IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL ANTHONY ARCHULETA, Appellant, v. STATE OF UTAH, Appellee.	Case No. 20160992-SC DEATH PENALTY CASE

Appeal from the Fourth Judicial District Court in Millard County
District Court Case No. 14070047
The Honorable Jennifer A. Brown

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

Michael Archuleta appeals the grant of summary judgment on his post-conviction claims. This Court has jurisdiction over the denial of post-conviction relief pursuant to Utah Code § 78B-9-110 and § 78A-3-102(3)(i).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Whether the district court improperly retroactively applied the 2008 Post-Conviction Remedies Act amendments to extinguish the right to the effective assistance of post-conviction counsel that should have protected Mr. Archuleta's initial post-conviction proceedings.

Summary judgment is appropriate only "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Any showing in support of summary judgment "must preclude all reasonable possibility that the loser could, if given a[n evidentiary hearing], produce evidence which would reasonably sustain a judgment in his favor." *Bullock v. Deseret Dodge Truck Ctr.*, 354 P.2d 559, 561 (Utah 1960).

This Court "review[s] the district court's decisions—on summary judgment, and on issues of law—de novo, affording no deference to its determination of the matters on appeal." *Graves v. N. E. Servs., Inc.*, 2015 UT 28, ¶ 17, 345 P.3d 619, 623 (citation omitted); *see also Wickham v. Galekta*, 2002 UT 72, ¶ 7, 61 P.3d 978. Mr. Archuleta preserved this issue in the district court. (*E.g.*, Memorandum of Points and Authorities in Support of Petition for Relief Under the Post-Conviction Remedies Act ("MIS"), filed

Dec. 12, 2014 at 99; Response to Second Motion for Summary Judgment ("Second Summary Judgment Response"), filed Aug. 1, 2016 at 2.)

II. Whether equity demands that, in the case of extinguishing the substantive right to the effective assistance of post-conviction counsel, a remedy nevertheless exists to ensure the integrity of those proceedings and to ensure the courts may reach substantial claims in capital cases.

Again, this Court "review[s] the district court's decisions—on summary judgment, and on issues of law—de novo, affording no deference to its determination of the matters on appeal." *Graves*, 2015 UT 28, ¶ 17, 345 P.3d at 623 (citation omitted); *see also Wickham*, 2002 UT 72, ¶ 7, 61 P.3d 978. Summary judgment is appropriate only "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Any showing in support of summary judgment "must preclude all reasonable possibility that the loser could, if given a[n evidentiary hearing], produce evidence which would reasonably sustain a judgment in his favor." *Bullock*, 354 P.2d at 561. Mr. Archuleta preserved this issue in the district court. (*E.g.*, MIS at 113; Second Summary Judgment Response at 21.)

III. Whether the district court improperly barred claims on summary judgment that ineffective initial post-conviction counsel failed to raise or support and that current counsel brought before the court as soon as permitted.

Summary judgment is appropriate only "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Any showing in support of summary judgment "must preclude all reasonable possibility that the loser could, if given a[n evidentiary hearing], produce evidence which would reasonably sustain a judgment in his favor." *Bullock*, 354 P.2d at 561. The Court views the facts in the light most favorable to the non-movant: Mr. Archuleta. *See, e.g., Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel.* Co., 844 P.2d 322, 324 (Utah 1992).

Mr. Archuleta preserved this issue in the district court. (*E.g.*, MIS at 99; Second Summary Judgment Response at 17, 37.)

DETERMINATIVE AUTHORITIES

The following authorities are either determinative of this appeal or are of central import to the arguments herein. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const. art. I, § 9. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.

Const. amend. V. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

“The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it.” Utah Const. art. I, § 5. “The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.” Utah Const. art. V, § I. “No person shall be deprived of life, liberty or

property, without due process of law." Utah Const. art. I, § 7. "In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense." Utah Const. art. I, § 12. "Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor." Utah Const. art. I, § 9.

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion. The motion and memoranda must follow Rule 7 as supplemented below." Utah R. Civ. P.

56(a); Utah R. Civ. P. 65C (Addendum 1); Utah Code § 78B-9-102 (Addendum 1); Utah Code § 78B-9-104 (Addendum 1); Utah Code § 78B-9-106 (Addendum 1); Utah Code § 78B-9-107 (Addendum 1); Utah Code § 78B-9-109 (Addendum 1); Utah Code § 78B-9-202 (Addendum 1); Utah R. Crim. P. Rule 8 (Addendum 1).

STATEMENT OF THE CASE

I. Nature of the Case

Mr. Archuleta appeals the order of the Fourth Judicial District Court in and for Utah County, the Honorable Jennifer A. Brown, which granted Appellee's second motion for summary judgment.[1] Mr. Archuleta now challenges the district court's grant of summary judgment and challenges the legality of his sentence of death under state law and the state and federal constitutions.

II. Procedural History

Mr. Archuleta was convicted of first degree murder in December 1989. (Trial ROA 535.[2]) The penalty phase took place five days later and lasted less than four hours, excluding breaks. (TR Trial Vol. 10, 12/20/1989 at 3564-3735.) Mr. Archuleta was

[1] As explained below, the district court bifurcated Mr. Archuleta's claim regarding his intellectual disability from the other claims he raised in post-conviction proceedings. His intellectual disability claim is the subject of an appeal in this Court's Case No. 20160419-SC. The remaining claims are the subject of this appeal.

[2] The trial transcripts are cited as "TR, proceeding, 00/00/0000." The trial record on appeal is cited as "Trial ROA (entry number)." The record on appeal for the previous post-conviction proceedings is cited as "PCR ROA (entry number)." Citations to the post-conviction proceedings on appeal are cited as "date filed, document name." Any other items cited are specifically explained within the text.

sentenced to death. (Trial ROA 594; Trial ROA 703-06.) This Court affirmed his conviction and sentence. *State v. Archuleta*, 850 P.2d 1232 (Utah 1993) (mem.).

Mr. Archuleta filed a Pro Se Petition for Writ of Habeas Corpus and/or Post-Conviction Relief on March 10, 1994. (PCR ROA 1-4.) Karen Chaney and Ronald Nehring agreed to represent Mr. Archuleta on a pro bono basis. (PCR ROA 22.) They filed an Amended Petition for a Writ of Habeas Corpus and/or Postconviction Relief on August 11, 1994. (PCR ROA 46-75.) On October 4, 1996, the Fourth District Court dismissed his post-conviction petition. (PCR ROA 462-527.) On June 26, 1998, this Court found "[t]he district court erred in ruling that the petition for a writ of habeas corpus, which was based on the allegation of ineffective assistance of counsel at trial and on appeal, was barred." It reversed and remanded Mr. Archuleta's case to the district court. (Utah Supreme Court, Case No. 960533; Dkt. No. 41; PCR ROA 590.)

Mr. Archuleta filed his Second Amended Petition for a Writ of Habeas Corpus and/or Postconviction Relief on June 14, 2002. (PCR ROA 888-1227.) On August 25, 2004, the Fourth District Court granted summary judgment on "all of Petitioner's claims with the exception of claims 33(d)-(t) and 35(o)-(q)"—claims regarding the ineffective assistance of trial counsel. (PCR ROA 2298.) On January 22, 2007, the court denied Petitioner's Petition for a Writ of Habeas Corpus and/or Post-Conviction Relief. (PCR ROA 3338-76, 3379-81.) This Court affirmed that denial. *Archuleta v. Galetka*, 2011 UT 73, 267 P.3d 232.

On December 6, 2012, Mr. Archuleta's federal habeas counsel (current counsel) filed his federal Petition for Writ of Habeas Corpus. (United States District Court for the District of Utah, Case No. 2:07-cv-630 ("USDC") Dkt. 58, Petition for Writ of Habeas Corpus.) On June 21, 2013, in accordance with a briefing schedule agreed to by the State (USDC Dkts. 65 and 66, Joint Proposed Case Management Schedule and Order), counsel filed a motion to stay Mr. Archuleta's federal habeas case and return to state court, (USDC Dkt. 75, Motion to Stay and Hold Habeas Proceedings in Abeyance).

In November 2014, the federal court stayed Mr. Archuleta's federal proceedings in order for him to return to state court. It also granted Mr. Archuleta's habeas counsel leave to represent him in state court proceedings, and ordered counsel to commence his state court proceedings within 30 days. (USDC Dkt. 107, Order Granting Motion to Stay (Addendum 3).)

In December 2014, counsel filed Mr. Archuleta's petition for post-conviction relief. (12/12/2014, Petition for Relief Under the Post-Conviction Remedies Act.) At the State's request, the state district court bifurcated his *Atkins*[3] claim and stayed all his non-*Atkins* claims. (01/14/2015, Motion for Extension to Respond to Petition and for Partial Stay of Petition; 02/05/2015, Ruling.)

After the district court granted summary judgment on Mr. Archuleta's *Atkins* claim (02/02/2016, Corrected Memorandum Decision and Order on Motions), it certified that claim as final and appealable (over Mr. Archuleta's opposition). (04/12/2016, Ruling

[3] *Atkins v. Virginia*, 536 U.S. 304 (2002).

and Order on Respondent's Motion to Certify *Atkins* Decision as Final and Appealable.) That claim is the subject of a separate appeal currently pending before this Court (Case No. 20160419-SC).

Appellee then moved for summary judgment on Mr. Archuleta's remaining claims. It also asked the district court to bifurcate the procedural aspects of the remaining claims from their merits. (05/16/2016, Second Motion for Summary Judgment; 05/16/2016, Motion to Bifurcate and Stay Time to Respond on the Merits.) The court, over Mr. Archuleta's opposition (05/31/2016, Opposition to Motion to Bifurcate and Stay Time to Respond on the Merits), only required Appellee to address the procedural issues regarding the remaining claims. (06/10/2016, Ruling and Order on Respondent's Motion to Bifurcate and Stay Time to Respond to the Merits.) It then granted summary judgment on those issues, never considering the claims' merits. (10/28/2016, Memorandum Decision and Order on Respondent's Second Motion for Summary Judgment (Addendum 2).)

Mr. Archuleta now appeals the district court's grant of summary judgment.

III. Statement of Facts

Michael Anthony Romero was born March 26, 1962, in Grand Junction, Colorado. His mother was Pilar Ruth Sandoval, age 16. (PCR ROA 1045.) He was born into a family of many people diagnosed with intellectual disability (PCR ROA 1040 and 1042; MIS Exh. 6 at 83; MIS Exh. 10 at 2; MIS Exh. 7 at 267, 269; MIS Exh. 11 at 2; MIS Exh.

12 at 2; MIS Exh. 13 at 21), and lived in extreme poverty and an unstable home. Many of his family members, for multiple generations, were addicted to drugs and alcohol.[4]

Michael's grandmother had 17 children, four of whom died in infancy, including two from malnutrition. (MIS Exh. 5 at 1-2.) His mother was referred to Juvenile Court at age 15. (MIS Exh. 6 at 39.) She quit school at 13 because, in her words, she "just couldn't seem to get along there." (MIS Exh. 6 at 40.) Her very young life was characterized by, among other things, commitment to the custody of the Utah State Industrial School (MIS Exh. 6 at 36), running away from home (MIS Exh. 6 at 36), suicide attempts (MIS Exh. 9 at 46), and "several abortions" (MIS Exh. 9 at 46).

By three years old, Michael's name had appeared in police reports regarding his family. (PCR ROA 1208.) In 1965, he was removed from his home. (PCR ROA 1040.) He was placed in a shelter home in April of 1965. His shelter mother told a caseworker that he arrived "in such a filthy condition that it took her a week to get him clean." He also had "several burn scars on his body which resembl[ed] cigarette burns," and "a very large deep burn on his buttocks which looked as though he had sat on a floor furnace." (PCR ROA 1046.)

He was tested multiple times and, according to records, "came to the foster home . . . retarded in many areas of development. He ate like an infant and did not seem

[4] A full description of the available facts regarding Mr. Archuleta's life is detailed in his MIS. Because the district court declined to consider the merits of Mr. Archuleta's claims and only addressed procedural issues, he only briefly summarizes those facts here. He respectfully asks the Court to consider the details of the MIS regarding the full factual record available to the district court.

to use his teeth to chew food. He could not talk and did not seem to understand what was said to him." (PCR ROA 1197-98.) For example, one of Michael's adoptive cousins described that he struggled with basic concepts. She illustrated this point with a story of how he would become very upset when he was given a half-glass of milk. Michael wanted only the top half of the glass to be full and could not understand, despite multiple explanations, that this was impossible.

After having been placed with five other foster families who had difficulty with his lack of adaptive functioning skills, Michael met with the Archuleta family for the first time on March 25, 1967. (PCR ROA 1054.) Mrs. Archuleta noted that Michael would awaken during the night needing "reassurance she was still there." (PCR ROA 1054.)

As detailed in his MIS, Michael had consistently low IQ scores and had great difficulties in school. At nine, he was tested at the Timpanogos Community Mental Health Center. His IQ was scored in the "borderline mentardation [sic] classification." (PCR ROA 1159.) Eventually, he was admitted to the Children's Ward at the Utah State Hospital on October 24, 1974. One evaluator diagnosed him with "Mental Retardation (marginal), etiology unknown but likely genetic in that both natural parents have been described as inadequate and marginal" and "Organic Brain Syndrome, nonpsychotic (MBD Syndrome), etiology to be determined." (PCR ROA 2870-71.)

At the Utah State Hospital, Michael was given Thorazine, a powerful antipsychotic medication, on several occasions. (PCR ROA 2869; *see also* MIS Exhs. 16-22.) Later, staff recommended that Michael be placed in supervised day treatment at

Timpanogos Mental Health Center: he was not accepted because there were "no openings." Michael's discharge diagnoses from the state hospital were "Mental Retardation (marginal), etiology unknown but likely genetic in that both natural parents have been described as marginal and Organic Brain Syndrome, nonpsychotic (MBD Syndrome) etiology to be determined." (PCR ROA 2867-68, 2871.)

Michael was later considered for placement at Odyssey House, but the program rejected him, in part because of his intellectual deficits (their program indicated that a low average IQ was required to master the cognitive aspects of the programming). (MIS Exh. 23.) When Michael was later committed to the department of corrections, one doctor, in apt understatement, concluded that Michael is "one of our failures in the area of Mental Health treatment." (MIS Exh. 27.)

Eventually, Mr. Archuleta was incarcerated (for his conviction for Arranging to Distribute a Controlled Substance) with a man named Lance Wood. They were both released in October 1988. (TR Preliminary Hearing Vol. 2, 01/25/1989 at 461-62.) They lived together. (TR Trial Vol. 8, 12/11/1989 at 2865-66.)

On November 23, 1988, Michael was arrested for the murder of Gordon Ray Church (police arrested him for a "technical" parole violation as a "guise"). (TR Preliminary Hearing Vol. 2, 1/25/1989 at 545-46, 551.) He was re-arrested two days later. (TR Preliminary Hearing Vol. 3, 1/26/1989 at 786.) Police interrogated him on November 24, 1988, again overnight from November 24 through 25, 1988, on November 27, 1988, and on December 2, 1988.

Wood, on the other hand, was engaged to Brenda Stapley. Stapley's cousin was married to State's witness, officer John Graff. (TR Preliminary Hearing Vol. 2, 01/25/1989 at 464.) Stapley set Wood up with Graff directly, and Wood made various statements about the crime, pointing the finger at Michael. (*E.g.* TR Preliminary Hearing Vol. 2, 01/25/1989 at 471-73.) At the State's request, Michael's trial was held before Wood's. (Trial ROA 146.)

The claims raised herein rely on specific facts related to trial and appellate counsels' errors, and concurrent trial court errors that undermine confidence in the outcome of Mr. Archuleta's conviction and sentence. The district court, however, made no findings regarding these facts. Indeed, it did not even address them or their merits. Thus, Mr. Archuleta briefly summarizes them here, but respectfully refers the Court to the discussion of those facts found in his MIS. (MIS at 126-187.)

Briefly, Mr. Archuleta's trial counsel performed deficiently and prejudicially by failing to: adequately investigate, develop, and present evidence and preserve arguments regarding the statements Mr. Archuleta made to other prisoners about the crime; adequately investigate co-defendant Lance Wood and discover that Wood had been sexually assaulted by a male inmate while previously incarcerated; obtain or use Utah Department of Corrections records about Lance Wood's psychological diagnostic evaluation to present evidence about the nature of the relationship between Wood and Mr. Archuleta; reasonably investigate and develop forensic evidence; adequately object to improper supplemental jury instructions; object to prosecutorial misconduct in using

evidence of an uncharged act of sodomy for purposes other than the basis for which it was admitted; object to the use of the guilt-phase special verdict form in the penalty phase; challenge the constitutionality of the impermissibly vague "especially heinous" special circumstance; and challenge constitutionality of the Utah death penalty statute. (MIS at 126-145 (Claim 2).)

Further, Mr. Archuleta's trial counsel ineffectively failed to investigate and present mitigating evidence in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Art I. Section 12 of the Utah State Constitution. (MIS at 145-158 (Claim 3).) Appellate and post-conviction counsel were also ineffective in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Utah State Constitution. (MIS at 158-164 (Claim 4).)

Mr. Archuleta's death sentence is disproportionate compared with the sentence of his co-defendant or with those in other capital cases in Utah in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Utah State Constitution. (MIS at 164-66 (Claim 5).)

Further, the trial court improperly refused to grant a mistrial based on the prosecution's presentation of false testimony (MIS at 166-69 (Claim 6)); and improperly admitted evidence of uncharged sodomy in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Utah State Constitution (MIS 169-71 (Claim 7)).

Utah's statutory death penalty scheme violates the United States and Utah Constitutions. (MIS 171-80 (Claim 8).) The prosecution also failed to disclose material exculpatory evidence and impeachment information in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, Section 7 of the Utah Constitution. (MIS 180-82 (Claim 9).) In addition, Mr. Archuleta's appellate record is inadequate for a meaningful and effective review, depriving him of his rights under the Fourteenth Amendment to the United States Constitution and Art. I, Section 7 of the Utah Constitution. (MIS 183-84 (Claim 10).)

Mr. Archuleta was denied due process and a fair trial due to the cumulative effect of all errors made during his trial, appeal, and post-conviction proceedings, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I of the Utah Constitution. (MIS 184-85 (Claim 11).)

It would also violate Mr. Archuleta's federal and state constitutional rights to be free from cruel and unusual punishment for the State to execute him after he has spent 25 under the conditions of its death row. (MIS 185-86 (Claim 12).) And finally, the death penalty is categorically cruel and unusual in violation of the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Utah State Constitution. (MIS 186-87 (Claim 13).)

Under the circumstances of all of the above errors, the jury convicted Mr. Archuleta of criminal homicide, murder in the first degree on December 15, 1989. (Trial ROA 535.) After a penalty phase that lasted less than four hours (excluding breaks) it

rendered a death verdict. (Trial ROA 594; *see also* Trial ROA 703-06.) While Michael was sentenced to death (Trial ROA 594), Wood received a life term, *State v. Wood*, 868 P.2d 70, 74 (Utah 1993.).

This Court affirmed Mr. Archuleta's conviction and sentence. *Archuleta*, 850 P.2d 1232 (mem.).

In March 1994, Mr. Archuleta filed a Pro Se Petition for Writ of Habeas Corpus and/or Post Conviction Relief and the State answered. (PCR ROA 1-4; 11-14.) Karen Chaney and Ronald Nehring represented Mr. Archuleta pro bono in post-conviction proceedings. (PCR ROA 22). His "request for appointment of counsel was denied by the Court in March 1994 when this postconviction proceeding was initiated." (PCR ROA 397 n.1.)

An Amended Petition for a Writ of Habeas Corpus and/or Postconviction Relief was filed in August 1994. (PCR ROA 46-75.) Soon thereafter, M. David Eckersley replaced Mr. Nehring as co-counsel. (PCR ROA 80, 82.)

