EXECUTION DATE SET FOR APRIL 20, 2017

IN THE SUPREME COURT OF ARKANSAS

LEDELL LEE,	)	
	)	
Appellant	)	
	)	
vs.	)	**Case No. CR17-315**
	)	
STATE OF ARKANSAS,	)	
	)	
Appellee.	)	

MOTION TO STAY EXECUTION

COMES NOW appellant, Ledell Lee, by and through counsel, and moves this Court to stay his execution set for April 20, 2017. Mr. Lee further moves this Court to remand the matter to the Circuit Court of Pulaski County for DNA testing or an evidentiary hearing on his petition for post-conviction DNA testing filed under Arkansas's Habeas Corpus – New Scientific Evidence Statute (the "DNA Statute") (codified at Ark. Code Ann. §§ 16-112-201, *et seq.*) or, in the alternative, an order directing the Circuit Court to release the DNA evidence immediately for DNA testing, because Mr. Lee has already satisfied the DNA Statute's requirements in light of undisputed facts in the record.

FACTS AND PROCEDURAL HISTORY

In May, 1993, Mr. Lee was charged by information in Pulaski County, Arkansas, Circuit Court with capital murder under Ark. Code Ann. § 5-10(101)(a)(5) (1987) for the alleged murder of Debra Reese. A trial in October, 1994 resulted in a hung jury. At his second trial in 1995, Mr. Lee was convicted of capital murder and sentenced to death.

On April 17, 2017, Mr. Lee filed a Verified Petition for Post-Conviction DNA Testing under Ark. Code Ann. §§ 16-112-201, *et seq.* ("the DNA Petition"). The DNA Petition sought to utilize DNA technology that was not available *to any party* at the time of his 1995 trial to determine whether (as the State alleged at trial) certain "Negroid" hairs found at the crime scene were Mr. Lee's, and whether two blood spots on Mr. Lee's own shoes actually came from the victim; the Petition further alleged that this same newly available DNA technology could not only disprove key pillars of the State's original case against him, but affirmatively prove his innocence by identifying the actual source of the crime scene hairs (and perhaps other items deposited by the perpetrator) through the CODIS DNA database, which was also not in existence at the time of his arrest and trial. The hair and blood evidence sought to be tested was collected by the Jacksonville Police Department at the time of the crime in 1993, admitted into evidence at Mr. Lee's trial in 1995, and in the possession of the Jacksonville Police Department since that time.

On April 18, 2017, the Circuit Court summarily denied Mr. Lee's petition for DNA testing. The Court permitted oral argument on the motion, but did not permit Mr. Lee to (1) offer expert testimony in support of his claim; or (2) present evidence regarding Mr. Lee's prior efforts to obtain DNA testing and his prior counsel's failure to pursue those claims on his behalf. Further, an attorney from the Innocence Project was prepared to argue and otherwise make a detailed proffer regarding the issues of fact, law, and DNA science that are central to Mr. Lee's claim of actual innocence and his entitlement to testing under the DNA statute,

ARGUMENT

I. The Circuit Court Erred in Summarily Denying Appellant's Meritorious Petition for DNA Testing of Blood and Hair Evidence the State Relied Upon to Convict Him and Sentence Him to Death

A. Despite the State's heavy reliance on the limited, non-DNA forensic testing performed at Mr. Lee's trial, post-conviction counsel never sought DNA testing to put the State's allegations – and their own client's longtime claim of innocence – to the test of definitive DNA science.

In 1995, Mr. Lee's jury was told that none of the rudimentary tests available at that time (serology and hair microscopy) could definitively tie Mr. Lee to the crime or crime scene – yet the prosecutor repeatedly asked the jury to infer that the presence of "Negroid" hairs that appeared "consistent" with Mr. Lee's at the scene, and small spots of "human blood" on his shoes, were powerful evidence of his guilt. Yet prior counsel never put any of the State's dubious claims to the test of modern

DNA science – even though Arkansas passed a statute permitting DNA testing in cases like Mr. Lee's over a decade ago. Because Mr. Lee has maintained his innocence for more than two decades; was denied minimally competent counsel to present that claim for DNA testing and have an expert appointed on his behalf; and the evidence he seeks to test satisfies each and every one of the statute's requirements, this Court should reverse the lower court and order a meaningful evidentiary hearing on these claims, or in the alternative, simply direct the court to enter an order for DNA testing.

