IN THE SUPREME COURT OF MISSISSIPPI

NO. 2015-DR-01373-SCT

TIMOTHY ROBERT RONK *Petitioner*

versus

STATE OF MISSISSIPPI *Respondent*

MOTION FOR REHEARING

Petitioner Timothy Robert Ronk, pursuant to Mississippi Rule of Appellate Procedure 40 and all other applicable law and authority,[1] files this Motion for Rehearing in this cause. In support of this motion, Mr. Ronk would show unto this honorable Court the following:

With its decision in this case, this Court has made a change in Mississippi law. Previously, to prepare for a death-penalty trial, "*at a minimum*, [defense] counsel ha[d] a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." *Ross v. State*, 954 So. 2d 968, 1005 (Miss. 2007) (emphasis added). They "had a duty to conduct a reasonable, independent investigation to seek out mitigation witnesses, facts, and evidence for the sentencing phase of [the] trial." *Davis v. State*, 87 So. 3d 465, 469 (Miss. 2012) (citing *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984)). Now this Court has put the capital defense bar on notice that it may

[1] Including but not necessarily limited to the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; applicable portions of the Mississippi Constitution; Mississippi Code Sections 99-39-1 *et seq*.; Mississippi Rules of Appellate Procedure 22 and 27; and the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. 2003).

dispense with a mitigation investigation and merely rely on a psychologist's pretrial evaluation—even if that expert says that she cannot do a mitigation study and recommends that one be done. Formerly, counsel had a "obligation to conduct a *thorough* investigation of the defendant's background." *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003) (emphasis added). Now, it is acceptable for a capital defendant to be sentenced to death following a mitigation investigation that is "arguably deficient." *Ronk v. State*, No. 2015-DR-01373-SCT, 2019 WL 244664, at *25 (Miss. Jan. 17, 2019) ("Arguably, counsel's mitigation investigation was deficient.").

The opinion seems to be telling trial counsel that they may skip the previously required adequate mitigation investigation and get by with a "deficient" one if it seems that the defendant is going to get death regardless, for the holding turns on the "prejudice" prong of *Strickland*. *See Stringer v. State*, 627 So. 2d 326, 328–29 (Miss. 1993). Under *Strickland*, the second prong of the test for ineffective assistance of counsel requires answering the question, "Did the attorney's poor performance prejudice the defendant?" *See id*. In other words, is this a case where the defendant would have been condemned to death anyway? If it appears to be, according to the most logical reading of this opinion, then trial counsel does not need to make much of an effort. Trial counsel can get by with an "arguably deficient" investigation. Trial counsel can evaluate the case, decide it is hopeless, that this client is going to death row regardless of any effort the attorney may make, and then skip the mitigation investigation. Or, perhaps, no such evaluation is

necessary—perhaps they can just skip the mitigation investigation, period, as Mr. Ronk's counsel did.

I. This decision is at odds with this Court's previous grant of relief in a case with nearly identical facts.

As recently as May 2017, this Court reached a very different result under a nearly identical set of facts. The case of Jason Lee Keller came before this Court on initial post-conviction review. *Keller v. State*, 229 So. 3d 715 (Miss. 2017). Mr. Keller's trial counsel had failed to conduct a mitigation investigation. On the issue of ineffective assistance of counsel, this Court handed down a decision that is one hundred eighty degrees off the decision in Mr. Ronk's case.

In granting Mr. Keller a hearing, this Court explained:

> Keller argues that his trial attorneys were ineffective for failure to investigate, collect and present mitigation evidence to the jury. Keller has now presented numerous affidavits from family, friends, acquaintances, former school teachers, former classmates, attorneys, and physicians demonstrating the mitigation evidence that effective trial counsel should have discovered and presented at the sentencing phase of his trial. Keller argues that the failure by trial counsel amounted to deficient performance and the deficiency prejudiced the defense of his case.
>
> Keller specifically points to the failure of trial counsel to obtain a mitigation expert, even though Dr. Beverly Smallwood, a psychologist, who evaluated Keller or the circuit court before trial, recommended doing so.
>
> After comparing what was presented at trial in support of mitigation with what has now been presented to the Court, we find that Keller has made a substantial showing of a denial of his right to effective assistance of counsel. We therefore find that Keller should be granted leave to proceed in the Harrison County Circuit Court, Second Judicial District, on Issue (I)(C).