After a motions hearing in March 1996, the district court (Judge Lynn Davis) dismissed Mr. Archuleta's post-conviction petition. (PCR ROA 458-59; 462-527; 532-46; 547-48; 550.) This Court eventually appointed Chaney and Eckersley as counsel for Mr. Archuleta. (1st PCR Appeal Dkt. 38.) Then, in 1998, it remanded his case because the district court had improperly barred Mr. Archuleta's claim regarding the ineffective assistance of his trial counsel. (1st PCR Appeal Dkt. 41; PCR ROA 590.)

Chaney and Eckersley were ordered to amend their post-conviction petition. (PCR ROA 639.) But, as Eckersley made clear to the court, Chaney had stopped communicating with him and the defense team. (PCR ROA 645-46.) Eventually, the court removed both Chaney and Eckersley from the case.[5] (PCR ROA 711-12; 726; 645-46.)

In July 2001, Edward K. Brass was appointed to represent Mr. Archuleta. (PCR ROA 728.) The next month, McCaye Christianson and L. Clark Donaldson also entered appearances on Mr. Archuleta's behalf. (PCR ROA 758; 742.) As permitted, they filed an amended post-conviction petition on Mr. Archuleta's behalf in June 2001. (PCR ROA 885-86; 888-1227.) Appellee moved for summary judgment, and also asked the court to strike portions of Mr. Archuleta's evidence. (PCR ROA 1261-1558, 1811-12.) The court struck many of Mr. Archuleta's affidavits (including information from experts). (PCR ROA 1981-84; 2102-04.)

Both Christianson and Donaldson moved to withdraw. (PCR ROA 1798-99; 1800-03.) Appellee then pursued a protracted course of litigation seeking sanctions against Brass, Christianson, and Donaldson.[6] (*E.g.*, PCR ROA 1986-90; 2138-76; 2221-25; 2306; 2425-36; 2494-2503; 2532-38; 2554.)

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[5] Appellee asked the post-conviction court to revoke Chaney's pro hac vice admission. (PCR ROA 653-54.)

[6] Mr. Brass also sought additional funding (above the "expense cap") to represent Mr. Archuleta. Appellee also weighed in on that request. (PCR ROA 2591-95; 2619-24.) The post-conviction court denied the funding. (PCR ROA 2633-42.)

The post-conviction court granted summary judgment on all of Mr. Archuleta's post-conviction claims, "with the exception of claims 33(d)-(t) and 35(o)-(q)." (PCR ROA 2298.) In July 2005, Appellee renewed their request for summary judgment. (PCR ROA 2578-80.)

Meanwhile, Mr. Archuleta was communicating with the court about Mr. Brass's failure to communicate with him, and asking the court to grant him new counsel. (PCR ROA 2421-22; 2487-88; 2629-32.) In October 2005, Brass asked to withdraw from the case.[7] The court did not permit it. (PCR ROA 2660.)

The district court then held an evidentiary hearing in 2006. (PCR ROA 2753; 2791-92; 2793-94.) Appellee continued to seek to keep out Mr. Archuleta's offered evidence. (PCR ROA 3209-17; 3242-52.) The court denied Mr. Archuleta's post-conviction petition. (PCR ROA 3338-76.)

Meanwhile, the sanctions litigation continued. (PCR ROA 3377-78; 3382-99.) The district court eventually entered judgment in March 2007. (PCR ROA 3400-01; *see also* PCR ROA 3402-04; R.11 Appeal Dkt. 1[8].) The State appealed the sanctions rulings (R.11 Appeal Dkt. 18), but this Court ultimately affirmed the post-conviction court's denial of sanctions in 2008 (R.11 Appeal Dkt. 45).

[7] Appellee weighed in on his request in November. (PCR ROA 2646-48; 2652-59.)

[8] Case No. 20070228-SC.

Brass began an appeal of the denial of post-conviction relief. At the same time, however, he again asked to be removed from the case. (2d PCR Appeal Dkts. 33-34.) Appellee again weighed in, opposing his removal. (2d PCR Appeal Dkt. 35.) The Court permitted Brass to withdraw and appointed James Slavens. (2d PCR Appeal Dkts. 50-51; R. 60(b) ROA 3438-39.) Slavens asked for an emergency stay and initiated Rule 60(b) proceedings. (2d PCR Appeal Dkt. 74; R.60(b) ROA 3502-62.) All of his requests (for a stay, for 60(b) relief, and to reverse the denial of post-conviction relief) were denied.[9] (2d PCR Appeal Dkts. 77 and 133; R.60(b) ROA 5261-85.)

In December 2012, current counsel filed Mr. Archuleta's petition for a writ of habeas corpus in federal court. (USDC Dkt. 58, Petition for Writ of Habeas Corpus.) Counsel then sought a stay of his federal proceedings and permission to return to state court. (USDC Dkt. 75, Motion to Stay and Hold Habeas Proceedings in Abeyance.) In November 2014, the federal court granted those requests, and counsel filed Mr. Archuleta's state post-conviction petition (that is the subject of this appeal) within 30 days. (Addendum 3.) The state district court never reached the merits of the claims Mr. Archuleta raised. It retroactively applied the 2008 PCRA amendments to refuse to consider his claims. (Addendum 2.)

[9] Appellee took the same course in these proceedings, seeking to keep out the evidence Slavens attempted to offer on Mr. Archuleta's behalf. (*E.g.*, R.60(b) ROA 5227-34.)

SUMMARY OF ARGUMENT

Multiple instances of trial and appellate counsels' ineffectiveness, and concurrent trial court errors (all described above), prejudiced the outcome of Mr. Archuleta's conviction, death sentence, and state court proceedings. Yet, at the time he should have been able to raise those issues, he was burdened with ineffective post-conviction counsel: counsel who was unqualified, underfunded, and conflicted. What is more, the State took aggressive measures to interfere with any semblance of representation that existed. Ultimately, material facts, allegations, and claims were never raised to the initial post-conviction court.

When current counsel discovered those issues, they promptly sought permission to return to state court in an attempt to bring them to light. The state district court, however, never considered them. Although Mr. Archuleta had a vested right to the effective assistance of initial post-conviction counsel, the district court retroactively applied the 2008 Post-Conviction Remedies Act amendments to bar the consideration of those claims and issues, and to grant summary judgment in favor of the State. The district court further refused to fashion even an equitable remedy to account for the failures of initial post-conviction counsel.

This Court should find that Mr. Archuleta's substantive right to the effective assistance of post-conviction counsel is enforceable or, alternatively, should fashion an equitable remedy that accounts for the failures of that ineffective counsel. Respectfully, it

should remand Mr. Archuleta's substantial claims to the district court for consideration on their merits.

ARGUMENT

I. The District Court Improperly Refused to Consider the Merits of Claims that Mr. Archuleta's Ineffective Post-Conviction Counsel Failed to Raise.

Mr. Archuleta's initial post-conviction proceedings in the state district court were persistently characterized by the ineffective assistance of counsel—counsel hindered by their own deficient performance and by the State's interference. His counsel was constitutionally ineffective, and failed to investigate, raise, and support substantial constitutional claims.

When Mr. Archuleta returned to state court to pursue those claims, the district court retroactively applied the 2008 Post-Conviction Remedies Act (PCRA) amendments to bar the consideration of the merits of his claims. The district court ignored the import of post-conviction counsels' failures. For the reasons below, this was improper and this Court should remand Mr. Archuleta's case and order the district court to consider the merits of his claims.

A. Mr. Archuleta Had a Right to the Effective Assistance of Initial Review Post-Conviction Counsel.

When an initial-review collateral proceeding (here, the post-conviction proceeding) is the first proceeding in which a person can raise claims that rely on extra-record evidence (such as the ineffective assistance of trial counsel), the collateral

proceeding "is in many ways the equivalent" of a direct appeal of those issues. *See Martinez v. Ryan*, 566 U.S. 1, 11 (2012). Petitioners "pursuing first-tier review . . . are generally ill equipped to represent themselves because they do not have a brief from counsel or an opinion of the court addressing their claim of error." *Id.* (internal quotations omitted). The extra-record claims appropriate in initial post-conviction proceedings "often require investigative work and an understanding of trial strategy." *See id.* To present those claims, then, "a prisoner likely needs an effective attorney." *See id.* at 12. The inability to present extra-record claims is "of particular concern when the claim is one of ineffective assistance of counsel." *Id.* "'[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'" *Id.* (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

While this does not imply that a State acts with impropriety in reserving extra-record claims for collateral or post-conviction proceedings (in fact there may be "sound reasons" for doing so), "this decision is not without consequences for the State's ability to assert a procedural default in later proceedings." *Id.* at 13. Thus, where initial post-conviction proceedings are the first in which a prisoner may bring extra-record claims, courts should not later procedurally bar those extra-record claims if "an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding." *See id*. at 14. This "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel,

may not have been sufficient to ensure that proper consideration was given to a substantial claim." *See id.*

This is true in Utah. Here, "'the procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.'" *Lafferty v. Crowther*, No. 2:07-CV-322, 2016 WL 5848000, at *1 (D. Utah Oct. 5, 2016) (quoting *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013)). "[A]lthough Utah's Rule 23B allows an ineffective assistance claim to be raised on direct appeal under narrow circumstances, the rule does not provide for the scope of evidentiary development that is ordinarily necessary for claims of ineffective assistance of counsel." *Id.* (footnote omitted). *See also State v. Tennyson,* 850 P.2d 461, 468 n.5 (Utah Ct. App. 1993) (Rule 23 clearly not intended to provide for remand where factual development necessary); *State v. Johnston,* 13 P.3d 175, 179 (Utah Ct. App. 2000); *Fernandez v. Cook,* 783 P.2d 547, 549 (Utah 1989); *Dunn v. Cook,* 791 P.2d 873, 878 (Utah 1990). Thus, Utah's post-conviction system as a matter of its structure, design, and operation does not offer petitioners in capital cases a meaningful opportunity to present substantial extra-record claims until the initial post-conviction proceeding. And, when a prisoner is saddled with ineffective initial post-conviction counsel, he has no hope of having a court hear his legitimate constitutional claims. Without the enforceable right to effective post-

conviction counsel, valid claims of trial error and of the deficiencies of prior counsel will remain un-remedied.[10]

Indeed, this state's statutory scheme recognized these principles at the time of Mr. Archuleta's initial post-conviction proceedings. It purported to protect him with the right to effective post-conviction counsel. Utah's PCRA, enacted in 1996, at least intended (in some ways) to protect petitioners by affording them the right to the effective assistance of state post-conviction counsel. *See* Utah Code 78-35a-101 (1996). This guarantee applied during the pendency of Mr. Archuleta's initial post-conviction proceedings. *See Menzies v. Galetka*, 2006 UT 81, ¶¶ 79-82, 150 P.3d 480; *see also generally Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (citation and quotation omitted) (the guarantee of counsel "cannot be satisfied by mere appointment").

This Court enforced that statutorily-guaranteed right. At the time the PCRA was enacted, several capital cases were pending at varying stages of post-conviction review. This Court uniformly applied the PCRA to appoint paid post-conviction counsel. (MIS Exh. 33 at 2-3; *see also* MIS Exh. 34 at 2-3; MIS Exhs. 35 and 36.) *See also Menzie*s, 2006 UT 81, ¶ 18.

[10] The district court here found that "[i]n the state system, appellate counsel routinely raises ineffective assistance of trial counsel on appeal" and, thus, a remedy recognizing the inequity of holding a petitioner accountable for the failings of post-conviction counsel "does not transfer congruently into [Utah] state court." (Addendum 2 at 22 n.4.) For the reasons above, this is incorrect. *See, e.g.*, *Lafferty*, 2016 WL 5848000, at *1.

During Mr. Archuleta's first post-conviction proceedings, his attorneys (who had represented him pro bono) also sought appointment as paid counsel under the newly-enacted PCRA. (MIS Exh. 37, ¶ 5; MIS Exh. 38, ¶ 8; MIS Exh. 39.) Appellee opposed the appointment, but this Court granted it. (MIS Exhs. 40-41.) When one of Mr. Archuleta's attorneys, Karen Chaney, became unresponsive to co-counsel, co-counsel moved to withdraw, as he was not qualified under the PCRA to represent Mr. Archuleta. (PCR ROA 645-46). Appellee asked the post-conviction court to revoke Ms. Chaney's pro hac vice admission, leaving Mr. Archuleta without representation. (PCR ROA 653-55).

The court then appointed Edward K. Brass to represent Mr. Archuleta. (PCR ROA 728). L. Clark Donaldson and McCaye Christianson also entered appearances on his behalf. (PCR ROA 752, 758). In 2006, this Court reviewed Mr. Brass' PCRA appointment in another case, in which the petitioner sought relief from a summary judgment dismissing his post-conviction petition, which his counsel had defaulted. *See Menzies*, 2006 UT 81, ¶¶ 1-2. Mr. Brass's representation of Mr. Menzies overlapped with his representation of Mr. Archuleta. *See id.* ¶ 24. This Court characterized Mr. Brass's performance in the *Menzies* case as follows:

> To say that Brass did little to represent Menzies during this five-and-a-half-year period would be an understatement. In fact, Brass' representation in this case was deplorable. Our review of the record indicates that Brass not only failed to provide Menzies with any meaningful representation, but in fact willfully disregarded nearly every aspect of this case. In

> effect, Brass defaulted Menzies' entire post-conviction proceeding, resulting in the dismissal of Menzies' case.

Id. This Court found Mr. Brass legally "ineffective," thus enforcing Mr. Menzies' statutory right to the effective assistance of state post-conviction counsel. *Id.* ¶ 72, ¶ 82.

Although this Court was not required to decide the question in *Menzies*, it nevertheless also indicated that the right to effective initial post-conviction counsel may also be constitutionally protected. *Id.* at ¶ 84 ("We do not foreclose the possibility that an indigent death row inmate may have a right to the effective assistance of counsel under the Utah Constitution, but that question must wait for another day.").

In sum, Mr. Archuleta had a right to the effective assistance of counsel in his initial post-conviction proceedings from at least the enactment of the PCRA in 1996 through the conclusion of those proceedings. The district court here should not have applied later amendments to the PCRA to retroactively eliminate that right.

In 2008, the state legislature amended the PCRA in an attempt to extinguish the right to effective post-conviction counsel, *see* Utah Code § 78B-9-202(4) (2008).[11] It

[11] Although the current version of the PCRA directs courts to "promptly appoint counsel who is qualified to represent petitioners in postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure," Utah Code § 78B-9-202(2), two competing provisions render that provision meaningless. First, the 2008 PCRA itself specifically prohibits "relief . . . on any claim that postconviction counsel was ineffective." § 78B-9-202(4). Second, the 2008 PCRA only allows courts 60 days to find and appoint counsel, or else a petitioner must proceed pro se or not at all. § 78B-9-202(5).

Additionally, while the qualifications of counsel are described in Utah R. Crim. P. 8, the Rule also states that "[m]ere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that

violates due process, the Utah Constitution, the federal constitution, and conflicts with state statute, however, to permit the legislature to retroactively nullify the rights that existed during Mr. Archuleta's initial post-conviction proceedings. Relief should not be foreclosed based on the extinguishment of rights that existed at the time of his post-conviction proceedings.

First, the Utah Code prohibits the retroactive application of the 2008 PCRA amendments. *See* Utah Code § 68-3-3 ("A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive."). *See also Stephens v. Henderson*, 741 P.2d 952, 953 (Utah 1987) (Section 68-3-3 is "[t]he starting point" for analyzing retroactivity.). The federal rule is the same. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). No part of the 2008 PCRA amendments regarding the elimination of the right to the effective assistance of counsel declares its retroactivity.

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appointed counsel ineffectively represented the defendant at trial or on appeal." This mirrors the 2008 PCRA's empty promise of counsel. In sum, a petitioner might or might not be appointed counsel, who might or might not be qualified. And, in any circumstance, a petitioner has no recourse if he is not appointed counsel or is appointed incompetent counsel.

In fact, it was Appellee's counsel that advocated for the statute which compels the appointment of counsel in post-conviction cases without providing adequate compensation, resulting in unwilling counsel being compelled to represent capital petitioners pro bono.

Second, this Court's well-established retroactivity precedent prohibits the retroactive denial of a substantive right. "A long-standing rule of statutory construction is that we do not apply retroactively legislative enactments that alter substantive law or affect vested rights unless the legislature has clearly expressed that intention." *Olsen v. Samuel Mclntyre Inv. Co.*, 956 P.2d 257, 261 (Utah 1998). "[S]tatutory enactments which affect substantive or vested rights generally operate only prospectively." *Dep't of Social Servs. v. Higgs*, 656 P.2d 998, 1000 (Utah 1982), *abrogated on other grounds by Gressman v. State*, 2013 UT 63, ¶ 16, 323 P.3d 998. The right to the effective assistance of counsel is a substantive right: one on which a petitioner may obtain relief. *See also generally State v. Ford*, 2008 UT 66, ¶¶ 15-16, 199 P.3d 892 (citation omitted) (non-capital post-conviction prisoners permitted the appointment of counsel, because Utah Constitution protects liberty interests); *McFarland v. Scott*, 512 U.S. 849, 855 (1994) (quoting 21 U.S.C. § 848(q)(7)) (capital petitioners require "quality legal representation" because of "the seriousness" of the penalty and the "unique and complex nature of the litigation"). *See also Archuleta v. Galetka*, 197 P.3d 650, 654 (Utah 2008) ("Competent defense and appellate counsel are guaranteed by our constitution.").

Further, the Utah state constitution provides that "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Utah Constitution, Art. 1, § 5; *see also* United States Constitution, art. 1, § 9. The writ is an entrenched and fundamental guarantee of liberty. *See Boumediene v. Bush*, 553 U.S. 723, 743 (2008). The authority regarding writs of habeas corpus properly

resides with the judicial bodies that adjudicate them. The state constitution grants the legislature authority to enact laws. It prohibits, however, the legislature from exercising any function reserved to another governmental branch. *See* Utah Const. Art. V, § 1. This Court should thus exercise its own authority, under the common law, to grant relief—unimpeded by the legislature's attempt to do away with substantive rights. *See generally Hurst v. Cook*, 777 P.2d 1029, 1033-34 (Utah 1989) (discussing the Utah Constitution's grant of powers to the state courts and provision protecting the separation of powers); *see also Goebel v. Salt Lake City S. RR Co.*, 2004 UT 80, ¶ 39, 104 P.3d 1185.

Thus, the district court should not have applied the 2008 PCRA to extinguish the right to the effective assistance of initial post-conviction counsel that existed at the time Mr. Archuleta was pursuing those proceedings. Otherwise, the promise of effective counsel that protected him at the time was hollow. As explained further below, then, the district court should not have acquiesced to the elimination of that substantive right by applying the 2008 PCRA's time and procedural bars to keep Mr. Archuleta's substantive claims out of court. It should have protected his vested right under the original, applicable 1996 version of the PCRA, and it should have applied the common law exceptions to default. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) ("[T]he Fourteenth Amendment preserves against arbitrary deprivation by the State" of a substantive right and the "denial of due process of law."); *see also Vitek v. Jones*, 445 U.S. 480, 488 (1980).

B. Even if Mr. Archuleta's Right to Effective Post-Conviction Counsel is Not a Substantive Basis for Relief, it Provides Cause to Overcome any Barriers to the Consideration of the Merits of his Claims.

Mr. Archuleta—for the reasons above, and for the detailed reasons specified in his arguments to the state district court (*see, e.g.*, 08/1/2016, Response to Second Motion for Summary Judgment)—had an enforceable, substantive right to the effective assistance of initial-review post-conviction counsel. Even if this Court does not enforce that vested right, however, the district court should nevertheless have considered the merits of his claims. At a minimum, Mr. Archuleta is entitled to an equitable remedy, analogous to the remedy of *Martinez*. 132 S. Ct. at 1315; *see also Trevino*, 133 S. Ct. at 1921.

