No. 16-2730
CAPITAL CASE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK A. CHRISTESON
Appellant/Petitioner

v.

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Appellee/Respondent

BRIEF OF FORMER FEDERAL AND STATE JUDGES AS AMICI CURIAE IN SUPPORT OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
THE HONORABLE DEAN WHIPPLE
Case No. 4:04-cv-08004

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AMICI CURIAE BRIEF

Amici curiae former federal and state judges respectfully submit this brief in support of appellant Mark Christeson.[1]

INTEREST OF THE AMICI

Amici are a group of former federal and state judges.[2] They include trial and appellate judges, conservatives, liberals, and others from across the political spectrum and the nation—including the state of Missouri. Notwithstanding their diversity, amici share a deep familiarity with the judicial system and a strong interest in maintaining its fairness and public legitimacy. These values are never more salient than in capital cases, where judges have the particularly heavy responsibility to ensure that the process is beyond reproach.

Many of the amici filed a brief in the previous appeal in this case, and another in support of Christeson's petition for a writ of certiorari. In those briefs, amici argued that the district court's prior decision—which denied Christeson the benefit of conflict-free substitute counsel—was contrary to Supreme Court precedent and to basic notions of fairness and justice. The Supreme Court agreed, and issued a summary disposition requiring the

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[1] Pursuant to Federal Rule of Appellate Procedure 29, amici certify that no counsel for any party authored this brief in whole or in part, and that only the amici and their counsel provided funds used in preparation of this brief. All parties have consented.

[2] A complete list of the amici appears as an addendum to this brief.

appointment of substitute counsel. *See Christeson v. Roper*, 135 S. Ct. 891, 896 (2015). The Court explained that on remand, Christeson "should have [the] opportunity" to present his case for equitable tolling, aided by counsel capable of presenting these arguments fully and fairly. *Id*. Indeed, even the dissent understood the Court's opinion to mean that "conflict-free substitute counsel should have been appointed for the purposes of investigating the facts related to the issue of equitable tolling and presenting whatever argument can be mounted in support of a request for that relief." *Id*. at 896 (Alito, J., dissenting).

On remand, however, Christeson received no genuine opportunity to present his tolling argument. His attorneys were denied even minimally adequate resources to investigate and present their theory of the case, *i.e.*, that Christeson had been abandoned by his counsel, and lacked the mental capacity to do anything further on his own. After the attorneys nevertheless made their best effort to file a motion for relief, the district court denied Christeson relief in a stilted and one-sided opinion.

Because the decision below, like the decision before, threatens amici's interest in a fair criminal justice system, they respectfully submit this amicus brief urging this Court to grant a certificate of appealability and reverse.

ARGUMENT

Mark Christeson is an indigent citizen with severe cognitive impairments who grew up in horrific conditions and now faces a death sentence because his court-appointed attorneys abandoned him as he sought to file his first federal habeas petition. It took a Supreme Court decision for Christeson to gain access to attorneys who are willing to advocate zealously on his behalf. But despite the Supreme Court's clear admonition that Christeson should now have a fair opportunity to present the case for equitable tolling of the AEDPA statute of limitations, he has not been afforded one. Instead, his attorneys were denied adequate funding to investigate and present his argument—and then denied tolling in an opinion that smacks of partisanship for the prosecution. The result is that Christeson, through no fault of his own, still has never had a federal court consider the merits of his first federal habeas petition.

This Court should grant Christeson's application for a certificate of appealability, reverse the district court's decision denying Rule 60(b) relief, and remand the case for review on the merits. To the extent there are ambiguities in the record, the Court could in the alternative vacate and remand with instructions to provide a workable budget for the Rule 60(b) motion, and to hold an evidentiary hearing on the key factual questions.

