IN THE SUPREME COURT OF THE STATE OF UTAH

MICHAEL ANTHONY ARCHULETA, Appellant, v. STATE OF UTAH, Appellee.	Case No. 20160419-SC DEATH PENALTY CASE

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. Respondent has failed to rebut that circumstances beyond Mr. Archuleta's control prevented him from bringing his *Atkins* claim to the Utah state courts any sooner than he did or that this Court may allow him an exception from the PCRA's preclusion of relief.

Respondent argues that this Court cannot grant Mr. Archuleta relief because it is precluded by the PCRA. Also, Respondent has offered a number of arguments in attempt to rebut Mr. Archuleta's showing that he could have raised his *Atkins*[1] claim in an earlier state court proceeding or otherwise brought it sooner than he has. Respondent's arguments, however, are all dependent upon either omissions of fact or misstatements of law.

A. The Utah Constitution explicitly reserves power over writs to the judicial branch.

Respondent makes the extraordinary assertion that "the Legislature, acting fully within its constitutional prerogative, abolished all common-law or equitable powers Utah courts historically exercised in post-conviction" and that "[t]he Utah Constitution grants the judiciary no independent power to grant post-conviction relief outside legislative enactments." (Brief of Appellee at 46.) Respondent ignores the text of the state constitution.

First, as shown in the opening brief, the state suspension clause was specifically drafted to keep the power of writs of habeas corpus vested in the judicial branch, and this Court has recognized its quintessential authority in that area. (Opening Brief of Appellant at 85, quoting *Tillman v. State*, 2005 UT 56, ¶ 22, 128 P.3d 1123.)

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

Second, the state constitution specifically reserves to the courts authority over writs. This Court retains "original jurisdiction to issue all extraordinary writs" and "power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause." Utah Const. Art. VIII, § 3. The only limitation in that section is that "[t]he Supreme Court shall have appellate jurisdiction over all *other matters* to be exercised as provided by statute[.]" *Id*. (emphasis added). While the legislature may determine this Court's jurisdiction in certain matters, the state constitution has specifically exempted writs from those matters. Likewise, the state district courts have authority "to issue all extraordinary writs." Utah Const. Art. VIII, § 5.

Finally, the state constitution is explicit in its separation of powers, prohibiting any "person charged with the exercise of powers properly belonging to one of these departments" from exercising "any functions appertaining to either of the others." Utah Const. Art. V, § 1. Therefore, Respondent's argument that this Court lacks independent power to grant post-conviction relief, or that the legislature may limit this Court's ability to grant writs, is false, based on the plain language of the state constitution.

B. The facts of the case, and the interest of justice, compel this Court to find that Mr. Archuleta's *Atkins* claim is timely and not precluded from relief by the PCRA.

In asserting that Mr. Archuleta's claim is not timely, Respondent has misconstrued Mr. Archuleta's arguments and failed to fully engage them. First, regarding Mr. Archuleta's intellectual disability as a mental incapacity within the meaning of the Postconviction Remedies Act ("PCRA"), Respondent argues that this issue was not

preserved. Respondent has misconstrued the issue. The issue raised to this Court is whether the "claim of intellectual disability is subject to the PCRA's statute of limitations." (Opening Brief of Appellant at 3, 80-84.) Mr. Archuleta's mental incapacity provides an exception to overcome application of the PCRA's bars to considering his claim—it is not the substantive, underlying claim (subject to "preservation" analysis). *See generally Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012) ("'Cause' . . . in not synonymous with 'a ground for relief.'").

As stated in the opening brief, Mr. Archuleta's intellectual disability prevents him from being able "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." (Opening Brief of Appellant at 81.) Mr. Archuleta's post-conviction counsel failed to raise a meritorious claim for relief. Holding him responsible for his attorney's acts and omissions assumes that Mr. Archuleta is aware of and supervising the attorney's work, and capable of engaging and understanding the issues at hand. But Mr. Archuleta'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." (*Id*.) His intellectual disability is a mental incapacity that prevented him from raising his *Atkins* claim during his prior post-conviction proceedings. Respondent's arguments—that he "argues for an outright exemption from the time bar on the basis of the mere existence of an intellectual disability" (Brief of Appellee at 51)—is nothing more than a quarrel with the fact that a mental incapacity exception exists at all.

Additionally, while Mr. Archuleta had federal habeas counsel, his counsel was, by law, prevented from representing him in state court until they could demonstrate good cause to the federal court. Respondent has argued that "Archuleta never showed that his federal counsel could not have obtained federal approval earlier to appear in state court and press these claims." (Brief of Appellee at 53-54.) This is false. As explained in the opening brief (Opening Brief of Appellant at 83), in *Harbison v. Bell*, 556 U.S. 180 (2009), the United States Supreme Court considered whether "federally appointed counsel" could "move[] to expand the authorized scope of her representation to include state . . . proceedings" where the appointment of state counsel was not authorized. *Id*. at 182. The Court held that "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." *Id*. at 190 n.7. This plainly shows that federally appointed counsel are prohibited from exceeding the scope of their representation to pursue remedies in state court until a federal district court determines it is appropriate.[2] Mr. Archuleta's current counsel brought this claim as soon as the federal court made that necessary determination. (*See* Opening Brief of Appellant at 82-84.)

Details of the proceedings in federal court illuminate Mr. Archuleta's diligence in pursuing his claim. He timely filed his federal habeas petition on December 6, 2012. (Addendum 1, *Archuleta v. Crowther*, United States District Court for the District of Utah, Case No. 2:07-cv-630 partial docket, at 4.) On December 20, 2012, the federal

[2] Notably, Respondent later relies on another case that clearly demonstrates that federal petitioners must seek leave of the federal court. (Brief of Appellee at 63, citing *Beatty v. Schriro*, 554 F.3d 780, 784-85 (9th Cir. 2009).)

court ordered the parties to submit a joint proposed case management schedule, which they did on January 17, 2013, and the court accepted by order on January 23, 2013. (Addendum 1 at 4; Addendum 2, Joint Proposed Case Management Schedule.) The schedule provided 180 days to begin preliminary neuropsychological testing, for the expert to submit a report (180 days contemplated having to litigate access to Mr. Archuleta, which the Department of Corrections ultimately stipulated to), and to file his motion to stay federal proceedings to pursue relief in state court within 30 days of submitting that report. (Addendum 2 at 2; Addendum 1 at 4-5.) Mr. Archuleta filed his notice of intent to seek a stay on May 20, 2013, ahead of schedule, and filed his motion to stay on June 21, 2013. (Addendum 1 at 5.)

To resolve whether to stay the case and allow Mr. Archuleta to return to state court, the federal court determined it required the state court record and ordered Respondent to submit the record within 21 days. (Addendum 3, Order for Records.) Respondent filed a motion to reconsider on the basis that "Respondent does not have the ability to comply within the time the Court has permitted." (Addendum 4, Motion and Memorandum to Reconsider Order to Provide Record, at 3.) Respondent instead proposed to only provide certain portions of the record or that the federal court delay determination of the motion to stay until much later in the proceedings. (*Id*. at 5-6.) To expedite a decision on the motion, Mr. Archuleta offered to supply the record, and the Court accepted his suggestion on October 2, 2013. (Addendum 5, Petitioner's Response to Motion to Reconsider Order to Provide Records; Addendum 6, Order for Documents.) Mr. Archuleta submitted the record on October 18, 2013.