Mr. Lee has petitioned the Pulaski County Circuit Court for an order directing forensic DNA testing of biological evidence collected during the investigation of the murder of Debra Reese pursuant to Arkansas's Habeas Corpus – New Scientific Evidence Statute (the "Statute") (codified at Ark. Code Ann. §§ 16-112-201, et seq.), and the Due Process and Cruel and Unusual Punishment Clauses of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. *Lee v. State*, No. CR 93-1249. This probative biological evidence in the custody and control of the Jacksonville Police Department since 1993 may now be able to provide—through the use of modern, cutting edge DNA testing technologies—confirmation of the veracity of Mr. Lee's innocence claim.

At the time of his arrest, at trial, and to this day, Mr. Lee has denied involvement in the murder of Debra Reese. At trial, the State introduced no

confession and no physical evidence that directly tied Mr. Lee to the murder of Ms. Reese. None of the lifted prints from the crime scene matched the defendant, and no DNA evidence was presented to the jury. To strengthen the weak circumstantial evidence, the State introduced "Negroid" hair found in Ms. Reese's home, and evidence of two "small spot[s]" of human blood found on Mr. Lee's Converse tennis shoes at the time of his arrest, which could not be further typed to determine their potential source(s).

Notwithstanding an extremely bloody crime scene, however, no other blood was discovered anywhere on Mr. Lee's clothes. Even more remarkably, despite the fact that the State alleged that Mr. Lee had worn *this very pair of shoes* to bludgeon Ms. Reese to death – leaving the scene spattered with blood on the walls and floor – the State never explained how Mr. Lee could have possibly committed this close-range, brutal murder yet left the rest of his tennis shoes wholly untouched with the victim's blood. As the Court's decision in *Lee I* explained:

> When Lee was arrested and taken into custody on the day of the murder, among the items police seized from him was a pair of Converse tennis shoes he was wearing. Kermitt Channell, a serologist with the State Crime Lab, examined the shoes and observed what he believed to be a small spot of blood on the sole of the left shoe, and another spot on the tongue of the right shoe. Channell performed what he termed a "Takayama test" on the shoes, which confirmed the presence of blood, but consumed the entire sample, thus removing the opportunity for independent analysis by the defense.

942 S.W.2d at 234. Channell testified at trial that he performed the confirmatory

blood test on the shoes in accordance with established laboratory guidelines, but acknowledged that he had not contacted the prosecutor or the defense counsel in advance to inform them that the sample on the shoes could be consumed. *Id.* at 235.

Significantly, the Court, in 1997, denied Mr. Lee's claim for due process relief on appeal because "Lee has made no showing that the blood evidence on the shoes possessed any exculpatory value before it was destroyed." *Id*. Yet at no time during the last two decades did post-conviction counsel for Mr. Lee ever retained a DNA expert to examine the shoes and determine if any traces of the original blood spots – or other blood on the shoes ---might not have been "destroyed" for DNA purposes. Since today's STR-DNA testing requires significantly smaller quantities of biological material than the serology tests conducted in 1993-95, and DNA analysts frequently detect traces of blood or other biological material that serologists do not, post-conviction counsel's failure to so investigate DNA testing on the shoes was patently unreasonable. *See* Petition for DNA Testing, Rp 31 (Declaration of Charlotte Word, Ph.D.) (explaining protocols and utility of reexamination of shoes for bloodstains suitable for DNA testing). More than merely raising a due process claim regarding bad faith destruction of the two bloodstains, then, postconviction counsel could and should have sought expert assistance in determining whether any blood, hair, or other evidence remained in a condition suitable for DNA testing to prove Mr. Lee's innocence.

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

In her closing arguments during the guilt phase of the guilt phase of trial, the prosecutor emphasized the importance of the identification of some Negroid hair fragments consistent with the defendant's and in contrast to the Caucasian head hairs of Debra Reese and her husband. Tp. 773. The prosecutor acknowledged the defendant's clothes had no blood on it three hours after the crime but emphasized two pinpoints of blood found at the same time on the defendant's tennis shoes that,

she argued, "puts the defendant at the scene." Tp. 773, 795. The blood and hair evidence were thus an essential part of the State's case identifying the defendant as the perpetrator of the murder, and postconviction counsel's failure to do any investigation into advances that permit DNA testing these items since 1995 is inexcusable.