Id. at 716 (internal citations omitted).

The similarity between this case and *Keller* is striking. They even involve the same psychologist, making the same recommendation in each case—that she does not do mitigation studies and that trial counsel should hire a mitigation specialist. In fact, one could simply change the name "Keller" to "Ronk" in the three paragraphs reproduced *supra* and they would still be spot-on.

Three justices of this Court recognized the inconsistency between the two decisions. The majority opinion in the *Ronk* decision used the term "troubling." *Ronk*, 2019 WL 244664, at *11. That word was apt as it was used, and it would also be a good choice to describe the inexplicable contradiction between the outcome of these two very similar cases.

II. A mitigation specialist is necessary even if defense counsel has obtained the services of a psychologist.

Experts in capital litigation cast the mitigation specialist's role as vital to mounting an adequate defense against the death penalty.

> The capital mitigation specialist is arguably the most important member of the capital defense team, especially when the client is facing a sentencing hearing in a death penalty case. This person, in effect, enables the capital defense team to develop and "tell the story" of the client—the key to saving the client's life.

Paul J. Bruno, *The Mitigation Specialist*, Champion, June 2010, at 26. Mitigation specialists are considered vital because they are experts in generating the life histories that psychologists and psychiatrists cannot compose but need for making reliable evaluations of capital defendants.

> [Mental-health experts] are typically neither experienced in the practice of nor inclined to pursue an in-depth investigation into a patient's social history. Because [they] are not qualified to conduct a

> thorough psychosocial and biosocial investigation of a defendant, they cannot fill the role of a mitigation specialist.
>
> A [mental-health expert] is unable to commit the amount of time necessary to conduct a sufficient mitigation investigation. A proper mitigation investigation requires travel to every location where the accused lived to seek birth, adoption, health, education, pre-military employment, and criminal records. . . . A mitigation specialist, whose sole task is to conduct an extensive biosocial and psychosocial investigation of the defendant, is capable of committing the time necessary to conduct a thorough investigation.
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> * * *
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> **A request for a mitigation specialist should be among the first motions a capital defender files**. . . . Without a detailed life history compiled by a mitigation specialist, a [mental-health expert] could potentially subject a defendant to tests that are unnecessary or even harmful to the defense.
>
> A mitigation specialist and a [mental-health expert] must work together to present an effective mitigation case for a capital defendant. A mitigation specialist, when properly employed, does not replace the work done by a [mental-health expert], but rather supplements and enhances the mitigation presentation provided by the [mental-health expert].

Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 Cap. Def. J. 43, 51–54 (2003) (internal quotation marks and citations omitted) (emphasis added).

These principles make it clear why Dr. Smallwood did not do a mitigation investigation. She told Mr. Ronk's trial counsel that it was outside of her area of practice, and she was right. As the above study points out, Mr. Ronk's counsel's very next move should have been to ask the trial court for money to hire a mitigation specialist. It was unreasonable and prejudicial under *Strickland* not to.

III. The potential mitigation evidence discovered by post-conviction counsel was not cumulative.

Mr. Ronk's petition for post-conviction relief and accompanying affidavits describe a great deal of potential mitigation evidence that post-conviction counsel and their investigators unearthed during their investigation but that trial counsel did not know about. This Court dismisses it, calling it "mostly cumulative." *Ronk*, 2019 WL 244664, at *26. That is not accurate.

Compare, for example, what little the jury learned about the effects of Mr. Ronk's having been adopted with the much more extensive expert testimony it could have heard. At trial, the entirety of the testimony on this topic was as follows:

Q: Mr. Ronk you found out, of course, is adopted, is that correct?

A: I'm sorry, is adopted, yes.

Q: He was adopted at what age?

