IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL ANTHONY ARCHULETA, Appellant, v. STATE OF UTAH, Appellee.	Utah Supreme Court Case No. 20160992 **DEATH PENALTY CASE**

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

RESPONSIVE BRIEF TO APPELLEE'S CORRESPONDENCE FILED JUNE 9, 2017

Sean D. Reyes
Utah Attorney General
Andrew F. Peterson
Aaron G. Murphy
Assistant Solicitors General
160 E. 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114
Attorneys for Appellee

Jon M. Sands
Federal Public Defender, Dist. of Ariz.
Leticia Marquez (AZ Bar #017357)
Charlotte G. Merrill (AZ Bar #029786)
Assistant Federal Public Defenders
850 W. Adams St., Ste. 201
Phoenix, AZ 85007
Attorneys for Appellant

FILED
UTAH APPELLATE COURTS
JULY 5, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Appellant, Michael Anthony Archuleta, through counsel, respectfully asks this Court to accept Appellee's (the State's) Letter in Lieu of Appellee Brief as a waiver of any arguments against the substance of the issues raised in his Opening Brief. For the reasons below, this Court should accept the assertions in Mr. Archuleta's Opening Brief and grant relief. In the alternative, should this Court order the State to respond to Mr. Archuleta's Opening Brief, he respectfully asks the Court to set a revised briefing schedule ordering the State to file an Answering Brief and to permit Mr. Archuleta adequate time to reply.

BACKGROUND

The United States District Court for the District of Utah found that Mr. Archuleta had raised "a potentially meritorious and not plainly meritless" issue that he is intellectually disabled. (ECF 107, Order Granting Motion to Stay at 12, *Archuleta v. Crowther*, No. 2:07-CV-630 (D. Utah Nov. 11, 2014).) It found that Mr. Archuleta had "made the preliminary showing that he is intellectually disabled and is entitled to an adjudication of his condition." (ECF 107, Order Granting Motion to Stay at 18, *Archuleta v. Crowther*, No. 2:07-CV-630 (D. Utah Nov. 11, 2014).) And, while the federal court, in the interest of comity, ultimately decided to permit Utah's state courts to adjudicate the merits of his intellectual disability, it noted that "there were questions about his intellectual ability and adaptive functioning from an early age that were not fully addressed during trial, or even during the later evidentiary hearing, in an Atkins

context."[1] (ECF 107, Order Granting Motion to Stay at 12, *Archuleta v. Crowther*, No. 2:07-CV-630 (D. Utah Nov. 11, 2014).)

The federal court also found that Mr. Archuleta had presented "good cause" for failing to raise his intellectual disability claim in state court—"the ineffective assistance of post-conviction counsel." As the court noted, the good cause standard in this context is a "very high bar." (ECF 107, Order Granting Motion to Stay at 10, *Archuleta v. Crowther*, No. 2:07-CV-630 (D. Utah Nov. 11, 2014).) It explained that, "Given everything else in the record before the court, the more reasonable conclusion is that [post-conviction counsel,] Mr. Brass, by his own admission, was not competent to handle capital habeas appeals alone, which is what he was doing in Mr. Archuleta's case, and that, as discussed more below, he did not have the time or resources" to raise Mr. Archuleta's intellectual disability claim. What is more, "The state made Mr. Brass's job difficult. It attacked him personally through litigation sanctions that were ultimately found to be baseless, and it refused to properly fund his defense of Mr. Archuleta. By its actions, the state created a conflict of interest between Mr. Brass and his client that made it impossible for him to completely and reasonably represent Mr. Archuleta." (ECF 107, Order Granting Motion to Stay at 11 n.13, *Archuleta v. Crowther*, No. 2:07-CV-630 (D. Utah Nov. 11, 2014).) Thus, the federal district court stayed Mr. Archuleta's federal habeas proceedings and permitted him to return to state court with the help of his federal

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002) (executing intellectually disabled persons violates the Eighth Amendment to the United States Constitution).

habeas counsel. In his resulting state post-conviction proceedings, federal habeas counsel raised both Mr. Archuleta's intellectual disability and additional claims ("non-*Atkins*" claims) which his ineffective trial and post-conviction counsel had failed to ever raise before the state courts.