I. The District Court's Denial Of Rule 60(b) Relief And Equitable Tolling Should Be Reversed.

While Rule 60(b) relief is reserved for extraordinary circumstances, this case presents them. Christeson's original court-appointed attorneys abandoned him for the entire time period that mattered, performing no meaningful work on his case until after the deadline to file his first federal habeas petition had already lapsed. They compounded that abandonment by presenting meritless rationalizations for their malfeasance to the district court. Making matters even worse, they failed to advise their client about what had happened, leading him to believe for a period of years that he had an active federal habeas case when he did not. Moreover, Christeson's cognitive disabilities prevented him from second-guessing or supervising his attorneys, nor was he capable of preparing his own petition. Under these circumstances, there was nothing more that Christeson could reasonably have been expected to do to ensure that his first federal habeas petition was heard on the merits.

A. This Case Presents Extraordinary Circumstances Warranting Both Rule 60(b) Relief And Equitable Tolling.

The standard for Rule 60(b) relief overlaps substantially with the standard for equitable tolling of the AEDPA statute of limitations. Both require Christeson to show that this case involves extraordinary circumstances warranting unusual relief.

Equitable tolling decisions "must be made on a case by case basis." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (quotation marks omitted). In *Holland*, the Court rejected the Eleventh Circuit's standard for tolling, which required "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part," as "too rigid." *Id*. at 649. The Court explained that instead of applying such a per se rule, courts should determine whether "specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id*.

The Court held that "at least sometimes, professional misconduct that fails to meet the Eleventh Circuit's standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Id*. at 651. It cited numerous examples, including a case in which the attorney "effectively abandoned" his client, another in which the attorney "failed to perform an essential service, to communicate with the client, and to do basic legal research," another where the attorney "denied client access to files, failed to prepare a petition, and did not respond to his client's communications," and another in which the attorney "retained files, made misleading statements, and engaged in similar conduct." *Id*. (citations omitted). The Court distinguished these cases from "garden variety claim[s] of excusable neglect," which would "not warrant equitable tolling." *Id*. at 651-52.

The Supreme Court then catalogued Holland's counsel's errors and, quoting a brief from legal ethics experts, explained that counsel had "violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never to abandon a client." *Id*. at 652-53. Although the Court remanded for further fact finding, it simultaneously acknowledged that if the facts were as alleged, they would likely qualify as "extraordinary." *Id*. at 652.

The Court considered a specific type of extraordinary circumstance—abandonment—in *Maples v. Thomas*, 132 S. Ct. 912 (2012). There, a capital inmate's attorneys quit their law firm without notifying him and without arranging for other attorneys to handle his case. As a consequence, the inmate missed a state appellate deadline. When he raised a federal habeas claim, the state argued that procedural default barred it, but the Supreme Court found that the inmate had shown "cause" for the default because his attorneys had effectively abandoned him. The Court recognized that the ordinary rule in procedural default cases is that the client bears the risk of attorney error, but it held that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own

behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id*. at 924. The Court determined that Maples had shown cause because he never received any "warning that he had better fend for himself," and "[t]hrough no fault of his own, Maples lacked the assistance of any authorized attorney" during the appeal period. *Id*. at 927.[3]

The facts of this case are similarly egregious. As Lawrence Fox—a visiting professor of legal ethics at Yale Law School, the former chairman of the ABA Standing Committee on Ethics and Professional Responsibility, and the author of amicus briefs that the Supreme Court quoted in *Holland* and *Maples*—explained: "It would be hard to imagine a more clear-cut case of abandonment." D. Ct. Doc. No. 77-1, at 4. Christeson's original attorneys lobbied for their own appointment and then—having been appointed by the court to represent a man whose life was at stake—"they did not meet Mr. Christeson until . . . over a month after his petition was due . . . and nearly eleven months after [the district court] appointed them." *Id*. at 5. Any lawyer

[3] *Maples* did not modify or narrow *Holland*; instead, it analyzed a particular kind of extraordinary circumstance in a particular setting, *i.e.*, procedural default. As the Court explained in *Holland*, procedural default cases are different because they implicate federalism concerns that equitable tolling of the AEDPA statute of limitations does not. *See* 560 U.S. at 650. Thus, the rule that attorney errors are attributable to clients absent some breakdown in the agency relationship, which applies in procedural default cases, does not govern in tolling cases. In other words, abandonment is not a prerequisite to tolling, even if it is essential to a claim of cause for procedural default.

