IN THE CIRCUIT COURT OF PULASKI COUNTY ARKANSAS
_____ DIVISION

PATRICIA YOUNG PLAINTIFF

V.

CASE NO. _____

THE JACKSONVILLE POLICE DEPARTMENT,
THE CITY OF JACKSONVILLE, ARKANSAS;
JOSEPH MCCULLOUGH, in his individual
And official capacities as Acting Chief of Police
Of the Jacksonville Police Department; and
BOB JOHNSON, in his individual and official
Capacities as Mayor of Jacksonville, Arkansas DEFENDANTS

COMPLAINT

Comes now, Plaintiff Patricia Young for her petition for injunctive and declaratory judgment and complaint for violation of the Arkansas Freedom of Information Act of 1967 ("FOIA"), seeking an order of this Court directing the release of physical evidence in Defendants' custody for DNA testing and fingerprint analysis. Ms. Young further requests a hearing on this petition within seven days pursuant to Ark. Code Ann. § 25-19-107(b). In support of this complaint, Ms. Young states:

PRELIMINARY STATEMENT

1. Ledell Lee was executed on April 20, 2017 for the 1993 murder of Debra Reese in Jacksonville, Arkansas. Mr. Lee maintained his innocence from the time of his arrest through his execution.

2. No physical evidence directly tied Mr. Lee to the murder of Ms. Reese. Instead, the State convicted Mr. Lee by vastly overstating the nature and significance of the limited forensic testing conducted at that time, including tests that its own experts admitted were ultimately "inconclusive." The State also relied heavily on alleged identifications of Mr. Lee by neighborhood eyewitnesses, even though that testimony contained notable inconsistencies in the witnesses' descriptions of the perpetrator.

3. Despite the grisly and high-profile nature of Ms. Reese's murder, the State had to put Mr. Lee on trial twice before convicting him. At Mr. Lee's first trial, the defense presented testimony from both acquaintances and family members who swore to his whereabouts during the extremely narrow window of time in which the murder occurred. Mr. Lee's alibi was also supported by time-stamped records from a local furniture rental store where Mr. Lee, accompanied by his brother, made a partial payment on the same day Ms. Reese was killed. This first trial resulted in a hung jury on the issue of guilt, but the State tried Mr. Lee a second time. The defense inexplicably called no alibi witnesses at the second trial, nor did it impeach the store clerk with his earlier testimony indicating the likely time of Mr. Lee's transaction, which, if correct, would have provided Mr. Lee with a complete alibi for the murder. Mr. Lee's second trial for the murder of Ms. Reese also began just one week after O.J. Simpson's October 1995 acquittal—perhaps the most closely-watched murder trial in recent American history, which ended in a verdict that polarized many Americans along stark racial lines. This time, the State obtained both a conviction and a death sentence for Mr. Lee—a Black man accused of murdering a white woman.

4. On February 27, 2017, after more than a decade without a single execution, Arkansas Governor Asa Hutchinson scheduled eight executions over eleven days in April because the State's on-hand lethal injection drug supply was expiring. Governor Hutchinson selected

Ledell Lee as one of the eight. The lawyer who had been newly appointed to represent Mr. Lee just months earlier was unprepared to make the case for a stay of execution. Indeed, over the course of more than two decades of litigation, none of Mr. Lee's prior defense counsel had conducted any meaningful investigation into his longtime claim of actual innocence. All overworked and under-resourced, and some battling addiction, disbarred, or conflicted, Mr. Lee's appellate lawyers failed to challenge many of the obvious holes and inconsistences in the State's case against Mr. Lee. Nor did they ask the courts to conduct any advanced forensic testing that could have proved Mr. Lee's innocence using techniques that were unavailable at the time of his trials.

5. In the days before his execution, new lawyers for Mr. Lee from the ACLU and Innocence Project conducted an expedited review of the trial record, and agreed to join Mr. Lee's counsel in an effort to obtain DNA testing. Even with limited time to review the record, the new lawyers quickly recognized that there were significant grounds to question Mr. Lee's guilt, given the inconsistencies in the witnesses' testimonies and logical gaps in the State's theory of the case. For example, the crime scene was spattered in blood from the repeated blows the killer inflicted on Ms. Reese—yet Mr. Lee was arrested wearing a white t-shirt and jeans that day, without a single drop of blood on them. Nor did any of the eyewitnesses whom the State claimed saw Mr. Lee in the neighborhood—some within minutes of when the murder occurred—see any blood on him, his shoes, or his clothing. Mr. Lee readily agreed to let the police search his house, but the police found no evidence of any kind that implicated him. The State took scrapings from under Mr. Lee's fingernails and found nothing incriminating. The State collected and analyzed multiple fingerprints from the crime scene, none of which came from Mr. Lee.

6. The courts declined to halt Mr. Lee's execution to allow for DNA testing. In the words of the federal District Court, Mr. Lee had "simply delayed too long" his request for DNA testing. The courts stayed the executions of the first three men scheduled in the spring of 2017, but allowed Mr. Lee's execution to proceed. The State of Arkansas took Mr. Lee's life on April 20, 2017, and Mr. Lee became the first of four executions carried out in a single week because of the expiration date of the State's drug supply.

7. Mr. Lee's execution has not put to rest the serious questions about his guilt. In the months since his execution, undersigned counsel have finally conducted some of the basic investigation into the State's case that Mr. Lee's court-appointed lawyers neglected to undertake while he was still alive. The results of this initial re-investigation are deeply troubling. Some of the nation's leading forensic experts have reviewed the trial evidence and—to the limited extent possible without a court order—independently reanalyzed that evidence. Their findings point to the troubling likelihood that Mr. Lee was, in fact, innocent of Debra Reese's murder—and provide powerful new grounds for this Court to allow the advanced DNA and fingerprint analysis that Mr. Lee was denied while he was alive.

8. The post-execution evidence of Mr. Lee's innocence is set forth in a series of expert affidavits attached to this Complaint. Plaintiff hopes this Court will review those affidavits in full, as they underscore the lack of reliability of the evidence used to convict Mr. Lee, as well as the questions that can be answered through additional forensic testing. Simply put, it is now clear that the State's forensic experts from trial misinterpreted the evidence in plain sight from Debra Reese's injuries and the crime scene, and their flawed opinions were further distorted by the State in its zeal to convict him of the crime.

9. For example, the State's experts mistakenly attributed a pattern injury on Ms. Reese's cheek to contact with a rug in the bedroom where her body was found, arguing that the perpetrator likely delivered the blows with a wooden tire club to her face while her face was against the rug. But the pattern on Ms. Reese's cheek is inconsistent with the rug's pattern (and is also inconsistent with the wooden club recovered next to her body). The direct fracture Ms. Reese suffered to her cheekbone also could not have occurred had her face been cushioned by the rug and struck from another angle, as the State contended. Her pattern injury and the fracture to her cheek are, instead, consistent with the perpetrator stomping his foot directly on Ms. Reese's face.

10. This finding is powerful evidence pointing to Mr. Lee's innocence because the shoes that he was wearing that day—indeed the very shoes that the State argued were the source of partial shoeprints on pieces of paper found next to Ms. Reese's body—*are incompatible with the injury pattern to Ms. Reese's face.* This finding, and other conclusions about the bloody crime scene and medical evidence reached by Dr. Michael Baden—considered by many to be the nation's leading forensic pathologist—powerfully corroborate Mr. Lee's claim of innocence.

11. And there is more. Before Mr. Lee's execution, none of his post-conviction counsel consulted an expert in footwear impression evidence. They failed to do so even though at trial, the State's expert told the jury that in his opinion, the soles of Mr. Lee's shoes were the "exact same size" and "same pattern" as those found on two partial shoeprints near the victim's bed—testimony that the prosecutor touted as a "home run" for the State's case against Mr. Lee. Yet these claims were incorrect, inflated and misleading. The State's trial expert appears to have lacked the basic qualifications and training to conduct this examination, having taken only a one-week FBI course that dealt in part with footwear comparison methods, with no indication that he received any subsequent training or casework supervision. More egregiously, the State's expert

(1) reached conclusions about the shoes' size that were not supported by the techniques he used; and (2) failed to note the presence of numerous, distinctive markings on the patterned soles of Mr. Lee's shoes—a well-recognized feature called "texturing"—which *do not appear* on the impressions of the shoeprints at the crime scene. Neither the jury that convicted Mr. Lee, nor the courts that reviewed his conviction and death sentence for over two decades, were aware of these serious deficiencies in the State's proof.

12. Similarly, none of Mr. Lee's post-conviction counsel ever engaged in more than a cursory review of the eyewitness testimony in the case. The jury was told that within hours of the murder, police located multiple eyewitnesses who reported seeing a suspicious Black male in the area just before and after Ms. Reese was killed (although they gave varied and contradictory descriptions of the suspect). Three of these witnesses identified Mr. Lee, while two did not. Now, one of the nation's leading experts in eyewitness misidentification has reviewed and reanalyzed this evidence. Her review has shown that (1) all three eyewitnesses who identified Mr. Lee had first been shown a photo lineup that was "shocking[ly]" biased against him, irrevocably tainting their identifications, and (2) the circumstances under which these witnesses viewed the suspect provided highly limited—and in the case of the key witness, simply impossible—conditions to make a reliable identification.

13. The foregoing new evidence raises deeply troubling questions about the shaky evidentiary pillars on which the State executed Ledell Lee. Thanks to advances in DNA and fingerprint technology, additional testing on physical evidence collected from the scene of Ms. Reese's murder can definitively answer the question whether Mr. Lee—or another, as-yet-unidentified individual—killed Debra Reese over 26 years ago.

14. Undersigned counsel's post-execution investigation has revealed the following:

a. The City of Jacksonville has retained a wealth of biological evidence that may contain the ***unique DNA profile of Ms. Reese's killer***. This evidence includes, *inter alia*, several "Negroid" hairs from the bedroom where the murder occurred, and fingernail scrapings highly likely to contain the assailant's DNA given the close-range and violent struggle that preceded her death. This evidence can now be tested with state-of-the-art methods unavailable at trial and compared to Mr. Lee's unique DNA profile. If he is excluded as the source, the results may be suitable for entry in the National DNA Index System ("NDIS" or "CODIS"), which could instantaneously compare the profile(s) entered against millions of convicted offenders and arrestees from around the nation—the same technology that has been used to exonerate *and* identify thousands of criminal suspects in recent years.

b. At least ***five latent fingerprints from key areas of the murder scene*** are of sufficient quality and detail as to be eligible for entry in the FBI's Next Generation Identification database ("NGI database"), which is part of the Automated Fingerprint Identification System ("AFIS"). Mr. Lee's post-conviction counsel were fully aware that none of the latent prints at the scene had been identified as his—in fact, the State's own expert excluded Mr. Lee from all prints taken from the crime scene that were suitable for comparison. Yet, it appears that defense counsel and the State did not make any inquiry into whether the actual source of these prints could be determined. That is now possible, using advanced technology whose capabilities have improved exponentially since Mr. Lee's trials. A search of the original crime scene fingerprints in these latent print databases—which contain the stored fingerprints of more than *70 million* individuals, many of whom were convicted of rape, murder, and other serious crimes—can be conducted in

minutes, at no cost to the City. This will permit the prints to be quickly compared to any suspects against whom a potential "candidate match" is obtained—just as they have been in several recent cases where innocent persons were exonerated after decades behind bars for crimes they did not commit and in the plethora of cases where suspects were identified and evidence from the database was used to obtain convictions.

15. Ms. Young and her counsel repeatedly have asked Defendants to release the aforementioned DNA and fingerprint evidence for testing (while preserving the chain of custody) and offered to bear all costs. Defendants have refused to do so.

16. The public, including Ms. Young, has a strong interest in knowing whether the true killer responsible for Ms. Reese's death remains at large and whether Arkansas executed an innocent man. The State has no remaining contrary interest. To the extent that the State still maintains Mr. Lee was the perpetrator, Mr. Lee has paid for the crime with his life. The State can have no additional punishment goals with respect to Mr. Lee. The State shares a common interest with the public in knowing the results of the DNA and fingerprint analyses if they identify another perpetrator.

17. In addition, the relief requested by Ms. Young not only serves the core public-information objective of FOIA, but also furthers important public safety interests. If new scientific testing reveals that Ledell Lee did not murder Debra Reese, then her real killer has never been brought to justice and may still pose a threat to other citizens.

18. Twenty-four years after Mr. Lee's conviction and death sentence was imposed, his family and the public should have access to available information that can answer the substantial doubts about Mr. Lee's conviction and execution for the death of Ms. Reese. Ms. Young respectfully requests that this Court compel the Defendants to comply with the Arkansas Freedom

of Information Act and issue an order requiring Defendants to release the physical evidence in the Debra Reese case for DNA testing and the crime scene fingerprints for upload and comparison to the AFIS database.

PARTIES

19. Plaintiff Patricia Young is a resident of Pulaski County, Arkansas and a citizen of the State of Arkansas. She is the sister of Ledell Lee.

20. Defendants Jacksonville Police Department and the City of Jacksonville, Arkansas are local government entities located in Pulaski County, Arkansas. The principal places of business for the Jacksonville Police Department and the City of Jacksonville are in Pulaski County, Arkansas.

21. Defendant John McCullough is the Acting Chief of Police of the Jacksonville Police Department. In his official capacity, Mr. McCullough has the authority to approve or deny the Jacksonville Police Department's disclosure of public records under FOIA, Ark. Code Ann. § 25-18-101 *et seq.* Upon information and belief, Mr. McCullough is a resident of Pulaski County, Arkansas and a citizen of the State of Arkansas.

22. Defendant Bob Johnson is the Mayor of Jacksonville, Arkansas. In his official capacity, Mr. Johnson oversees the Jacksonville Police Department. Upon information and belief, Mr. Johnson is a resident of Pulaski County, Arkansas and a citizen of the State of Arkansas.

JURISDICTION AND VENUE

23. This Court has original jurisdiction over Ms. Young's claims. *See* Ark. Code Ann. §§ 16-13-201(a), 25-19-107(a).

24. This Court has general personal jurisdiction over the Jacksonville Police Department and the City of Jacksonville because they are located in and have principal places of business in Pulaski County, Arkansas.

25. This Court has general personal jurisdiction over Mr. McCullough and Mr. Johnson in their official capacities because they perform their official duties in the State of Arkansas and are citizens of the State of Arkansas.

26. This Court has specific personal jurisdiction over Defendants because their conduct regarding Ms. Young's claims occurred within the State of Arkansas.

27. Venue is proper in this Court pursuant to Ark. Code Ann. § 25-19-107(a).

FACTUAL BACKGROUND

I. Debra Reese's Murder And The Trials Of Ledell Lee

28. Ms. Reese was found murdered in her home in Jacksonville, Arkansas in the early afternoon of February 9, 1993. It is undisputed that the murder was committed during a narrow window of time in the late morning that same day. Neighbors saw the suspected perpetrator—a lone Black male—entering the Reese home sometime after 11:15 a.m., and leaving the area on foot between 11:45 a.m. and noon. R.595–98.[1]

29. Ms. Reese's mother, Catherine Williams, lived approximately two blocks away and talked with Ms. Reese around 10:50 a.m. that morning. R.1110. Ms. Williams recounted that Ms. Reese said a Black man had knocked on her door looking for tools, and that Ms. Reese was frightened. R.1110–11. Ms. Reese promised her mother that she would go to her mother's house shortly after curling her hair. R.1111.

[1] "R.__" refers to the Arkansas Supreme Court record from the Debra Reese murder case, *Lee v. State*, CR-96-0053. Plaintiff has provided electronic courtesy copies of the record to the Court. Plaintiffs will provide copies of any other documents upon the Court's request.

30. Ms. Williams became concerned when her daughter failed to show as promised. R.1932. She then called Ms. Reese repeatedly over the next hour and a half and received no answer. R.1112. Around 1:00 p.m., she went to Ms. Reese's house and discovered that the living room appeared turned upside down. R.1114. She then asked Ms. Reese's neighbor to call the police. R.1113–14. Jacksonville Police officers were dispatched to Ms. Reese's house at 212 Cherry Street at 1:28 p.m., approximately two and a half hours after Ms. Reese had talked with her mother. R.998. Ms. Williams met the police in the driveway of her daughter's house. R.999.

31. The police searched the house, and immediately found signs of a struggle. R.2000. The living room television was at full volume, and the police discovered a chair and several plants knocked over in the living room, with a purse on the floor near the couch. R.1021. Down the hall, in one of the bedrooms, they found Ms. Reese's body lying on the bed, with her feet dangling on the floor. R.1021–22. The body was partially covered by a rug. R.1022. There was blood spattered on the bedframe, telephone and nightstand, walls, comforter, bedsheet, a pillow, clothes on the floor, a blanket and rug. R.2125. A wooden club with blood, identified by law enforcement as the apparent murder weapon, was on the bed, with a bloody white shirt covering one end of the club. R.1023.

32. The police found partial footprints on two pieces of paper on the floor, near the bed. R.2107. Two wallets were found, one in the living room and one on her bed, and both had no money inside. R.1149–50. The police found her curling iron in the bathroom, still turned on, suggesting the crime occurred shortly after she called her mother. R.1023.

33. The police collected much of the evidence from the bedroom, including the clothing, comforter, shoeprint, and wooden club. R.1077. They vacuumed the carpet from the bedroom, collected strands of hair from the bed, and lifted latent prints from the front door, living

room, television set, living room wallet, bedroom, hallway walls, and the countertops in the kitchen and bathrooms. R.1028, 1078–80, 2139.

34. The Jacksonville Police arrested Mr. Lee for Ms. Reese's murder less than two hours after her body was found; they charged him with capital murder later that day. R.547. Mr. Lee was not apprehended at or near the crime scene, nor was he in possession of any proceeds from the crime. R.2075. Instead, Mr. Lee's arrest was based on the uncorroborated and, in some respects, contradictory statements of two alleged eyewitnesses. R.1936–67, 2021–41.