B. Arkansas' DNA testing statute was designed precisely for cases like Mr. Lee's -- in which advanced technology unavailable at trial can "raise a reasonable possibility that [he] did not commit the crime" -- and the Circuit Court erred in summarily denying his statutory right to prove his innocence with DNA evidence before he is executed.

There is no question that today's advanced DNA testing methods can provide definitive answers to the questions that could not be resolved by the State's experts at trial. Indeed, this previously-unavailable testing could now demonstrate that the blood on the shoes was *not* Ms. Reese's, and that the numerous hairs of African American origin found at the scene were *not* Mr. Lee's. Further, if a sufficient quantity of "root" (tissue) material is present on the hairs, and a DNA profile is obtained that excludes Mr. Lee as the source, the profile can be searched in the national CODIS DNA databank and potentially identify Ms. Reese's actual killer, who may still be at large and a threat to others. Importantly, although the exculpatory potential of a DNA databank "hit" to a known offender as the source of the hair featured prominently in Mr. Lee's petition for DNA testing (and is supported by

caselaw in other jurisdictions), the Circuit Court made no mention whatsoever of this argument in summarily denying the testing.

Mr. Lee began seeking DNA testing in 1996 – years before Arkansas even had a statute on the books to provide indigent prisoners with access to DNA testing. But he had no funds, scientific expertise, or qualified counsel to pursue and present this claim on his behalf. Nor has he had an opportunity to have his new counsel – much less a qualified DNA expert – examine the evidence to determine if it is suitable for DNA testing and confirm chain of custody. As such, this is clearly a case where, if Mr. Lee is executed without the opportunity to conduct a simple DNA test on the evidence used to convict him, "a denial of the motion [for DNA testing] would result in manifest injustice." § 16-112-202(10)(B)(iv). The mandate should be recalled with an order directing testing under the DNA statute, or, in the alternative, with instructions to the Circuit Court to conduct a full evidentiary hearing on these issues.

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

This Court should consider the merits of Mr. Lee's DNA testing claim in determining whether he has been afforded a full and fair opportunity to prove his

actual innocence before he is executed. Notably, in its Response to the DNA petition below, the State did NOT deny that the DNA testing Mr. Lee seeks on the hair and blood evidence has the scientific potential to establish his factual innocence. Nor did it deny that the same testing Mr. Lee seeks to conduct was unavailable at Mr. Lee's trial, but is now regularly utilized by state and federal law enforcement to investigate and prosecute such crimes. It instead argued that the prosecution's original, largely circumstantial case against him was (in the State's words) so "overwhelming" that DNA testing was *unlikely* to turn out in his favor, and thus, he should be denied the right to have the test conducted at all. That is both incorrect as a factual matter (given that numerous individuals exonerated through DNA testing appeared far more "guilty" based on the evidence at trial than Mr. Lee), and is not a relevant inquiry under the DNA Statute in any event. For its part, the Circuit Court failed to apply or even note the test adopted by this Court in *Johnson, supra* -- whether "new, material evidence" from a DNA test could "significantly advance" Mr. Lee's claim of innocence – and asked only whether, absent any forensic evidence at all, the State had presented legally "sufficient proof" to sustain his conviction. That test was invented by the Circuit Court out of whole cloth, and has no support in the statute's text or history.

Mr. Lee can readily establish what the statute and this Court's precedents *do* require: that he (1) "identify a theory of defense" consistent with the defense he

presented at trial that could establish his actual innocence, and (2) demonstrate that the results "may create new, material evidence" that would support that theory of defense, and "raise a reasonable probability" that he did not commit the crimes of which he stands convicted. *See* §16-112-202 (6) (theory of defense), and (8)(B) (potential to establish reasonable probability of innocence).

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

Most fundamentally, the DNA requested has the scientific potential to prove the truth of Mr. Lee's innocence claim. As set forth in the uncontested Affidavit of Charlotte Word, Ph.D, in his Petition, and in the accompanying authorities, the testing he seeks uses advanced STR and mitochondrial DNA technology that was unavailable to any party at the time of trial. And the potential materiality of

exculpatory DNA results is apparent, because the testing can: (1) show that the blood on Petitioner's shoes was not Mr. Lee's; (2) show that the "Negroid" hairs found at the crime scene came from someone other than Mr. Lee, and (3) if an STR-DNA profile is obtained from the root of the "intact" hair (as the State's expert said was present when he examined the root), and Mr. Lee is not the source, that STR-DNA profile can be searched in the CODIS DNA database, and potentially identify Ms. Lee's actual killer.