At that point, Appellee (the State) sought to avoid addressing any of the issues that are the subject of this appeal. Citing its own "workload" and the "complexity of the issues," the State asked to delay litigating any of the non-*Atkins* claims. (*See* Order Granting Motion for Extension to Respond to Petition and for Partial Stay of Petition, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. Feb. 18, 2015).) It asked, over Mr. Archuleta's objection, to be excused from responding to the merits of these claims. (Motion to Bifurcate and Stay Time to Respond on the Merits, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. May 16, 2016); *see also* Opposition to Motion to Bifurcate and Stay Time to Respond on the Merits, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. May 31, 2016).) The State addressed only procedural issues in its summary judgment requests and has never addressed the merits of the non-*Atkins* issues.

The State also specifically asked the state post-conviction court to separate the non-*Atkins* claims from Mr. Archuleta's *Atkins* claim on appeal. (Motion to Certify *Atkins* Decision as Final and Appealable, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. Feb. 3, 2016).) Mr. Archuleta opposed such an action, explaining "the effect will be to burden the Utah Supreme Court with two appeals where there should only be one." (Response in Opposition to Respondent's Motion to Certify *Atkins* Decision as Final and

Appealable at 2, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. Feb. 17, 2016).) The court granted the certification over his objection.

In fact, the State argued and the post-conviction court accepted that "there is no factual overlap between the *Atkins* claim and the remaining claims." (*See* Ruling and Order on Respondent's Motion to Certify *Atkins* Decision as Final and Appealable at 4, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. Apr. 12, 2016).) The court found (again, over Mr. Archuleta's objection) that "the *Atkins* order is completely separate from the remaining twelve claims and will not require the appellate court to address similar issues in a piecemeal fashion." (Ruling and Order on Respondent's Motion to Certify *Atkins* Decision as Final and Appealable at 4, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. Apr. 12, 2016).)

The result of the above was twofold. First, the State has entirely avoided ever addressing any of the merits of Mr. Archuleta's non-*Atkins* claims. Second, it has succeeded in causing this Court to proceed with two separate appeals from one post-conviction case.

Now, however, the State has changed course. It asserts that its arguments in the *Atkins* appeal (Case Number 20160419), "apply with equal force to the claims at issue in this matter" and deigns to write the Court that "this case does not merit the State's resources to prepare a responsive brief." (Letter in Lieu of Appellee Brief ("Appellee Letter") at 1, *Archuleta v. State*, No. 20160992 (Utah June 9, 2017).)

This Court should hold the State to the consequences of its decisions and accept its letter as a waiver of the arguments made in Mr. Archuleta's Opening Brief.

POINTS AND AUTHORITIES

In this Court, an appellee's brief must generally include the same elements as an appellant's brief, and must "contain the contentions and reasons of the appellee with respect to the issues presented in the opposing brief." *See generally Brown v. Glover*, 2000 UT 89, ¶ 22, 16 P.3d 540, 545 (citing Utah R. App. P. 24 (a)(9), (b)). This Court does not "assume a party's burden of argument and research, . . . particularly when, as here, a party's lack of clarity and supporting argumentation leaves the opposing party without a fair opportunity to respond." *See Cheek v. Clay Bulloch Constr., Inc.*, 2016 UT App 227, ¶ 31, 387 P.3d 611, 617-18. This Court may refuse, sua sponte, to consider inadequately briefed arguments. *See State v. Hawkins*, 2016 UT App 9, ¶ 60, 366 P.3d 884, 897 (quoting *State v. Lee*, 2006 UT 5, ¶ 22, 128 P.3d 1179).

Mr. Archuleta filed with this Court a 56-page Opening Brief, complete with authority and record citations, outlining his claims for relief in this case.[2] (Opening Brief, *Archuleta v. State*, No. 20160992 (Utah May 5, 2017).) The State replied with a one-and-a-half page letter, insisting that "The outcome of this case is not in doubt" and that it

[2] These claims include the post-conviction court's improper denial of his non-*Atkins* claims.

"does not merit the State's resources to prepare a responsive brief." (Appellee Letter at 1-2.)

The State has thus failed to present any arguments opposing the substance of Mr. Archuleta's Opening Brief. This Court should consider any such opposition waived.

