DEATH PENALTY CASE

***** EXECUTION SCHEDULED APRIL 20, 2017 *****

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Ledell Lee, *Plaintiff,* -v- **Governor Asa Hutchinson**, in his official capacity; **John Felts**, in his official capacity; **John Belken**, in his official capacity; **Andy Shock**, in his official capacity; **Abraham Carpenter**, Jr. in his official capacity; **Dawne Benafield Vandiver**, in her official capacity; **Jerry Riley**, in his official capacity; and **Lona H. McCastlain**, in her official capacity, *Defendants*.	Civil Case No. 17-198 (consolidated in 17-194) **BRIEF IN SUPPORT OF AMENDED MOTION FOR PRELIMINARY INJUNCTION** **Expedited Review Requested**

Introduction

On April 4 and 5, 2017, this Court held an evidentiary hearing to determine whether Plaintiffs' original Motion for Preliminary Injunction ("Original Motion") should be granted. The Original Motion was filed contemporaneously with a Complaint establishing the grounds upon which Plaintiffs' statutory and regulatory rights were violated by the State in the clemency process, in violation of their right to Due Process under the 5th and 14th Amendments.

After two days of testimony, the Court issued an Order ("Clemency Order"), granting the State's Motion to Dismiss as to Plaintiff Bruce Ward, denying the Preliminary Injunction as to

all Plaintiffs on the allegation that the Arkansas Department of Correction ("ADC") deliberately interfered with the clemency process by denying prisoners' access to correctional officers, granting a Preliminary Injunction as to Jason McGehee, and denying injunctive relief to the remaining Plaintiffs, including Mr. Lee, without foreclosing further consideration of evidence on the merits.

Since this Court's order, counsel for Ledell Lee have endeavored to seek out and provide the additional information of prejudice the Court has requested. Counsel Lee Short has, in this period, been joined by additional counsel in Mr. Lee's individual federal case, Cassandra Stubbs, in light of abandonment and conflicts of Mr. Lee's prior federal counsel. Together, this new counsel team have uncovered a wealth of information that should have been presented to the Parole Board and transmitted to the Governor to aid in considering Mr. Lee's case for clemency, including that he is likely has intellectual disability has serious neuropsychological deficits stemming from Fetal Alcohol Syndrome Disorder ("FASD"), which had never before now been diagnosed or even presented. The team has also devised a plan to prove once and for all Mr. Lee's longstanding claim of innocence, through DNA testing that was not previously available and which counsel have now requested. Although the Circuit Court has today denied Mr. Lee's request for DNA testing, Mr. Lee will be appealing that denial to the Arkansas Supreme Court. Clemency is the last fail-safe, a backstop to judicial determinations concerning guilt and innocence and here life and death. *Herrera v. Collins*, 506 U.S. 390, 415 (1993). As the Court has already found, the State has cut corners in the clemency process to the point that state procedure was not followed. Because of the truncated process, Mr. Lee has not until now been able to present this critical information, which comprises the prejudice this Court identified as missing in its initial denial of *all* plaintiffs' motion for a preliminary injection. Having now

shown prejudice, Mr. Lee's execution cannot go forward consistent with his Fourteenth Amendment rights to Due Process. Accordingly, this Court should grant Mr. Lee's Amended Motion for Preliminary Injunction.

Facts

Clemency, guaranteed by the Arkansas Constitution, is governed by statute and the regulations of the Arkansas Parole Board (Board). *See* Ark. Const. Art. 6, § 18. Arkansas law requires a thirty-day public notice period before the Board can give its recommendation regarding clemency to the Governor. Ark. Code Ann. § 16-93-204; Exhibit 1 to Complaint (Ark. Parole Board Policy Manual ("Policy Manual")). The Policy Manual, a set of policies governing executive clemency, requires that filing deadlines for clemency petitions be set "no later than 40 days prior to the scheduled execution date[.]" Exhibit 1 to Complaint at 25. The Policy Manual also provides for a two-hour window for presentation of evidence, typically in a single day. *Id.* at 35.

