark's bed instead of the one he nominally shared with his wife.

The unremitting sexual trauma at the hands of those responsible for his welfare and protection had tragic consequences for Mark's psychological constitution. Society is becoming more aware of the grave effects sexual trauma has for such victims. Even a single event of this kind has lasting, profound consequences. The consequences of nightly depredations of the kind visited upon Mark, with the imprimatur of society as he could conceive of it in his isolated circumstances and limited mental capacity, are incalculable as a clinical matter. As a matter of empathy, the personal effects of such ceaseless violation are unfathomable.<sup>8</sup>

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8. See, e.g., MIC HUNTER, *ABUSED BOYS: THE NEGLECTED VICTIMS OF SEXUAL ABUSE* 45–47 (Lexington Books 1990); TONI C. JOHNSON & ELIANA GIL, *SEXUALIZED CHILDREN: ASSESSMENT AND TREATMENT OF SEXUALIZED CHILDREN AND CHILDREN WHO MOLEST* 92 (1993); Christine Heim et al., *Pituitary-adrenal and autonomic responses to stress in women after sexual and physical abuse in childhood*, 284 *J. OF THE AM. MED. ASS'N* 592, 592–96 (2000); A.B. Rowan & D.W. Foy, *Post-traumatic stress disorder in child sexual abuse survivors (1993): A literature review*, 6 *J. TRAUMATIC STRESS* 3, 3–20 (1993); George W. Woods & David Freedman, *Symptom presentation and functioning in neurodevelopmental disorders: Intellectual disability and exposure to trauma*, 1 *ETHICS, MED. & PUB. HEALTH* 348, 352 (2015); Mary Sykes Wylie, *The Long Shadow of Trauma*, 34 *PSYCHOTHERAPY NETWORKER* 20, 23–24 (2010). See generally

Mark Christeson was eighteen years old and trying to escape this physical, sexual victimization when he was arrested with his sixteen-year-old cousin, Jessie, in 1998. The two had fled to California, to the town where they spent periods of their childhood, stretches that were, by comparison, humane and, while outside the margins of society, less exploitive than the circumstances they endured during the bulk of their existences in Missouri. In Blythe, California, a small town in the Colorado Desert, law enforcement located them easily. Less than a year earlier, Mark had run away to this same place. The two had simply returned to the only other home they had known.

Both boys were cognitively impaired. Mark was a special education student with a substandard IQ of seventy-four. He suffered from absence seizures that caused him to fade out and then return to consciousness without even realizing he had ever lost it.<sup>9</sup> His limited capacity left him easily exploited and unable to navigate the brutal sexual violence of his home life, not that any child could hope to escape that isolation and exploitation from his caretakers.

Mark and Jessie had fled Missouri to California with no money and no plan. They managed to find the one person who had been purely kind to them, a bait and tackle shop owner in Blythe who had allowed Mark's mentally ill and impaired, homeless mother buy food and supplies on credit when Mark was a young child. During Mark and Jessie's final flight from Missouri, the two slept in a truck in an open field next to the shop. They were sitting ducks when the police came to arrest them.

## II. TRIAL

Mark's lawyers at trial presented none of the evidence of his horrific upbringing or severe limitations and impairments. Mark's public defenders knew essentially nothing about their client and did not spend time with him or his family in order to understand how an eighteen-year-old kid—with neither a criminal history nor a history of violence—could be involved in such a severe crime. In many ways, trial counsel took their cues from Mark's guardian, his adult cousin. During those years immediately leading up to Mark and Jessie's flight from Missouri, Mark's cousin had preyed upon Mark relentlessly, just as he had sexually victimized other vulnerable children within this extended family. He was eager to keep the family's secrets hidden from defense counsel. Mark's trial counsel posed little threat of exposing them.

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BESSEL VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* 7-89 (2014).

9. See, e.g., Andres M. Kanner, *Recognition of the Various Expressions of Anxiety, Psychosis, and Aggression in Epilepsy*, 45 *EPILEPSIA* 22, 22-24 (2004); Michael Trimble & Anthony Freeman, *An Investigation of Religiosity and the Gastaut-Geschwindsyndrome in Patients with Temporal Lobe Epilepsy*, 9 *EPILEPSY & BEHAV.* 407, 411 (2006); Adam Zeman, *Tales from the Temporal Lobes*, 352 *N. ENGL. J. MED.* 119, 119-21 (2005).

The unprepared and under resourced defense attorneys were no match for the special prosecutors brought in to secure a death sentence. After a change of venue due to pre-trial publicity, Mark Christeson was tried in Vernon County, Missouri. But local prosecutors did not carry out this capital prosecution. Instead, the case was handled by a special unit of attorneys dedicated to traveling throughout the state to step in for local prosecutors in county courthouses in order to conduct capital cases. Under the lead of Attorney General Jeremiah “Jay” Nixon, Robert Ahsens, one of the most infamous assistants in the unit, prosecuted Mr. Christeson’s case.<sup>10</sup> The unit had a well-established pattern and practice of gravely unethical and unconstitutional tactics. Many of these instances resulted in several wrongful murder convictions and resultant exonerations.<sup>11</sup> After Mr. Christeson’s trial, he had a perfunctory appeal to the Missouri Supreme Court, which affirmed the trial court’s judgment.<sup>12</sup>

### III. STATE POST-CONVICTION

In 2001, Mark’s case returned to his trial court,<sup>13</sup> where new public defenders were tasked with challenging additional constitutional violations in

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10. Kenny Hulshof led this division for years before being elected to Congress, securing the Republican nomination for Governor in 2008, and then losing to the Democratic incumbent and his former boss, Jay Nixon. See Alan Zagier, *Who killed Cathy Robertson?*, COLUM. DAILY TRIB. (Aug. 2, 2009), <http://www.columbiatribune.com/72ab0a1e-ef00-52c8-bc68-ffa6234d2357.html> [<https://perma.cc/Y8DN-3RUN>]. During that campaign, journalists uncovered Mr. Hulshof’s unethical indictment and prosecution of a teenager for murder in Chillicothe. *Id.* In Mark Woodworth’s case, the circuit judge in his county wrote Mr. Hulshof directly to solicit his unit taking over the murder case for the local prosecuting attorney in order to charge Mr. Woodworth at the judge’s urging and despite the county attorney’s determination that there was no basis to indict the teenager. *Id.*