A: At three days old.

Q: Now based upon your evaluation did you feel that the adoption had anything to do with Tim's early disorder problems?

A: He apparently had resentment about that adoption, feeling that he was a mistake, and he tended to take that anger out on his adoptive parents.

Tr. at 680.

Then trial counsel asked a question about when that behavior began. Dr. Smallwood's three-sentence answer recounts a trip to Mississippi when Mr. Ronk was about ten years old. Tr. at 680–81. That answer did not add any substantive information about the effects of adoption.

That is all the information the jurors got on this subject from Dr. Smallwood's testimony. It came up fleetingly in cross-examination, but that added nothing apart from the expert's agreeing that many adopted people refrain from committing crimes. Tr. at 697.

Compare that with the extensive potential testimony of Dr. Garbarino. His seventeen-page affidavit contains much more than the thirty-four words Dr. Smallwood uttered about Mr. Ronk's adoption. It is not merely the volume—thirty-four words versus seventeen pages—that makes it hard to see how this could be considered cumulative but the substance. Dr. Garbarino begins with the summary on page 3:

> Tim Ronk is best understood as a troubled child inhabiting a young man's body. His troubled development appears to flow from some combination of temperamental vulnerabilities combined with disrupted family relationships linked to parental rejection. Despite the generally positive family and community environment provided by his adoptive parents, the unresolved issues of his adoption and his reaction to that adoption had a serious negative effect on Tim's emotional life and development. His problems with attachment and a resulting "emotional neediness" and oppositional and defiant behavior flowed from this disconnect and deteriorated in adolescence. This in turn led to chronic maladjustment, substance abuse, and delinquent behavior leading up to the crime for which he was sentenced (to death row). His developmental problems came to fruition during adolescence and early adulthood as very serious issues with identity, socio-emotional immaturity, deceitfulness, substance abuse, and depression.

Aff. of James Garbarino, Ph.D., at 3 [hereinafter "Garbarino aff.].

Dr. Garbarino further explains:

> In Tim's case, his adoption has been the central fact of his life, as it is for so many individuals who have been adopted (for better or for worse). The developmental significance of the struggle to deal with adoption issues is captured in the title and in the content of Nancy Verrier's 2003 book *The Primal Wound*. Research reveals that adopted

> children are disproportionately represented in a wide range of developmental issues—ranging from depression to delinquency.

Garbarino aff. at 5.

While in her testimony Dr. Smallwood briefly mentioned a trip Mr. Ronk took back to Mississippi when he was ten, tr. at 697, she did not testify about a far more significant trip when he was seventeen. Dr. Garbarino, however, discusses this later trip in some detail. Garbarino aff. at 5–6. It was a momentous event in Mr. Ronk's life. Although he had already known that he had been adopted, it was during this trip to Mississippi at age seventeen when he met his biological mother, learned that he was conceived as the result of a rape, and wound up feeling that neither his birth mother or his adoptive parents wanted him.

It is not surprising that Dr. Smallwood did not tell the jury about this important event, because Dr. Smallwood (as she explained repeatedly) did not do a mitigation investigation. Thus she did not know about this trip. Nothing about it appears in her report or her testimony. Her lack of knowledge of this trip is further shown by her report, where she wrote, "When he looked up his biological mother a few years ago, he learned that he was born as the result of a rape." Smallwood report at 7. Mr. Ronk was thirty years old at the time of the report. It would have been thirteen years since the trip when he was seventeen, when he first met his birth mother and learned of the rape. Dr. Smallwood's choice of the words "a few years ago" is consistent with her ignorance of the trip thirteen years earlier. She must have been thinking of the more recent visit to Mississippi that Mr. Ronk described to her and that she recounts on page 17 of her report. There she quoted

Mr. Ronk as follows: "I hadn't seen my biological mother since 17 years old . . . ." Smallwood report at 17.