35. The first witness was a neighbor of Ms. Reese's named Andy Gomez. Mr. Gomez suffered from various medical conditions, including post-surgical nerve damage for which he was regularly taking Vicodin (an opiate), including on that day. R.614–15. He approached the police at the crime scene and described seeing a Black man enter Ms. Reese's home shortly after 11:15 a.m., and exit the home between 11:45 a.m. and noon. R.595–98. He told the police that he had followed the man in his car into the adjacent neighborhood. R.597–98. Mr. Gomez stated that while he had lost track of the man several times, he claimed to have found him later talking to a person outside a house on Galloway Circle. R.1950. He took the police to Galloway Circle, R.1945–50, where they talked with a resident of that area, Glenda Pruitt, who said she had briefly talked with a man outside her home that morning whom she knew by the name "Skip." R.2021–22.

36. Sergeant Kelley Smiley took Mr. Gomez to the Jacksonville Police Department. R.957. At the station, Sergeant Smiley talked with Lieutenant Jerry Johnson about what Mr. Gomez had told him.[2] R.2005.

[2] Lieutenant Johnson had a prior relationship with Ledell Lee: the year before, he had asked Mr. Lee to work as a police informant, a request Mr. Lee had refused. R.556, 560. In September of 1992, after

37. Lieutenant Johnson also spoke with Ms. Pruitt. R.621. Ms. Pruitt testified that she was outside on her porch when "Detective Johnson," whom she knew, came into her yard and *told her* that she had been talking with Ledell Lee that day. R.622–23. She went on to tell Lieutenant Johnson that earlier in the day, she briefly talked with a man she knew as "Skip," who had previously asked her for marijuana. *Id.* She testified that the police then "held [her] at [her] house for a couple of hours." R.623. Ms. Pruitt said the man she was talking with might have been wearing a red plaid shirt. R.623–24. Ms. Pruitt also admitted she was not wearing her eyeglasses when speaking with this person, and that she might have been using drugs that day.[3] R.625, 983.

38. Lieutenant Johnson said he knew Ledell Lee went by the name "Skip," and called the police station to ask Sergeant Smiley to assemble a photo lineup to show to Mr. Gomez and Ms. Pruitt. R.2005. Sergeant Smiley assembled a photo lineup of six individuals. R.632. Of the six, only one—Ledell Lee—is wearing a jacket (i.e., the clothing described by both Mr. Gomez and Glenda Pruitt hours earlier). R.637–38. The prosecutor later described the lineup as a "great" photo spread, where it would be "hard to pick someone out at random." R.1447.

39. Glenda Pruitt and Andy Gomez reportedly identified Ledell Lee from the lineup.[4] R.628–30, 2007. Glenda Pruitt testified that she knew most of the people in the lineup from her neighborhood. R.627. Even still, she was only "pretty sure" that the picture she identified was the person she talked with that day. R.979.

Mr. Lee refused to work as an informant, Jacksonville Assistant Police Chief Larry Hibbs wrote to the parole board opposing Lee's parole.

[3] Glenda Pruitt's testimony of how she knew Skip was inconsistent. She conceded that she "didn't really know him," and said that she had only said hello to him a few times in the neighborhood when they talked about drugs. R.2022. She first testified at the pre-trial hearing that she had met him about six months before the crime, in the summer of 1992. R.619. Ms. Pruitt could not have met Mr. Lee six months because he was in prison until December of 1992. At trial, she revised this estimate to say that she had met him "recently" before February 9, 1993, "a couple of months earlier." R.2022.

[4] The record is unclear as to whether Mr. Gomez viewed the lineup before or after Mr. Lee's arrest.

40. Based on these identifications alone, police moved to arrest Ledell Lee. They found Mr. Lee at his mother's house, where they arrested him and took him into custody. R.547. Mr. Lee was arrested wearing a pair of black Converse tennis shoes, blue jeans, and a white pocket t-shirt. R.2075. The police also took into custody a black satin jacket found at his mother's house. R.2277. None of these items contained any visible blood. Nor did police observe any blood, scratches, or injuries on Mr. Lee's body. R.0545. Mr. Lee's brother, Howard Young, a Sergeant in the U.S. Army, gave a voluntary statement to police that day, in which he reported being with Mr. Lee (often in the presence of other friends and family members) throughout the morning—including when he accompanied Mr. Lee to a local Rent-A-Center store (the "RAC") to make a payment shortly before noon. R.1326–32.

41. The State first tried Mr. Lee and sought the death penalty against him in October 1994, represented by court-appointed counsel. P.C.270–71.[5] The State called Ms. Pruitt and Mr. Gomez to describe their interactions with the suspect and identify Mr. Lee, along with a third neighborhood witness, William McCullough. R.619, 594, 880. Mr. McCullough testified that a tall Black man had woken him in the late morning of February 9, 1993 by knocking on his door and asking to borrow tools to fix his car. R.882–83. Mr. McCullough later identified Mr. Lee as the person he had seen at his door; however, he was not shown a photo array or otherwise asked to make an identification until the day *after* Mr. Lee had already been arrested. R.940–41. At Mr. Lee's second trial, the State called two additional eyewitnesses: Pamela Gomez, Andy Gomez's wife, who testified that she saw a Black male in jeans and sneakers leaving the area when she looked briefly out the window; and Kris Stough, who testified that she saw a short Black man walking up and, approximately 20 minutes later, back down the street, appearing intoxicated.

[5] "P.C.__" refers to the Arkansas Supreme Court record from Mr. Lee's first state habeas petition, *Lee v. State*, CR-99-1116.

R.1973–74, 1977–81. However, neither of these new witnesses identified Mr. Lee as the man they saw.

42. At both trials, the State also presented evidence it claimed provided a link between Mr. Lee and the crime through money stolen from Ms. Reese's wallet. Both Mr. Lee and his brother told the police he made a payment at the RAC on the day of Ms. Reese's murder. R.1329. RAC staff showed the police records confirming Mr. Lee's statement that he had come to the store that day and showing that he had made a partial payment on an item he had rented with a one-hundred-dollar bill. R.1134–35. The store clerk gave the police the three hundred-dollar bills from the cash register. R.1133. Ms. Reese's father had fourteen hundred-dollar bills in his possession, including money he had received during withdrawal from the local credit union earlier that week. R. 1124, 1127–28. He testified that he and his wife gave Ms. Reese three hundred-dollar bills from the money he had withdrawn. R.2067, 2069. At Mr. Lee's trial, the State introduced evidence showing that one of these three hundred-dollar bills left by customers at the RAC was close in serial number to one of the fourteen remaining hundred-dollar bills in Ms. Reese's father's possession. R.2069–70; *see also* State's Exs. 43–45, 48.[6] From this evidence, the State asked jurors to find that Mr. Lee had stolen money from Ms. Reese's wallet that morning, and paid RAC that same day with one of these stolen hundred-dollar bills.

43. However, the store's records reflected that two other RAC customers had also made $100 payments on February 9th. R.2188. The records did not indicate which hundred-dollar bill was paid by Mr. Lee. R.2188. Although other two customers' names could have been identified from the customer ID numbers on the RAC transaction logs, *see* State's Ex. 80, there is no indication that law enforcement (or Mr. Lee's own counsel) ever contacted the RAC to request the

[6] "State's Ex. __" refers to exhibits from the record filed with the Arkansas Supreme Court from the Debra Reese murder case trial, *Lee v. State*, CR-96-0053.

names of those other two customers, nor any evidence that they attempted to talk with those customers or otherwise investigated whether they had (1) recently obtained cash from the same local credit union as Ms. Reese's family, and/or (2) had other bills in their possession which were also close in serial number to any of the fourteen hundred-dollar bills retained by Ms. Reese's father.

44. The State also called the RAC witness, Dave Taylor, to testify about the time Mr. Lee came into the store, a topic on which Mr. Taylor gave conflicting testimony. He testified that the time on the receipt, 12:53 p.m., was off by an hour. R.1135. The prosecutor asked why the time was wrong, and Mr. Taylor then testified that the time was off because the clocks had not been reset for daylight savings time in the fall. R.1132. Under this explanation, however, the true time Mr. Lee went to the store was 11:53 a.m., since clocks "fall back" in the fall (i.e., a February clock which RAC had not properly reset in the fall would show the time as one hour later than the actual, post-Daylight Savings time). Thus, Mr. Taylor's initial explanation for the faulty clock provided Mr. Lee *with a complete alibi to the murder*. The prosecutor, evidently dissatisfied with that answer, asked Mr. Taylor the question again: "Let me put it to you this way. Was it too fast or too slow by an hour?" R.1132. Mr. Taylor then said he "was trying to remember," and backtracked, ultimately giving an example of how the receipts showed a particular transaction happening an hour earlier than what he recalled as the actual time.[7] R.1132.

45. Finally, the State presented a number of forensic experts to try and link Mr. Lee to the murder through their analyses of various items of physical evidence. *See, e.g.*, R.1299–307, 2299–305, 2276–86. Notably, none of these forensic experts claimed that Mr. Lee could be identified as the source of any evidence from the crime scene. R.1306, 2295, 2305–07. But the

[7] At the second trial, Mr. Taylor did not provide new testimony about daylight savings time and—consistent with the State's theory—testified that the clocks were an hour slow. R.2184.

State repeatedly elicited detailed opinion testimony from these experts that made their findings appear far more inculpatory and conclusive than they actually were.

46. Donald Smith, a criminologist, testified that he had examined several "Negroid" hairs collected at the scene under a microscope and compared them to Mr. Lee's hair. R.1239, 1240. Mr. Smith admitted that he could not conclusively identify the hairs as Mr. Lee's, but claimed that they shared multiple microscopic properties with Mr. Lee's hairs. R.1240–41. Berwin Monroe, the State's firearms and tool marks expert, told the jury that a comparison he conducted between the shoeprints found at the scene and a test impression of Mr. Lee's sneakers was "inconclusive." R.1306. Yet, Mr. Monroe then claimed that he was able to determine the precise size of the shoes that left the partial impressions on the paper next to Ms. Reese's bed, and that those impressions were from shoes of the "same size sole" as Mr. Lee's size 10 1/2 men's Converse sneaker. R.1307. He also claimed that Mr. Lee's shoes bore the exact "same pattern" on the sole as the crime scene shoeprints. R.2331. And even while the State's expert admitted that his findings were ultimately "inconclusive," R.1308, the prosecutor characterized them as nothing less than a "home run" for the State. R.1481.

47. A third expert, Kermit Channell, a forensic serologist, analyzed the only traces of apparent blood found anywhere on Mr. Lee's clothes or shoes—one "pinhead" sized, "very, very small" spot on the tongue area of each of Mr. Lee's shoes. R.2303. Mr. Channell confirmed that the blood was human, but consumed the samples during testing and was unable to determine even the ABO (serology) blood type. *See* R.2306. Based solely on this testimony, the prosecutor argued that the blood belonged to Ms. Reese and was "spatter[ed]" onto Mr. Lee's shoes during the crime; the defense (without expert support) argued that these two tiny specks of blood were inconsistent

with the extensive spraying of blood that Ms. Reese's injuries would have caused.[8] R.1459–63. James Beck, the State's latent fingerprint expert, conceded that the latent fingerprints the police had collected from the crime scene did not match Mr. Lee's. R.1262. Mr. Channell concluded that there was no blood on the shirt or pants Mr. Lee was wearing. R.2305.

48. At Mr. Lee's first trial, his defense team called four witnesses to support his alibi defense and detail Mr. Lee's whereabouts throughout the day: his mother, Stella Young; his sister, Patricia Young; his brother, Howard Young; and Corey Briscoe, a family friend. Mr. Lee did not have a working car. Beginning early in the day, he asked his family for a ride to an appointment in Little Rock. R.1369. He asked his mother and brother for rides to Little Rock, and both said no. R.1334–35, 1322. Mr. Lee went to his mother's house that morning around 7:30 a.m., where he stayed until about 10:45 a.m., when he left briefly to walk through the nearby area in the hopes that someone with a car might give him a ride to Little Rock. R.1388. Unsuccessful, Mr. Lee came back to his mother's house, and then went with his brother—who had just returned from giving Mr. Briscoe a ride to work—at approximately 11:00 a.m. to go to the RAC.[9] R.1329. Mr. Lee made a payment at the RAC, then went to the liquor store and to another local store to pick up some bleach that their mother had requested to clean her grill. R.1329–30. From there, they went back to their mother's house, where their mother asked them to take her van to retrieve her grill from Howard's house. R.1330–31. Mr. Lee drove the van back with the grill to his mother's

[8] Notably, prior to trial Mr. Lee requested to test the blood spots for DNA to prove that the blood was not from Ms. Reese. R.152. (DNA testing on the jacket collected from his mother's home was completed, and showed that trace amounts of blood on the jacket were from an unknown (third-party) source, not Ms. Reese. R.538–39.) This testing was unavailable at the time of trial, however, because Mr. Channell elected to use a testing technique that consumed all of the visible biological material. R.764–65. As discussed *infra*, however, the shoes can now be reexamined and re-tested with highly discriminating DNA analysis for trace amounts of blood that may not have been detectible in 1994–95.

[9] One or more witnesses testified to the times provided. R.1336-37. Witnesses also offered unimpeached recollections of the specific television shows they were watching at different times and (in Mr. Briscoe's case) the specific time (11:00 a.m.) that he needed to be at work that day. R.1402.

house. R.1331. Mr. Lee, his brother, Howard Young, his mother, Stella Young, and his sister, Patricia Young were all at the house when Mr. Lee was arrested at approximately 2:00 p.m. on the afternoon of February 9, 1993. R.1340–41, 1380, 1389.

49. Mr. Lee's first trial—where his counsel presented an alibi defense—resulted in a hung jury. After extensive deliberations, the jurors informed the court that they were "hopelessly deadlocked" at 9–3. R.1500, 1502. The following day, after being ordered to return and continue deliberations, they were still unable to reach a unanimous verdict, and a mistrial was declared on October 7, 1994. R.1499–1503, 1509.

50. Mr. Lee's second capital murder trial did not begin until a full year later. The delay was caused by serious conflict-of-interest issues involving his appointed counsel—one of whom told Mr. Lee that he believed the first jury should have convicted Mr. Lee of the murder. R.1546. Months of unsuccessful litigation to obtain new counsel ensued, during which even the Attorney General agreed that Mr. Lee's original legal team could not ethically continue to represent him. *See* Part II.A., *infra*. Mr. Lee, however, ultimately capitulated and agreed to a court order retaining his original counsel for his second trial, with an additional attorney added to the team before the retrial began. R.1577–80.

51. As the second trial approached, Mr. Lee's counsel were unprepared. They had largely stopped working on the case during the litigation around their conflict. His defense counsel promised the jury in opening statements that they would present an alibi defense, but then inexplicably failed to call any of the alibi witnesses who testified in the first trial about Mr. Lee's whereabouts. The State's witnesses testified to a tidier version of facts than they had in the first trial, and Mr. Lee's lawyers repeatedly failed to impeach them with their prior testimony. Mr. Lee was convicted of Ms. Reese's murder. At the penalty phase, the State introduced evidence that

Mr. Lee had sexually assaulted three women (Jennifer Perkins, Avis Smith, and Lillie Dodd); each of these alleged offenses occurred before Ms. Reese was killed, but he was not charged with the aggravating offenses until after he was arrested for Ms. Reese's murder.[10]

52. Mr. Lee, a Black man charged with the vicious beating and murder of a white woman in her home, was tried under the shadow of the O.J. Simpson prosecution and trial. The Simpson case was one of the most racially charged trials in American history, and its likely impact on Mr. Lee's proceedings cannot be overstated. Simpson was arrested on June 17, 1994 for the murders of his ex-wife Nicole Simpson and her friend Ron Goldman, both of whom were white. Mr. Lee's first trial started on October 4, 1994—less than four months after Simpson's highly televised police chase and arrest. And Mr. Lee's second trial began on October 10, 1995—just *seven days* after O.J. Simpson was acquitted. The Simpson verdict shocked and angered many white Americans and polarized much of the nation along racial lines.[11]

53. It is difficult to imagine that any jury could be truly objective in considering the evidence against Mr. Lee at that particular moment in time. But these difficulties were no doubt

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[10] At the penalty phase of the Reese trial, the State sought to prove the aggravating offenses primarily through a combination of DNA evidence tested by the FBI and testimony from the rape victims. R.2675–80, 2683–84. In that proceeding, and in post-conviction litigation, the State has asserted that the FBI's DNA testing inculpated Mr. Lee in each of these aggravating offenses, as well as in a fourth offense—the rape and murder of Christine Lewis. R.453. Mr. Lee maintained his innocence of each of the additional offenses.

It should also be noted that while the State has repeatedly contended that Mr. Lee's guilt in these other cases has been conclusively established through the FBI's DNA testing, at least one jury of his peers apparently was unconvinced. When Mr. Lee was tried for the rape/murder of Christine Lewis in November 1995, the jury was unable to reach a verdict and deadlocked at 8–4, even after the State presented its DNA evidence. The State elected not to retry the Lewis case, and it was nolle prossed in May 1997.

DNA testing techniques have advanced significantly since the time of Mr. Lee's trials. If the State wishes to subject not only the Reese evidence, but also any remaining evidence from the alleged aggravator cases, to advanced DNA testing using today's highly sensitive and discriminating techniques, Ms. Young has no objection to doing so.

[11] *See, e.g.*, Mary Armstrong, *Vast Majority Disagree with Simpson Verdict*, Baxter Bulletin (Mountain Home, Ark.), Oct. 13, 1995, at 4A ("How can race supersede a matter as critical as murder? Overwhelming evidence was ignored in favor of 'sending a message.' Race relations have plunged to a new low.").

exacerbated by the prosecution's arguments and the composition of his jury. The State at Mr. Lee's first trial argued twice in closing argument that Ledell Lee had "hunt[ed]" Debra Reese. R.1442, 1449. And the prosecution described Mr. Lee in even more dehumanizing terms at the second trial: telling the jury that he was "checking out his prey" while he stalked the area near Ms. Reese's home. R.2359.