This simple equitable remedy would not give rise to a stand-alone claim challenging initial post-conviction counsel's performance. Rather, proof of the ineffective assistance of post-conviction counsel would constitute cause to overcome anyapplicable time and procedural bars. In other words, the district court (or other fact finder) should determine whether post-conviction counsel was ineffective and, if so, it should then consider the merits of the substantial claims that post-conviction counsel failed to raise or support. *See Adams v. State*, 2005 UT 62, ¶ 23, 123 P.3d 400, 405 (the interest in finality "cannot outweigh the individual rights, both substantive and procedural, which the justice system exists to protect").

As explained below, each of the claims specifically enumerated by the district court and Appellee as defaulted—Claims 2d, 2i, 8b, 9, 12, and 13 (*see* 05/16/2016,

Second Motion for Summary Judgment at 83-89)—are substantial and potentially meritorious. As also explained below, post-conviction counsel ineffectively failed to raise and support these claims. This Court should recognize that counsels' ineffective assistance provides good cause to overcome the default of Mr. Archuleta's claims.[12]

C. Mr. Archuleta's Post-conviction Counsel Performed Ineffectively, and Was Further Rendered Ineffective by the State's Actions.

Post-conviction counsel was ineffective. Their performance fell below the objective standard of reasonableness, and their deficient performance undermines confidence in the outcome of the proceedings against Mr. Archuleta. *See generally Strickland v. Washington*, 466 U.S. 668, 686-87 (1984). The district court did not address the merits of Mr. Archuleta's allegations that post-conviction counsel was ineffective. Thus, on the initial showing made on the face of his pleadings and on his arguments herein, this Court should remand for factual presentation and development on this issue.

Here, post-conviction counsels' performance was hindered by the State's failure to provide resources and the State's direct interference with their representation of Mr. Archuleta. These circumstances exacerbated counsels' own errors in failing to investigate, present, or support the claims herein.

[12] For the purposes of determining whether summary judgment was appropriate, this Court should consider the claims and their evidence in the light most favorable to Mr. Archuleta, *see infra*.

The United States District Court aptly characterized the circumstances of Mr. Archuleta's initial post-conviction proceedings. As that court explained: "Following what was then the common law tradition of habeas relief in Utah, Mr. Archuleta filed a petition for a writ of habeas corpus with the trial court on March 10, 1994. An amended petition, prepared with the assistance of pro bono counsel, was filed on August 11, 1994." (Addendum 3 at 2.) Although Ms. Chaney filed an initial and amended habeas petition, raising numerous claims, they were raised in name only, with no evidentiary bases. (PCR ROA 46-75.)

After a remand from this Court, the state post-conviction court ordered "Mr. Archuleta to file a second amended petition for habeas corpus relief on March 20, 2001. Before that date was reached, one of Mr. Archuleta's lawyers [Chaney], the one who was capital-qualified and lived in Colorado, suffered from an illness that resulted in her absence from the case." (Addendum 3 at 3.) "The habeas court allowed Mr. Archuleta's other pro bono lawyer to withdraw because he was not qualified under Utah law to continue as counsel in a capital appeal." (Addendum 3 at 3 (citations omitted).) (*See also* PCR ROA 645-46.) Appellee did not oppose co-counsel's withdrawal. (PCR ROA 651.) It did, however, move the post-conviction court to revoke Ms. Chaney's pro hac vice admission to appear in the case, ensuring that Mr. Archuleta would be left without any counsel. (PCR ROA 653-54).

Edward Brass, McCaye Christianson, and L. Clark Donaldson were then appointed to represent Mr. Archuleta. Prior counsel failed to immediately provide their

files. Even past the deadline for filing an amended petition, Brass, Christianson, and Donaldson had not been paid for their work. (Addendum 3 at 3 n.4.) *See also Archuleta v. Galetka*, 197 P.3d 650, 654 (Utah 2008) (noting "low levels of public funding for capital cases" threatened the integrity of the process and that "[i]t is the duty of the legislative branch to provide for adequate defense of capital defendants, including sufficient resources to attract, train, compensate, and support legal counsel").

Post-conviction counsel nevertheless filed a petition. Mostly, the second amended petition relied on claims the post-conviction court had already dismissed, with no attempt to revive the claims by overcoming any procedural hurdles. The State then "launched a multi-pronged response to Mr. Archuleta's second amended petition for habeas relief."[13] (Addendum 3 at 4.) It moved for summary judgment against all of Mr. Archuleta's claims and moved to strike evidence supporting his claims. (Addendum 3 at 4.) What is more, the State "served Mr. Archuleta's post-conviction counsel, Mr. Brass, Mr. Donaldson, and Ms. Christianson, with a proposed motion for sanctions on February 27, 2004, and filed an amended motion for sanctions against them with the habeas court on April 12, 2004." (Addendum 3 at 4.)

"The state pursued its action for sanctions against Mr. Archuleta's counsel with active and aggressive litigation for almost three years before the habeas court denied its

[13] With the exception of certain claims relating to ineffective assistance of trial counsel during the penalty phase, the other claims were all dismissed on summary judgment. (PCR ROA 2226-98.) Notably, several of the claims were defaulted in the summary judgment proceeding. (PCR ROA 2239.) Others were presented with incomplete legal arguments. Few were presented with any factual basis.

motion on February 23, 2007." (Addendum 3 at 4 n.6.) "Despite the habeas court's detailed order denying the state's motion for sanctions, as well as counsel's cross-motion for sanctions, the state immediately filed a notice of appeal with the Utah Supreme Court on March 9, 2007." (Addendum 3 at 4 n.6.) This Court "ruled against the state and affirmed the habeas court's decision." (Addendum 3 at 4 n.6.) *See also Archuleta*, 197 P.3d at 653.

By the time certain claims survived summary judgment (PCR ROA 2298), Mr. Christianson and Mr. Donaldson had withdrawn. They sought their own removal because they were not paid for any of their work on Mr. Archuleta's case. (Addendum 3 at 4 n.5.) This left Mr. Brass to manage the case on his own. Appellee moved the court to appoint co-counsel for Mr. Brass, because he was unqualified on his own and because he had defaulted another capital case and appeared to be heading in the same direction in Mr. Archuleta's case. (PCR ROA 2323.)

During and after these proceedings, Mr. Brass sought to remove himself from the case multiple times, but the district court denied it. (Addendum 3 at 5 n.8.) Mr. Archuleta also sought Mr. Brass's removal several times. (Addendum 3 at 5 n.8.) Mr. Brass specifically argued that the State's interference had so harmed his representation that he could not adequately advocate on Mr. Archuleta's behalf. (Addendum 3 at 4-5.) (*See also* PCR ROA 2649-50.) He also noted that "financial restrictions plagued Mr. Archuleta's representation." (Addendum 3 at 5.)

Eventually, during appeal, Mr. Brass was allowed to withdraw. At that point, however, it was too late to salvage the case.

Later, in Rule 60(b) proceedings, new counsel (Mr. Slavens) asked for relief based on Mr. Brass's ineffective assistance. (Addendum 3 at 5-6.) This Court did not set aside the judgment. "Of course saying that Mr. Brass's representation was not bad enough to set aside everything that he did for Mr. Archuleta under Rule 60(b)(6), is not the same as finding that Mr. Archuleta had constitutionally sufficient counsel."[14] (Addendum 3 at 6 n.10.) In fact, in *Menzies*, "Mr. Brass filed an affidavit stating that he was not competent to represent a capital post-conviction petitioner without counsel." (Addendum 3 at 6 n.10.) (*See also* PCR ROA 2343-44 (Brass informing the court, "I now realize that I do not understand the complex procedural rules governing capital cases in state and federal post-conviction, and now recognize that unless I am serving jointly with other counsel who are properly trained and current in the complexities of post-conviction law, I cannot adequately represent a capital defendant in post-conviction cases.").) "There is no reason to believe that Mr. Brass's abilities with regard to his representation of Mr. Archuleta during the same time period were any different." (Addendum 3 at 6 n.10.)

As the federal district court explained, "The state made Mr. Brass's job difficult. It attacked him personally through litigation sanctions that were ultimately found to be

[14] In the 60(b) context, the question was only whether Mr. Brass's "conduct was so extraordinary and egregious that it amounted to an abdication of representation such that Mr. Archuleta's entire post-conviction proceedings needed to be set aside pursuant to Rule 60(b)." (Addendum 3 at 10-11 n.12.)

baseless, and it refused to properly fund his defense of Mr. Archuleta." (Addendum 3 at 11 n.13.) The State "created a conflict of interest between Mr. Brass and his client that made it impossible for him to completely and reasonably represent Mr. Archuleta." (Addendum 3 at 11 n.13.)

"That Mr. Brass had to defend himself against the state's Rule 11 sanctions at all, while trying to do a job that no other lawyer in the state was willing to do (in part because there was no funding) was an untenable situation." (Addendum 3 at 11 n.13.) "The Rule 11 sanctions were levied against Mr. Brass for pursuing claims on Mr. Archuleta's behalf that the state believed were unreasonable and unnecessary, despite the fact that Mr. Brass and his then-co-counsel believed otherwise." (Addendum 3 at 11 n.13.) Investigating and presenting this case effectively would have required Mr. Brass to investigate and expend his personal resources and his own time, and to "open himself up to additional Rule 11 sanctions." (Addendum 3 at 11-12 n.13.) "That conflict alone meant that Mr. Brass could not have competently represented Mr. Archuleta." (*See* Addendum 3 at 11-12 n.13.) (*See also* PCR ROA 605 (Appellee's counsel involved in discussion of payments to Mr. Archuleta's counsel and defense experts) and PCR ROA 1986-89 (Appellee's motion for sanctions against Mr. Archuleta's counsel, creating a conflict between Mr. Archuleta and his counsel); *see also* Exhibit 1, Utah Supreme Court Case No. 20070256, 02/01/2008, Memorandum in Support of Motion to Permit Withdrawal of Counsel and to Remand to the Trial Court for the Appointment of Substitute Counsel on Appeal, at 1-6.) Ultimately,

the record reflects that "there were claims left unaddressed due to lack of time and resources." (Addendum 3 at 11-12 n.13.)

Thus, Mr. Archuleta's meritorious claims raised herein, including those regarding the ineffective assistance of trial and appellate counsel, were never afforded a full or fair presentation and determination. He was prohibited from fully developing and presenting the facts regarding his trial counsel's failures and concurrent trial court errors.

As described above, a capitally-sentenced post-conviction petitioner cannot be expected to proceed without effective counsel. It is not sufficient that trial or post-conviction counsel presented some evidence, or even that they presented similar types of evidence in areas that Mr. Archuleta now points out as deficient. Upholding a superficial case as reasonably adequate is contrary to the requirement that a capital defendant be sentenced on "an *individualized determination* on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original).

The limitations described above—Mr. Archuleta's intellectual disability, his post-conviction counsels' lack of experience, training, and expertise, the limitations of the PCRA, and the State's direct interference—have all combined to deny Mr. Archuleta a full and fair determination of his claims. Thus, there has never been adequate factual development of his claims. It is in the interest of justice to ensure that Mr. Archuleta is afforded the due process he has been thus far denied. The ineffective assistance of Mr. Archuleta's initial post-conviction counsel should provide cause to overcome any barriers

to the consideration of the merits of his claims. The district court improperly barred Claims 2(d), 2(i), 8(b), 9, 12, and 13—finding they "could have been raised"—without any accounting for the failures of post-conviction counsel. It should have permitted the development and consideration of those claims.

D. Mr. Archuleta Brought These Claims Without Delay and as Soon as He Was Permitted. The District Court Improperly Found them Barred by the 2008 PCRA Statute of Limitations.

For the reasons above, the district court should not have retroactively applied to Mr. Archuleta's claims any of the time or procedural bars of the 2008 PCRA amendments. It nevertheless improperly found Mr. Archuleta's Claims 2(a)-(i), 3-13 "time barred" under the 2008 PCRA. This was improper for the reasons above.

What is more, Mr. Archuleta asserted that his mental incapacity—his intellectual disability as addressed in his briefing in Case Number 20160419-SC—tolled the 2008 PCRA's time limitations period. The district court, however, did not address this concern or make any of the necessary fact-findings regarding this issue. (*See* Addendum 2 at 14.) Instead, the district court simply found that Mr. Archuleta's counsel should have raised these claims sooner, regardless of Mr. Archuleta's incapacity. (Addendum 2 at 14.) This ignores that a client's mental capacity is directly relevant and necessary to the ability to adequately raise and present extra-record claims.

More importantly, however, the district court unreasonably and improperly misconstrued the history of these proceedings, and the junctures at which counsel could

have brought these claims. Mr. Archuleta is now (and has been for several years) solely represented by federal public defenders, who may only be appointed in compliance with 18 U.S.C. §§ 3006A; *see also* 18 U.S.C. § 3599(e). Federal counsel cannot simply return a client's case to state court at any time—they must seek permission. As the United States Supreme Court has advised, "[p]ursuant to § 3599(e)'s provision that counsel may represent her client in 'other appropriate motions and procedures,' a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." *Harbison v. Bell*, 556 U.S. 180, 190 (2009).

Mr. Archuleta's counsel may only represent him in state court matters when granted express leave by the federal court, and only after making specific showings in federal court. (*See, e.g.*, Addendum 3.) *See also Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). This necessarily can only happen after a petition has been filed in federal court. Mr. Archuleta's counsel filed his federal habeas petition within the limitations period allowed by federal law. As ordered, the parties then met and conferred regarding a proposed case management schedule. (USDC Dkts. 63, 65, 66.) According to the agreed upon schedule (which included time to investigate the necessary showings), Mr. Archuleta's counsel promptly sought permission to return to state court. Once the federal court granted Mr. Archuleta's counsel permission to file state post-conviction proceedings, they did so within 30 days. Mr. Archuleta has been proceeding diligently, as required by the terms of his only counsels' appointment.

The state district court, however, improperly found that Mr. Archuleta's counsel should have known of the extra-record claims by looking to the record (Addendum 2 at 14-15.) Yet many of these claims have never been fully developed due to the court's prior grant of summary judgment. It further improperly found that federal habeas counsel should have returned to state court immediately. (Addendum 2 at 15.) As described above, this is simply incorrect. Habeas counsel returned to state court as soon as permitted.

Indeed, Justice Zimmerman's concurrence in *Parsons v. Barnes* offers a more apt explanation of the time it has taken for Mr. Archuleta to pursue his substantial claims:

> Much of the successive postconviction writ practice that currently incites public wrath against the criminal justice system can be traced directly to the fact that the system persists in refusing to assure that a defendant has adequate counsel in the initial postconviction proceeding.

871 P.2d 516, 531 (Utah 1994) (Zimmerman, J., concurring). Had Mr. Archuleta been provided competent counsel 20 years ago, they could have investigated and presented the claims raised herein. In sum, for the reasons above, the district court should not have applied the time bars of the 2008 PCRA to refuse to consider the merits of Mr. Archuleta's Claims 2(a)-(i), 3-13. [15]

[15] In addition, Claim 12—asserting a violation of *Lackey v. Texas*, 514 U.S. 1045 (1995)—should not be subject to time bars for an additional reason. It is an accruing claim, based on the continuing time Mr. Archuleta has been subjected to the conditions raised in that claim, *see infra* Claim 12.

II. The District Court Improperly Barred Claims that Were Not, in Fact, Previously Adjudicated.

In addition to applying the 2008 PCRA to bar the consideration of the claims above, the district court improperly refused to consider the merits of Claims 2(a)-(c), 2(e)-(h), 3-8, and 10-11—finding that Mr. Archuleta had "litigated . . . similar claim[s]" in his prior post-conviction proceedings. (*E.g.*, Addendum 2 at 17.) The fact that prior post-conviction counsel may have raised some semblance of a claim, however, does not equate to these claims being adjudicated on their merits. *See generally Dickens v. Ryan*, 740 F.3d 1302, 1320-21 (9th Cir. 2014) (en banc) (Equitable exception based on post-conviction counsel's ineffectiveness is not limited simply because post-conviction counsel brought other IAC claims that were exhausted.); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (noting that it is "irrational" to distinguish between failing to properly assert a claim in state court and failing to properly "develop such a claim"). Again, upholding a superficial case as reasonably adequate is contrary to the requirement that a capital defendant be sentenced on "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879 (emphasis omitted).

Indeed, the claims Mr. Archuleta sought to develop before the state district court were fundamentally different: even if some of the legal principles remained the same, the

facts supporting them were never developed in initial post-conviction proceedings.[16] New allegations may render a claim new when they "'fundamentally alter' the claim presented to the state court." *See Dickens*, 740 F.3d at 1317. New evidence "fundamentally alters a claim if it places the claim in a significantly different and stronger evidentiary posture than it had in state court." *See id.* (quoting *Aiken v. Spalding*, 841 F.2d 881, 883, 884 n.3 (9th Cir.1988)).

Thus, contrary to the district court's assessment, these claims are not barred as "previously adjudicated." And, again, the failure to have them adjudicated rests at the feet of ineffective post-conviction counsel. The district court should have considered their merits.

III. Reviewing the claims de novo, in the light most favorable to the non-movant, Mr. Archuleta's claims should have survived summary judgment.

This Court reviews the district court's grant of summary judgment "for correctness, granting no deference" to the court's decision or legal interpretations. *See, e.g.*, *Daniels v. Gamma W. Brachytherapy, LLC*, 2009 UT 66, ¶ 40, 221 P.3d 256, 268 (internal quotation and citations omitted). The Court views the facts in the light most

[16] It is important to note that where Mr. Archuleta now raises the ineffective assistance of trial counsel, for example, that numbered claim is *one* claim. Lettered subparts may point out instances of ineffectiveness, but the entire course of counsel's failed representation in certain phases of the trial is presented as one claim. The Court should not parse out pieces of the representation to find the entire claim and its allegations defaulted. *E.g.*, *Dickens*, 740 F.3d at 1320-21 (en banc).

favorable to the non-movant: Mr. Archuleta. *See, e.g., Estate Landscape & Snow Removal Specialists, Inc.*, 844 P.2d at 324.

The district court refused to reach—or even order further briefing—on the merits of Mr. Archuleta's claims. Thus, he respectfully asks the Court to take into consideration that he has had no opportunity to further develop these claims. For purposes of showing the impropriety of dismissing them on procedural grounds, he briefly describes them here.

CLAIM TWO[17]

Again, as an initial matter it is important to note that where Mr. Archuleta now raises the ineffective assistance of trial counsel, for example, Claim 2 is one comprehensive claim. Lettered subparts may point out instances of ineffectiveness, but the entire course of counsel's failed representation in certain phases of the trial is one issue. The Court should not parse out pieces of the representation to find the entire claim and its allegations defaulted. *E.g.*, *Dickens*, 740 F.3d at 1320-21 (en banc).

Material factual issues exist regarding all of the instances of trial counsel's ineffectiveness. For example, factual issues remain regarding trial counsels' failure to investigate and clarify or impeach the statements of a State's witness: the result of which was, among other things, failing to bring out Mr. Archuleta's heavy remorse (permitted the State to misconstrue the witness's testimony). (*See, e.g.*, MIS at 126-27.) Material

[17] The district court bifurcated, denied, and certified as final Claim One. It is the subject of an appeal in *Archuleta v. Crowther*, UT Supreme Court Case No. 20160419-SC.

factual issues remain regarding co-defendant Wood's character and the nature of his relationship to Mr. Archuleta that undermine the evidence regarding relative culpability presented at trial and further undermine previous determinations on the disproportionality of their sentences, *see infra*, Claim 5. (MIS at 130-34.) Many material facts regarding trial counsel's failure to investigate forensic evidence are unresolved. (MIS at 134-37.) The same is true regarding trial counsels' failure to make proper objections to instructions, prosecutorial misconduct, improper verdict forms, improper aggravating circumstances, and improper sentencing statutes. (MIS at 137-45.)