11. Joshua Kezer spent sixteen years in prison before he was exonerated in 2009. In granting his writ of habeas corpus and ordering his release, the Cole County circuit court found that “the prosecutors repeatedly misstated the evidence” to the jury and hid exculpatory evidence. Findings of Fact, Conclusions of Law, and Judgment at 2–3, 19, 31–33, 44, *Kezer v. Dormire*, No. 08AC-CC00293 (Cole Cty., Feb. 17, 2009) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). Dale Helmig was exonerated in 2010 and released from prison after serving seventeen years, when a DeKalb county court judge ruled that the prosecutors knowingly presented false testimony to the jury and then used it to make “highly improper” arguments as to the defendant’s guilt. Findings of Fact and Conclusions of Law at 55, 79–80, 85, 87–89, *Helmig v. Denny*, No. 09DK-CC00110 (DeKalb Cty., Nov. 3, 2010). Richard Clay’s death sentence and conviction were vacated in 2001 by a federal district court because the prosecution lied to the jury about the existence of a plea deal with a state’s witness. *Clay v. Bowersox*, 367 F.3d 993, 997 (8th Cir. 2004).

12. *State v. Christeson*, 50 S.W.3d 251, 273 (Mo. banc 2001).

13. See *Christeson v. State*, 131 S.W.3d 796, 799–802 (Mo. banc 2004). Missouri’s mechanism for state post-conviction review from an unconstitutional or otherwise unlawful conviction and sentence requires a petitioner to “seek relief in the sentencing court for the claims enumerated.” MO. SUP. CT. R. 29.15.

his case.<sup>14</sup> The resulting perfunctory performance by these state post-conviction attorneys caused more harm to Mark's legal position. Many of Mark's family witnesses met the state post-conviction lawyers for the first time when they appeared, under subpoena, to testify at depositions at a Ramada Inn, testimony that typically took about ten or fifteen minutes from start to finish. Tragically, many of these family members held indispensable information for Mark's case at that point, information that would come to light from investigation conducted years later. But his lawyers from the state defender system, in effect, buried this information by serially lurching into the depositions without prior investigation or even discussions with the witnesses. At bottom, post-conviction counsel failed to expose the rampant incest and sexual abuse that Mark was subjected to and observed for his entire life (and which the attorney could have discovered had he only conducted a courthouse search).<sup>15</sup> Naturally, the family members did not volunteer information about the sadistic, often shameful, family history or Mark's own brutal upbringing.

Meaningful investigation and preparation of witnesses would have yielded considerable evidence of Mark's life history and acute intellectual, cognitive, and psychological limitations. By failing to engage the witnesses in a manner adhering to professional norms, the lawyers forfeited the evidence for all future appeals. Even worse, the Missouri public defenders superficially engaged witnesses just enough to provide a veneer of performance. Due to the ever-more onerous procedural barriers erected in the federal habeas corpus and state post-conviction schemes, this veneer resulted in procedurally sealing off the underlying substance, the actual evidence, from presentation and weighing by any court.<sup>16</sup> The basic legal consequences of this facade was the vitiation,

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14. Missouri Supreme Court Rule 29.15 governs motions to vacate felony convictions post-trial. It requires that such motions "include every claim known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall declare in the motion that the movant has listed all claims for relief known to the movant and acknowledging the movant's understanding that the movant waives any claim for relief known to the movant that is not listed in the motion." MO. SUP. CT. R. 29.15(c). Mr. Christeson's counsel facially raised multiple meritorious constitutional challenges, many of which would be thereby exhausted and thus available for presentation in a federal habeas application considered under the deferential review standard applicable under the 1996 amendments to the process. *See infra* note 16.

15. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (finding counsel ineffective for failing to examine the defendant's prior conviction file despite knowing that the prosecution planned to use the prior conviction to prove an aggravating circumstance).

16. Since enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the complexity of federal habeas corpus procedure has dramatically increased—and to the profound detriment of the habeas petitioner. The Supreme Court's so-called "fair-minded jurist" rule announced in *Harrington v. Richter*, 131 S. Ct. 770 (2011), to govern review of state court constitutional determinations is such that, "if the 'fair-minded jurist' rule were taken literally, it would mean that a federal court could *never* grant habeas relief." Stephen A. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly*



largely, of constitutional review by the Missouri courts and, prospectively, the federal courts, as discussed below. In the end, no judge ever addressed the grave constitutional deficiencies in Mark's case,<sup>17</sup> especially concerning the Eighth Amendment prohibition against executing the intellectually disabled and the Sixth Amendment right to the effective assistance of counsel in developing and presenting mitigation evidence.<sup>18</sup>

In fact, the "judge" who evaluated the meager claims litigated in Mark's post-conviction motion was not actually a "judge" at the time of his review. When Mark's state post-conviction proceedings began, his trial judge had been voted off the bench.<sup>19</sup> Yet, in an extraordinary determination, the Missouri Supreme Court ordered the former judge to preside over Mark's post-conviction litigation.<sup>20</sup> At the end of the proceedings, the former judge signed the State's lengthy proposed order without changing even a single punctuation mark or word. The only indication that he even looked at the document was that he signed and filled in the date, April 23, 2003, on the only lines the State had left for him to complete. The Missouri Supreme Court then affirmed this denial of relief.<sup>21</sup>

Five years had passed since Mark's arrest and significant changes to our death penalty jurisprudence had transpired. In June 2002, the U.S. Supreme Court, in *Atkins v. Virginia*, ruled it unconstitutional to execute the intellectually disabled.<sup>22</sup> The reverberations of that case were significant, particularly in Missouri. First, while *Atkins* was still pending, the state supreme court stayed the execution of Christopher Simmons due to the potential impact of *Atkins* on juvenile capital defendants. Once *Atkins* was decided, the Missouri Supreme Court vacated Mr. Simmons's death sentence—which it had previously upheld for decades—ruling that pursuant to *Atkins* it was unconstitutional to execute

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*Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1229 (2015) (emphasis in original). *Richter* states: "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond *any possibility for fair-minded disagreement*." *Id.* at 1228 (quoting *Richter*, 131 S. Ct. at 786–87) (emphases in original).