First, the State points out that it is "accept[ing] this Court's invitation to 'rest on the pleadings' it has already filed." (Appellee Letter at 2.) The pleading the State filed—its December 2016 "Motion for Summary Disposition" [3]—however, did not at all address the substance of the legal and factual issues raised in Mr. Archuleta's Opening Brief. The State made various incorrect assertions regarding the timing of the filing of his claims, then asserted in a conclusory manner that the post-conviction court's application of time and procedural bars to Mr. Archuleta's non-*Atkins* claims was "clearly correct." (Motion for Summary Disposition at 6, *Archuleta v. State*, No. 20160992 (Utah Dec. 28, 2016).) Nothing in the State's amorphous arguments about appellate review addresses any of the specific arguments raised in Mr. Archuleta's Opening Brief. The State has not only failed to address Mr. Archuleta's specific assertions about the application of the Post-Conviction Remedies Act, but it has failed to even mention the merits of the underlying claims. No reading of the State's Motion for Summary Disposition can be said to address the detailed allegations in Mr. Archuleta's Opening Brief.

[3] Mr. Archuleta outlined the reasons summary disposition is entirely inappropriate in his Response to Motion for Summary Disposition, filed January 9, 2017. He respectfully incorporates those reasons herein.

Second, the State seems to suggest that "its brief in [Mr.] Archuleta's other appeal, case number 20160419 . . . set forth the State's arguments for applying time and procedural bars to all of [Mr.] Archuleta's claims." (Appellee Letter at 1.) As explained above, however, the State was the party which asked, over Mr. Archuleta's objection, to pursue separate appeals. In fact, in ruling on the motion to separately certify the *Atkins* issue for appeal, the post-conviction court relied upon the State's assertions that "the remaining [non-*Atkins*] claims are independent and freestanding." (*See* Motion to Certify *Atkins* Decision as Final and Appealable at 6, *Archuleta v. State*, No. 140700047 (Fourth Judicial Dist. Feb. 3, 2016) (citing *Powell v. Cannon*, 2008 UT 19, 179 P.3d 799 (conditioning appealability on the degree of "factual overlap" between resolved and unresolved claims)).) Thus, there is no basis for this Court to consider arguments the State has made outside the proceedings in the instant case number.

The State first elected to "conserve resources" by splitting for separate appeals these meritorious non-*Atkins* claims from the claim regarding Mr. Archuleta's intellectual disability. Now that the time has come to respond to their merits, it has changed course and insists that it would waste its resources to respond separately. At best, the State should be judicially estopped from avoiding its briefing responsibilities in this way. *See generally Hill v. State Farm Mut. Auto. Ins. Co.*, 829 P.2d 142, 148 (Utah Ct. App. 1992) (principles of judicial estoppel seek to "prevent a party in legal proceedings from taking a position, pursuing that position to fruition, and later returning to attack the validity of the prior position or the outcome flowing from it"). At worst, this reveals, among other

things, the State's ultimate goal: to protect itself from engaging these serious issues. The State has, at every turn, attempted to turn the courts' focus away from addressing the merits of the issues in this case. Either way, the time for games must come to an end. The State asked to respond to Mr. Archuleta's claims in a separately certified appeal. It has failed to do so.

CONCLUSION

For the reasons above, Mr. Archuleta respectfully asks this Court to accept the State's Letter in Lieu of Appellee Brief as a waiver of any arguments against the substance of the issues raised in his Opening Brief. This Court should accept the assertions in Mr. Archuleta's Opening Brief and grant the relief requested therein.

In the alternative, should this Court order the State to respond to Mr. Archuleta's Opening Brief, he respectfully asks the Court to set a revised briefing schedule ordering the State to file an Answering Brief and to permit Mr. Archuleta adequate time to reply.

Respectfully submitted this 5th day of July, 2017.

Jon M. Sands
Federal Public Defender
Leticia Marquez
Charlotte G. Merrill
Assistant Federal Public Defenders

By: s/ Charlotte G. Merrill
Charlotte G. Merrill
Counsel for Petitioner/Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 1,958 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

s/ Charlotte G. Merrill
by Charlotte Merrill

CERTIFICATE OF SERVICE

I certify that, on this 5th day of July, 2017, I filed the attached motion with the Utah Supreme Court Clerk. A copy is also being sent by first class mail to the following:

Andrew F. Peterson
Aaron G. Murphy
Assistant Solicitors General
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114

s/Daniel Juarez
Assistant Paralegal