IN THE SUPREME COURT FOR THE STATE OF UTAH

MICHAEL ANTHONY ARCHULTA,	)	
	)	
Petitioner/Appellant,	)	Case No. 20160419-SC
	)	
v.	)	Fourth District Court Case No. 14070047
	)	
STATE OF UTAH,	)	Death Penalty Case
	)	
Respondent/Appellee.		

OPENING BRIEF OF APPELLANT

On Appeal from the Order of the Fourth Judicial District Court Granting Partial Summary Judgment on the Petition for Post-Conviction Relief, the Honorable Jennifer A. Brown, Presiding.

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JURISDICTIONAL STATEMENT

Michael Archuleta appeals the grant of summary judgment on his post-conviction claim of an intellectual disability and being exempt from execution. 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 erred in granting summary judgment on a post-conviction claim of intellectual disability which would exempt the petitioner from the death penalty.

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 issue was preserved in the Response to Respondent's Motion for Partial Summary Judgment, filed July 20, 2015 ("Response to Partial Summary Judgment Motion"). (Response to Partial Summary Judgment Motion at 1-3, 30-46.)

II. Whether a claim of intellectual disability may be brought at any time as a categorical exemption from the death penalty.

The United States Supreme Court held that intellectually disabled[1] persons are "categorically excluded from execution" by virtue of the Eighth Amendment of the Federal Constitution. *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)[2]. "Matters of constitutional interpretation are questions of law" which are reviewed for correctness with "no deference to the district court's legal conclusions." *State v. Poole*, 2010 UT 25, ¶ 8, 232 P.3d 519; *see also Wickham v. Galekta*, 2002 UT 72, ¶ 7, 61 P.3d 978 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion."). This issue was preserved in the Memorandum of Points and Authorities in Support of Petition for Relief Under the Post-Conviction Remedies Act ("MIS"), filed December 12, 2014. (MIS at 62-73, 90-93.)

III. Whether Michael's right to the effective assistance of counsel in his prior post-conviction proceedings may be cause to overcome any procedural default on his intellectual disability claim.

This question involves the interpretation and application of the 1996 and 2008 versions of the Post Conviction Remedies Act ("PCRA"). Appellate courts review a trial court's determination of the law for correctness. *State v. Pena*, 869 P.2d 932, 935 (Utah

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[1] The United States Supreme Court, in its *Atkins* opinion, used the term "mental retardation," however, clinical practitioners now use the term "intellectual and developmental disabilities." The United States Supreme Court recognized and adopted this change. *See Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014).

[2] The claim of intellectual disability and categorical exemption from eligibility for execution will be referred to as the "*Atkins* claim."

1994). Correctness review provides no deference to the trial court's determination of law. *Id*.; *see also Wickham*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion."). This issue was preserved in the memorandum in support of the petition for post-conviction relief. (MIS at 93-115.)

IV. Whether Michael's claim of intellectual disability is subject to the PCRA's statute of limitations.

This question involves the interpretation and application of the Post Conviction Remedies Act ("PCRA"). Appellate courts review a trial court's determination of the law for correctness. *Pena*, 869 P.2d at 935. Correctness review provides no deference to the trial court's determination of law. *Id*.; *see also Wickham*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion."). This issue was preserved in the response to Appellee's motion for partial summary judgment. (Response to Partial Summary Judgment Motion at 20-22.)

V. Whether subjecting a claim of intellectual disability that was defaulted by the ineffective assistance of counsel in a prior post-conviction proceedings is an unconstitutional application of the PCRA's procedural and time bars.

"Matters of constitutional interpretation are questions of law" which are reviewed for correctness with "no deference to the district court's legal conclusions." *Poole*, 2010 UT 25, ¶ 8; *see also Wickham*, 2002 UT 72, ¶ 7 ("Generally, an appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness,

giving no deference to the post-conviction court's conclusion."). This issue was preserved in the memorandum in support of the petition for post-conviction relief. (MIS at 116-126.)

DETERMINATIVE AUTHORITIES

The following authorities are either determinative of this appeal or are of central importance to the arguments herein: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; "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. 1, § 9; "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; **"**A defendant who is found by the court to be intellectually disabled as defined in Section 77-15a-102 is not subject to the death penalty." Utah Code § 77-15a-101; "The court in which a capital charge is pending may raise the issue of the defendant's intellectual disability at any time. If raised by the court, counsel for each party shall be allowed to address the issue of intellectual disability." Utah Code § 77-15a-103; "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

This appeal is from an order of the Fourth Judicial District Court in and for Utah County, Honorable Jennifer A. Brown, presiding, granting Appellee's motion for partial summary judgment on Michael's claim that he has an intellectual disability and is exempt from execution by the State of Utah. Michael is challenging the legality of his sentence of death under state law and the state and federal constitutions.

II. Procedural History

Michael was arrested on November 25, 1988, for the murder of Gordon Church. (TR Preliminary Hearing Vol. 3, 1/26/1989 at 786.[3]) The jury returned a guilty verdict on December 15, 1989. (Trial ROA 535.) The entire penalty phase took place in less than four hours, excluding breaks, on December 20, 1989. (TR Trial Vol. 10, 12/20/1989 at 3564-3735.) That evening, the jury unanimously rendered a verdict of death for Michael. (Trial ROA 594.) On December 21, 1989, Michael was sentenced to death by Judge Ballif. (Trial ROA 703-06.) This Court affirmed the conviction and sentence. *State v. Archuleta*, 850 P.2d 1232 (Utah 1993).

Michael filed a Pro Se Petition for Writ of Habeas Corpus and/or Post-Conviction Relief on March 10, 1994. (PCR I ROA 1-4.) Karen Chaney and Ronald Nehring agreed to act as Michael's attorneys pro bono. (PCR I ROA 22.) "Mr. Archuleta's request for appointment of counsel was denied by the court in March, 1994, when this postconviction proceeding was initiated." (PCR I ROA 397.) Michael's counsel filed an Amended Petition for a Writ of Habeas Corpus and/or Postconviction Relief on August 11, 1994. (PCR I ROA 46-75.) On October 4, 1996, the Fourth District Court dismissed the petition. (PCR I 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

[3] Citations to the trial transcripts will be "TR, proceeding, 00/00/0000 at page number," citations to the trial record on appeal will be "Trial ROA (entry number)," citations to the record on appeal for the previous post-conviction proceedings will be "PCR I ROA (entry number)," and citations to the post-conviction proceedings on appeal will be "date filed, document name."

allegation of ineffective assistance of counsel at trial and on appeal, was barred" and was reversed and remanded. (Utah Supreme Court, Case No. 960533, Dkt. No. 41, PCR I ROA 590.)

The Second Amended Petition for a Writ of Habeas Corpus and/or Postconviction Relief was filed on June 14, 2002. (PCR I 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 ineffective assistance of trial counsel. (PCR I ROA 2298.) On January 22, 2007, the court denied Petitioner's Petition for a Writ of Habeas Corpus and/or Post-Conviction Relief. (PCR I ROA 3338-3376, 3379-81.) This Court affirmed denial of the petition. *Archuleta v. Galetka*, 2011 UT 73, 267 P.3d 232.

On December 6, 2012, counsel for Michael filed his federal Petition for a Writ of Habeas Corpus. (United States District Court for the District of Utah Case No. 2:07-cv-630 ("USDC"), Dkt. No. 58, Petition for Writ of Habeas Corpus.) On June 21, 2013, in accordance with a briefing schedule agreed to by the State (USDC Dkt. Nos. 65 and 66, Joint Proposed Case Management Schedule and Order), counsel for Michael filed a motion to stay his federal habeas case and return to state court to present his *Atkins* claim, (USDC Dkt. No. 75, Motion to Stay and Hold Habeas Proceedings in Abeyance). As part of that motion, Michael's counsel requested leave of the federal court to represent him in the subsequent state court proceedings.

The federal district court granted Michael's motion to stay the federal proceedings and return to state court to exhaust his *Atkins* claim on November 12, 2014. (USDC Dkt. No. 107, Order Granting Motion to Stay.[4]) The order directed Michael to commence his state court proceedings within 30 days of the order. The order also granted his federal habeas counsel leave to represent Michael in state court.

On December 12, 2014, Michael filed his petition for post-conviction relief. (12/12/2014, Petition for Relief Under the Post-Conviction Remedies Act.) The State filed a motion for partial stay of the petition, asking the court to bifurcate the *Atkins* claim and stay the non-*Atkins* claims, which the court granted. (01/14/2015, Motion for Extension to Respond to Petition and for Partial Stay of Petition; 02/05/2015 Ruling.) The State moved for partial summary judgment on the *Atkins* claim, and Michael filed a response. (05/27/2015, Motion for Partial Summary Judgment; 07/20/2015, Response to Respondent's Motion for Partial Summary Judgment.) The State moved to file a reply, which was granted. (07/27/2015, Motion for Leave to File a Reply Memorandum in Support of Summary Judgment; 08/12/2015 Ruling and Order on Respondent's Motion For Leave to File a Reply Memorandum.) In its reply, instead of responding to Michael's opposition to partial summary judgment, the State indicated that "For various reasons, including changes in the law since the State initially filed its summary judgment motion, the State has concluded to withdraw its motion on the merits of Archuleta's *Atkins* claim"

[4] The order is attached to the 12/12/2014 Memorandum of Points and Authorities in Support of Petition for Relief Under the Post-Conviction Remedies Act ("MIS") as Exh. 3.

but did not concede that Michael met the *Atkins* standard. (09/23/2015, Reply Re: Summary Judgment Motion.) The State also filed a motion to stay the summary judgment proceedings and move ahead with a determination of the merits of the *Atkins* claim. (09/23/2015, Motion to Stay the Summary Judgment Reply and Ruling on the Procedural Defenses.) The court denied this motion and granted summary judgment on the *Atkins* claim. (02/02/2016 Corrected Memorandum Decision and Order on Motions ("Memorandum Decision").)

The State moved to certify the decision as final and appealable, which Michael opposed. (02/03/2016, Motion to Certify *Atkins* Decision as Final and Appealable; 02/17/2016, Response in Opposition to Respondent's Motion to Certify *Atkins* Decision as Final and Appealable.) The court granted the State's motion. (04/12/2016, Ruling and Order on Respondent's Motion to Certify *Atkins* decision and final and appealable.)

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 I ROA 1045.) Ruth Sandoval[5] wasn't married and claimed Michael's father was Steven Romero, an 18-year-old unemployed man. There was no indication Romero "acknowledged paternity or evidenced any interest in Michael since his birth." (PCR I ROA 1041.)

Intellectual disabilities defined Michael's maternal family, which lived in extreme poverty and could not provide a stable or healthy home for him. They were nomadic,

[5] Ms. Sandoval's first name is Pilar, however, she was at times also known as Ruth and some records may refer to her by that name.

often moving between Colorado and Utah. Many were drug addicts and alcoholics. These afflictions beset multiple generations of Michael's kin. Michael was in the putative care of these impaired and irresponsible people--primarily his mother and her parents--during his early development.

Pilar, was the first child born to Erminio Sandoval, 19, and Larry "Linia" Martinez, 21, in 1946. (MIS Exh. 4.) After Pilar, Linia would give birth to at least 17 babies, four of whom died in infancy, including two from malnutrition. (MIS Exh. 5 at 1-2.) At 15, Pilar was referred to Juvenile Court. (MIS Exh. 6 at 39.) It was noted that Pilar "is a very thin girl and the officer states she could very well be undernourished." (MIS Exh. 6 at 39.) In a psychological report dated Dec. 7, 1962, Pilar's sister, Martha, 13, was described as "thin and slightly undernourished." (MIS Exh. 7 at 82.)

Pilar informed her probation officer in 1961 that she had quit school two years prior because she "just couldn't seem to get along there." (MIS Exh. 6 at 40.) The probation officer wrote that "from observation it would seem that her intelligence is below average. She is very easily led and "appears to be a follower." (MIS Exh. 6 at 40-41.)

By the time Michael was seven months old, his 16-year-old mother and her two sisters, Louise and Martha, were committed to the custody of the Utah State Industrial School to be "cared for and trained according to law." (MIS Exh. 6 at 36.) The Salt Lake County District Juvenile Court found Pilar to be:

> wayward or habitually disobedient and is uncontrolled by her parents in that: A) On or about July 28, 1962, said child

> [Pilar] left the home of her parents and remained away without her parents' knowledge of her whereabouts, until returning home on or about August 4, 1962. B) She [Pilar] frequently leaves her home and remains away for long periods of time without her parents' knowledge of her whereabouts.

(MIS Exh. 6 at 36.)

Pilar's behavior resulted in emergency care. In 1964, Pilar's friends took her to the hospital after she ingested pentobarbital and bromide and fell unconscious. (MIS Exh. 9 at 22, 24.) Pilar stated "her recent boyfriend has been fooling around with other girls and she took 14-15 pills because of this." (MIS Exh. 9 at 46.) One of her friends told medical staff that Pilar may be pregnant. "She [Pilar] states she has one child, [and] has had several abortions." (MIS Exh. 9 at 46.)

Later in 1964, Pilar was again taken to an emergency room by the police after a drug overdose. While Pilar was "admittingly" very drunk, she took 12 birth control pills and went to her mother's home, complaining of sickness. Pilar's mother called police, who took her directly to the hospital. (MIS Exh. 9 at 19.) Medical staff noted, "Patient [Pilar] thinks she is pregnant and boyfriend wants her to 'get rid of it' so she took these pills (belonging to mother) in this attempt." (MIS Exh. 9 at 19.)

Michael himself appears in a police report at the age of three. On April 6, 1965, the police responded to a complaint, made by Pilar's brother, [Erminio] Junior, of a family fight. The officer reported a "good deal of yelling and name calling going on between [Pilar] Ruth Sandoval and her father, Erminio Sandoval." Erminio was calling Pilar "a whore and various other names of equally infamous nature." She was "returning

the names with equal fervor." The dispute apparently started between Junior and Erminio, but "spread to the whole family." Erminio

> Erminio had been drinking which was not unusual there. After this had gone on for some time and after [Erminio] made some threats to strike [Pilar] Ruth's small child Michael, [Pilar] decided to have [Michael] adopted out. Considering the situation and the feeling of Mr. Sandoval towards the child, [Officer Goodrich] took the child to the Detention Home for Protective Custody. [Officer Goodrich noted] the child had a large burn on his bottom which [Pilar] Ruth said was put there by her father, which he deni[ed].

(PCR I ROA 1208.)

In 1965, juvenile court officer Barbara Liebroder authored an investigative report that reiterated details surrounding Michael's removal from the home. Records indicated Michael had been "raised by his maternal grandparents nearly since his birth." His mother had been "committed to the [State] Industrial School about one month" after Michael's birth and since her release she had been living with various friends, "leaving Michael in the care of her parents." (PCR I ROA 1040.) After Michael had been placed into shelter care, Pilar never inquired as to his well-being. (PCR I ROA 1041.)

Pilar's absence in Michael's young life was well documented in her State Industrial School records; a caseworker named Dixie Smith wrote that in 1962, Pilar and her sister Louise were referred to the juvenile court for being habitually absent from home. (MIS Exh. 6 at 38.) In a juvenile court report, the writer states that according to police, "the parents exercise no control over these girls and seldom report them missing

from home." (MIS Exh. 6 at 38.) "The family feel that they are persecuted by the people in authority and agencies. (MIS Exh. 6 at 38.)

The Sandoval family was "well known" to the juvenile courts as Pilar and her oldest three siblings had "all been committed to the [State] Industrial School." Two of Pilar's younger siblings had also been under the supervision of the Welfare Department. Pilar's parents, who had been caring for Michael, also had four of their own pre-school aged children to care for. The Sandoval family "had presented with serious social and legal problems" via contact with most all of the social service agencies in the Salt Lake City area and in Colorado. "Volumes had been written" about the "family's various inadequacies," including "mental retardation" and their general "failure to follow cultural norms of society." In 1965, at the age of 19, Pilar presented as "a hardened 30 year old street walker." Most all of her "associates" were "girls who had also been placed at the [State] Industrial School" and had been "deprived of their children." (PCR I ROA 1040.) After being detained for one incident, Pilar was released a short time later "to care for her child and family . . . The mother [Linia Sandoval] has a heart condition and is expecting her 12th child . . . Mr. S [Erminio Sandoval] has cancer of the leg and is to go into the hospital this month." (MIS Exh. 8 at 21.)

Michael's mother and her siblings also failed to thrive academically. At age 6, Pilar was reported to have an IQ of 62. At age 8, her IQ was reported as 77. (MIS Exh. 10 at 2.) When she was 16, Pilar was given an achievement test for grades 7 through 9. "[Pilar] Ruth's test results indicate that she is probably functioning in an I.Q. range

falling in the upper 60's to lower 70's." (MIS Exh. 6 at 83.) The State Industrial School records indicated that Pilar "is the oldest and most severely retarded of the three sisters received here . . . She is obviously mentally limited and can probably never progress beyond to learning of low level work skills." (MIS Exh. 6 at 83.)

A psychological evaluation from 1962 indicated "[s]he was found to be of dull normal intelligence (Verbal IQ 74, Performance IQ 89, Full Scale IQ 79)" and "not motivated to change and her antisocial behavior was literally taught by her parents." It was felt that she could not be helped at the State Industrial School. (PCR I ROA 1041.) Five months after Pilar was admitted to the State Industrial School, a report noted that she had "progressed very little. She is still bossy, ignorant and defiant. I don't think she wants to improve or she is too mentally retarded to care." (MIS Exh. 6 at 71.)

Pilar's siblings also manifested low intellectual functioning. Martha's IQ was reported at 64. (MIS Exh. 7 at 267, 269.) Louise's IQ was reported at 73. (MIS Exh. 11 at 2.) Erminio Junior's IQ was reported at 78 and at 73. (MIS Exh. 12 at 2.) Lana, who was eight years younger than Pilar, was also eventually placed in the State Industrial School in 1966 when she was 14. (MIS Exh. 13 at 21.) The school reported Lana's full scale IQ to be 59.

Juvenile court officer Liebroder, who was assigned to Michael's case, wrote that Pilar's mother appeared "retarded" and "expressed complete disgust with her daughter," but failed to report any sense of responsibility for Pilar's behaviors. Pilar's father was "unemployed due to injury," but even when working he was unable to maintain an

income to adequately support his family and the family had received "welfare" benefits for years. (PCR I ROA 1042.)

Shortly after the three oldest Sandoval sisters (Pilar, Louise and Martha) were removed from the Sandoval home and placed into the State Industrial School, 13-year-old Martha had her first private interview with her caseworker. During that interview Martha confided that her "father has been quite strict and brutal. She doesn't want to be in the same home with him." The caseworker noted that Martha could not understand why she was in the State Industrial School, but thinks "it is ok now because she doesn't get beat by her father." (MIS Exh. 7 at 76.) "Mr. Sandoval has a drinking habit and from time to time attempts to discipline his children by beating them with a wire or a broom." (MIS Exh. 13 at 56.)