17. Order Denying Rule 60(b) Motion to Reopen Final Judgment Dismissing Habeas Corpus Application as Untimely, *Christeson v. Roper*, No. 04-cv-08004-DW (W.D. Mo. Mar. 9, 2016), ECF 150.

18. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that capital punishment of a mentally retarded individual constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution); *Rompilla v. Beard*, 545 U.S. 377, 393 (2005) (finding ineffective assistance of counsel in capital case where the defense did not request a file which would have shown that defendant's mental health and childhood presented mitigating factors for the penalty phase of his trial).

19. *Christeson v. State*, 131 S.W.3d 796, 800 (Mo. banc 2004).

20. *Id.*

21. *Id.* at 802.

22. *Atkins*, 536 U.S. at 321.

minors.<sup>23</sup> In so finding, the court thus held that *Atkins* had effectively overruled *Stanford v. Kentucky*, which had previously established that it was constitutional to execute juveniles.<sup>24</sup> Later, *Simmons v. Roper* was upheld by the Supreme Court.<sup>25</sup> In addition to these landmark decisions, in the time between Mr. Christeson's arrest and state post-conviction proceedings, the Supreme Court had issued several key opinions recognizing that it was unconstitutional for lawyers to fail to develop available mitigation evidence.<sup>26</sup>

All of these decisions should have helped Mark Christeson. Yet, his state public defenders failed utterly to litigate any of these critical changes in the law. Federal court should have been the place for Mark to finally secure meaningful review of the profound constitutional questions in his case. Mark's federal lawyers had an important and legally weighty story to tell, but they discarded his case before ever starting it.

#### IV. FEDERAL HABEAS CORPUS PROCEEDINGS

In the spring of 2004, Mr. Christeson's state post-conviction attorney from the Missouri Public Defender System contacted two private attorneys in the St. Louis area to determine their willingness to accept appointment under the Criminal Justice Act, pursuant to 18 U.S.C. § 3599, for Mr. Christeson's federal habeas case.<sup>27</sup> They agreed and Mark's state public defender drafted a nominal pro se motion for their consideration,<sup>28</sup> which he then had notarized in his office and filed for Mr. Christeson in the district court on May 14, 2004.<sup>29</sup> This was just three days after the denial of rehearing and the resumption of the one-year statute of limitations of which only thirty-one days had elapsed between the finality of the judgment on direct review and the initiation of the state collateral review proceedings under Mo. Rule 29.15.<sup>30</sup> On July 2, 2004, the district court provisionally granted the appointment motion, making it contingent upon the attorneys' establishment of their qualifications and the court's approval of a budget.<sup>31</sup> After each attorney entered his appearance, they filed the requisite

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23. State ex rel. *Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. banc 2003) aff'd sub nom., *Roper v. Simmons*, 543 U.S. 551 (2005).

24. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

25. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

26. See *Wiggins v. Smith*, 539 U.S. 510, 537–38 (2003); *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000).

27. Transcript of Hearing at 8, 47, *Christeson v. Griffith*, No. 16–2730, (8th Cir. Jan. 23, 2017). See generally 18 U.S.C. § 3599.

28. Transcript of Hearing at 47–49, *Christeson*, No. 16–2730, (8th Cir. Jan. 23, 2017).

29. Motion to Appoint Counsel, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. May 14, 2004), ECF 3.

30. *Christeson v. State*, 131 S.W.3d 796, 800 (Mo. banc 2004).

31. Order Provisionally Granting Motion to Appoint Counsel at 1, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. May 14, 2004), ECF No. 5.

budget on July 28, 2004.<sup>32</sup> Then the attorneys waited for the court to approve their budget and thereby complete their appointment. Between July and October, Mark's state public defender wrote him several times that the federal lawyers had contacted the judge's clerk and were waiting for the court to approve the budget so they "can then begin work on your case."<sup>33</sup>

The lawyers themselves had no contact of any kind—not a letter, a call, nor a visit—with Mr. Christeson until May 27, 2005,<sup>34</sup> over a year after they moved for appointment and, it would emerge, over six weeks *after their deadline* for his habeas corpus petition on April 10, 2005.<sup>35</sup> They did not file a motion to renew the budget, or anything else for that matter, until August 5, 2005—one year and ninety days after they moved for appointment—when they filed a hastily prepared fifty-two page habeas petition, which was largely cut and pasted from his state court petition.<sup>36</sup> That petition was filed four months after the one-year statute of limitations had expired. It was woefully late.

When the State challenged their pleadings for being very late, the attorneys defended themselves and offered highly convoluted and plainly incorrect explanations of a calculation of the limitations period that it appears, in fact, they had not actually calculated at the time.<sup>37</sup> Throughout this litigation over their blown deadline and in the ensuing years, they had next to nothing to do with Mark. After the courts ruled definitively that the filing had been very late and the case was dismissed without any review of the merits, the attorneys failed even to explain this dire situation to Mark. He had no understanding at all about his predicament for many years.

Had the lawyers admitted that they abandoned their client, as the record so clearly demonstrates, Mark could have had a chance at federal review. Instead, they repeatedly argued in defense of their own mistake. In April 2014, these lawyers, perhaps to clear their consciences, sought expert advice and contacted consulting counsel. They sought an assessment of what might be done at this very late date, in the midst of monthly executions in Missouri. Specifically, the Missouri Supreme Court had issued an order to show cause why the court should not set an execution date for Mr. Christeson.<sup>38</sup> By that point, the Supreme Court

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32. Order Provisionally Granting Motion to Appoint Counsel at 1–3, *Christeson*, No. 4:04–cv–08004–DW.

33. Transcript of Hearing at 63, 65, 84, 135–36, *Christeson v. Griffith*, No. 16–2730 (8th Cir. Jan. 23, 2017).

34. Transcript of Hearing at 80, *Christeson v. Griffith*, No. 16–2730 (8th Cir. Jan. 23, 2017).

35. *Christeson v. Roper*, 135 S. Ct. 891, 892 (2015).

36. Petition for Writ of Habeas Corpus at 52, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Jan. 31, 2007), ECF 10.

37. Motion to Alter, Amend or Set Aside Judgment at 4, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Feb. 12, 2007), ECF 54.