The federal court took the matter under consideration and issued its ruling on November 12, 2014. (Addendum 7, Order Granting Motion to Stay.[3]) 30 days later, Mr. Archuleta filed his petition and supporting documents in state court. (12/12/2014, Petition for Relief Under the Post-Conviction Remedies Act, and Memorandum of Points and Authorities in Support of Petition for Relief Under the Post-Conviction Remedies Act ("MIS").) As shown, once Mr. Archuleta was provided with adequate and funded counsel, he has diligently pursued bringing this claim before both the federal and state courts, even voluntarily providing the state court record to the federal court where

[3] Respondent also complains about the federal court's criticism of Respondent's use of Rule 11 sanctions litigation, and asks this Court to offer an advisory opinion that approves of Respondent's actions. (Brief of Appellee at 76-80.) This Court has already made findings regarding the Rule 11 sanctions litigation: "After thorough consideration, the trial court issued a seventeen-page, well-reasoned ruling in which it held that 'none of the actions by counsel for Petitioner raised in Respondent's motion for sanctions were so egregious as to constitute a violation of rule 11.' We find no error in the trial court's findings of fact or conclusions of law." *Archuleta v. Galetka*, 2008 UT 76, ¶8, 197 P.3d 650. Further, Respondent complains that the federal court made a finding "unvetted by the State's adversarial input." (Brief of Appellee at 77 n.14.) This, however, overlooks the fact that the federal court had the entire state record, including all of the State's filings on the matter. Finally, Respondent has not identified anything the federal court got factually wrong. The federal court's findings were in line with what this Court expressed in affirming the denial of Rule 11 sanctions:

> we are concerned by the possibilities of increased delay, expense, and complexity which may be occasioned by the raising of a motion for rule 11 sanctions during the pendency of an underlying capital case. The moment allegations of a personal violation are filed against capital defense counsel, the interests of attorney and client diverge. The attorney is required to invest time and resources in his or her own defense in the rule 11 matter. An attorney's rule 11 defense may also require disclosure of strategy or communications that constitute a possible breach of the confidentiality between attorney and client.

Archuleta, 2008 UT 76, ¶ 11. This Court should decline Respondent's request.

Respondent would have delayed resolution of the motion to stay for several additional months, or possibly years.

Respondent has conceded that "[an] intellectual disability could qualify as a 'mental incapacity' within the meaning of the tolling statute" or that an "intellectual disability could toll the statute of limitations if it prevented a petitioner from filing a timely petition." (Brief of Appellee at 52.) Especially in light of the ineffectiveness of Mr. Archuleta's initial post-conviction counsel, this is the case here. Mr. Archuleta's post-conviction counsel unreasonably failed to amend his petition to include an *Atkins* claim. How does someone who lacks the mental capacity to raise a claim do so if they do not have unconflicted counsel who will act effectively, independently of the client, and in his best interests?

Respondent has observed that "*Atkins* was one of the biggest cases of that term and any lawyer litigating a capital case would have been aware of it." (Brief of Appellee at 56.) The only modification that sentence needs is that any *reasonable* lawyer would have been aware of it. To find that Mr. Archuleta is responsible for the omissions of prior counsel, despite his intellectual disability,[4] or to find that current counsel could have brought the claim sooner, is to disregard fact and further the injustice of subjecting an intellectually disabled person to an unconstitutional—and unconscionable—execution.

Finally, Respondent argues that there can be no exception to the PCRA's subsection procedurally barring claims that could have been raised in a prior post-

[4] The fact that post-conviction counsel undertook *some* acts on Mr. Archuleta's behalf, or raised *some* claims, does not erase the fact that he was saddled with ineffective counsel.

conviction proceeding. (Brief of Appellee at 55.) But there is an implicit exception written into the statute. The applicable part reads: "A person is not eligible for relief under this chapter upon any ground that . . . could have been, but was not, raised in a previous request for post-conviction relief." Utah Code § 78B-9-106(1)(d). As shown above, given that Mr. Archuleta has a mental incapacity (in the form of his intellectual disability) and that he had ineffective post-conviction counsel who unreasonably failed to raise an *Atkins* claim, Mr. Archuleta could not have raised the claim in his prior post-conviction proceeding. *Harbison*, 556 U.S. at 190 n.7.

For the reasons above, this Court should exercise its power to issue writs and adjudicate matters related to petitions of habeas corpus, and find that Mr. Archuleta's *Atkins* claim is not precluded by the PCRA.

C. Intellectual disability is a categorical exemption to execution and Respondent's arguments to the contrary disregard the state courts' obligation to enforce federal constitutional rights.

Respondent has argued that there can be no exemption for *Atkins* claims because states have no federal obligations regarding post-conviction proceedings (citing *Murray v. Giarratano*, 492 U.S. 1, 6 (1989)), because some federal circuit courts have applied the statute of limitations and procedural bars of the Antiterrorism and Effective Death Penalty Act ("AEDPA") to *Atkins* claims, and because it would result in unnecessary delay. (Brief of Appellee at 56-63.)

Respondent writes that "[b]ecause there is no federal constitutional right to State post-conviction review, there is no federal constitutional boundary on the procedural limits the States choose to impose on it" and "[t]hat means state law governs." (*Id*. at

57.) Regardless of whether there is a substantive federal right to state collateral proceedings, both the federal and Utah constitutions restrict and inform how a state must administer its post-conviction review.

In *Hicks v. Oklahoma*, the state of Oklahoma argued that denying a defendant the benefit of a change made to the state's sentencing laws denied "a procedural right of exclusively state concern." 447 U.S. 343, 346 (1980). The Court held that Oklahoma was incorrect to believe that its "discretion is merely a matter of state procedural law" because the defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State." *Id*. (internal citations omitted). Just because a state has engaged in a discretionary judicial proceeding, it is not free of its obligation to be compliant with the federal constitution. *See generally Evitts v. Lucey*, 469 U.S. 387, 393 (1985) ("[T]he Constitution does not require States to grant appeals as of right to criminal defendants. . . . Nonetheless, if a State has created appellate courts as "an integral part of the . . . system . . . the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."). Therefore, Respondent is wrong that "there is no federal constitutional boundary on the procedural limits the States choose to impose" on post-conviction proceedings." (Brief of Appellee at 57.) Utah, in providing collateral review of capital cases, is bound by the United States Constitution to provide due process, equal

protection, and protection against the imposition of cruel and unusual punishment, among other federal constitutional rights.

This means that in determining whether to hear Mr. Archuleta's *Atkins* claim, this Court must consider the federal constitutional implications of allowing a person with an intellectual disability to be executed without ever allowing him to have the merits of his claim of exemption from execution under the Eighth Amendment heard by any court.

Respondent, in seeming contradiction to its assertion that federal law does not apply here, also makes an argument that some federal circuit courts have applied the time and procedural bars of the AEDPA to *Atkins* claims. (Brief of Appellee at 59-60.) This argument is not tenable for two reasons. First, Respondent cites cases from only five circuit courts, meaning that this trend is established in less than half of the federal circuits. The issue has yet to be addressed by the United States Supreme Court. Therefore, it cannot be said that federal law allows for application of the AEDPA to preclude a court from hearing an *Atkins* claim on the merits. Second, and more importantly, nothing in the cases cited by Respondent limits this Court's ability to allow the claim to be heard: allowing adjudication of the merits of the claim would not impinge any federal constitutional rights. It is up to this Court to determine when a petitioner has good cause to overcome any alleged default of a state post-conviction claim, or whether equitable considerations demand merits consideration.

Regarding *Lake v. Arnold*, 232 F.3d 360 (3rd Cir. 2000), Respondent likewise argues that "State law, not federal policy, governs the limits on state procedures when there is no federal right to the procedure in the first place." (Brief of Appellee at 62.)

Respondent overlooks, however, the fact that *Lake* supports the finding that intellectually disabled persons are a protected class under federal law. 232 F.3d at 369 ("mentally retarded are a protected class"). States cannot disregard that categorization. A major protection afforded this federally protected class is an exemption from being executed by the government. What is more, that protection is not just a "federal policy," it is dictated by the Eighth Amendment.