Indeed, the testing that Mr. Lee seeks on the root of this hair is so fundamental to the investigation of criminal culpability that it is routinely used by law enforcement to identify and prosecute criminal defendants in the modern era. *See, e.g.*, *State v. Alexander*, 194 So.3d 33 (La. Ct. App. 2nd Cir. 2016) (affirming conviction for murder based principally on DNA profile of defendant obtained from root of hair on victim's corpse, which led to his identification as suspect through CODIS database search); U.S. Dept. of Justice, Off. Justice Programs, *What Every Law Enforcement Officer Should Know About DNA Evidence*, at 2 (discussing how DNA from "a single hair" inside victim linked to suspect "provided critical evidence in a capital murder prosecution), *available at* https://www.ncjrs.gov/pdffiles1/nij/bc000614.pdf. Such testing has also been used to exonerate the factually innocent -- including, for example, Innocence Project client Randolph Arledge of Texas, who served more than thirty-two years in prison

for a rape and murder he did not commit, before DNA testing conducted on a root of a hair found on clothing in the victim's car yielded a "hit" in CODIS to another convicted felon. Following the hit, Texas prosecutors investigated the new suspect and agreed to Mr. Arledge's immediate release and dismissal of all charges against him. *See* Innocence Project: Randolph Arledge, *available at* https://www.innocenceproject.org/cases/randolph-arledge/ (last visited April 18, 2017).

Remarkably, despite the possibility of a DNA databank "hit" to a known offender as the source of the "Negroid" hair at the scene featured prominently in Mr. Lee's petition for testing below, the Circuit Court never once mentioned – much less analyzed the merits of – his claim that such a result could wholly exculpate him. Nor did the Court address any of the decisions from other states recognizing a petitioner's entitlement to have such evidence considered under virtually identical DNA statutes. For example, in *Powers v. State*, 343 S.W.3d 36, 55 (Tenn. 2011), the Supreme Court of Tennessee held that, in determining whether a petitioner had satisfied his burden of showing a "reasonable probability" that exculpatory DNA results would establish actual innocence, "the trial court should postulate whatever realistically possible test results would be most favorable to [the] defendant," including whether "the non-matching DNA profile on the [evidence to be tested] would match the profile of a prior offender contained

in a DNA database." Surely, this Court should not permit Mr. Lee to be executed unless and until he is given a similar opportunity to prove his innocence with the use of previously-unavailable DNA databanks.

2. The State's Trial Evidence in No Way Defeats Mr. Lee's Entitlement to DNA Testing That Can Wholly Exculpate Him

The Circuit Court adopted the State's contention in its Response to the petition that DNA testing does not have the *potential* to provide new, material evidence of Mr. Lee's innocence in light of the other, non-DNA evidence offered against him at trial, particularly the eyewitness testimony offered by the State. That conclusion is deeply flawed, for at least two reasons.

First, it is now well established that subjective assessments of the apparent strength of the State's case can be, and often are, later rebutted by objective DNA science. One study of written court decisions from the records of more than 200 post-conviction DNA exonerations, for example, found that in fully 47% of the cases, it was found that one or more courts had earlier commented on a later exonerated defendant's apparent guilt; and in 10% of the cases, courts had characterized the evidence against these factually innocent defendants as "overwhelming." Brandon Garrett, CONVICTING THE INNOCENT 201-02 (2011)

Second, the trial evidence against Mr. Lee was far from "overwhelming." No physical evidence placed him at the scene. Latent fingerprints analyzed from the scene were not Mr. Lee's. Arrested less than three hours after Ms. Reese's murder, wearing the same clothing that the State alleged he had used to commit the murder, Mr. Lee's shirt, pants, and fingernails were wholly devoid of precisely the kind of inculpatory forensic evidence—namely, any traces of the victim's blood—that would certainly have been shed all over her killer in this close-range, violent struggle that left "spattered" blood all over her walls and floors. The three eyewitnesses who testified that they believed Mr. Lee was the man they saw leaving and/or near the crime scene gave contradictory and at times irreconcilable accounts of the man's clothing, route, and appearance; they also gave inconsistent statements as to the time at which these identifications occurred in relation to the crime itself. [1]