38. Order for Parties to File Written Notice at 1, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. May 27, 2014), ECF 63 (ordering each party to promptly file a notice with the court if an execution date was set for Mr. Christeson).

of Missouri had entered execution dates for six men whom, in turn, the State of Missouri executed between November 2013 and March 2014.<sup>39</sup>

The appointed attorneys requested that counsel meet Mr. Christeson at the Potosi Correctional Center and then sit down with them in their office in suburban St. Louis to discuss what might be done to litigate equitable tolling of the federal statute of limitations, the deadline they had missed in 2005. When new counsel arrived at the prison to meet with Mark, two things were immediately clear. First, he had absolutely no idea that his case had been dismissed seven years prior. His simple understanding was that his case was still in court, that his “appeals” were ongoing.<sup>40</sup> Second, he suffered from cognitive impairments. Judging from the initial budget filing by his appointed attorneys, the second observation was not a surprise. The federal lawyers initially had requested \$4,000 in their budget for a neuropsychological evaluation.<sup>41</sup> Yet,

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39. On July 1, 2013, the Honorable Mary Russell was sworn in as Chief Justice. Marshall Griffin, *Mary Russell To Become Chief Justice Of Mo. Supreme Court Next Week*, ST. LOUIS PUB. RADIO, June 26, 2013, <http://news.stlpublicradio.org/post/mary-russell-become-chief-justice-mo-supreme-court-next-week#stream/0> [<https://perma.cc/U8FP-JD5G>]. That day, the State renewed motions to set execution dates for Joseph Franklin and Allen Nicklasson in implicit defiance of a Missouri Supreme Court order entered August 14, 2012 concerning four pending motions by the State to obtain execution dates. Renewed Motion to Set Execution Date, *State v. Nicklasson*, No. SC79163 (Mo. banc. July 1, 2013). In that August 14, 2012 order, the Missouri Supreme Court had deemed it premature to set any execution during the pendency of discovery in a federal lethal injection challenge then active in the Western District of Missouri. Robert Patrick, *Missouri execution dates postponed because of suit over new drug*, ST. LOUIS POST-DISPATCH, Aug. 15, 2012, [http://www.stltoday.com/news/local/crime-and-courts/missouri-execution-dates-postponed-because-of-suit-over-new-drug/article\\_9f82e200-e672-11e1-b3eb-0019bb30f31a.html](http://www.stltoday.com/news/local/crime-and-courts/missouri-execution-dates-postponed-because-of-suit-over-new-drug/article_9f82e200-e672-11e1-b3eb-0019bb30f31a.html) [<https://perma.cc/YNG6-6ZCA>]. On August 14, 2013, exactly one year after the court’s lethal injection stay and with discovery in the federal lethal injection litigation still pending, the Russell Court set execution dates for both Mr. Franklin and Mr. Nicklasson. Both men were executed before the end of the year. Sam Levin, *Joseph Franklin, Serial Killer Who Shot Larry Flynt, Gets Execution Date in Missouri*, RIVERFRONT TIMES, Aug. 15, 2013, <https://www.riverfronttimes.com/newsblog/2013/08/15/joseph-franklin-serial-killer-who-shot-larry-flynt-gets-execution-date-in-missouri> [<https://perma.cc/JD3D-DB9W>]. This ushered in the aforementioned period of executions wherein the supreme court entered show cause orders at a near monthly interval to capital prisoners who had concluded their federal habeas proceedings. Todd C. Frankel, *Execution drug worked quickly, but debate persists on use*, ST. LOUIS POST-DISPATCH, Nov. 21, 2013, at A1, A6. As set forth below, it later emerged that Mr. Christeson’s lawyers wrote him about his show cause order dated April 7, 2014. Transcript of Evidentiary Hearing at 163-64, *Christeson v. Roper*, No. 04-08004 (W.D. Mo. Jan. 23, 2017), ECF 175. Instead of giving him a sober assessment of his dire situation, they offered assurances that the court was merely carrying out an “administrative” piece of housekeeping. *Id.*

40. Petition for a Writ of Certiorari at 8, *Christeson v. Roper*, 135 S. Ct. 891 (2014) (No. 14-6873).

41. Memorandum of Filing Proposed Budget, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. May 14, 2004), ECF No. 8.

despite obtaining the funding from the court, the lawyers failed to pursue any mental or psychological testing.

After meeting Mark, recruited counsel met with the appointed attorneys who had solicited their consultation. Recruited counsel explained that a review of appointed counsel's file of their representation of Mr. Christeson would be critical in determining whether equitable tolling of the statute of limitations could be litigated. Many boxes from Mr. Christeson's trial, direct appeal, and state post-conviction litigation, were arrayed in a conference room in the original lawyers' offices. But not a single document within that room came from the federal counsel's file pursuant to their 2004 appointment by the Western District of Missouri. After fruitless discussion about the need to assess their file and their actual conduct between their appointment and their late filing of Mark's federal habeas petition, the meeting ended.

The next day, on May 7, 2014, Mark's appointed attorneys filed their response to the Missouri Supreme Court's show cause order.<sup>42</sup> Despite being made aware, repeatedly, that their conflict of interest against Mr. Christeson foreclosed any assertions about their own conduct and actions relating to their appointment, the lawyers made a self-interested portrayal of those very things.<sup>43</sup> In the very same pleading, the appointed attorneys explicitly recognized their own conflict, even as they manifested it.<sup>44</sup>

Because the filing was adverse to Mr. Christeson, it created ethical obligations for counsel recruited to consult on this case. Ethics advice confirmed the need to alert the appointing court to the conflict of interest under which the 2004-appointed attorneys labored. Recruited counsel thus filed a notifying pleading, as an interested party, apprising the federal court of the misconduct of the appointed attorneys during the critical stage in Mr. Christeson's habeas case, when AEDPA's one-year statute of limitations was running.<sup>45</sup> The pleading explained that appointed counsel had abandoned their client prior to the expiration of the statutory time limit, and then, after the fact, attempted to hide that from the courts and from their client.<sup>46</sup> The abandonment and subsequent cover up created an unwaivable conflict of interest. The filing set forth the need for the district court to appoint new unconflicted lawyers to review the case and

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42. Appellant's Response to Order to Show Cause at 1, *State v. Christeson*, 50 S.W.3d 251 (Mo. 2001) (No. SC 82082).

43. *Id.* at 12–13.

44. *Id.* at 12; *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015) (“The court’s principal error was its failure to acknowledge [counsel’s] conflict of interest. . . . Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood.”).