A welfare worker indicated that the Sandovals had no authority over their children, and lacked knowledge in caring for them. (PCR I ROA 1041.) A public health nurse reported there was "no discipline in the home," the home was generally "unclean," and "the entire family suffer[ed] a persistent staph infection." (PCR I ROA 1041-42.) In 1964, Michael, age 2, was taken to an emergency room by his grandmother for an infected ear. (MIS Exh. 14 at 1.) Linia reported that it had been four days since Michael "developed a sore on [his] left ear and he picked this and it has become swollen and discolored since that time." (MIS Exh. 14 at 2.)

The Sandoval home was described in a 1962 juvenile investigation report as "very substandard in its surroundings with no lawn or trees and nothing but adobe looking soil

around it." The writer noted "a very strong odor" from "an outhouse or an open septic tank." "The home inside is very meagerly furnished and quite unclean looking." It did not have any lights on during the reporter's evening visit, so he had this discussion with Linia in the dark. (MIS Exh. 7 at 108.) Eventually the family was forced to move from the home because it was "scheduled for demolition." (MIS Exh. 11 at 32.)

Pilar's sister Louise was "permanently deprived" of a child by the court. Juvenile court officer Liebroder predicted the Sandoval family would "continue to be involved with public agencies," and that leaving Michael in such a home "would virtually assure his becoming an antisocial, nonproductive person." Liebroder noted that the Sandovals could not care for their own 13 children, let alone Michael. Pilar, "as early as 1962," when she was 16 years old, had been deemed "a hopeless case." Since then, she had become a "known prostitute, alcoholic and probably a narcotics addict." Pilar was "unable to read or write," expressed "no interest in improving herself," and "failed to acknowledge anything faulty about her behavior." (PCR I ROA 1042.) Eventually, it was recommended that Pilar Sandoval be "permanently deprived" of her son Michael and "he be placed in an adoptive home." (PCR I ROA 1042.)

Michael was placed into a shelter home on in April 1965. It was anticipated he would be released for adoption by the court in June. During a home visit on May 21, 1965, Michael's shelter mother told a Children's Service Society caseworker that Michael arrived to her home "in such a filthy condition that it took her a week to get him clean." Michael was "at first destructive and abusive, and refused to mind" but seemed

to respond positively to love and care. It was noted that "Michael ha[d] several burn scars on his body which resembl[ed] cigarette burns," and he also had" a very large deep burn on his buttocks which looked as though he had sat on a floor furnace." (PCR I ROA 1046.) After a hearing, the State of Utah gave legal custody and guardianship of Michael to the Children's Service Society of Utah. (PCR I ROA 1099-100.)

In 1966, Michael was evaluated at the Utah Psychological Center by Malcolm Liebroder, Ph.D. "On the Peabody Picture Vocabulary Test Michael obtained an IQ score of 77. On the basis of this test, he would be considered a very slow learner." He performed better on the Merrill-Palmer Scale of Mental Tests and "obtained a converted IQ score of 86 (dull normal)." His foster mother's responses to the Vineland Social Maturity Scale placed him at about the 36-month level (Michael was 49-months old). It was noted that when Michael "came to the foster home he was retarded in many areas of development. He ate like an infant and did not seem to use his teeth to chew food. He could not talk and did not seem to understand what was said to him." On the Merrill-Palmer test he performed at the 30-35-months level on speech and language tasks. On other tasks, on the same test, he performed at the 36-41-months, 42-47-months, and 48-53-months levels. Michael exhibited severe behavioral problems. He was able to tolerate his foster mother, but wanted no one else to touch him. Dr. Liebroder concluded it was not in Michael's best interest to be adopted at that time. He thought it might be helpful for his social and emotional adjustment to be "sent to a good nursery school

several times a week." It was thought that expanding his environment may be helpful to his "intellectual development." (PCR I ROA 1197-98.)

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. Stella Archuleta seemed accepting of Michael's presentation as a "high strung, nervous child." They planned for another visit before Michael was moved to their home but Michael was placed with the Archuletas the following day because the prior foster family would not take him back. He was "quite apprehensive" about the move. (PCR I ROA 1054) Michael expressed some apprehension about the case worker leaving him at the home and wanted her to stay. During a check-in call with the Archuleta family a few days later, Mrs. Archuleta noted Michael would awaken during the night needing "reassurance she was still there." (PCR I ROA 1054.)

During a home visit a month later, the case worker noted that Michael is already calling the Archuletas "mama" and "daddy." (PCR I ROA 1055.) He expressed to Mrs. Archuleta that he wanted to stay with her and not go back to his previous foster home. He was having difficulty minding and staying in the yard as directed. He misbehaved in the grocery store and was a "rather destructive child" but Mrs. Archuleta was able to identify positive qualities as well. On a subsequent home visit in May 1967, the case worker discussed a summer nursery program for Michael to help him adjust to other children. Mrs. Archuleta was very affectionate with Michael and he seemed to respond

well, this was "encouraging to [the] worker as Michael used to act as though he did not care to have other people touch him." (PCR I ROA 1055.)

In August 1967, the Archuletas noted Michael's "inability to follow through with instructions and his determination to disregard discipline." The case worker explained some of Michael's previous foster care history and noted he was "a very disturbed child" and that he might "be a child for whom [they] could do nothing as far as any great change in his behavior," but also noted that "good, kind, fair discipline administered consistently over a long period may have a favorable effect." The case worker felt the Archuletas would benefit from a "mental hygiene clinic or child guidance clinic." The Archuletas want more help in dealing with Michael. Mrs. Archuleta expressed concern if Michael would be able to manage kindergarten in the fall. The case worker noted Michael had in the past pushed people away and "seemed to be afraid to have people touch him" but was responsive to affection from the Archuletas. Michael had been exhibiting hostile behavior to his foster brother by breaking his things and making a mess out of his room. Michael had been associating with another child in the neighborhood who also had emotional problems and Michael was often blamed for things that they both did. Michael had difficulty understanding why he was punished and the other child was not. (PCR I ROA 1056.)

In September 1967, Mrs. Archuleta informed the Children's Service Society that she had been called to Michael's kindergarten to take him home. The teacher did not want him in the class. He had been acting up and causing a disturbance. Mrs. Archuleta

was very upset and noted his behaviors had caused her own children not to like him anymore. She felt they were not able to help Michael. Michael had been hitting other children and laughing. He was unable to discern "when things were dangerous" and took chances "walking in the road and picking on older children." He was unable to show appropriate fear. The Archuletas were referred to the meetings at the Community Mental Health Center to help them better understand Michael and his behaviors. By October 1967, Michael was doing better at school and at home. (PCR I ROA 1057.)

A letter from a social worker with Nebo School District, confirmed the above account of Michael's academic difficulties. Michael was referred to the Department of Special Services because he was unable to satisfactorily adjust to kindergarten. It was recommended that Michael be placed into the Headstart program where he could have more individual attention and a better opportunity to correct the "language development deficiency that resulted from early life deprivation." (PCR I ROA 1149.) In April 1968, it was reported that Michael had received an evaluation with recommendations that he remain in Headstart through the summer and repeat kindergarten in the fall because he was not "emotionally ready" for first grade. (PCR I ROA 1059.)

On June 4, 1968, Michael was evaluated by Dr. Liebroder at the Utah Psychological Center again. He received a Verbal IQ of 86, a Performance IQ of 87 and a Full Scale IQ of 85. (PCR I ROA 1059, 1199). Dr. Liebroder felt the scores on the test were "disappointing" and fell within the dull normal range. It was noted that Michael did not view himself "as a capable child" and "[h]is insecurity and lack of confidence were

somewhat revealed in responses to the Thematic Apperception Test." There were also "strong anxieties about being abandoned." Michael had "expressed an unwillingness to go to school and relate to his peers." (PCR I ROA 1199-1200.)

In June 1968, the case worker recorded concerns that Mrs. Archuleta was weary of accepting full responsibility for Michael as an adopted child. The case worker noted that Mrs. Archuleta may not have realized that Michael "may not ever reach the low normal range." Michael seemed unable to achieve academically. The school planned to place Michael into kindergarten in the fall, but Mrs. Archuleta had some concern that Michael would be bored if not started in first grade. (PCR I ROA 1060.)

In August 1968, the Children's Service case worker met the school psychologist, Dr. Gayle, and reviewed Michael's testing from March 1968. Michael was reported to have "poor eye and motor control." Michael distrusted "his own ability and has a lack of confidence." The school psychologist felt that in some areas Michael had "peaks of achievement, but in too many areas he was slow and needed special help." Dr. Gayle stated that it may be possible to have Michael admitted to remedial reading, although it normally required an IQ higher than Michael's. Dr. Gayle agreed to work with the family and "help them understand the family constellation" and what could be done to help Michael have "confidence in his ability to achieve." (PCR I ROA 1061.)

The Nebo School District social worker noted that Michael was placed in kindergarten at the beginning of the 1968 school year but "was misbehaving because he lacked interest in the classroom activities." A recommendation was made for transfer to

the 1-B program which was an "in-between kindergarten and 1st grade readiness program." It was felt to be an appropriate placement for Michael because the group was "smaller and not as demanding" as first grade, but more stimulating than kindergarten. Michael had some behavior problems in 1-B, but it was he could cope with it. (PCR I ROA 1149.)

At a home visit by a case worker in September 1968, Mrs. Archuleta related that Michael had been placed into 1-B class, a full day program, from his previous kindergarten program of only 2 and ½ hours daily. The teacher of the 1-B class had "a reputation for being especially good with troubled children." Michael continued to have good and bad days in school. By October 1968, Mrs. Archuleta had contacted the Children's Service Society and noted Michael had been having great difficulties in school with aggression towards other children. Michael was having problems being liked by the children at school and his siblings. Michael had also engaged in further risk-taking behavior by setting off flare caps. The case worker followed up with a call to Dr. Gayle who indicated that Michael was displaying behavior that "certainly needed professional attention." (PCR I ROA 1062.)

A case worker summary of October and November 1968 indicated that Mrs. Archuleta reported ongoing problems with Michael's short attention span, aggressive behaviors, lying, stealing, and difficulty communicating verbally. She also reported Michael to be extremely hyperactive. She noted that Michael was sensitive and when he

had done something wrong he would ask if he was going to be sent away. (PCR I ROA 1063.)

In September 1971, Michael was taken for evaluation to the Timpanogos Community Mental Health Center by Mrs. Archuleta. Michael was 9-years-old. It was his first outpatient admission to the Center. Mrs. Archuleta reported that Michael had problems with "disrespect of authority and of other kids at school," that he "won't readily follow rules," and he was stealing, lying, and insecure. It was noted that Michael had seen prior counselors since kindergarten in connection with his behavioral problems in school. Positive qualities for Michael were noted, but it was also reported that he did not have a very long attention span, even for activities which he enjoyed. Michael was enrolled in third grade at Westside Elementary School. He was noted to have alienated himself from many of his peers and teachers. Michael was referred to Dr. Washburn's play therapy group and Mrs. Archuleta was referred to the corresponding mothers' group. (PCR I ROA 1157-59.)

Michael was tested at the Timpanogos Community Mental Health Center. His IQ was scored in the "borderline mentardation [sic] classification." (PCR I ROA 1159.) On the Hooper Visual Organization Test, Michael's scores indicated a mild degree of impairment that "[m]ay reflect severe emotional disturbance, mild organic defect, or disturbed mental functioning in schizophrenics." (PCR I ROA 1171-73.)

In October 1971, Michael was attending play therapy groups at the Mental Health Unit in Provo, but Mrs. Archuleta questioned what purpose the group was really serving.

She did not feel it was helping much with Michael's problems. A more complete evaluation was requested. Michael continued to have difficulty concentrating on his work in school. His teacher noted that he had a very short attention span. Michael continued to have difficulty in his peer relationships, especially with younger children. (MIS Exh. 15 at 35-36.)[6]

At age 10, Michael was reading at a first grade level which impaired the rest of his subject matters in school. In November 1972, school officials determined that Michael could no longer continue at the school he was attending. (PCR I ROA 1079.) He was unruly and disruptive in class. One recommendation was to place Michael at Salem School, a school for children with learning disabilities. Another possibility was the Children's Ward at the Utah State Hospital. (PCR I ROA 1080.)

At the Salem School, Michael was in a class of only 10 other students. Mrs. Archuleta attended school with Michael one day and was concerned that there was more playing than learning. The case worker noted that contact had been made with Dr. Washburn at Timpanogos Community Mental Health Center and Michael was in need of EKG testing. (PCR I ROA 1078.)

Michael, at 12, was evaluated again by Dr. Liebroder in January 1974. Michael was restless and had some tendency to "respond excessively to auditory distractions." He was only able to read at the fourth grade level. There were indications of "minor

[6] This exhibit is a more legible copy of the documents found at PCR I ROA 1039-97. Note that pages 35 and 60 of Exhibit 15, are two new additional pages and were not part of the PCR I ROA.

difficulties in integration of visual-motor skills noted on the Bender-Gestalt [test]." Michael's academic and behavioral problems at school and home were attributed to "strong feelings of insecurity, anxiety in relationships, and an extremely poor image of self." Test results supported these findings. Michael needed counseling to help him work through feelings about adoption and his natural mother, and to work on establishing trusting interpersonal relationships and feelings of competence. It was recommended that contact be made with Michael's school to discuss his fourth grade placement, two years behind his age group, as additional problems might arise if he reached puberty while still in elementary school. (PCR I ROA 1201.)

A Children's Service Society case worker summary from September 1974, through January 1975, indicated that Michael's behaviors at school and in the neighborhood warranted an evaluation at Timpanogos Mental Health Center. The middle school had informed Mrs. Archuleta in October 1974, that Michael could not attend there any longer. The school recommended Provo Canyon Boy's School or the State Hospital Children's Ward. Michael admitted to problems with "jumping out of his seat and talking out of turn." The evaluation at Timpanogos Mental Health recommended placement at the Children's Ward at the State Hospital. (PCR I ROA 1091).

Michael was admitted to the Children's Ward at the Utah State Hospital on October 24, 1974. Claudia Dastrup, MSW, reported the reason for Michael's admission was that he had become "impossible to handle" in his home, neighborhood, and school; admission was recommended by Dr. Washburn with the Timpanogos Mental Health

Center. It was reported that Michael had been dismissed from all the grade schools in the Springville area. He was considered to be "ungovernable at home and at school" where he did not respond to authority or discipline and was "seemingly unable to learn from past experience." Multiple examples of Michael's difficult behaviors were noted, but it was coupled with examples of his ability to demonstrate kindness and compassion. Ms. Dastrup summarized many of the facts known from Michael's early years which noted his dysfunctional family of origin including his neglectful and impaired biological mother, his retarded grandmother and heavy-drinking grandfather. Michael's abuse in the form of burn scars and general neglect was also reported. Upon his arrival to the Archuleta home, Michael expressed a fear of "closed doors" and "warm water." Michael's educational history had also been unstable. Michael was unable to function in kindergarten and had to be placed into the Headstart program. He was unable to function in elementary schools in the Springville area and ultimately had to be enrolled in Salem School--a school for children with learning disabilities--for his fourth and fifth grade years. For the current academic year, he was enrolled in regular programming at the Springville Middle School, but began demonstrating behavioral problems after just a week. It was reported that Michael had a very difficult time reading. (PCR I ROA 2884-86.)

Eugene J. Faux, M.D., the Director of Youth Services at the Utah State Hospital completed Michael's admission evaluation in October 1974. Michael, age 12, was identified very early on as a "disturbed child" and it was apparent he was "hyperactive"

and "destructive." Dr. Faux commented on Michael's instability in his early years and his eventual placement with the Archuleta family. Mrs. Archuleta was noted to be unique in her determination to afford Michael the best opportunities socially and academically despite his many problems. Dr. Faux noted that a series of psychological tests had documented the fact that Michael was of "marginal intelligence" and had been "a very slow student." In formal testing, Michael's achievement was found to be between the second and third grade level and in some areas even lower. Michael obviously had a reading disability as he demonstrated word and letter reversals frequently seen with this syndrome. His insight and judgment were defective. Dr. Faux provided diagnoses of "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 I ROA 2870-71.)

Donald F. Bishop, Ph. D., performed psychological testing on Michael in November 1974. Dr. Bishop noted that despite having been tested many times in the past, Michael was cooperative with testing. He encountered significant difficulty on the vocabulary portion of the Slosson Intelligence Test. Results of the tests indicated Michael was functioning at a mental age of 10 years and 6 months (he was 12). Michael performed especially low in reading and arithmetic. On the Sentence Completion Test, Michael produced sentences that were reflective of the here-and-now with little thought of future consequences. Overall, Michael fell into the "dull or slow learner classification." It was noted that a treatment program that protected Michael from his

"poor judgment" was needed, along with an academic program that provided "special help." (PCR I ROA 2887-88.) Michael was placed in the lowest behavioral level due to aggressive behavior. He was placed in first grade level in his classes, but was progressing to more advanced levels.

In October 1975, Michael was assessed by psychiatrist Cantril Nielsen, M.D., at the Utah State Hospital. Dr. Nielsen noted Michael had been able to exert "some controls" over his destructive, acting out and aggressive behavior, but without sufficient structure Michael had "great difficulty maintaining any degree of control." Michael's schooling remained a "significant problem" and he had a "rather severe learning disability." Dr. Nielsen reported his learning disability may well be related to the fact his IQ was in the "lower range and because of his long-term negative experiences in the school setting." Dr. Nielsen was doubtful Michael had been able to internalize any of the "external control systems" put into place at the hospital. He also noted that Michael had some problems "learning from experiences." His diagnoses were: unsocialized-aggressive reaction of childhood and learning disability. (PCR I ROA 2869.)

After Dr. Nielsen's assessment, Michael's progress at the Utah State Hospital was summarized by Program Coordinator, Ronald B. Kelly, MSW. Mr. Kelly noted only slight improvement to Michael's behavior since the time of admission and that Michael still needed a great deal of behavioral improvement if he were to be able to successfully function in the community. A special behavioral program was developed for Michael, but after having been in effect for two months it showed little effect. Mr. Kelly noted

that despite the minimal improvements and the unsuccessful treatment programs, Michael would likely "need to be placed back in the community regardless of his ability to handle the situation." It was thought that should Michael's attempts at functioning in the community fail, he would be better served on the adolescent unit of the hospital as he needed to develop "more proficient skills in peer relationships." (PCR I ROA 2882-83.)

At the Utah State Hospital, Michael was given Thorazine, a powerful antipsychotic medication, on several occasions to control his behavior. The consistent administration of this powerful drug throughout Michael's hospital stay occurred despite a report that "[m]edication may help, but if so, only minimally" and that Michael had already "been on medication for a number of months" with little benefit. (PCR I ROA 2869); (*see* MIS Exhs. 16-22.)