54. One of the witnesses at trial casually referenced the date of a conversation she had with the prosecutor by saying it "was last week, when they let OJ Simpson go." R.2447. Remarkably, Mr. Lee's counsel did not object to the prejudicial comment about the Simpson verdict (the implication being that an acquittal was "let[ting]" a murderer "go"), just as they had not objected to the prosecutor's language that Mr. Lee had "hunted" for "prey" when he chose his alleged victim. R.2447, 2684. And although Black residents at that time comprised 32 percent of Pulaski County, Mr. Lee was tried and convicted by a jury that did not remotely reflect the County's diversity: there were eleven white jurors and a lone Black juror. *See* R.1894–96, 1904; P.C.43.

II. Mr. Lee's Court-Appointed Lawyers Fail To Investigate His Claim Of Innocence Or Otherwise Provide Him With Minimally Effective Legal Representation

55. The guarantee of counsel proved hollow for Ledell Lee. All of Mr. Lee's lawyers were under resourced. Beyond that, one of the lawyers charged with representing Mr. Lee in his capital case was actively struggling with addiction during the time he handed his case, another was mentally ill, and still others were riddled by conflicts of interest. Other appellate counsel abandoned him without conducting any meaningful investigation into his case. As a result of the utter breakdown in counsel, Ledell Lee went through two trials and over 20 years of appeals, post-conviction, and habeas proceedings without the most basic investigation into his innocence or the integrity of the State's evidence. In a case with weak circumstantial evidence and an unwavering

assertion of innocence, the investigators and lawyers assigned to save Mr. Lee's life failed to talk with key trial witnesses, seek impeachment evidence, or consult important forensic experts. His appellate and habeas counsel failed to move for DNA testing and fingerprint analysis—even when new techniques became available and Arkansas passed a law specifically allowing convicted persons to seek DNA testing.

56. Over the years, Mr. Lee and his family, including Plaintiff Patricia Young, tried to get anyone they could to look into the question of Mr. Lee's innocence. Over the course of twenty-four years, Mr. Lee repeatedly wrote letters and pro se pleadings to judges, public defenders, non-profit organizations and the Supreme Court, all protesting his innocence and his growing concern that his case would never truly be investigated. His mother, Stella Young, wrote to her senator, Dale Bumpers, who wrote back and told her he could not get involved in a criminal case. A Memphis-area investigator, Gloria Shettles, sent a letter to the NAACP Legal Defense Fund in 1997 after she had been approached by a guard who suggested Ledell Lee was likely innocent and needed legal help. Mr. Lee never received the legal assistance he so desperately needed.

A. Trial Counsel (1993–95)

57. Mr. Lee's trials in the Debra Reese case were bookended by heated litigation regarding his counsel's conflicts. He was assigned counsel from the local public defender's office to represent him before his first trial for the murder of Debra Reese. *Simpson v. Pulaski Cty. Cir. Ct.*, 320 Ark. 468, 470 (1995). The State noticed its intent to use three newly charged rape allegations against Mr. Lee at the sentencing phase as aggravating evidence if Mr. Lee were convicted. R.188. Mr. Lee's counsel from his first trial were also assigned to represent him on the separate rape allegations. *See Simpson*, 320 Ark. at 469. However, the rape cases were assigned to a different presiding trial judge than in the capital murder trial. *See id.*

58. Mr. Lee's relationship with counsel deteriorated following the mistrial in the Reese case, when Mr. Lee's lead lawyer remarkably told him that he thought Mr. Lee should have been convicted of Ms. Reese's murder. P.C.II.271–72. That same counsel was still assigned to represent him in a retrial on that charge. *Id.* at 275–76.

59. In November 1994, Mr. Lee filed a motion for new counsel in all of his pending cases, including the Reese retrial and the pending rape cases. R.245–53. The trial judge presiding over the rape cases promptly held a hearing on the motion where Mr. Lee put on the record the bases for his request to be assigned new counsel, including a lack of communication about his case and the comments by counsel about his death penalty mistrial. R.261. The judge presiding over the rape cases declared a conflict, removed his existing attorneys, and appointed new counsel. *See id.*

60. The prosecution vigorously opposed the change of counsel in the rape cases, over Mr. Lee's objections to their participation. *See* R.1530–39. As Mr. Lee litigated his request for change of counsel for the Reese retrial, the prosecution again opposed it. *Id.*

61. On March 8, 1995, the Reese trial judge ruled that he was not bound by the other judge's conflict determination, and that no substitution of counsel was necessary. R.1525.

62. Counsel for Mr. Lee took an interlocutory appeal of the conflict issue to the Arkansas Supreme Court. On appeal, even the Attorney General of Arkansas agreed that Mr. Lee's counsel was conflicted and should not continue in the case. P.C.636–38. Indeed, counsel for the Attorney General stated that Mr. Lee "cannot now obtain a fair trial" as a result of the conflicts with his counsel. P.C.637. Nevertheless, the Arkansas Supreme Court ruled that Mr. Lee was not entitled to new counsel on the Reese capital murder case. *Simpson*, 320 Ark. at 471–72.

63. On remand, the presiding trial judge added an additional lawyer to the group of assigned counsel for the Reese retrial. R.1524–26. Five months later, Mr. Lee's assigned lawyers proceeded to retrial on the Reese case. R.1601–05.

64. With the proceedings largely on hold for the previous year and their relationship with their own client having badly deteriorated during the bitter and protracted conflict litigation, Mr. Lee's counsel were woefully unprepared for the challenge of defending their client at his retrial. In this second trial, Mr. Lee was convicted and sentenced to death on October 16, 1995. R.2700.

B. Post-Conviction Counsel (1997–2016)

65. After his conviction, Mr. Lee filed a petition for post-conviction relief in Arkansas state court pursuant to Arkansas Rule of Criminal Procedure 37 (the "first state habeas petition"). In that petition, Mr. Lee alleged a Sixth Amendment violation of his right to conflict-free counsel, as well as grounds for relief that included, among other things, trial counsel's failure to present alibi testimony in the guilt and sentencing phases.

66. Mr. Lee was represented in his initial post-conviction hearing by Arkansas death penalty lawyer Craig Lambert, a sole practitioner with a large capital docket. Ex. A, Declaration of Craig Lambert ("Lambert Decl."), ¶¶ 3–7. Within two years of being appointed to Mr. Lee's case, Mr. Lambert had three other clients on Arkansas' death row who were executed, and another capital client he represented at a Rule 37 evidentiary hearing; Mr. Lambert also carried a full criminal caseload in his solo practice. *Id.* ¶ 7. Mr. Lambert later attempted to withdraw from the case given his extensive and consuming workload, but was denied. *Id.*

67. Mr. Lambert was in the throes of a debilitating addiction the entire time he was counsel for Mr. Lee, which included an unsuccessful stint in inpatient rehabilitation. The

consequences of Mr. Lambert's substance abuse extended to his representation of Mr. Lee. For example, the State had sought to buttress its circumstantial case that Mr. Lee must have stolen the money from Ms. Reese by pointing to the fact that Mr. Lee's last pay check was for $26.00, and arguing that Mr. Lee had only been able to pay the RAC bill because of his "new found wealth" from the robbery of Ms. Reese. R.1484. Mr. Lambert had collected Mr. Lee's tax documents that showed Mr. Lee had in fact received a tax refund in the amount of $1,406.00 on January 17, 1993. Lambert Decl. ¶ 17. But when it came time to introduce and argue the tax refund evidence at the post-conviction hearing, Mr. Lambert struggled to explain its relevance. He failed to introduce much of the evidence he had gathered and created a jumbled and incoherent record of the many failings of Mr. Lee's trial counsel.

68. Counsel for the State observed Mr. Lambert's failings at the post-conviction hearing, and to his credit, raised the alarm about the impact on Mr. Lee's case:

> Your Honor, I don't do this lightly, but with regard to [Mr. Lee's counsel's] performance in Court today, I'm going to ask that the Court require him to submit to a drug test. I don't think that he's, he's not, he's just not with us. He's reintroduced the same items of evidence over and over again. He's asking incoherent questions. His speech is slurred. He stumbled in the Court Room. As a friend of the Court, and I think it's our obligation to this Court and to this Defendant that he have competent counsel here today, and I don't—That's just my request of the Court, Your Honor.

P.C.554–55. The post-conviction court denied the request for testing, left Mr. Lambert as post-conviction counsel, and denied Mr. Lee's first state habeas petition. *Id.* at 555. The issue of Mr. Lambert's intoxication was not raised on direct appeal. *See generally Lee v. State*, 327 Ark. 692 (1997). The Arkansas Supreme Court denied Mr. Lee's case on direct appeal. *See id.* at 696.

69. To his credit, even while battling his addiction, Mr. Lambert did make considerable efforts to obtain other assistance for Mr. Lee's defense—yet the courts rejected virtually all of these efforts. Citing his overwhelming capital caseload, Mr. Lambert repeatedly moved to have

co-counsel appointed for Mr. Lee, to no avail. Lambert Decl. ¶ 5. He lacked adequate funding to hire the investigators and experts necessary to build a strong case. *Id.* ¶¶ 5–6. And he was rebuffed by virtually every reputable investigator he attempted to retain, with the investigators telling Mr. Lambert they were unwilling to sign on to such a sensitive case. *Id.* ¶ 6. Mr. Lambert was forced to work solo with only the part-time assistance of an inexperienced investigator and friends he managed to recruit to occasionally assist him with witness interviews and serving subpoenas. *Id.* ¶¶ 5–7, 9–10.

70. After the Arkansas Supreme Court affirmed Mr. Lee's death sentence, Mr. Lambert was appointed, with Jennifer Horan from the Federal Public Defender's office, to represent Mr. Lee in federal post-conviction proceedings. *Id.* ¶ 18. Mr. Lambert and Ms. Horan, who were dating, filed a habeas writ in federal court in November of 2001 that did not raise Mr. Lambert's ineffectiveness. *Id.* Mr. Lambert's intoxication during the hearing came to light when the District Court *sua sponte* noted in April of 2003 that Mr. Lambert "may have been impaired to the point of unavailability on one or more days" of hearings on Mr. Lee's state habeas proceeding. Dkt. 11, *Lee v. Hobbs*, No. 5:01-cv-00377, at 1 (E.D. Ark. Apr. 2, 2003). The federal judge stayed the proceedings on this federal habeas petition for the Arkansas trial court to "take appropriate action." *Id.* at 3. After the state filed an interlocutory appeal, the Eighth Circuit affirmed, noting that the circumstances of the case were "truly exceptional." *Lee*, 354 F.3d at 847.

71. Ms. Horan first moved to withdraw from Mr. Lee's case in the Eighth Circuit later in 2003, and then moved on February 26, 2004 to withdraw from the case in District Court based on her personal relationship with Mr. Lambert. Lambert Decl. ¶ 19. Shortly thereafter, Mr. Lambert sought to withdraw from the case because of the conflict raised by his own intoxication in the proceedings then on appeal. He urged reconsideration of the order permitting withdrawal

of the Federal Public Defender's office. ¶ 3, 18. Mr. Lambert also privately urged Ms. Horan to reconsider keeping Mr. Lee's case. *Id.* ¶ 19. Mr. Lambert stressed that Mr. Lee's case was extraordinarily complex, included a claim of intellectual disability, and would require significant investigation. *Id.* ¶ 5, 19. Ms. Horan's contemporaneous internal notes reflect that she also was concerned with the lack of available counsel in Arkansas who could competently investigate the case given that the small number of qualified attorneys had conflicts.

72. The federal District Court appointed new federal habeas counsel for Mr. Lee on July 28, 2004, including two out-of-state attorneys, Kent Gipson and William Odle, with one new attorney as local counsel. Dkt. 27, *Hobbs*, No. 5-01-cv-00377, at 1–3 (E.D. Ark. July 28, 2004). The District Court entered a stay so that Mr. Lee could return to state court to apply to reopen his state post-conviction proceedings. *Id.* at 1–2. As she would explain in her motion to withdraw years later, the new local counsel "did not participate in [the Rule 37] proceedings in state circuit or appellate courts." Dkt. 153, *Hobbs*, No. 5-01-cv-00377, at 1 (E.D. Ark. June 8, 2016). Nor did this counsel become involved in any way with the case preparation or strategy or have a relationship with Mr. Lee. *Id.*

73. On June 29, 2006, the Arkansas Supreme Court recalled the mandate, ruling that Mr. Lee's representation by impaired counsel required new proceedings. *Lee v. State*, 367 Ark. 84, 86 (2006). The Arkansas Public Defender appointed attorneys Gerald Coleman and Danny Glover to represent Mr. Lee in his new Rule 37 proceedings. P.C.15–17.

74. The representation that the new state post-conviction counsel provided to Mr. Lee was grossly incompetent, falling significantly short of even the impaired performance of Mr. Lee's first, intoxicated counsel. *See generally* P.C.II.182–185.[12]

[12] "P.C.II.__" refers to the Arkansas Supreme Court record from Mr. Lee's second state habeas petition, *Lee v. State*, CR-08-00160.

75. For these limited issues, Mr. Lee's second Rule 37 counsel actually presented *less* evidence that his first post-conviction counsel. In his intoxicated state, Mr. Lambert had presented five days of testimony. P.C.285–994. Mr. Coleman and Mr. Glover presented *less than half a day* of testimony and argument. P.C.II.182–285. The Circuit Court denied Mr. Lee's post-conviction petition on November 21, 2007, P.C.II.163, and the Arkansas Supreme Court affirmed the denial. *Lee v. State*, 308 S.W.3d 596, 604–09 (Ark. 2009).

76. On November 10, 2008, Gary Brotherton was appointed co-counsel for Mr. Lee's federal habeas petition. Dkt. 72, *Hobbs*, No. 5:01-cv-00377, at 1 (E.D. Ark. Nov. 10, 2008). Mr. Brotherton and Mr. Gipson thereafter operated as Mr. Lee's federal habeas counsel for almost the entirety of the remainder of his federal habeas proceedings. They did not independently investigate the case, and erroneously believed they could not intervene in the pending state court proceedings (where new evidence could have been presented) because they lacked local counsel in Arkansas. Dkt. 155, *Hobbs*, No. 5:01-cv-00377, at 1 (E.D. July 18, 2016). In fact, local Arkansas counsel represented Mr. Lee in the federal case. *Lee v. Hobbs*, No. 5:01-cv-00377, 2012 WL 4338691, at *1 (E.D. Ark. Sept. 20, 2012).

77. Mr. Lee's new federal counsel filed federal pleadings but never identified—because they never investigated—the available evidence of innocence that would have been uncovered with competent state post-conviction counsel. They never sought an opportunity to test the physical evidence available in the case in light of new DNA advances. They never submitted the fingerprints to an independent expert or considered whether additional testing could identify the source of those prints as a third-party suspect. The federal District Court denied Mr. Lee's petition for writ of habeas corpus on June 18, 2013. *Lee v. Hobbs*, No. 5:01-cv-00377, 2013 WL 3149755, at *28 (E.D. Ark. June 18, 2013). All of Mr. Lee's subsequent state and federal court filings—

none of which raised any new information for the courts to consider—were denied. *See Lee v. Hobbs*, No. 5:01-cv-00377, 2013 WL 6669843, at *5 (E.D. Ark. Dec. 18, 2013); *Lee v. Hobbs*, 354 F.3d 846, 846 (8th Cir. 2004), *rehr'g & rehr'g en banc denied* (8th Cir. Nov. 21, 2014); *Lee v. Kelley*, 136 S. Ct. 354 (Mem.) (2015).

C. Pre-Execution Counsel (2016-17)

78. On May 24, 2016, Mr. Gipson and Mr. Brotherton moved to withdraw as Mr. Lee's counsel, describing themselves as "ill equipped" to fulfill Mr. Lee's right to have counsel for potential executive clemency and stay of execution litigation under 18 U.S.C. § 3599(e).[13] Dkt. 148, *Hobbs*, No. 5:01-cv-00377, at 2 (E.D. Ark. May 24, 2016). The federal District Court denied that motion on July 18, 2016, stating that Mr. Lee's long-term lawyers "know the case better than any substitution lawyers would," and were "best suited to represent Mr. Lee in clemency and any other ancillary proceedings." Dkt. 155, *Hobbs*, No. 5:01-cv-00377, at 1 (E.D. Ark. July 18, 2016) The District Court stressed that even if local counsel would be necessary to pursue proceedings in state court, they should "still be doing the legwork" because the "case is at a critical stage; and Lee needs his long-time lawyers to see it through." *Id.*

79. Mr. Brotherton ultimately was replaced as federal counsel, however, after his law license was suspended by the Missouri Supreme Court. Dkt. 156, *Hobbs*, No. 5:01-cv-00377, at 2 (E.D. Ark. Aug. 8, 2016); Dkt. 157, *Hobbs*, No. 5:01-cv-00377, at 1 (E.D. Ark. Aug. 16, 2016).

80. Lee Short had agreed to step in at the eleventh hour in light of Mr. Brotherton's suspension, at the federal District Court's request. *See* Hr'g Tr. (Dkt. 34–35), *Lee v. Hutchinson*, No. 4:17-cv-00194, at 356–57 (E.D. Ark. Apr. 5, 2017) (the Court noting that Mr. Short became involved because "I roped you in, as I recall"). Mr. Short was surprised and unprepared when, on

[13] Remarkably, they did not obtain Mr. Lee's consent for this motion, nor did they seek the agreement of counsel from the Federal Public Defender's office, whose substitution they sought.

February 27, 2017, Governor Hutchinson set Mr. Lee's execution for April 20, 2017. *Id.* at 358. Governor Hutchinson had previously set several cases for execution, all of which were stayed, but Mr. Lee's case had not been in the previous group.