None of these issues were adequately investigated by trial counsel, and initial post-conviction counsel defaulted the claims during summary judgment proceedings. This default has precluded any court from evaluating the full evidentiary picture on both these trial counsel claims, and the underlying claim. Initial post-conviction counsel did not support these allegations with facts or argument, and the questions of fact regarding the deficient performance of trial counsel and the prejudice resulting from these errors is unaddressed and unresolved. The district court did not even consider this evidence to determine whether material facts remained, making summary judgment inappropriate. It should be ordered to do so on remand.

CLAIM THREE

Mr. Archuleta's trial counsel also ineffectively failed to investigate and present mitigation evidence in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Art I. Section 12 of the Utah State Constitution. (MIS at 145-58.)

While initial post-conviction counsel raised some semblance of a claim regarding sentencing counsel's ineffectiveness, they failed to investigate the full, available evidentiary picture or present a coherent account and argument to any court. The claim has never been properly presented or determined, and the evidence Mr. Archuleta seeks to develop to support this claim renders it "fundamentally altered," *see above.* What is more, the material factual issues underlying this claim (as specifically outlined in Mr. Archuleta's Claim 3 (MIS at 145-48) have never been resolved. Summary judgment was inappropriate.

CLAIM FOUR

Mr. Archuleta's appellate and post-conviction counsel were ineffective in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Utah State Constitution. (MIS at 158-64.) Again, while some semblance may have been hinted at by initial post-conviction counsel, the state courts have never heard the full allegations of this claim on their merits. (*See* PCR ROA 890, 930, 2237; PCR ROA 2239 (summarily dismissing appellate counsel claim with no discussion or explanation, despite the fact that it had never been raised prior to the post-conviction proceedings).) This district court should not have been considered "previously adjudicated." And, because ineffective initial post-conviction counsel failed to support it, it should be adjudicated now.

CLAIM FIVE

Mr. Archuleta's death sentence is disproportionate compared with the sentence of his co-defendant or with other capital cases in the State of Utah in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Utah State Constitution. (MIS at 164-66.) Mr. Archuleta sought to develop this claim beyond summary judgment. It is significant and requires factual development, particularly as it relates to Mr. Archuleta's co-defendant, Lance Wood.

Again, while initial post-conviction counsel raised some semblance of a claim regarding Mr. Archuleta's disproportionate sentence, they failed to investigate the full, available evidentiary picture or present a coherent account and argument to any court.

The claim has never been properly presented or determined, and the evidence Mr. Archuleta seeks to develop to support this claim renders it "fundamentally altered," *see above.* Failures by trial and post-conviction counsel to investigate and present evidence that would have changed the evidentiary picture with regard to relative culpability has left Mr. Archuleta with a death sentence and Lance Wood with a life sentence, despite being convicted of the same offense on the same set of facts. This claim has never been properly presented or determined, leaving questions of material fact unresolved. It should not have been denied on summary judgment without assessing its merits.

CLAIM SIX

The trial court improperly refused to grant a mistrial based on the prosecution's presentation of false testimony (MIS at 166-69). As shown in the memorandum in

support of Mr. Archuleta's post-conviction petition, the state courts failed to hear or resolve this claim. (MIS at 166-69.) Mr. Archuleta specifically alleged that the prosecution knowingly put on false testimony in violation of the federal constitution that prejudiced Mr. Archuleta. (MIS at 168, citing *Napue v. Illinois*, 360 U.S. 264 (1959).) This claim should not have been dismissed on summary judgment without assessing its merits.

CLAIM SEVEN

The trial court improperly admitted evidence of uncharged sodomy in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Utah State Constitution. (MIS 169-71.) Again, the merits and factual allegations of this claim have never been properly presented or determined, and to any extent that it has been considered, the evidence Mr. Archuleta seeks to develop to support this claim renders it "fundamentally altered," *see above.* Trial and post-conviction counsel failed to investigate and present evidence that would have changed the evidentiary picture. This claim has never been properly presented or determined, leaving questions of material fact unresolved. In addition, trial counsel's ineffectiveness in failing to object to this serious misconduct (*see* Claim 2) has never been presented or resolved. This claim should not have been dismissed on summary judgment without assessing its merits.

CLAIM EIGHT

Utah's statutory death penalty scheme is unconstitutional and violates the United States and Utah Constitutions. (MIS 171-80.) The state courts have never addressed the full array of issues regarding the constitutional defects in Utah's death penalty statute. Utah's aggravated murder statute is one of the broadest in the nation, with over 20 aggravating circumstances, not counting the numerous subparts. (*See* MIS at 175.) In *State v. Young*, for example, Justice Durham wrote that "[a]n examination of each of our death penalty cases since 1983, when Utah's capital murder statute, Utah Code Ann. § 76-5-202(1), was significantly amended, discloses that we have never addressed the question defendant now raises" on the failure to narrow the class of eligibility. 853 P.2d 327, 397 (Utah 1993) (Durham, J., dissenting). These constitutional challenges to the Utah death penalty have never been properly resolved by state courts and the claim should be fairly heard on its merits.

CLAIM NINE

The Prosecution failed to disclose material exculpatory evidence and impeachment information in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Art. I, Section 7 of the Utah Constitution. (MIS 180-82.) This includes the material evidence regarding State witness David Homer. Material evidence is unresolved, especially as a result of trial and post-conviction counsels' ineffectiveness. The district court should not have granted summary judgment without reaching the merits of this claim.

CLAIM TEN

Mr. Archuleta's appellate record is inadequate for a meaningful and effective review, depriving him of his rights under the Fourteenth Amendment to the United States Constitution and Art. I, Section 7 of the Utah Constitution. (MIS 183-84.) This claim has never been fully developed, due to the ineffective assistance of appellate counsel. (*See* PCR ROA 51-52, 916-17, 2237-39.) Mr. Archuleta has a constitutional right to the effective assistance of appellate counsel and should be allowed to overcome the prior default to allow the claim to be heard on its merits. *Evitts*, 469 U.S. at 395.

CLAIM ELEVEN

Mr. Archuleta was denied Due Process and a Fair Trial due to the cumulative effect of all errors during his trial, appeal, and post-conviction proceedings, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I of the Utah Constitution. (MIS 184-85.) Mr. Archuleta also asked the district court for relief based on the cumulative effects of all of the constitutional errors that occurred in his case. Initial post-conviction counsel failed to raise or support this claim.

Further, this claim must be determined on the errors as determined by this Court, not as determined in prior proceedings. There are significant factual disputes that are not appropriate for summary dismissal. Therefore, summary judgment on the basis of a procedural bar is not appropriate for this cumulative claim.

CLAIM TWELVE

It would also violate Mr. Archuleta's federal and state constitutional rights to freedom from cruel and unusual punishment for the State to execute him after he has spent 25 years on its death row. (MIS 185-86 (Claim 12).) Again, this claim was not raised because of the ineffective assistance of initial-postconviction counsel.

In addition, it may not have been ripe. The harms of this claim accrue: the claim may not be ripe until Mr. Archuleta has been on death row past a certain threshold period of time, sufficient to determine that executing him at this point would be cruel and unusual. The district court found that "Because he waited until his twenty-fifth year of incarceration, he was untimely." (Addendum 2 at 12-13.) Simply, this is illogical. The harm has changed and become worse: the district court's note that "The Supreme Court did not articulate a minimum amount of time that a petitioner must wait before a claim becomes ripe for judicial resolution" (Addendum 2 at 12.) actually supports the point that Mr. Archuleta should not be barred from developing the merits of this claim. There was not a mandated "time" in which he failed to bring this claim. Material facts remain, and summary judgment on procedural issues was improper.

CLAIM THIRTEEN

And finally, the death penalty is categorically cruel and unusual in violation of the Eight Amendment to the United States Constitution and Article I, Section 9 of the Utah State Constitution. (MIS 186-87.) The district court improperly found that counsel should have brought this claim within a year of knowing of a Stanford Law Review article.

(Addendum 2 at 13.) Again, this is illogical. The evidence available was not investigated or presented by initial post-conviction counsel. What is more, knowing of a piece of scholarship is not the "start" point for any limitations period (though none should apply in these circumstances). Material facts remain, and summary judgment on procedural issues was improper.

CONCLUSION

For the reasons above and those explained in the district court, summary judgment was not appropriate here. The district court should have considered the merits of Mr. Archuleta's claims and permitted factual development. Mr. Archuleta now asks this Court to remand his claims to the district court to permit him to do so.

Respectfully submitted this 5th day of May, 2017.

Jon M. Sands
Federal Public Defender
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Assistant Federal Public Defenders

By: s/ David Christensen
David Christensen
Assistant Federal Public Defender

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 12,021 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

_____
by David Christensen

CERTIFICATE OF SERVICE

I certify that, on this 9th day of January, 2017, I filed the attached document with the Utah Supreme Court Clerk. A copy is also being sent by first class mail to the following:

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s/ Daniel Juarez
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Assistant Paralegal

ADDENDUM 1

Rule 65C. Post-conviction relief.

(a) **Scope.** This rule governs proceedings in all petitions for post-conviction relief filed under the Post-Conviction Remedies Act, Utah Code Title 78B, Chapter 9. The Act sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired.

(b) **Procedural defenses and merits review.** Except as provided in paragraph (h), if the court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106.

(c) **Commencement and venue.** The proceeding shall be commenced by filing a petition with the clerk of the district court in the county in which the judgment of conviction was entered. The petition should be filed on forms provided by the court. The court may order a change of venue on its own motion if the petition is filed in the wrong county. The court may order a change of venue on motion of a party for the convenience of the parties or witnesses.

(d) **Contents of the petition.** The petition shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. The petition shall state:

(d)(1) whether the petitioner is incarcerated and, if so, the place of incarceration;

(d)(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;

(d)(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;

(d)(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;

(d)(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

(d)(6) if the petitioner claims entitlement to relief due to newly discovered evidence, the reasons why the evidence could not have been discovered in time for the claim to be addressed in the trial, the appeal, or any previous post-conviction petition.

(e) **Attachments to the petition.** If available to the petitioner, the petitioner shall attach to the petition:

(e)(1) affidavits, copies of records and other evidence in support of the allegations;

(e)(2) a copy of or a citation to any opinion issued by an appellate court regarding the direct appeal of the petitioner's case;

(e)(3) a copy of the pleadings filed by the petitioner in any prior post-conviction or other civil proceeding that adjudicated the legality of the conviction or sentence; and

(e)(4) a copy of all relevant orders and memoranda of the court.

(f) **Memorandum of authorities.** The petitioner shall not set forth argument or citations or discuss authorities in the petition, but these may be set out in a separate memorandum, two copies of which shall be filed with the petition.

(g) **Assignment.** On the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner. If the judge who sentenced the petitioner is not available, the clerk shall assign the case in the normal course.

(h)(1) **Summary dismissal of claims.** The assigned judge shall review the petition, and, if it is apparent to the court that any claim has been adjudicated in a prior proceeding, or if any claim in the petition appears frivolous on its face, the court shall forthwith issue an order dismissing the claim, stating either that the claim has been adjudicated or that the claim is frivolous on its face. The order shall be sent by mail to the petitioner. Proceedings on the claim shall terminate with the entry of the order of dismissal. The order of dismissal need not recite findings of fact or conclusions of law.

(h)(2) A claim is frivolous on its face when, based solely on the allegations contained in the pleadings and attachments, it appears that:

(h)(2)(A) the facts alleged do not support a claim for relief as a matter of law;

(h)(2)(B) the claim has no arguable basis in fact; or

(h)(2)(C) the claim challenges the sentence only and the sentence has expired prior to the filing of the petition.

(h)(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a copy of the petition with leave to amend within 21 days. The court may grant one additional 21-day period to amend for good cause shown.

(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

(i) **Service of petitions.** If, on review of the petition, the court concludes that all or part of the petition should not be summarily dismissed, the court shall designate the portions of the petition that are not dismissed and direct the clerk to serve a copy of the petition, attachments and memorandum by mail upon the respondent. If the petition is a challenge to a felony conviction or sentence, the respondent is the state of Utah represented by the Attorney General. In all other cases, the respondent is the governmental entity that prosecuted the petitioner.

(j) **Appointment of pro bono counsel.** If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post conviction court or on post-conviction appeal. In determining whether to appoint counsel the court shall consider whether the petition or the appeal contains factual allegations that will require an evidentiary hearing and whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(k) **Answer or other response.** Within 30 days after service of a copy of the petition upon the respondent, or within such other period of time as the court may allow, the respondent shall answer or otherwise respond to the portions of the petition that have not been dismissed and shall serve the answer or other response upon the petitioner in accordance with Rule 5(b). Within 30 days (plus time allowed for service by mail) after service of any motion to dismiss or for summary judgment, the petitioner may respond by memorandum to the motion. No further pleadings or amendments will be permitted unless ordered by the court.

(l) **Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the

conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:

(l)(1) consider the formation and simplification of issues;

(l)(2) require the parties to identify witnesses and documents; and

(l)(3) require the parties to establish the admissibility of evidence expected to be presented at the evidentiary hearing.

(m) **Presence of the petitioner at hearings.** The petitioner shall be present at the prehearing conference if the petitioner is not represented by counsel. The prehearing conference may be conducted by means of telephone or video conferencing. The petitioner shall be present before the court at hearings on dispositive issues but need not otherwise be present in court during the proceeding. The court may conduct any hearing at the correctional facility where the petitioner is confined.

(n) **Discovery; records.** Discovery under Rules 26 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible at an evidentiary hearing. The court may order either the petitioner or the respondent to obtain any relevant transcript or court records.

(o) **Orders; stay.**

(o)(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 7 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

(o)(2) If the respondent fails to provide notice or gives notice that no action will be taken, the stay shall expire and the court shall deliver forthwith to the custodian of the petitioner the order to release the petitioner.

(o)(3) If the respondent gives notice that the petitioner will be retried or resentenced, the trial court may enter any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary and proper.

(p) **Costs.** The court may assign the costs of the proceeding, as allowed under Rule 54(d), to any party as it deems appropriate. If the petitioner is indigent, the court may direct the costs to be paid by the governmental entity that prosecuted the petitioner. If the petitioner is in the custody of the Department of Corrections, Utah Code Title 78A, Chapter 2, Part 3 governs the manner and procedure by which the trial court shall determine the amount, if any, to charge for fees and costs.

(q) **Appeal.** Any final judgment or order entered upon the petition may be appealed to and reviewed by the Court of Appeals or the Supreme Court of Utah in accord with the statutes governing appeals to those courts.

Advisory Committee Notes

— Recovery from court or judge.

— — Allowed.

If judgment was in favor of applicant, he was entitled to costs as a matter of course, even as against a public officer, at least where officer acted arbitrarily, capriciously and in bad faith. It had, however, been the policy in this jurisdiction not to allow costs against the court or judge. It was within court's discretion to award costs both in trial court and on appeal. Fowler v. Gillman, 76 Utah 414, 290 P. 358 (1930).

— — Not allowed.

In proceeding for issuance of alternative writ of mandate requiring district judge to reinstate and try action dismissed by him on appeal from justice court, held, plaintiff was entitled to recover costs as against all defendants other than district judge. State v. District Court, 39 Utah 1, 114 P. 143 (1911).

Damages.

— Attorney fees.

In mandamus proceeding, "damages" which applicant could recover included attorney's fees, where properly shown. Colorado Dev. Co. v. Creer, 96 Utah 1, 80 P.2d 914 (1938).

COLLATERAL REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d Mandamus § 495 et seq.; 63A Am. Jur. 2d Prohibition § 88 et seq.

C.J.S. — 55 C.J.S. Mandamus §§ 342, 375 et seq.; 73 C.J.S. Prohibition §§ 49, 51.

A.L.R. — Attorneys' fees in mandamus proceedings, 34 A.L.R.4th 457.

Mandamus, under 28 USCS § 1361, to obtain change in prison condition or release of federal prisoner, 114 A.L.R. Fed. 225.

Key Numbers. — Mandamus ⇐ 177, 190; Prohibition ⇐ 28, 35.

78-35-10. Disobedience of writ — Punishment.

When a peremptory writ of mandate or writ of prohibition has been issued and directed to an inferior tribunal, corporation, board or person, if it appears to the court that any member of such tribunal, corporation, board or person upon whom such writ has been personally served has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding $500. In cases of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-35-10.

Cross-References. — Imprisonment to compel performance, § 78-32-12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d Mandamus § 482; 63A Am. Jur. 2d Prohibition § 93.

C.J.S. — 55 C.J.S. Mandamus §§ 360, 361; 73 C.J.S. Prohibition § 52.

Key Numbers. — Mandamus ⇐ 186; Prohibition ⇐ 33.

CHAPTER 35a
POST-CONVICTION REMEDIES ACT

Part 1

General Provisions

PART 1

GENERAL PROVISIONS

78-35a-101. Short title.

This act shall be known as the "Post-Conviction Remedies Act."

History: C. 1953, 78-35a-101, enacted by L. 1996, ch. 235, § 1.
Compiler's Notes. — As enacted, this chapter did not contain a Part 2.
Effective Dates. — Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

78-35a-102. Replacement of prior remedies.

(1) This chapter establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

History: C. 1953, 78-35a-102, enacted by L. 1996, ch. 235, § 2.
Effective Dates. — Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

78-35a-103. Applicability — Effect on petitions.

Except for the limitation period established in Section 78-35a-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

History: C. 1953, 78-35a-103, enacted by L. 1996, ch. 235, § 3.
Effective Dates. — Laws 1996, ch. 235 became effective on April 29, 1996, pursuant to Utah Const., Art. VI, Sec. 25.

78-35a-104. Grounds for relief — Retroactivity of rule.

(1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

78B-9-102 Replacement of prior remedies.

(1) This chapter establishes the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies, including a direct appeal except as provided in Subsection (2). This chapter replaces all prior remedies for review, including extraordinary or common law writs. Proceedings under this chapter are civil and are governed by the rules of civil procedure. Procedural provisions for filing and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

Renumbered and Amended by Chapter 3, 2008 General Session
Amended by Chapter 288, 2008 General Session

78B-9-104 Grounds for relief -- Retroactivity of rule.

(1) Unless precluded by Section 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained or the sentence was imposed under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed or probation was revoked in violation of the controlling statutory provisions;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received; or

(f) the petitioner can prove entitlement to relief under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal, and that:

(i) the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final; or

(ii) the rule decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted.

(2) The court may not grant relief from a conviction or sentence unless the petitioner establishes that there would be a reasonable likelihood of a more favorable outcome in light of the facts proved in the post-conviction proceeding, viewed with the evidence and facts introduced at trial or during sentencing.

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA , or Part 4, Postconviction Determination of Factual Innocence. Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

Amended by Chapter 153, 2010 General Session

78B-9-106 Preclusion of relief -- Exception.

(1) A person is not eligible for relief under this chapter upon any ground that:
  (a) may still be raised on direct appeal or by a post-trial motion;
  (b) was raised or addressed at trial or on appeal;
  (c) could have been but was not raised at trial or on appeal;
  (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
  (e) is barred by the limitation period established in Section 78B-9-107.

(2)
  (a) The state may raise any of the procedural bars or time bar at any time, including during the state's appeal from an order granting post-conviction relief, unless the court determines that the state should have raised the time bar or procedural bar at an earlier time.
  (b) Any court may raise a procedural bar or time bar on its own motion, provided that it gives the parties notice and an opportunity to be heard.

(3) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

(4) This section authorizes a merits review only to the extent required to address the exception set forth in Subsection (3).