In October, 1974, a teacher at the Utah State Hospital, Arthella Starke, noted that Michael, age 12, read the first grade reader "rapidly and well and was placed in a 3rd grade reader." Michael's level in math, phonics, and spelling was at second grade levels. The teacher's goal was to move him rapidly to a level that challenged him, approximately fourth grade. (PCR I ROA 2854.) In December 1974, Ms. Starke reported Michael to be working at a fourth grade level in most areas, but remained low in math and spelling. (PCR I ROA 2856.) She also reported Michael was still behind in reading. (MIS Exh. 21.) Teacher Linnea Leary noted in March 1975, that Michael's lack of academic skills was slowly improving, but much work was still needed. She noted efforts to improve Michael's self-concept and that he needed to feel accepted. **(**MIS Exh. 22.) Problem lists

developed by staff at the State Hospital repeatedly identified Michael's poor school performance as a deficit and that he was "academically behind." (PCR I ROA 2873, 2875, 2877, 2879.)

Upon Michael's discharge from the Utah State Hospital in January 1976, Ronald Kelly, noted that Michael only made slight gains in behavior improvement. The staffs' opinion was Michael would continually need supervision and structure to channel his abundant energies. If he needed to return to the hospital, he would have been a more acceptable candidate for the adolescent unit. The staff initially recommended Michael be placed in a supervised day treatment setting at Timpanogos Mental Health Center, but he was not accepted because there were "no openings," and Michael's behaviors coincided with the behaviors of other children in the program, creating an imbalance of patients. Michael was referred back to his local school district for programming. A program was developed with the staff of Springville Junior High School. The school was "reluctant, but willing to give [Michael] their best effort." Michael was also referred for outpatient care with Timpanogos Mental Health Center. Michael's discharge diagnoses from the hospital was "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 I ROA 2867-68, 2871.)

During an interview on September 9, 2012, Michael's adoptive mother, Stella Archuleta, and adoptive sister, Peggy Ostler, reported that Michael had been involved in

an incident that seriously injured his head. They reported that Michael was at Price River with an adoptive cousin. Michael dove into the river and struck the bottom of the river with his head and face. Mrs. Ostler reported that upon her arrival to Castleview Hospital in Price, Utah, Michael was virtually unrecognizable because his face was so bruised, cut, and swollen.

Descriptions from family and acquaintances of Michael's life-long difficulties are abundant. Stella Archuleta confirmed childhood records which noted that Michael was unable to tolerate kindergarten and had to be placed into Headstart. She also noted a chronic history of impulsivity for Michael and illustrated with an example that Michael decided to marry his girlfriend in the early 1980's with one day's notice. Mrs. Archuleta was able to talk him into waiting 3 days so she could organize a proper wedding. Mrs. Ostler stated that Michael was never capable of thinking through a single thing, he just acted. When Michael began using a bike for transportation, since he had lost his driver's license, he was never able to keep track of the bike for more than a day or two. Mrs. Archuleta and Mrs. Ostler recalled that Michael's drinking behavior began at an early age.

Mrs. Archuleta remembered once when Michael was elementary-school-age he came home intoxicated after drinking alcohol pilfered from a friend's father. Mrs. Ostler noted that she had visited Michael at a detention facility when he was 14 or 15 years old. Upon her arrival, Michael was visibly intoxicated and told her he had drunk Kool-Aid that had been fermented with a potato. Mrs. Ostler also recalled having to pick up

Michael, age 17 or 18, once from a detention facility on the BYU campus due to an alcohol-related offense. He also damaged her car once while under the influence of alcohol. Both Mrs. Archuleta and Mrs. Ostler were aware that Michael had gone on to develop a serious addiction to heroin in his adulthood. Michael once shared with Mrs. Ostler that he had reached the point of injecting heroin into his neck and had once passed out with the needle in his neck. Mrs. Archuleta recalled seeing track marks on Michael's arms that he would try to hide from her by injecting heroin into his tattoos.

Mr. and Mrs. Archuleta reported that Michael had exercised poor judgment throughout his life. He often had difficulty altering a course of action and Mrs. Archuleta noted that when Michael became obstinate she was often the only one who could reason with him. Michael did not appear to exhibit appropriate fear responses. He would provoke authority figures and be seemingly unaware of the potential consequences. Michael also had great difficulty attending to anything for a prolonged period of time and would "just drift." Mrs. Archuleta was well versed in Michael's difficulties academically and recalled that he had been placed in learning disability classes at school. One of Michael's primary problem areas was reading and when Mrs. Archuleta attempted to use creative techniques to assist Michael he was unable to tolerate it.

When Michael first arrived in the Archuleta home, she wanted to put Michael to bed and read him bedtime stories, but Michael could not manage this simple activity and would eventually fall asleep from utter exhaustion. Mrs. Ostler said that Michael's hyperactivity was in evidence the first time she met him when her family was considering

fostering Michael. Michael did not color with the crayons and booklet provided to him, but instead threw the crayons up in the air and ran around the room, spinning out of control. Michael seemed unable to learn from punishment or correction. He was constantly getting into trouble throughout his life and she remembered a picture of him as a child as "heartbreaking" because he was crying due to consistently being in trouble. Michael also had difficulties with adapting to new circumstances when his plan of action needed to be modified. She noted that on one occasion when Michael was in his early 20's he had brought his wife and young stepchildren to her parent's home to watch television. Michael had unrealistic expectations that the children would remain on the couch and be still and quiet. When her son tried to coax Michael's stepson into playing, Michael became very frustrated and did not know how to handle the situation.

Lynda Garcia Gonzales, Michael's adoptive cousin, has known him since he was brought into the Archuleta home. She noted that Michael struggled with basic concepts and illustrated this point with a story of how Michael would become very upset when he was given a half-glass of milk even though he had asked for one. Michael wanted the top half of the glass to be full and could not understand, despite Mrs. Gonzales' multiple explanations, that this was impossible. Mrs. Gonzales was also aware that Michael lacked proper fear for dangerous situations. She recalled taking Michael for a reward of ice cream if he demonstrated good behavior, and once Michael obtained the ice cream cone he would run away from her, often into stores or down the sidewalk, completely unsupervised. She noted that Michael never had apprehension or fear about going into

unknown places or talking with strangers. Once, while Mrs. Gonzales was present, Mrs. Archuleta received a call telling her that Michael was in downtown Springville, standing in the middle of the street, and attempting to direct traffic. She could not recall his age at the time, but noted it to be within a few years of him coming to the Archuleta home.

Betty Davies, a Diagnostic Agent with the Utah Division of Corrections completed an evaluation of Michael in November 1980. Ms. Davies noted Michael read at less than a sixth grade level and that even on an orally administered IQ test (which she believed would minimize a depressed score due to reading ability), Michael scored in the Dull Normal range of intellectual functioning. Placement at Odyssey House was considered, but the program rejected Michael in part because of his intellectual deficits, as their program indicated that a low average IQ was required to master the cognitive aspects of the programming. It was also noted that Michael was handicapped by Minimum Brain Dysfunction (MBD) and there was no doubt Michael exhibited behavior consistent with MBD or hyperactivity. She noted that the most predictable outcome for males with this diagnosis was teenage and early adult (at least) criminality and impulsivity, often in the presence of substance abuse. The report illustrated Michael's problems with substance abuse at his young age by noting his desire to obtain drugs and an arrest at the age of 18 and 5 weeks for illegal possession of alcohol. She commented that Michael's juvenile history consisted of several out-of-home placements at the State Hospital, a boy's ranch, and the State School. She concluded with a recommendation that Michael be placed in the Youth Offender program at the Utah State Prison. (PCR I ROA 2889-90.)

In December 1980, Carol S. Tyler, MA, assessed Michael at the Utah State Prison and conducted several psychological tests. Ms. Tyler noted the high likelihood that Michael was a MBD child and commented that "apparently few, if any, public agencies in Utah" were capable of appropriately treating this problem. Since his MBD went improperly treated, Michael had resultant "severe behavior problems at an early age" and was "placed in various institutions where he learned to rely on drugs and alcohol," all of which led to escalating criminal behaviors. Michael acknowledged an alcohol problem quite readily. Michael's measured educational proficiency was below a sixth grade level and he received an overall IQ of 71. Ms. Tyler recommended placement at Odyssey House, but noted only "50/50 odds" of Michael successfully completing the program, but she found these to be better odds than the "nearly 100%" chance of his becoming a "career criminal at the Utah State Prison." (MIS Exh. 23.)

In preparation for trial in the homicide case, Robert J. Howell, Ph.D., was retained by Michael's attorney. Dr. Howell noted that Michael's elevated IQ scores on testing conducted by Dr. Liebroder in January 1974 may have been due to the practice effect (as Michael had taken the same IQ test several times). Dr. Howell noted historical diagnoses for Michael consistent with the terminology in 1989 were attention deficit hyperactivity disorder and borderline intellectual functioning. Dr. Howell also detailed Michael's substance abuse history with a notation that Michael began to use alcohol at the age of 7 and drugs at the age of 13 or 14. Dr. Howell noted evidence that Michael continued to suffer from attention deficit hyperactivity disorder as he had as a child. (MIS Exh. 25.)

Dr. Howell also participated in Michael's mental health treatment at the Utah State Prison after Michael was incarcerated. In December 1990, Dr. Howell saw Michael in the prison infirmary where Michael had been placed after he became intoxicated on prison brew and cut his arm and neck. Michael claimed no memory of the incident due to his high level of intoxication. Michael expressed feeling depressed for some time and a desire to die. Dr. Howell noted that Michael's depression was worse than when he assessed him in September 1989. Dr. Howell noted that Michael was born to a 16-year-old mother who was using alcohol extensively and he might have been suffering from fetal alcohol syndrome. Dr. Howell noted that Michael's history is supportive of this diagnosis, including a long history of behavior consistent with attention deficit hyperactivity disorder and low intelligence test scores. Dr. Howell recommended that Michael remain in the prison infirmary and be started on an antidepressant. He continued the diagnosis of attention deficit hyperactivity disorder and added a diagnosis of major depression without psychotic features. (MIS Exh. 26.)

Dr. Washburn, the psychiatrist who had treated Michael at Timpanogos Community Mental Health Center, also became involved in Michael's care at the prison. Dr. Washburn obtained a self-report social history from Michael and conducted a review of social service records from the Utah State Hospital. He reported that Michael had a well-documented history of social, emotional, and maternal deprivation, and demonstrated social and emotional retardation. Dr. Washburn noted that small doses of an antidepressant may be helpful in managing Michael, in reducing his stress, and

improving coping. Dr. Washburn cautioned that there needed to be safeguards in place with regard to the medication in order to limit any future suicide gestures or attempts, as Michael had made lacerations to his arm and neck recently. Dr. Washburn concluded his report with what, in hindsight, was an understatement, that it must be accepted that Michael is "one of our failures in the area of Mental Health treatment." (MIS Exh. 27.)

SUMMARY OF ARGUMENT

Issue I concerns the nature of an intellectual disability as a categorical bar to execution, as established by the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002). Because an intellectual disability is a permanent status determined by clinical standards, it is not acceptable for any person with an intellectual disability to be subject to execution by a state, regardless of when they bring their claim before a state court, if that claim is meritorious and is not brought to abuse judicial process.

Issue II concerns the intersection between a claim of intellectual disability and summary judgment. Michael has alleged facts establishing he has a potentially meritorious claim of an intellectual disability. These facts are material and were disputed by the Appellee. Given the categorical bar against execution of intellectually disabled persons, dismissing such a claim on procedural grounds through summary judgment is unjust and in contravention of *Atkins v. Virginia*.

Issue III concerns the statutory right to the effective assistance of counsel that Michael enjoyed during his previous post-conviction proceedings and seeking redress of the violation of that right through the post-conviction proceeding giving rise to this

appeal. Michael alleged facts demonstrating how his prior post-conviction counsel failed to properly investigate and develop evidence of Michael's intellectual disability, causing the claim to be defaulted. Because Michael had a substantive right to effective counsel and because the amendment to the PCRA is not retroactive, Michael should be allowed to use the ineffective assistance of his prior counsel to demonstrate cause to overcome the default of his intellectual disability claim.

Issue IV concerns the PCRA statute of limitations being applied to a claim of intellectual disability. This disability qualifies as a "mental incapacity" under the PCRA, allowing for tolling of the statute of limitations. Because Michael is intellectually disabled, he cannot be held accountable for the unreasonable acts or omissions by his prior counsel. He was unable to fully apprehend the nature of his disability, the claim, or complex intersection of law and procedure required to have timely brought the claim in his previous post-conviction proceedings. His federal counsel developed the claim and presented it to the state court at the earliest possible date they were allowed by the federal law governing their appointment.

Issue V concerns the constitutionality of the 2008 amendments to the PCRA so far as they prohibit a state court from allowing a defaulted claim of intellectual disability from being heard. If the statute operates to bar Michael's claim from being heard, the State of Utah will violate the Federal Constitution's categorical prohibition against executing the intellectually disabled. The State's interest in finality does not outweigh

the State's interest in prohibiting cruel and unusual punishment, nor does it outweigh Michael's right to be free from such punishment.

ARGUMENT

The Fourth District Court granted the State's motion for partial summary judgment on Michael's *Atkins* claim because it found his claim to be procedurally barred. (Memorandum Decision at 5-7.) The lower court found the *Atkins* claim could have been raised in his prior post-conviction proceeding and he was outside of the one-year statute of limitations imposed by the PCRA. Even assuming the PCRA's procedural bars would otherwise properly apply, applying them against an intellectually disabled petitioner who has not been provided with adequate assistance of legal counsel is an unconstitutional denial of due process. The lower court's grant of summary judgment was improper.

I. A claim of intellectual disability is inappropriate for summary judgment.

Michael's post-conviction petition and memorandum in support stated a claim upon which relief may be granted, and he alleged facts in support. As explained therein, the full range of evidence regarding a fetal alcohol spectrum disorder ("FASD"), how the symptoms of that disorder manifests in Michael, and how it relates to his intellectual functioning, needed to be presented to the district court before it could have properly made a final determination of his intellectual disability. These are complex issues requiring specialized testing, reports, and testimony from qualified experts. The threshold questions required by Utah R. Civ. P. 65C and Appellee's Motion for Summary

Judgment are enmeshed with these technical scientific determinations. Also, the issues raised by Michael involved questions of first impression for Utah courts.

Summary judgment is only appropriate when the pleadings, discovery, and affidavits "show[] that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). "It is not the purpose of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence." *Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975). Rather, it "is to eliminate the time, trouble[,] and expense of trial when upon any view taken of the facts as asserted by the party ruled against, he would not be entitled to prevail." *Id*. 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); *see also Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (a court's denial of an evidentiary hearing on an *Atkins* claim was unreasonable where the record contained facts sufficient to support a reasonable inference of impairments in intellectual function and adaptive behaviors).

In order to survive a motion for summary judgment, a petitioner must demonstrate that there is a genuine issue of material fact. In reviewing for summary judgment, a court must "liberally construe the facts and view the evidence in a light most favorable to the party opposing the motion." *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah Ct. App. 1988). Michael alleged facts which support his claim of intellectual disability.

Respondent has disputed those facts. Therefore, summary judgment was not the correct resolution for this matter.

II. Executing a person with an intellectual disability is a violation of due process. Prohibiting an intellectually disabled petitioner from litigating the merits of an intellectual disability claim is a violation of due process.

Michael has only raised a claim of his intellectual disability in the Utah state courts on one occasion, in the case giving rise to this appeal. In the court below, the judge held that "[t]he PCRA and rule 65C define the process afforded to defendants and petitioners for pursuing their post-conviction relief claims" and that Michael "ha[d] not cited any precedent that would allow this Court to expand Petitioner's due process rights beyond the process afforded in the statutes and rules." (Memorandum Decision at 11.) The lower court proceeded cautiously. However, an intellectual disability is a status that is an absolute bar to execution, and should not be subject to the procedural limitations of the PCRA and Rule 65C.

a. Persons with intellectual disabilities are categorically excluded from eligibility for execution by the federal constitution and state law.

In 2002, the United States Supreme Court held that intellectually disabled persons are "categorically excluded from execution." *Atkins*, 536 U.S. at 318. The Court recognized that although that class of persons was not wholly exempt from criminal responsibility, "their disabilities in areas of reasoning, judgment, and control of their impulses" result in actions that do not have "the level of moral culpability that characterizes the most serious adult criminal conduct." *Id*. at 306. On this basis, capital

punishment could not be a proportionate punishment for an intellectually disabled person. *Id*. at 311, 321.

The Court reached this conclusion by examining the clinical definitions of the disability. *Id*. at 308 n.3. The Court cited, with approval, definitions adopted by the American Association on Mental Retardation[7] ("AAMR") and the American Psychiatric Association ("APA"). *Id*. The AAMR defined the disability as follows:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) (emphasis in original). And the APA described the condition similarly,

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.

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[7] This organization has changed its name to the American Association of Intellectual and Developmental Disabilities ("AAIDD"). Therefore, AAMR and AAIDD reference the same entity and use of the terms will vary depending on which era of the entity is being referred or which of their manuals are being cited.

Diagnostic and Statistical Manual of Mental Disorders ("DSM") IV at 42-43. These clinical definitions provided the baseline for the Court's categorization of persons who were to be excluded from eligibility for the death penalty by reason of an intellectual disability.

The Court also determined that the practice was not proportionate to the offense based on the nature of the disability and its impact on culpability. Given that an intellectual disability includes both "subaverage intellectual functioning" and "significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18," persons with the disability may "know the difference between right and wrong" and may be "competent to stand trial," but "[b]ecause of their impairments . . . by definition they 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." *Id*. at 318. And while there is not "evidence that they are more likely to engage in criminal conduct . . . there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." *Id*. These deficits "diminish their personal culpability." *Id*.

Executing a person with diminished culpability does not serve the policies underlying the legality of the death penalty: retribution and deterrence. *Id*. at 319. "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does

not merit that form of retribution." *Id*. And a punishment is only a deterrent when the offense "is the result of premeditation and deliberation." *Id*. (quoting *Enmund v. Florida*, 458 U.S. 782, 799 (1982). The deficits symptomatic of an intellectual disability diminish one's ability to premeditate and deliberate—"the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id*. at 320. Therefore, executing the intellectually disabled "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S. at 798 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). Thus, executing an intellectually disabled person would be "excessive punishment." *Atkins*, 536 U.S. at 321.

b. Michael is intellectually disabled and should be excluded from eligibility for execution.

Michael is intellectually disabled.[8] As such, he is ineligible for execution under both federal and state law. *See Atkins*, 536 U.S. 304 and *Hall*, 134 S. Ct. 1986; *see also* Utah Code § 77-15a-101. The PCRA provides, as grounds for relief, that the circumstances in which the sentence was imposed violate the United States Constitution.