The Circuit Court found that even with wholly exculpatory DNA results showing that Mr. Lee was not the source of the "Negroid" hairs from the scene, and that not a single trace of the victim's blood is anywhere on his clothes and shoes,

[1] One witness, Mr. McCullough, said the person he identified as Mr. Lee came to his house to borrow tools. They talked for 10-15 minutes, face-to-face. He is positive that this person was not wearing a jacket, positive that he had no ball cap on, and says he believed he was wearing a short-sleeved shirt. Mr. Gomez, on the other hand, said the man he saw entering and leaving Ms. Reese's house was wearing a ball cap and dark jacket. But, Mr. Gomez admits he was taking Vicodin for pain at this time. Still another witness, Ms. Pruitt, who did not claim to have seen Mr. Lee at or near the victim's home, but only in the general area where the crime occurred, at trial said she wasn't sure about the clothing but, at another hearing testified she believed he had on a red plaid shirt. She admittedly was a daily marijuana user, and initially reported seeing Mr. Lee at 11am –*before* the murder even occurred.

"the trial record would still contain the testimony of three eyewitnesses who placed the defendant at the victim's home or nearby at the time of the murder." Rp 71, Order at 4. Reliance on lay eyewitness testimony to defeat a claim for DNA testing is particularly inappropriate given what is now widely known among courts and scholars about the fallibility of eyewitness testimony – particularly where, as with the State's two key eyewitnesses against Mr. Lee, the identifications are made by persons of a different race than the suspect.[2]

Well-reasoned Supreme Courts in other states have discussed this body of knowledge in detail. *See, e.g., State v. Henderson*, 208 N.J. 208, 232-34 (2011) (discussing extensive social science research and data from DNA exonerations regarding risk of error in eyewitness identification testimony, including cross-racial identification); *Comm. v. Walker*, 625 Pa. 450, 461-64 (2014) (same). Similarly, there is now extensive data showing the role that eyewitness misidentification has played in wrongful convictions of persons later exonerated through DNA science. For example, a recent comprehensive study of data from the first twenty-five years of DNA exonerations reported that fully 72% of the exonerations involved eyewitness misidentification as a contributing factor. *See* West & Meterko, *DNA Exonerations 1989-2014: Review of Data and Findings from the First Twenty-Five*

[2] *See, e.g., State v. Henderson*, 208 N.J. 208, 232-34 (2011); *Comm. v. Walker*, 625 Pa. 450, 461-64 (2014).

Years, 79 Alb. Law Rev. 717, 730-31 (2015-16). Moreover, fully one-third of the DNA exoneration cases involved – as in Mr. Lee's case – misidentifications of an innocent defendant by two or more witnesses. *See id.*

The fact that Mr. Lee's conviction was premised almost entirely on contradictory, weak eyewitness identifications by lay people who believed they saw Mr. Lee at the scene, or merely (as the Court put it) simply "nearby," may explain why, despite the obvious brutality of the crime and highly sympathetic victim, Mr. Lee's first trial *resulted in a hung jury* at the guilt-innocence phase. Thus, for the State to claim that before he is executed, Mr. Lee is not entitled to a simple DNA test – one that could finally put its evidence to the test of modern science – belies the intent of the Legislature in enacting this landmark statute.

There are also important public safety interests to be served by a recall of the mandate to permit DNA testing. If Mr. Lee is actually innocent of Ms. Reese's murder, then the real perpetrator of this brutal crime has not yet been brought to justice. That individual may still be at large, or incarcerated but pending release, and thus putting other members of the public at risk of future violence. The potential for post-conviction DNA testing to identify the real perpetrator of a serious crime is not speculative: in fully 29% of the post-conviction DNA exonerations documented over a twenty-five year period (1986-2014), the same DNA testing that exculpated a wrongly convicted defendant was used to directly identify a known alternate

suspect in the crime(s). *See* West & Meterko, *DNA Exonerations 1989-2014: Review of Data and Findings from the First Twenty-Five Years*, 79 Alb. Law Rev. 717, 730-31 (2015-16). Tragically, many of these individuals had committed still more violent crimes while the innocent defendants were wrongly incarcerated: sixty-eight of these perpetrators went on to commit at least 142 additional violent crimes—including 34 homicides and 77 rapes. *See id.* at 731.