Further, in *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court drew an explicit parallel between juveniles and other classes of persons who may not be executed, including the intellectually disabled and the insane, regardless of the circumstances of the crime. *Id*. at 568. ("The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime."). Mr. Archuleta's disability is "a substantive restriction on the State's power to take [his] life." *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). This Court is under no obligation to apply procedural bars that directly conflict with Mr. Archuleta's right to pursue remedies for violations of his constitutional rights as a person with limited mental capacity. *See Lake*, 232 F.3d at 369-70 (even though claim was unquestionably time-barred, the state statute of limitations would not be applied in a federal civil-rights lawsuit given plaintiff's intellectual disability, because applying the statute would violate federal policy protecting intellectually disabled individuals).

Finally, with regard to *Roper*, Respondent argues that "*Roper* only listed specific death-penalty exclusions. It said nothing about whether the States could restrict when a

person could seek state relief for those exclusions." (Brief of Appellee at 61.) Of course this is the case, because the states are not permitted to impose restrictions on the guarantee of rights under the federal constitution.

Regarding the Utah exemption statute, Utah Code § 77-15a-101 et seq., Respondent argues that it has no bearing on the relief a post-conviction court may provide. (Brief of Appellee at 61.) This is not so. The statute defines intellectual disability in the context of criminal cases,[5] and, thus, is relevant to determining Mr. Archuleta's exemption from execution—the core issue of his post-conviction proceedings.

Respondent also relies on *Pinder v. State*, 2015 UT 56, ¶ 56, 367 P.3d 968, for the proposition that the 2008 amendments to the PCRA eliminated the common law exceptions for post-conviction claims. (Brief of Appellee at 58.) More recently, however, this Court has stated that "it is unclear whether the common law unusual circumstances exception still exists after the 2008 amendments to the Post-Conviction Remedies Act (PCRA)." *State v. Griffin*, 2016 UT 33, ¶ 21, 384 P.3d 186 (citing *Winward v. State*, 2012 UT 85, ¶¶ 14, 19, 293 P.3d 259). Given that this issue is unsettled, Mr. Archuleta urges this Court to give fair consideration to the arguments he has presented in support of finding that the common law exceptions should apply to his case. (Opening Brief of Appellant at 84-99.)

[5] Mr. Archuleta has contended that the Utah exemption statute fails to meet the standard for determining an intellectual disability as mandated by *Atkins* and *Hall v. Florida*, 134 S. Ct. 1986 (2014). (MIS at 83-90.) This matter is, however, beyond the necessary scope of this appeal.

Relatedly, Respondent incorrectly asserts that "the rule Archuleta advocates—that no time or procedural limits could apply to state petitions raising *Atkins* claims—would give death-sentenced petitioners a tool for unjustified delay, a well-recognized problem in death-penalty litigation." (Brief of Appellee at 62.) As stated in the opening brief, the rule Mr. Archuleta has proposed could be crafted to be limited solely to his case, given the current state of death penalty cases in Utah. (Opening Brief of Appellant at 93.) It could be limited to overcoming the PCRA statute of limitations and preclusion of relief for *Atkins* petitioners whose post-conviction counsel had defaulted an *Atkins* claim. This would mean that it would only apply to death penalty cases tried pre-*Atkins* that had a viable *Atkins* claim. Mr. Archuleta's case is the only one that fits those criteria. Therefore, Respondent's arguments about delay tactics or vexatious litigation are unfounded.[6]

D. Mr. Archuleta was provided counsel during his prior state post-conviction proceedings that was conflicted, unfunded, and ineffective. Further, the *Atkins* claim, as currently raised, was beyond the scope of his post-conviction appellate counsel's appointment.

Respondent contends that funding restrictions could not possibly have impacted Mr. Archuleta's counsel's failure to pursue an *Atkins* claim because the 2008 PCRA amendments included less restrictive funding provisions. (Brief of Appellee at 64.) This is obviously false for two reasons. First, as Respondent is well aware, summary judgment was granted in early 2007 on the only claim that survived the first summary

[6] Because Mr. Archuleta has not been dilatory in bringing his claim (as shown above in Section I.B), and because Mr. Archuleta has a colorable claim (*see* MIS at 19-82; Response to Partial Summary Judgment Motion at 30-46), Mr. Archuleta's post-conviction petition was neither dilatory nor vexatious. (*See also* Addendum 7 at 12-13.)

judgment motion (PCR ROA 3338-75) and the entire case was dismissed with prejudice shortly thereafter. (PCR ROA 3379-81.) Therefore, the pre-2008 PCRA funding restrictions were in place throughout the entirety of Mr. Archuleta's prior post-conviction proceedings. Second, as established in the opening brief, Mr. Archuleta's post-conviction counsel were plagued by the systemic lack of funding throughout his entire case. (Opening Brief of Appellant at 66-68.)

Respondent also seems to imply that either Mr. Archuleta's post-conviction appellate counsel should have raised the claim, or that Mr. Archuleta should have raised it himself. Both of these suggestions defy reason. The first is untenable because it was clearly beyond the scope of the appellate counsel's appointment. (PCR ROA 3438-39.) That counsel did, however, file a Motion to Set Aside Judgment and/or For a New Trial, which included a claim that the prior post-conviction counsel was ineffective for failing to raise an *Atkins* claim. (PCR ROA 3539-45.) The district court denied the motion and this Court affirmed that decision as not being an abuse of discretion. *Archuleta v. Galetka*, 2011 UT 73, ¶¶ 167-69, 267 P.3d 232. In affirming the decision, this Court did not address the ineffective assistance of counsel issues specifically. Instead, the Court simply determined that, generally, those issues failed to meet the gross negligence standard articulated in *State v. Menzies*, 2006 UT 81, 150 P.3d 480, for making a claim of ineffective assistance of counsel in a Rule 60(b) motion. *Id*. at ¶ 169.

The second suggestion, that Mr. Archuleta should have raised the claim on his own, is likewise nonsensical. Again, Mr. Archuleta has an intellectual disability and lacks the capacity to pursue post-conviction claims—or any legal redress—

independently. Such a task is beyond the skill and ability of most untrained individuals, much less one with demonstrable deficits in functioning. *See Douglas v. California*, 372 U.S. 353, 357-58 (1963) (observing that appointing counsel to indigent appellants is required to overcome the disparity between "a meaningless ritual" and "a meaningful appeal"); *see also Halbert v. Michigan*, 545 U.S. 605, 621 (2005) ("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."); *Evitts*, 469 U.S. at 393 ("[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."); and *Adams v. State*, 2005 UT 62, ¶ 23, 123 P.3d 400 ("we decline to put the burden on individuals untrained in the law to discover the errors of those whose assistance they were constitutionally guaranteed").

II. Respondent's contention that Mr. Archuleta is not intellectually disabled depends on a gross misunderstanding both of the diagnostic criteria and the legal standards.

A. Mr. Archuleta's post-conviction counsel was unreasonable to abdicate his responsibility to identify and determine the viability of claims and disregard indications of an intellectual disability in Mr. Archuleta's records.

Respondent contends there is an "absence of evidence" about Mr. Archuleta's post-conviction counsel's failure to investigate the *Atkins* claim. (Brief of Appellee at 68-69, citing *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013).) This is not accurate. There is

evidence that what Mr. Archuleta's counsel did was abdicate his responsibility as a legal counselor and advocate to non-lawyers. Counsel was specifically asked "what legal analysis [he] explored regarding a possible *Atkins* claim[.]" (Brief of Appellee, Addendum C ¶ 17.) His answer was "I relied on the advice and evaluation of these two experts *regarding what claims to pursue*." (*Id*.) (Emphasis added.) That is to say, his counsel did not undertake any legal analysis at all. It is not the metal health experts' responsibility to determine what claims to pursue. That is the responsibility of the person who should be a legal expert—the attorney. Further, both experts identified significant indications of Mr. Archuleta's intellectual disability in the records they reviewed and gave testimony regarding these indications, discussed in detail below in this section. Mr. Archuleta's counsel was on notice about the possibility of his intellectual disability and failed to pursue it.