45. Notice by Friends of the Court of Petitioner's Need for Substitution by Conflict Free Counsel at 1–35, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. May 23, 2014), ECF 62.

46. *Id.* at 3–8.

litigate on Mr. Christeson's behalf.<sup>47</sup> Pro bono counsel, acting as "friends of the court," submitted their availability to accept appointment while insisting that Mr. Christeson, at bottom, needed qualified, conflict-free attorneys to address these grave matters for the district court.<sup>48</sup>

In turn, the district court ordered the extant, conflicted lawyers, and the State, to respond to the pleading.<sup>49</sup> That order precipitated the objection to requesting the conflicted lawyers to argue (yet again) against the interests of their current client. The district court ignored the objection and Mr. Christeson's initial lawyers did exactly what was feared. In two separate filings, appointed counsel violated multiple ethical obligations to their client (including the attorney-client privilege) and continued to defend their conduct and actions, insisting that they had intentionally filed the petition 117 days after the actual deadline.<sup>50</sup> Appointed counsel also argued that it would be a waste of court resources to appoint out-of-district counsel for Mr. Christeson.<sup>51</sup> The district court ruled that new counsel was not needed.<sup>52</sup>

While litigating the district court's order in the Eighth Circuit, Missouri issued an execution warrant for Mr. Christeson, scheduling his execution for forty days later.<sup>53</sup> The Eighth Circuit declined to grant a stay of execution and, days before the scheduled date of October 29, 2014 at 12:01 a.m. CDT, summarily affirmed the district court without an opinion.<sup>54</sup> Pro bono counsel sought certiorari and a stay in the Supreme Court. Midday on October 28, 2014, Justice Alito entered a unique order for supplemental briefing on the question of whether Mr. Christeson had authorized pro bono counsel to represent him.<sup>55</sup> About ten hours after this simultaneous briefing by the State and pro bono counsel and about two hours before the appointed time for Mark's execution,

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47. *Id.* at 18–25.

48. *Id.* at 31–33.

49. Order for Written Response to Notice by Friends of the Court of Petitioner's Need for Substitution by Conflict Free Counsel, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. May 27, 2014), ECF 63.

50. Response to Court Order for Written Response at 1, 5, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. June 16, 2014), ECF 73; Response to Motion to Reconsider at 1–4, *Christeson v. Roper* No. 4:04-cv-08004-DW (W.D. Mo. June 20, 2014), ECF 75.

51. Response to Court Order for Written Response at 19, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. June 16, 2014), ECF 73.

52. Order Denying Motion to Appoint Substitute Counsel, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. July 10, 2014), ECF 78.

53. Warrant of Execution, *State v. Christeson*, No. SC82082 (Mo. banc. Sept. 19, 2014).

54. Judgment Denying Motion for Stay of Execution, *Christeson v. Roper*, No. 14–3889 (8th Cir. 2014).

55. Order for Supplemental Briefs, *Christeson v. Roper*, 135 S. Ct. 891 (2015) (No. 14–6873) (directing the parties to file supplemental briefs regarding whether Mark had authorized Phillips Black attorneys to move on his behalf).

the U.S. Supreme Court stayed the execution.<sup>56</sup> Three months later, the Court entered a per curiam opinion summarily reversing the Eighth Circuit, by a seven to two vote and remanding the case for appointment of conflict free counsel.<sup>57</sup> The Court held that the “appointed attorneys—who had missed the filing deadline—could not be expected to argue that Christeson was entitled to the equitable tolling of the statute of limitations.”<sup>58</sup> As the Supreme Court explained,

Christeson’s only hope for securing review of the merits of his habeas claims was to file a motion under Federal Rule of Civil Procedure 60(b) seeking to reopen final judgment on the ground that AEDPA’s statute of limitations should have been equitably tolled. But [original counsel] could not be expected to file such a motion on Christeson’s behalf, as any argument for equitable tolling would be premised on their own malfeasance in failing to file timely the habeas petition.<sup>59</sup>

As the Court observed, that malfeasance had led one renowned ethical expert to opine: “if this was not abandonment, I am not sure what would be.”<sup>60</sup>

Two months later, the Eighth Circuit remanded the case to the district court, which terminated the appointment of the attorneys appointed nearly eleven years prior and appointed formerly pro bono counsel to serve under 18 U.S.C. § 3599 as the conflict-free counsel to which the Supreme Court had adjudged Mr. Christeson was entitled.<sup>61</sup> Pursuant to this order, new counsel prepared a budget requesting funds to cover the necessary investigation and expert assistance.<sup>62</sup>

Two things had to be established for the courts to reopen Mr. Christeson’s federal habeas application. First, as the Supreme Court had observed, pursuant to *Holland v. Florida*, “[t]olling based on counsel’s failure to satisfy AEDPA’s statute of limitations is available only for ‘serious instances of attorney misconduct.’”<sup>63</sup> Second, *Holland* required that the petitioner, in the normal course, had to establish that he, individually, had been reasonably diligent in protecting his rights, despite being confined in prison.<sup>64</sup> This is a fact-bound inquiry and would require investigation into the capacity for diligence of Mr.

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56. Stay of Execution, *Christeson v. Roper*, 135 S. Ct. 891 (2015) (No. 14–6837).

57. *Christeson v. Roper*, 135 S. Ct. 891, 896 (2015) (per curiam).

58. *Id.* at 892.

59. *Id.* at 892–93.

60. *Id.* at 892.

61. Order Granting Substitution of Counsel at 1, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Mar. 17, 2015), ECF 110.

62. This budget proposal was filed ex parte and under seal. Order Granting Motion to File Budget Under Seal, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Apr. 20, 2015), ECF 121.

63. *Christeson v. Roper*, 135 S. Ct. 891, 891 (2015) (per curiam) (citing *Holland v. Florida*, 560 U.S. 631, 652 (2010)).

64. *Holland*, 560 U.S. at 649.