81. Mr. Short had represented Mr. Lee for just six months when his new client's execution date was set. Dkt. 157, *Hobbs*, No. 5:01-cv-00377, at 1 (E.D. Ark. Aug. 16, 2016). In the short time (less than eight weeks) that remained between the notice of execution and the scheduled execution date, Mr. Short was suddenly tasked with representing Mr. Lee in his clemency proceeding, his lawsuit challenging clemency, and his lawsuit challenging lethal injection, all of which required an extraordinary amount of time. *See Lee v. Hutchinson*, No. 4:17-cv-00194 (E.D. Ark. 2017) (civil lawsuit regarding clemency due process violations); *Lee v. Hutchinson*, No. 4:17-cv-00179 (E.D. Ark. 2017) (lethal injection civil lawsuit).

82. The ACLU became involved in Mr. Lee's case in late March 2017 after reading a news account that described how his lawyers had neglected to pursue a claim that Mr. Lee might be ineligible for the death penalty because he had an intellectual disability. In light of the lack of prior investigation into the case, Mr. Short sought the substitution of attorney Cassandra Stubbs from the ACLU for Mr. Gipson. Dkt. 160, *Hobbs*, No. 5:01-cv-00377, at 1 (E.D. Ark. April 17, 2017). With less than two weeks remaining before the scheduled execution, Ms. Stubbs reviewed the record from Mr. Lee's capital trials and became concerned that Mr. Lee had a viable, but uninvestigated, claim for actual innocence. She contacted Nina Morrison, senior litigation counsel with the Innocence Project, about some of the forensic evidence. After her own highly expedited review, Ms. Morrison shared Ms. Stubbs's concerns. The Innocence Project agreed to enter the case on April 13, 2019—one week before the execution date—to try and secure an order staying

Mr. Lee's execution for purposes of DNA testing. Dkt. 2, *Lee v. Jegley*, No. 4:17-cv-00256, at 1 (E.D. Ark. Apr. 20, 2017).

83. Mr. Lee filed a motion to stay his execution in order to conduct DNA testing as provided for under Ark. Code Ann. § 16-112-201 et seq. Mot. for Post-Conviction DNA Testing Pursuant to Arkansas Code Annotated §§ 16-112-201, et seq. and Request for Hearing, *Lee v. State*, No. 60CR-93-1249, at 19 (Ark. April 17, 2017). The Arkansas Supreme Court denied relief to Mr. Lee without an opinion, over the dissent of Justice Linker Hart. *Lee v. State*, 2017 Ark. 149, 1–3 (Apr. 20, 2017) (Hart, J., dissenting) (noting, *inter alia,* that Mr. Lee had "repeatedly" asked for DNA testing during and after trial, and should not "go to his grave without having this modest request granted," and that because the Court had stayed an execution to allow such testing in another capital case decided the day before, Justice Hart was "at a loss to explain this court's dissimilar treatment of similarly situated litigants"). The federal courts also rejected Mr. Lee's motion to stay the execution in order to conduct DNA testing. The United States District Court for the Eastern District of Arkansas denied the equitable remedy of a stay because it found that Lee had delayed his request for DNA testing for too long. *See* Dkt. 5, *Jegley*, No. 4:17-cv-00256, at 2 (E.D. Ark. Apr. 20, 2017). The federal court agreed that the new technology he sought had not been available at the time of trial, but found it was "available for several years" and that "Lee simply delayed too long; and now he can't overcome the strong equitable presumption against a stay." *Id.* The Eighth Circuit affirmed the District Court's denial of the stay. *Lee v. Kelley*, 854 F.3d 544, 546 (8th Cir. 2017).

84. Mr. Lee gave a recorded interview to a BBC journalist on April 19, 2017, the day before his execution. He described his life on death row as "one of those types of nightmares that

you cannot wake up from."[14] He told the reporter that while he could not prevent Arkansas from carrying out his execution, his "dying words will always be, as it has been: 'I am an innocent man.'"[15] Mr. Lee opted for Holy Communion as his last meal.[16]

85. The state of Arkansas executed Ledell Lee on April 20, 2017. The State closed the investigation into the murder of Debra Reese on that date.

III. Posthumous Investigation Of Mr. Lee's Longtime Claim Of Innocence Reveals Serious Defects In The Evidence On Which The State Convicted Him—Including False And Misleading Forensic Testimony—And The Existence Of Probative Biological Evidence That Can Still Be Tested With Advanced Scientific Methods

86. The State's case against Mr. Lee relied heavily on the cumulative impact of several pieces of inconclusive forensic evidence that were either inappropriately analyzed or overstated to the jury. The only definitive forensic results from the investigation into Debra Reese's murder that the State's trial experts obtained *excluded* Mr. Lee (i.e., the latent fingerprints; the bloodstained jacket). In a capital murder investigation that effectively began and ended in a matter of hours, the State's tunnel vision regarding Mr. Lee's alleged guilt of this undeniably brutal killing appears to have caused law enforcement (and Mr. Lee's own counsel) to fail to explore the serious questions about the State's case raised by the evidence.

87. There is more to the story for almost every single piece of forensic evidence collected at the scene. And there is far more to Mr. Lee's misidentification defense than his jury or reviewing courts ever heard. But thanks to extraordinary advances in DNA and fingerprint

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[14] Aleem Maqbool, *My Life on Death Row Is Like the Twilight Zone*, BBC News (Apr. 19, 2017), https://www.bbc.com/news/av/world-us-canada-39584497/my-life-on-death-row-is-like-twilight-zone.

[15] *Id.*

[16] Alan Blinder & Manny Fernandez, *Arkansas Puts Ledell Lee to Death in Its First Execution Since 2005*, N.Y. Times (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/us/arkansas-death-penalty-ledell-lee-execution.html.

technology since trial, the physical evidence still in the possession of the Jacksonville Police Department can tell the full story if Plaintiff is granted access to it.

A. Pathology and Footwear Evidence

88. For the last 25 years, the State has repeatedly contended that the black-and-white pair of Converse sneakers that Mr. Lee was wearing on the day of his arrest were the same shoes he wore less than four hours earlier to commit the murder of Debra Reese. At the same time, the State struggled to explain how Mr. Lee supposedly committed this brutal, close-range crime and yet was immediately observed by multiple witnesses—first while walking away from the scene, then in face-to-face encounters in Jacksonville's streets and retail stores—without anyone seeing even the slightest traces of blood on his shoes or clothing. After its own analysts at the Arkansas Crime Laboratory and the FBI failed to detect anything but, at most, two tiny "pinheads" of human blood on Mr. Lee's shoes, the prosecutors suggested, without any evidence, that Mr. Lee somehow shielded his shoes and clothes from any further traces of the victim's blood. R.1445, 2303. They also suggested, obliquely, that Mr. Lee somehow found a way to change his bloody clothing (but not his shoes) but had no explanation for how the State's witnesses allegedly saw Mr. Lee with no blood on his clothes. PC.608–09.

89. The record upon which the jury was asked to evaluate the State's claims was at best incomplete—and at worst, entirely false and misleading. In fact, the forensic evidence strongly supports the conclusion that Mr. Lee's shoes and clothes were *not* the ones worn by Ms. Reese's killer.

1. Ms. Reese Sustained a Fracture to Her Cheek From a Direct "Stomping" Blow by the Assailant—and Mr. Lee's Shoes Are

Inconsistent with the Pattern the Killer's Shoe Left on Her Cheek

90. None of Mr. Lee's counsel consulted with a qualified forensic pathologist before his execution. Had they done so, they would have learned that the State's medical examiner, Dr. William Sturner, misunderstood the mechanism of Ms. Reese's facial injuries and failed to appropriately analyze the pattern injury on Ms. Reese's cheek.

91. Dr. Sturner testified that based on his observations at the autopsy and the photos from the autopsy and crime scene, he concluded Ms. Reese had sustained 36 blows to her body and head, with numerous cuts on her head and face. R.1206. The injuries to Ms. Reese's facial area included a large cut on her forehead, fracture of the right cheek bone, and a "patterned abrasion" on her right cheek. R.2243, 2258.

92. On the same day as his testimony at Mr. Lee's first trial, Dr. Sturner also examined the rug found on Ms. Reese's body. R.1215. He then testified that the rug was "consistent with that vertical ridging" in the patterned abrasion he observed on Ms. Reese's check. R.1216. Dr. Sturner testified again about this alleged consistency between the rug pattern and the cheek injury at Mr. Lee's second trial. R.2257–60. He further opined that the patterned abrasion was consistent with her head "laying or pressed firmly" against the rug while the blows were applied elsewhere, such as "from the top or the sides of the head." R.2259.

93. Based entirely on Dr. Sturner's opinion, the prosecution argued to the jury in summation at both trials that the assailant placed the rug over Ms. Reese's head while she was beaten with a wooden tire club. R.1445, 2364. This allowed the State to bolster Dr. Sturner's purported expertise and highlight the brutal manner in which Ms. Reese was attacked. It also gave the State an additional means through which to try and explain the absence of blood on Mr. Lee's

clothing. *See* R.1445 ("I want you to look at the markings on her face where he laid that rug and beat her over again . . . . He has to cover her up with that rug so he can't get blood on him.").

94. There is no dispute that Ms. Reese was ultimately found at the scene with a rug partially covering her corpse. But Dr. Sturner's conclusion that the rug was on top of Ms. Reese's face while the assailant struck her around the face and caused the pattern injury to her cheek is simply wrong.

95. A renowned national expert in forensic pathology, **Dr. Michael Baden**, has now reviewed the autopsy report, crime scene and autopsy photos, and trial testimony of Dr. Sturner. Dr. Baden is one of the best-known and most widely respected forensic pathologists in the world. He has served as the chief pathologist for both the City and State of New York; conducted forensic reviews into the deaths of John F. Kennedy, Martin Luther King, Jr., and Medgar Evers, among others, and has held a host of prestigious academic and international positions in forensic pathology. *See* Ex. B, Affidavit of Michael Baden ("Baden Aff."), ¶ 1, Ex. A at 2. Dr. Sturner, by contrast, was retained by the State of Arkansas and called as a witness in Mr. Lee's case after he was suspended by the Governor of Rhode Island and forced to resign from his position as a medical examiner for "unprofessional conduct" and providing false testimony. R.2234–35.

96. Dr. Baden has reviewed the record and made two key findings that seriously undermine the State's case against Mr. Lee. *See* Baden Aff. ¶ 2. *First*, he has determined that these injuries were not caused by contact with a cushioned rug while the assailant struck Ms. Reese elsewhere on the head or face. *Id.* ¶¶ 6–7. Instead, a direct blow from the assailant's shoe—specifically, from the force of the assailant's foot "stomping" on the victim's face—caused her underlying cheek injury and the visible abrasion. *Id.* ¶¶ 8–9. *Second*, Dr. Baden has determined

that the sole of Mr. Lee's shoe *does not have the same pattern as the shoe that caused the injury to Ms. Reese's cheek.* *Id.* ¶ 9.

97. Dr. Baden's conclusions are based on the following observations and scientific principles:

a. The underlying injury to Ms. Reese's right cheek included fractures to her underlying nasal bone and adjacent zygomatic bone. *Id.* ¶¶ 3, 5.

b. The zygomatic bone is a strong bone that requires a forceful impact to break. Indirect force against a cushioned rug of the kind hypothesized by Dr. Sturner would be insufficient to fracture this bone. In addition, contrary to Dr. Sturner's testimony, there were no corresponding impact injuries to the top or sides of the head documented in the autopsy report or photographs. *Id.* ¶¶ 5, 7.

c. The rug pattern is inconsistent with the pattern of the abrasion on Ms. Reese's face. The parallel lines of her patterned injury are also inconsistent with having been caused by the smooth wooden club recovered at the scene. *Id.* ¶¶ 6, 7.

d. The injury pattern on Ms. Reese's cheek "is not consistent with having been inflicted by the sneakers recovered from Mr. Lee." This is because "*[t]he soles of Mr. Lee's sneakers have a much more closely spaced and more solid linear pattern* than was transferred in the cheek imprint." *Id.* ¶ 9.

98. The potential significance of Dr. Baden's findings for Mr. Lee's claim of innocence is profound. If a shoe—not a club or rug—caused the injury to the victim's cheek, and if the pattern on the bottom of Mr. Lee's shoes is incompatible with the cheek abrasion, *then another shoe must have caused this injury*. And because the State so heavily rested its case for Mr. Lee's guilt on the contention that Mr. Lee wore this specific pair of shoes to commit the murder, Dr.

Baden's findings not only are independently exculpatory (e.g., pointing to another assailant wearing a different pair of shoes), but also seriously undermine other aspects of the State's case (e.g., as to blood, shoeprints). As discussed *infra*, there are independent grounds to question those aspects of the State's case as well.

2. The State's Footwear Expert Gave Invalid Testimony as to the Alleged Size of the Assailant's Shoes, and Failed to Account for Differences Between the Patterned Soles of Mr. Lee's Shoes and the Crime Scene Shoeprints

99. One of the central pieces of evidence the State relied upon to convict Mr. Lee—the purported match between the "size" and "design" of Mr. Lee's shoes and two partial shoeprints found on pieces of paper at the scene—were based on, at best, incomplete and highly misleading expert testimony. R.2331–36. In fact, the State's expert compared the shoeprints at the scene to one and only one pair of shoes: Mr. Lee's. R.2339. That comparison did not provide the State's expert with anything close to the data needed to determine the precise size of the shoes that left these partial Crime Scene Impressions ("CSIs"), as he confidently told the jury he could do. R.2335. Moreover, the State's expert appears to have missed—and thus, the jury never heard about—certain characteristics present on the soles of Mr. Lee's shoes that were *not* found in the corresponding areas of the CSIs.

100. The State called a firearm and tool-mark examiner from the Arkansas State Crime Lab, Berwin Monroe, to testify about the shoeprints. Mr. Monroe conceded that his findings were ultimately "inconclusive" as to whether Mr. Lee's shoes had actually left the prints at the scene. R.1306. But his testimony as to the alleged consistencies between the two scarcely left room for the jurors to find otherwise. Mr. Monroe testified that Mr. Lee's shoes were the exact same "pattern," "sole design," and "size" as the shoes that left the partial impressions at the scene of the crime, and that he was "very confident" in these conclusions. R.2330–31. Regarding shoe size,

Mr. Monroe even went so far as to tell the jury that he was certain that the CSIs were made by a men's size 10 ½ shoe—the same size appearing on the label Mr. Lee's sneakers. *See* R.2330 (Mr. Monroe "determined that these [the CSIs and Mr. Lee's shoes] are the same size"); R.2335 (Mr. Monroe was "very confident" that the shoes were "consistent" with the size of the shoes that made the CSIs); R.2329–30 (Mr. Monroe stating that Mr. Lee's shoes are "size 10 ½," and that the shoes that made the marks on the pieces of papers at the crime scene (State's Exs. 29-A and 29-B) were "the same size as these shoes").

101. To say that the State relied heavily on Mr. Monroe's footwear analysis at both of Mr. Lee's trials is an understatement. *See e.g.*, R.1481 ("[M]ore than just the *exact same sole design, it is the exact same size, 10 ½.* That is what Berwin Monroe says . . . . *That is a home run. That is what that shoe is about.*" (emphasis added)); R.1922 ("It turns out that Mr. Ledell Lee wears a 10 ½. *That particular day he was wearing a 10 ½ Converse tennis shoe. Son of a gun. The footprints on those pieces of paper, ladies and gentlemen, are 10 ½ converse tennis shoes.* It just so happens to be the shoes the defendant was wearing that day." (emphasis added)); R.2391 (Mr. Monroe "says resoundingly" that "it was *a shoe that was exactly this size with exactly this pattern from exactly this manufacturer.* It is very compelling evidence" (emphasis added)).

102. A leading forensic scientist who specializes in footwear examinations, **Dr. Alicia Wilcox**, recently reviewed Mr. Monroe's testimony, qualifications, and the evidence upon which Mr. Monroe based his opinions. Ex. C, Affidavit of Alicia Wilcox ("Wilcox Aff."), ¶¶ 1, 5–6. Dr. Wilcox has nearly twenty years of experience as a forensic scientist and is a member of the Footwear and Tire Subcommittee of the Organization of Scientific Area Committees, which sets standards for forensic scientists. *Id.* ¶¶ 1, 3. She travelled to Jacksonville in October 2018 and examined the shoeprints, the partial prints and the impressions in the custody of the Jacksonville

Police Department. *Id.* ¶ 6. She also took new impressions from Mr. Lee's Converse shoes and closely examined the shoes themselves. *Id.*

103. Dr. Wilcox found serious deficiencies in the qualifications of Berwin Monroe and errors in his conclusions and testimony. She concluded that Mr. Monroe appears to have lacked the minimum qualifications, training, and experience to conduct reliable footwear impressions when he testified. *Id.* ¶ 9. The only training Mr. Monroe described specific to footwear analysis was a one-week introductory course without any supervision or review of work by the instructors. *Id.* ¶ 13. Mr. Monroe did not testify to any apprenticeship or supervision by any experienced footwear examiner. *Id.* ¶¶ 14–15. The vast majority of Mr. Monroe's experience is from a different field of tool-mark testimony. *Id.* ¶¶11–15.