Dr. Garbarino's discussion shows that events during that trip at age seventeen were of monumental significance in forming the "troubled child inhabiting a young man's body" that Mr. Ronk became. Garbarino aff. at 3, 5–6. In describing these experiences to Dr. Garbarino, Mr. Ronk said, "intense is not the word." Dr. Garbarino uses the term "overwhelming." Garbarino aff. at 6.

Dr. Garbarino's affidavit discusses the well-established assessment tool called ACE, or Adverse Childhood Experiences. If trial counsel had done a mitigation study, this sort of information would have helped them present a much more useful picture of Mr. Ronk's life and development to the jury. The same can be said of Dr. Garbarino's discussion of the effects of being conceived as a result of the rape of Mr. Ronk's then-fifteen-year-old birth mother, of attachment issues, of the total estrangement of his biological father (who disappeared after the rape), and of much more—all of it potential mitigation evidence that was never heard in a courtroom, but could be still, if this Court reconsiders its decision and grants the hearing that this case deserves.

This Court's finding that this evidence was "mostly cumulative" is reminiscent of the case of Terry Williams, the petitioner who eventually got relief in the landmark U.S. Supreme Court case *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Before that case went before the U.S. Supreme Court, the Virginia Supreme Court considered Mr. Taylor's ineffective-assistance-of-

counsel claim, which was based on the failure of trial counsel to discover and put on mitigating evidence that was later uncovered by post-conviction counsel. *Williams v. Warden of the Mecklenburg Corr. Ctr.*, 254 Va. 16, 487 S.E.2d 194 (1997). The state supreme court denied relief, stating that "[t]he mitigation evidence that the prisoner says, in retrospect, his trial counsel should have discovered and offered barely would have altered the profile of this defendant that was presented to the jury." *Id.* at 19, 196. In other words, the Virginia Supreme Court ruled that it was cumulative. *See Davis v. State*, 87 So. 3d 465, 470 (Miss. 2012) ("This substantial mitigation evidence failed to impress the Supreme Court of Virginia, which held that it was merely cumulative to what the jury had heard at sentencing."). In reversing that judgment, the U.S. Supreme Court held that the Virginia Supreme Court's analysis of the prejudice prong was "unreasonable." *Williams v. Taylor*, 529 U.S. at 397.

It is hard to square this Court's assessment of this evidence as "mostly cumulative," *Ronk*, 2019 WL 244664, at *26, with the stark, substantive difference between what was presented at trial and what could have been. As Justice Coleman wrote, "While the majority would find that the medical evidence Ronk submitted is 'mostly cumulative,' given the lack of meaningful investigation and the extent of Ronk's mental history that was not explored or presented to the jury, I cannot agree." *Id.* at *42 (Coleman, J., concurring in part and dissenting in part).

IV. The ABA *Guidelines* represent widely accepted best practices and the standard of care in capital litigation.

The decision in Mr. Ronk's case represents not only a departure from existing law, but a disregard of the widely accepted best practices in capital litigation. This Court, like the U.S. Supreme Court, has acknowledged the usefulness of "[p]revailing norms of practice as reflected in American Bar Association [*Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*] . . . ." *Ronk*, 2019 WL 244664, at *3 (quoting *Strickland*, 466 U.S. at 688). Both Courts have stated, of course, that the *Guidelines* are "only guides." *E.g.*, *Strickland*, 466 U.S. at 688; *Ronk*, 2019 WL 244664, at *3. Nonetheless, the *Guidelines* advise in no uncertain terms that the defense team must include "at least one mitigation specialist." Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.4(C)(2)(a), 31 Hofstra L. Rev. 913, 1000 (2003) [hereinafter "ABA *Guidelines*"].

This Court's opinion in Mr. Ronk's case emphasizes this "only guides" language to a fault. The opinion seems to suggest that this Court considers those guides as not very useful, not really standards that deserve much attention—in short, not really "guides to determining what is reasonable," *Wiggins*, 539 U.S. at 524 (internal punctuation omitted).