At the evidentiary hearing on April 4, this Court noted that the Regulations governing the activities of the Parole Board, as well as the attachments to those Regulations, have the force of law. (R. at 120). In addition, testimony by the first and former Chairman of the Parole Board, Leroy Brownlee, established that Board practice had always been to allow prisoners as much time as needed to present at their clemency hearing; that he would have never limited a prisoner to only one hour to present; and that he would have never scheduled more than one clemency hearing to take place in one day. (R. at 155-156). Mr. Brownlee testified that he would not have scheduled two clemency hearings to take place in one day because of the "work that's involved," and the responsibility of the Board to "address each" of the reasons the prisoner is making a request for clemency. (R. at 156).

During Chairman Felts' testimony, he noted that, prior to the Plaintiffs' clemency hearings, he did "not recall there ever being a limitation set on the amount of time" in capital clemency hearings. (R. at 107). In addition, he conceded that he had communicated to Plaintiffs' attorneys Scott Braden and John C. Williams that in these cases that the Board "wanted to do [the clemency hearings] in one hour." (*Id.* at 108). He noted that in addition to the one-hour time limit, the Board set clemency hearings for Plaintiffs Jason McGehee and Kenneth Williams, and Ledell Lee and Stacey Johnson, on the same days, respectively. (*Id.* at 108-109). He confirmed that the Board deliberated on each of these Plaintiffs' clemency recommendations during the same session, (*id.* at 108), and that the reason behind scheduling two clemency hearings a day and limiting the time allotted for each was in order to make things more "efficient" for the Board. (*Id*. at 110).

New Evidence of Prejudice to Mr. Lee

In ruling on the Original Motion, the Court noted it had "struggled long and hard" on denying injunctive relief to the remaining Plaintiffs, but ultimately concluded that there was not "enough of record evidence that the imperfections, the deviations from procedure . . . made a real difference." (Vol. 3 at 423-24). The Court continued, "Counsel have . . . demonstrated . . . that square corners were not turned and that the process was imperfect. . . [but] success would require a showing of prejudice, of harm, from the deviations from the statutes and regulations that I've mentioned." (*Id.* at 425).

Mr. Lee has suffered unique prejudice on account of the State's rush to execute eight individuals in under two weeks and its corresponding haste in conducting executive clemency proceedings. Mr. Lee is one of the only Plaintiffs in the present group who has never before been slated for execution, and thus, has never before received an opportunity to pursue clemency. *See*

e.g., *Lee v. Hutchinson*, 4:17-CV-194 DPM (E.D. Ark. April 5, 2017 Hearing) Transcript at 358. In its filings to the Court, the State asserted that many of the Plaintiffs in the present case have been scheduled for execution in the past, and therefore, have had the benefit of having to prepare for clemency and present a case to the Board at least once before. *See* Brief in Support of Defendants' Motion to Dismiss at 2. To the extent that this argument was offered to suggest that this Court employ an even higher standard to determine prejudice from the State's unlawful actions here than it otherwise would, this argument fails as to Mr. Lee.

Due to the fact that Mr. Lee had never before been noticed for execution, local counsel for Mr. Lee—Mr. Short, appointed by this Court—had no reason to anticipate that Mr. Lee would be among those the State next chose for execution. While clemency counsel can reasonably be expected to prepare for clemency in advance of an execution date being set, it is nevertheless important to point out that no one could have reasonably expected the State to act in such an unprecedented manner as regards these eight dates. The State's decision to schedule more individuals for execution in a shorter period of time than has ever before occurred in the modern death penalty era, therefore, is not irrelevant to this Court's consideration of prejudice to Mr. Lee. Furthermore, Mr. Short had no reason to believe that, even if Mr. Lee was suddenly scheduled for execution alongside seven other individuals, he would be given less time to prepare his client, his clemency petition, and his clemency hearing than Arkansas law provides.