Respondent refers to the testimony of Dr. Mark Cunningham, one of Mr. Archuleta's experts during the post-conviction evidentiary hearing, who testified that based on testing when he was nine, Mr. Archuleta's IQ was at 71 or 72, within the range of intellectual disability. Respondent says that Dr. Cunningham "did not say that Archuleta was intellectually disabled." (Brief of Appellee at 70.) This is a misleading oversimplification. It also overlooks the question being addressed at the hearing. The purpose of the hearing was not to determine whether Mr. Archuleta was intellectually disabled. It was to determine whether Mr. Archuleta's trial counsel was ineffective in presenting a case in mitigation—a trial which predated *Atkins*, when an intellectual disability would not have been a bar to execution. Therefore, whether Mr. Archuleta was

intellectually disabled was not a question the post-conviction court had taken up, and it was not one Mr. Archuleta's counsel was putting on evidence to answer.

What Dr. Cunningham did say was that this score was "closer to functioning in a mentally retarded range" and that "the cognitive abilities that he's bringing to bear, to abstract, to talk to himself, to think through things verbally, to perform in school at age 9 is extremely deficient." (TR PCR I Evidentiary Hearing Vol. 2, 5/17/2006 at 212.) Dr. Cunningham also testified that Mr. Archuleta's "intellectual resources that he can bring to bear to make sense of what's happened to him or to cope with his psychological status or his difficulties or social interactions is—is deficient, and more deficient than the score alone . . . would reflect." (*Id*.) So while Dr. Cunningham did not say Mr. Archuleta was intellectually disabled (which wasn't the question he was asked), he did testify that Mr. Archuleta was tested as having an IQ of 71 or 72, and that his cognitive abilities and intellectual resources are extremely deficient. As discussed, both of these facts are consistent with intellectual disability.

Dr. Cunningham also addressed the numerous risk factors present in Mr. Archuleta's life that would adversely impact his neuropsychological functioning. These include having "a teenage mother," evidence of a Fetal Alcohol Spectrum Disorder ("FASD"), "significant early developmental delay," "indications of ADHD and learning disability and broad social problems and impulse control problems that extend through his adolescence," and "actively drinking and drugging pretty early." (*Id*. at 229.) He testified that there was evidence that Mr. Archuleta "is brain damaged, that he has impaired neuropsychological functioning[.]" (*Id*. at 230.) These are all significant

factors in the etiology of neuropsychological dysfunction, which includes intellectual disability.

Dr. Linda Gummow testified that her testing indicated Mr. Archuleta had organic brain damage. (*Id*. at 48.) She also testified that records indicated concerns throughout Mr. Archuleta's life that he was intellectually disabled based on his results on IQ and other tests, and based on the presence of risk factors, such as his mother and maternal grandmother being intellectually disabled. (*Id*. at 94-95.) Further, as described and evidenced in Mr. Archuleta's current post-conviction proceedings, his opening brief, and below, there is ample other evidence of his intellectual disability. This includes historical records and other available evidence regarding his intellectual and adaptive behavior functioning.

The sum of this evidence is that there has been a concern throughout Mr. Archuleta's life that he had an intellectual disability. This is bolstered by his performance on IQ and other tests, indicated by numerous and significant risk factors, and demonstrated through his academic performance and other behaviors. Given that *Atkins* created an absolute bar to execution for persons with intellectual disability, it was not reasonable for his counsel to fail to raise the claim and present the wealth of evidence in support. (*See* Addendum 7 at 10-12 (the federal court found good cause under *Rhines* for Mr. Archuleta's failure to exhaust his *Atkins* claim based on a showing of the ineffective assistance of post-conviction counsel).) It was not enough to simply ask the mental health experts to investigate "any and all possible mental health defenses" and rely on their "advice and evaluation" "regarding what claims to pursue." (Brief of

Appellee, Addendum C, ¶ 17.[7]) It was counsel's obligation to know the record, to be able to determine the available legal claims for relief, and to raise any potentially meritorious claim on his client's behalf. It is no excuse that his non-legal experts failed to do his job for him.

"[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[.]" *Rompilla v. Beard*, 545 U.S. 374, 391 n.8 (2005). Dr. Gummow testified that "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." (TR PCR I Evidentiary Hearing Vol. 2, 5/17/2006 at 57-58.) Mr. Archuleta's counsel was on notice of the strong possibility of a developmental disorder, and had retained experts who were qualified in those fields. Mr. Archuleta's counsel should have been aware that *Atkins* had created a new claim for relief for his client. He should have tasked his experts specifically with undertaking a full evaluation for the presence of an intellectual disability. But he did not, to Mr. Archuleta's detriment.

[7] Respondent offers Brass's affidavit as if it shows he made reasonable, strategic choices. Instead, the affidavit is replete with Brass's admissions of non-strategic omissions, including his failure to review the trial record and his failure to investigate numerous claims.

B. Although Mr. Archuleta's IQ scores indicate significant subaverage intellectual functioning, Respondent's strict emphasis on his IQ score is contrary to the clinical standards, this Court's instruction, and the Constitution.

Respondent states that "IQ scores aid in determining whether a defendant has SSGIF [significantly subaverage general intellectual functioning], but Utah law imposes no absolute IQ score cutoff[,]" then proceeds to argue that Mr. Archuleta does not meet the criteria solely on the basis of a strict cutoff of IQ test scores. (Brief of Appellee at 68, 70-72.) This is not supported by the evidence in this case or by clinical standards. Mr. Archuleta's IQ is as low as 71 or 72, as stated by Dr. Cunningham. (TR PCR I Evidentiary Hearing Vol. 2, 5/17/2006 at 212.) Additionally, Mr. Archuleta was determined to have too low of an IQ to be admitted to a remedial reading program (MIS at 37), his IQ was considered to be in the borderline mentally retarded range (MIS at 41), and his other more elevated scores appeared to be the result of the testing effect due to having been tested so often (MIS at 59).

This Court has recognized that, in addition to test scores, "[c]ourts should carefully consider expert testimony regarding the validity and interpretation of IQ tests when evaluating a defendant's IQ scores" and "look to clinical guidelines for assistance in determining whether IQ scores indicate that a defendant's intellectual impairments are substantial enough to qualify." *State v. Maestas*, 2012 UT 46, ¶ 198, 299 P.3d 892. One of the clinical guides this Court considered was from the American Association on Intellectual and Developmental Disabilities ("AAIDD"). *Id.* at ¶ 199.

The AAIDD instructs that IQ scores are "far from perfect" and should be considered in light of "other dimensions of human functioning" including "adaptive behavior, health, participation, and context." AAIDD Intellectual Disability: Definition, Classification, and Systems of Supports 31 (11th ed. 2010) ("AAIDD Manual"). This approach recognizes that intelligence itself defies a coherent definition on which specialists can agree. *Id*. at 32-34. It emphasizes that the "intent of this definition is not to specify a hard and fast cutoff," and that the word "approximately" has been used to "reflect the role of clinical judgment in weighing the factors that contribute to the validity and precision of a decision." *Id.* at 35. "Just as defining intelligence has proven to be a challenging task, measuring or quantifying intelligence is equally difficult." *Id.*

This Court understood and incorporated the AAIDD's approach to IQ scores in *Maestas*.

> IQ scores are just one factor to be considered in determining if the defendant has SSGIF. The testing instrument or other circumstances may result in an IQ score that does not truly reflect a defendant's intellectual functioning. Thus, courts should carefully consider other relevant evidence of intellectual impairment. This is particularly true when the defendant's IQ score falls in the range spanning the cusp of clinical mental retardation.