That would explain why this Court's opinion goes outside the *Guidelines* in stating that "we disagree that the *requirement* of a mitigation specialist is well settled. That is untrue." *Ronk*, 2019 WL 244664, at *26 (emphasis in original). The opinion cites decisions from the Sixth Circuit and the Ohio Supreme Court that held

that there is no constitutional right to a mitigation specialist. *Id*. at *26. That is true as far as it goes, but it ignores the fact that the issue is not, at this early stage, the constitutionality of trial counsel's performance but whether there is evidence of the unreasonableness of trial counsel's failure to hire such an expert. The ABA Guideline that requires a mitigation specialist is one of the "standards to which we long have referred as guides to determining what is reasonable." *Wiggins*, 539 U.S. at 524 (internal punctuation omitted). This Court's ruling flies in the face of that settled and binding precedent.

The ABA *Guidelines* advise in no uncertain terms that "[l]ead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards." ABA *Guidelines*, Guideline 10.4(B). Yet this Court discounts credible evidence from one member of the defense team that "[n]o one was calling the shots or directing defense team members what to do." *Ronk*, 2019 WL 244664, at *9. That evidence, considered in light of ABA Guideline 10.4(B), should be enough for this Court to grant leave for a hearing in the trial court on the issue. *See Stringer v. State*, 627 So. 2d 326, 329 (Miss. 1993) (citing *Alexander v. State*, 605 So. 2d 1170, 1173 (Miss. 1992); *Leatherwood v. State*, 473 So. 2d 964, 971 (Miss. 1985)) ("If defendant raises questions of fact regarding the deficiency of counsel's conduct or prejudice to the defendant, he is entitled to an evidentiary hearing on ineffective assistance of counsel.") One is left to conclude that this Court does not really

consider the ABA *Guidelines* to be "guides to determining what is reasonable." *Wiggins*, 539 U.S. at 524 (internal punctuation omitted).

While the *Guidelines* have not been adopted in Mississippi, they have been in nine other states, including neighboring Louisiana and Alabama. Georgia and Texas have also adopted the *Guidelines*, as well as Arizona, Idaho, Nevada, Ohio, and Oregon. The exact nature of the implementation has varied from state to state.[2] In Louisiana, the *Guidelines* were incorporated into the state administrative code pursuant to an act of the legislature that required the Public Defender Board, an entity within the Office of the Governor, to implement standards for capital defense. The code reads in part as follows:

> These guidelines are intended to adopt and apply the guidelines for capital defense set out by the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* its associated Commentary and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.* In these guidelines, the ABA guidelines have been adapted and applied to meet the specific needs and legal requirements applicable in Louisiana while seeking to give effect to the intention and spirit of the ABA guidelines.

22 La. Admin. Code Pt XV, 901(A)(3).

With this Court's apparent rejection of the *Guidelines*, or at least its minimizing of their importance as "guides to determining what is reasonable," *Wiggins*, 539 U.S. at 524 (internal punctuation omitted), practitioners are left to

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[2] Details can be found on the ABA's website. Am. Bar Ass'n, *ABA Guidelines*, available at https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines (last accessed March 19, 2019).

wonder just what the floor is when it comes to, for example, the requirement of a mitigation investigation. Despite the requirement in the *Guidelines* that counsel must conduct a thorough investigation, this Court's opinion in Mr. Ronk's case gives a stamp of approval to an "arguably deficient" one. Not only does all this fly in the face of accepted best practices when Mr. Ronk was convicted and sentenced to die, it leaves the bar and bench to wonder and to speculate about just what is required. Apparently, it is not much.

V. Under this Court's "heightened scrutiny" standard of review, the bona fide doubts should be resolved in favor of Mr. Ronk.

To reconsider this decision and grant a hearing would be in keeping with this Court's often repeated statement that death penalty cases require "heightened scrutiny." This Court once again acknowledged that principle in this very case:

> In capital cases, non-procedurally barred claims are reviewed using "'heightened scrutiny' under which all bona fide doubts are resolved in favor of the accused." *Crawford v. State*, 218 So. 3d 1142, 1150 (Miss. 2016) (quoting *Chamberlin v. State*, 55 So. 3d 1046, 1049–50 (Miss. 2010)). "[W]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death." *Crawford*, 218 So. 3d at 1150 (quoting *Chamberlin*, 55 So.3d at 1049–50).