The investigation Mr. Lee's new legal team has been able to undertake shows that in over two decades of incarceration under sentence of death, Mr. Lee has *never received constitutionally adequate representation*. Although this Court has determined that there is no postconviction right to counsel in clemency, and therefore that due process challenges to the clemency process cannot be framed in the context of ineffective assistance of counsel, the

staggering lack of adequate representation in Mr. Lee's case—combined with the State's truncation and violation of its own clemency processes here—have unquestionably prejudiced Mr. Lee. Over the past ten days, substitute counsel has determined that *no one* assigned to Mr. Lee's case has ever conducted an adequate mitigation investigation, including speaking to family and friends about the dire poverty and abuse which he endured as a child. *See* Declaration of Liz Vartkessian, Ph.D. at ¶20 (Exhibit 1). ("The only records I found related to Mr. Lee had been requested by Mr. Short. They were approximately 92 pages of medical health records from the Department of Corrections spanning the years 2015-2017. In the 24 year history of this case Mr. Lee has had at least ten separate attorneys. No one appears to have meaningfully investigated the allegations lodged against him or to have conducted even the most basic of social history investigation. To call the investigation paltry would be an overstatement.").

In addition to Dr. Vartkessian's findings concerning the total lack of investigation or inquiry into Mr. Lee's case, she also noted the following facts that had never before been examined by counsel or presented to a Court:

- Mr. Lee has physical and behavioral characteristics consistent with Fetal Alcohol Syndrome Disorder (FASD) and evidence of possible brain damage resulting from a boxing injury as a child. Vartkessian at ¶¶22, 23.
- Mr. Lee was enrolled in special education classes as a child and even then had difficulty completing some basic tasks. *Id.* at ¶25.
- Mr. Lee grew up in extreme poverty alongside at least nine other relatives in his grandmother's house, where a brick found on the street was used to prop up the broken couch, and a propane fire stove was used to heat the house in the winter. ¶32.
- Mr. Lee grew up perpetually hungry, not knowing where his next meal would come from, and often skipped meals himself in an effort to help provide for his siblings. ¶¶33, 35, 40.
- Stella Lee, Mr. Lee's mother, exhibits signs of mental illness and was never prepared by trial counsel for testifying in Mr. Lee's case. In addition, she has never been interviewed anyone other than Mr. Short in the course of Mr. Lee's postconviction representation. ¶47, 48.

Following Dr. Vartkessian' s initial meetings with Mr. Lee, substitute counsel was able to provide for a neuropsychologist, Dr. Dale Watson, to visit Mr. Lee and review what information does currently exist concerning his background and intellectual functioning. Dr. Watson found Mr. Lee has "a neurodevelopmental disorder, a probable Fetal Alcohol Spectrum Disorder, and likely has either borderline or mild Intellectual Disability." Declaration of Dr. Watson ¶ 44 (Exhibit 2). He observed Mr.Lee

> to have significant and serious deficits in academic skills, memory abilities, motor functions, social cognition, and executive functions. The findings are indicative of diffuse brain dysfunction, worse in the right hemisphere, with particular evidence of frontal-striatal and temporal lobe dysfunction. The temporal lobes are responsible for an array of cognitive tasks most notably including language and memory. The frontal-striatal system is involved in executive processes, active learning and recall, and making tasks routine.

Id. ¶18. Having reviewed Dr. Watson's findings and other evidence presented here, the Arc, the nation's oldest and most well-known organization for people with intellectual and developmental disabilities, has now urged Governor Hutchinson to grant Mr. Lee clemency. The Arc cites Mr. Lee's history "replete with evidence indicating a potential [intellectual disability] diagnosis, which would bring him under the protection of the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002) . . ." *See* Exhibit 3.

In addition to the above findings, Dr. Watson found evidence that "Mr. Lee has clear and consistent findings of impaired executive functioning impacting non-verbal abilities," *id.* at ¶35. Dr. Watson is convinced, "to a reasonable degree of professional certainty, that Mr. Lee has a neurodevelopmental disorder." *Id.* at ¶ 38. Dr. Watson believes the most likely source of this neurodevelopmental disorder to be FASD, consistent with the observations made and

information received by Dr. Vartkessian. *Id.*

To provide the courts as complete a picture as possible, counsel for Mr. Lee have requested his medical records from the Arkansas Department of Correction (DOC). The DOC responded that "[m]ost of the inmates scheduled for execution have been here for 25 years or more" and it "would be very difficult to produce, perhaps even locate, on a short deadline." *See* Exhibit 4. Defense counsel subsequently reduced the request to cover only Mr. Lee's mental health records, but still have not received them.