Amended by Chapter 48, 2010 General Session

78B-9-107 Statute of limitations for postconviction relief.

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed;

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based; or

(f) the date on which the new rule described in Subsection 78B-9-104(1)(f) is established.

(3) The limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3).

(4) The statute of limitations is tolled during the pendency of the outcome of a petition asserting:

(a) exoneration through DNA testing under Section 78B-9-303; or

(b) factual innocence under Section 78B-9-401.

(5) Sections 77-19-8, 78B-2-104, and 78B-2-111 do not extend the limitations period established in this section.

Renumbered and Amended by Chapter 3, 2008 General Session
Amended by Chapter 288, 2008 General Session
Amended by Chapter 358, 2008 General Session

78B-9-109 Appointment of pro bono counsel.

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis to represent the petitioner in the post-conviction court or on post-conviction appeal. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition or the appeal contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Renumbered and Amended by Chapter 3, 2008 General Session
Amended by Chapter 288, 2008 General Session

78B-9-202 Appointment and payment of counsel in death penalty cases.

(1) A person who has been sentenced to death and whose conviction and sentence has been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter allowing challenges to the conviction and death sentence and the appointment of counsel for indigent petitioners.

(2)

(a) If a petitioner requests the court to appoint counsel, the court shall determine whether the petitioner is indigent and make findings on the record regarding the petitioner's indigency. If the court finds that the petitioner is indigent, it shall, subject to the provisions of Subsection (5), promptly appoint counsel who is qualified to represent petitioners in postconviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(b) A petitioner who wishes to reject the offer of counsel shall be advised on the record by the court of the consequences of the rejection before the court may accept the rejection.

(3) Attorney fees and litigation expenses incurred in providing the representation provided for in this section and that the court has determined are reasonable shall be paid from state funds by the Division of Finance according to rules established pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(a) In determining whether the requested funds are reasonable, the court should consider:

(i) the extent to which the petitioner requests funds to investigate and develop evidence and legal arguments that duplicate the evidence presented and arguments raised in the criminal proceeding; and

(ii) whether the petitioner has established that the requested funds are necessary to develop evidence and legal arguments that are reasonably likely to support postconviction relief.

(b) The court may authorize payment of attorney fees at a rate of $125 per hour up to a maximum of $60,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

(c) The court may authorize litigation expenses up to a maximum of $20,000. The court may exceed the maximum only upon a showing of good cause as established in Subsections (3)(e) and (f).

(d) The court may authorize the petitioner to apply ex parte for the funds permitted in Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes the need for confidentiality. The motion to proceed ex parte must be served on counsel representing the state, and the court may not grant the motion without giving the state an opportunity to respond.

(e) In determining whether good cause exists to exceed the maximum sums established in Subsections (3)(b) and (c), the court shall consider:

(i) the extent to which the work done to date and the further work identified by the petitioner duplicates work and investigation performed during the criminal case under review; and

(ii) whether the petitioner has established that the work done to date and the further work identified is reasonably likely to develop evidence or legal arguments that will support postconviction relief.

(f) The court may permit payment in excess of the maximum amounts established in Subsections (3)(b) and (c) only on the petitioner's motion, provided that:

(i) if the court has granted a motion to file ex parte applications under Subsection (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant attorney

general employed in a division other than the one in which the attorney is employed who represents the state in the postconviction case; if the court has not granted a motion to file ex parte applications, then the petitioner must serve the attorney representing the state in the postconviction matter with the motion to exceed the maximum funds;

(ii) if the motion proceeds under Subsection (3)(f)(i), the designated assistant attorney general may not disclose to the attorney representing the state in the postconviction matter any material the petitioner provides in support of the motion except upon a determination by the court that the material is not protected by or that the petitioner has waived the attorney client privilege or work product doctrine; and

(iii) the court gives the state an opportunity to respond to the request for funds in excess of the maximum amounts provided in Subsections (3)(b) and (c).

(4) Nothing in this chapter shall be construed as creating the right to the effective assistance of postconviction counsel, and relief may not be granted on any claim that postconviction counsel was ineffective.

(5) If within 60 days of the request for counsel the court cannot find counsel willing to accept the appointment, the court shall notify the petitioner and the state's counsel in writing. In that event, the petitioner may elect to proceed pro se by serving written notice of that election on the court and state's counsel within 30 days of the court's notice that no counsel could be found. If within 30 days of its notice to the petitioner the court receives no notice that the petitioner elects to proceed pro se, the court shall dismiss any pending postconviction actions and vacate any execution stays, and the state may initiate proceedings under Section 77-19-9 to issue an execution warrant.

(6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may not be appointed at public expense for a petitioner, except to raise claims:

(a) based on newly discovered evidence as defined in Subsection 78B-9-104(1)(e)(i); or

(b) based on Subsection 78B-9-104(1)(f) that could not have been raised in any previously filed post trial motion or postconviction proceeding.

Amended by Chapter 165, 2011 General Session

Rule 8. Appointment of counsel.

(a) A defendant charged with a public offense has the right to self representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the following minimum requirements:

(b)(1) at least one of the appointed attorneys must have tried to verdict six felony cases within the past four years or twenty-five felony cases total;

(b)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a capital or a felony homicide case which was tried to a jury and which went to final verdict;

(b)(3) at least one of the appointed attorneys must have completed or taught within the past five years an approved continuing legal education course or courses at least eight hours of which deal, in substantial part, with the trial of death penalty cases; and

(b)(4) the experience of one of the appointed attorneys must total not less than five years in the active practice of law.

(c) In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

(c)(1) whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;

(c)(2) the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;

(c)(3) the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;

(c)(4) the diligence, competency and ability of the attorneys being considered; and

(c)(5) any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(d) In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

(d)(1) at least one attorney must have served as counsel in at least three felony appeals; and

(d)(2) at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(e) In all cases in which counsel is appointed to represent an indigent petitioner pursuant to Utah Code Ann. Section 78B-9-202(2)(a), the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

(e)(1) at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;

(e)(2) at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;

(e)(3) at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;

(e)(4) at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and

(e)(5) the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(f) Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(g) Cost and attorneys' fees for appointed counsel shall be paid as described in Chapter 32 of Title 77.

(h) Costs and attorneys fees for post-conviction counsel shall be paid pursuant to Utah Code Ann. Section 78B-9-202(2)(a).

ADDENDUM 2

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IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY, STATE OF UTAH

MICHAEL ANTHONY ARCHULETA, Petitioner, vs. SCOTT CROWTHER, Respondent.	**MEMORANDUM DECISION AND ORDER ON RESPONDENT'S SECOND MOTION FOR SUMMARY JUDGMENT** Case No. 140700047 Judge Jennifer A. Brown

THIS CASE IS BEFORE THE COURT on Respondent's Second Motion for Summary Judgment, which was filed on May 16, 2016. Petitioner filed an opposition on August 1, 2016, and the State filed a reply on September 1, 2016. Neither party has requested oral argument. After reviewing the parties' memoranda and the relevant law, the Court issues the following ruling on the State's motion.

The Utah Rules of Civil Procedure dictate that summary judgment is appropriate when there is no genuine issue as to any material fact and where the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(a). While the court need only consider materials cited in the motion, it may also consider other materials in the record. *See* Rule 56(c)(3). The Court views the evidence in the light most favorable to the non-moving party.

Undisputed Material Facts

The State sets forth 98 undisputed material facts. In his opposition, Archuleta did not include "a verbatim restatement of each of the moving party's facts that is disputed with an explanation of the grounds for the dispute supported by citing to materials in the record" as required by rule 56(a)(2). Thus, for purposes of the motion for summary judgment, the State's undisputed material facts are deemed admitted. *See* Utah R. Civ. P. 56(a)(4), 56(e)(2). Rather

than restate all the admitted facts, the Court incorporates facts 1 through 98 listed in the State's Second Motion for Summary Judgment into this ruling by reference. The Court will summarize the material facts presented by the State and that are apparent from the record below.

In December 1989, a jury convicted Petitioner Michael Anthony Archuleta of first degree murder and sentenced him to death. Petitioner appealed his conviction and sentence, which were affirmed by the Utah Supreme Court on March 25, 1993. *See State v. Archuleta,* 850 P.2d 1232 (Utah 1993).

Following the appeal, the court appointed Ms. Karen Chaney pro hac vice to represent Archuleta, and he filed an amended petition for post-conviction relief on August 11, 1994. *See* case number 940401006, hereinafter "PCR Record." The district court dismissed the amended petition on October 4, 1996; however, the Supreme Court reversed the dismissal and remitted the case back to the district court on August 14, 1998. *See Archuleta v. Galetka*, 960 P.2d 399 (Utah 1998). Subsequently, the district court granted Mr. Eckersley's motion to withdraw as local counsel and the State's motion to revoke Ms. Chaney's pro hac vice admission to the bar. *See* PCR Record.

The Court appointed Mr. Edward Brass, Mr. Lynn Donaldson, and Ms. McCaye Christianson to represent Archuleta. *See id.* Archuleta then filed a second amended petition on June 14, 2002, about 11 months after new attorneys were appointed. *See id.*; State's Addendum B.

On August 24, 2004, the district court granted summary judgment on a majority of Archuleta's claims. *See id.* The district court denied all remaining claims on January 22, 2007, and issued a final order on February 26, 2007. *See id.* Archuleta subsequently appealed the dismissal.

In August 2007, while the appeal was pending in state court, the federal district court appointed counsel to represent Archuleta in his federal habeas proceedings. *See* State's Exhibits D, E. On June 6, 2008, the court granted permission to Mr. Brass to withdraw from the state court proceedings. *See* Archuleta's Exhibit 43.

Archuleta's federal counsel then filed a habeas petition in federal court in December 2012, alleging 16 claims for relief. *See* State's Addendum A. On June 1, 2013, Archuleta moved to stay the federal case while he returned to state court to exhaust a claim that he is constitutionally exempt from the death penalty due to intellectual disability. *See* State's Exhibits I and J, filed on May 1, 2015. On November 12, 2014, the federal district court granted the motion to stay, giving Archuleta 30 days to file a claim in state court. *See* State's Exhibit N, filed on May 1, 2015. Archuleta filed his current petition for post-conviction relief in this court on December 12, 2014, claiming that he is exempt from the death penalty due to intellectual disability and alleging twelve additional claims for relief.

On January 14, 2015, the State moved for a stay on the other twelve claims pending the resolution of the intellectual disability claim. Archuleta did not object to the State's motion, and the Court, finding good cause to stay the other 12 claims, granted the State's motion on February 5, 2015.

The court dismissed the intellectual disability claim on February 2, 2016. *See* Court's Corrected Memo. Decision and Order on Motions. The Court also lifted the stay on the remaining twelve claims and ordered the State to answer or otherwise respond to the remainder of Archuleta's petition. In lieu of filing an answer, the State filed the underlining motion for summary judgment, alleging that all twelve of Archuleta's remaining claims are procedurally barred under the PCRA.

Discussion

The Post-Conviction Remedies Act (PCRA) allows a petitioner to claim relief if the claim is not procedurally-barred. *See* Utah Code § 78B-9-106. In relevant part, a petitioner is not eligible for relief on a claim in three instances: First, a claim is barred if it is brought after the limitation period established in section 78B-9-107. *See* § 78B-9-106(e). Second, a claim is barred if it "was raised or addressed at trial or on appeal" or "any previous request for post-conviction relief." § 78B-9-106(b); § 78B-9-106(d). And third, a claim is barred if it "could have been, but was not, raised in a previous request for post-conviction relief." § 78B-9-106(d).

In response, Archuleta argues that the procedural bars should not apply to him for four reasons: 1) the statute of limitations is tolled due to Archuleta's intellectual disabilities; 2) he received ineffective assistance of counsel during his initial post-conviction relief petition filed before 2008; 3) the court should recognize an equitable remedy for claims that could have been brought sooner but were not due to the ineffective assistance of post-conviction relief counsel; and 4) the 2008 amendments to the PCRA are unconstitutional. The Court will discuss the application of the raised procedural bars and Archuleta's arguments below.

1. Statute of Limitations

Pursuant to the PCRA statute of limitations, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code § 78B-9-107(1). In relevant part, a cause of action accrues on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." Utah Code § 78B-9-107(2)(e).[1] The court will address each of Archuleta's

[1] While some of Archuleta's claims may be barred under subsections (2)(a) through (2)(d) and subsection (2)(f), none of the accrual dates of these subsections occurred after December 2012. Because the court finds that all of Archuleta's claims accrued within a year after December 2012 at the latest, the court has determined that it is

claims under the procedural bars raised by the State below, followed by a discussion of whether Archuleta's intellectual disability tolls the statute of limitations pursuant to section 78B-9-107(3).

a. The Claims

The court concludes that the evidentiary facts for each of Archuleta's claims were known to the petitioner or to his counsel by December 2012 at the latest. Therefore, because Archuleta did not file his petition and raise these claims in state court until December 2014, each claim is barred by the statute of limitations.

i. Claim 2(a)

In claim 2(a), Archuleta alleges that his trial counsel was ineffective for omitting impeachment evidence of David Homer, an inmate at the Millard County of jail. The evidentiary facts relied upon by Archuleta in support of this claim are contained in a declaration from Mr. Homer dated December 2, 2011; the record on appeal for his post-conviction case, the trial record, and the record on appeal for his state rule 60(b) motion. *See* Archuleta's Memo. in Supp., filed on Dec. 12, 2014 [hereinafter "Memo"], at 126-128. All of these evidentiary facts were alleged in Archuleta's federal habeas petition filed in December 2012. *Compare* Memo., pages 126-128 *with* State's Attachment A, filed on May 16, 2016, at 79-82. Because none of the evidentiary facts were discovered after December 2012 and because Archuleta did not file his current petition until December 2014, claim 2(a) is time-barred.

ii. Claims 2(b) and 2(c)

In claims 2(b) and 2(c), Archuleta contends his trial counsel were ineffective for failing to obtain UDOC records showing the culpability of his co-defendant, Lance Wood, and for

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unnecessary for purposes of this ruling to determine whether an accrual date for a particular claim occurred at an earlier date.

failing to present that evidence at trial. The evidentiary support for these claims is found in a letter written by Wood's attorney dated April 19, 1988, and Wood's UDOC file from 1988. Archuleta does not provide the date that he became aware of this evidence; however, his counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 130-34 *with* State's Exhibit A, pages 87-90. Because Archuleta knew of the factual basis of his claims at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, these claims are barred by the statute of limitations.

iii. Claim 2(d)

In claim 2(d), Archuleta alleges that his trial counsel failed to investigate and present blood stain evidence that would have challenged the State's experts' opinions and its theory of the case. In support of this claim, Archuleta attached a declaration from Keith E. Peterson Inman dated December 4, 2012. *See* Archuleta's Exhibit 48. Archuleta does not provide the date that he became aware of the declaration; however, his counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 134-37 *with* State's Exhibit A, pages 82-84. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

iv. Claim 2(e)

In claim 2(e), Archuleta contends that his trial counsel were ineffective for failing to object to jury instructions provided by the judge in response to jury questions during deliberations. The factual basis of this claim arises from the trial record. Archuleta does not provide the date that he became aware of this evidence; however, his counsel knew of the

evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 137-39 *with* State's Exhibit A, pages 85-87. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

v. Claim 2(f)

In claim 2(f), Archuleta contends that his counsel provided ineffective assistance by failing to object to the State's use of evidence of the uncharged crime of sodomy at trial to prove one of the aggravating factors in the case. The evidentiary support for this claim comes from the trial record. Archuleta does not provide the date that he became aware of this evidence; however, his counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 140-41 *with* State's Exhibit A, pages 92-94. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

vi. Claim 2(g)

In claim 2(g), Archuleta alleges that his trial counsel were ineffective for failing to object to the special verdict forms presented to the jury at trial. The evidentiary support for this claim comes from the trial record. Archuleta does not provide the date that he became aware of this evidence; however, his counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 141-43 *with* State's Exhibit A, pages 98-100. Because Archuleta knew of the evidentiary facts in support of his claim at least by

December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

vii. Claim 2(h)

In claim 2(h), Archuleta alleges that his trial counsel were ineffective for failing to challenge the "especially heinous" aggravating factor as unconstitutionally vague. The evidentiary support for this claim comes from the trial record. Archuleta does not provide the date that he became aware of this evidence; however, his counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 143-44 *with* State's Exhibit A, pages 100-01. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

viii. Claim 2(i)

Finally, in claim 2(i), Archuleta contends that his trial counsel were ineffective for failing to challenge the constitutionality of Utah's death penalty statute, which, according to Archuleta, impermissibly creates a presumption that death is the appropriate sentence. The evidentiary support for this claim comes from the trial record. Archuleta does not provide the date that he became aware of this evidence; however, his counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 144-45 *with* State's Exhibit A, page 101. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

ix. Claim 3

In claim 3, Archuleta contends his trial counsel rendered ineffective assistance for failing to investigate and present adequate mitigation evidence during his sentencing trial. The evidentiary support for this claim comes from the trial record and his first post-conviction relief case record. Archuleta does not provide the date that he became aware of this evidence; however, his current counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 145-58 *with* State's Exhibit A, pages 102-21. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

x. Claim 4

Archuleta contends that his appellate and post-conviction attorneys rendered ineffective assistance of counsel for failing to raise and preserve claims regarding death qualification of the jury and evidence challenging the testimony of David Homer. In addition, Archuleta alleges that his post-conviction counsel was ineffective for failing to raise the nine claims his counsel raised in his 60(b) motion to set aside the dismissal of his initial post-conviction relief case. Archuleta argues that because the appellate court failed to address these claims under the umbrella of ineffective assistance of counsel, this court should review each of these nine claims *de novo*.