Maestas, 2012 UT 46, ¶ 200. According to Respondent's characterization of Mr. Archuleta's IQ, he is on "on the 'cusp' or 'edge' of intellectual disability." (Brief of Appellee at 70.) This means that the tests alone—more than one of which places Mr. Archuleta in the 70-75 IQ range that is within the margin of error for a clinical

determination of significantly subaverage intellectual functioning—are not adequate to make a definitive determination. (*See* MIS at 68-69.)

In fact, the Eighth Amendment requires complying with the clinical definitions promulgated by the medical and professional communities. In striking a state law that imposed a rigid cutoff of 70 IQ points in determining whether someone met the criterion of subaverage intellectual functioning, the United States Supreme Court wrote that "[t]his rigid rule . . . creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2277-78 (2015). In reaching this conclusion, the Court relied upon the imprecision of the IQ tests, and the need to consider intellectual disability as a multidimensional condition, as described by the AAIDD and American Psychiatric Association. *Id*. at 1993 ("In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.").

The approach advocated by Respondent is essentially the same kind of unconstitutional rigid rule. Respondent would have this Court violate Mr. Archuleta's Eighth Amendment rights and risk executing persons regardless of whether they meet the clinical standards for an intellectual disability, without an opportunity to reach the merits of the claim.

C. Respondent's emphasis on the facts of the offense to assert that Mr. Archuleta's adaptive behavior is not consistent with an intellectual disability is contrary to clinical standards, which require an assessment of deficits, not strengths.

Respondent makes a similar error—inconsistent with clinical standards—by limiting its discussion of Mr. Archuleta's adaptive functioning deficits to solely the facts of the offense.[8] (Brief of Appellee at 4 n.2, 73-74.) First, the clinical standards require the disability to "originate[] before age 18." AAIDD Manual at 5.[9] Therefore, evidence of adaptive functioning during adulthood is not determinative.

Second, and more importantly, the emphasis of the inquiry is on deficits, not strengths, and is not limited to any specific area of adaptive functioning. AAIDD Manual at 1 ("Within an individual, limitations often coexist with strengths."). Adaptive functioning behavior is "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." *Id*. at 43. It is "multidimensional," including conceptual skills, social skills, and practical skills. *Id*. at 44. This encompasses a broad range of skills including language; the ability to manage money, time and numbers; interpersonal relations; social responsibility; self-esteem; gullibility or naiveté; social problem solving; ability to follow rules, laws, or instructions; ability to avoid victimization; ability to engage in personal care; occupational skills; ability to engage in healthcare; ability to manage transportation; sense of direction; understanding schedules or routines; and ability to protect oneself from harm. *Id*.

[8] Mr. Archuleta disputes Respondent's characterization of the offense, however, he recognizes that any errors in facts of the offense as found by the Utah courts is not at issue in this appeal.

[9] The Utah exemption statue puts age of onset at 22. Utah Code § 77-15a-102(2).

Adaptive behavior is to be determined based on the "individual's typical performance and not their best or assumed ability or maximum performance." *Id*. at 47.

The adaptive behavior prong is met if an individual has a significant limitation in any one of the three areas—conceptual, social, or practical skills. *Id*. at 43. It is not necessary that the individual have a limitation in all three. Also, it does not require a balancing of deficits to strengths. For example, if an individual exhibits a deficit in the area of conceptual skills but also exhibits strengths in social and practical skills, that individual has still met the adaptive behavior criterion and may be classified as intellectually disabled. *Id*. at 1, 47.

Thus, the evidence Respondent points to (and which occurred after the age of onset of 18) is not inconsistent with Mr. Archuleta's deficits in adaptive behavior. Intellectual disability does not mean a complete inability to function adaptively—again, strengths can and do coexist with limitations. Further, "[a]daptive behavior is conceptually different from maladaptive or problem behavior. . . . Correlational relationships between domains of adaptive and maladaptive behavior are generally low[.]" *Id*. at 49.

In fact, the United States Supreme Court has recognized, consistent with medical assessments, that even a diagnosis of "antisocial personality" is not inconsistent with "any of the . . . areas of adaptive impairment, or with intellectual disability more generally." *Brumfield*, 135 S. Ct. at 2280 (citations omitted). As the Court noted, even where the facts of the crime involved "a degree of advanced planning," "intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some

adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" *Id.* at 2281 (citation omitted). (*See also* 7/20/2015 Response to Respondent's Motion for Partial Summary Judgment at 42-43 (discussing United States Department of Education, *The Post-High School Outcomes of Youth With Disabilities up to 8 Years After High School: A Report From the National Longitudinal Transition Study-2* (2011)).)

Thus, even considering that some records indicate that some assessors believed Mr. Archuleta may have acted "manipulatively" as a child, or that he may have progressed to understand the meaning of more words, this does not refute the reasonable inference (and recorded instances) that he displayed deficits in adaptive behavior consistently throughout his childhood, adolescence, and into his adult life. The evidence he has presented establishes genuine issues of fact regarding that criteria, and further comprehensive assessment in light of that evidence and presentation to this Court are necessary. *See Brumfield,* 135 S. Ct. at 2281 ("An individual who points to evidence that he was at risk of 'neurological trauma' at birth, was diagnosed with a learning disability and placed in special education classes, was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot 'process information,' has raised substantial reason to believe that he suffers from adaptive impairments.").

As above, Respondent's arguments regarding Mr. Archuleta's adaptive behavior disregard both the clinical standards used by the medical and professional community, contradict the United States Supreme Court's rulings regarding intellectual disability

determinations, and would violate the Constitution by creating an unnecessary risk of executing an intellectually disabled person.

D. Mr. Archuleta should have the opportunity to develop evidence by FASD and other testing under scientifically accurate conditions.

Respondent wrote, "Archuleta proffered no evidence that he actually qualifies for an *Atkins* exemption." (Brief of Appellee at 75.) In fact, Mr. Archuleta has demonstrated ample evidence that there is a clear, colorable issue that he is likely intellectually disabled. Still, he sought further development of this evidence and, despite the federal district court's findings and its abeyance of his case, the State has repeatedly fought to prevent him from even developing those merits. Respondent's argument is clearly belied by the volume of evidence submitted with the memorandum in support of the petition he filed in the state district court. (MIS at 19-61; MIS Exhs. 3-31.) The fact that additional testing would aid in developing and supporting those allegations does not undermine that.

As shown in the state district court, there is significant evidence that Mr. Archuleta was exposed to alcohol, drugs, and physical trauma in utero and, as a result, has FASD. (MIS Exh. 28 at ¶¶ 3-4, 6-7.) This is significant for a determination of Mr. Archuleta's intellectual disability because fetal alcohol exposure is well established as a significant risk factor for a variety of neurological, cognitive, and behavioral impairments, including intellectual and developmental disabilities. (PCR ROA 1725-28.) Mr. Archuleta's history and prior testing have established that he has exhibited behaviors and symptoms consistent with the impact of fetal alcohol exposure. (PCR ROA 1728-29.)

Also, FASD would account for some irregularities in Mr. Achuleta's testing and behaviors. Dr. Julian Davies, a medical doctor and FASD expert retained to evaluate Mr. Archuleta (*see* MIS Exhs. 29-30), has stated that Mr. Archuleta "has clear evidence of poor adaptive functioning" and that "IQ is a misleading and inadequate marker for adaptive functioning and disability in alcohol-affected individuals." (7/20/2015 Response to Respondent's Motion for Partial Summary Judgment, Exh. 1 at ¶¶ 11, 5.) Dr. Davies explains,

> The gaps between some of Mr. Archuleta's more intact testing scores (borderline to low average IQ), his academic achievement, and his dysfunctional young adult outcomes fit the pattern described above in people with FASD. They can perform at a relatively higher level in a one-on-one, focus[]ed testing environment, but have trouble translating that performance into the more complex environment of school, and have even more difficulty using the brain abilities they may have in the less structured life of an adolescent/young adult. They can perform more basic, rote skills but when complexity is introduced, or the need for abstract thought, interpretation, or judgment, their adaptive "real world" performance can be surprisingly impaired.