Ronk, 2019 WL 244664, at *2. In other opinions, this Court had said simply that "*all* doubts are to be resolved in favor of the accused . . . ." *Flowers v. State*, 842 So. 2d 531, 539 (Miss. 2003) (emphasis added).

It is hard to square this principle with the decision in this case. It would seem that there must be some "bona fide doubt" about whether trial counsel may dispense with a mitigation study, against the advice of the psychologist and in the face of authority that imposes an "obligation to conduct a thorough investigation of

the defendant's background," *Ronk*, 2019 WL 244664, at *12 (quoting *Wiggins*, 539 U.S. at 522). It would seem that there must be some "bona fide doubt" about the effectiveness of a chronically ill attorney who was taking the equivalent of over 200 milligrams of morphine a day, partly in the form of the powerful synthetic drug fentanyl, aff. of Dr. Sheldon Hersh at 13–19 (attached to Petitioner's Supplement to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief (filed in this Court on Oct. 13, 2017)), which this Court called "troubling," *Ronk*, 2019 WL 244664, at *11. It would seem that there must be some "bona fide doubt" about whether Mr. Ronk should have been denied any relief when, under nearly identical facts, Mr. Keller was granted a hearing. And it is evident that at least three justices of this Court have serious doubts about the "cumulative" nature of the mitigation evidence presented in the petition for post-conviction relief.

VI. Conclusion

This Court has held:

> To obtain evidentiary hearing in the lower court on the merits of an effective assistance of counsel issue, a defendant must state "a claim prima facie" in his application to the Court. To get a hearing ". . . he must allege . . . with specificity and detail" that his counsel's performance was defective and that the deficient performance prejudiced the defense . . . .

Hymes v. State, 703 So. 2d 258, 261 (Miss. 1997). Further, "[i]f defendant raises questions of fact regarding the deficiency of counsel's conduct or prejudice to the defendant, he is entitled to an evidentiary hearing on ineffective assistance of counsel." *Stringer v. State*, 627 So. 2d 326, 329 (Miss. 1993) (citing *Alexander v.*

State, 605 So. 2d 1170, 1173 (Miss. 1992); *Leatherwood v. State*, 473 So. 2d 964, 971 (Miss. 1985)).

Especially in light of the heightened scrutiny standard, "under which all bona fide doubts are resolved in favor of the accused," *Crawford v. State*, 218 So. 3d 1142, 1150 (Miss. 2016), Mr. Ronk should get such a hearing in the circuit court. He respectfully requests that this Court reconsider its decision and allow him that opportunity to be heard.

Respectfully submitted,
Timothy Robert Ronk
By:

s/ Alexander D. M. Kassoff
Alexander D. M. Kassoff (MSB # 103581)
Benjamin H. McGee III (MSB # 100877)
Scott A. Johnson (MSB # 9592)
Office of Capital Post-Conviction Counsel
239 North Lamar Street, Suite 404
Jackson, MS 39201
Telephone: (601) 359-5733
Facsimile: (601) 359-5050

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned attorney for Timothy Robert Ronk, do hereby certify that I have on this day filed the foregoing Motion for Rehearing with the Clerk of the Court using the MEC system, which sent notice to the following:

Hon. Brad Alan Smith
Hon. Jason L. Davis
Special Assistant Attorneys General
P.O. Box 220
Jackson, MS 39205
bsmit@ago.state.ms.us
jdavi@ago.state.ms.us

Further, I certify that I have caused on this day a true and correct copy of the foregoing Motion for Rehearing to be sent via first-class U.S. postal mail, postage fully prepaid, to the following:

Mr. Timothy Robert Ronk
MDOC No. 141817
Unit 29-J
Mississippi State Penitentiary
P.O. Box 1057
Parchman, MS 38738

This the 27th day of March 2019.

s/ Alexander D. M. Kassoff
Alexander D. M. Kassoff
Certifying Attorney