104. Further, as Dr. Wilcox explains, Mr. Monroe's conclusion that the crime scene shoe impressions were the exact same size as Mr. Lee's shoes, based solely on a comparison of the CSIs to that single pair of shoes, was seriously flawed:

> Mr. Monroe did not follow accepted practices in the field of footwear examination when he made this size estimation. It is rare for a footwear examiner to offer an opinion as to the exact size or, more commonly, a narrow range of shoe sizes from a given brand of shoes that could have made an impression on paper or another surface. But in order to do so, Mr. Monroe would have needed to obtain representative Converse sneakers *across a range of sizes*, in order to carefully compare each of them to the CSIs in this case. He did not do so. Instead, he compared one and only one pair of shoes—Mr. Lee's size 10.5 sneakers—to the CSIs, and offered a definitive opinion based on that single comparison. (R.2339).
>
> An examiner simply cannot reliably determine the size of the shoe that made an impression based on an examination of a single known shoe standard. There is typically only a three-millimeter (0.12 of an inch) difference between a size 10.5 and a size 10 or 11 men's shoe, which is spread across the length of an entire shoe. These very small distinctions between sizes prevent an analyst from reliably determining the exact size of a shoe with just a single size of that shoe to compare to the CSIs.
>
> Rather than just examining Mr. Lee's sneakers, Mr. Monroe should instead have obtained and made test impressions of Converse sneakers across a far broader range of sizes to more closely and precisely compare their sizing to the CSIs. Ideally he

> would have obtained and compared Converse shoes ranging from size 8 to size 12, or even just from size 9 to 11 if the 10.5 shoes appeared, upon initial inspection, to be extremely close in size to the CSIs.
>
> Even with a range of sizes for comparison, such precise size determinations are extremely difficult to make, and should be offered by footwear examiners in rare circumstances where the data is extremely strong. In my 17 years of experience as a footwear examiner, having conducted hundreds of individual comparisons, I myself have only offered an expert opinion as to the exact size of a shoe that likely made a given impression on two occasions. And I did so in those cases only after following the methods described above. . . .
>
> In short, Mr. Monroe had nothing close to the data he needed in this case to support his "very confident" opinion at Mr. Lee's 1995 trial that the CSIs were made by a size 10.5 sneaker. (R.2335.) His testimony that he could reliably determine the size of the shoes that made the crime scene impressions on these pieces of paper from the single comparison he made was highly misleading.

Id. ¶¶ 26–29, 32. Instead, "it is likely that a broad range of men's shoes—potentially millions of shoes manufactured by Converse in the early 1990s—could have made the impressions." *Id.* ¶ 25. The visible movement on the crime scene impressions, and "the fact [] that the impressions were only partial" (rather than capturing the whole length of the shoe) further increased unreliability of any precise shoe size determination. *Id.* ¶ 31.

105. Even more damning, there is a strong possibility that Ledell Lee's shoes *exclude* him from the CSIs because of disparities in subclass characteristics between Mr. Lee's shoes and the crime scene impressions. As Ms. Wilcox explains in her affidavit, footwear examiners consider three categories of characteristics for shoe comparisons: (1) "class characteristics," such as physical size and design common to many shoes; (2) "subclass characteristics," which are distinctive marks or patterns left on shoe from a single manufacturer's mold; and (3) "individual characteristics" or randomly acquired characteristics, like imperfections or marks caused from wear or alterations to a particular shoe. *Id.* ¶¶ 36–38. Mr. Monroe's testimony that Mr. Lee's shoes had a consistent "pattern" and "sole design" with the crime scene impressions went only to

the issue of common class characteristic. *Id.* ¶¶ 39–40. Such commonalities are insufficient to make an individual identification, a fact that was never shared with the jury. *Id.* ¶ 40.

106. Mr. Monroe did not testify about the subclass characteristics present on Mr. Lee's shoes. As part of her review and analysis, Dr. Wilcox reexamined Mr. Lee's shoes (both the shoes themselves—which she viewed at the Jacksonville Police Department—as well as a new set of impressions she took from the original shoes) and considered all three categories of impression characteristics. *Id.* ¶¶ 41–42. She observed subclass characteristics *present on the outsoles of Mr. Lee's shoes* that were clearly replicated when she made test impressions of the shoes—but *which were not present* in the transparencies made by the State's expert of the crime scene impressions. *Id.* ¶ 43.

107. Specifically, Dr. Wilcox observed "texture" on Mr. Lee's shoes, a patterned subclass characteristic that is created in certain shoe molds for aesthetic reasons. *Id.* ¶ 44. The observable texture on Mr. Lee's shoes was replicated in the impressions she made—but was nowhere visible in the transparencies made from the crime scene impressions. *Id.* ¶¶ 44–51. If Mr. Lee's shoes had made the CSIs, an examiner would expect to find the same texturing on the CSIs. But Mr. Lee's shoes were not consistent with these visible subclass features of the crime scene impressions—meaning that either the crime scene impressions were an incomplete reflection of the shoeprint *or that Mr. Lee's shoes simply did not make the impressions* and should have been excluded. *Id.*

108. In its closing, the State argued that Berwin Monroe's testimony that "a shoe that was exactly [that] size with exactly this pattern from exactly this manufacturer" was "very compelling evidence." R.2391. Yet this "very compelling" picture was wrong: Mr. Lee's shoe may have been in the same general size range as the one on the impressions and shared some of

the manufacturer's characteristics with the prints from the scene. But Mr. Monroe had nowhere near the data he needed to determine the shoe's actual size (i.e., to distinguish it among *potentially millions of Converse shoes*, in a range of men's sizes, that were in circulation at that time). Further, Mr. Lee's shoes had numerous, distinctive subclass characteristics that were not anywhere visible on the footprints left at the scene. Wilcox Aff. ¶¶ 44–51.

109. Simply put, the jury heard highly misleading and incomplete testimony regarding the State's most highly touted forensic evidence from an expert who lacked the necessary qualifications, and used incorrect methodology, to reach those conclusions.

3. Autopsy and Crime Scene Evidence Demonstrate that Whoever Killed Ms. Reese Was Not Wearing Ledell Lee's Shoes or Clothing

110. Mr. Lee was arrested wearing a white t-shirt and jeans without a single drop of blood on them. R.1140. The State did find blood in two places on Mr. Lee's property: a small bloodstain on the jacket seized from Mr. Lee's mother's house, and a small pinhead-sized droplet on the tongues of each of his shoes. R.757. The State crime lab serology expert tested the blood stain on the shoes to confirm it was likely blood, but used all of the visible biological sample in the test, leaving nothing for possible DNA testing under the methods available at the time of the trial. R.2306–07. The specks of blood were so tiny that the State could not even determine their serology (ABO) blood type. *See* R.2306.

111. In contrast to the shoes, the State was able to perform DNA testing on the jacket. R.772. The DNA results from the blood on Mr. Lee's jacket[17] *excluded* both Mr. Lee and Ms.

[17] There is some question whether the jacket belonged to Mr. Lee or his mother. The police reports describe Mr. Lee as saying he wore the jacket that day, and quote his mother as saying the jacket was hers. One witness, Andy Gomez, described seeing the perpetrator wearing a jacket. R.602–03. When shown the jacket, which had a distinctive insignia design on the back, Mr. Gomez told the police he did not remember anything about the back of the jacket, and only remembered that the jacket was dark. At trial, however, he claimed that he saw Mr. Lee wearing a dark jacket with an insignia on the back. R.615–16.

Reese. R.538–39. In other words, the small drop of blood on the jacket was wholly unrelated to the Reese murder—strong evidence the tiny drops of blood on Mr. Lee's shoes may well have come from entirely innocent circumstances (such as incidental contact with another person) days, weeks, or months before the murder. Nonetheless, Mr. Lee's defense lawyers *never introduced the DNA results from the jacket*—allowing the State to present evidence that blood was found on his shoes without having to confront the exculpatory evidence from the jacket showing that the blood was not the victim's.

112. The extensive blood spattering at the scene and the lack of blood on Mr. Lee's clothing is a stark inconsistency. At trial, Mr. Lee's counsel argued in closing that this contrast suggested innocence. R.2375–77. But they did so solely by raising the apparent significance of the scene photographs and serology results in closing argument, and without expert assistance. *Id.* In post-conviction proceedings, Mr. Lambert retained a blood-spatter expert to examine the photographs and some of the physical evidence at the courthouse. R.580–606. However, the expert's brief testimony at the Rule 37 hearing did little more than echo the defense's trial assertion that the amount of blood shed by Ms. Reese was incompatible with Mr. Lee's guilt given his near-pristine clothing and shoes. P.C.606.

113. None of Mr. Lee's prior counsel retained a pathologist to look at the nature and degree of Ms. Reese's injuries, the mechanism by which those were inflicted, or the extent to which her injuries or the movement of the body indicated a likely transfer of blood. **Dr. Michael Baden** has now conducted that independent analysis. And his findings are powerful rebuttal to the State's claim that Mr. Lee committed this brutal attack.

114. Dr. Baden has spent more than five decades determining the cause and manner of death and injury in deceased persons. *See* Baden Aff., Ex. A. From the autopsy report and

autopsy/scene photographs, he made two findings regarding Ms. Reese's murder that Dr. Sturner never reported to the jury:

115. *First*, it is clear, as Dr. Sturner testified, that Ms. Reese was beaten extensively around the head, face, and neck. R.2281. *But she was also manually strangled.* This additional cause of death is evident from the autopsy findings of a fracture to the right cricoid cartilage of her neck and hemorrhaging in the neck muscles. Baden Aff. ¶¶ 3, 10. Thus, not only did the perpetrator wield a wooden tire club at arm's length, leaving the considerable blood splatter visible in the photographs that reached the walls, headboard, and nightstand. The perpetrator also *made close-range contact with Ms. Reese with his own hands as he strangled her to death. Id.* ¶ 10. Moreover, the bruises to Ms. Reese's hands demonstrate that she tried to fight off the assailant as he strangled her neck. *Id.* Because Ms. Reese—already bleeding extensively from the blows to her head and neck—was "physically resisting while she was manually strangled" and came into "close contact with her assailant" just before she died, these events would necessarily "result in the transfer of blood from Ms. Reese onto the skin and clothes of the assailant." *Id.* ¶¶ 10–12.

116. *Second*, the medical evidence shows that the assailant *lifted and moved Ms. Reese's bloody corpse from the floor and onto the bed. Id.* ¶ 11. As noted in Part III.A.1., *supra*—but not heard by the jury—Ms. Reese's attacker did not cause the injury to her right check with a wooden tire club, but instead by stomping directly with his foot. Because this portion of the assault required direct impact with sufficient force to break the zygoma bone in her cheek, it could not have occurred when Ms. Reese was lying on the soft bed where her body was later found. *Id.* ¶ 7. As Dr. Baden explains, this injury occurred when the perpetrator "stomp[ed]" his foot "directly onto Mrs. Reese's exposed right cheek as she lay on the floor." *Id.* ¶ 8. And because she was ultimately found by police in a different location (the bed), this means that the perpetrator must have moved

her body himself. Thus, in addition to the considerable spatter from the wooden tire club blows, "[a]dditional transfer of Ms. Reese's blood onto the perpetrator's skin and clothing would have occurred when her body was lifted onto the bed with blood dripping from multiple head lacerations." *Id.* ¶ 11.

117. In sum, as Dr. Baden explains:

> The many injuries Mrs. Reese incurred during close contact with her assailant would have transferred considerable amounts of blood onto the skin and clothing of the perpetrator. The presence of only a single "pinhead in size, very, very small" drop of blood described by the State serologist as being present on the tongue of each of Mr. Lee's shoes, and the absence of any blood on Mr. Lee's t-shirt or jeans, are incompatible with these items having been worn by the person who committed this murder.

Id. ¶ 12.

118. These findings are powerful scientific support for Mr. Lee's unwavering claim of innocence. The pathology evidence demonstrates that this was a crime committed at close-range, resulting in massive, diffuse bloodshed, and that the perpetrator strangled the victim after she was bleeding, stomped on her face, and moved her bloodied body. Because none of Mr. Lee's lawyers ever consulted a forensic pathologist while he was alive and protesting his innocence, neither his jury nor reviewing courts ever heard this evidence.

B. Hair Evidence

119. Mr. Lee was also convicted based on microscopic hair comparison—a forensic method whose flaws and risk of error have become well-known since trial. The police collected a number of dark and light-colored hairs from the crime scene. These included one "intact Negroid hair" (containing not just a hair strand, but an attached root with tissue) and several "Negroid" hair fragments. R.2287. One of the "Negroid" hair fragments was found *on the suspected murder weapon* (the wooden tire club). R.1239. The others, including the intact hair, were collected in the vacuum bag: the day after Ms. Reese was found murdered, the police returned to the crime

scene to vacuum the bedroom area between the bed and the bedroom wall—focusing on the area where police believed the perpetrator stood over the bed as he wielded the wooden tire club. R.2154.

120. Donald E. Smith, a criminologist, testified for the State as an expert witness in the field of hair analysis. He examined the one "intact Negroid hair" and several "Negroid" hair fragments under a microscope and compared them to samples of Mr. Lee's hair. R.2287. Like the State's footwear expert, Berwin Monroe, Mr. Smith conceded that his analysis did not actually identify Mr. Lee. R.2286. But the State elicited detailed testimony that did much to convey the misimpression that his microscopic comparison led inexorably to that very conclusion. R.2280–90.

121. According to Mr. Smith, the hairs from the crime scene could neither be identified nor excluded as coming from Lee. R.2285. Mr. Smith was careful to emphasize that his inconclusive conclusion was not a negative finding, and he elaborated on the many ways in which he found the hairs to be "consistent," in terms that were tantamount to an identification. R.2284–89. According to Smith, Mr. Lee's hairs and the "Negroid" crime scene hairs shared the following distinctive microscopic features: they were "brittle," "tips with fractured ends or broken off," "the same roll, the same kink," "the same relative diameter," "the same color pattern," the "same distribution of pigments," the "shape of the pigments," and "pigment characteristics." R.2285–86. He then told the jury that there were *no* characteristics in any of the hairs that were inconsistent with Mr. Lee's. R.2286. The State underscored this in closing argument, acknowledging that "there's not enough there to say yes, it is, or no it is not [Mr. Lee's hair]," while in the next breath reminding the jury that "[t]here wasn't anything inconsistent" when Mr. Lee's hair was compared microscopically to all of the "Negroid" hairs at the scene. R.2370; *see also* R.1482 ("Hair was

found of a Negroid origin . . . they were short and they were brittle, *just like Mr. Lee's hair*. And [Mr. Smith] put them side by side in a comparison microscope, *and they were identical*." (emphasis added)).

122. The trouble with the microscopic hair comparison Mr. Smith conducted is that *it has now been proven wholly unreliable* as a method of assessing whether hairs share a common origin. *See* Ex. D, Affidavit of Alan Keel ("Keel Aff."), ¶ 16 (citing FBI's unprecedented review of flawed hair analysis by its own experts, which resulted in findings that more than 90% of examiners erred in interpreting or testifying about microscopic comparisons; and discussing two Montana cases tried separately in 1987 in which innocent men were wrongly convicted of rape based on microscopic hair comparison, but DNA testing revealed hairs were not from the convicted men, and both were exonerated).[18] The subjective methods Mr. Smith used—examining the hairs under a microscope, and offering his personal opinion as to whether or not their features appeared "consistent"—are no substitute for an objective DNA test on the genetic material contained within the hairs. As is further discussed in Part III.D.1., *infra*, only DNA testing can answer the question whether those hairs actually came from Mr. Lee, as the State contended at trial.

C. Eyewitness Testimony and Pretrial Identification Procedures

123. Although there were no witnesses to the homicide, the State presented several witnesses who reported seeing a Black man the morning of the murder near 212 Cherry Street:

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[18] *See also* Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 160–61 (2009) (discussing FBI study which found that of 80 hair comparisons "associated" through microscopic examinations, 12.5 % were found to come from different sources when reexamined through DNA analysis); Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, Wash. Post (Apr. 18, 2015), https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html (discussing results of decades-long review of cases in which FBI acknowledged that over 95% of senior hair examiners who testified as to an alleged hair comparison match or consistency either erroneously reported or overstated the significance of their findings; errors identified in phase 1 of study included 32 capital cases).

Andy Gomez, a neighbor who lived diagonally from Ms. Reese, on a street that ran perpendicular to her home; his wife, Pamela Gomez, who lived with him; William McCullough, a man who lived on the same street as Mr. Gomez, multiple houses down from Ms. Reese; Kris Stough, a woman who lived on Ms. Reese's street, down the block; and Glenda Pruitt, a woman who lived nine blocks away, in a different Jacksonville neighborhood. These witnesses provided differing physical descriptions of the man they observed or spoke with on the day of Reese's homicide. Three of them—Mr. McCullough, Mr. Gomez, and Ms. Pruitt—picked Mr. Lee out of a photo lineup that, as will be discussed *infra*, was highly suggestive. R.883–84, 599, 2025. They each later identified him at trial as the man they saw in the neighborhood around the time Ms. Reese was killed. R.1988, 1943–44, 2021. Kris Stough and Pamela Gomez did not identify Mr. Lee in the photo lineup and did not identify him at trial.

124. **Dr. Jennifer Dysart**, a professor of psychology and a leading national expert in eyewitness identifications, reviewed the related witness testimony, photos, and police reports in the case. When analyzing the accuracy of an eyewitness identification, Dr. Dysart explains there are factors inherent to the viewing environment that impact accuracy. *See* Ex. E, Report of Jennifer Dysart ("Dysart Report") at 6. These factors, such as distance and lighting, among many others, are known as estimator variables. Factors that impact an identification that are controlled by the police in the course of their investigation, such as how a photo lineup is presented and recorded, are known as system variables. *See* Dysart Report at 3.

125. In reviewing the eyewitness identifications of Mr. Gomez, Mr. McCullough, and Ms. Pruitt, Dr. Dysart concludes that, collectively, "this case has one of the largest number of factors [common to eyewitness misidentification] than *any case I have reviewed as an expert witness over the last 13 years*." *Id.* at 33 (emphasis added). As discussed *infra*, her analysis reveals

troubling issues with each of these identifications that completely undermine their reliability and accuracy, and thus "the combination of all of these factors significantly decreased the likelihood that an accurate identification was made." *Id.*

1. Andy Gomez

126. Mr. Gomez testified that sometime around 11:15 a.m., he saw a Black male walking along Cherry Street, towards his home. R.1938, 1944. Through the window of his home, Mr. Gomez saw the man approach 212 Cherry Street, speak with a woman in the doorway of the home, and quickly enter. R.1938. Although he testified that the distance between his living room window, where he stood observing the man, and 212 Cherry Street was approximately 50 to 75 feet, R.597, the actual distance is 221 feet. *See* Ex. F, Affidavit of Elizabeth Vartkessian ("Vartkessian Aff."), ¶ 4; Dysart Report at 9–11. Approximately 20 minutes later, Mr. Gomez testified he observed a Black male leave 212 Cherry Street and walk south on Cherry Street, away from his home. R.1942. Mr. Gomez then decided to get in his car and follow the man. R.1941–42. He claims to have followed the man for 20 to 25 minutes, and to have lost sight of him while driving at least four times. R.1943, 1960.