(*Id*. at ¶ 15.)

The Utah Department of Corrections, however, has consistently fought Mr. Archuleta's efforts to obtain an order that his neuropsychological testing be completed under clinically appropriate conditions. (*See* 2/3/2015 Opposition to Petitioner's Motion for Expert Contact Visit Under Conditions Adequate for Evaluation.) Until those tests are completed, and completed with accuracy, validity, and reliability, Dr. Davies cannot complete his assessment of Mr. Archuleta. The Department of Corrections refusal to accommodate testing under clinically appropriate conditions is a State action that has

prevented Mr. Archuleta from obtaining a full evaluation of his intellectual disability and FASD.

E. Respondent overstates and misapplies law, and fails to address Mr. Archuleta's arguments that the ineffective assistance of post-conviction counsel is cause to overcome the PCRA's preclusion of relief.

Respondent has made three arguments that this Court should not consider the ineffective assistance of Mr. Archuleta's post-conviction counsel in determining whether he can overcome any default of his *Atkins* claim. Each relies upon an error—either a misstatement of law or the failure to engage the arguments Mr. Archuleta has made. This Court should therefore disregard Respondent's arguments. His *Atkins* claim—defaulted by ineffective post-conviction counsel—should be heard on its merits.

First, regarding the application of *Menzies*, Respondent writes that "Archuleta already raised and lost that argument." (Brief of Appellee at 83.) This is not true. What Mr. Archuleta raised in his prior proceedings was not that the statutory right to the effective assistance of counsel allows him to overcome default of a claim, it was that the ineffective assistance of post-conviction counsel was sufficient to set aside his prior post-conviction judgment under Rule 60(b). These are discrete issues.[10] Regarding the latter, this Court articulated a gross negligence standard in *Menzies* and determined that Mr.

[10] As the federal court observed, "saying that Mr. Brass's representation was not bad enough to set aside everything that he did for Mr. Archuleta under Rule 60(b)(6), is not the same as finding that Mr. Archuleta had constitutionally sufficient counsel." (Addendum 7 at 6 n.10.) The federal court continued, "In the *Menzies* case, Mr. Brass filed an affidavit stating that he was not competent to represent a capital post-conviction petitioner without counsel. There is no reason to believe that Mr. Brass's abilities with regard to his representation of Mr. Archuleta during the same time period were any different." (*Id.*)

Archuleta's post-conviction counsel did not rise to that level of ineffectiveness.[11] "[O]nly ineffective assistance of post-conviction counsel claims amounting to 'willful and deliberate' inaction, complete 'forfeit[ure] [of] the entire post-conviction proceeding,' or 'gross negligence,' qualify as 'any other reason justifying relief from the operation of the judgment' under rule 60(b)(6). Occasional omitted claims do not constitute extraordinary or unusual circumstances sufficient to trigger the rule." *Archuleta*, 2011 UT 73, ¶ 166 n.14 (quoting *State v. Menzies*, 2006 UT 81, ¶¶ 73, 100, 105, 150 P.3d 480) (internal citations omitted); *see also Honie v. State*, 2014 UT 19, ¶ 91, 342 P.3d 182 (citing *Archuleta*, 2011 UT 73, ¶ 166 n.14) ("Our subsequent cases have essentially limited *Menzies* to its facts . . . only where an ineffective assistance of counsel claim rises to the level of 'willful and deliberate' inaction or gross negligence, will a rule 60(b)(6) motion be appropriate."). Respondent knows this given that it quoted from the same cites in its brief, although it omitted and failed to address the fact the *Menzies* standard applies in a Rule 60(b) context. Regarding the issue Mr. Archuleta has actually presented to this Court, there is not yet a decision on point.

Second, Mr. Archuleta has argued that (at the time of his prior post-conviction proceedings) he had a substantive statutory right to the effective assistance of counsel and, because it is a *substantive* and not *procedural* right, the 2008 PCRA amendment cannot be applied retroactively to extinguish that right. (Opening Brief of Appellant at

[11] Mr. Archuleta respectfully disagrees with the Court's determination in the prior appeal. Additionally, it appears this Court lacked all of the information Mr. Archuleta has now presented to the state district court. (*See generally* MIS and 7/20/2015 Response to Respondent's Motion for Partial Summary Judgment.)

54-56.) Respondent again misapprehends the argument and relies on inapplicable law. It cites to language in *State v. Clark*, 2011 UT 23, 251 P.3d 829, that addresses the retroactive application of changes in procedural laws, but not laws conferring substantive rights. (Brief of Appellee at 85-86.) And, again, Respondent neglects to address or include portions of the case it is relying on that undermines its position. This Court, in *Clark*, clearly delineates between the outcome in *Clark*, and cases in which substantive rights are at issue.

> The difference is in the nature of the underlying occurrence at issue. On matters of *substance* the parties' primary rights and duties are dictated by the law in effect at the time of their underlying primary conduct (e.g., the conduct giving rise to a criminal charge or civil claim). When it comes to the parties' *procedural* rights and responsibilities, however, the relevant underlying conduct is different: the relevant occurrence for such purposes is the underlying procedural act (e.g., filing a motion or seeking an appeal).

Clark, 2011 UT 23, ¶ 14 (emphasis in original). Respondent has not addressed the fact that Mr. Archuleta's statutory right to the effective assistance of counsel—that existed and protected him during his prior post-conviction proceeding—is a substantive right and cannot be retroactively denied. Respondent has thus waived any further argument in opposition, and its arguments about procedural rights may be disregarded as inapplicable.

Finally, regarding Mr. Archuleta's request that this Court recognize an equitable rule similar to the one identified in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), Respondent argues that Mr. Archuleta has not established "that Utah courts have a comparable equitable power in post-conviction proceedings[,]" that Utah post-conviction proceedings are not initial review collateral

proceedings as considered in *Martinez* and *Trevino*, and, that, therefore, they do not apply in Utah. (Brief of Appellee at 87-91.[12])

Mr. Archuleta has shown that Utah courts do have a comparable equitable power in post-conviction proceedings. In Section I.A. above, Mr. Archuleta establishes that the Utah Constitution explicitly reserves power over writs to the judicial branch, which would encompass an equitable power to grant relief. Mr. Archuleta also made these arguments in his opening brief. (Opening Brief of Appellant at 84-86.) Neither rules nor statutes can preempt the Constitution.

With regard to whether Utah post-conviction proceedings are initial review collateral proceedings within the meaning of *Martinez* and *Trevino*, as shown in the opening brief, the United States District Court for the District of Utah has already settled this issue. (Opening Brief of Appellant at 52 n.11, citing *Lafferty v. Crowther*, No. 2:07-CV-322, 2016 U.S. Dist. LEXIS 138845, at *5 (D. Utah Oct. 5, 2016) ("*Trevino* and *Martinez* do apply in Utah[.]").) In reaching its conclusion, the federal court specifically rejected Respondent's argument that Utah's post-conviction process was sufficiently similar to the one in Oklahoma where the Tenth Circuit held *Martinez* and *Trevino* did not apply from the process in Utah. *See Lafferty*, 2016 U.S. Dist. LEXIS 138845, at *4-5. This Court should likewise reject Respondent's argument.

[12] Respondent also reiterates its contention that the legislature can extinguish the common law exceptions to preclusion of relief, based on *Pinder v. State*, 2015 UT 56, ¶ 56, 367 P.3d 968. (Brief of Appellee at 88-89.) As shown above, this is an unsettled issue. *See Griffin*, 2016 UT 33, ¶ 21.