Christeson, who, the Supreme Court had observed “appears to have severe cognitive disabilities that lead him to rely entirely on his attorneys, [and] may not have been aware of [his petition’s] dismissal.”<sup>65</sup> The Court suggested, for the first time since its 2010 ruling in *Holland*, that the given petitioner’s individual impairments or lack of capacity to overcome the circumstances of his attorneys’ misconduct could warrant equitable tolling.<sup>66</sup>

In addition to Mark’s low IQ score and his special education records, there existed other evidence of impaired cognition and potential brain injury. Multiple prisoners described Mark as “slow” and “childlike” in his thinking. Mark suffered from absence seizures that caused him essentially to lose consciousness for moments at a time. Because of his youth, the details of his crime involving a mother and children, and his own status as a victim of child sexual exploitation, he was immediately sexually preyed upon when he entered the maximum-security prison. In addition to unrelenting sexual assault and trauma in prison, he was beaten nearly to death in 2000 by two prisoners, whose letter bragging about what they had done bizarrely was published by their local newspaper as a sort of celebration of rough justice.<sup>67</sup> All of these factors severely impacted Mark’s capacity to diligently assert his rights in 2004-2005 and undermined his ability to question his attorneys when they assured him that everything was fine. Correspondence reflects that even as the Missouri Supreme Court issued a show cause order moving toward issuing an execution warrant, the lawyers wrote to Mark that it “does not mean that an execution date will be set in your case anytime in the near future. . . . It appears that the State of Missouri [sic] is doing nothing more than administratively reviewing all of the capital cases pending in the state.”<sup>68</sup> As they wrote this, another client of theirs, William Rousan, was set to be executed just eight days later,<sup>69</sup> following the issuance in his case of the same show cause order Mr. Christeson had just received.<sup>70</sup> Mr. Rousan was, in fact, executed on April 23, 2014, as scheduled.

The district court denied the funding request submitted upon the case’s remand.<sup>71</sup> Instead, it approved a mere fraction of the substantiated budget (about 1/16 of the amount)<sup>72</sup> and, without reason, deprived counsel of the capacity to

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65. Christeson, 135 S. Ct. at 892.

66. *Id.*

67. The Associated Press, *Inmates Publicize Retribution Attack on Children’s Killer*, SE. MISSOURIAN, Apr. 18, 2001, at 4A; Editorial, *Prison Justice Takes a Pretty Nasty Turn*, SE. MISSOURIAN, Apr. 24, 2001, at B6.

68. Petition for a Writ of Certiorari at 7, *Christeson v. Roper*, 135 S. Ct. 891 (2014) (No. 14–6873).

69. Execution Judgment, *Rousan v. Lombardi*, No. 14–01919 (8th Cir. Apr. 28, 2014).

70. Show Cause Order 79566, *Rousan v. State*, 48 S.W.3d (Mo. banc Jan. 29, 2014).

71. Order Denying Budget at 2, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Apr. 29, 2015), ECF 122.

72. *Id.* at 1–2.



hire experts and conduct the requisite investigation. Subsequent filings proffered preliminary expert reports showing that serious red flags existed, and that follow up and full evaluations and assessments were necessary.<sup>73</sup> The experts analyzed testing data revealing that Mark was in the lowest brackets for memory, recall, language, and expression.<sup>74</sup> They opined that the impairments were a combination of organic brain dysfunction and the neurobiologic impact of life long trauma.<sup>75</sup>

Mark's capacity made him particularly vulnerable to the fraud perpetrated by his prior counsel. Prior counsel could not provide a single shred of evidence to suggest that they had undertaken any work on his behalf during the statutorily relevant, 334-day time period.<sup>76</sup> They could not produce a single piece of work product, nor a memo, note, time entry, bill, email, letter, or even a post-it created during that time. They never interviewed a single witness or expert. They had not met with or emailed resource counsel. They had absolutely no contact with Mr. Christeson during that time. Their complete absence of a file was proof, ipso facto, of their abandonment.<sup>77</sup> As legal expert Prof. Lawrence Fox observed, "no lawyer[ ] could handle a habeas case without taking notes, writing reviews of documents, preparing questions in advance of conducting depositions, researching and outlining legal arguments, summarizing case law, printing out key cases, and producing research memoranda."<sup>78</sup>

The district court denied the petition without holding a hearing.<sup>79</sup> Though the state provided no evidence – or even argument—about the attorneys' action during the relevant time, the court nonetheless found that there was not abandonment.<sup>80</sup>

The required application for a certificate of appealability ("COA"), pursuant to 28 U.S.C. § 2253 followed, asking permission to appeal the injustice.<sup>81</sup> This type of permission is routinely denied by federal courts, even in capital cases.<sup>82</sup>

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73. Rule 60(b) Motion at 37–41, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Aug. 28, 2015), ECF 125.

74. *Id.* at 39.

75. *Id.* at 34–45.

76. *See* Transcript of Evidentiary Hearing at 133–145, *Christeson v. Roper*, No. 04–08004 (W.D. Mo. Jan. 23, 2017), ECF 145.

77. Appellants Addendum to Brief Supplemental Report of Lawrence J. Fox at 4–6, *Christeson v. Griffith*, No. 16–2730 (8th Cir. Jan. 24, 2017).

78. *Id.* at 5.

79. Order Denying Rule 60(b)(6) Motion at 21, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Mar. 8, 2016), ECF 150.

80. *Id.* at 16.

81. Application for Certificate of Appealability at 10–103, *Christeson v. Griffith*, No. 16–2730 (8th Cir. Aug. 16, 2016).

82. *See, e.g.,* *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997) ("[I]n a capital case...the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.") (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)).

Thus, several organizations filed amicus petitions in support: The American Bar Association, represented by Skadden, Arps, Slate, Meagher, and Flom; a group of former judges, represented by Goldstein & Russell; and three national defense associations: the National Association of Criminal Defense Attorneys, National Legal Aid and Defender Association, and National Association of Public Defenders, represented by the Roderick and Solange MacArthur Justice Center in St. Louis Missouri.<sup>83</sup> The Amici argued that the district court's denial of funding represented a dangerous precedent – for Mr. Christeson as well as other indigent capital defendants – and part of a troubling pattern in certain states around the country undermining the access to justice and the rule of law.<sup>84</sup>

Three months later, on October 12, 2016, with the COA request still pending, the Missouri Supreme Court set another execution date for Mr. Christeson.<sup>85</sup> This was an unprecedented measure. The state's high court had not previously ordered an execution date *before* litigation under the federal habeas corpus statute had run its course in the federal courts.<sup>86</sup> The Eighth Circuit continued to entertain the request for two more months, until December 12, when it granted permission to appeal on four separate issues, and set a briefing schedule that extended six weeks beyond Missouri's scheduled execution date.<sup>87</sup> Nine days later, however, on motion of the State, the court expedited its schedule, condensing the two-month process into three weeks, thereby

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83. Brief of Am. Bar Ass'n as Amicus Curiae Supporting Petitioner, *Christeson v. Griffith*, No. 16–2730 (8th Cir. Aug. 17, 2016); Brief of Former Federal and State Judges as Amici Curiae Supporting Petitioner, *Christeson v. Roper*, No. 16–2730 (8th Cir. Aug. 17, 2016); Brief for Roderick and Solange MacArthur Justice Center, et al. as Amici Curiae Supporting Petitioner, *Christeson v. Roper*, No. 16–2730 (8th Cir. Aug. 19, 2016).