127. Dr. Dysart explains that the scientific research on the impact distance plays in a witness' ability to accurately observe facial details strongly suggests that Mr. Gomez, who observed the Black man entering 212 Cherry Street from 221 feet away, could not have seen the man's face clearly enough to make any accurate identification of him. Dysart Report at 3–4, 11. This is significant because Mr. Gomez would go on to select a picture of Mr. Lee's face from a photo lineup presented by police, and to claim that he clearly saw the man's face. R.599, 113. Notably, too, Mr. Gomez told the jury that he only made his observations from 50 to 75 feet away, R.597, a gross underestimation of the actual distance. Also impacting Mr. Gomez's ability to accurately perceive: he used glasses to see far distances at night but was not wearing them the

morning of murder. *See* R.961, 1951; Dysart Report at 10. Mr. Gomez also expressed he was very fearful while observing and later following this man; fear impacts a person's ability to accurately perceive and encode physical details of another person. *See* Dysart Report at 17–18.

128. Dr. Dysart also concludes it is quite possible Mr. Gomez indeed saw two—or more—different Black men between the observations he made standing in his home and those made while driving around following, and repeatedly losing sight of, a Black man walking away from him. *Id.* at 16–17. Mr. Gomez estimates he lost sight of "the man" approximately four times, for several minutes each time. R.1960–61. While Mr. Gomez testified that he was confident he saw the same person the entire time because he recognized his clothing,[19] Dr. Dysart explains scientific research shows people routinely mistakenly believe they have observed only one person when they in fact observed two different people. Dysart Report at 16–17. This phenomenon is known as "change blindness" and originates from the brain's instinct to fill in gaps in perception. *Id.* at 15–17. Thus, even if Mr. Gomez saw Ledell Lee walking in the neighborhood near Galloway Circle and believed him to be the same person he saw entering 212 Cherry Street, given the great distance from which he observed "the man" entering the home, and given the number of times he lost "the man" while driving, R.1960–61, his identification of Mr. Lee as the person he saw entering 212 Cherry Street is highly questionable.[20]

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[19] Mr. Gomez's description of the man was very general, a fact Dr. Dysart found unsurprising given the great distance from which he observed him—first, from 212 feet away, and then while driving and losing track of his pursuit. Dysart Report at 19. He described the man as slim build, tall, Black, wearing a ball cap, jeans, and a dark jacket. R.602–05, 952, 1942.

[20] Dr. Dysart also notes that it also does not make sense temporally that Mr. Gomez observed the same person the entire time. Multiple witnesses testified that the Black male they saw was walking quickly away from 212 Cherry Street, R.977, 1982, and the distance between 212 Cherry and 128 Galloway Circle, where Mr. Gomez claims to have observed the man talking with someone, is only .4 miles. Dysart Report at 21. Given the relatively short distance between these two locations and that Mr. Gomez estimates he drove around 20 to 25 minutes, there's even more reason to suspect he saw different people along his route. *Id.*

2. Pamela Gomez

129. Pamela Gomez, Andy Gomez's wife, testified that she was home when Andy Gomez left in his car for 20 to 30 minutes, and she saw a "black male" walking up Cherry Street, who was turning and looking behind as he was walking. R.1973. She testified that she remembered the man wore blue jeans and tennis shoes, but she could offer no other description. R.1976. She did not identify Mr. Lee at trial or at any point prior to trial.

3. Glenda Pruitt

130. Ms. Pruitt testified that she was outside on her porch when Lieutenant Johnson came into her yard and *told her* that she had been talking with Ledell Lee that day. R.622–23. She went on to tell Lieutenant Johnson that she talked with a man she knew as "Skip," whom she had previously asked for marijuana. R.622–23. Notably, there is no evidence in the record that police asked Ms. Pruitt for a description of the man she spoke with before telling her she was speaking with Mr. Lee. Ms. Pruitt recalled having seen "Skip" in the neighborhood a few times, but she did not know him well and did not know his real name. R.620, 627. Ms. Pruitt said the man she was talking with might have been wearing a red plaid shirt. R.623–24. Ms. Pruitt admitted she was not wearing her eyeglasses when speaking with this person, and that she might have been using drugs that day. R.625, 983. Lieutenant Johnson showed Ms. Pruitt a photo lineup featuring Mr. Lee and she ultimately selected his photo as the person with whom she spoke in passing. R.628–30.

131. At first blush, it might seem unlikely that someone who "knew" Mr. Lee could misidentify him. As Dr. Dysart explains, however, scientific research shows that misidentifications do occur between non-strangers, and that the likelihood of misidentification greatly increases when the observer has had minimal prior exposure to the person in question. *See* Dysart Report at 12. Here, the record reveals Ms. Pruitt was relatively unfamiliar with Mr. Lee:

She testified at the preliminary hearing that she had only "met him briefly" and she even had trouble recognizing him from the witness stand when he was sitting in the courtroom wearing an orange jumpsuit. R.619–20. Additionally, Ms. Pruitt only interacted with the man passing by her house the day of the murder for "seconds" before she later identified him as Mr. Lee. R.2023. Notably, it took Ms. Pruitt about ten minutes to select Mr. Lee's photograph from the photo lineup. R.2025. Dr. Dysart explains that an accurate identification should only take seconds to make. *See* Dysart Report at 29. Ms. Pruitt needed a full ten minutes to select Mr. Lee's picture even though police had *told* her the person she was speaking with was Ledell Lee.[21] R.622–23. Dr. Dysart concludes that, based on these facts, it is quite possible Ms. Pruitt was mistaken in identifying Mr. Lee as the person she spoke with in passing. Dysart Report at 14.

4. William McCullough

132. William McCullough, who also lived on North Oak Street, testified that a Black man dressed in a short-sleeved shirt and long trousers knocked on his door and asked him to borrow his tools on the morning of Ms. Reese's murder. R.1994–95. He estimated speaking with the man for 10 to 15 minutes. R.1988. He estimated the man was about 6 feet tall and weighed 180 pounds. R.1980. Although the police asked him multiple times, Mr. McCullough remained absolutely certain that the man he saw was *not* wearing a hat or jacket. R.1994. He said in a police statement the day after the murder and at Mr. Lee's first trial that the man came to his house to ask about tools before 10:00 a.m. R.882–83. However, at the second trial, he testified that the man came by at 11:00 a.m. R.1987, 1994.

[21] Telling a witness who they saw, and thus who to select from a photo lineup, is inherently biasing. Indeed, all three witnesses who were shown the photo lineup by officers knew that the suspect might be included. *See* Dysart Report at 27. This non-blind administration increased the chance the officers, purposefully or inadvertently, suggested who to select. *Id.* at 28–29.

133. Dr. Dysart explains relevant scientific research shows people very commonly overestimate the amount of time they interact with another person, and that those overestimations are often drastic. *See* Dysart Report at 12–13. Notably, despite estimating he spoke with the man for 10 to 15 minutes, at the suppression hearing held before Mr. Lee's first trial, Mr. McCullough could offer no description of the clothing the man wore other than that he wore long pants and could not describe any facial features, except to say the man had dark skin. R.883, 887–89.

134. Police did not speak with Mr. McCullough until February 10, 1993, the day after the murder, well after Mr. Lee had been arrested and was the sole suspect in the case. R.890–91. In addition to numerous other biasing factors related to the photo lineup, discussed *infra,* the fact that police knew Mr. Lee was the arrested suspect at the time they showed Mr. McCullough the lineup and at the time they took a witness statement from him, and the fact that this procedure was not recorded so as to memorialize what the officers said to Mr. McCullough (or what he said to them) as he made his selections, undermines the reliability of his identification, and all in-court identifications stemming from it. *See* Dysart Report at 28–29. As Dr. Dysart explains, "If an individual has been identified in one identification procedure, he is considerably more likely to be identified in a subsequent procedure regardless of whether or not he is the actual perpetrator." *Id.* at 32.

5. Kris Stough

135. The fifth witness, Kris Stough, like Pamela Gomez, did *not* identify Mr. Lee at trial and did *not* identify him in any identification procedure. She lived on Cherry Street and told police during their canvass of the neighborhood that she saw a Black man, 5 feet 6 inches tall, wearing a black jacket and blue jeans, just before 12:00 p.m. R.1977–81. She described the man as walking fast and said that he appeared intoxicated. R.1982. The police did not ask Ms. Stough for a written statement at the time of the crime, but she testified over a year later at Mr. Lee's second trial. At

trial, Ms. Stough testified that she saw a Black man walk up Cherry Street from Graham Street, and then she saw him walk back towards Graham. R.1977–79, 1983–84. Mr. Gomez described following the man down Cherry Street toward Graham Street in his red car, but Ms. Stough testified that she did not see a red car following the man. R.1981. She watched the man from her front window, on her couch, peaking through the blinds. R.1977, 1983. Troublingly, Ms. Stough's testimony suggested she had been coached to avoid some facts, as she testified in response to the question by the defense lawyer that she "didn't think [she] was supposed to say that [he was intoxicated]." R.1982.

136. Mr. Lee was a tall man, six feet. Ms. Stough's description did not meet his physical build, and while Ms. Stough described someone weaving and intoxicated, neither the police, Andy Gomez, nor Glenda Pruitt described Mr. Lee as intoxicated. This description, inconsistent with the descriptions of other witnesses and with Mr. Lee's actual appearance, lends even more support to the possibility that there were two or more Black men walking in the neighborhood that day—and thus, that Mr. Gomez, in particular, may have lost sight of the man he saw exit the victim's home and confused that man with Mr. Lee.

6. Biased Photo Lineup

137. Dr. Dysart explains that the photo lineup was far from the unbiased identification procedure touted by the State in closing argument; instead, it was overly suggestive on several fronts, thus undermining the reliability of the "identifications" made from it.[22] The police included a picture of Mr. Lee wearing a jacket and he appears to be the only person in the array wearing a

[22] The State argued in closing that the photo lineup did not show height, weight, or attire of those featured. R.2389.

jacket.[23] R.637–38. This is significant because two of the three witnesses who viewed the lineup described the man walking through the neighborhood or leaving 212 Cherry Street as wearing a jacket. R.602–03, 981, 1994. According to Dr. Dysart, the least biasing, and thus best-constructed, photo lineups are those in which no one person stands out, especially the suspect. *See* Dysart Report at 24.[24] A conspicuous photo like Mr. Lee's vis-à-vis the other photos in the lineup effectively reduces the functional size of the other photographs in comparison, making it more likely an observer will select the suspect's photograph.[25]

138. To measure just how biased the photo lineup was towards Ledell Lee, Dr. Dysart oversaw a mock witness experiment[26]: She presented a group of graduate students with a description of the alleged perpetrator of an unnamed crime and, showing them a copy of the photo lineup presented to Mr. Gomez, Ms. Pruitt, and Mr. McCullough, asked them to select the person who best fits the description. Dysart Report at 25. Using these five color photos still available, if each of the photos were a viable comparator, one would expect one fifth, or 20 percent, of the subjects who read the witnesses descriptions to pick Mr. Lee's photo. *Id.* In fact, of the 47 students

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[23] Mr. Lee is undoubtedly the only person wearing a jacket in the color-photo array copied as an exhibit from the Arkansas Supreme Court's file, State's Ex. 20, used by Dr. Dysart in the functional size analysis experiment. Dysart Report at 25. Although the black-and-white copy of the array featuring the sixth picture is grainy, it appears that the missing photograph (in position "1") also does not feature a man wearing a jacket, thus making Mr. Lee the only person wearing a jacket in the photo lineup shown to Mr. Gomez, Ms. Pruitt, and Mr. McCullough. State's Ex. 20.

[24] Citing U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* 30 (1999), https://www.ncjrs.gov/pdffiles1/nij/178240.pdf.

[25] Dr. Dysart also noted that the photo lineup was uniquely biased towards Mr. Lee when Ms. Pruitt made her selection because she said she knew at least two other people featured in the lineup. R.627–28. This means that the lineup was thus reduced from six possible options who could have been the person she was speaking with to four. *See* Dysart Report at 25.

[26] Dr. Dysart asked Dr. Thomas Kucharski, a fellow instructor at John Jay College of Criminal Justice, to conduct the actual experiment with Dr. Dysart's instructions. This was to ensure there was no potential for unconscious biasing of participants, since Dr. Kucharski has no knowledge of the case and did not know Mr. Lee was the ultimate suspect. *See* Dysart Report at 25.

who participated in the study, 39 of the 47 picked Ledell Lee from the photo lineup, meaning *83 percent*—more than 4 out of 5—of participants selected his photo. *Id.* This is an astonishing result that suggests the 1993 photo lineup overwhelmingly encouraged the actual eyewitnesses to pick Mr. Lee's picture. *See id.* at 25–26. Once Mr. Lee was identified in this highly biased lineup, he was then almost guaranteed to be identified in-court at the subsequent hearing and trials.[27]

139. Dr. Dysart concludes that the combination of all these factors significantly decreased the likelihood that an accurate identification was made by *any* witness in this case. *See id.* at 33. Unlike these subjective and highly questionable eye witness identifications, however, advanced DNA testing and a search of the original fingerprints in the national AFIS database—both of which were unavailable at the time the State showed these witnesses Mr. Lee's photograph and called them to testify—can objectively and accurately identify the perpetrator of this crime.

D. Forensic Evidence Remains in Defendants' Custody, and Post-Trial Scientific Advancements Could Exculpate Mr. Lee

140. The errors and improprieties in the State's trial evidence raise profound doubts about whether Ledell Lee committed the murder for which the State executed him in April 2017. But the inquiry need not—and should not—end there. For undersigned counsel has confirmed that (1) the State ***has retained virtually all of the physical evidence collected*** from the scene of Ms. Reese's murder and autopsy; (2) much of that evidence is ***highly likely to contain the perpetrator's unique DNA profile and/or his fingerprints***; (3) both DNA and fingerprint analysis methods have advanced significantly since trial, making much of this ***evidence suitable for testing with methods not available to either party in 1993-95***; and (4) the development and expansion of ***DNA and fingerprint databases*** since the early 2000s makes it possible not only to determine with scientific

[27] "Psychologists view in-court identifications as mere theater and not as independent tests of a witness's memory or ability to identify perpetrators." Dysart Report at 32.

certainty whether or not Ledell Lee killed Debra Reese, but ***to identify the real source of the DNA and/or fingerprints if Mr. Lee is in fact innocent.***

1. DNA Evidence

141. Before trial, and until the day of his execution, Mr. Lee sought DNA testing of the "pinheads" of blood found on his shoes, for the purpose of showing that the blood came from an innocent third-party source or Mr. Lee himself, not from Ms. Reese as the State asked the jury to infer. The testing was not available at the time of his trial because Kermit Channell, a serologist with the State Crime Lab, had elected to use a "Takayama test" technique on both blood spots to confirm that they were human blood, and, according to Mr. Channell, the test consumed all of the available biological material that could be tested using the early-generation DNA testing methods in existence at that time. *See Lee v. Arkansas*, 327 Ark. 692, 699 (1997). Mr. Channell submitted the shoes to the FBI for it to conduct its own review of potential blood on the shoes before the second trial. The FBI serology analyst, Harold Deadman, examined the shoes and observed no blood, further concluding that "nothing of apparent significance was noted in an examination of the [shoes]."

142. DNA technology has advanced exponentially in the 24 years since Mr. Lee's trial. Today, that technology may be capable not only of detecting and obtaining a DNA sample from any trace amounts of blood that may remain on Mr. Lee's shoes. It may also permit the killer's DNA to be successfully typed from other deposits of hair, blood, semen, skin tissue, and saliva on an array of other items from the crime scene and Ms. Reese's autopsy.

143. **Alan Keel,** a DNA analysist and criminologist, certified in molecular biology, who worked for over half of his career as a criminalist in state and police crime laboratories, has conducted DNA analysis and review in hundreds of cases since 1991. Keel Aff. ¶¶ 2–4. Keel has reviewed the forensic testimony, autopsy, bench notes of the state's experts, and the crime scene

photographs from the Debra Reese murder. *Id.* ¶ 5. He has determined that numerous pieces of evidence collected by the Jacksonville Police Department and the Medical Examiner's Office are suitable for DNA analysis using today's advanced and highly sensitive methodologies. *See id.* ¶¶ 6–13.