[8] Because the lower court did not address the facts of the claim, Michael will not re-argue them here. The memorandum in support of Michael's petition explained the criteria of intellectual disability (MIS at 65-73) and why Michael meets those criteria (MIS at 73-82). It also explained how the Utah exemption statute deviates from the clinical standards for an intellectual disability, another issue not reached by the lower court. (MIS at 83-90; *see also* Response to Partial Summary Judgment Motion at 32-44.)

Utah Code § 78B-9-104. This subsection of the PCRA is broadly stated and does not include a temporal limitation on the constitutional violation. It is therefore applicable to Michael as his sentence is in violation of the United States Constitution.

Given that *Atkins* places a constitutional "'substantive restriction on the State's power to take the life' of a mentally retarded offender," procedural barriers, as applied to the factual circumstances of this case, should not operate to bar such a claim. *See Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The intellectually disabled are a protected class under federal law, and courts are under no obligation to apply procedural bars which conflict with their rights to pursue remedies for violations of constitutional rights. *See Lake v. Arnold*, 232 F.3d 360, 369-70 (3rd Cir. 2000) (even though claim was time-barred, the statute of limitation would not be applied given plaintiff's disability, because application of the statute would violate federal policy).

In *Hall*, the United States Supreme Court clarified that it had exercised its "independent judgment" in determining that the death penalty was not proportional "for a particular class of . . . offenders" and their execution would, therefore, violate the Eighth Amendment. 134 S. Ct. at 2000. In reaching this conclusion, the Court cited *Roper v. Simmons*, a case prohibiting life sentences for juveniles. *See id.* In *Roper*, the Court undertook a similar kind of analysis and drew a conceptual link between various classes of person for whom it had determined that particular punishments were not proportional. 543 U.S. 551, 574-75 (2005). These included the death penalty for juveniles, citing

Thompson v. Oklahoma, 487 U.S. 815, 833-38 (1988); the death penalty for those who aid and abet a felony in which a murder occurs but who do not themselves kill or have intent to kill, citing *Enmund v. Florida*, 458 U.S. 782, 797 (1982); the death penalty imposed for rape, citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977); and the death penalty for the intellectually disabled, citing *Atkins*, 536 U.S. at 312-13. The portion of the *Atkins* opinion referenced in *Roper*, tellingly, cites back to *Enmund* and *Coker*. It is clear that the United States Supreme Court is considering these categorical classes analogously to impose an absolute bar on eligibility for the death penalty. If procedural and time bars are not appropriate for denying sentencing relief to persons sentenced to death as juveniles, or for the crime of rape, then they are not appropriate for denying relief to persons who are intellectually disabled. This is the interpretation of the federal constitutional rule as determined by the United States District Court in which Michael's federal habeas petition is pending. (MIS, Exh. 3 at 13.) At the very least, the state courts must give Michael the opportunity to properly present evidence of his intellectual disability.

An intellectual disability claim as a categorical bar to execution does not conform neatly to the post-conviction framework designed for other types of claims. There no restrictions written into *Atkins* or *Hall* limiting a petitioner's ability to raise an intellectual disability claim. Similarly, the Utah exemption statute allows for the issue to be raised "at any time" and contains no prohibitions or limitations on raising the claim. Utah Code § 77-15a-103. Simply stated, the State may not execute an intellectually disabled person.

The only matter to be resolved is whether Michael meets the criteria of an intellectual disability. *See Atkins*, 536 U.S. at 317 ("To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded."). A denial of Michael's claim without it ever having been heard on its merits by any court is not an application of *Atkins*. It is a denial of the rights conferred by *Atkins* without due process. *See Brumfield*, 135 S. Ct. 2269 (a court's denial of an evidentiary hearing on an *Atkins* claim was unreasonable where the record contained facts sufficient to support a reasonable inference of impairments in intellectual function and adaptive behaviors).

III. If Michael's *Atkins* claim has been defaulted, then he had the right to the effective assistance of post-conviction counsel during the time in which it was defaulted, and can establish cause to excuse the default.

Michael maintains that his status as intellectually disabled renders him ineligible for the death penalty regardless of when the claim is raised. However, if this Court is inclined to assess the procedural posture of this claim under the PCRA's subsections precluding relief, this Court should recognize his statutory right to the effective assistance of PCR counsel—which existed at least from 1996 through 2008—and that the failure of his counsel to provide effective assistance is sufficient cause to excuse any default of the claim. The district court granted Appellee's motion for partial summary judgment in part because "the Supreme Court has not yet addressed whether the statutory right to effective assistance of counsel expands a petitioner's due process rights and creates an exception to

the procedural bars of the PCRA in subsequent petitions—especially petitions filed after the 2008 amendments to the statute." (Memorandum Decision at 11.)

Michael's prior PCR proceedings began in 1994 with the filing of a pro se Petition for Writ of Habeas Corpus and/or Post Conviction Relief. (PCR I ROA 1-4.) His second amended petition was filed on June 14, 2002. (PCR I ROA 888-1227.) Six days later, the United States Supreme Court decided *Atkins v. Virginia*, finding that executing the intellectually disabled violated the Eighth Amendment. 536. U.S. 304 (2002). Despite this significant new rule, and the abundance of clear evidence that it may apply to Michael, his post-conviction counsel failed to either investigate his eligibility for relief, amend his petition to include the claim, or file a successive petition raising the claim—all of which were allowable under the PCRA. (*See* MIS Ex. 3 at 11 n.12 ("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").

Additionally, under the initial version of the PCRA—in effect during the pendency of Michael's prior PCR proceedings–Michael had a statutory right to the effective assistance of counsel. *See Menzies v. Galetka*, 2006 UT 81, ¶¶ 79-82, 150 P.3d 480. At the time the PCRA was enacted, there were several capital cases pending in post-conviction. Uniformly, in each of these cases, Appellee argued for the applicability of the portion of the PCRA that allowed for the appointment of paid counsel, (*see, e.g.*, MIS Exh. 33 at 2-3; *see also* MIS Exh. 34 at 2-3), and this Court accepted that position (s*ee, e.g.*, MIS Exh. 35; *see also* MIS Exh. 36). This Court acknowledged these events in its

background discussion in the *Menzies* decision, making explicit that the appointment of counsel was pursuant to the then-newly enacted PCRA, and in conformance with its requirement of counsel meeting certain qualifications:

> in proceedings before this court involving the district court's order awarding Menzies' investigative fees, the State had filed a motion suggesting that the issue may be moot given the recent passage of House Bill 60, enacting Part 2 of the Post-Conviction Remedies Act, Capital Sentence Cases, which governs the appointment and payment of counsel in post-conviction death penalty proceedings. Utah Code Ann. §§ 78-35a-201 to -202 (2002). We granted the State's motion on April 28, 1997, noting that the parties had agreed to voluntarily stay proceedings in the district court until after July 1, 1997, the date on which the new legislation and associated rules went into effect. After the new legislation became effective, both parties sought to have the district court appoint new counsel qualified under rule 8 of the Utah Rules of Criminal Procedure, as required by the newly enacted Utah Code section 78-35a-202(2)(a).

Menzies, 2006 UT 81, ¶ 18.

When Michael's attorneys, who had previously represented him pro bono, sought appointment as paid counsel, they similarly sought their appointment under the newly enacted PCRA. (*See* MIS Exh. 37, ¶ 5; MIS Exh 38, ¶ 8; MIS Exh. 39.) This motion was unopposed by Appellee. (MIS Exh. 40.) Their appointment was granted by this Court, and the order specifically referenced the PCRA. (MIS Exh. 41.)

Also, when one of Michael's attorneys, Karen Chaney, became unresponsive to co-counsel, David Eckersley, and other members of Michael's legal team, Eckersley

moved to withdraw, as he did not meet the Rule 8 qualifications, required by the PCRA.[9] (PCR I ROA 645-46.) After a review of attorneys, the post-conviction court appointed Edward Brass. (PCR I ROA 728.) Subsequently, L. Clark Donaldson and McCaye Christianson also entered appearances on his behalf. (PCR I ROA 752, 758.) That is, the post-conviction court appointed counsel to Michael in accordance with the requirements of the PCRA.

In *Menzies*, one issue was the representation that Menzies received from Brass, the same attorney appointed to Michael's case. Menzies sought 60(b) relief from summary judgment dismissing his post-conviction petition, which had been defaulted. *See Menzies*, 2006 UT 81, ¶¶ 1-2. Brass represented Menzies from 1998 through 2003, overlapping with his representation of Michael. *See id.* ¶ 24. The Court characterized 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

[9] Appellee did not oppose Eckersley's withdrawal. (PCR I ROA 651.) Appellee did, however, move the PCR court to revoke Chaney's pro hac vice admission to appear in Michael's case, ensuring that Michael would be left without any representation whatsoever. (PCR I ROA 653-54.) This is in line with Appellee's pattern of interfering with the relationship between Michael and his counsel. (*See, e.g.*, MIS Exh. 42 at 3 ("the Court is not interested in Respondent's attempts to invade and limit the scope" of Michael's attorney-client relationship with his counsel); *see also* PCR I ROA 605 (counsel for Appellee involved in discussion of payments to Michael's counsel and defense experts) and PCR I ROA 1986-89 (Appellee's motion for sanctions against Michael's counsel, creating a conflict between Michael and his counsel.))

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

Id. Based on these facts, the Court found that "Brass rendered ineffective assistance of counsel." Id. ¶ 72. This Court reasoned that

> '[B]y extending the right to appointed counsel to [death penalty defendants in post-conviction cases], our legislature has expressly recognized that [these] proceedings are unlike the traditional civil case.' This intent is consistent with our habeas corpus jurisprudence and with the underlying nature and policy of post-conviction death penalty proceedings. Given the high stakes inherent in such proceedings—life and liberty—providing a petitioner the procedural safeguard of appointed counsel is an important step in assuring that the underlying criminal conviction was accurate. We refuse merely to pay lip service to this legislatively created protection by holding that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel. Therefore, we hold that Menzies has a statutory right to effective assistance of counsel under Utah Code section 78-35a-202.

Id. ¶ 82 (quoting *T.S. v. State*, 2003 UT 54, ¶ 6, 82 P.3d 1104) (internal citations omitted).[10] Accordingly, this Court held that the extreme circumstances warranted relief under 60(b)(6). And although this Court has declined to grant 60(b) relief based on ineffective assistance of post-conviction counsel in any subsequent capital case, there has

[10] The Court declined to answer whether there was a state constitutional right, but did not foreclose the possibility that it existed. "While we have not yet considered whether such a right exists under the Utah Constitution, there is no need to do so in this case because of the statutory right provided by section 78-35a-202. 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." *Id*. ¶ 84. Michael expressly asserts that he does have corresponding state and federal constitutional rights to the effective assistance of counsel, despite courts not yet having recognized such rights.

been no limitation by the court on this statutory right to effective post-conviction counsel. Therefore, Michael had a statutory right to the effective assistance of counsel in his post-conviction proceedings from at least the enactment of the PCRA in 1996 through the conclusion of his proceedings before the post-conviction court.

This right has an analog in the federal court. Although the United States Supreme Court has not yet recognized a federal constitutional right to counsel in habeas proceedings, *see Coleman v. Thompson*, 501 U.S. 722, 755-56 (1991), that Court has recognized that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012); *see also Trevino v. Thaler*, 133 S. Ct. 1911 (2013).[11] That is, ineffective assistance of post-conviction counsel may be cause to overcome any default of a claim that "has some merit." *Martinez*, 132 S. Ct. at 1318.

The basis for this right is the "key difference between initial-review collateral proceedings and other kinds of collateral proceedings." *Id*. at 1316. "When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will

[11] The United States District Court for the District of Utah has recently held "that *Trevino* and *Martinez* do apply in Utah, because although Utah's [Appellate] 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." *Lafferty v. Crowther*, No. 2:07-CV-322, 2016 U.S. Dist. LEXIS 138845, at *5 (D. Utah Oct. 5, 2016). This is in accordance with this Court's and the Utah Court of Appeals application of Rule 23B. *See State v. Tennyson*, 850 P.2d 461, 468 n.5 (Utah Ct. App. 1993); *see also State v. Johnston*, 2000 UT App 290, ¶ 9, 13 P.3d 175, and *Pascual v. Carver*, 876 P.2d 364, 366 n.1 (Utah 1994).

hear the prisoner's claim." *Id*. Therefore, "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default . . . no court will review the prisoner's claims." *Id*. The Court also recognized the need for counsel in working up and presenting claims which require investigation and an understanding of legal issues, and that prisoners under these circumstances "'are generally ill equipped to represent themselves'" and "cannot rely on a court opinion or the prior work of an attorney addressing that claim," which they do not have. *Id*. at 1317 (quoting *Halbert v. Michigan*, 545 U.S. 605, 619 (2005)). Thus, "[w]here . . . the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id*.

The Tenth Circuit Court of Appeals has explicitly applied the *Martinez* rationale to post-conviction *Atkins* proceedings in a case with facts similar to Michael's. In *Hooks v. Workman*, Hooks was convicted in 1989, and his first *Atkins* proceedings were in 2004, two years after the *Atkins* opinion was announced. 689 F.3d 1148, 1183 (10th Cir. 2012). In that case, the circuit court determined that there is an unequivocal federal right to counsel during *Atkins* proceedings, even when the initial *Atkins* proceeding is post-conviction. *Id.* at 1182. Citing *Martinez*, *Hooks* recognized that this was the initial-review collateral proceeding at which Hook's *Atkins* claim could be adjudicated. *Id*. at 1183 (citing *Martinez*, 132 S. Ct. at 1317). Because "Mr. Hooks [was] surely 'ill equipped to represent [himself],' the usual rationale for denying a right to counsel in

postconviction proceedings is inapposite." *Id*. (quoting *Martinez*, 132 S. Ct. at 1317) (internal citations omitted). In light of this, the Utah federal district court questioned whether "Utah Code §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." (MIS Exh. 3 at 12, n.14.)

Given that Michael had a right to the effective assistance of counsel during the entire time that his post-conviction case was before the post-conviction court, if this Court is inclined to assess the procedural posture of his *Atkins* claim under the PCRA's procedural bar, then this Court should recognize a right similar to that provided by the United States Supreme Court in *Martinez* and by the Tenth Circuit in *Workman*. If this Court finds that the procedural or time bars apply to Michael's *Atkins* claim, then this Court should consider facts related to the assistance rendered by Michael's appointed attorneys. These facts will establish that his *Atkins* claim, if it was defaulted, was defaulted by the acts and omissions of his appointed counsel.

Although the state legislature amended the PCRA in 2008 to extinguish the right to effective assistance of post-conviction counsel, *see* Utah Code § 78B-9-202(4) (2008), the legislature cannot retroactively extinguish the rights that Michael had during his post-conviction proceedings, nor can the legislature prohibit this Court from hearing and granting relief based on those rights.

First, Utah law prohibits the retroactive application of the 2008 amendments to the PCRA. The chapter of the state code directing how the statutes are to be constructed lays out the rule on retroactivity: "[a] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." Utah Code § 68-3-3. This is "[t]he starting point" for analysis of retroactivity. *Stephens v. Henderson*, 741 P.2d 952, 953 (Utah 1987). It's the federal rule as well. *See 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."). The 2008 PCRA amendments regarding the elimination of the right to the effective assistance of counsel do not a declaration of retroactivity.

Second, the well-established rules applied by this Court prohibit 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, as identified in *Menzies*, is a substantive right because it creates a right on which a petitioner may obtain relief. *See* Black's Law Dictionary 1349 (8th ed. 2004). Michael's

right to the effective assistance of counsel vested at the time his counsel was appointed under the PCRA. Therefore, this right cannot be eliminated or destroyed by a subsequent amendment to the PCRA. *See Goebel v. Salt Lake City S. R.R. Co.*, 2004 UT 80, ¶ 39, 104 P.3d 1185; *cf. Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 437-38 (Utah 1997) (Retroactively applying a statutory amendment, giving jurisdiction to review tax commission decisions to the district court rather than the Supreme Court, because it was a purely procedural change that did not eliminate a vested right, recognizing that this was an "exception" to the general rule prohibiting retroactivity).

In sum, Michael was vested with a substantive right to the effective assistance of counsel during his prior PCR proceedings. As will be shown, he was denied this right by the acts and omissions of his PCR counsel, resulting in prejudice. On this basis, Michael has cause to overcome the default of his claim based on the ineffective assistance of counsel in his initial collateral-review proceeding. For this Court to find otherwise is to deny Michael his vested right to the effective assistance of post-conviction counsel in contravention of this Court's precedent, and in violation of his state and federal constitutional rights to due process, to counsel, and to be free from cruel and unusual punishment.

a. Michael's post-conviction counsel performed deficiently by not pursuing and presenting proof of his intellectual disability, evidence of which existed in the record and should have compelled investigation; the failure to do so was deficient performance which caused Michael to be prejudiced by not having evidence that would have undermined confidence in his death sentence presented to the post-conviction court.

In *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984), the United States Supreme Court outlined the standard for determining when counsel has provided ineffective assistance. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceedings] cannot be relied on as having produced a just result." *Id.* at 686. Under *Strickland*, counsel is ineffective if: (1) "representation fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. The standard is the same regardless of what type of proceeding is being assessed. *State v. Templin*, 805 P.2d 182, 185-86 (Utah 1990) (referring to the state court having adopted the *Strickland* standard for review of ineffective assistance of counsel claims and its uniform application to trial, appeals, and habeas proceedings.)

The inquiry under the deficiency prong is "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688. Although defense counsel has broad discretion when making strategic decisions, those decisions must be reasonable and informed. *Id.* at 691. And the failure to adequately investigate a case cannot be considered a reasonable strategic decision. *See Gregg v. State*, 2012 UT

32 ¶ 24, 279 P.3d 396 (Utah 2012), *quoting Templin*, 805 P.2d at 188-89 and *Strickland*, 466 U.S. at 689; *see also Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) (finding that an "uninformed strategy" is "no strategy at all").

In determining the reasonableness of counsel's investigation, the "principal concern" is "whether the investigation supporting counsel's decision not to introduce . . . evidence . . . *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). The "deference owed such strategic judgments" of trial counsel is "defined . . . in terms of the adequacy of the investigations supporting those judgments." *Id*. at 521.

It is imperative the investigation is thorough enough to make an informed decision about what evidence to present because it is trial counsel's responsibility to ensure that the trier of fact is provided enough specific information "to make an individualized assessment of the appropriateness of the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), abrogated on other grounds by *Atkins*, 536 U.S. 304. The duty to investigate extends to post-conviction proceedings, which is where deficiencies it trial counsel's investigations come to light. *See Sears v. Upton*, 561 U.S. 945, 946 (2010); *see also Williams (Terry) v. Tayler*, 529 U.S. 362, 370 (2000), *Rompilla v. Beard*, 545 U.S. 374, 378 (2004), and *Porter v. McCollum*, 558 U.S. 30, 38 (2009). This must include "evidence about the defendant's background and character . . . because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545

(1987) (O'Connor, J., concurring); *see also Atkins*, 536 U.S. at 306, 318 (because of their deficiencies, persons with intellectual disabilities are less morally culpable that those without the disability and are "categorically excluded from execution") and *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("impaired intellectual functioning is inherently mitigating").