Even if Archuleta is correct that this court has the authority to review these claims *de novo* as alleged in this petition, Archuleta has not diligently sought review by timely bringing the claims to the court. Each of the allegations he makes in claim 4 were raised by his current counsel in his federal habeas petition filed in December 2012. *Compare* Memo., at 158-163 *with* State's Addendum A, at 122-29. Because he did not file his current petition until December

2014, his claims of ineffective assistance of appellate and post-conviction relief counsel are barred by the statute of limitations.

xi. Claim 5

In his fifth claim, Archuleta contends that his sentence is disproportionate with the sentence of his co-defendant and other defendants convicted of capital homicide in Utah. Archuleta does not provide the date he became aware of the evidence underlining his claim; however, his current counsel knew of the evidence at least by December 2012 when he filed his habeas petition in federal court. *Compare* Memo., pages 164 – 66 *with* State's Exhibit A, pages 129-32. Because Archuleta knew of the evidentiary facts in support of his claim at least by December 2012, and because Archuleta did not file his petition in state court until December 2014, this claim is barred by the statute of limitations.

xii. Claim 6

In claim 6, Archuleta argues that the trial court erred by failing to grant a motion for a mistrial due to the undisclosed testimony of Anna Luce. The evidentiary basis for this claim is found in the trial record. Because Archuleta raised a similar claim in his federal habeas petition, the court finds that his counsel was aware of the evidentiary facts supporting this claim by December 2012. *Compare* Memo., at 166-69 *with* State's Addendum A, at 133-37. Because his current petition was not filed until December 2014, the claim is time barred.

xiii. Claim 7

In claim 7, Archuleta alleges that the trial court's admission of evidence of the uncharged offense of sodomy was unconstitutional. In addition, Archuleta contends that his trial, appellate, and post-conviction relief counsel were ineffective for failing to raise this claim sooner. The evidentiary support for this claim comes from the trial record. Archuleta's counsel was aware of

this evidence at least by December 2012. *Compare* Memo., at 169-71 *with* State's Addendum A, at 138-40. Because Archuleta did not raise his claim with this court until December 2014, the claim is barred by the statute of limitations.

xiv. Claim 8

In claim 8, Archuleta makes various challenges to Utah's death penalty statutes as violations of both the federal and Utah constitutions. The evidentiary facts for this claim are contained in the trial record. Archuleta's current counsel was aware of these claims by at least December 2012. *Compare* Memo., at 171-180 *with* State's Addendum A, at 153-63. Because it was not raised until December 2014, it is barred by the statute of limitations.

xv. Claim 9

In claim 9, Archuleta contends the State violated the Supreme Court's mandate in *Brady v. Maryland* to disclose exculpatory and impeachment evidence because it withheld evidence that contradicted the testimony of David Homer. The evidentiary facts for this claim are similar, if not identical, to the evidentiary facts necessary to raise claim 2(a). Archuleta's counsel knew of these facts on or before December 2012. *Compare* Memo., at 180-82 *with* State's Addendum A, at 163-67. Because the claim was not raised in this court until December 2014, the court finds that it is untimely under the statute of limitations.

xvi. Claim 10

In claim 10, Archuleta contends the appellate record is incomplete and inadequate for meaningful review. Archuleta offers no evidentiary support for this assertion; however, Archuleta's counsel must have known about the facts supporting his claim by December 2012 because he filed a similar claim in federal court. *Compare* Memo., at 183-84 *with* State's

Addendum A, at 169-70. Because the claim was filed in state court approximately one year late, it is barred by the statute of limitations.

xvii. Claim 11

In claim 11, Archuleta alleges the combined errors of claims 1 through 10 constitute cumulative error, which should result in a remand. As explained in the court's discussion of claims 2 through 10 in this ruling and as explained in the court's ruling on claim 1, the evidentiary facts supporting this claim were available to Archuleta's counsel at least by December 2012. *Compare* Memo., at 184-85 *with* State's Addendum A, at 170-71. Because it was not raised until December 2014 in this case, it is barred by the statute of limitations.

xviii. Claim 12

In claim 12, Archuleta contends that executing him after he has spent almost twenty-five years in prison constitutes cruel and unusual punishment, as articulated by Justice Stevens' dissent in *Lackey v. Texas*, 514 U.S. 1045 (1995) (hereinafter "*Lackey* claim"). The State argues that Archuleta is time-barred from raising this claim because his counsel knew of the evidentiary facts as early as December 2012 when he raised a similar claim in federal court.

One of the evidentiary facts raised in the federal petition asserts that Archuleta has been incarcerated for approximately twenty-three years. In Archuleta's current petition, he alleges that he has been incarcerated for approximately twenty-five years. As noted by the Supreme Court in *Gardner v. State*, 2010 UT 46, a *Lackey* claim is "not dependent on the final number of years that have passed." *Id.* ¶ 86. The Supreme Court did not articulate a minimum amount of time that a petitioner must wait before a claim becomes ripe for judicial resolution. However, in *Gardner*, the Supreme Court held that the defendant in that case could have raised his claim sometime within the first fourteen years of his incarceration. Because he waited until his twenty-fifth year

of incarceration, he was untimely. The Supreme Court held the evidentiary facts were known to the defendant in the *Gardner* case well before he raised his claim under *Lackey*. *Id.*

The Court finds that Archuleta, like the petitioner in *Gardner*, has known of the evidentiary facts supporting his *Lackey* claim for more than a year prior to bringing the claim in his petition. *See* State's Addendum A, at 172. Therefore, his claim is barred by the statute of limitations.

xix. Claim 13

Finally, Archuleta contends that empirical evidence over the past thirty-six years shows that the death penalty in general constitutes cruel and unusual punishment. As evidentiary support for his claim, Archuleta cites a Stanford Law Review article written by Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*. 58 Stan. L. Rev. 751 (2005). Archuleta's counsel knew of this article by December 2012. *Compare* Memo., at 186 *with* State's Addendum A, at 173-74. Because he did not raise his claim until December 2014, it is time-barred under the statute of limitations.

b. Tolling Provisions

Pursuant to section 78B-9-107(3), the statute of limitations period "is tolled for any period during which the petitioner was prevented from filing a petition . . . due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief." Archuleta argues that the statute of limitations should be tolled because his intellectual disabilities have rendered him unable to navigate the PCRA on his own or to "properly supervise counsel in a way that would give effect to the traditional agent-principal relationship that generally is presumed to exist in an attorney-client relationship." Archuleta's Opposition, at 16.

In *Pinder v. State*, the Supreme Court explained that a claim could have been raised when the petitioner "*or his counsel* is aware of the essential factual basis for asserting it. . . . Thus, the general rule is that the procedural bar applies to claims known to a defendant *or his counsel* . . . ." 2015 UT 56, ¶ 44 (emphasis added) (footnotes omitted). This is true even if a petitioner "later discovers additional evidence providing further support for the claim." *Id.*

Even assuming, without deciding, that Archuleta has a mental incapacity as contemplated by the tolling provision in the PCRA, Archuleta has not shown by a preponderance of the evidence that his mental incapacity prevented him or his counsel from raising his claims sooner than December 2014. Archuleta has been represented by counsel consistently since he was charged with an offense. From 2007 until 2011, he was represented by both state appellate counsel and by federal counsel. From 2011 until the present, he has been represented by his current attorneys. Most of the claims alleged in the petition rely on facts that are apparent from the trial record and have been available to his attorneys in the exercise of reasonable diligence for several years. None of the claims assert facts that became known to Archuleta or his counsel after December 2012.

Furthermore, none of Archuleta's claims are based upon facts or information that only Archuleta knew but was unable to communicate to his counsel. And even if Archuleta's mental incapacity prevented prior counsel from asserting claims, Archuleta does not explain how or when circumstances changed to allow his current counsel to bring claims in 2014. Therefore, because the underlining facts for each of Archuleta's claims were known to counsel at least one year prior to the date his causes of action accrued, the court finds that the tolling provisions do not apply to Archuleta's petition.

Archuleta also suggests that his current counsel was prevented from filing a state action due to federal restrictions on when his attorneys may represent a petitioner in state court. The PCRA does not create an exception to the statute of limitations due to delays caused by federal procedure. Furthermore, Archuleta has not explained why his federal counsel could not have sought state review sooner. His federal attorneys were appointed in 2007 but did not request a stay of the federal case to file a petition in state court until June 2013.

Finally, to the extent Archuleta is arguing that the statute of limitations should be tolled because he was represented by ineffective counsel in his prior petition for post-conviction relief, the court concludes there is no tolling provision for ineffective assistance of counsel. *See* § 78B-9-107(3)-(5). Moreover, even if ineffective assistance of counsel was a valid exception to the statute of limitations, Archuleta has only alleged that his prior post-conviction relief counsel was ineffective. He has not alleged that his current counsel was ineffective for failing to file a petition until December 2014, at least two years after his current counsel knew of the factual basis for each claim.

2. Previously Adjudicated

Many of Archuleta's current claims have been previously adjudicated, whether during the appeal of his criminal case or during Archuleta's initial petition for post-conviction relief. Archuleta argues his current claims should be considered in this petition because the Supreme Court did not receive the "full picture" of evidence available during his initial petition for post-conviction relief due to the ineffective assistance of counsel.[2] In response, the State argues the procedural bars in the PCRA would be rendered meaningless if a petitioner is justified in filing a

[2] As explained *infra*, section 78B-9-106 does not contain an exception to a defaulted claim due to the ineffective assistance of post-conviction relief counsel. The only exception the PCRA creates for defaulted claims is the ineffective assistance of *appellate* counsel.

new petition based upon a different argument or the presentment of an additional, incrementally-small amount of evidence. *See* State's Reply, at 18-19.

The court finds the claims described below are being raised under a substantially similar ground as previous claims and are thus subject to the procedural bar. *See Meyers v. State*, 2004 UT 31, ¶ 14. Indeed, the court presumes the prior courts gave full consideration to the claims, even if they were not raised in the most effective manner. *See Kell v. State*, 2008 UT 62, ¶ 17. Thus, the court finds that in addition to being barred by the statute of limitations, the following claims are barred because they have been previously adjudicated.

In addition, to the extent that any of the following claims were not fully presented to prior courts, the court finds that each of these claims could have been raised by Archuleta during his initial petition for post-conviction relief, even if further evidence was discovered at a later date. *See* § 78B-9-106(1)(d); *Pinder v. State*, 2015 UT 56, ¶ 44 ("Our cases establish that a defendant 'could have' raised a claim when he or his counsel is aware of the essential factual basis for asserting it. And that conclusion holds even when the defendant later discovers additional evidence providing further support for the claim." (footnotes omitted)). The essential factual bases for each of the claims listed below were available through the exercise of reasonable diligence to Archuleta and his counsel before or during his initial petition for post-conviction relief case.

Claim 2(a) is procedurally barred because Archuleta litigated and lost a similar claim in his Second Amended Petition for Post-conviction Relief, which he filed on June 14, 2002. *See* State's Addendum B, at 33-38.

Claims 2(b) and 2(c) are procedurally barred because Archuleta litigated and lost similar claims in his 2002 post-conviction relief petition. *See* State's Addendum B, at 33-38.

Claim 2(e) is procedurally barred because Archuleta litigated this claim in his 2002 post-conviction relief petition. *See* State's Addendum B, at 9, 39. The Supreme Court addressed this claim in *Archuleta v. Galetka*, 2011 UT 73, ¶¶ 53-55.

Claim 2(f) is procedurally barred because Archuleta litigated a similar claim in his direct appeal. *See State v. Archuleta*, 850 P.2d at 141. He also litigated a similar claim in his prior petition for post-conviction relief. *See* State's Addendum B, at 7-8; *Archuleta v. Galetka*, 2011 UT 73, ¶ 34 n.4.

Claim 2(g) is procedurally barred because Archuleta litigated this claim in his 2002 post-conviction relief petition. *See* State's Addendum B, at 20-21, 41.

Claim 2(h), alleging that the death penalty scheme is unconstitutional because the "especially heinous" aggravating circumstance is both vague and overbroad, is procedurally barred because he raised a similar claim in his prior post-conviction petition proceeding. *See* State's Addendum B, at 25; *Archuleta v. Galetka*, 2011 UT 73, ¶¶ 62, 67.

Claim 3 is procedurally barred because Archuleta litigated this claim in his 2002 post-conviction relief petition. *See* State's Addendum B, at 34-38.

Claim 4, alleging ineffective assistance of appellate counsel for failure to challenge the death qualification of the jury, is procedurally barred because Archuleta litigated a similar claim in his 2002 post-conviction relief petition. *See* State's Addendum B, 3, 43. In 2002, Archuleta claimed that the death qualification of the jury panel contributed to a greater likelihood that the jury would render a death sentence. In his current petition, he argues that the Supreme Court was denied the ability to review the death qualification of the jury to identify the State's impermissible death qualification efforts. Although Archuleta has changed his argument on how he was prejudiced by the failure to raise a claim challenging the death qualification of the jury

venire, the essence of the claims are the same. *See Gardner v. Holden*, 888 P.2d 608, 615 (Utah 1994) (barring claims that were "essentially" the same as those raised on appeal).

Furthermore, with regard to Archuleta's allegation in claim 4 that appellate counsel was ineffective for failing to challenge the testimony of David Homer, the court finds that Archuleta is procedurally barred from raising this claim now because it was, in essence, raised during his prior post-conviction relief case. *See* State's Addendum B, at 13, 43. The factual basis of this claim is identical to claim 2(a), which the court has also procedurally barred.

Claim 5 is procedurally barred because Archuleta litigated this claim in his direct appeal. *See State v. Archuleta*, 850 P.2d 1232, 1249 (Utah 1993).

Claim 6 is procedurally barred because Archuleta litigated this claim during his criminal appeal. *See id* at 1242-44.

Claim 7 is procedurally barred because Archuleta litigated a similar claim in his direct appeal. *See State v. Archuleta*, 850 P.2d at 141. He also litigated a similar claim in his prior petition for post-conviction relief. *See* State's Addendum B, at 7-8; *Archuleta v. Galetka*, 2011 UT 73, ¶ 34 n.4.

Claim 8, alleging Utah's death penalty scheme is unconstitutional because it does not require special verdict forms during the sentencing phase of the trial, is procedurally barred because he raised it in his prior petition for post-conviction relief. *See Archuleta v. Galetka*, 2011 UT 73, ¶ 26. His claim that the death penalty scheme is unconstitutional because it fails to narrow the class of persons eligible for the death penalty is likewise procedurally barred because he raised it in his prior petition for post-conviction relief. *See id.* ¶¶ 26, 59-61. And his claim that the death penalty scheme is unconstitutional because the "especially heinous" aggravating circumstance is both vague and overbroad is also procedurally barred because he raised a similar

claim in his prior post-conviction petition proceeding. *See* State's Addendum B, at 25; *Archuleta v. Galetka*, 2011 UT 73, ¶¶ 62, 67.

Claim 10 is procedurally barred because Archuleta raised a similar claim in his prior petition for post-conviction relief. *See* State's Addendum B, at 29-30, 40; *Archuleta v. Galetka*, 2011 UT 73, ¶ 26.

Archuleta raised a claim of cumulative error during his first petition for post-conviction relief. Because many of the errors that he currently uses as a basis for Claim 11 are similar to the errors he used as evidentiary basis for his prior cumulative error claim, the court concludes claim 11 is procedurally barred because it was previously litigated. *See* State's Addendum B, at 47; *Archuleta v. Galetka*, 2011 UT 73, ¶ 146.

3. Could Have Been Raised

The State alleges the following claims are procedurally barred because they could have been raised in a previous request for post-conviction relief but were not: claims 2(d), 2(i), 8(b), 9, 12, and 13. *See* Second Mot. for Summary Judgment, at 83-89.

As explained above, a claim "could have" been raised when a petitioner or his counsel "is aware of the essential factual basis for asserting it." *Pinder*, 2015 UT 56, ¶ 44 (citing *Taylor v. State,* 2012 UT 5, ¶ 19; *Gardner v. State*, 2010 UT 46, ¶ 76; *Gardner v. Galetka*, 2004 UT 42, ¶¶ 9-13).

Claim 2(d) is barred because the essential facts—the State's reliance on blood stain evidence at trial—were available to counsel at the time of trial. Although his current counsel did not obtain an expert declaration until December 2012 to support the claim, counsel has not alleged or shown by a preponderance of the evidence that it could not have obtained the expert declaration sooner.

Claims 2(i) and 8(b) are barred because the essential facts – that the jury was allowed to consider the aggravating factors presented during the guilt phase when making its sentencing decision—were available to counsel at the time of the trial and during his initial petition for post-conviction relief.

Claim 9 is barred because Archuleta has not shown by a preponderance of the evidence that he was not aware of the essential facts – that the State withheld exculpatory or impeachment evidence – until after his initial petition for post-conviction relief. The claim was originally raised in the context of a rule 60(b) motion following the adjudication of his initial petition, but Archuleta does not include a date when he or his counsel first became aware of the factual basis.

Claim 12 is barred because Archuleta has not shown by a preponderance of the evidence that he or his counsel did not know the factual basis for the claim at the time of his initial petition for post-conviction relief. As explained earlier in this ruling, a *Lackey* claim is not dependent on the final amount of years a prisoner serves in prison before he is executed, and a claim may be raised much earlier. *See Gardner v. State*, 2010 UT 46, ¶¶ 82-86.

Claim 13 is barred because the factual basis for the claim – empirical evidence cited in a 2005 law review article – was available during Archuleta's initial petition for post-conviction relief.

Archuleta argues the failure to raise these claims in his initial petition for post-conviction relief was due to the ineffective assistance of post-conviction counsel. Thus, because Archuleta has not had the opportunity to litigate these claims, the court should excuse the procedural bar. Otherwise, according to Archuleta, the court will be "placing a value on finality above the constitutional guarantees of people subject to state law." Archuleta's Opposition, at 14 (citing *Adams v. State*, 2005 UT 62, ¶ 23).

Ineffective assistance of *appellate* counsel is an exception to the procedural bar for claims that are raised for the first time in an initial petition for post-conviction relief. *See* § 78B-9-106(3). But ineffective assistance of *post-conviction relief* counsel usually does not excuse the procedural bar in successive petitions. *See* 78B-9-106(1)(d).

The court recognizes that the landscape in this litigation differs from other post-conviction relief petitions. Due to the Supreme Court's holding in *Menzies v. State*, 2006 UT 81, Archuleta had the statutory right to the effective assistance of counsel for his initial petition, which was filed prior to the 2008 amendments to the PCRA. However, the Supreme Court in *Menzies* did not discuss the full extent of a petitioner's right to the effective assistance of post-conviction relief counsel. It did not address whether such a right allows a petitioner to raise defaulted claims in successive petitions. Indeed, subsequent case law has limited the *Menzies* decision to its facts, and the Supreme Court may have only intended it to apply to motions to set aside judgments under rule 60(b)(6) due to gross negligence. *See, e.g.*, *Honie v. State*, 2014 UT 19, ¶ 91; *Archuleta v. State*, 2011 UT 73, ¶ 166 n.14.

In light of the Supreme Court's holding in *Menzies* and its progeny, the court concludes that the pre-2008 statutory right to the effective assistance of counsel does not excuse defaulted claims in successive petitions absent a finding of gross negligence. Because the right to the effective assistance of post-conviction relief counsel is a statutory right and not a right based in the federal or Utah constitutions, the statute itself may place limits on that right. The legislature presumably knew how to create an exception to defaulted claims in successive petitions for petitioners sentenced to death, but the legislature did not do so. *See* § 78B-9-106(3) (creating an exception for a procedural default of a claim when the failure to raise the claim was due to the ineffective assistance of appellate counsel). Therefore, the court concludes that even if

Archuleta's initial post-conviction relief counsel were ineffective for failing to raise these claims earlier, the claims are procedurally barred under section 78B-9-106(1)(d).[3]

If the PCRA does not itself contain an exception for defaulted claims, Archuleta argues the court should adopt an equitable remedy, similar to the federal remedy adopted in *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012),[4] that would allow the court to hear claims that could have been raised in previous proceedings but were not raised due to the ineffective assistance of counsel. *See* Archuleta's Opposition, at 12-14.

Utah does not currently have a comparable equitable remedy for procedurally-barred claims due to the ineffective assistance of counsel. Although a comparable equitable remedy to the *Martinez* remedy may have been available under the common law exceptions to the procedural bars, those common law exceptions were removed by our legislature and abrogated by our Supreme Court in 2008. *See* 78B-9-102(1) (as amended in 2008); Utah R. Civ. P. 65C(a); *Pinder v.* State, 2015 UT 56, ¶ 56; *Branch v. State*, 2015 UT App 204, ¶ 6; *Taylor v. State*, 2012 UT 5, ¶ 11 n. 3. This court declines to create an equitable remedy without precedential authority to do so.[5]

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[3] Archuleta did not assert that his initial post-conviction relief counsel was "grossly negligent."

[4] The State effectively distinguishes the *Martinez* remedy in the federal system from how the state courts handle ineffective assistance of trial counsel claims. Because a claim of ineffective assistance of trial counsel is usually not raised on appeal in the federal system, if counsel in an initial collateral proceeding fails to raise it as a claim, then the claim will not be heard by a court unless the *Martinez* exception applies. In the state system, appellate counsel routinely raises ineffective assistance of trial counsel on appeal. Thus, a *Martinez* remedy in federal court does not transfer congruently into state court.

[5] In addition, Archuleta has not provided this court with enough specificity to adopt such a remedy. For instance, Archuleta does not indicate how long after an initial post-conviction proceeding a petitioner has to assert un-raised claims. Archuleta's initial post-conviction relief petition was adjudicated in 2011. He has been represented by his current counsel since 2007. But Archuleta did not raise these claims until December 2014, over three years after the appeal concluded in the initial post-conviction relief case.