144. Mr. Keel's detailed affidavit explains these new technologies and provides examples of how such testing has been successful in similar cases, including where (as here) prior analysts did not previously detect DNA using the more limited methods available in decades past. His affidavit also explains why the specific items of evidence he reviewed are likely to contain the perpetrator's DNA or otherwise answer important questions about the perpetrator's identity. Mr. Keel's findings and scientific conclusions include the following:

a. Methods of DNA analysis have advanced significantly since Mr. Lee's trial, including examination and technological advances in the collection and detection of biological material. The more sensitive and discriminating method of Short Tandem Repeat (STR) gene analysis used today has been used successfully in cases with degraded and low-level DNA samples, including fingernail clippings/scrapings, vaginal samples recovered in cases with no ejaculation, and so-called "touch DNA," or small amounts of biological material containing DNA that was transferred from brief physical contact, on clothing or objects. *Id.* ¶ 8.

b. The methods used by the State to analyze the biological evidence before Mr. Lee's trial, conventional serology and outdated DNA analysis known as restriction fragment length polymorphism, have been replaced by today's far more powerful polymerase chain reaction (PCR)-based STR technology. And STR-DNA technology has itself witnessed additional advances in recent years. These include the development of Y-

STR testing (which targets DNA on the Y-chromosome, a gene that only males possess) and Mini-STR testing (which first became available in 2007, and focuses on small or degraded DNA samples). *Id.* ¶¶ 7–10.

c. With these capabilities, it is likely that any stains remaining on Mr. Lee's shoes, on which only two tiny spots of blood were found and tested in the early 1990s, could still provide meaningful DNA results, even if the blood was not visible when the State Lab and FBI examined the shoes. Today, *meaningful DNA results can be expected with less than 1/200th of a pinhead droplet of blood.* *Id.* ¶ 20.

d. Microscopic hair analysis (i.e., the examination conducted by the State's trial expert) is now widely recognized as an unreliable method of determining the source of a hair. *Id.* ¶ 16. DNA comparison, by contrast, has been shown to be highly probative and often dispositive of the identity of the hair source. *Id.* ¶ 17. The kind of DNA evidence suitable for a particular hair sample testing turns on whether the hair is intact, i.e., with a root still attached. *Id.* ¶ 15. The collected dark-colored (what the State's criminologist dubbed "Negroid") hair with a root can be tested for nuclear DNA through STR analysis. *Id.* The remaining hair fragments can be tested using mitochondrial DNA analysis. *Id.* ¶ 17. DNA testing on hair evidence was not available at the time of Mr. Lee's trial, but has now been available for over a decade. *Id.* ¶¶ 15–18.

e. Several other categories of evidence collected in the Reese investigation that are appropriate for STR-DNA analysis, including: (1) the fingernail swabs collected from Lee after his arrest; (2) the victim's fingernail clippings; (3) the vaginal, oral, and rectal swabs taken from Ms. Reese; (4) the wooden tire club used to beat the victim; and (5) the victim's bloody clothing and bedding. *Id.* ¶¶ 22–26, 29, 33–35.

f. There is potential for each of these items to contain DNA from the perpetrator of this brutal crime. And he provides numerous examples of post-conviction cases where advanced STR-DNA and mitochondrial DNA testing of similar biological material, collected under similar circumstances, revealed new evidence that exonerated one or more innocent persons who had been wrongly convicted of a crime, and the results of that testing were used to identify the true perpetrator(s). *See, e.g., id.* ¶¶ 16, 27, 28.

g. Among the technological advancements Mr. Keel cites are significant improvements to the national CODIS database maintained by the FBI. CODIS began to collect and store STR-DNA profiles from convicted offenders and crime scenes in 2000. *Id.* ¶ 7. In 2017, the FBI expanded CODIS to include 20 core genes and made other changes that allowed a broader range of DNA profiles to be entered and searched. *Id.* ¶ 11. These recent developments "have created the potential to produce DNA profile investigative leads from almost any human biology that can be recovered from physical evidence." *Id.* And other recent advances in DNA technology—particularly computer-assisted probabilistic genotyping—have made it possible for analysts to accurately interpret complex mixtures and identify an individual's DNA profile with far greater accuracy and precision than ever before. *Id.* ¶¶ 7, 11.

145. Mr. Keel's review of the record and his expertise in DNA analysis powerfully lays out the case for DNA testing in a way that none of Mr. Lee's appointed post-conviction counsel—none of whom consulted *any* DNA experts, much less nationally-recognized ones—ever did before his execution. The public has a strong interest in knowing whether the "Negroid" hairs found on the bedroom floor and murder weapon, the biological material under Ms. Reese's fingernails, and

potentially inside her body, on her clothing, or on her bedding came from Mr. Lee—or from another, as-yet-unidentified individual.

146. And the potential for the DNA testing sought here to not only answer the serious questions that remain about Mr. Lee's innocence, but affirmatively identify another assailant, is by no means speculative. As of November 2019, the FBI's CODIS database contained the unique DNA profiles of over *17 million* offenders and arrestees from around the nation.[28] These profiles can be simultaneously compared in a matter of hours to any unknown DNA profile(s) generated from the Debra Reese crime scene.

147. As of November 2019, CODIS has generated over 491,537 DNA "hits," assisting in more than *481,098 investigations*, including 5,771 in Arkansas alone.[29] These include a significant number of actual-innocence cases in which the hit to a known individual provided crucial information that cleared another, wrongly convicted person. As of 2016—just before Mr. Lee's execution—nearly half of the nation's post-conviction DNA exonerations led to the identification of one or more actual perpetrators.[30]

148. Tragically, these cases too often resulted not only in grievous consequences for the wrongly convicted, but for the public, as well. In Arizona, an already-imprisoned man who had murdered a Phoenix bartender might have gone free on parole had DNA evidence not exonerated Ray Krone and yielded a hit to the real assailant in CODIS.[31] And while Michael Morton sat

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[28] U.S. Dep't of Justice, FBI, *CODIS - NDIS Statistics*, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (last visited Jan. 10, 2020).

[29] *Id.*

[30] Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989–2014: Review of Data and Findings From the First 25 Years*, 79 Alb. L. Rev. 717, 730 (2016).

[31] *See* Nat'l Registry of Exonerations, *Ray Krone*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3365 (last visited Jan. 14, 2020).

behind bars for 25 years in Texas for a crime he did not commit, his wife's real killer murdered another young wife and mother, before that man was finally identified through a CODIS hit to the killer's DNA from a bloody bandana found near the Morton crime scene.[32] Thus, if there is even a chance that Mr. Lee was not the person who murdered Ms. Reese, the public not only has a right to know that information. The public also has a direct interest in ensuring that the real assailant does not pose an ongoing threat to public safety.

2. Latent Fingerprints

149. On the day Ms. Reese's body was discovered, investigators collected numerous latent fingerprints from key locations at the crime scene. These included prints from locations that the perpetrator almost certainly touched, like the, front door, the television, the wallet, and a calendar book from Ms. Reese's purse. R.2140–41. Indeed, at both of Mr. Lee's trials, the State specifically contended that the killer pushed his way through the front door, turned the volume of the television up to high to mask his victim's screams, and stole money from Ms. Reese's wallet, which was likely kept in her purse with the calendar book. R.1443–45.

150. James Beck, the Arkansas State Crime lab analyst, testified that he analyzed all of the submitted latent prints, and found that four were of sufficient value for comparison. R.2270. Mr. Beck compared these latent prints to Mr. Lee's fingerprints and concluded that the fingerprints collected from the scene *excluded* Mr. Lee. R.2273.

151. Incredibly, the latent prints have never been compared to state and national fingerprint databases to identify the possible source of the fingerprints. Nor does it appear that

[32] Nat'l Registry of Exonerations, *Michael Morton*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3834 (last visited Jan. 14, 2020).

any of Mr. Lee's appointed counsel even considered this potential avenue of investigation. The latent prints remain unidentified as of today.

152. In July 2019, **Matthew Marvin**, a national expert in latent fingerprint analysis and a Board Certified Latent Print Examiner, reviewed digital scans of the nine latent fingerprint cards collected by the Jacksonville police that remained in the State's files. These included all four of the prints that were deemed to be "of value" and not from Mr. Lee back in 1994-95. *See* Ex. G, Affidavit of Matthew J. Marvin ("Marvin Aff."), ¶¶ 1–4, 11–13.

153. Like the Arkansas State Crime Lab examiner, Mr. Marvin examined the prints to determine whether there was sufficient ridge detail to be of value for comparison purposes. *Id.* ¶ 12. He also considered whether there was sufficient detail in the fingerprints that they could be searched though the Automated Fingerprint Identification System ("AFIS"), which includes the FBI's Next Generation Identification database ("NGI"). *Id.* ¶¶ 7–8, 12, 14. NGI is the largest criminal fingerprint database in the world, and contains fingerprints and criminal histories for over 70 million subjects. *Id.* ¶ 25.

154. Mr. Marvin was able to use enhanced digital processing techniques in his evaluations of suitability for comparison and AFIS upload that were unavailable at the time of Mr. Lee's trial. *Id.* ¶¶ 24–31. The database itself has been significantly expanded and upgraded in recent years, both with respect to speed and matching capability. *Id.* ¶ 30.

155. Like the State's analyst, Mr. Marvin determined that four prints from the storm door were suitable for comparison. *Id.* ¶ 14. He also determined that two additional prints (from the television set and the calendar book inside the victim's purse) were suitable for comparison. *Id.* Mr. Marvin determined that *five of these crime scene fingerprints*—three from the storm door,

one from the television set, and one from the calendar book—*are suitable for automated searching in state and national fingerprint databases. Id.*

156. The AFIS database is a law-enforcement-controlled system whose data may only be accessed by approved law enforcement agencies or by court order. If access to the original fingerprints and a search of the database is granted, this technology could potentially identify the source of one or more of the still-unidentified latent prints from this case *in as little as ten minutes. Id.* ¶ 31.

157. Comparison of latent prints in these national databases has repeatedly led to the identification of actual perpetrators and the exoneration of wrongfully convicted individuals. That has been particularly true in recent years, as the capabilities of these databases have increased substantially. *See id.* ¶¶ 32–34 (discussing exoneration of Archie Williams in 2018, based on updated NGI/AFIS search of unknown prints from scene of Louisiana rape for which Mr. Williams had wrongly served 36 years in prison; crime scene prints were identified through database hit as coming from serial sex offender who had committed at least five other rapes in intervening years).[33]

* * *

158. Two-and-one-half years after Ledell Lee's execution, there is now a powerful factual record on which this Court may find that the core purposes of FOIA are readily served by releasing the DNA evidence and fingerprints to Ms. Young in this now-closed criminal investigation, at no cost to the City or State. Notably, those who seek the truth about Ledell Lee's

[33] *See also* Thomas Fuller, *He Spent 36 Years behind Bars. A Fingerprint Database Cleared Him in Hours*, N.Y. Times (Mar. 21, 2019), https://www.nytimes.com/2019/03/21/us/fingerprint-database-archie-williams.html; Michelle Hunter, *Royal Clark Jr. Freed After 2003 Wrongful Conviction in Terrytown Armed Robbery*, NOLA.com (June 27, 2019), https://www.nola.com/news/crime_police/article_f3ff092a-9b73-5a7e-b1e3-fdc2660f7c53.html (discussing 2019 exoneration of Royal Clark, freed after 17 years in prison based on AFIS/NGI hit to source of crime scene fingerprints).

claim of innocence are not limited to his family, friends, and the pro bono counsel who sought to obtain DNA testing in the final days of his life. They also include those who have admitted they failed in their obligation to properly investigate Mr. Lee's innocence in years past. As Craig Lambert—Mr. Lee's former post-conviction counsel, who suffered from addiction throughout his representation—has forthrightly stated:

> Even in the peak of my addiction I wanted to do all I could to provide Ledell with the representation to which he was entitled. I know I did not do enough for Ledell, even though Ledell was always was kind towards me. Even after I withdrew from the case, Ledell would call me each year to check in. Ledell often thanked me for the work I did. I remain grateful that Ledell didn't hate me or hold a grudge.
>
> I recognize the investigation into Ledell's innocence was not adequate and he deserved far better than the representation I was able to provide him back then. I wholly support a posthumous scientific inquiry into Ledell's innocence and will cooperate in any way I can with that inquiry.

Lambert Decl. ¶¶ 20–21.

159. If Mr. Lambert can publicly admit that his own failings may have contributed to the execution of a potentially innocent man, it is remarkable that Defendants are blocking that inquiry. The City of Jacksonville is now simply the custodian of evidence in a long-closed murder investigation. Neither the State, nor these Defendants, have any present interest in that evidence—other than, one would hope, its potential to reveal the objective, scientific truth about Debra Reese's murder.

IV. Defendants Unlawfully Denied Ms. Young's FOIA Requests

160. On February 9, 2018, Arkansas resident Holly Dickson (Legal Director of the ACLU of Arkansas) submitted an initial FOIA request in person to the Jacksonville Police Department via the designated form. Ex. H (Feb. 9, 2018 FOIA Request). The initial request sought approval to inspect the physical evidence in the Debra Reese case. *Id.* The Jacksonville Police Department instructed Ms. Dickson that Robert Bamburg, then the City Attorney of

Jacksonville, would need to approve the request. Mr. Bamburg approved the initial request to inspect the physical evidence.

161. Over the course of several months, Ms. Young's counsel inspected the physical evidence at the Jacksonville Police Department under the supervision of Mr. Bamburg. While at police headquarters, Mr. Bamburg agreed to allow counsel to visually inspect the evidence, including taking high-resolution pictures of the evidence and (through its retained expert, Alicia Wilcox) test impressions of Ledell Lee's shoes. On October 9, 2018, Ms. Young's counsel met with Mr. Bamburg and asked the City for permission to submit physical evidence for DNA testing at a mutually agreeable outside laboratory, with the testing to be considered an extension of the initial FOIA request.

162. In January 2019, Ms. Young's counsel spoke with Stephanie Friedman, the newly elected City Attorney of Jacksonville, and reiterated the request to submit evidence from the case for DNA testing and run the fingerprints found at the crime scene through a national database. On February 5, 2019, Ms. Young's counsel met with Ms. Friedman at the Jacksonville Police Department to jointly inspect the evidence from the Debra Reese case.

163. In May 2019, Ms. Friedman requested further information from Ms. Young's counsel regarding the legal authority for the City to release the evidence pursuant to the earlier FOIA request. Ms. Young's counsel responded with a letter outlining the relevant legal authority on May 8, 2019. *See* Ex. I (May 8, 2019 Letter from Ms. Young's Counsel to Ms. Friedman). On May 9, 2019, Ms. Friedman indicated that she had forwarded Ms. Young's counsel's letter to the Arkansas Attorney General. Ms. Friedman failed to respond to numerous telephone and email messages from counsel thereafter.

164. On July 19, 2019, counsel for Ms. Young contacted Ms. Friedman by email again and asked that she authorize the fingerprints to be searched in the national databases. *See* Ex. J (July 19, 2019 Email from Ms. Young's Counsel to Ms. Friedman). Counsel attached the report showing that five of the fingerprints from the police files are of sufficiently good quality as to be eligible for entry into the national database, at no expense to the City. Ms. Friedman never responded to this email.

165. On October 3, 2019, Ms. Friedman spoke with Holly Dickson about the request for DNA testing. Ms. Friedman said that after additional conversations and reflection she would not permit testing of the evidence requested via FOIA in the absence of a court order.

166. On January 16, 2020, Ms. Young, an Arkansas resident, by and through undersigned counsel John Tull, sent Ms. Friedman a letter requesting that Defendants release the DNA evidence and fingerprint evidence from the Debra Reese case for DNA testing and a fingerprint analysis/database search for inspection and testing, pursuant to Arkansas's Freedom of Information Act.

167. On January 21, 2020, Ms. Friedman responded via email and denied Ms. Young's FOIA request. *See* Ex. K (January 21, 2020 Email from Ms. Friedman to Ms. Young's Counsel).

ARGUMENT AND ENTITLEMENT TO RELIEF

168. Plaintiff requested to inspect two types of public records under FOIA: (1) the underlying genetic material (DNA data) within the physical evidence recovered from the Debra Reese crime scene and autopsy, and (2) the original fingerprints from the Debra Reese investigation. Both of these categories are considered public records under FOIA because they are "data compilation[s] in any medium." *See* Ark. Code Ann. § 25-19-103(7)(A). No exceptions to disclosure of these public records apply in this case. And it is in the public interest—and indeed

the state of Arkansas's best interest—to release these public records, which may reveal the innocence of a man executed by the state. If Mr. Lee is innocent, the release of these records may also reveal that a person other than Ledell Lee murdered Debra Reese in 1993 and permit the apprehension and prosecution of that person for her murder. Defendants must release both types of public records pursuant to FOIA.

169. Under FOIA, "[e]xcept as otherwise specifically provided by this section or by laws specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas." Ark. Code Ann. § 25-19-105(a)(1)(A). The Arkansas General Assembly explained that it adopted FOIA to "mak[e] it possible for [the public] or their representatives to learn and to report fully the activities of their public officials." *Id.* § 25-19-102. To that end, courts "liberally interpret the FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner." *Fox v. Perroni*, 358 Ark. 251, 256 (2004); *see also Laman v. McCord*, 245 Ark. 401, 404–05 (1968) (Arkansas Supreme Court had "no hesitation in asserting our conviction that the Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved"). Courts also broadly construe FOIA in favor of disclosure of public records. *See Fox*, 358 Ark. at 256.

170. Records must be disclosed under FOIA if they are "(1) possessed by an entity covered by the Act; (2) fall within the Act's definition of a public record; and (3) not be exempted by the Act or other statutes." *Apprentice Info. Sys., Inc. v. DataScout, LLC*, 2018 Ark. 146, 5 (2018). Here, Ms. Young's requested records satisfy each of the three requirements.

171. *First,* Defendants are covered entities under FOIA because they are the custodians of the public records requested by Ms. Young. The Jacksonville Police Department not only

physically stores the physical evidence that contains the requested underlying genetic material (i.e., Ms. Reese's fingernail clippings, Mr. Lee's shoes, hairs found at the crime scene, etc.), *see* Part IV, *supra*, but also is the custodian of that physical evidence by law. *See* Ark. Code Ann. § 12-12-104(a) ("In a prosecution for a sex offense or a violent offense, the law enforcement agency shall preserve, subject to a continuous chain of custody, any physical evidence secured in relation to a trial and sufficient official documentation to locate that evidence."). Pursuant to this same authority, the Jacksonville Police department is the custodian of the original fingerprints taken from the crime scene in the Reese case. It is further charged with the authority to authorize the uploading of these fingerprints to the AFIS database, either directly through their own AFIS portals, or through an interagency search.

172. Defendants Joseph McCullough and Bob Johnson, in their official capacities, oversee the Jacksonville Police Department and thus are appropriate custodians of both categories of public records under FOIA. *See Daugherty v. Jacksonville Police Dep't*, 2012 Ark. 264, 1 (2012) (Jacksonville Police Department, Police Chief, and Mayor violated FOIA by charging a fee for copies of audio/video recordings of speeding vehicle).