In the context of *Atkins*, the duty is analogous. An *Atkins* claim is, at essence, a sentencing issue because it is determinative of a defendant's eligibility for execution. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, [the intellectually disabled] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. On this basis, the intellectually disabled are "categorically excluded from execution." *Id*. at 318. Therefore, the duty to fully investigate and present evidence which demonstrates a lower degree of culpability in mitigation of the aggravating factors of an offense must include the duty to investigate any available evidence of an intellectual disability. *See Winston v. Pearson*, 683 F.3d 489, 505 (4th Cir. 2012) (finding deficient performance for counsel failing to review school records, which would have led to interviews of teachers and counselors, who could have provided evidence supporting a meritorious *Atkins* claim).

The *Strickland* prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was

fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). A reviewing court must find that prejudice exists if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694. A "[r]easonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id*.

Prejudice can be demonstrated by providing evidence which would have established an essential element of an intellectual disability or that would have impacted an expert's finding regarding the disability. *Winston*, 683 F.3d at 506. A petitioner may also be prejudiced by counsel's failure to uncover mitigating evidence that included borderline intellectual functioning, repeated head injuries, and possible organic mental impairments. *Williams (Terry)*, 529 U.S. at 370. Or a petitioner may be prejudiced by failing to discover evidence of impaired cognitive functioning and low IQ scores. *See Rompilla*, 545 U.S. 392-93.

In *Porter v. McCollum*, trial counsel prejudiced the defendant by failing to present "the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" 558 U.S. at 41 (citing *Wiggins*, 539 U.S. at 535). The prejudice was based on the fact that the sentencer did not hear the "evidence which 'might well have influenced the jury's appraisal of [Porter's] moral culpability.'" *Id*. (quoting *Williams (Terry)*, 529 U.S. at 398). Evidence of intellectual impairment is of particular significance in capital cases involving more than one defendant, since it may bear on relative culpability. *See Tennard*, 542 U.S. at 287 ("impaired intellectual functioning is

inherently mitigating"). Michael's counsel failed to pursue any of this evidence despite the red flag warning that Michael suffered from borderline mental retardation. *See Rompilla*, 545 U.S. at 392-93.

The trial record is replete with evidence that Michael suffered from organic brain damage and other neurological deficits. The evidence also suggested that Michael suffered from cognitive, emotional, and behavioral deficits at an early age, and that he functioned at a low intellectual level. The decision in *Atkins* was announced mere days after Michael's counsel filed his second amended petition. There is no plausible reason why his counsel should not have amended the petition and presented evidence that Michael had intellectual and adaptive behavior deficiencies sufficient to exempt him from the death penalty. As a result of this deficient performance by his counsel, Michael's *Atkins* claim has not yet been determined by any court.

Social history records available to counsel reflect that Michael had been tested and found to have borderline or lower level intellectual functioning. Historical intellectual functioning or IQ testing had results falling "within the range of intellectual functioning that would qualify for the definition of Intellectual Disability." (MIS Exh. 31 at ¶ 21.) Michael had previously been diagnosed with mental retardation by Eugene J. Fox, M.D., Director of Youth Services at the Utah State Hospital in 1974. *Id*. Given the historical records regarding Michael's intellectual and cognitive functioning, an "assessment of Mr. Archuleta's intellectual and cognitive functioning" was warranted because "the prior scores do not preclude a finding of mental retardation." *Id*.

On this basis alone it was unreasonable for counsel to fail to investigate and raise a claim of intellectual disability. The Utah federal district court, in determining that Michael had good cause for failing to exhaust the state court remedies for this claim, based its decision, in part, on the fact that "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 Michael's intellectual ability and adaptive functioning, as well as his history of intellectual disability diagnoses." (MIS Exh. 3 at 11.) The federal court explained,

> *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 Brass did so, and the court does not agree with the state's suggestion that the lack of such evidence means that 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 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 . . . he did not have the time or resources to pursue an *Atkins* claim on Mr. Archuleta's behalf.

Id. Finally, the federal court concluded "there is no evidence that Brass investigated a possible *Atkins* claim while preparing for the evidentiary hearing on mitigation issues . . . . These failings provide a sufficient showing that Michael's state post-conviction representation was defective under *Strickland v. Washington*." *Id*. at 12.

It is a bitter irony, then, that counsel for Michael retained experts and put on evidence about the failings of trial counsel while replicating those same failings. Dr. Linda Gummow, in her affidavit, identified numerous cognitive, behavioral and neurological problems with Michael, which pointed to the presence of an intellectual disability. Yet, counsel failed to explore the possibility of the presence of an intellectual disability despite it arguably being the best chance for Michael to obtain relief from his death sentence.

In her affidavit, Dr. Gummow states that the tests she administered, records she reviewed, and interviews she conducted indicated that Michael had "probable Fetal Alcohol and Drug Exposure" (PCR I ROA at 1725); that "the adverse impact of fetal alcohol and drug exposure was well known" and there are "literally hundreds of references [in clinical literature] to the adverse impact of fetal exposure to alcohol on the brain, development, learning and behavior" (*id*. at 1726); that fetal alcohol exposure and the disorders it causes "can result in a wide range of outcomes" including intellectual and developmental disabilities (*id*. at 1727); that disorders related to fetal alcohol exposure result in "structural abnormalities" in the brain, resulting in a "myriad" of "behavioral and cognitive impairments" (*id*. at 1728); that Michael's recorded history of deficits were in line with those of children who had been exposed to alcohol in utero (*id*. at 1728-29); and that "[t]he neurocognitive impairment of Michael was comparable to that defined during childhood examinations," which, as shown above, indicated the presence of an intellectual disability (*id*. at 1725).

Additionally, Dr. Gummow testified that Michael's biological family had incidents of intellectual disabilities for at least two generations, including his mother and both of her parents. (TR PCR I Evid. Hearing Vol. 2, 5/17/2006 at 57.) She further testified to the range of IQ scores in Michael's history, including that "in the mid 70s there was a doctor who felt that Mr. Archuleta was mentally retarded." (*Id.* at 95.) Although Dr. Gummow also testified that she did not believe that all of the evidence supported a diagnosis of an intellectual disability, counsel for Michael did not undertake a full investigation to definitively confirm or rule out the possibility. And, regarding the evidence of intellectual disability among Michael's biological family, Dr. Gummow emphasized the need to fully explore the possibility of the impact on Michael. She was asked if this evidence required "some follow-up in psychological or psychiatric investigation" and answered "[y]es . . . whenever you think that there's a developmental, ah, disorder and it's possibly psychiatric/neurological it's wise to have experts look at that who are qualified in those fields." (*Id*. at 57-58.) Therefore, despite Michael's counsel eliciting testimony from his own expert about what he himself needed to do regarding the *Atkins* claim, he failed to do any of it. *See, e.g.*, *Rompilla*, 545 U.S. at 391 n.8 ("[O]nce counsel had an obligation to examine the file, counsel had to make reasonable efforts to learn its contents; and once having done so, they could not reasonably have ignored mitigation evidence or red flags").

The other expert, Dr. Mark Cunningham, testified similarly. He addressed the "multigenerational family distress" including the history of intellectual disabilities. (TR

PCR I Evid. Hearing Vol. 2, 5/17/2006 at 171-72.) Dr. Cunningham testified that Michael had been labeled as possibly being intellectually disabled when he was as young as 3 or 4 years old. (*Id*. at 180-82.) Dr. Cunningham also discussed Michael's various IQ scores and how some of the higher scores may have been misleading or inaccurate, that they should have indicated a lower IQ, one that would have likely been within the range of significantly subaverage intellectual functioning. (*Id*. at 211-12.)

It is important to note that the purpose of the post-conviction hearing was only to take evidence on the claims which had survived summary judgment. These were limited to the ineffective assistance of counsel in investigating and preparing for the penalty phase, and the ineffective assistance of counsel during the penalty phase. (*See* PCR I ROA 2298; PCR I ROA 921-25, 929.) The investigation, preparation, and testimony of the experts were focused on determining the deficiencies of trial counsel and trial counsel's experts. They were not tasked by to make a determination of Michael's intellectual disability or the viability of his claim for exclusion from execution under *Atkins*. Therefore, the evidence and testimony presented by these experts cannot be held as determinative of whether Michael does or does not have an intellectual disability, nor whether his counsel made a reasonable strategic decision not to investigate and present the claim. The cumulative effect of the evidence and of the expert testimony indicates the presence of an intellectual disability. This created a duty, in light of the *Atkins* opinion, for counsel to investigate the possibility of the presence of an intellectual

disability and present evidence that Michael was ineligible for the death penalty. Michael's counsel failed to meet this duty.

Brass's ability to meet this duty was impeded by two external factors. First, the Utah post-conviction scheme was inadequate to equip him with the funds and resources necessary to adequately investigate and present Michael's claims. In 2001, Michael had three attorneys appointed to his case. (PCR I ROA 728, 752, 758.) In early 2004, two of his attorneys moved to withdraw, citing the failure of the State to pay them anything for their time or the expenses. (PCR I ROA 1798, 1801.) These motions were granted. (PCR I ROA 1969.)

His sole remaining counsel, Brass also moved to withdraw on several occasions, the first two of which were in 2005 and 2006, before the evidentiary hearing. The first time was in response to a letter Michael wrote to the post-conviction court detailing some concerns he had with his counsel.[12] In four years, Brass only met with Michael twice, and each meeting was for less than 30 minutes. (PCR I ROA 2629.) He only spoke on the phone to Brass on a few occasions, the topic of the converstaions were the failure of Brass to maintain communications and "the fact that Brasses [*sic*] secretary . . . hangs up as soon as she hears my name." (*Id*.) Michael reported to the court that he could "not get any accurate information about the status of my case." (*Id*. at 2629-30). This pattern of behavior is consistent with what the Utah Supreme Court found in the *Menzies* case. *See Menzies*, 2006 UT 81 ¶ 25 ("Brass communicated with Menzies only sparingly

[12] Michael ends the letter by writing that "If this doesn't sound right, it's because I had to have help writing it because I could not do it on my own." (PCR I ROA 2632).

throughout his representation. He discussed the issues in the case at length with Menzies only once—for one to two hours during an initial meeting—and thereafter rarely spoke with his client, appearing to deliberately avoid any communication. Menzies consistently attempted to contact Brass by telephone to discuss various aspects of the case. Brass's office rarely answered Menzies's calls, frequently refused to accept collect calls from the prison, and even hung up when they realized it was Menzies calling.").

Brass filed a motion to withdraw citing an "irreconcilable conflict between counsel and the petitioner" created by Michael's letter to the court. (PCR I ROA 2646.) He also cited the loss of his co-counsel, who were driven from the case by the State's failure to remunerate them. (*Id*.) Brass stated that he had not been paid for his work on the case either. (*Id*. at 2647.) He wrote that

> [T]he present case is a pro bono case because the financial resources allocated for such cases were drained long ago. Thus, the Utah Attorney General's office enjoys a significant advantage in resources it can bring to bear in this case, including, but not limited to, compensated attorneys, law clerks, paralegals, and experts. Finally, the Attorney General's office is seeking financial sanctions against present and former counsel for pursuing claims that office deems to have been brought in bad faith.

(*Id*.)[13] The court denied the motion. (PCR I ROA 2660.) The court did note that it would permit Brass to withdraw upon the appearance of new counsel that was "willing to

[13] Appellee's motion for sanctions was based solely on the fact that counsel for Michael did not oppose Appellee's motion for summary judgment on certain claims. On this basis, Appellee asserted that this "failure to do so amounts to an admission that those claims were not supported by the evidence, the law, or a good faith argument to change the law," that counsel for Michael should have omitted the claims, and that his counsel

stick with the schedule as presently set." (*Id*.) This indicates that the court may have been more concerned with concluding the proceedings than ensuring that Michael was provided with adequate, compensated, and non-conflicted counsel.

Brass submitted a second motion to withdraw in 2006, citing the lack of an attorney-client relationship since at least the date of Michael's letter to the court. (PCR I ROA 2737.) He reiterated that he had not been paid for his time or expenses, which has resulted in a conflict—pitting the financial interests of Brass's practice against Michael's interest in adequate representation. (*Id.* at 2737-38.) He stated that the failure to be compensated by the State violated the terms under which he accepted the case. (*Id*. at 2738.) He also referenced the continuing conflict and strain created by the sanction proceedings which were ongoing. (*Id*.) Again, the court denied the motion. (PCR I ROA 2742.)

Brass was finally allowed to withdraw by this Court in 2008. (*See* MIS Exh. 43.) In affirming the denial of sanctions against counsel for Michael, this Court recognized that the failure to adequately fund counsel was crippling Utah's PCR process. "We cannot allow a defendant's life to be taken by the government without an adequate review of the conviction . . . it falls to us, as the court of last resort in this state, to assure that no person is deprived of life, liberty, or property, without the due—and competent—process of law. Without a sufficient defense, a sentence of death cannot be constitutionally

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was therefore in violation of the rules of civil procedure and should be subject to sanctions. (PCR I ROA 1987). This motion was denied by and the denial was affirmed on appeal. *Archuleta IV*, 2008 UT 76, 197 P.3d 650.

imposed." *Archuleta IV*, 2008 UT 76, ¶¶ 18-19. "If, in the future, we find that the unavailability of competent and willing counsel impedes prompt, constitutionally sound resolution in capital cases, we may be forced to hold that the lack of such counsel is sufficient grounds for outright reversal of a capital sentence . . . ." *Id*. ¶ 20.

The other external factor was Respondent's insistence on pursuing a motion for sanctions and doing so during the pendency of the PCR petition. The Utah federal district court provided a concise summation of how this impacted Michael's PCR case in its finding of good cause for his failure to exhaust the *Atkins* claim in state court.

> 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 [I] 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 [I] 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.

(MIS Exh. 3 at 4 n.6 (citing *Archuleta IV*, 2008 UT 76, ¶ 12).) In determining that Brass failed to adequately represent Michael, the federal court specifically relied, in part, on the "context of Brass's representation of Michael" explaining that

> The state made 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 Brass and his client that made it

> impossible for him to completely and reasonably represent Mr. Archuleta. That 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 Brass for pursuing claims on Mr. Archuleta's behalf that the state believed were unreasonable and unnecessary, despite the fact that Brass and his then-co-counsel believed otherwise. There is no way to understand the chilling effect that had on 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 there were claims left unaddressed due to lack of time and resources. (PCR [I] ROA 2042.) To investigate and add an *Atkins* claim in this context, assuming Brass thought about doing so, would have required 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 Brass could not have competently represented Michael.

(MIS Exh. 3 at 11-12, n.13.)

On these bases—counsel's failure to investigate a significant constitutional claim that would entitle him to sentencing relief; the failure to do so despite the readily available evidence of his intellectual disability and testimony from their own expert that such investigation would be warranted by that evidence; the State's failure to adequately compensate his counsel, despite assurances to do so, creating a conflict between Michael and his attorney; and Appellee's interference in Michael's attorney-client relationship by moving for sanctions and pursuing that motion during the pendency of the post-conviction proceedings—Michael did not receive the effective assistance of counsel

generally during his post-conviction proceedings and specifically with regard to raising and supporting his *Atkins* claim. There is no reasonable basis or strategy for this failure.

Michael has been prejudiced by this failure. In the more than fourteen years since *Atkins* was announced, Michael has yet to have his *Atkins* claim determined on the full merits by any court. Given the abundance of evidence that Michael is impaired by an intellectual disability, and that such would disqualify him from execution, there is more than a reasonable probability that, "but for counsel's unprofessional errors," the outcome of his proceedings "would have been different." *Strickland*, 466 U.S. at 694. Michael can produce evidence that he is entitled to relief, evidence which is "sufficient to undermine confidence" in the legality of his death sentence. *Strickland*, 466 U.S. at 694. Michael has thereby been prejudiced by the deficient performance of his counsel and is entitled to a hearing on his *Atkins* claim.

b. Michael had a right to the effective assistance of counsel in his prior post-conviction proceeding. Denying Michael the ability to enforce that right is a denial of due process.

Although the current version of the PCRA directs courts to "promptly appoint counsel who is qualified to represent petitioners in post conviction death penalty cases as required by Rule 8 of the Utah Rules of Criminal Procedure," Utah Code § 78B-9-202(2), there are two competing provisions that render this one meaningless. First, the PCRA itself specifically prohibits "relief . . . on any claim that post conviction counsel was ineffective." § 78B-9-202(4). Second, the 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).

The qualifications of counsel are described in Utah R. Crim. P. Rule 8. However, that rule also says 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 appointed counsel ineffectively represented the defendant at trial or on appeal." Rule 8(f). This mirrors the 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 only appointed incompetent counsel.

Once a state creates a right, the federal constitution prohibits a state from arbitrarily denying that right. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) ("the Fourteenth Amendment preserves against arbitrary deprivation by the State" of a substantive right as a "denial of due process of law"); *see also Vitek v. Jones*, 445 U.S. 480, 488 (1980). Michael should have been afforded effective representation, and the failure to provide and ensure that right would also violate his rights to due process under both the Utah and federal constitutions.

This is supported by the Utah State Constitution and case law. The PCRA allows for the appointment of counsel for non-capital petitioners where "the petition or the appeal contains factual allegations that will require an evidentiary hearing" or "the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication." Utah Code § 78B-9-109(2). This Court has held that this is proper because petitioners in post-conviction proceedings under these circumstances are

"defending [a] liberty interest," which is protected by the Utah Constitution Art. 1 § 7. *State v. Ford*, 2008 UT 66, ¶¶ 15-16, 199 P.3d 892 (citing *State v. Eichler*, 483 P.2d 887, 889 (Utah 1971) (the Utah State Constitution guarantees "that an accused be provided with the assistance of counsel at every important stage of the proceedings against him . . . [that] involves the possibility of changing the defendant's status from one of being at liberty to one of being in confinement")). This Court has also recognized the concurrent federal right and adopted the Tenth Circuit's analysis abandoning the distinction between criminal and civil proceedings if the result is incarceration. *Id*. at ¶¶ 18-19. "'The right to counsel, as an aspect of due process, turns not on whether a proceeding may be characterized as "criminal" or "civil," but on whether the proceeding may result in a deprivation of liberty.'" *Id*. at ¶ 19 (quoting *Walker v. McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985). Thus, the State has violated Michael's right to due process under the Utah and federal constitutions, and his statutory right, by denying him recourse for his claims based on the ineffective assistance of his post-conviction counsel.

c. The only way to ensure the right to competent counsel in capital proceedings is to enforce it through effective representation in post-conviction proceedings.