Had Mr. Lee's case been adequately investigated by past counsel, and had Mr. Short been given the time and opportunity contemplated by the clemency statute and regulations to prepare for Mr. Lee's petition and hearing, this information would have been presented and uncovered. As Mr. Short informed the Court, however, not only did he have no idea that this case would be noticed for execution so suddenly, but he was virtually unable to devote more than 24 hours to Mr. Lee's clemency petition given his ongoing work commitments and the timeframe presented by the Board. Hearing Trans. at 356-364. Mr. Lee's counsel have now submitted the above new evidence to the Parole Board in a letter requesting reconsideration of the Board's recommendation to deny Mr. Lee clemency. Exhibit 5. The letter notes that Mr. Lee's request for DNA testing to prove his innocence, although today denied in the state Circuit Court, will now be appealed to the Arkansas Supreme Court.

Legal Argument

I. Legal Standard

The Court should issue a preliminary injunction barring Defendants from proceeding with Mr. Lee's scheduled execution on April 20, 2017, until this Court is able to evaluate whether his rights to due process were violated by the multiple arbitrary variances from

procedure found in this case. Although this Court initially ruled that Plaintiffs had not yet submitted enough evidence of prejudice to demonstrate that Defendants' repeated abrogation of state law had caused them injury,[1] the additional facts and affidavits submitted with this Motion show that a wealth of information that could have convinced Board members to recommend Mr. Lee's life be spared was never presented.

In deciding whether to grant a preliminary injunction the Court must consider "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest." *Dataphase Systems, Inc. v. CL Systems, Inc*. 640 F.2d 109, 114 (8th Cir. 1981) (en banc). In a capital case, where the granting of a preliminary injunction will have the effect of delaying a scheduled execution, the Court

[1] The State's abrogation of procedure has been so widespread as to effectively undermine the entire framework created by Arkansas to process and review applications for executive clemency. Even in contexts where only "minimal due process" is awarded, courts have recognized that "where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial." *United States v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999) (*citing in re Garcia–Flores*, 17 I. & N. Dec. 325 (BIA), 1980 WL 121881 (BIA 1980).) While Plaintiffs recognize that the standard for prevailing on a due process violation in clemency is exceptionally high, Plaintiffs can identify no other case in which a state has violated so many of it is own clemency regulations and procedures as here. Plaintiffs would submit that challenges to the clemency process are routinely unsuccessful where a Court is asked to find that an existing process—or an altogether lack of process—is constitutionally insufficient. *See, e.g., Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 277 (1998) (the due process challenge that reached the Supreme Court was a facial challenge to the state's clemency procedure itself, which—also of significance here—the plaintiff was permitted to raise even though he had not availed himself of it); *see also Foley v. Beshar*, 462 S.W.3d 389, 392 (Ky. 2015) ("'In short, [in Kentucky,] the decision to grant clemency is left to the unfettered discretion of the Governor.'…[but] in the absence of a substantive constitutional right…the federal Constitution's procedural protections can sometimes be called into play by substantive rights emanating from other sources.") (emphasis added) (internal citations omitted). Challenges where plaintiffs have requested courts to find more clemency process due than the State chose to supply are inapposite; as are those where a prisoner alleges a single deviation from agency procedure to be inherently prejudicial. *This* case involves a state which, through statute and regulation, has created substantive rights in capital clemency review, and which it has failed to follow at nearly every turn. It is this systemic failure that gives rise to the violation of "minimal due process" owed Plaintiffs under *Woodard*, which did not suggest that where such a violation did occur, additional prejudice would need to be shown.

must also consider any unnecessary delay by the prisoner in bringing the suit, and weight such delay against the prisoner. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

II. Plaintiff faces irreparable harm.

As the Court has already found, "Defendants have candidly acknowledged there is that possibility here because carrying out a death sentence is irreversible." (R. at 408).

III. The balance of harm and injury weighs heavily in favor of injunctive relief.

While the State unquestionably has an interest in proceeding with executions, Plaintiff does not seek in this lawsuit to indefinitely, or even significantly, postpone his execution. Rather, Mr. Lee simply asks this Court to find that the evidence provided in this amended petition shows that had the State not acted so hastily and in violation of its own process in scheduling Mr. Lee for clemency, there is a reasonable chance that the outcome of his hearing would have been different.