173. *Second,* both categories of information and data requested by Ms. Young constitute public records within the meaning of FOIA. The General Assembly defined "public records" as:

> writings, recorded sounds, films, tapes, electronic or computer-based information, or *data compilations* in any medium required by law to be kept or otherwise kept and that constitute a record of the performance or lack of performance of official functions that are or should be carried out by a public official or employee, a governmental agency, or any other agency or improvement district that is wholly or partially supported by public funds or expending public funds. All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records.

Ark. Code Ann. § 25-19-103(7)(A) (emphasis added). "Medium," within the definition of "public records" means "the physical form or material on which records and information may be stored or

represented and may include, but is not limited to, paper, microfilm, microform, computer disks and diskettes, optical disks, and magnetic tapes." *Id.* § 25-19-103(4). The Arkansas Supreme Court has previously upheld the release of state police files from a dormant homicide investigation under the FOIA statute. *See Dep't of Ark. State Police v. Keech Law Firm, P.A.*, 2017 Ark. 143, 3 (2017).

174. The pieces of physical evidence recovered from the Debra Reese crime scene and autopsy are objects "on which records and information may be stored or represented"—in this case, the underlying genetic material on the evidence. In other words, the physical evidence stores the underlying genetic material within blood, hair, etc.

175. The underlying genetic materials themselves are "data compilation[s] in any medium" and thus constitute public records under FOIA. *See* Ark. Code Ann. § 25-19-103(7)(A). Modern STR-DNA testing (*see* Keel Aff., attached as Exhibit D) involves nothing more than the extraction of *numerical data* from cellular material, i.e., a portion of the genotype of the donor. *See, e.g.*, John M. Butler, Fundamentals of Forensic DNA Typing 205 (1st ed. 2009) ("An STR genotype is the allele . . . present in a sample for a particular locus and is normally reported as the number of repeats present in the allele. *A full sample genotype or STR profile is produced by a combination of all the locus genotypes into a single series of numbers.* This profile is what is entered into a case report or a DNA database for comparison purposes to other samples." (emphasis in original)). This is the essence of a "data compilation."[34]

[34] *See also id.* at 230-35 (describing how DNA profile statistics are calculated and DNA databases are created) ("To assess how common or rare a particular allele or allele combination are, *data is gathered* from representative groups of individuals. It is possible to run a small subset of the population and reliably predict allele and genotype frequencies in the entire population—much like a telephone survey of several hundred individuals is sued to try and predict the outcome of a political election." (emphasis added)).

176. Inspection of the underlying genetic material on the physical evidence in this case diverges significantly from *Nolan v. Little*, in which the Arkansas Supreme Court held that seed samples did not constitute public records under FOIA. 359 Ark. 161, 165 (2004). The plaintiff in *Nolan* sought to take permanent possession of seeds from a state agency for his own testing on the seed samples, a request that would have required the complete destruction of the seed samples. The Court rejected the request, holding that "[g]iving the words of the statute their plain and ordinary meaning as required by the rules of statutory construction, a seed sample does not constitute a 'public record,' nor does it fall within the definition of a medium." *Id.* at 166. Specifically, the Court found that "[r]emoval and destructive testing of seed samples go far beyond the inspection and copying of public records." *Id.*

177. Ms. Young's request to analyze the underlying genetic DNA material here is distinguishable from the large quantities of seed samples requested in *Nolan*. In *Nolan*, the plaintiff requested transfer and the permanent custody of 100 grams of seed samples so that he could determine whether the seeds contained wheat. *See id.* at 164. In this case, however, Ms. Young requests only temporary access to the physical evidence for the purpose of analyzing the data in the underlying genetic material—not the permanent control or destruction of the physical evidence itself. Upon the extraction of DNA data from the evidence and completion of the DNA testing, the original items of evidence can be returned to the City of Jacksonville.

178. Even more fundamentally, the contrary interests of the evidence custodians in *Nolan* are not present here. The Court in *Nolan* relied heavily on the fact that, if seeds were given out via FOIA, the State agency could well run out of seeds and the State Board's ability to carry out its mandate could be compromised. *See id.* No such concern is present here. Any testing of the physical evidence for genetic material would not wholly consume or destroy the evidence (for

example, it would require only that the shoes be swabbed for minute traces of human DNA, leaving the shoes themselves intact).

179. Indeed, rather than consume an entire item of evidence—as in *Nolan*—modern technology can generate reliable and unique DNA data by testing just a single one-billionth of a gram (one nanogram) of biological material.[35] *See, e.g.*, Butler, *supra* at 154 ("The availability of STR kits that permit robust multiples amplification of eight or more STR markers has truly revolutionized forensic DNA analysis. Matching probabilities that exceed one in a billion are possible *in a single amplification with 1 ng (or less) of DNA sample*. Just as impressive is the fact that results can be obtained today in less than a few hours, as opposed to the weeks that [older] (RFLP) methods took just a few years ago." (emphasis added)). Such testing is far more analogous to "inspection and copying" than in *Nolan*, which would have required the State to relinquish forever 100 seeds from the State's possession, with legitimate concerns about the impact of the transfer on the State's legitimate interest. Here, the State does not run the risk of depleting the evidence entirely. *See id*

180. And crucially, unlike in *Nolan*, the relief requested here involves no concern whatsoever that the requested testing and analysis will leave Defendants unable to carry out the mandate of the Jacksonville Police Department. Defendants closed their investigation into Debra Reese's murder nearly three years ago, and have already exacted the ultimate retributive punishment on Mr. Lee through his 2017 execution.

181. Arkansas relies on a common-sense balancing test when deciding whether to order disclosure. *Id.* at 164 (citing *Ark. Dept. of Finance & Admin v. Pharm. Assoc.*, 970 S.W.2d 217 (1998)). This common-sense approach also favors disclosure. The requested DNA testing and

[35] *See Nanogram*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/nanogram (last visited Jan. 15, 2020).

fingerprint analysis is consistent with Jacksonville Police Department's interest in solving crimes and the broader statutory scheme for preservation of evidence. Arkansas law requires the Jacksonville Police Department to hold the physical evidence from the Debra Reese murder *permanently* but specifically contemplates allowing disposal of the evidence *only after "[t]he evidence has no significant value for forensic analysis."* *See* Ark. Code Ann. §§ 12-12-104(b)(2)(A); 12-12-104(c)(1)–(2) (emphasis added). The legislature has expressed its clear intent through this statutory scheme to promote the preservation of evidence for the purpose of forensic testing. The Defendants have no competing interest in maintaining evidence, but not allowing testing, in this case—where the State of Arkansas has already imposed the ultimate, irreversible punishment of death by execution. What point is there to continuing to store the physical evidence collected from the crime scene of a murder, other than to use that evidence to determine who is responsible for the murder? Since the Jacksonville Police Department has already concluded its own investigation into Ms. Reese's murder, it has no legitimate interest in guarding that evidence in perpetuity, simply to obstruct an independent investigation into whether the State in fact executed the guilty party. Inspection of the genetic material contained within the forensic evidence and release of the fingerprints fits squarely within the General Assembly's purpose of both the evidence-retention statute and FOIA.

182. Similarly, (1) the original fingerprints from the Reese crime scene that are being held by the Jacksonville Police Department, and (2) the fingerprints of the known individuals contained in AFIS, and records regarding those individuals in the database (which may reveal that a person other than Ledell Lee is the source of the crime scene prints) all constitute public records under FOIA. This information clearly is a "data compilation." *See* Ark. Code Ann. § 25-19-103(7)(A).

183. *Third*, FOIA compels the disclosure of both categories of public records (genetic DNA material and fingerprints) because neither falls within an exception. Although FOIA enumerates some exceptions, courts "interpret those exemptions narrowly." *Keech Law Firm*, 2017 Ark. at 3. FOIA does permit an exception for "*undisclosed* investigations by law enforcement agencies of suspected criminal activity." Ark. Code Ann. § 25-19-105(b)(6) (emphasis added). The Arkansas Supreme Court has held that the purpose of this exemption is "to protect ongoing investigations." *Keech Law Firm*, 2017 Ark. 143 at 3 (internal quotation marks omitted). In no sense is this investigation either "undisclosed" or "ongoing." The Jacksonville Police Department has already permitted Ms. Young's counsel to visually inspect the physical evidence in the Debra Reese murder case multiple times (and, with respect to the shoe soles, to take additional test impressions of the soles). And the State of Arkansas already concluded its investigation and executed the man convicted of the crime. In *Keech Law Firm*, the Supreme Court concluded that an investigation was not "open and ongoing" for purposes of a 2013 FOIA request regarding a 1963 murder when the police undertook only "sparse activity" between 1965 and 2014, most of which occurred after the petition was filed. *Id.* at 4. This petition presents an even clearer situation: the Jacksonville Police Department and the State of Arkansas remain firm in their convictions that in 2017 they executed the sole man they believe was responsible for the murder of Debra Reese.

184. Moreover, the public interest strongly favors granting Ms. Young's petition. It is difficult to imagine what could be more in the public interest than ensuring that public officials convicted—and ultimately executed—the right man for a capital crime. The public has an interest in holding public officials accountable. As in *Keech Law Firm*, "the public are entitled to know how the officials in this case, i.e., law enforcement, performed their duties." *Id.* at 5. Either the

underlying genetic material or the fingerprint data within AFIS may reveal that another person murdered Debra Reese—a person who was never tried or even investigated for her murder. If Mr. Lee is indeed innocent, failure to disclose the requested public records "could detract from [the State's] ability to bring the person responsible for [Reese's] death to justice." *Id.* Such a failure not only compromises the public interest in learning the truth about who murdered Mrs. Reese, but also the public safety interest. For if it turns out that Mr. Lee is innocent, the person who actually killed Debra Reese may still be at large and at risk of committing further violent crimes as has, tragically, been the case with many other true perpetrators of the crimes for which innocent persons were convicted or sentenced to death.[36]

185. Ms. Young's strong interest in obtaining this data—and the State's lack of any legitimate interest in opposing it—would be more than sufficient under FOIA even on the record that existed at the time of Mr. Lee's April 20, 2017 execution. But it is even more powerful now, given the new information that Ms. Young's investigation has yielded about (1) the serious flaws and errors in the forensic evidence used by the State to convict Mr. Lee and defend his death sentence on appeal; (2) the extent to which the expert findings attached to this Complaint provide still strong, objective evidence that Mr. Lee may be innocent of the murder, none of which was known at the time of his execution; and (3) the lack of minimally adequate representation Mr. Lee received from his assigned post-conviction counsel charged with conducting this investigation while he was alive, including (but not limited to) Mr. Lambert's candid admissions as to the toll that his addiction and lack of resources took on his representation of Mr. Lee. In other words, it is no longer a mere theoretical possibility that the State of Arkansas executed the wrong man for Ms. Reese's murder. For there is an array of new evidence revealing that Mr. Lee's jury and

[36] *See supra* ¶ 148.

reviewing courts were given flawed and inaccurate information. That evidence is powerful support for Mr. Lee's longtime claim of innocence, and strongly tips the balance of interest in favor of disclosure.

186. Accordingly, under FOIA Defendants must release both the underlying genetic material within the physical evidence recovered from the Debra Reese crime scene and autopsy so that they can be subjected to DNA testing, and the original crime scene fingerprints so that they can be uploaded and compared to the fingerprint data stored in the AFIS database.

CONCLUSION

187. The review of the testimony and exhibits in this case by leading national forensic experts dramatically undermines the case for guilt presented by the prosecution at Mr. Lee's trial. Experts in DNA and fingerprint evidence confirm that the available physical evidence and fingerprints, maintained in the files of Defendants, contain identifying information that almost certainly will shed light on Mr. Lee's guilt or innocence. The time is long past overdue to answer the troubling questions raised by the flaws in the presentation of the evidence in this case. Whether Mr. Lee or another as-yet-uncharged person committed the murder of Debra Reese is a matter of great importance to Ms. Young and the public alike.

CLAIMS FOR RELIEF

COUNT ONE (DNA EVIDENCE)

188. Plaintiff Patricia Young reincorporates the foregoing paragraphs.

189. Under FOIA, "all public records shall be open to inspection and copying by any citizen of the State of Arkansas." Ark. Code Ann. § 25-19-105(a)(1)(A).

190. FOIA is broadly construed in favor of disclosure of documents or other items deemed to be public records.

191. Ms. Young is a resident of the State of Arkansas for purposes of FOIA.

192. Defendants are the custodians of all physical evidence regarding the murder of Debra Reese and the investigation of Ledell Lee for that murder. *See* Ark. Code Ann. § 12-12-104(a), (b)(1).

193. Ms. Young seeks to have certain items of physical evidence that are highly likely to contain the DNA of the person who killed Debra Reese, or may otherwise prove Ledell Lee's innocence of Ms. Reese's murder by demonstrating that her DNA was not present on his person or property. The unique genetic code (DNA profile) of the person who killed Ms. Reese, if present on the requested items, may further identify the person who killed Ms. Reese through the national DNA database. These items of physical evidence include:

a. Ledell Lee's shoes (State's Ex. 47);

b. Hair and hair fragments found at the crime scene, including the so-called "Negroid" hairs;

c. Ledell Lee's fingernail swabs;

d. Debra Reese's fingernail clippings;

e. Debra Rees's oral, vaginal, and rectal swabs;

f. Wooden tire club (State's Ex. 22);

g. Debra Reese's clothing (State's Exs. 35 and 67); and

h. Debra Reese's bedding (State's Exs. 24–27, 34, and 36).

194. The underlying genetic material within the physical evidence recovered from the Debra Reese crime scene and autopsy are "data compilation[s] in any medium" and thus constitute public records under FOIA. *See* Ark. Code Ann. § 25-19-103(7)(A).

195. The underlying genetic material does not fall under the exceptions to disclosure of public records under Ark. Code Ann. § 25-19-105(b).

196. Defendants have no legitimate interest in withholding the underlying genetic material requested by Ms. Young from disclosure under FOIA. There is no pending investigation into the murder of Debra Reese by any City, County, or State official. That investigation was officially closed by the State of Arkansas after the April 20, 2017 execution of Ledell Lee.

197. By denying Ms. Young the right to access and inspect public records regarding the underlying genetic material within the aforementioned physical evidence, Defendants denied Ms. Young the rights granted to her under FOIA.

198. Ms. Young now appeals the denial of these rights pursuant to Ark. Code Ann. § 25-19-107(a).

COUNT TWO (LATENT PRINT EVIDENCE)

199. Ms. Young reincorporates the foregoing paragraphs.

200. Defendants are the custodian of the original fingerprints found at the crime scene of the Debra Reese murder, data regarding the identity of individuals whose fingerprints are contained in AFIS, and records regarding those individuals in the database. *See* Ark. Code Ann. § 12-12-104(a), (b)(1).

201. The fingerprints found at the crime scene of the Debra Reese murder constitute public records under FOIA. *See* Ark. Code Ann. § 25-19-103(7)(A).

202. The identity of individuals whose fingerprints are contained in AFIS and records regarding those individuals in the database constitute a public record under FOIA. *See id.*

203. None of these items fall under the exceptions to disclosure of public records under Ark. Code Ann. § 25-19-105(b).

204. By denying Ms. Young the right to access and inspect public records that reveal whether the fingerprints from the Debra Reese crime scene correspond to, or may otherwise be

identified as, the fingerprints of a known offender contained in the AFIS database, Defendants denied Ms. Young the rights granted to her under FOIA.

205. Ms. Young now appeals the denial of these rights pursuant to Ark. Code Ann. § 25-19-107(a).

REQUEST FOR RELIEF

WHEREFORE, Ms. Young respectfully asks that this Court:

A. Hold a hearing on Ms. Young's petition within seven (7) days, pursuant to Ark. Code Ann. § 25-19-107(b);

B. Enjoin Defendants from denying Ms. Young the right to access and inspect public records regarding (1) the underlying genetic material within the physical evidence recovered from the Debra Reese crime scene and autopsy, and (2) the original crime scene fingerprints;

C. Declare that Defendants violated Ms. Young's rights under FOIA by denying her the right to access and inspect public records regarding (1) the underlying genetic material within the physical evidence recovered from the Debra Reese crime scene and autopsy, and (2) the original crime scene fingerprints;

D. Enter an order directing Defendants to release the physical evidence set forth in ¶ 193 for DNA testing at a nationally accredited DNA laboratory at Ms. Young's expense, and further directing Defendants to release the original crime scene fingerprints for upload and comparison to the AFIS database;

E. Award Ms. Young litigation costs and reasonable attorney's fees, pursuant to Ark. Code Ann. § 25-19-107(c); and

F. Grant such other, further, or different relief as the Court may deem just and proper.

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Nina Morrison*
Jane Pucher*
INNOCENCE PROJECT
40 Worth St., Suite 701
New York, NY 10013
212-364-5340 (Phone)
212-364-5341 (Fax)
nmorrison@innocenceproject.org
jpucher@innocenceproject.org

Pieter Van Tol*
HOGAN LOVELLS US LLP
390 Madison Ave.
New York, NY 10017
212-918-3000 (Phone)
212-918-3100 (Fax)
pieter.vantol@hoganlovells.com

Kaitlin Welborn*
HOGAN LOVELLS US LLP
555 13th Street NW
Washington, DC 20004
202-637-5600 (Phone)
202-637-5910 (Fax)
kaitlin.welborn@hoganlovells.com

Attorneys for Plaintiff

John E. Tull III (Ark. Bar No. 84150)
QUATTLEBAUM, BROOMS & TULL PLLC
111 Center St., Suite 1900
Little Rock, AR 72201
501-379-1700 (Phone)
501-379-1701 (Fax)
jtull@qgtlaw.com

Cassandra Stubbs*
Olivia Ensign*
ACLU CAPITAL PUNISHMENT PROJECT
201 W. Main St. Suite 402
Durham, NC 27701
919-688-4605 (Phone)
919-682-5961 (Fax)
cstubbs@aclu.org
oensign@aclu.org

On behalf of the American Civil Liberties Union Foundation, Inc., and the Arkansas Civil Liberties Union Foundation, Inc.

* Motion for admission *pro hac vice* pending.