The United States Supreme Court has recently acknowledged the necessity of competent counsel in post-conviction proceedings, and its approach can be instructive for how to resolve claims arising from post-conviction representation. In *Martinez*, the United States Supreme Court answered affirmatively, as a question of first impression, that "[i]nadequate assistance of counsel at initial-review collateral proceedings may

establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315. The United States Supreme Court defined an "initial-review collateral proceeding" as a "collateral proceeding[ ] which provide[s] the first occasion to raise a claim of ineffective assistance" of counsel. *Id.* That Court recognized the necessity for this exception, observing that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id*. at 1316.

In *Martinez*, the United States Supreme Court recognized the inequity of allowing relief based on an ineffective assistance of trial counsel claim in a system where a lay petitioner was left to her own devices to understand, discover, and plead complex claims under highly technical rules in post-conviction proceedings. The Court also acknowledged that the appointment of counsel in a post-conviction setting was not a sufficient safeguard. What is necessary is the appointment of qualified counsel with the requisite knowledge and skill to both discover the factual bases for claims and to adequately plead them within the confines of a rigid procedural system.

The rationale is analogous to that where the United States Supreme Court found that indigent appellants had the right to direct appeal counsel. In considering the inequity before the courts of wealthy and indigent appellants, the Court found

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is

> forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Douglas v. California, 372 U.S. 353, 357-58 (1963). The United States Supreme Court has stood by this conclusion, finding more recently that

> Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little education, learning disabilities, and mental impairments. *See* [*Evitts v. Lucey* 469 U.S. 387, 393 (1985)] ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."); *Gideon v. Wainwright*, 372 U.S. 335, 345 [ ] (1963) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law." (quoting *Powell v. Alabama*, 287 U.S. 45, 69 [ ] (1932))). Appeals by defendants convicted on their pleas may involve "myriad and often complicated" substantive issues, [*Kowalski v. Tesmer*, 543 U.S. 125, 145 (2004)] (Ginsburg, J., dissenting), and may be "no less complex than other appeals," *id*., at 141, [ ] (same).

Halbert, 545 U.S. at 621. This analysis reflects the unreasonableness of expecting a lay person, especially a person like Michael, with significant limitations in intellectual functioning, to be able to navigate a complex legal landscape that is beyond the reach of many educated professionals or, even to supervise his appointed counsel.

This analysis applies with greater force to the post-conviction petitioner. There is a greater need for counsel with a specialized expertise in post-conviction litigation because post-conviction claims rely on non-record based evidence. Therefore, counsel must have sufficient knowledge and skill to be able to discover and present the factual

bases for the claims, in addition to understanding the law and procedure on how to properly and timely present the claims. All of this is beyond the ability of an average lay person, and the fact that capital petitioners are imprisoned with limited access to their court records, counsel, witnesses, and any relevant extra-record evidence makes the undertaking all the more difficult. It is virtually impossible for an imprisoned petitioner to review, understand, or supervise what his appointed counsel is or is not doing, much less what they should or should not be doing.

These principles have been acknowledged by this Court. In a case involving several aspects of state habeas proceedings, two Justices observed that popular concerns over perceived delays in collateral proceedings are "seriously flawed and . . . [do] not represent a true picture of the uses to which the writ is usually put by prisoners" and overlook basic flaws that persist in those proceedings. *Julian v. State*, 966 P.2d 249, 259 (Utah 1998) (Zimmerman, J., concurring).

> [T]hose who complain of seemingly tardy habeas petitions need to recognize that neither the state nor the national government has done anything of significance to make it possible for even the most conscientious prisoner to discover possibly valid legal claims of error and pursue them competently. In Utah, most minimal legal research materials are lacking at the prison, and the legal services provided to assist the prisoners are grossly inadequate. Under such circumstances, it is a cruel joke to presume as the legislature has that virtually all prisoners are abusing the system when they file habeas petitions more than a year after their conviction.

Id. The full Court later cited this concurrence in reversing a dismissal of a post-conviction petition, holding that the lower court erred when it found "that an incarcerated

petitioner's failure to understand the legal significance of facts is irrelevant to the analysis in the context of ineffective assistance of counsel claims." *Adams v. State*, 2005 UT 62, ¶ 23, 123 P.3d 400, 406 (citing *Julian*, 966 P.2d at 259 (Utah 1999) (Zimmerman, J., concurring)). This Court explained,

> Where a criminal defendant exercises his right to counsel at trial and on direct appeal, we decline to put the burden on individuals untrained in the law to discover the errors of those whose assistance they were constitutionally guaranteed. The State is correct when it points out that there is an important public interest in finality of judgments and that there are real costs to reprosecution where a conviction is overturned on postconviction review, but these cannot outweigh the individual rights, both substantive and procedural, which the justice system exists to protect.

Id. Denial of the effective assistance of post-conviction counsel impedes the imprisoned petitioner's ability to present his claims in an initial-review collateral proceeding. In the words of this Court, without reasonably competent counsel, that review is "a cruel joke." *Julian*, 966 P.2d at 259 (Zimmerman, J,. concurring).

Utah's peculiar appellate Rule 23B, allowing for remands from direct appeal to develop an ineffective assistance of trial counsel claim, highlight the inequity of disallowing an ineffectiveness claim against post-conviction counsel. Rule 23B allows an ineffective assistance claim to be raised on direct appeal under certain narrow circumstances. In cases where it does apply, though, the appellant enjoys the right to the effective assistance of counsel in the remand and subsequent appellate proceedings. If, however, an ineffectiveness claim falls outside of Rule 23B, a post-conviction petitioner under the PCRA has no right to effective assistance in bringing that claim. If the

petitioner is saddled with incompetent counsel, when the post-conviction attorney fails to raise or botches the claim, the petitioner is foreclosed from relief, regardless of the merit of the underlying claim. *See Martinez*, 132 S. Ct. at 1316. It violates any sense of fairness and is in no way in the interest of justice. It favors only finality to the exclusion of an honest merits review of viable claims. *See Adams*, 2005 UT 62, ¶ 23. This is the "cruel joke." *See Julian*, 966 P.2d at 259.

The Utah state courts should also recognize this principle and enforce the right to the effective assistance of counsel recognized in *Menzies*, 2006 UT 81, ¶¶ 79-82. If the state courts fail to do so, the federal courts will not be required to give the state court any deference to determinations of law or fact, as there will effectively be no "available State corrective process." 28 U.S.C. § 2254(b)(1)(B)(i).

d. If Utah will not recognize a constitutional right to the effective assistance of post-conviction attorneys, or enforce the statutory right, Utah courts should recognize a *Martinez*-like equitable remedy for defaulted claims.

Michael has both a constitutional and statutory right to the effective assistance of post-conviction counsel, as explained above. If, however, this Court fails to recognize and enforce either of those rights, it should recognize an equitable remedy analogous to that created by the United States Supreme Court in *Martinez v. Ryan* and *Trevino v. Thaler* where a petitioner has the equitable right to the effective assistance of counsel in initial-review collateral proceedings. *See Martinez*, 132 S. Ct. at 1315; *see also Trevino*, 133 S. Ct. at 1921.

In federal law, a petitioner procedurally defaults a claim if he fails "to exhaust state remedies and the court to which the petitioner would be required to present his claim [ ] in order to meet the exhaustion requirement would now find the claim [ ] procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). Prior to *Martinez*, *Coleman* was understood to hold that deficient performance by a petitioner's state post-conviction attorney would not qualify as cause to excuse a procedural default. However, in *Martinez*, the United States Supreme Court noted that *Coleman* "did not present the occasion to . . . determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default." 132 S. Ct. at 1316. The United States Supreme Court held that counsel's deficient performance "at initial-review collateral proceedings may establish cause for a [petitioner's] procedural default of a claim of ineffective assistance at trial." *Id.* at 1315. This is necessary because "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id*. at 1316.

If the Utah courts continue to apply the PCRA bars to claims without recognizing this type of exception, post-conviction petitioners will be in the situation predicted by the United States Supreme Court where, despite the merit of their claims, there will be no court to review them. *Martinez*, 132 S. Ct. at 1316. That is, Utah courts will be doing precisely what this Court said it would not do, placing a value on finality above the constitutional guarantees of people subject to state law. *See Adams*, 2005 UT 62, ¶ 23

(the interest in finality "cannot outweigh the individual rights, both substantive and procedural, which the justice system exists to protect").

IV. Michael's intellectual disability is a mental incapacity that excuses him from the PCRA statute of limitations; he could not have raised his claims any earlier than the date his petition was filed in this case.

It is axiomatic that a fundamental miscarriage of justice generally excuses a procedural default. It is equally axiomatic that a potential miscarriage of justice must trump the PCRA's procedural and time bars to an otherwise properly asserted *Atkins* claim if that assertion is made outside the limitations period. A fundamental miscarriage of justice will occur if Michael is executed without having been given an opportunity to prove that he is intellectually disabled.

As established above, application of the PCRA's procedural bars is premised on the false notion that Michael is fully responsible for the acts and omissions of his post-conviction counsel. This is a fiction for any prisoner, however, it is doubly so when the petitioner is intellectually disabled. The same reasoning applies to subjecting an *Atkins* claim in its first instance to a strict time-bar. An intellectually disabled person is incapable of being cognizant of and presenting the claim themselves, and is equally incapable of compelling their court-appointed counsel to investigate, develop, and present the claim.

a. Michael's intellectual disability is a mental incapacity which exempts him from the time bar provisions of the PCRA.

Michael presented the district court with substantial evidence of his intellectual disability, which is manifest through his significant limitations in intellectual functioning

and adaptive behavior. The PCRA allows an exception to application of the statute of limitations on the basis of a mental incapacity. Utah Code § 78B-9-107(3). Michael qualifies for this exception because his intellectual disability is a mental incapacity for purposes of the PCRA.

The intellectual and adaptive behavior deficits he has shown are, independent of his *Atkins* claim, sufficient to merit an exception for the PCRA statute of limitations. (MIS at 19-61, 73-81; Response to Partial Summary Judgment Motion at 28-44.) Michael's intellectual disability prohibits him from a full understanding of the law that governs collateral relief, of the procedural requirements of pleading claims, and of the complex intersection of facts to be parsed in determining the bases for post-conviction claims. He lacks the capacity to navigate these issues 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.

Utah courts have not yet determined whether an intellectual disability is a "mental incapacity" within the meaning of § 78B-9-107(3). As shown above, meeting the requirements of the PCRA may be beyond the capacity of the average lay person. Michael, having an intellectual disability, lacks the capacity to fully appreciate the post-conviction legal process and is limited in his ability to assist his counsel. A definitive determination of the extent of Michael's deficits is a question of fact that would require

him to be fully evaluated by a qualified expert using the appropriate tests designed to make determinations of the symptoms of an intellectual disability.[14]

Because Michael's intellectual disability and the applicability of § 78B-9-107(3) are material questions of fact yet to be resolved, summary judgment on procedural grounds was improper on Michael's *Atkins* claim.

b. The date that Michael's post-conviction petition was filed was the earliest date that it could have been filed.

As established, Michael is not capable of raising his own claims in post-conviction. He requires the assistance of counsel. Also as shown above, his state-appointed counsel unreasonably failed to properly investigate or raise the claim. His present counsel are not state-appointed. They are federally appointed to assist Michael in his federal habeas action. Michael's present counsel has solely represented him since completion of his prior state case in 2011.

Federal law requires that all claims in a federal habeas petition that arises from a state court proceeding must first have been presented to a state court. *See* 28 U.S.C. § 2254 (b)(1)(A); *see also Rose v. Lundy*, 455 U.S. 509, 510 (1982). However, federal law also imposes restrictions on federal court-appointed counsel. The federal courts only

[14] The Utah Department of Corrections will not allow a contact visit between an intellectual disability expert and Michael without Michael being restrained, which would violate the clinical testing standards necessary for accuracy in neurological testing. The state district court did not rule on Michael's motion for testing under clinically appropriate conditions because it found it moot after granting summary judgment on the *Atkins* claim. (*See* Memorandum Decision at 11-12.) More information about the Department of Corrections policy and the clinically appropriate standards for testing can be found in the documents filed with the state district court. (*See, e.g.*, 1/23/2015, Memorandum in Support of Motion for Expert Contact Visits Under Conditions Adequate for Evaluation.)

have authority to appoint counsel to represent defendants or petitioners in federal cases. *See* 18 U.S.C. § 3006A; *see also* 18 U.S.C. § 3599(e). The United States Supreme Court has advised that "[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). Therefore, Michael's present counsel may only represent him in state court matters when granted leave by the federal court, and only under limited circumstances, such as presenting unexhausted claims in state court.

Before such leave may be granted, federal counsel must prepare and file a federal habeas petition, identify any unexhausted yet potentially meritorious claims, then seek a limited stay of the federal court proceedings to exhaust those claims in state court. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). They must also seek the federal court's leave to represent the petitioner in state court. Michael's counsel followed these procedures. His federal habeas petition was timely filed, a case management schedule was stipulated to by the parties and, in accordance with that schedule, Michael moved the federal court for a limited stay to exhaust his claims in state court. (*See* United States District Court of Utah Case No. 2:07-cv-630-TC, Dkt. Nos. 58, 63, 65, 66, and 75.) After the federal court granted Michael's motion to stay the federal case, Michael filed the petition which started this case. (*See* MIS Exh. 3 at 19.)

Under the circumstances, the date Michael's present post-conviction petition was filed was the earliest possible date that his claims could have been presented to a Utah state court. To deny him evidentiary development and a hearing on his *Atkins* claim because of a strict application of the time and procedural bars of the PCRA would result in the manifest injustice of subjecting an intellectually disabled person to execution in violation of the Eighth Amendment.

V. If Michael is without a remedy, then the 2008 amendments to the PCRA are unconstitutional and this Court should exercise its traditional common law authority over collateral proceedings.[15]

The Utah 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 Const., art. I, § 5. This language corresponds, almost exactly, with that from the federal constitution, which states that "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. Envisioned by our nation's founders, the writ was an entrenched and fundamental guarantee of liberty.

"[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme." *Boumediene v. Bush*, 553 U.S. 723, 743 (2008). The suspension clause exists as an "exception" to the "power given to Congress to regulate courts." *Id.*

[15] The state district court explicitly declined to take on a challenge to the PCRA, writing that it "was not in a position to expand its constitutional authority to address the merits of Archuleta's constitutional claim . . . that is the prerogative of our appellate courts, which are in a much better position to balance the policy interests at play and define the scope of any constitutional exception to a procedural bar." (Memorandum Decision at 12.) This Court may now address that matter of law de novo.

(quoting 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 460-64 (J. Elliot 2d ed. 1876)). It is a safeguard against "undivided, uncontrolled power," *id*. at 742, and therefore necessary to preserve the independence of the judiciary as a full and equal power to the legislative and executive branches.

Just as the language of the Utah suspension clause is modeled on the federal constitution, so were the analytical underpinnings. The language of the state constitutional clause was debated in the Utah Constitutional Convention and specifically adopted to keep the power the writ out of the hands of the state legislature.[16] *See* Transcript of Utah Constitutional Convention, Thursday, March 21, 1895 at 252-58.[17] Authority regarding writs of habeas corpus properly resides with the judicial bodies that adjudicate them and the state constitution prohibits the legislature from exercising any function reserved to another governmental branch. *See* Utah Const. art. V, § I. "[B]ecause 'the power to review post-conviction petitions "quintessentially . . . belongs to the judicial branch of government,' and not the legislature, . . . [the] law exceptions 'retain their independent constitutional significance and may be examined by this court in our review of post-conviction petitions.'" *Tillman v. State*, 2005 UT 56, ¶ 22, 128 P.3d

[16] "While we first look to the text's plain meaning, we recognize that constitutional language . . . is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them. We thus inform our textual interpretation with historical evidence of the framers' intent." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235 (internal citations omitted).

[17] This transcript may be referenced at http://le.utah.gov/documents/conconv/18.htm.

1123 (quoting *Gardner v. Galetka*, 2004 UT 42, ¶ 17, 94 P.3d 263, and *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989)).

To challenge the PCRA as an unconstitutional restriction of remedies, "a petitioner must prove that his case presents the type of issue that would rise to the level that would warrant consideration of whether there is an exception to the PCRA's procedural bars." *Winward v. State*, 2012 UT 85, ¶ 18, 293 P.3d 259. "[T]he petitioner must then fully brief the particulars of this exception." *Id*. "Finally, a petitioner must demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." *Id*.

a. Michael's case warrants an exception to the PCRA because he has a meritorious claim that he is exempt from execution and is justified in raising it now.

To demonstrate that "his case presents the type of issue that would rise to the level that would warrant consideration of whether there is an exception to the PCRA's procedural bars," a petitioner "must demonstrate that he has a reasonable justification for missing the deadline combined with a meritorious defense." *Id*. This is accomplished by persuading "the court that, given the combined weight of the meritoriousness of the petitioner's claim and the justifications for raising it late, the interests of justice require the court to apply an exception to procedural rules." *Gardner v. State*, 2010 UT 46, ¶ 94, 234 P.3d 1115.

This threshold is not "a hard and fast rule that a petitioner must be able to demonstrate both that his claim is meritorious and that he was justified in raising it late."

Adams v. State, 2005 UT 62, ¶ 16, 123 P.3d 400. Instead, a court should "give appropriate weight to each of those factors according to the circumstances of a particular case." *Id.* "[T]he law should not be so blind and unreasoning that where an injustice has resulted the victim should be without remedy[,]" therefore, "the writ should be available in rare cases, where it appears that there is a strong likelihood that there has been such unfairness, or failure to accord due process of law, that it would be wholly unconscionable not to re-examine the conviction." *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979) (remanding for additional proceedings where defense counsel failed to investigate petitioner's defenses and coerced petitioner into accepting plea).

i. Michael has a meritorious claim that he is intellectually disabled and categorically exempt from eligibility for execution.

The United States Supreme Court held that intellectually disabled persons are "categorically excluded from execution." *Atkins*, 536 U.S. at 318. Although they are not entirely exempt from criminal responsibility, "their disabilities in areas of reasoning, judgment, and control of their impulses" result in actions that do not have "the level of moral culpability that characterizes the most serious adult criminal conduct." *Id*. at 306. On this basis, capital punishment could not be a proportionate punishment for an intellectually disabled person. *Id*. at 311, 321.

Being intellectually disabled is not curable by rehabilitation or therapy. The categorical status applies wherever the clinical standards are found to apply by an appropriate expert, regardless of etiology or comorbidity with other physical or psychological disorders. *See* AAIDD, Mental Retardation: Definition, Classification, and

Systems of Supports 57-64 (11th ed. 2010); *see also* DSM IV at 47 ("The diagnostic criteria for Mental Retardation do not include an exclusion criterion; therefore, the diagnosis should be made . . . regardless of and in addition to the presence of another disorder."). It also applies regardless of the facts of a petitioner's offense. *See, e.g.*, *Brumfield*, 135 S. Ct. at 2283 ("We do not deny that Brumfield's crimes were terrible . . . [b]ut we are called upon today to resolve a different issue.").