Finally, because Mr. Lee's claim under the DNA Statute is the vehicle through which he seeks access to critical forensic evidence that could form a basis for a petition for post-conviction relief based on actual innocence under Arkansas law, such access is required to ensure that he is provided with fundamentally fair post-conviction proceedings and to ensure that he is not subjected to cruel and unusual punishment, under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.. *See, e.g., Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308 (2009); *Newton v. City of New York*, 779 F.3d 140 (2nd Cir. 2015).

C. Mr. Lee's petition for testing is timely, because there is no dispute that he requests access to DNA testing that was not available at trial, and which is "substantially more probative" than the serology and microscopic hair analysis used by the State to convict him.

The Circuit Court also committed plain error in holding that Mr. Lee's petition is untimely. The Court based its holding on its conclusion that the

advanced STR- and mitochondrial DNA technology Mr. Lee seeks to utilize "has been available for some years prior to the Defendant's Motion." Rp 71, Order at 3. But this Court has already rejected the Circuit Court's interpretation of the statute, holding that there is in fact no time limitation in which a defendant must file for testing after a new method of DNA testing becomes available. Instead, the relevant inquiry is whether, upon filing, the technology at issue constitutes a significant advance over whatever technology was actually utilized and available at trial or other testing proceedings.

Unlike some states, the Arkansas legislature did not incorporate a strict time limitation in its DNA statute. Instead, Ark. Code Ann. § 16-122-202(10)(B) makes clear that a defendant can rebut a presumption against timeliness (for any motion not made within thirty-six (36) months of the date of conviction) by satisfying *any* of five separate, enumerated grounds. *See also Carter v. State*, 2015 Ark. 57 (2015).

Here, Mr. Lee clearly satisfies ground (iv) of subsection (10)(B) – "[t]hat **a new method of technology that is substantially more probative than prior testing** is available." (emphasis supplied). That is true both as to the requested DNA testing of blood and the hair evidence. As to the evidence of tiny quantities of blood on the tennis shoes, Mr. Lee satisfied this test by proffering an uncontested expert affidavit of Dr. Charlotte Word demonstrating that at the time

of Mr. Lee's trial in 1995, today's advanced methods of STR DNA analysis were unavailable. Rp 31 at ¶ 3, 8-11(Word aff). As to the hair evidence, Mr. Lee satisfied this test by Dr. Word's affidavit stating that Mitochondrial DNA testing was not available to either the State or Mr. Lee in 1995. *See* Rp 31, Word aff. at ¶8.

Significantly, the court below acknowledged that there is "a new method of technology that is substantially more probative than testing available in the early 90's." Rp 71, Order at p. 3. That should have been the end of the trial court's analysis because this finding met the precise requirements of the statute. Nevertheless, the court below added a novel requirement not found in the statute. According to the trial court, Mr. Lee's proof failed because this new method of technology "has been available for some years prior to the Defendant's Motion, and the Defendant has not given a satisfactory explanation for the delay in the petition." Rp 71, Order at p. 3.

Not only was this requirement not mandated by statute, it was also foreclosed in *Carter v. State*, where this Court held in similar circumstances:

> Despite the State's assertion to the contrary, the statute imposes no time limitation for rebutting a presumption against timeliness. *See* Ark. Code Ann. § 16-112-202(10)(B). We hold that the circuit court erred in finding that Carter failed to meet the timeliness requirement of section 16-112-202(10).

Carter v. State, 2015 Ark. 57, *7. For these reasons, the trial court erred in finding that the defendant did not rebut the presumption of untimeliness in raising this issue.

Nor does Ark. Code Ann. § 16-112-202(2)(A) have any application here. Ark. Code Ann. § 16-112-202(2)(A) permits a motion for DNA testing if the "specific evidence to be tested was not previously subjected to testing and the person making the motion under this section did not . . . [k]nowingly and voluntarily waive the right to request testing of the evidence in a court proceeding commenced on or after August 12, 2005[.]" The blood and hair evidence at issue here have not been previously subjected to testing. Ledell Lee has consistently and persistently asserted his innocence and requested that his counsel pursue all available options to demonstrate his innocence. Moreover, neither he nor his counsel have ever in any court waived his right to request testing. Simply appearing in a Rule 37 hearing and not raising this issue at that time does not demonstrate a knowing and voluntary waiver. Additionally, at the hearing in the Court below, the State presented no testimony or affidavit, and otherwise made no showing of a knowing and voluntary waiver by Mr. Lee.