who had not abandoned his client could "not miss a one-year statute of limitations by 117 days." *Id*. at 4. But Christeson's original attorneys not only did so, they "perpetuated the abandonment by attempting to hide their misconduct and choosing to defend themselves at the expense of their client when their prompt withdrawal would have permitted replacement counsel to investigate and present . . . bases for equitable tolling." *Id*. at 5. In the process, the attorneys "revealed privileged attorney-client communications in support of their self-serving argument that they have acted as competent, diligent lawyers throughout Mr. Christeson's representation." *Id*. at 8. "An assault on loyalty and confidentiality does not get more unethical than this." *Id*.

In the previous appeal in this case, the Supreme Court essentially agreed with Mr. Fox's assessment. Describing the arguments that Christeson's original attorneys set forth *to oppose their own client's request for conflict-free counsel*, the Court explained that "[w]hile not every case in which a counseled habeas petitioner has missed AEDPA's statute of limitations will necessarily involve a conflict of interest, Horwitz and Butts' contentions here were directly and concededly contrary to their client's interest, and manifestly served their own professional and reputational interests." *Christeson*, 135 S. Ct. at 895. The Court compared this case to *Maples* and held that the considerations upon which the district court had relied to deny substitute counsel—including that the

original attorneys continued to represent Christeson in other matters—were "not substantial," and that Christeson's motion "was not abusive." *Id*. at 894. The Court further noted that Christeson "appears to have severe cognitive disabilities that lead him to rely entirely on his attorneys." *Id*. at 892.

On remand, however, the district court concluded that the original attorneys were merely negligent in calculating the deadline, and that their conduct did not amount to abandonment. D. Ct. Doc. No. 150, at 14-15. It credited the attorneys' self-serving arguments that they had relied on a "colorable" interpretation of the law to miscalculate the deadline, and it determined that Christeson had not been abandoned because his original attorneys "visited Christeson on May 27, 2005, which was ten weeks before they filed the Petition," and thereafter wrote to him once and visited him again two years later—as well as filed multiple documents after the petition. *Id*. at 15. Thus, the district court held, contrary to the Supreme Court, that "[t]he facts of this case do not resemble the abandonment and misconduct at issue in *Maples* and *Holland*." *Id.*

That reasoning is deeply flawed, for the reasons ably set forth in the Appellant's application for a certificate of appealability. But even if the attorneys' arguments can be deemed "colorable" in hindsight, that cannot excuse their decision to do nothing in the case for nine months when their

client's life was on the line. When, as here, an attorney seeks a court appointment to file a capital inmate's most important pleading, and then fails to conduct even the most basic legal research necessary to understand the scope of his obligations—let alone take any action to fulfill those obligations in a reasonable manner—that is, or at least ought to be, regarded as extraordinary in our system of justice. No reasonable attorney could have considered the state of the law in this circuit at that point in time and decided that it was a good idea to roll the dice with respect to tolling, especially when there were two attorneys assigned to the case, and they had the better part of a year to prepare a petition without risking a statute of limitations problem.

The district court's claim that Christeson's attorneys did not abandon him because they met with him on May 27, 2005, wrote to him three months later to inform him that they had filed the petition, and visited him two years after that is likewise unpersuasive, and indeed misleading. The district court does not mention that the first meeting occurred ten months after the attorneys had been appointed to represent Christeson, and one month after the petition had actually been due. Similarly, all documents the attorneys filed were after the tardy petition, *i.e.*, while the attorneys faced an "obvious conflict of interest." Prior to the deadline, it is not evident that the attorneys did *any* meaningful work on Christeson's case. As Mr. Fox explained, in language that the Supreme Court

quoted, "[i]f this was not abandonment, I am not sure what would be." *Christeson*, 135 S. Ct. at 892.

Moreover, abandonment—in the sense of a complete severance of the attorney-client relationship—is not the only "extraordinary circumstance" that justifies equitable tolling. Instead, as the Court held in *Holland*, tolling must be applied equitably on a case-by-case basis, and not in a rigid, categorical manner. 560 U.S. at 653. When attorneys fail to comply with multiple ethical norms, including their obligations to represent the client competently and to communicate with the client, extraordinary circumstances may arise. *Id*. at 652-53. This case is a stark example of exactly those failures.