For this reason, it is not an appropriate issue to be dismissed on summary judgment. While the State may have a legitimate interest in finality, it has a concurrent interest protecting its citizens who, by virtue of a disability, lack "the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins*, 536 U.S. at 306. Executing the intellectually disabled serves no legitimate interest, penological or otherwise. Denying a petitioner a fair hearing on a potentially meritorious intellectual disability claim only evinces indifference toward due process and manifest justice.

Where a petitioner alleges facts sufficient to support an *Atkins* claim, denial of evidentiary development and a hearing on the claim unreasonable. *See Brumfield*, 135 S. at 2281 (denial of an evidentiary was unreasonable where the record contained facts sufficient to support a reasonable inference of impairments in intellectual functioning and adaptive behaviors). This is so even where a procedural bar may otherwise apply. *See Sasser v. Norris*, 553 F.3d 1121, 1125-26 (8th Cir. 2009) (rejecting arguments that an *Atkins* claim was barred from review because it had been defaulted in state court and holding that such claims were exempt from limitations on successive habeas petitions).

The special status of an *Atkins* petitioner as being categorically exempt from execution, and the nature of the disability, undermine any argument that would attempt to justify imposition of time and procedural bars.

ii. Michael is justified for raising his *Atkins* claim now because of his intellectual disability and because it is the first time that he has trained counsel who function independent of the restrictive state appointment statute and other state interference.

Michael has been denied the effective assistance of counsel in his state proceedings. (*See* MIS at 19-61, 93-101, Response to Partial Summary Judgment Motion at 14-20.) More specifically, Michael was denied the right to the effective assistance of post-conviction counsel for litigating his *Atkins* claim. This prohibited him from being able to fully develop and present facts regarding his intellectual disability.

As established in Issue II, a post-conviction petitioner cannot be expected to proceed without effective counsel's assistance, whether it is recognized as a constitutional, statutory, or an equitable right. As courts, including this Court have recognized, it is a fiction to believe that the average capital petitioner will be able to navigate the appellate or post-conviction process without adequate assistance of qualified counsel; when coupled with an intellectual disability, it is even more of an impossibility.

This Court has granted post-conviction relief on the basis that petitioners cannot always be held responsible for the acts or omissions of their counsel, especially in areas of the law not commonly known to lay persons. "We refuse to indulge the fiction (contrary to the alleged fact) that the *petitioner* failed to assert a right when, allegedly, it was his attorney who failed to do so, and then on the basis of that default impose the

adverse consequence on petitioner himself." *Chess v. Smith*, 617 P.2d 341, 344 (Utah 1980).

Michael's post-conviction proceedings were plagued by the appointment of counsel who were unable to adequately represent him, either because of their own failings, or because of interference by the State. When his first post-conviction attorney, Karen Chaney, became unresponsive to communications Michael's legal team, co-counsel, David Eckersley, moved to withdraw, as was not Rule 8 qualified. (PCR I ROA 645-46). Respondent did not oppose Eckersley's withdrawal. (PCR I ROA 651). Respondent did, however, move the post-conviction court to revoke Chaney's pro hac vice admission, ensuring that Michael would be left without counsel. (PCR I ROA 653-54). Although other counsel was appointed to the case, they moved to withdraw after the State refused to compensate them and sought sanctions against them. (*See* PCR I ROA 605 (counsel for Respondent involved in discussion of payments to Michael's counsel and defense experts) and PCR I ROA 1986-89 (Respondent's motion for sanctions against Michael's counsel, creating a conflict between Michael and his counsel); *see also* Response to Partial Summary Judgment Motion Exh. 1 at 1-6).

Once Michael's case made its way into federal court, he was, for the first time, provided with counsel funding independent of State funding and interference. Thus, this was the first instance in which Michael could investigate and adequately present his *Atkins* claim and the facts supporting it to the state courts, but for the unconstitutional

limitations of the PCRA and the improper interference by the State in the appoint, funding, and functioning of his prior post-conviction counsel.

b. Michael's *Atkins* claim would qualify for the common-law exception of a claim overlooked in good faith with no intent to delay or abuse the writ.

i. The overlooked claim exception may include claims not properly raised by prior counsel.

As explained in Issue II, this Court should enforce the already recognized statutory right to the effective assistance of post-conviction counsel. Absent that, this Court should recognize an equitable remedy available to petitioners whose post-conviction counsel fail to properly raise or plead meritorious claims that warrant review. This is a variation of the rule announced by the United States Supreme Court in *Martinez*, discussed in Issue II, and would fit within the common law rule that allowed a successive habeas petition to raise "a claim overlooked in good faith with no intent to delay or abuse the writ." *Hurst*, 777 P.2d at 1037.

Post-conviction petitioners may not know all of the claims available to them, which facts are relevant in support, or how and when to plead those claims. These petitioners necessarily rely on the assistance of counsel to investigate, develop, and present claims to courts on their behalf. This is especially true of petitioners with disabilities or limitations, such as Michael. If they are failed by their appointed counsel, because counsel is unlearned, unfunded, overburdened, or for other reasons external to the petitioner, petitioners cannot be fairly held accountable for the acts, omissions, or oversight of their counsel. Therefore, if a claim is defaulted in an initial-review collateral

proceeding, if a claim is pled insufficiently as to preclude merits review, or if a claim is otherwise presented in a way that does not allow for a full and fair determination, the failing may not be attributable to the petitioner. *See Martinez*, 132 S. Ct. at 1315; *see also Sanders v. United States*, 373 U.S. 1, 16-17 (1963). Recognition that ineffective assistance of post-conviction counsel can fit within the exception of claims overlooked in good faith, with no intent to delay or abuse the writ, would allow for the determination of claims which may merit relief that would otherwise be precluded solely on strict procedural grounds. This would allow for a more fair determination of all aspects of capital cases, and reduce the risk of executing a petitioner where it is otherwise illegal or not appropriate. "[P]roper consideration of meritorious claims raised in a habeas corpus petition will always be in the interests of justice." *Adams*, 2005 UT 62, ¶ 15 (quoting *Julian v. State*, 966 P.2d 249, 254 (Utah 1999)).

ii. This use of the exception would allow for summary denial of frivolous, re-litigated, and purposefully withheld claims.

For two reasons, recognizing this exception will not open the door to endless litigation forever forestalling an end to cases. First, it is a return to the more balanced approach courts have historically taken to habeas petitions. "Frivolous claims, once-litigated claims with no showing of 'unusual circumstances' or 'good cause,' and claims that are withheld for tactical reasons should be summarily denied." *Hurst*, 777 P.2d at 1037. The burden is on the petitioner to show that hearing the claim is in the interests of justice. *Id*. (citing *Sanders v. United States*, 373 U.S. 1, 16 (1963)). If a claim has

already been heard on its merits by the post-conviction court, and a petitioner raises nothing new warranting consideration of the claim, it may be summarily denied.

However, it would allow courts to reach the merits of claims that have not been deliberately withheld or abandoned, or unless the petitioner exhibited inexcusable neglect in failing to assert the claim earlier. *See Sanders*, 373 U.S. at 18. The exception would limit claims that are facially frivolous, re-litigated, and tactically withheld. In all instances, the governing principle would not be the automatic imposition of a procedural rule, but a consideration of the interests of justice, allowing courts to hear the merits of substantial claims.

Second, if this Court crafts an exception that is specifically tailored to *Atkins* claims, it would further limit petitioners' eligibility to raise claims that would otherwise be barred. Practically speaking, for Utah petitioners, there are no other death row prisoners who have *Atkins* claims that are not already pursuing relief on those claims in the state courts. As far as future cases are concerned, capital-charged defendants must bring their *Atkins* claim pre-trial. If there is a deficiency in the pre-trial proceedings, those issues will be litigated in the direct appeal and post-conviction proceedings, which would occur regardless. Therefore, the only potential beneficiary of an exception narrowly-tailored to a first-instance *Atkins* claim would be Michael.

iii. This Court has asserted its constitutional authority over the traditional habeas writ process.

It is long settled that determinations of the constitutionality of statutes is the sole province of the judiciary.

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> . . .
>
> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). It is similarly settled that habeas corpus is the sole province of the courts. Even when a legislative act may attempt to suspend it, "[t]he suspension of the privilege of the writ of habeas corpus does not suspend the writ itself." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130-31 (1866) "The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it." *Id*.

In Utah, this Court unequivocally has authority over matters of habeas corpus as a check and balance to legislative and executive powers. "[T]o the degree that the PCRA purports to erect an absolute bar to this court's consideration of successive post-conviction petitions, it suffers from constitutional infirmities." *Gardner v. Galetka*, 2004 UT 42, ¶ 17, 94 P.3d 263. "Quintessentially, the Writ belongs to the judicial branch of government." *Hurst*, 777 P.2d at 1033-34 (discussing the Utah Constitution's grant of powers to the state courts and provision protecting the separation of powers as it relates

to writs and habeas corpus); *see also Tillman v. State*, 2005 UT 56, ¶ 22, 128 P.3d 1123 (because power over habeas corpus belongs to the courts and not the legislature, the common-law exceptions to procedural bars against successive petitions retain their effect).

The exception that Michael requests is one recognized by this Court as a traditional common law exception. Because this area is one over which the Utah courts have traditionally had constitutional dominion, there is no question that Utah courts have the authority to apply the exception.

c. Michael's intellectual disability and the chronic failure of the state to provide him with adequate counsel warrant application of the common-law exception.

The two main facts that qualify Michael for the proposed exception are his intellectual disability and that he has never had post-conviction counsel that was able to provide him the necessary assistance to raise and plead his constitutional claims to the post-conviction court.

First was Karen Chaney, who ceased communicating with her co-counsel, David Eckersley, and other team members. (PCR I ROA 645-46.) Based on this, Eckersley moved to withdraw from the case because he was not Rule 8 qualified. (*Id*.) Chaney was suffering from a medical condition that prohibited her from completing work on the case, allowing it to languish. (PCR I ROA 657-60.) Although Chaney filed an initial and amended habeas petition, raising numerous claims, they were raised in name only, with no evidentiary bases. (PCR I ROA 47-75.) After being unresponsive, Respondent

moved to revoke Chaney's pro hac vice status, leaving Michael unrepresented. (PCR I ROA 653-54.) This was the first step in an ongoing pattern of interference by Respondent into Michael's representation.

Next, the post-conviction court appointed Edward Brass, and, subsequently, McCaye Christianson and L. Clark Donaldson to assist. (PCR I ROA 728, 752, 758, 742.) Eventually, both Christianson and Donaldson withdrew, citing that neither had been compensated for their 18 months of work on the case. (PCR I ROA 1798-99, 1800-03.) According to Brass, all of the funds allotted to Michael's representation needed to be expended on the experts retained in the case. (*See Archuleta v. State*, Utah Supreme Court Case No. 2000256, 02/01/2008, Motion to Permit Withdrawal of Counsel at 2.)

During this period, counsel for Michael filed a second amended petition and attached some records, a social history document, and declarations from his adoptive mother and birth mother, and a neuropsychologist. (PCR I ROA 888-1227.) Mostly the second amended petition relied on claims already dismissed by the post-conviction court, with no attempt to revive the claims by overcoming any procedural hurdles. 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 I ROA 2226-98.) Notably, several of the claims were defaulted in the summary judgment proceeding. (PCR I ROA 2239.) Others were presented with incomplete legal arguments. Few were presented with any factual bases.

Despite this, certain claims regarding trial counsel's performance in preparation of and during the penalty phase survived summary judgment. (PCR I ROA 2298.) By that point, however, Christianson and Donaldson had withdrawn, leaving Brass to manage the case on his own. Respondent filed a motion to appoint co-counsel to Brass on the bases that he was unqualified on his own, that he had defaulted another capital case (*see Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480), and that he appeared to be heading in the same direction in Michael's case. (PCR I ROA 2323.) In the *Menzies* case, Brass filed an affidavit asserting that

> Despite being perhaps technically qualified under Rule 8 to serve as post-conviction counsel in capital cases, I have had no training regarding federal habeas law, and believed Menzies was better off seeking relief in federal 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.

(PCR I ROA 2343-44.) Brass sought to withdraw, citing a conflict with Michael, the burdens of capital litigation, being compelled to represent Michael without compensation, and having to defend himself against the sanctions sought by Respondent. (PCR I ROA 2649-50.) The motion was denied. (PCR I ROA 2660.) Eventually, during appeal, Brass was allowed to withdraw. At that point, however, it was too late to salvage the case.

Respondent bears responsibility for the circumstances of Michael's deficient representation. Counsel for Respondent advocated for the statute which compels

appointment of counsel in post-conviction cases without providing adequate compensation, resulting in unwilling counsel being compelled to represent capital petitioners pro bono. Then, when Michael's counsel inevitably was unable to provide competent representation, Respondent moved for sanctions against those attorneys, and further overburdened them and placed their interests in conflict with Michael's. When Michael's counsel inevitably moved to withdraw, Respondent opposed the request. (PCR I ROA 2652-2658.) Respondent has attempted to interfere with Michael's present federal habeas counsel, however, the federal court ordered that "Once the Court assigned Petitioner federal counsel, an attorney-client relationship was created, and the Court is not interested in Respondent's attempts to invade and limit the scope of that relationship." (MIS Exh. 42 at 3.[18])

The limitations described above—Michael's intellectual disability, his post-conviction counsels' lack of experience, training, funding, and expertise, and the limitations of the PCRA—have all combined to deny Michael a full and fair determination of his claims. Because there has been no proper factual development of

[18] The federal habeas court characterized Respondent's actions during Michael's post-conviction proceedings as follows: "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 I 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 I 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)." (MIS Exh. 3 at 4 n.6.)

the claims, Michael has been denied a fair determination of his *Atkins* claim. It is in the interests of justice to ensure that Michael is afforded the due process he has thus far been denied.

CONCLUSION

Based on the foregoing, Michael asks this Court to recognize an *Atkins* claim as a status claim which may be raised at any time, in harmony with the Utah exemption statute and in conformance with the *Atkins* decision. In the alternative, Michael asks that this Court either enforce his right statutory to the effective assistance of counsel that he enjoyed during his prior PCR proceedings or provide an equitable remedy allowing him to raise a claim of ineffective assistance of counsel in an initial-review collateral proceeding where otherwise he would be prohibited from having any court review a meritorious constitutional claim. Or, in the alternative to that, Michael asks this Court to assert its quintessential authority over habeas corpus and find a good cause exception to the procedural and time bars of the PCRA for failing to raise his *Atkins* claim in his prior PCR proceedings on the basis of the intellectual disability itself and the ineffective assistance of his prior PCR counsel. Finally, he asks this Court to find that the district court's summary judgment grant was improper, and to permit him the opportunity to finally develop and present evidence of his intellectual disability ineligibility for execution.

Respectfully submitted this 19th day of December, 2016.

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_____
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 27,669 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

_____
by David Christensen

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2016, the original of the foregoing Opening Brief was filed by electronically with the Clerk's Office and two copies were mailed via First Class Mail, postage prepaid, to the following:

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_____
by David Christensen

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

FILED
FEB - 2 2016
4TH DISTRICT
STATE OF UTAH
MILLARD COUNTY

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

MICHAEL ANTHONY ARCHULETA, Petitioner, vs. SCOTT CROWTHER, Respondent.	**CORRECTED MEMORANDUM DECISION AND ORDER ON MOTIONS**[1] Case No. 140700047 Judge Jennifer A. Brown

THIS CASE IS BEFORE THE COURT on Respondent's Motion to Stay the Summary Judgment Reply and Ruling on the Procedural Issues, which was filed on September 23, 2015; Respondent's Motion for Partial Summary Judgment, which was filed on May 27, 2015; Respondent's Motion for Contact Visit, which was submitted for decision on September 25, 2015; Petitioner's Motion for Contact Visit, which was submitted for decision on September 30, 2015;[2] Respondent's Motion for Leave to Conduct Discovery, which was filed on December 1, 2015; and Petitioner's Renewed Motion for Expert Contact Visit, which was filed on December 9, 2015. The Court will address each motion below.

1. **Respondent's Motion to Stay the Summary Judgment Reply and Ruling on Procedural Issues**[3]

On May 27, 2015, the State filed a motion for summary judgment on Petitioner's claim that he is exempt from the death penalty due to intellectual disability. The State's motion argued

[1] The decision itself has not been modified, but the headings and footnotes were lost in processing the prior Memorandum Decision issued on February 2, 2016. This Corrected Memorandum Decision is to provide the format in which the Memorandum Decision had originally been drafted.

[2] On November 24, 2015, the Court issued an Order indicating the September 25 and September 30 requests to submit for decision were not ripe for review.

[3] The State's motion does not comply with rule 7 of the Utah Rules of Civil Procedure, which requires a motion to be accompanied by a separate memorandum. Although the Court is considering the motion at this time, the Court reminds the parties that they must comply with the Rules of Civil Procedure in all future filings.

that summary judgment is proper because Petitioner has not met his burden to show he is intellectually disabled and because the claim is barred both by time and by procedural deficiencies under the post-conviction relief statutes. In the State's reply memorandum, however, the State withdrew its motion for summary judgment on the merits. The State now asks the Court to stay determination of summary judgment on the time and procedural bars until the merits can be fully adjudicated in an evidentiary hearing.

While the Court accepts the State's withdrawal of its motion for summary judgment on the merits, the Court declines to grant the motion to stay on the time and procedural bars pending an evidentiary hearing for two reasons: First, if the Court were to grant the State's request, there would be no legal mechanism that would allow the Court to conduct an evidentiary hearing. The State did not answer the petition; instead, it chose to file a motion for summary judgment as its response. If the motion for summary judgment is both withdrawn and stayed, the petition has no answer. Without an answer or other response, an evidentiary hearing on the merits of the petition is premature. If the State desires to withdraw its motion for summary judgment on the merits and stay the motion on the procedural issues, the proper course of action would be for the State to file an answer to the claim in the petition. At that point, discovery would be opened and the case could move forward to an evidentiary hearing on the merits.

Second, the Court is persuaded by the State's motion that summary judgment is proper on the procedural issues, and it would be a waste of judicial resources to proceed with an answer from the State, conduct discovery, and hold an evidentiary hearing. Importantly, even if the State had not initially raised these issues, the Court may raise them on its own motion at any time, as long as the Court provides notice to the parties and an opportunity to be heard. *See* § 78B-9-106(2)(b). Here, both parties have briefed the procedural and time bar issues in their memoranda

on the motion for summary judgment; accordingly, the Court concludes both parties have had an opportunity to be heard on these matters. Thus, whether the Court rules on the summary judgment motion or whether it dismisses Petitioner's claim on its own motion, the end result is the same. The Court will set forth its reasoning for granting summary judgment more fully in its ruling below. The State's motion to stay is, therefore, denied.