In the alternative, given Mr. Lee's difficulties communicating with his visibly drunk post-conviction lawyer and the other well-documented lapses by his assigned counsel over the previous two decades, Mr. Lee can also demonstrate "good cause" to rebut the presumption of untimeliness pursuant to § 16-122-202(10)(B)(v). Mr. Lee sought vigorously to challenge all the State's evidence against him, but those efforts were thwarted by the deficient performance of post-conviction counsel. The

court below erred by not providing an evidentiary hearing at which Mr. Lee could present evidence showing "good cause" to rebut a presumption against timeliness. For similar reasons, and because of the undisputed potential of DNA evidence to establish Mr. Lee's factual innocence, "a denial of the motion would result in a manifest injustice," yet another independent basis for this Court to find the petition timely. *See* § 16-122-202(10)(B)(iii).

D. There is no impediment to performing DNA testing due to any weakness in the chain of custody of the evidence to be tested.

Notwithstanding the fact that the Jacksonville police department possessed continually the shoe and hair evidence since recovering this evidence on the day of the crime in 1993, and the prosecution introduced this evidence at Mr. Lee's capital trial, the State maintains that Mr. Lee has not proven that he satisfied his burden pursuant to Section 16-112-202(4). The court below did not deny relief based on this basis for good reason. Section 16-112-202(4) states:

> E. Except when direct appeal is available, a person convicted of a crime may make a motion for the performance of fingerprinting, forensic deoxyribonucleic acid (DNA) testing, or other tests which may become available through advances in technology to demonstrate the person's actual innocence if:
>
> **(4)** The specific evidence to be tested is in the possession of the state and has been subject to a chain of custody and retained under conditions sufficient to ensure that the evidence has not been substituted, contaminated, tampered with, replaced, or altered in any respect material to the proposed testing;

The statute requires this proof where the evidence has not been collected at the time of the crime, introduced into evidence and retained by law enforcement officials. As this Court recently stated:

> With respect to Makkali's additional requests for DNA testing of a shotgun, screwdrivers, a handgun, a toilet roll, and a bedsheet, he failed to allege sufficient facts establishing that these items are in the possession of the State or have been retained under conditions ensuring that the evidence has not been substituted, tampered with, replaced or altered in any respect. Ark. Code Ann. § 16-112-202(4). **To the extent that these items had been collected and retained by the State, Makkali did not demonstrate that testing these items had the potential to provide evidence that would significantly advance his claim of innocence in light of all the evidence presented to the jury**. *King*, 2013 Ark. 133, at 4-5.

Makkali v. State, 2017 Ark. 46, at 7 (2017) (emphasis added). This case suggests that if defendant alleges that the State collected and retained the physical evidence, then the defendant's burden under Ark. Code Ann. § 16-112-202(4) is satisfied.

Further, the Jacksonville police department was required by law at least since 2001 to maintain and preserve the hair, blood and shoe evidence introduced and trial, subject to a continuous chain of custody:

> 12-12-104. Physical evidence in sex offense prosecutions--Retention and disposition.
>
> **(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.

(b) (1) After a trial resulting in conviction, the evidence shall be impounded and securely retained by a law enforcement agency.

(2) Retention shall be the greater of:

(A) Permanent following any conviction for a violent offense;

(B) For twenty-five (25) years following any conviction for a sex offense; and

(C) For seven (7) years following any conviction for any other felony for which the defendant's genetic profile may be taken by a law enforcement agency and submitted for comparison to the State DNA Data Base for unsolved offenses.

(c) After a conviction is entered, the prosecuting attorney or law enforcement agency having custody of the evidence may petition the court with notice to the defendant for entry of an order allowing disposition of the evidence if, after a hearing and a reasonable period of time in which to respond, the court determines by a preponderance of the evidence that:

(1) The evidence has no significant value for forensic analysis and must be returned to its rightful owner; or

(2) The evidence has no significant value for forensic analysis and is of a size, bulk, or physical character not usually retained by the law enforcement agency and cannot practicably be retained by the agency.

(d) The court may order the disposition of the evidence if the defendant is allowed the opportunity to take reasonable measures to remove or preserve portions of the evidence in

question for future testing.