Particularly at this point, where the Court has found significant arbitrariness in the State's clemency process, the risk of irreparable harm to Mr. Lee outweighs the State's interest in proceeding with this execution. Without the injunction, Mr. Lee would be executed without having the opportunity, before his death, to avail himself of the full clemency process and protections under Arkansas statute and controlling regulations.

IV. Plaintiff is likely to succeed on the merits.

In light of the information presented here, and this Court's finding during the evidentiary hearing requiring only evidence of prejudice to show that the State's actions likely affected Plaintiffs' ability to present information in support of clemency, Mr. Lee is likely to succeed on the merits. This Court stated that without additional information concerning what Plaintiffs would have presented had they not relied on Defendant's statement that the hearing

would be limited to one hour, it could not yet rule that Plaintiffs had demonstrated a significant likelihood of success on the merits. It did, however, leave the hearing open to allow Plaintiffs to present additional evidence of prejudice before a merits ruling could be reached. (R. at 426-27).

Here, Mr. Lee submits evidence, first and foremost, of the extent to which he was abandoned by counsel *at every turn* and, as a result, significant information concerning the appropriateness of his death sentence was never uncovered. Additionally, even after only cursory investigation, it seems clear that Mr. Lee suffers from significant neurological deficits including in executive functioning, which likely impacted his decision-making and reasoning abilities throughout the course of his life. He is likely intellectually disabled, and ineligible for execution. Atkins v. Virginia, 536 U.S. 304 (2002). Although the real travesty in this case, in particular, is that this information was never presented to a jury or a court, these failings are precisely why the Supreme Court has recognized clemency to be a fail-safe in the judicial system. On account of the State's actions here, however, Arkansas has made it virtually impossible for Mr. Lee to benefit from this crucial safety-valve.

V. Injunctive relief is in the public interest.

Plaintiff should also prevail because he can show that injunctive relief is in the public interest. "[I]t is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roger v. City of Manchester*, 697 F.3d 678, 692 (8th Cir. 2012); *see also, Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 752 (8th Cir. 2008 (same). Clemency operates as a "'fail safe' in our criminal justice system." *Herrera*, 506 U.S. at 415. "The public has a strong interest in a well-functioning criminal justice system. *Acacia Corp. v. United States*, 2008 WL 2018438, *4 (E.D. CA. 2008).

Accordingly, Mr. Lee has met this Court's burden of establishing prejudice sufficient to entitle him to a preliminary injunction at this stage of the litigation. Although nothing can make up for the nearly 30 years Mr. Lee has been incarcerated and sentenced to death without the constitutional right to even minimally effective counsel, this Court can at least stay Mr. Lee's execution and order the State to provide him with a new clemency hearing schedule that will allow this information to be presented.

VI. The Court Should Stay Plaintiff's Execution Because Plaintiff Has Not Intentionally Delayed in Presenting this Additional Information to the Court.

Before granting a stay of execution, courts must "consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004).

Mr. Lee has not delayed in bringing this Amended Motion for Injunctive Relief before this Court. Indeed, his doing so is directly responsive to what the Court indicates would be needed for it to rule that Plaintiffs had demonstrated a significant likelihood of success on the merits. This Court issued its opinion on Thursday, April 6, and counsel and substitute counsel have spent the last full week gathering the information presented herein. This is the earliest feasible date this information could have been presented to the Court for reconsideration.

Due to the imminent nature of Mr. Lee's execution—one week from today—and the time required to present this new information to the Court and allow the Court to rule on its credibility and likelihood of changing the outcome of Mr. Lee's clemency recommendation, Plaintiff requests **expedited ruling in this case, in the form of a final order that will allow Mr. Lee, if necessary, to pursue an appeal.**

CONCLUSION

For the reasons outlined in this Memorandum, this Court should:

a. Grant Mr. Lee's Amended Motion for Preliminary Injunction and schedule an evidentiary hearing for additional testimony on this evidence; and

b. Grant any other relief as this Court deems appropriate.

Respectfully Submitted,

/s/ Lee Short
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2017, this notice was filed using the CM/ECF system which sends notice to all counsel of record.

/s/ Lee Short
Counsel for Petitioner