4. The 2008 Amendments

Finally, Archuleta argues that the 2008 amendments to the PCRA, which eliminated the common law exceptions to the procedural bars, are unconstitutional. Citing *Tillman v. State*, 2005 UT 56, ¶ 22, Archuleta contends that the power to review post-conviction relief petitions "'quintessentially . . . belongs to the judicial branch of government,' and not the legislature." Thus, "all five common law exceptions 'retain their independent constitutional significance and may be examined'" by the court. Archuleta's Opposition, at 37. Due to Archuleta's intellectual disability, his post-conviction counsel's ineffective assistance, and the limitations on the PCRA, Archuleta asks this court to consider his claims.

The court addressed the applicability of the common law exceptions in its ruling issued on February 2, 2016. There, the court examined Utah Supreme Court opinions interpreting the 2008 amendments to the PCRA and explained that "even if Archuleta is correct that the judiciary retains the constitutional authority to apply the . . . common law exceptions, the Utah Supreme Court has apparently abrogated the exceptions in light of the amendments to the PCRA and rule 65C." In addition, the court acknowledged that although this court no longer may apply the common law exceptions, the Utah Constitution may allow for an "egregious injustice" exception to the procedural bars. However, as explained in the court's prior ruling, the finding of that exception is the prerogative of the Utah Supreme Court and not the district court.

Therefore, without further guidance and direction from our appellate courts, this court concludes the common law exceptions do not provide relief from the procedural limitations on post-conviction relief claims for petitions that are filed after May 5, 2008. Because Archuleta did not file his petition until December 2014, his claims are procedurally barred.

ORDER

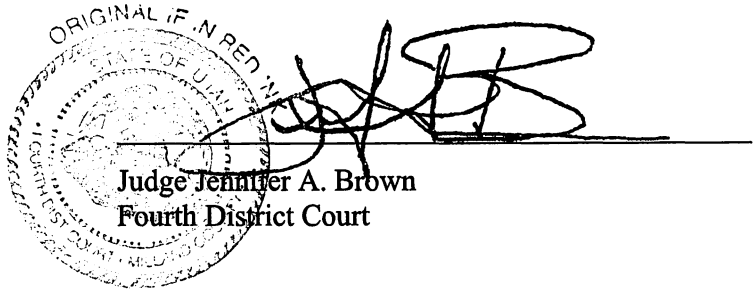
Accordingly, for the foregoing reasons, it is hereby ordered that the State's Second Motion for Summary Judgment on each of the remaining twelve claims in Archuleta's petition for post-conviction relief is GRANTED.

Because there are no pending claims or other matters for the court to review, it is further hereby ordered that this case is dismissed with prejudice.

This is the final order of the court for the matters addressed herein. No further order is necessary or contemplated from the parties.

DATED this 28 day of Oct, 2016.

BY THE COURT:



Judge Jennifer A. Brown
Fourth District Court

By Deri Stephenson
STAMP USED AT DISCRETION OF JUDGE

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140700047 by the method and on the date specified.

EMAIL: DAVID A CHRISTENSEN david_christensen@fd.org
EMAIL: AMANDA N MONTAGUE amontague@utah.gov
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EMAIL: ANDREW F PETERSON andrewpeterson@utah.gov

Date: 10/28/2016 /s/ SHERI L STEPHENSON

Deputy Court Clerk

ADDENDUM 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MICHAEL ANTHONY ARCHULETA, Petitioner, v. SCOTT CROWTHER, Warden, Utah State Prison, Respondent.	Order Granting Motion to Stay Case No. 2:07-CV-630 Judge Tena Campbell

Petitioner Michael Anthony Archuleta, a state prisoner, filed a petition under 28 U.S.C. §2254 for habeas corpus relief based on a number of claims, the first of which is the claim that he should be exempt from the death penalty pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), which forbids the execution of persons with intellectual disabilities[1] under the Eighth and Fourteenth Amendments. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [intellectually disabled] defendants." Id. at 306.

Mr. Archuleta's claim that he is intellectually disabled has not been addressed in Utah state court.

Mr. Archuleta asked the court to stay his petition pursuant to Rhines v. Weber, 544 U.S. 269 (2005), so that he can return to state court with the Atkins issue.

[1] Atkins uses the term "mental retardation," but Hall v. Florida, 134 S. Ct. 1986 (2014), notes that it adopts and uses the term "intellectual disability" to describe the same condition. Likewise, the court will use "intellectual disability."

Respondent Scott Crowther[2] concedes that the claim has not been exhausted, but opposes the motion, arguing that Mr. Archuleta cannot meet the threshold requirements for a Rhines stay and that, even if he could, he would not have a remedy for his Atkins claim in state court.

I. Procedural History

Mr. Archuleta was convicted of criminal homicide on December 15, 1989, for the murder of Gordon Ray Church with Co-Defendant Lance Conway Wood.[3] The jury unanimously returned a verdict of death for Mr. Archuleta on December 20, 1989, and a sentence of death was imposed the next day. On direct appeal, the Utah Supreme Court affirmed Mr. Archuleta's conviction and the imposition of the death penalty. See State v. Archuleta, 850 P.2d 1232 (Utah 1993), cert. denied, 510 U.S. 979 (1993).

Following what was then the common law tradition of habeas relief in Utah, Mr. Archuleta filed a petition for a writ of habeas corpus with the trial court on March 10, 1994. An amended petition, prepared with the assistance of pro bono counsel, was filed on August 11, 1994.

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) on April 24, 1996. The statute was designed to "further the principles of comity, finality, and federalism." Miller-El v. Cockrell, 537 U.S. 322, 337 (2003).

Five days later, on April 29, 1996, Utah's Post-Conviction Relief Act (PCRA) became effective, and it "applies only to post-conviction proceedings filed on or after July 1, 1996." Utah Code Ann. § 78B-9-103.

On October 4, 1996, the trial court granted the state's motion to dismiss the petition, but the order was not entered until November 18, 1996. On appeal, the Supreme Court of Utah

[2] Mr. Crowther is the named respondent for the State of Utah, and the court will refer to him as "the state."

[3] Mr. Wood was tried separately, found guilty, and given a life sentence.

reversed the trial court's decision for error on August 14, 1998, finding that Mr. Archuleta had a Sixth Amendment right to pursue claims of ineffective assistance of counsel against his trial and appellate lawyers, and his petition was remanded for further proceedings. See Archuleta v. Galetka, 960 P.2d 399 (Utah 1998).

The habeas court ordered Mr. Archuleta to file a second amended petition for habeas corpus relief on March 20, 2001. Before that date was reached, one of Mr. Archuleta's lawyers, the one who was capital-qualified and lived in Colorado, suffered from an illness that resulted in her absence from the case. (PCR ROA 622-48.) The habeas court allowed Mr. Archuleta's other pro bono lawyer to withdraw because he was not qualified under Utah law to continue as counsel in a capital appeal. (PCR ROA 706.)

New counsel, Edward Brass, was appointed in July 2001, and two other lawyers, McCaye Christianson and L. Clark Donaldson, entered appearances in August 2001. The court set a deadline of February 1, 2002, for the filing of a second amended petition.

In light of the difficulties[4] new counsel faced, the habeas court extended the deadline for the second amended petition again to June 14, 2002, and it was timely filed.

Six days later, on June 20, 2002, the United States Supreme Court issued its Atkins decision, which changed the landscape of death penalty jurisprudence by categorically distinguishing individuals with intellectual disabilities from other adult criminals.

[4] Each of the lawyers was new to the case and did not receive the file from previous counsel, despite effort, until November 2001. (PCR ROA 741-46.) And, as of March 6, 2002, they had yet to be paid for their work on Mr. Archuleta's post-conviction case because the funds allocated for that purpose pursuant to Utah Administrative Code R25-14 had been disbursed to previous post-conviction counsel. Years later, when considering the Rule 11 sanctions filed against post-conviction counsel by the state, the Utah Supreme Court noted that "low levels of public funding for capital cases" threatened the integrity of the process and that "[i]t is the duty of the legislative branch to provide for adequate defense of capital defendants, including sufficient resources to attract, train, compensate, and support legal counsel." Archuleta v. Galetka, 197 P.3d 650, 654 (Utah 2008). "Competent defense and appellate counsel are guaranteed by our constitution." Id.

Mr. Archuleta's second amended petition for habeas relief in state court was not amended to include an Atkins claim.

The state launched a multi-pronged response to Mr. Archuleta's second amended petition for habeas relief. First, on April 1, 2003, the state moved for summary judgment against all of Mr. Archuleta's claims. Second, on February 19, 2004, it filed a motion to strike evidence in support of Mr. Archuleta's second amended petition.[5] (PCR ROA 1811.) Third, it served Mr. Archuleta's post-conviction counsel, Mr. Brass, Mr. Donaldson, and Ms. Christianson, with a proposed motion for sanctions on February 27, 2004, and filed an amended motion for sanctions against them with the habeas court on April 12, 2004.[6] (PCR ROA 1973-78, 1986-2008.)

Against this backdrop, the habeas court granted the state's motion for summary judgment against Mr. Archuleta on August 24, 2004, for all but two claims.[7]

The habeas court held an evidentiary hearing on the remaining claims before ultimately denying them on January 22, 2007. (PCR ROA 3338-36.) The order was entered on February 26, 2007. (PCR ROA 3379-81.)

Mr. Archuleta filed a notice of appeal with the Utah Supreme Court on March 20, 2007.

On February 1, 2008, Mr. Brass moved to withdraw from the case.[8] (PCR ROA 3685-98.) Mr. Brass argued that Mr. Archuleta's post-conviction representation had been harmed by

[5] By then, the habeas court had permitted Ms. Christianson and Mr. Donaldson to withdraw from the case for "good cause" on March 1, 2004. (PCR ROA 1969.) Their motions to withdraw, filed on January 22, 2004, reflect that they had not been compensated for any of their work on Mr. Archuleta's case. (PCR ROA 1798-1803.)

[6] The state pursued its action for sanctions against Mr. Archuleta's counsel with active and aggressive litigation for almost three years before the habeas court denied its motion on February 23, 2007. (PCR ROA 3382.) Despite the habeas court's detailed order denying the state's motion for sanctions, as well as counsel's cross-motion for sanctions, the state immediately filed a notice of appeal with the Utah Supreme Court on March 9, 2007. (PCR ROA 3407.) The Utah Supreme Court ruled against the state and affirmed the habeas court's decision. It instructed future trial courts faced with Rule 11 motions in capital cases to stay proceedings on those motions until the underlying capital matters are resolved to avoid increased delay, expense, and complexity for the court and parties. See Archuleta v. Galetka, 197 P.3d 650, 653 (Utah 2008).

[7] Claims 33(d)-(t) and 35(o)-(z) were left standing.

the State's decision to litigate and appeal Rule 11 sanctions against him, and that Mr. Brass could not provide zealous advocacy for Mr. Archuleta because he was defending himself against the state's Rule 11 motion, which created a conflict of interest.[9] Mr. Brass also noted that financial restrictions plagued Mr. Archuleta's representation.

The Utah Supreme Court granted Mr. Brass's request to withdraw on June 6, 2008, and temporarily remanded the case to the trial court for the appointment of new counsel.

James Slavens was appointed to represent Mr. Archuleta on August 27, 2008. (60(b) ROA 3438, 5263.)

On November 7, 2008, the Utah Supreme Court denied the state's appeal of the habeas court's Rule 11 decision. See Archuleta v. Galetka, 197 P.3d 650 (Utah 2008). Significantly, the court found that "[t]he moment allegations of a personal violation are filed against capital defense counsel, the interests of attorney and client diverge. The attorney is required to invest time and resources in his or her own defense in the rule 11 matter. An attorney's rule 11 defense may also require disclosure of strategy or communications that constitute a possible breach of the confidentiality between attorney and client." Id. at 653.

On July 17, 2009, while Mr. Archuleta's appeal from the habeas decision was still pending before the Utah Supreme Court, Mr. Slavens asked the trial court to set aside its judgment denying habeas relief and/or grant Mr. Archuleta a new trial because of Mr. Brass's ineffective assistance of counsel during the post-conviction proceedings. The motion was filed

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[8] Mr. Brass moved to withdraw twice before, on October 28, 2005, and March 16, 2006, but the trial court denied his requests. The court denied the October 28, 2005 request because it did not see any deficiency and Mr. Archuleta had not requested the withdrawal. Even though Mr. Archuleta did not request the removal of Mr. Brass, he was not pleased with Mr. Brass's representation, and sent letters to the court with concerns about Mr. Brass on February 28, 2005, March 4, 2005, and October 11, 2005. (PCR ROA 2421-22, 2487-88, 2629-32.) The record also reflects that Mr. Archuleta had assistance with the third letter because he could not write it on his own.

[9] Despite making this argument in his March 16, 2006 motion to withdraw, the trial court nevertheless denied the motion during a telephonic conference the next day. (PCR ROA 2742.)

pursuant to Rule 59, Rule 60(b), and Rule 65(c) of the Utah Rules of Civil Procedure, as well as the Sixth and Fourteenth Amendments to the Constitution of the United States. (60(b) ROA 3505-61.) It was in this motion, which alleged Mr. Brass's ineffective assistance of counsel during the post-conviction process, that an Atkins claim was included on Mr. Archuleta's behalf for the first time. (Id. at 3509.) But the Atkins issue was not cast as a stand-alone claim.

The trial court held oral arguments on the Rule 60(b) motion before denying it on April 21, 2010. (60(b) ROA 4896-4980.)

Mr. Archuleta appealed the Rule 60(b) decision to the Utah Supreme Court. (60(b) ROA 5319-21.)

The Utah Supreme Court denied both appeals. Archuleta v. Galetka, 267 P.3d 232 (Utah 2011). Because the Court found that Mr. Brass's "performance was nowhere near the level that he stooped to in Menzies [v. Galetka, 150 P.3d 480 (Utah 2006)]," where he "willfully abdicated his role as advocate," and "abandoned the required duty of loyalty to this client," the Court concluded that his representation of Mr. Archuleta was not bad enough to be the kind of "egregious lawyer misconduct" that would justify setting aside the post-conviction case pursuant to Rule 60(b).[10] Id. at 273-77. As a result, the court "decline[d] to individually examine each of Archuleta's claims that his habeas counsel rendered ineffective assistance." Id. at 277. The Atkins claim was one of those claims that the Utah Supreme Court declined to address.

[10] Of course saying that Mr. Brass's representation was not bad enough to set aside everything that he did for Mr. Archuleta under Rule 60(b)(6), is not the same as finding that Mr. Archuleta had constitutionally sufficient counsel. In the Menzies case, Mr. Brass filed an affidavit stating that he was not competent to represent a capital post-conviction petitioner without counsel. There is no reason to believe that Mr. Brass's abilities with regard to his representation of Mr. Archuleta during the same time period were any different.

II. Applicable Law

A. Rhines Analysis

Barring "unusual" and "exceptional" circumstances, federal courts should not consider claims that have not been exhausted in state court. See Rose v. Lundy, 455 U.S. 509, 515 (1982). This rule reflects a long-standing federal court commitment to comity and allowing state courts to address constitutional claims first, and it also means that ideally federal review of the claims will have the benefit of a complete factual record. Id. at 519-20.

More pragmatically, the exhaustion requirement provides "a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." Id. at 520. With these principles in mind, Lundy held that a federal court faced with a "mixed petition," one that contained exhausted and unexhausted claims, could either dismiss the petition, or allow the petitioner to amend the petition and remove the unexhausted claims.

Under AEDPA, no court may grant an application for habeas relief unless the claims have been exhausted in state court or either there is no state process available or that process is ineffective to protect the rights of the applicant. 28 U.S.C. § 2254 (b)(1). "The federal habeas scheme leaves primary responsibility with the state courts . . . ." Woodford v. Visciotti, 537 U.S. 19, 27 (2002). State court decisions are deemed to be presumptively valid, and any petition for federal review of them must be filed within one year.

"As a result of the interplay between AEDPA's 1-year statute of limitations and Lundy's dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims." Rhines v. Weber, 544 U.S. 269, 274 (2005). To prevent this outcome, courts may stay the federal case

and allow the petitioner, in limited circumstances, to return to state court with any unexhausted claims because "the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions." Id. at 278.

A stay under Rhines creates tension between AEDPA's goals of federalism and comity and its goal of finality and streamlining the habeas process. For those reasons, any stay under Rhines cannot be indefinite and must meet certain criteria. The petitioner must have (1) good cause for his failure to exhaust, (2) his unexhausted claims must be potentially meritorious, and (3) there must no indication of intentional delay tactics. See id. When a petitioner can meet these threshold issues, "it likely would be an abuse of discretion for a district court to deny a stay." Id.

The first question, then, is whether Mr. Archuleta had good cause for his failure to exhaust his Atkins claim in state court. Mr. Archuleta argues that the ineffective assistance by Mr. Brass and/or Mr. Slavens during his post-conviction proceedings in state court constitutes good cause for his failure to exhaust. The state disagrees.

The Rhines decision did not explain the "good cause" standard with any precision, but in a decision on month later, the United States Supreme Court stated that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' to excuse his failure to exhaust." Pace v. DiGuglielmo, 544 U.S. 408, 416 (2005).

Since 2005, district courts have reached different conclusions about whether good cause in the Rhines context is akin to good cause to excuse a procedural default in federal court (which is set as a high standard because it would allow the district court to consider the merits of a defaulted claim) or a more expansive and equitable reading of good cause (which would allow the claim to return to state court for merits review). Compare Hernandez v. Sullivan, 397 F.

Supp. 2d 1205, 1207 (C.D. Cal. 2005) (courts should look to procedural default law to determine cause), with Rhines v. Weber, 408 F. Supp. 2d 844, 849 (D.S.D. 2005) (Rhines II) (rejecting procedural default analysis for cause in exhaustion context). Based in part on those different standards, some district courts have concluded that ineffective assistance of post-conviction counsel constitutes good cause for failure to exhaust. See, e.g., Vasquez v. Parrott, 397 F. Supp. 2d 452, 464-65 (S.D.N.Y. 2005); see also Rhines II. Others, including another court in this district, have concluded the opposite. See, e.g., Carter v. Friel, 415 F.Supp.2d 1314 (D.Utah 2006).

But the only circuit court to address these two issues directly is the Ninth Circuit.[11] In Blake v. Baker, 745 F.3d 977 (9th Cir. 2014), the Ninth Circuit followed the reasoning in Pace and Rhines II to find that good cause for a Rhines stay cannot be any more demanding than a showing of cause for procedural default under Martinez v. Ryan, 132 S. Ct. 1309 (2012), and, in fact, may be less demanding. "The Supreme Court's statement in Pace . . . suggests that the good cause standard is, indeed, lesser than the cause standard discussed in Coleman [v. Thompson, 501 U.S. 722 (1991)] and applied in Martinez." Blake, 745 F.3d at 984 n.7.

The Blake court held that ineffective assistance of state post-conviction counsel can establish good cause for failure to exhaust. "While a bald assertion [of ineffective assistance of post-conviction counsel] cannot amount to a showing of good cause, a reasonable excuse, supported by evidence to justify a petitioner's failure to exhaust, will." Blake, 745 F.3d at 982.

The Ninth Circuit found, and the court agrees, that the good cause standard is grounded in equitable considerations to ensure that a stay and abeyance "is available only to those

[11] The Tenth Circuit has not addressed this issue but its jurisprudence suggests that it would view the "good cause" standard within a tradition of equitable discretion of Pace. In Fairchild v. Workman, 579 F.3d 1134, 1152-54 (10th Cir. 2009), the Tenth Circuit cited the "reasonable confusion" standard from Pace, as well as the equitable reasoning in Lundy and Rhines, with approval. "In this connection, we acknowledge that the good cause requirement should not be 'the sort of strict and inflexible requirement that would trap the unwary pro se prisoner.'" Id. at 1154.

petitioners who have a legitimate reason for failing to exhaust a claim in state court. As such, good cause turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence to justify that failure." Id.