Finally, even if Christeson's attorneys did not technically "abandon" him, the only effect that their lingering presence had in the case was to prevent him from obtaining relief. Their ongoing appointment masked the fact that nobody was actually advocating for Christeson; their efforts to mislead him gave him false hope, and their subsequent attempt to trade his life for their own reputations is perhaps the most extraordinary betrayal of a client possible by his appointed representative. Our system of justice cannot function if we are willing to attribute such gross attorney misconduct to the very clients who were victimized by it in the first instance.

B. In Light Of His Severe Cognitive Impairments, Christeson Was Reasonably Diligent In Pursuing His Rights.

In order to win his claim for tolling, Christeson must show that he exercised "reasonable diligence" in pursuing his rights. *Holland*, 560 U.S. at 653. "[T]he question whether a habeas petitioner has exercised due diligence is context-specific. The fact that we require a petitioner in one situation to undertake certain actions does not necessitate that we impose the same burden on all petitioners." *Wilson v. Beard*, 426 F.3d 653, 661 (3d Cir. 2005). Thus, the inquiry necessarily turns on the circumstances of each case.

Here are Christeson's circumstances: He has almost no education and a very low IQ, having failed or barely passed remedial high school classes. He does not know how to use computers, or understand legal concepts. His family has a long history of mental illness, and he has what the Supreme Court recognized as "severe cognitive impairments" stemming from more than a decade of physical, sexual, and emotional abuse during his childhood, followed by continued victimization in prison. *Christeson*, 135 S. Ct. at 892. The stomach-churning details were set forth in Christeson's Rule 60(b) motion. D. Ct. Doc. No. 125, at 18-37 (describing the near-constant abuse Christeson suffered throughout his childhood and its likely effects on Christeson's mental state and ability to safeguard his legal interests); *id*. at 38-53 (describing Christeson's cognitive disabilities and their effect on his ability to understand

his case or monitor his counsel); *id*. at 53-60 (describing Christeson's ongoing victimization in prison and its effects on his ability to advance his legal interests). A fair summary is that for his entire life, Christeson has been betrayed and violated by the very people who were supposed to care for him. He grew up in a dysfunctional trailer park surrounded by poverty, substance abuse, incest, and violence. He was regularly sexually molested from his infancy until the day that he committed the crime in this case; he has a history of head injuries from beatings; and he witnessed similar horrors happening to other children around him every day. After he was imprisoned, the abuse only continued as Christeson was the target of frequent physical and sexual assaults. Moreover, Christeson's access to legal resources in prison was exceedingly limited. *See* D. Ct. Doc No. 146, at 38-39. While a complete psychological evaluation was not performed, it is highly likely that this prolonged history of abuse deeply scarred Christeson and conditioned him to respond to danger with helplessness—preventing him actively from participating in his defense.

Still, Christeson has done what he is capable of doing and, when properly assisted, has moved his case forward. With the assistance of his state post-conviction counsel, Christeson took steps to initiate federal habeas proceedings shortly after his state application for postconviction relief was denied. His state attorney drafted and Christeson filed a motion to appoint federal counsel, which

noted that his "casefile, like most death penalty cases, is large and will require a substantial expenditure of time to review." D. Ct. Doc. No. 3, at 2. The motion noted that "[i]n *Snow v. Ault*, 238 F.3d 1033, 1033-36 (8th Cir. 2001), the Eighth Circuit ruled that under the AEDPA the time for filing my habeas corpus petition will commence running when rehearing is ruled on," and asked for the immediate appointment of counsel "to allow timely and thorough presentation of my claims to this Court." *Id*. at 3. Christeson's motion was granted. D. Ct. Doc. No. 5. The two attorneys, Eric Butts and Philip Horwitz, touted their qualifications in accepting the appointment. *See* D. Ct. Doc. No. 7, at 1-2; D. Ct. Doc. No. 9, at 1-2.