2. Respondent's Motion for Summary Judgment / Court's Motion to Dismiss

a. Material Facts[4]

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). On March 3, 1993, the court appointed Ms. Karen Chaney pro hac vice and Mr. Eckersley as local counsel to represent Mr. Archuleta in his first post-conviction relief case. Archuleta filed an initial petition on March 10, 1994, and an amended petition on August 11, 1994. 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. 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.

The Court appointed Mr. Edward Brass, Mr. Lynn Donaldson, and Ms. McCaye Christianson to represent Archuleta. Archuleta then filed a second amended petition on June 14, 2002, approximately 11 months after new counsel was appointed. Six days later, the United States Supreme Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held

[4] These facts are taken directly from the court records and the State's recitation of facts in its supporting memorandum. In his opposition, Petitioner alleges in a sweeping fashion that the facts in the State's memorandum are disputed; however, Petitioner does not indicate which facts he is specifically disputing nor does he advance any alternative facts. The Court, therefore, finds the facts to be as recited in this ruling.

that it is unconstitutional for a state to execute a person who is intellectually disabled. In support of the pending petition, Archuleta's counsel hired Dr. Gummow and Dr. Cunningham to evaluate Archuleta for "any and all possible mental health defenses." The State hired Dr. Stephen Golding to also evaluate Petitioner. Archuleta's counsel did not move to amend its second petition to add an *Atkins* claim.

On August 24, 2004, the district court granted summary judgment in favor of the State on a majority of Archuleta's claims. On March 21 and 22 and May 17 and 18, 2006, the district court held an evidentiary hearing on Archuleta's remaining claims, during which Dr. Gummow, Dr. Cunningham, and Dr. Golding all testified regarding various issues of Archuleta's mental abilities. Dr. Gummow testified that she did not see any evidence that Archuleta was intellectually disabled. Dr. Cunningham specifically referred to *Atkins* as categorically exempting intellectually disabled defendants from receiving the death penalty and testified that Archuleta was on the "edge" of intellectual disability. Still, Archuleta's counsel did not move to amend his petition and add a claim under *Atkins*. The district court denied all remaining claims on January 22, 2007, and issued a final order on February 26, 2007. 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. On February 1, 2008, Mr. Brass asked permission to withdraw from the state court proceedings, and on August 27, the district court appointed new counsel to represent Archuleta on the appeal in state court, Mr. James Slavens.

On July 17, 2009, Archuleta, aided by new counsel, filed a motion under Rules 59 and 60(b) in the state district court to set aside the order dismissing the second amended petition for

post-conviction relief. Among the reasons raised by the rule 59 and 60(b) motion was a claim that Archuleta's post-conviction counsel was ineffective for failing to raise a claim that Archuleta is intellectually disabled and therefore constitutionally barred from receiving the death penalty pursuant to *Atkins*. The district court denied the motion on April 21, 2010, and the Supreme Court affirmed the dismissal of the petition for post-conviction relief and the denial of the rule 59 and rule 60(b) motion on November 22, 2011. *See Archuleta v. Galetka*, 2011 UT 73.[5] The United States Supreme Court denied review on October 1, 2012.

On November 29, 2012, Dr. Weinstein signed a Declaration indicating that Archuleta may be intellectually disabled and that further testing was required. *See* Pet.'s Exhibit 31. Archuleta's federal counsel then filed a habeas petition in federal court in December 2012, claiming he is exempt from the death penalty pursuant to *Atkins* v. *Virginia.* In January 2013, the parties agreed to a scheduling order, which included a deadline for Archuleta to file a motion to stay the federal case while he pursued an *Atkins* claim in state court. In addition, Archuleta represented he would file a motion for a contact visit for a neuropsychological examination to support his *Atkins* claim.

Dr. Weinstein provided a second report on June 1, 2013, wherein he represented that Archuleta's intellectual functioning was subaverage and consistent with intellectual disability. However, Dr. Weinstein did not come to a final conclusion regarding whether Archuleta met the standards for intellectual disability. *See* State's Exhibit H.

Archuleta then moved to stay the federal case[6] while he returned to state court to exhaust

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[5] The Supreme Court found that Mr. Brass "diligently sought to serve his client's interests," and commended Mr. Brass for hiring Drs. Cunningham and Gummow to evaluate Archuleta's mental abilities. *See Archuleta v. Galetka*, 2011 UT 73, ¶¶ 167-68.

[6] The State did not provide the exact date Archuleta's motion to stay was filed in district court. However, based upon the State's representation that it was five months after the scheduling order was established in January 2013, the Court concludes the motion to stay was filed sometime in June 2013.

his *Atkins* claim. On November 12, 2014, the federal district court granted the motion to stay, giving Archuleta 30 days to file a claim in state court. On December 3, 2014, Archuleta filed a motion in federal court for his expert, Dr. Watson, to have a contact visit with Archuleta at the prison. Archuleta filed his current petition for post-conviction relief in this court on December 12, 2014.

b. Discussion

The Post-Conviction Remedies Act (PCRA) allows a petitioner to claim relief if the claim is not procedurally-barred. *See* § 78B-9-106. In relevant part, a person is not eligible for relief in two instances: First, 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). *Atkins* was decided on June 20, 2002, only six days after Archuleta filed his second amended petition. In addition, Dr. Cunningham provided evidence of Archuleta's mental abilities at an evidentiary hearing in 2006. However, Archuleta did not move to amend his petition and add an *Atkins* claim at any point throughout his initial post-conviction relief case. Thus, the Court concludes that because Archuleta could have raised his claim that he is intellectually disabled in his first petition for post-conviction relief case, he is procedurally barred from raising it in a subsequent petition. *See* § 78B-9-106(d).

Second, a person is not eligible for relief if the claim is barred by the limitation period established in the PCRA. *See* § 78B-9-106(e). Under the 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,[7] a cause of action accrues on the latest of the following dates: "(e) the date on which petitioner knew or should have known, in the exercise of

[7] Subsections (a) through (d) of the statute refer to accrual dates that occurred prior to the Supreme Court's decision in *Atkins v. Virginia*.

reasonable diligence, of evidentiary facts on which the petition is based"; or (f) the date on which a new rule is established by the United States Supreme Court that justifies relief. Utah Code § 78B-9-107(2); § 78B-9-104(1)(f).

The United States Supreme Court issued its decision in *Atkins v. Virginia* on June 20, 2002. Thus, pursuant to subsection (f) of section 78B-9-107, Archuleta had until June 20, 2003, to file his claim that he is exempt from the death penalty due to intellectual disability. Under this provision, Archuleta's filing is over eleven years too late.

Under subsection (e), Archuleta had a year from the date he knew or, in the exercise of reasonable diligence, should have known of the evidentiary facts in support of his claim. The Court finds that Archuleta should have known of the evidentiary facts in support of his claim at the time *Atkins* was decided or soon thereafter. Thus, under this provision, Archuleta had until June 20, 2003, or soon after, to file his claim. However, Archuleta filed his claim that he is intellectually disabled over 12 years after *Atkins* was decided. To the extent that his counsel needed more evidence to support a claim of intellectual disability, the Court finds that Archuleta was not reasonably diligent in pursuing the evidentiary facts to support his claim.

Even assuming that Archuleta did not know of the facts until a later time, the Court concludes that his filing is untimely. Dr. Cunningham specifically mentioned *Atkins* at the 2006 evidentiary hearing and testified that Archuleta was on the "cusp" of being intellectually disabled. Calculating from the time Dr. Cunningham's evidence was known, Archuleta had until May 2007 to file his claim. However, at no time did Archuleta move to amend his second amended petition to add a claim under *Atkins*, nor did he file a motion to request permission to pursue additional evidentiary facts that may have bolstered Dr. Cunningham's conclusions.

Furthermore, on July 17, 2009, Mr. Slavens specifically raised *Atkins* as a reason for the district court to set aside its dismissal of Archuleta's initial post-conviction relief case, arguing that Mr. Brass was ineffective for failing to raise intellectual disability as a claim. Thus, Archuleta was aware of the evidence underlying his claim at least by July 2009. Calculating from that date, Archuleta had until July 17, 2010, to raise his claim in a post-conviction relief action.

The Supreme Court issued a ruling affirming the dismissal of the second amended post-conviction relief petition and the denial of the rule 60(b) motion on November 22, 2011. Archuleta's petition for a writ of certiorari to the United States Supreme Court was denied on October 1, 2012. Calculating from that date, Archuleta had until October 1, 2013, to file his claim.

Dr. Weinstein examined Archuleta and provided an initial report on November 29, 2012, indicating that Archuleta may be intellectually disabled. Calculating from that date, Archuleta had until November 29, 2013, to file his claim. In January 2013, Archuleta's counsel informed the federal court that they intended to pursue an *Atkins* claim in state court. Calculating from that date, Archuleta had until January 2014 to file his claim. Dr. Weinstein evaluated Archuleta a second time and provided a second report on June 1, 2013. Calculating from that date, Archuleta had until June 1, 2014, to file his claim.

Archuleta did not file his claim until December 2014. Thus, even under the most generous evaluations of when Archuleta knew or should have known of the evidentiary facts in support of his claim, Archuleta's claim is untimely and therefore precluded from relief under sections 78B-9-104(1), 78B-9-106(e), and 78B-9-107.[8]

[8] Under section 78B-9-107(3), the limitations period is tolled "for any period 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." Petitioner has not alleged that the tolling provision of the statute applies in this case.

Archuleta argues that the procedural and time bars should not apply to his case for two reasons: 1) the good cause common law exceptions to the procedural limitations apply and 2) the PCRA procedural and time limitations are unconstitutional. The Court will address both arguments below.

1. Good Cause Exceptions

Prior to 2008, the Utah Supreme Court recognized and applied common law exceptions to the procedural bars precluding a claim of post-conviction relief. *See Hurst v. Cook*, 777 P.2d 1029 (Utah 1989)[9]; *Tillman v. State*, 2005 UT 56, ¶¶ 20-22. In 2008, the legislature amended the PCRA, indicating that the Act "replaces all prior remedies for review, including extraordinary or common law writs" and that it is now "the sole remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies" § 78B-9-102(1). In addition, the 2008 amendments removed a provision that allowed an exception to be made to a procedural bar if it would be in the "interests of justice" for the court to hear the merits of the claim. The "interests of justice" language was replaced with the statutory tolling provision currently found in section 78B-9-107(3). *See Branch v. State*, 2015 UT App 204, ¶ 6.

Following the 2008 amendments to the PCRA, the Supreme Court recognized in *Peterson v. Kennard* that the PCRA "appears to have extinguished [the Court's] common law writ authority." 2008 UT 90, ¶ 16 n. 8. Archuleta suggests the *Kennard* Court merely acknowledged an "appearance" of extinguishment of the court's authority to hear common law writs, "pointedly" leaving the question open. Pet.'s Opposition, at 10. Quoting *Tillman*, Archuleta argues that "the power to review post-conviction petitions quintessentially . . . belongs to the judicial branch of government" and that the common law exceptions to procedural bars

[9] Although the good cause exceptions are listed in *Hurst,* the list is not exhaustive. *See Candelario v. Cook*, 789 P.2d 710, 712 (Utah 1990).

cannot be eliminated by the legislature. 2005 UT 56, ¶ 22. Thus, despite the language of the PCRA, Archuleta contends this court has the inherent power to exercise its constitutional authority and apply the good cause common law exceptions to the procedural bars.

After the decision in *Kennard*, the Utah Supreme Court addressed the issue of whether the common law exceptions are still applicable at least three times: First, in *Gardner v. State*, the Supreme Court explained that following the 2008 amendments to the PCRA, it amended rule 65C to "embrace [the PCRA] as the law governing post-conviction relief" by removing language referring to the court's constitutional authority to grant relief in cases of "obvious injustice." 2010 UT 46, ¶ 92.[10] Second, in *Taylor v. State*, the Supreme Court recognized that the 2008 amendments to the PCRA "extinguished" the court's common law authority to apply exceptions to the procedural bars. 2012 UT 5, ¶ 11 n. 3. Finally, in *Pinder v. State*, the Supreme Court explicitly indicated the *Hurst* common law exceptions "are available only for claims filed before May 5, 2008." 2015 UT 56, ¶ 56.

Thus, even if Archuleta is correct that the judiciary retains the constitutional authority to apply the *Hurst* common law exceptions, the Utah Supreme Court has apparently abrogated the exceptions in light of the amendments to the PCRA and rule 65C. Accordingly, without further guidance and direction from our appellate courts, this Court concludes the *Hurst* 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.

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[10] Even so, as is discussed more fully *infra*, the *Gardner* court specifically acknowledged that it may retain some constitutional authority to hear a claim where denying it may cause "an egregious injustice." *Id.* ¶ 93.

2. Constitutional Issues

Archuleta also contends the PCRA is unconstitutional under the Fourteenth and Eighth Amendments. Because the constitution forbids the state to execute people who are intellectually disabled, Archuleta argues that his status as a potentially intellectually disabled person facing execution should provide a constitutional exception to any procedural bar to hearing his claim. Archuleta further argues that, because his claim has never before been presented to a court due to the "unreasonably deficient performance of his post-conviction counsel," due process requires this court to allow the claim to proceed. Pet.'s Memo. at 12. Otherwise, according to Archuleta, the primary effect of the PCRA "is to deny relief without affording due process of law." *Id.* at 4.

The PCRA and rule 65C define the process afforded to defendants and petitioners for pursuing their post-conviction relief claims. Petitioner has not cited any precedent that would allow this Court to expand Petitioner's due process rights beyond the process afforded in the statutes and rules. Petitioner is correct that the Utah Supreme Court has ruled that a petitioner facing the death penalty had the statutory right to the effective assistance of counsel in an initial capital post-conviction relief case filed before 2008. *See Menzies v. Galetka*, 2006 UT 81. But the Supreme Court has not yet addressed whether the statutory right to effective assistance of counsel expands a petitioner's due process rights and creates an exception to the procedural bars of the PCRA in subsequent petitions—especially petitions filed after the 2008 amendments to the statute. This Court declines to create such an exception where our appellate courts have not yet recognized one.

Furthermore, as argued by the State, even if the right to effective assistance of counsel does create such an exception, Archuleta's counsel, Mr. Brass, stopped representing him in 2008—over 6 years before he filed his claim. Since that time, Archuleta was represented by Mr.

Slavens and his current counsel. Archuleta does not provide a reasonable excuse for failing to raise his claim until December 2014.[11]

Even so, in *Gardner v. State*, 2010 UT 46, the Supreme Court acknowledged that it *may* have the authority under the Utah Constitution to address the merits of an otherwise-barred post-conviction relief petition when not addressing it may result in an "egregious injustice." *Id.* ¶ 93. Subsequently, in *Winward v. State*, 2012 UT 85, the Utah Supreme Court articulated a framework for considering whether a petitioner's claim would be subject to such an exception. First a petitioner must show that he has "a reasonable justification for missing the deadline combined with a meritorious defense." Second, the petitioner must then "fully brief the particulars of this exception," including an "articulation of the exception itself, its parameters, and the basis for [the] court's constitutional authority for recognizing such an exception." *Id.* Finally, a petitioner must explain "why the particular facts of his case qualify under the parameters of the proposed exception." *Id.*

The parties did not explicitly address the *Winward* framework in their briefing with the Court. This Court recognizes that even if the parties had briefed the issue, this Court is not in a position to expand its constitutional authority to address the merits of Archuleta's constitutional claim. Rather, that is the prerogative of our appellate courts, which are in a much better position to balance the policy interests at play and define the scope of any constitutional exception to a procedural bar.

Accordingly, the Court concludes Archuleta's claim of intellectual disability is procedurally barred under the PCRA and, absent direction and authority from our appellate

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[11] Archuleta's counsel argues he was diligent in pursuing his claim in state court, but the timeline of events between 2008 and December 2014 suggests otherwise. Indeed, Archuleta's current counsel explicitly indicated their intent to bring a state court claim in January 2013, almost two years before they actually filed the petition.

courts, no statutory, common law, or constitutional exception applies to his case. The Court, therefore, dismisses the claim.

3. The Parties' Motions for Contact Visit and Motion for Leave to Conduct Discovery

Both parties have moved the Court for an order to allow them to evaluate the petitioner due to his claim of intellectual disability. With regard to the State's request, because the *Atkins* claim has been dismissed and the Court declines to hold an evidentiary hearing on the issue, there is no good cause under rule 65C(n) to grant the motions. Therefore, the State's motions are DENIED.

With regard to Petitioner, the Court is aware that it is the position of both the Petitioner and the Respondent that Petitioner's requests for his expert to have less restrained access to Archuleta are not discovery motions under rule 35. Petitioner and his expert, Dr. Watson, currently have access to Archuleta—just not *unrestrained* access. While generally the Court agrees that Petitioner's counsel's access to their client is not discovery, Petitioner has requested an order compelling the prison to provide certain testing conditions. Regardless of whether Petitioner's request is a discovery request or merely a motion for unencumbered access pursuant to *Turner v. Safley*, 482 U.S. 78, 79 (1987), and its progeny, Petitioner's reasons for bringing the motion is to develop evidence to support his *Atkins* claim. Because the *Atkins* claim has been dismissed, his request is moot. His motions are, therefore, DENIED.

4. The Remaining Claims in the Petition

Following the filing of the petition for post-conviction relief, the State moved the Court to sever the *Atkins* claim from Archuleta's other claims. The Court has dismissed the *Atkins* claim, and the remaining claims in the petition are now ripe for review. The Court orders the State to answer or otherwise respond to the remaining claims within 60 days of this ruling and

order.

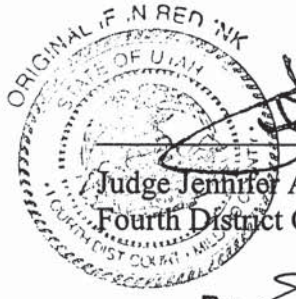
ORDER

For the foregoing reasons, the State's Motion to Stay the Motion for Summary Judgment is DENIED; the State's Motion for Partial Summary Judgment, or alternatively, the Court's sua sponte Motion to Dismiss is GRANTED; the State's Motion for Contact Visit is DENIED; the State's Motion for Leave to Conduct Discovery is DENIED; and the Petitioner's Motions for Contact Visit are DENIED. The Court orders the State to file an answer or otherwise respond to the remaining claims in the petition within 60 days of this order.

This Memorandum Decision and Order completes the court's disposition of the matters addressed herein. No further order is required from the parties.

DATED this 2nd day of Feb, 2016.

BY THE COURT:



Judge Jennifer A. Brown
Fourth District Court

By Teri Stephenson
STAMP USED AT DISCRETION OF JUDGE

CERTIFICATE OF DELIVERY

I certify that a true and correct copy of the foregoing **Memorandum Decision and Order on Motions** was either emailed, mailed, faxed, or hand-delivered on the 2nd day of Feb, 2016, to the following:

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