But more than that, the Ninth Circuit analysis in Blake also provides an answer to those district courts, including the Hernandez court, that set a very high bar for "good cause" out of the hypothetical concern that, without it, Rhines stays will be granted routinely in almost every case. The court finds the analysis of Blake and Rhines II to be better reasoned than the analysis followed by Hernandez and Carter:

> [T]his concern does not require limiting the definition of good cause to only those excuses that arise infrequently. Factors (2) and (3) of the Rhines test itself—that the "unexhausted claims are potentially meritorious," and that "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics,"—are designed, together with the first factor, to ensure that the Rhines stay and abeyance is not, contrary to the district court's concern, available "in virtually every case."

Id. at 981-82 (citations omitted).

The Tenth Circuit has agreed with this analysis, finding, after quoting Blake with approval, that "the Rhines three-part test strictly limits the availability of a stay where a petitioner has not yet exhausted his state remedies." Doe v. Jones, 762 F.3d 1174, 1181 (10th Cir. 2014).

With that in mind, the court finds the following pursuant to Rhines:

Mr. Archuleta has offered a good cause for failing to exhaust his Atkins claim in state court: the ineffective assistance of post-conviction counsel.[12] To support his good cause

[12] The court need not defer to the Utah Supreme Court's findings regarding Mr. Brass's performance in Archuleta v. Galetka, 267 P.3d 232 (Utah 2011), because the analysis of his performance in that case went to whether or not his

argument, Mr. Archuleta points to the fact that his post-conviction counsel did not investigate and amend his second amended petition to include an Atkins claim, despite the fact that there were questions about Mr. Archuleta's intellectual ability and adaptive functioning, as well as his history of intellectual disability diagnoses.

Atkins, which was one of the most significant Supreme Court decisions during that term, was announced a mere six days after Mr. Archuleta's second amended petition was filed. Any reasonable and competent attorney knowing Mr. Archuleta's record would have investigated an Atkins claim and amended the petition so that there could be an evidentiary hearing on it. There is no evidence that Mr. Brass did so, and the court does not agree with the state's suggestion that the lack of such evidence means that Mr. Brass made a reasonable, informed, and strategic decision against an Atkins claim. Given everything else in the record before the court, the more reasonable conclusion is that Mr. Brass, by his own admission, was not competent to handle capital habeas appeals alone, which is what he was doing in Mr. Archuleta's case, and that, as discussed more below, he did not have the time or resources to pursue an Atkins claim on Mr. Archuleta's behalf.[13]

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conduct was so extraordinary and egregious that it amounted to an abdication of representation such that Mr. Archuleta's entire post-conviction proceedings needed to be set aside pursuant to Rule 60(b). The Utah Supreme Court pointedly did not analyze whether, based on the facts in the record, Mr. Brass should have pursued an Atkins claim on Mr. Archuleta's behalf. It may well be true that, as a general matter, "[o]ccasional omitted claims do not constitute extraordinary or unusual circumstances sufficient to trigger the rule [of setting aside a judgment]." Id. at 276 n.14. But it is also true that based on the facts in Mr. Archuleta's case, the Atkins claim is not an occasional claim, Mr. Brass should have pursued it, and his failure to do so amounted to ineffective assistance of counsel.

[13] The context of Mr. Brass's representation of Mr. Archuleta informs the court's analysis. The state made Mr. Brass's job difficult. It attacked him personally through litigation sanctions that were ultimately found to be baseless, and it refused to properly fund his defense of Mr. Archuleta. By its actions, the state created a conflict of interest between Mr. Brass and his client that made it impossible for him to completely and reasonably represent Mr. Archuleta. That Mr. Brass had to defend himself against the state's Rule 11 sanctions at all, while trying to do a job that no other lawyer in the state was willing to do (in part because there was no funding) was an untenable situation. The Rule 11 sanctions were levied against Mr. Brass for pursuing claims on Mr. Archuleta's behalf that the state believed were unreasonable and unnecessary, despite the fact that Mr. Brass and his then-co-counsel believed otherwise. There is no way to understand the chilling effect that had on Mr. Brass's ability to zealously advocate for Mr. Archuleta and to include an Atkins claim in his post-conviction petition, but the state undoubtedly would have considered an Atkins claim to be unreasonable and unnecessary as well. But what the record does reflect is that

In addition, there is no evidence that Mr. Brass investigated a possible Atkins claim while preparing for the evidentiary hearing on mitigation issues, nor did Mr. Archuleta's other post-conviction counsel seek to amend the second amended petition after identifying the Atkins claim during the Rule 60(b)(6) litigation. These failings provide a sufficient showing that Mr. Archuleta's state post-conviction representation was defective under Strickland v. Washington, 466 U.S. 668, 687 (1984).[14]

Although the court declines to decide the merits of Mr. Archuleta's Atkins claim at this point, it finds, based on the expert report that Mr. Archuleta supplied with his motion, as well as the state court record as discussed more below, that Mr. Archuleta's claim is potentially meritorious and not plainly meritless. This is a conclusion limited to the specific facts in Mr. Archuleta's case, which show that, in addition to the more recent determination about the potential validity of Mr. Archuleta's intellectual disability, there were questions about his intellectual ability and adaptive functioning from an early age that were not fully addressed during trial, or even during the later evidentiary hearing, in an Atkins context.

There is no evidence before the court of intentionally dilatory litigation tactics. Mr. Archuleta's Atkins claim was not raised in his second amended post-conviction petition because

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there were claims left unaddressed due to lack of time and resources. (PCR ROA 2042.) To investigate and add an Atkins claim in this context, assuming Mr. Brass thought about doing so, would have required Mr. Brass to pay for an expert analysis while not being paid for his own time and to open himself up to additional Rule 11 sanctions. That conflict alone meant that Mr. Brass could not have competently represented Mr. Archuleta.

[14]The state argues that ineffective assistance of post-conviction counsel will not establish cause for failure to exhaust his claim under the PCRA because the 2008 amendments also eliminated the ability of petitioners to bring claims of ineffective assistance of post-conviction counsel in a capital case. See Utah Code Ann. §78B-9-202(4). This amendment was made in response to the Utah Supreme Court's decision in Menzies v. Galetka, 150 P.3d 480 (Utah 2006), which found Mr. Brass's representation of Mr. Menzies constituted ineffective assistance of counsel and that Mr. Menzies should be given an opportunity to investigate certain claims and file an amended post-conviction petition. Based on the Menzies decision, and the 2008 Amendments, Mr. Archuleta arguably was entitled to effective assistance of post-conviction counsel between 1996 and 2008. Moreover, it is not clear that Utah Code Ann. §78B-9-202(4) is good law as applied to Atkins proceedings after the Tenth Circuit's decision in Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012), which found that defendants in Atkins proceedings, even if "post-conviction," have the right to effective assistance of counsel secured by the Sixth and Fourteenth Amendments.

he had ineffective assistance of counsel who had an impermissible conflict of interest with him. When Mr. Archuleta's other post-conviction lawyer did raise the Atkins issue in state court, it was not raised as a stand-alone claim, and it was not addressed by the Utah Supreme Court. Mr. Archuleta appropriately raised the Atkins claim as his first claim in his petition for habeas corpus pending before the court, and he immediately sought an order for a stay of proceedings to present the issue to the state courts for an evidentiary hearing.

B. Atkins Analysis

Like its landmark decisions in Ford v. Wainwright, 477 U.S. 399 (1986), which prohibits the execution of individuals who are insane, and Roper v. Simmons, 543 U.S. 551 (2005), which prohibits the execution of individuals who were under eighteen years of age at the time of their capital crimes, the United States Supreme Court in Atkins v. Virginia, 536 U.S. 304 (2002), held that the Eighth and Fourteenth Amendments prohibit the execution of another class of individuals: individuals with intellectual disabilities. The Supreme Court found that intellectually disabled persons "frequently know the difference between right and wrong and are competent to stand trial" but "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Atkins, 576 U.S. at 318. Those "deficiencies do not warrant an exemption from criminal sanctions, but they do diminish [a defendant's] personal culpability." Id.

In addition to finding that the retributive and deterrent aims of capital punishment cannot apply to those with intellectual disabilities, the Supreme Court found in Atkins that the "reduced capacity" of persons with intellectual disabilities created the impermissible "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty'" because

they have a diminished ability "to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors." Id. at 320 (citations omitted). "[R]eliance on [intellectual disability] can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. [Intellectually disabled] defendants in the aggregate face a special risk of wrongful execution." Id. at 321 (citations omitted).

There is no national definition of what it means to be intellectually disabled. Atkins, like Ford, deferred to the states to develop standards that ensure persons with intellectual disability, like persons who are incompetent, are not executed. Id. at 317. But in Hall v. Florida, 134 S. Ct. 1986 (2014), the Supreme Court found that Florida's rigid rule defining intellectual disability as an IQ of 70 or lower, without a further exploration of adaptive functioning, was unconstitutional because it suggested that intellectual functioning can be reduced to a single numerical score that was unaffected by a test's "standard error of measurement." Id. at 1995. "Intellectual disability is a condition, not a number." Id. at 2001.

Utah codified the holding in Atkins by creating an exemption from the death penalty for persons who have intellectual disabilities. See Utah Code Ann. § 77-15a-101 to -106. Unlike Florida's statute, Utah's statute defines intellectual disability[15] as "significant subaverage general intellectual function that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reason or impulse control, or in both of these areas" provided that both are manifested before twenty-two years of age. See Utah Code Ann. §77-15-a-102.

[15] Utah's statute uses the phrase "mental retardation" but for consistency in the order, and recognizing that the phrases refer to the same status, the court substitutes "intellectual disability."

Mr. Archuleta may or may not be intellectually disabled within the meaning of Utah's statute, "but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." Hall, 134 S.Ct. at 2001. "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." Id.

The state argues that Mr. Archuleta already had that opportunity. Because Mr. Archuleta's post-conviction counsel failed to raise the issue of his intellectual disability at what the state believes was the appropriate post-conviction moment in state court, the state argues that his Atkins claim may not be considered by the state courts, or even by this court, because the state courts, pursuant to Utah's PCRA, will find that Mr. Archuleta's claim is time barred and procedurally barred.[16] (Docket No. 80 at 30-38.)

The Utah Supreme Court may agree with that position. It may not. But this court finds that the interests in federalism and comity require that the state courts have the opportunity to make that decision. "Whether a state remedy is presently available is a question of state law as to which only the state courts may speak with final authority." Simpson v. Camper, 927 F.3d 392, 393 (8th Cir. 1991). "[A] federal court always must be chary about reaching a conclusion, based upon a speculative analysis of what a state court might do, that a particular claim is procedurally foreclosed." Pike v. Guarino, 492 F.3d 61, 74 (1st Cir. 2007).

[16] The state cites to Thomas v. Gibson, 218 F.3d 1213, 1221 (10th Cir. 2000), and Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991), to support its claim that Mr. Archuleta's Atkins claim, since it was not exhausted in state court, is deemed exhausted and defaulted from federal review because it will be procedurally barred by the state courts under the PCRA. (Docket No. 96 at 5-7.) At this point the court is not undertaking a federal review of Mr. Archuleta's Atkins claim, and therefore Thomas and Coleman are inapposite. Neither Thomas nor Coleman circumscribe this court's discretion to issue a stay, or its consideration of whether state or federal court is the best forum for an evidentiary hearing on Mr. Archuleta's Atkins claim. Moreover, both Thomas and Coleman are cases that address challenges to the state criminal justice system, and both were decided before Atkins. Mr. Archuleta's Atkins claim is not a challenge to the state criminal system that convicted and sentenced him. It does however, point to the limitations of the state's post-conviction process.

That is especially important where, as here, it is not clear that the PCRA, which is "the sole remedy for any person who challenges a conviction or sentence" necessarily applies to a determination of his intellectual disability status pursuant to Atkins. See Utah Code Ann. § 78B-9-102. The Atkins claim "is 'post-conviction' only in the strict chronological sense: Atkins was handed down in 2002, after [Mr. Archuleta] had been convicted in 1989." Hooks v. Workman, 689 F.3d 1148, 1183 (10th Cir. 2012).

Most of the claims in Mr. Archuleta's federal habeas petition focus on what happened at the trial and appellate stages, and request federal review of the state court proceedings where the jury found him guilty and sentenced him to death. AEDPA appropriately circumscribes the federal court's ability to review such claims for a variety of reasons, not the least of which is the presumption of a valid state conviction and sentence. See Ryan v. Gonzales, 133 S. Ct. 696, 709 (2013). Federal habeas review exists as a civil remedy only as a "guard against extreme malfunctions in the state criminal justice system." Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011) (citations omitted).

Mr. Archuleta's Atkins claim is fundamentally different than his other claims. It argues that, regardless of the process by which he was convicted and sentenced, regardless of the state appellate and post-conviction review process, the Eighth Amendment prohibits the death penalty for persons with intellectual disability, and that he is intellectually disabled. Mr. Archuleta has presented the court with evidence that he is intellectually disabled. (See Docket No. 75, Ex. A.) The state does not contest this evidence except to say that Mr. Archuleta should have submitted it sooner and that other experts have reached different conclusions.

That one of the experts during the 2006 hearing opined that Mr. Archuleta's "test data" does not support a finding of intellectual disability is not dispositive.[17] Indeed, what the record before the court shows is that there is a question of fact as to Mr. Archuleta's intellectual ability that must be answered. Evidence on this issue from the penalty phase in 1989, as well as during the evidentiary hearing on mitigation issues in 2006, makes it clear that there have been questions about Mr. Archuleta's intellectual ability and his adaptive functioning for most of his life.

The issue before the court is whether those questions are best answered in federal court or state court. The court considers that issue within the overall context of Mr. Archuleta's case as a capital case in federal court for habeas review, keeping in mind that the Tenth Circuit has found that resolution of an Atkins claim "is 'part of the criminal proceeding itself' and not 'civil in nature.'" Hooks, 689 F.3d at 1184.

The state worries about the court's intrusion into its interest in finality and deference to the trail court's decisions. But the state's interest in finality, in executing Mr. Archuleta, must be counterbalanced by the state's interest in carrying out only those executions that are constitutionally permissible. Whether Mr. Archuleta has an intellectual disability must be addressed pursuant to Atkins before the state is in a position to execute Mr. Archuleta. Given the time and resources the parties have already invested in litigating Mr. Archuleta's case, the open question about his intellectual ability, and the goals of AEDPA, it is not an abuse of discretion for the district court to stay the case and send the Atkins issue back to state court.

[17] The state suggests that Dr. Gummow's testimony is sufficient in this regard. It is not. Dr. Gummow testified that intellectual disability "is based usually on an IQ test" and "I don't see any evidence from the—from the actual test data that he was [intellectually disabled] . . . ." (May 17, 2006 Evidentiary Hearing Transcript, 94:23-95:24.) While IQ scores are a significant part of an analysis of intellectual disability, they must be considered along with an assessment of adaptive functioning. See Hall v. Florida, 134 S. Ct. 1986, 1994 (2014).

Atkins claims, like claims of incompetency pursuant to Ford v. Wainwright, 477 U.S. 399 (1986), can be raised at any time they are ripe.

> Prior findings of competency do not foreclose a prisoner from proving he is incompetent to be executed because of his present mental condition. Under Ford, once a prisoner makes the requisite preliminary showing that his current mental state would bar his execution, the Eighth Amendment, applicable to the States under the Due Process Clause of the Fourteenth Amendment, entitles him to an adjudication to determine his condition.

Panetti v. Quarterman, 552 U.S. 930, 934-5 (2007).

Mr. Archuleta, by and through his motion, has made the preliminary showing that he is intellectually disabled and is entitled to an adjudication of his condition. In Panetti, when faced with a question about a petitioner's mental status and competence, the Supreme Court found that AEDPA did not bar a second or successive federal habeas petition filed to address those issues, and directed the district court to hold an evidentiary hearing on Panetti's claims that he was incompetent to be executed. "It is proper to allow the court charged with overseeing the development of the evidentiary record in this case the initial opportunity to resolve petitioner's constitutional claims. These issues may be resolved in the first instance by the District Court." Id. at 962. Those principles are likewise applicable to Mr. Archuleta's Atkins claim. Indeed, in Hooks, 689 F.3d at 1162, the Tenth Circuit allowed the petitioner to file a second, or successive habeas petition to address his Atkins claims.[18]

Post-AEDPA, the court charged with overseeing the evidentiary record in Mr. Archuleta's case is a state court. Although it may well be within the court's discretion to address

[18] Mr. Hooks was convicted in 1989 and did not have his Atkins claim considered by a state court until 2004 after he filed a second petition for post-conviction relief in Oklahoma state court and received a stay in his federal habeas case until the resolution of the Atkins claim in state court. See Hooks, 689 F.3d at 1162. The Tenth Circuit cited Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012), to note that Mr. Hooks' Atkins trial was "the first designated proceeding" at which Mr. Hooks could raise a claim of intellectual disability. See Hooks, 689 F.3d at 1183.

Mr. Archuleta's Atkins status, and an evidentiary hearing in federal court remains a possibility if there is no state court forum for Mr. Archuleta, Mr. Archuleta has requested that his Atkins claim be addressed first in state court.[19]

Mr. Archuleta has a constitutional right not to be executed if he is intellectually disabled. No court has ever made a determination about his intellectual disability. The court is "hard-pressed to imagine a more 'significant consequence[]' for [Mr. Archuleta] than a determination of whether the state has the power to take his life." Hooks, 689 F.3d at 1184. To the extent that the State of Utah is committed to ensuring that Mr. Archuleta's sentence of death is constitutionally permissible, the court trusts that it will find a way to address Mr. Archuleta's Atkins claim. "The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." Hall, 134 S. Ct. at 2001. Moreover, "[o]nce a substantive right or restriction is recognized in the Constitution, . . . its enforcement is in no way confined to the rudimentary process" that preceded it. Ford, 477 U.S. at 410.

III. Conclusion

Mr. Archuleta's motion for a limited stay and abeyance of his petition is granted. Mr. Archuleta must commence his Atkins proceedings in state court within thirty days of this order,

[19] Since 2008, when the Utah Legislature amended the PCRA to "extinguish" common law exceptions in Hurst v. Cook, 771 P.2d 1029, 1037 (Utah 1989), to the procedural bar rule, the PCRA has held itself out as "the sole remedy for any person who challenges a conviction or sentence for a criminal offense" Utah Code Ann. § 78B-9-102(1). Among other things, Utah courts can no longer "excuse a petitioner's failure to file" where "the interests of justice require." See Gardner v. State, 234 P.3d 1115, 1145 (Utah 2010). The Utah Supreme Court has noted on more than one occasion "that [the 2008] amendments 'appear[] to have extinguished our common law writ authority.'" Id. at 1145 (citation omitted); see also Taylor v. State , 270 P.3d 471, 476 n.3 (Utah 2012). But if the PCRA truly is the sole remedy available to Mr. Archuleta to bring his Atkins claim in Utah courts, without exception, and his Atkins claim is barred by its terms, then the PCRA may violate not only the Utah Constitution, which, in Article I, Section 5, provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it" but also the United States Constitution, which, in Article I, Section 9, provides "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."

and he shall provide the court with status updates every three months. Mr. Archuleta must notify the court immediately upon the resolution of the state court Atkins proceedings.

Pursuant to the Sixth and Fourteenth Amendments, there is a right to counsel during Atkins proceedings. See Hooks, 689 F.3d at 1184-85. Accordingly, Mr. Archuleta's federal counsel has leave to petition the state courts to represent Mr. Archuleta in the Atkins proceedings before them.

SO ORDERED this 12th day of November, 2014.

BY THE COURT:

Tena Campbell
United States District Judge