(e) (1) It is unlawful for any person to purposely fail to comply with the provisions of this section.

(2) A person who violates this section is guilty of a Class A misdemeanor.

(f) As used in this section:

(1) "Law enforcement agency" means any police force or organization whose primary responsibility as established by statute or ordinance is the enforcement of the criminal laws, traffic laws, or highway laws of this state;

(2) "Sex offense" means a sex offense as defined in former 12-12-1103(10); and

(3) "Violent offense" means a violent offense as defined in 12-12-1103(11) [repealed].

Finally, even assuming that more proof was needed, the court below denied Mr. Lee subpoena power and an evidentiary hearing to present that evidence, and the issue should be remanded for an evidentiary hearing.

II. Mr. Lee's claims are indistinguishable from those set forth in the Motion to Stay Granted Today in *Johnson.*

Mr. Lee's claim that he is entitled to a remand for an evidentiary hearing on his petition for DNA testing prior to his execution is indistinguishable from the motion for a stay and remand by Stacey Johnson that was just granted by this Court. Like Johnson, Mr. Lee has maintained innocence since his arrest more than twenty years ago, but had not previously filed a motion for DNA testing under § 16-

112-202. Like Johnson, Mr. Lee secured the assistance of new counsel (including pro bono counsel from the Innocence Project) to file a petition for DNA testing on crime scene evidence that he alleged would exculpate him and provide grounds for relief from his conviction and death sentence. Like Johnson, Mr. Lee seeks to utilize previously-unavailable STR DNA technology on evidence secured by the State which has never before been subjected to any form of DNA testing. Like Johnson, Mr. Lee's principal claim is that this newly available technology could exculpate him by excluding him as the source of the forensic evidence and by identifying the real perpetrator of the murder through a search of the DNA databank. And like Johnson, Mr. Lee submitted an affidavit from a nationally recognized DNA expert explaining the advances in DNA technology and how it could advance his claim of innocence -- but the Circuit Court refused to afford either petitioner an evidentiary hearing on these issues.

The similarities do not end there. In both cases, the Circuit Court found the applications for DNA testing untimely, without holding an evidentiary hearing on whether the petitioner had satisifed any of the five separate bases that warrant an exception to the presumption against untimeliness under § 16-112-202(10)(B). In both cases, the Court also found that the testing sought would not significantly advance the defendants' claims of innocence, without permitting them to offer any evidence (scientific or otherwise) in order to meet that burden. Instead, in both Mr.

Lee's and Mr. Johnson's cases, the Circuit Court merely allowed counsel to present oral argument before denying the petitions in their entirety.

Mr. Lee is thus entitled to the same relief as Mr. Johnson: a stay of tomorrow's scheduled execution, and a remand to the Circuit Court for an evidentiary hearing on the merits of his petition for DNA testing under § 16-112-202 *et. seq.*, so that his claim for access to DNA evidence can be fully presented, briefed, and considered by this Court before he is executed.

CONCLUSION

The State of Arkansas is poised to execute Ledell Lee without giving him access to DNA evidence that could prove, beyond any doubt, the truth of his longstanding claim of innocence. Reversal of the Circuit Court's order denying Appellant's petition is required under Arkansas law, and is necessary to prevent final, irreversible, and manifest injustice. Appellant respectfully contends the matter should be remanded for an evidentiary hearing on Mr. Lee's motion for DNA testing.

Appellant hereby moves for a stay of his execution set for April 20, 2017 and for an order reversing the Circuit Court's order denying his petition to test critical forensic evidence used to convict him.

This the 19th day of April, 2017.

Respectfully submitted,

/s/ Cassandra Stubbs
CASSANDRA STUBBS
ACLU Capital Punishment Project
201 W. Main St. Suite 402
Durham, NC 27701
(919) 688-4605
cstubbs@aclu.org

/s/ *Nina Morrison*
NINA MORRISON
Innocence Project
40 Worth Street, Suite 701
New York, NY 10013

/s/ Lee Short
LEE SHORT
Short Law Firm
425 W. Broadway, Ste. A
North Little Rock, AR 72114
(501) 766-2207
leedshort@gmail.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

On April 19, 2017, I electronically filed the foregoing document using the ECF system which will send notification of such filing to counsel of record.

/s/*Lee Short*
LEE SHORT