At that point, the representation was handed off from Christeson's state attorney to Butts and Horwitz. And Christeson's "severe cognitive disabilities . . . lead him to rely entirely on [those] attorneys." *Christeson*, 135 S. Ct. at 892. Indeed, the evidence in the record is especially clear that without the assistance of counsel, Christeson was lost at sea. His fellow prisoners made the following statements:

- "Mark cannot seem to understand any of the issues surrounding his case. He has absolutely no clue about anything legal. Everything is confusing to him." D. Ct. Doc. No. 125, at 42.

- "I cannot think of another inmate I have met in the past twenty years with less capacity to understand his situation." *Id*. at 43.
- "Each time that I spoke to Mark it was clear that he did not understand his legal case . . . He also had a difficult time communicating about his case. For example, when I asked him to write something for me related to his case, his writings were jumbled and did not make sense." *Id*.
- "Mark had no capacity to understand the most basic issues. He could not explain anything about his case or his situation in court. I do not think he can absorb the difference between state and federal court let alone that there are fixed procedures for federal habeas corpus." D. Ct. Doc. No. 146, at 40.

A clinical psychologist who conducted a "provisional and partial review" found that "Mr. Christeson would have had profound limitations in understanding his legal proceedings and effectively communicating with counsel. From the standpoint of his adaptive functioning, Mr. Christeson appears to have grossly lacked the mental capacity to have understood his legal interests in federal habeas corpus litigation." D. Ct. Doc. No. 125, at 52.

In light of the circumstances he faced, Christeson was reasonably diligent in pursuing his rights. With the assistance of his state post-conviction attorney, he timely filed his petition and timely sought the appointment of counsel. He even flagged the issue of the statute of limitations. Once Butts and Horwitz took

over the representation, it was eminently reasonable for Christeson—as an uneducated and imprisoned death row inmate with severe cognitive impairments—to rely on experienced, court-appointed counsel to file the petition on time.

The reasonable diligence inquiry—like all facets of equitable tolling—is a flexible one that must account for the circumstances of each case. Christeson had every reason to rely on his attorneys, and no reason to believe that he could add anything of value. Indeed, there is evidence in the record that Christeson lacked even the ability to monitor the calendar and calculate the deadlines. In light of his impairments, Christeson did all that was reasonably expected of him in order to ensure the timely filing of his petition: he promptly sought the appointment of experienced capital habeas counsel, on the understanding that they would timely file his petition.

Christeson's application for a certificate of appealability should be granted, and the district court's decision should be reversed.

II. The District Court's Funding Decision Was An Abuse Of Discretion.

If this Court does not reverse outright, it should nevertheless vacate and remand the district court's decision because the court denied Christeson adequate funding to investigate and present his tolling argument, and it should

instruct the district court to provide sufficient resources and hold an evidentiary hearing.

Our adversarial criminal justice system "is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). This principle applies with full force in federal habeas proceedings—and especially to first federal habeas petitions, the dismissal of which "denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996). Thus, Congress provided not only that petitioners shall have the right to counsel, but also authorized payment for investigative, expert, or other services that are "reasonably necessary for the representation of the defendant." 18 U.S.C. § 3599(f). The reason for these protections is obvious: "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

When attorneys lack adequate funds to investigate and prepare submissions in a capital habeas case, the adversarial process cannot perform its essential function of revealing the truth. In this case, the motion for Rule 60(b) relief and for equitable tolling raises new issues that require further factual

development—specifically issues relating to the scope of the original attorneys' abandonment of Christeson, and also a full inquiry into Christeson's ability to participate in the case. Christeson's current attorneys asked for approximately $160,000 to develop these arguments, including attorney's fees and expert witness fees, and were given a budget of $10,000.

Despite receiving merely 6.25 percent of the requested funding, Christeson's attorneys have done an admirable job of presenting his arguments. But it is fanciful to think that they have been able to develop their position adequately. Christeson's arguments for tolling require a detailed psychological and medical evaluation, and then the preparation of a cogent and thorough expert report, as well as a well-documented investigation into Christeson's life in prison. All of those require substantial time and money if the ultimate work product is to be helpful to the courts.

