INTRODUCTION

The crime in this case was tragic

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

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

his case.[14] The resulting perfunctory performance by these state post-conviction attorneys caused more harm to Mark's legal position. Many of Mark's family witnesses met the state post-conviction lawyers for the first time when they appeared, under subpoena, to testify at depositions at a Ramada Inn, testimony that typically took about ten or fifteen minutes from start to finish. Tragically, many of these family members held indispensable information for Mark's case at that point, information that would come to light from investigation conducted years later. But his lawyers from the state defender system, in effect, buried this information by serially lurching into the depositions without prior investigation or even discussions with the witnesses. At bottom, post-conviction counsel failed to expose the rampant incest and sexual abuse that Mark was subjected to and observed for his entire life (and which the attorney could have discovered

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

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

IV. FEDERAL HABEAS CORPUS PROCEEDINGS

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

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

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

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

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

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

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

29. Motion to Appoint Counsel, Christeson v. Roper, No. 4:04–cv–08004–

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

The appointed attorneys requested that counsel meet Mr. Christeson at the Potosi Correctional Center and then sit down with them in their office in suburban St. Louis to discuss what might be done to litigate equitable tolling of the federal statute of limitations, the deadline they had missed in 2005. When new counsel arrived at the prison to meet with Mark, two th li 137.52t5349(w)a137.52t5349(w)a13

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

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

As the Court observed, that malfeasance had led one renowned ethical expert to opine: "if this was not abandonment, I am not sure what would be."[60]

Two months later, the Eighth Circuit remanded the case to the district court, which terminated the appointment of the attorneys appointed nearly eleven years prior and appointed formerly pro bono counsel to serve under 18 U.S.C. § 3599 as the conflict-

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

Mark's capacity made him particularly vulnerable to the fraud perpetrated by his prior counsel. Prior counsel could not provide a single shred of evidence to suggest that they had undertaken any work on his behalf during the statutorily relevant, 334-day time period.[76] They could not produce a single piece of work product, nor a memo, note, time entry, bill, email, letter, or even a post-it created during that time. They never interviewed a single witness or expert. They had not met with or emailed resource counsel. They had absolutely no contact with Mr. Christeson during that time. Their complete absence of a file was proof, ipso facto, of their abandonment.[77] As legal expert Prof. Lawrence Fox observed, "no lawyer[ ] could handle a habeas case without taking notes, writing reviews of documents, preparing questions in advance of conducting depositions, resi3H4tmFtndle ndlelhre. T (b)11.4 (a)08 (ki)5.3 (n6)08 (ki)5u(c)0.8 (m t)5.3 (ha)7nO(hr)3L2 (e. (s)2.7 (,z8

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

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

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

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

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

86. Further, in Mr. Christeson's case, the U.S. Supreme Court had stayed his 2014 execution date and ultimately remanded the case to the lower federal courts, thereby triggering a Missouri

compressing the timetable to conclude briefing before the execution date imposed by the state court two months prior.[88]

The crux of the argument on appeal was that the district court needed, at the very least, to hold a hearing on the issue of abandonment. That court's factual finding that the attorneys had not abandoned Mark was not only unsupported by the evidence, it was actually contrary to the only evidence in the record and the determinations made by the U.S. Supreme Court in this very case. Apparently recognizing the efficacy of the COA application, and perhaps to protect itself from another reversal, the Court of Appeals interrupted its accelerated briefing schedule and, in a bizarre turn of events, granted the defense's longstanding request for an evidentiary hearing, remanding for that limited purpose while expressly retaining jurisdiction over the appeal.[89] Briefly, it appeared th.3 2 (d)-5 (.3 2 O(e)-4.3 2 O(e) (e)0.

impeding the ability of Mr. Christeson's counsel, let alone witnesses, to physically attend the hearing.[92]

Mark's prior lawyers, however, wasted no time getting to the court. The Attorney General's Office immediately called them (*ex parte*) and instructed them to travel across the state from St. Louis. Eleven days before the execution date, without even receiving service of a subpoena as their enduring duty to Mr. Christeson would require—at a minimum—before they could give testimony adverse to their fo

of the Assistant Attorney General's objections and denied all ten of Mr. Christeson's counsel during this hearing.[101]

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

When the case returned to the federal appeals court in St. Louis, one judge openly acknowledged that the lawyers' defense, if true, would still amount to "deficient" performance, but that, because they "