III. This Court has a quintessential, constitutional power to grant post-conviction relief and Respondent has failed to rebut Mr. Archuleta's arguments that he is entitled to an exception to the PCRA's preclusion of relief.

A. Respondent's arguments that Mr. Archuleta's case does not qualify for an exception to the PCRA rely on misstatements of law and the lower court's basis for granting summary judgment.

Mr. Archuleta has argued that his *Atkins* claim qualifies for an exception to the PCRA preclusion of relief on the basis that it is "a claim overlooked in good faith with no intent to delay or abuse the writ." *Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989). Respondent argues "this Court already determined that Archuleta's first state post-conviction effort did not qualify for the *Hurst* exceptions and that his effort to relitigate them constituted 'an abuse of the writ.'" (Brief of Appellee at 93-94, citing *Archuleta*, 2011 UT 73, ¶ 34 n.4.) Respondent overstates what that language applies to. Specifically, this Court was addressing claims the prior post-conviction court determined could have been raised on appeal. *Archuleta*, 2011 UT 73, ¶¶ 26-34. Mr. Archuleta's current *Atkins* claim falls outside of that category and Respondent's cited language does not apply.

Respondent also argues that Mr. Archuleta has erred by conflating the *Hurst* exception to the PCRA procedural bar with the *Winward* standard for determining whether a petitioner should be allowed an exception to the PCRA's preclusion of relief.[13] (Brief of Appellee at 94.) It is not clear what Respondent means by this argument. What Respondent argues after making this statement is that it believes Mr. Archuleta cannot qualify for an exception to the PCRA's preclusion of relief because summary judgment

[13] *See Winward v. State*, 2012 UT 85, ¶¶ 17-18, 293 P.3d 259.

was granted on the *Atkins* claim (Brief of Appellee at 94-95), and because Respondent asserts that prior counsel's decision to not pursue an *Atkins* claim was strategic.[14] (Brief of Appellee at 95-96).

Winward requires the petitioner to explain why "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[,]" and show "why the particular facts of his case qualify under the parameters of the proposed exception." *Id.* ¶ 18. Mr. Archuleta identified the "claim overlooked in good faith with no intent to delay or abuse the writ" from *Hurst* as the exception to apply and briefed all three *Winward* elements. *Id*. (*See* Opening Brief of Appellant at 86-99.) Although Respondent asserts that "Archuleta fails all three" elements of the *Winward* standard, Respondent doesn't offer any argument in support that actually addresses the *Winward* standard. (Brief of Appellee at 94.)

With regard to whether Mr. Archuleta conflated *Hurst* and *Winward*, he did not. In *Winward*, this Court established what a petitioner must show to demonstrate that their claim should be allowed an exception to the PCRA's procedural bar. *Winward*, 2012 UT 85, ¶¶ 17-18. Mr. Archuleta has cited *Hurst* for the exception that should apply to his case. *Hurst*, 777 P.2d at 1037 ("a claim overlooked in good faith with no intent to delay or abuse the writ"). Therefore, discussion of the *Winward* standard requires a discussion of the exception to be applied—in this case, the cited exception from *Hurst*—in addition to the other elements.

[14] This argument has been addressed above in Section II.A.

Respondent only argues that because the *Atkins* claim did not survive summary judgment, and because Archuleta did not address *Pinder*, the claim must not satisfy *Winward*. (Brief of Appellee at 94-96.) Addressing *Pinder* first, Respondent writes that *Pinder* "unequivocally holds that the very *Hurst* exception he relies on is no longer available[.]" (Brief of Appellee at 96.) But this is not borne out by the case. In *Pinder*, this Court wrote that the *Hurst* exceptions were "repudiated by the legislature" for claims brought after the effective date of the 2008 PCRA amendments. 2015 UT 56, ¶ 56. Pinder's petition, however, was filed in 2006. *Id*. at ¶ 57. Therefore, this Court did not have to consider whether the legislative repudiation actually extinguished the exceptions. When the *Pinder* language is taken in consideration of this Court's other statements on 2008 PCRA amendments, it is clear that the issue has not been settled by this Court, which is the final arbiter of writs.[15] *See Griffin*, 2016 UT 33, ¶ 21, (citing *Winward*, 2012 UT 85, ¶¶ 14, 19) ("it is unclear whether the common law unusual circumstances exception still exists after the 2008 amendments to the Post-Conviction Remedies Act").

With regard to the *Atkins* claim not surviving summary judgment, Respondent disregards that the determination was made on purely procedural grounds. (Brief of Appellee at 94-95 ("Archuleta did not overcome even the basic requirement to defeat summary judgment by producing evidence sufficient to create an issue of material fact.").) Respondent makes this same error through its brief. (*See*, *e.g*., Brief of Appellee at 44 ("Archuleta's pleaded facts and proffered evidence—presumptively his 'best

[15] Also, Respondent's citation to the Advisory Committee comments on Rule 65(C) are not compelling given that the Advisory Committee comments are not controlling in any way, nor is it a body with jurisdiction over issuance of writs. (Brief of Appellee at 92.)

showing'—were insufficient as a matter of law to demonstrate that he is entitled to post-conviction relief.").) Mr. Archuleta—as a result of the State's actions—has never had the material questions of facts in his case addressed. Despite Respondent's disingenuous arguments otherwise, the purely procedural rulings thus far have deprived him of *any* findings regarding the factual merits of his allegations.

Below, the court held that "Archuleta's claim of intellectual disability is procedurally barred under the PCRA and, absent direction and authority from our appellate courts, no statutory, common law, or constitutional exception applies to his case. The Court, therefore, dismisses the claim." (Opening Brief of Appellant, Addendum 2 at 12-13.) The court made no findings of material fact on the merits of whether Mr. Archuleta is intellectually disabled. The post-conviction court did not take the opportunity to conclude that the underlying claim, regardless of procedural issues was meritless. Implicit in the court's language regarding the need for additional "direction and authority from our appellate courts" about whether any "statutory, common law, or constitutional exception applies to his case" is that the court was not convinced Mr. Archuleta is not intellectually disabled.

Although factfinding on the merits regarding Mr. Archuleta's intellectual disability should be made in the first instance by the lower court, Mr. Archuleta, as shown above, in his opening brief, and in his memorandum in support of his petition in the lower court, has proffered a substantial amount of evidence demonstrating that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior. Also, as shown above, Respondent's contentions to the contrary all depend on

disregarding clinical standards used by the scientific and medical communities (and, thus, in contravention of the requirements of the Eighth Amendment and this Court's laws).

Respondent's use of a purely procedural ruling granting summary judgment is an improper basis for arguing that Mr. Archuleta cannot meet the *Winward* standard. (Brief of Appellee at 94-95 ("Archuleta did not overcome even the basic requirement to defeat summary judgment by producing evidence sufficient to create an issue of material fact. He fails to meet *Winward*'s threshold test for this reason alone.").) *Winward* is about overcoming the PCRA's preclusion of relief. Mr. Archuleta was denied relief solely on the basis of the procedural bar. There is nothing in the lower court's determination of this issue that supports Respondent's repeated argument that there is no dispute of material fact regarding whether Mr. Archuleta has an intellectual disability.

B. Respondent failed to address Mr. Archuleta's arguments about the deficiency of the PCRA's appointment of counsel in capital cases.

Respondent has argued that Mr. Archuleta "has already lost his claim that the Sixth Amendment guaranteed him the right to effective PCI counsel." (Brief of Appellee at 98.) As shown above in Section II.E, the claim Mr. Archuleta has raised to this Court is not the same as the one raised before, and Respondent knows this.