It is no response to argue that attorneys representing indigent defendants generally will not be compensated at their full rates. *See In re Carlyle*, 644 F.3d 694 (8th Cir. 2011). The issue here is not whether attorneys should be able to earn the same amount by serving indigent clients as they could by serving wealthy white collar defendants. It is instead whether attorneys facing the overwhelming resources of the government can marshal the resources necessary to advocate effectively for their clients. And it is whether the funding decisions

that district courts make in capital habeas cases reflect the complexity of the issues presented and the magnitude of our society's interest in ensuring that nobody is executed who does not deserve to be.

The point is especially acute as it relates to expert witnesses, investigators, and others who are not bound by the same norms of service as members of the bar. While many attorneys give generously of their time, or accept the Criminal Justice Act's reduced rates to do work that they feel is important, the same is not often true of the non-lawyer third parties who may hold the keys to success in court. *See, e.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (holding that defendants have a right of access to psychiatrists because "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense"). It is essential that budgets reflect the need to compensate these individuals so that attorneys can provide the vigorous presentation that courts need to make informed decisions.

Even if the district court had articulated a persuasive reason to reject the original $160,000 request, its effective denial of funding is inimical to the pursuit of justice. In any event, the district court provided essentially no explanation for its denial of funding—contrary to the Supreme Court's instructions. Indeed, even Justice Alito's dissent in this case recognized that the

import of the majority decision was that "conflict-free substitute counsel should have been appointed for the purposes of investigating the facts related to the issue of equitable tolling and presenting whatever argument can be mounted in support of a request for that relief." 135 S. Ct. at 896. By effectively prohibiting any meaningful investigation, the district court's funding decision frustrates the Supreme Court's remand order.

III. The District Court's Opinion Is Nakedly Partisan.

The result the district court reached in this case is unjust, but the tone of the opinion is equally disturbing. In criminal cases generally and capital cases in particular, judges must act as impartial arbiters, applying the facts to the law in a manner that gives the parties and society confidence that justice has been done. As the Supreme Court recently explained:

> [T]he appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.

Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016). The decision below, however, reads less like a judicial opinion and more like a prosecutor's brief. While it is inevitable that judges will emphasize the arguments that persuaded them, the opinion below crossed the line from analysis into advocacy by

focusing on irrelevant and inflammatory facts while dismissing Christeson's strongest arguments without considered analysis.

A few examples will illustrate the point. First, the district court dismissed Christeson's history of abuse—a central issue in the tolling inquiry—with the flippant statement that he had a "bad childhood." D. Ct. Doc. No. 150, at 18. On the other hand, the court spent three pages describing Christeson's underlying offense in the light most favorable to the prosecution—using language drawn almost verbatim from the Missouri Supreme Court's opinion in his direct appeal. Perhaps not coincidentally, the prosecution's brief opens the same way. *See* D. Ct. Doc. No. 137, at 1-4. That description, of course, is irrelevant to whether Christeson is entitled to equitable tolling. It appears in the opinion for one reason only: to extinguish any sympathy the reader might have for Christeson, paving the way for a denial of relief.

Second, the district court routinely made factual statements—even though it held no evidentiary hearing, and never so much as acknowledged the contrary evidence that Christeson presented. For example, the district court determined that Christeson had the wherewithal to participate in his federal habeas proceeding in part based on statements by other inmates saying that Christeson had the capacity to read, write, cook, watch television, and play

games. D. Ct. Doc. No. 150, at 18. But it ignored on-point statements by inmates denying Christeson's capacity to understand the legal proceedings.

Perhaps most alarming is the court's perfunctory rejection of Christeson's contention that his original attorneys deceived him about his case. The court dismissed Christeson's troubling allegations in a single sentence, stating that they "are not supported by actual facts, but by speculation and conjecture." *Id*. at 16. Yet Christeson advanced specific facts in support of his position—namely that when his current attorneys first visited with him in May 2014, Christeson "expressed the belief that his 'appeals' were ongoing and betrayed that he was unaware his federal habeas case had been closed in 2007 due to the late filing of his petition." D. Ct. Doc. No. 125, at 67. Another inmate similarly conveyed that "Mark thought he was still in his 'appeal period,' but it turns out that they were over and he had no understanding of this." *Id*. at 46. Moreover, "Christeson conveyed he had great difficulty communicating with appointed counsel and that his requests for assistance and information had been ignored." *Id*. at 67 n.43.