84. See, e.g., Brief for Roderick and Solange MacArthur Justice Center, et al. In Support of Petitioner at 1, 31–32, *Christeson*, No. 16–2730.

85. Warrant of Execution, *State v. Christeson*, No. SC82082 (Mo. banc. Oct. 12, 2016).

86. Further, in Mr. Christeson's case, the U.S. Supreme Court had stayed his 2014 execution date and ultimately remanded the case to the lower federal courts, thereby triggering a Missouri Supreme Court rule providing for the exhaustion of the right to relief before the setting of a new date. MO. SUP. CT. R. 30.30(c) ("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.") Since this precedent in *Christeson*, the Missouri Supreme Court entered an execution date for Mr. Russell Bucklew on November 21, 2017 despite ongoing federal court action pursuant to a U.S. Supreme Court stay of execution. See *Bucklew v. Lombardi*, 783 F.3d 1120, 1122 (8th Cir. 2015). Mr. Bucklew received another stay of execution from the U.S. Supreme Court on the day of his scheduled execution. *Bucklew v. Precythe*, 17–3052, March 20, 2018.

87. Order Granting Certificate of Appealability, *Christeson v. Griffith*, No. 16–2730 (8th Cir. Dec. 13, 2016).

compressing the timetable to conclude briefing before the execution date imposed by the state court two months prior.<sup>88</sup>

The crux of the argument on appeal was that the district court needed, at the very least, to hold a hearing on the issue of abandonment. That court's factual finding that the attorneys had not abandoned Mark was not only unsupported by the evidence, it was actually contrary to the only evidence in the record and the determinations made by the U.S. Supreme Court in this very case. Apparently recognizing the efficacy of the COA application, and perhaps to protect itself from another reversal, the Court of Appeals interrupted its accelerated briefing schedule and, in a bizarre turn of events, granted the defense's longstanding request for an evidentiary hearing, remanding for that limited purpose while expressly retaining jurisdiction over the appeal.<sup>89</sup> Briefly, it appeared that the circuit court was contemplating meaningful process. But less than 120 minutes later, before it had received the mandate or even electronic notice of the appellate court's order, the district court took the extraordinary step of ordering an evidentiary hearing to occur less than 48 hours later.<sup>90</sup> By the following morning, before court opened, discovery motions were filed seeking the requisite, targeted production for a meaningful hearing, specifically requesting copies of the lawyers' calendars, billing records, telephone records, as well as the identity of their former paralegals or assistants in order to prove that they had not been working on the case during the time in question.<sup>91</sup> The district court denied the motions and denied a continuance, giving no credence to the problems resulting from allotting only forty-one hours' notice of the hearing and

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88. Order Granting Expedited Appeal, *Christeson v. Griffith*, No. 16–2730, (8th Cir. Dec. 22, 2016).

89. *Christeson v. Griffith*, 845 F.3d 1239, 1240 (8th Cir. 2017), as amended (Feb. 6, 2017).

90. Order Granting Evidentiary Hearing, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Jan. 18, 2017), ECF 160.

91. Motion for Discovery at 8-9, *Christeson v. Roper*, No. 4:04–cv–08004–DW (W.D. Mo. Jan. 19, 2017), ECF 165. Had the district court granted discovery, a stay of execution would almost certainly have been necessary. In considering the district court's denial of the motion, it must be noted that the "good cause" standard for obtaining discovery under Rule 6(a) of the "Rules Governing Section 2254 Cases in the United States District Courts" is lower than, and subsumed within, the standard to obtain an evidentiary hearing, as a habeas petitioner may be entitled to Rule 6 discovery before he is entitled to an evidentiary hearing. *See* Rules Covering § 2254 cases, 28 U.S.C.A. foll. §2254 R. 6(a) (2010); *Blackledge v. Allison*, 431 U.S. 63, 80–83 (1977) (noting the district court's power to conduct discovery under Rule 6 and that petitioners are "entitled to careful consideration and plenary processing of [claims], including full opportunity for presentation of the relevant facts," but declining to order an evidentiary hearing) (quoting *Harris v. Nelson*, 394 U.S. 286, 298 (1969)); *accord* *East v. Scott*, 55 F.3d 996, 1000–002 (5th Cir. 1995) (holding a state habeas petitioner "has shown good cause for discovery under Rule 6" although the Court "need not . . . decide whether [petitioner] is entitled to an evidentiary hearing," noting that a "hearing is required . . . only if the record reveals a genuine question of fact" and "[a]llegations that are facially sufficient to entitle a petitioner to discovery under Rule 6 might not entitle a petitioner to an evidentiary hearing").

impeding the ability of Mr. Christeson's counsel, let alone witnesses, to physically attend the hearing.<sup>92</sup>

Mark's prior lawyers, however, wasted no time getting to the court. The Attorney General's Office immediately called them (*ex parte*) and instructed them to travel across the state from St. Louis. Eleven days before the execution date, without even receiving service of a subpoena as their enduring duty to Mr. Christeson would require—at a minimum—before they could give testimony adverse to their former client, they got in their cars and traversed the state for five hours to get to Kansas City to testify. These men had taken eleven months to meet their client for the first time but managed to set aside everything else instantly in order to testify against him in proceedings days before his execution date.