The district court's factual statements are especially disturbing because to the extent the record is underdeveloped, that is because the district court denied both the funding necessary to pay for more comprehensive mental health evaluations, and an evidentiary hearing. *See* Part II, *supra*. Indeed, the district

court's decision on funding itself contains further evidence of partiality for the prosecution. When Christeson's attorneys filed a Rule 59(e) motion urging the court to reconsider the effective denial of funding, the court responded with the flat declaration that "[t]he Motion has been considered and is DENIED for the reasons previously stated by the Court, and for the reasons stated in the Respondent's Suggestions in Opposition." D. Ct. Doc. No. 155. The district court's willingness to simply incorporate the prosecution's briefs by reference is extremely troubling in a capital case.

The district court's one-sided presentation is an affront not only to Christeson's rights, but to the integrity of the judicial process. When judicial opinions gloss over the losing party's arguments and evidence, they betray the appearance of bias. Even the possibility that a district court is biased in a death penalty case, however, is unacceptable. If our society is to base life and death decisions on the outcome of the adversarial process, we must have the utmost confidence that the decision makers are evaluating the arguments on their merits, and not to achieve a predetermined outcome. The district court's opinion shatters that confidence in this case.

While this point may not furnish an independent basis for reversal, it should encourage this Court to scrutinize closely the district court's characterizations of the record in determining whether relief or remand is

required. If the Court finds the appearance of bias, it should consider requiring a different district judge to adjudicate Christeson's case on remand. *Cf. Williams*, 136 S. Ct. at 1908 (holding that when a judge's actions "so endanger[] the appearance of neutrality," then "his participation in the case must be forbidden if the guarantee of due process is to be adequately implemented") (quotation marks omitted). The stakes are simply too important.

CONCLUSION

Mark Christeson's case involves a terrible crime, but also a top-to-bottom failure by our society to ensure safety and justice for our citizens. We failed Christeson's victims, and we also failed him. No child should have to grow up as he did, and no inmate in our custody should endure the abuses he suffers. The state court system failed him by refusing to account for mitigating circumstances that could have reduced his sentence. His original federal court-appointed attorneys failed him by missing the most critical deadline, and then by attempting to salvage their reputations at the cost of his life. And the district court in this case has failed him twice—first by refusing to appoint substitute counsel, and now by refusing to give substitute counsel a fair opportunity to advocate on their client's behalf.

This Court's decision presents an opportunity to redeem at least some of these failures by providing Christeson with a fair hearing on his petition. He

may prevail, or he may not, but our system owes him at least a chance to be heard before we take his life.

The decision of the district court should be reversed, or in the alternative vacated for an evidentiary hearing with an appropriate budget.

Respectfully submitted,

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Judge, United States District Court for the District of New Jersey (1996-2003); Magistrate Judge, United States District Court for the District of New Jersey (1976-1980)

Fern Smith
Judge, United States District Court for the Northern District of California (1988-2005); Judge, Superior Court of the State of California in and for the County of San Francisco (1986-1988)

Marsha Ternus
Chief Justice, Iowa Supreme Court (2006-2010); Associate Justice (1993-2006)

Sol Wachtler
Judge, New York Court of Appeals (1972-1992; Chief Judge, 1985-1992); Judge, New York State Supreme Court (1968-1972)

Alfred Wolin
Judge, United States District Court for the District of New Jersey (1988-2004)

Michael Wolff
Chief Justice, Supreme Court of Missouri (2005-2007);
Judge, Supreme Court of Missouri (1998-2011)

CERTIFICATIONS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations contained in Federal Rules of Appellate Procedure 29 and 32 because it contains 5662 words.

CERTIFICATE REGARDING VIRUS SCAN

I have scanned this brief for viruses and the brief is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Tejinder Singh