On the stand the lawyers swore up and down that they had not abandoned their client, but that they had intentionally calculated the date by rejecting the stated law of the jurisdiction—*law explicitly invoked in their own motion seeking appointment in this case*—and using a conflicting interpretation from a wholly different federal circuit.<sup>93</sup> They conceded that they had failed to meet him for 329 days after appearing in the case.<sup>94</sup> They unequivocally defended their total lack of a file: they swore that in preparing a federal habeas petition for a capital petitioner they did not take a single written note—not even a post-it note—and thus had nothing to produce.<sup>95</sup> They both testified that they met only in person and thus generated not a single email during their representation of Mr. Christeson.<sup>96</sup> They testified that they conducted research only in books and physically at a law library, thus never producing an electronic record from any service such as Westlaw, Lexis, or Pacer.<sup>97</sup> Despite having drafted and filed a budget (and repeatedly calling the clerk to check its status), they never kept a time entry for their activities.<sup>98</sup> They testified that they never intended to bill because they never billed in any capital cases.<sup>99</sup> Efforts on cross-examination to impeach them with documentary proof of their bills (public records available from the district court's own dockets) were prevented by counsel for the State's objections, which the district judge sustained.<sup>100</sup> All told, the judge sustained all

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92. Order Denying Motion to Reschedule Evidentiary Hearing, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. Jan. 19, 2017), ECF 167.

93. Transcript of Evidentiary Hearing at 23–24, *Christeson v. Roper*, No. 4:04-cv-08004-DW (W.D. Mo. Jan. 23, 2017), ECF 175.

94. *Id.* at 79–80.

95. *Id.* at 55–58, 151.

96. *Id.* at 85.

97. Transcript of Evidentiary Hearing at 55–56, *Christeson*, No. 04-08004.

98. *Id.* at 59.

99. *Id.*

100. *Id.* at 87.

of the Assistant Attorney General's objections and denied all ten of Mr. Christeson's counsel during this hearing.<sup>101</sup>

In sum, the testifying lawyers asked the court to simply take their word. After the five-hour hearing, the judge took a brief recess and returned to the bench in order to do just that. The court read fact-findings into the record, finding credible all of the foregoing positions asserted by the testifying lawyers.<sup>102</sup>

When the case returned to the federal appeals court in St. Louis, one judge openly acknowledged that the lawyers' defense, if true, would still amount to "deficient" performance, but that, because they "allegedly conducted some legal research, cursory as it may have been" it did not amount to serious misconduct.<sup>103</sup> Thus, the lawyers' excuse was sufficient to eliminate the development and presentation of all of Mr. Christeson's possible legal claims, thereby sending him to his death with no federal review of any violations of the Constitution. With that, the Circuit Court of Appeals, which had kept the case pending for seven months prior, issued a short denial seven days after the hastily ordered hearing, on the Friday afternoon before the Tuesday execution date.<sup>104</sup> This left next to no time to present the case to the U.S. Supreme Court.

The Supreme Court had intervened once in this case, but it would not step in a second time, manifesting a resistance to exercising its inherent supervisory powers.<sup>105</sup> Only Justice Ginsburg dissented from the denial of the stay application, singularly expressing her disquiet with the lower courts' treatment of the case since its remand two years prior.<sup>106</sup>

## V. EPILOGUE

January 31, 2017, 5:37 p.m. CST: The Supreme Court denies Mark Christeson's final legal action and application to stay his execution.<sup>107</sup> Minutes later, the governor's office issued its statement denying clemency.<sup>108</sup> It is now 6:40 p.m., and the prison has cut Mark's phone line, leaving his lawyers stunned and frantically calling the prison. The correctional officers will come and escort Mark to his gurney. There, a Department of Corrections Official will read his

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101. *Id.* at 25–134.

102. Transcript of Evidentiary Hearing at 176–79, *Christeson*, No. 04–08004.

103. *Christeson v. Griffith*, 860 F.3d 585, 591 (8th Cir. 2017) (Murphy, J., Concurring) ("Here, counsel allegedly conducted some legal research, cursory as it may have been. Minimal or mistaken legal research does not equate to serious attorney misconduct, however.")

104. *Id.* at 590.

105. See SUP. CT. R. 10 ("Considerations Governing Review on Certiorari").

106. *Christeson v. Griffith*, 137 S. Ct. 910, 910 (2017).

107. *Id.*

108. Jim Salter, *Missouri executes Mark Christeson for 1998 murders of mother and two children*, ST. LOUIS POST-DISPATCH (Feb. 1, 2017), [http://www.stltoday.com/news/local/crime-and-courts/missouri-executes-mark-christeson-for-murders-of-mother-and-two/article\\_c926a284-6f54-5496-941b-9f9beac1d553e.html](http://www.stltoday.com/news/local/crime-and-courts/missouri-executes-mark-christeson-for-murders-of-mother-and-two/article_c926a284-6f54-5496-941b-9f9beac1d553e.html) [<https://perma.cc/PXF3-C4JU>].

final words: “let my family know I love them with all my heart and I’m more than blessed to have them in my life. . .and thank God for such an amazing family.”<sup>109</sup> At 6:57 p.m. the Missouri Department of Corrections will begin the lethal injection protocol. At 7:05 p.m. he will be pronounced dead.

By virtually any measure, Mark’s family had failed him. His life before prison presaged his life within prison. He was prey, relentlessly exploited and violated. Yet he was much more than a mere victim. Mark succeeded in seeing the love that his troubled family had shown him in the years leading up to his death. For their part, they saw beyond this crime and embraced the human being Mark was, a man capable of love and generosity of spirit, a person of great kindness and warmth. So too should our system of laws and the officers of its courts have fully considered the human dignity of Mr. Christeson and the totality of circumstances concerned in his case. But that simply did not happen.

In 1998, the same year of the crime for which Mark was condemned, Judge Blackmar wrote about another deeply troubled life: “The easiest course of action might be to execute him as a means of extermination or euthanasia, but there should be a limit to the process of burying our mistakes. The state must bear some responsibility for the situation which has developed.”<sup>110</sup> So too, we bear responsibility for the tragic crime and death of Mark Christeson, who spent half of his life in a maximum-security prison before, just shy of his thirty-seventh birthday, he met his executioner.

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109. Marshall Griffin, *Missouri executes Mark Christeson for 1998 triple slayings*, ST. LOUIS PUB. RADIO (Jan. 31, 2017), <http://news.stlpublicradio.org/post/missouri-executes-mark-christeson-1998-triple-slayings#stream/0> [<https://perma.cc/32LV-B2EU>].

110. *State v. Parkus*, 753 S.W.2d 881, 890 (Mo banc. 1988).