Respondent has also argued that "the Legislature has defined the scope of representation provided to death-sentenced post-conviction petitioners" and that "Archuleta argues only that it would be better policy to constitutionalize a different right." (Brief of Appellee at 99.) Again, it is not clear what Respondent means regarding "policy." Mr. Archuleta has articulated a rationale based on existing law for recognizing

his right to effective post-conviction counsel—either a constitutional right (Opening Brief of Appellant at 71-78), or his substantive statutory right that existed during his prior post-conviction proceedings (Opening Brief of Appellant at 55-56). In the alternative, Mr. Archuleta has also requested for this Court to recognize an equitable remedy that allows for raising meritorious claims which were defaulted by the deficient, prejudicial acts of post-conviction counsel. (Opening Brief of Appellant at 78-80.) Regardless, Respondent's arguments have been addressed above in Sections I & II.

Additionally, Respondent argues that the appointment provisions of the PCRA provide "competent, funded counsel." (Brief of Appellee at 100.) Respondent fails to address, however, the PCRA's preclusion of relief in instances where a capital post-conviction petitioner has been provided incompetent or underfunded counsel (*see* Utah Code § 78B-9-202(4)-(5)), and that Utah R. Crim. P. Rule 8 fails likewise to guarantee that a capital post-conviction petitioner will be provided qualified counsel. (Opening Brief of Appellant at 71-78.) Respondent has therefore waived any argument in opposition to the specific contentions Mr. Archuleta articulated about the failings of the PCRA appointment statute and Rule 8.

Finally, as shown above and in the opening brief, this Court can craft a solution that strictly limits relief to Mr. Archuleta, if it so chooses. (Opening Brief of Appellant at 92-93.) Such a solution would not be generally applicable and, therefore, would not open the floodgates to additional litigation.

C. The writ of habeas corpus in Utah is codified as the PCRA, and Respondent has not shown that the plain language of the state constitution, or historical use of the writ, limits this Court from granting exceptions to the PCRA's preclusion of relief in the interest of justice.

Respondent asks this Court to answer the question of "whether post-conviction review is part of the constitutional writ enshrined in the Utah Constitution." (Brief of Appellee at 106.) Respondent appears to be arguing that the way this Court has allowed use of the writ for post-conviction review of illegal convictions or sentences is a deviation from historical use of the writ and therefore beyond what the framers of the Utah Constitution intended to enshrine in the state constitution. Respondent extrapolates from this premise that anything beyond what Respondent argues that the framer's understood the writ to be may be properly limited by legislation. As will be shown, the plain language of the state constitution contains no limitation on this Court's exclusive jurisdiction over extraordinary writs, and Respondent's historical cites do not support its arguments regarding historical use.

Respondent contends that "over the past seventy years, this Court slowly developed a body of common law post-conviction relief that . . . was beyond the boundary of the constitutional writ and therefore fully subject to regulation." (Brief of Appellee at 115.) Respondent's arguments, however, are based on misstatements of the law and misrepresentations of the facts in the cases it cites. The cases Respondent cite make evident that post-conviction review of the legality of a conviction or sentence is well within the historical scope of the application of extraordinary writs. It is, thus, well within the constitutional scope of this Court's authority, and beyond that of the legislature

to limit. *See Hurst*, 777 P.2d at 1033-34 (Quintessentially, the Writ belongs to the judicial branch of government. . . . Furthermore, the separation of powers provision, Article V, section 1 of the Utah Constitution, requires, and the Open Courts Provision of the Declaration of Rights, Article I, Section 11, presupposes, a judicial department armed with process sufficient to fulfill its role as the third branch of government.").

As an initial matter, Respondent repeats its erroneous assertion that "[b]ecause the post-conviction process is a creation of state law not mandated by the constitution, states have plenary power to regulate it or do away with it altogether." (Brief of Appellee at 105-06, citing *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987).) As shown above, this is true only to the extent that states do not create federal constitutional obligations. *See Hick*, 447 U.S. at 346 ("the Fourteenth Amendment preserves against arbitrary deprivation by the State" of any liberty interest). This is completely inapposite to the issues in this case. Here, at the time of his post-conviction proceedings, Mr. Archuleta had a protected right to the effective assistance of post-conviction counsel. Only now, years later, by the application of the 2008 PCRA amendments, does the State seek to retroactively eviscerate that vested right. This is not the same as the state choosing, before any proceedings have begun, not to have a post-conviction system at all. Further, *Finley* itself implies that federal constitutional rights are implicated in state post-conviction systems. In finding that the state laws had provided meaningful access in that case, it necessarily implied that a right to equal protection was at stake. *Finley*, 481 U.S. at 557.

Respondent cites to *State v. Poole*, 2010 UT 25, ¶ 12, 232 P.3d 519 (Brief of Appellee at 110), to justify its reliance solely on historical cites but disregards that this Court, in that same paragraph, wrote, "[i]ndependent analysis must begin with the constitutional text." 2010 UT 25, ¶ 12, quoting *State v. Tiedemann*, 2007 UT 49, ¶ 37, 162 P.3d 1106, and citing *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 10, 140 P.3d 1235 (The Court looks first to the "plain meaning" of the constitution.). This Court also wrote that it could consider "[o]ther legitimate sources" including "evidence of the framers' intent, the common law, particular traditions of our state, and decisions by our sister states and federal counterparts." *Id*. Despite this, Respondent ignores the plain meaning of the constitution and instead looks only to historical cases.

The plain language of the state constitution is clear in its scope. The state constitution vests in this Court "original jurisdiction to issue all extraordinary writs" and "power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination of any cause." Utah Const. Art. VIII, § 3. This is a broad grant of authority without limitations on how this Court may develop its own common law regarding the use of writs. Instead of engaging the broad grant of jurisdiction, Respondent relies solely on historical cases which, it argues, engaged the writs in more limited circumstances. But Respondent does not explain why this Court, exercising its proper broad constitutional authority, cannot address the writ in its current context or how doing so would be inconsistent with that authority.

Respondent only engages the text of the state constitution to write, "The 'privilege of the writ of habeas corpus' enshrined in Article I, section 5 of the Utah Constitution

encompassed almost none of the avenues for relief later developed at common law or currently enumerated in the PCRA." (Brief of Appellee at 108.) Nothing in the text (or any related case law), however, suggests there is any specific enumerations about when or how the writs may be used, neither are there any limitations. It is well within this Court's competence to make those determinations.[16]

Respondent argues, "For most of its history, the writ of habeas corpus was an extremely limited procedure for challenging confinement when no other judicial process was available." (Brief of Appellee at 107.) Broadly stated, this is precisely how the PCRA and post-conviction challenges to sentence operate. In Utah, the only way to challenge a conviction or sentence that violates the law is through post-conviction review. Mr. Archuleta, for example, is confined under a sentence of death that violates both state and federal law.[17] Given that his cause of action arose only after direct appeal, his only course for redress is through the PCRA.

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[16] Respondent cites to discussions from the state constitutional convention regarding concerns about "depriving [a person] of his liberty without [the writ's] particular redress," and the need to suspend the writ in times of emergency. (Brief of Appellee at 111, quoting State of Utah Constitutional Convention at 253, 256.) Respondent uses these cites to argue that "the text of the Utah Constitution itself shows that the framers understood the writ to redress only incarceration without process." (Brief of Appellee at 111.) It is not clear, though, how Respondent draws that conclusion from those cites.

[17] Respondent is correct that drawing too close of an analogy between federal use of the writ and Utah may not be appropriate, but for the wrong reason. (Brief of Appellee at 113, 116.) Respondent employs this argument to discourage this Court from drawing on anything in federal law that would open the door to relief for petitioners. What is more accurate, however, is that federal courts lack the same unencumbered constitutional grant of authority over writs as compared to Utah state courts. *See* U.S. Const. Art. III §§ 1-3. Also, the federal constitutional provision restricting suspension of the writ is found within Article 1, granting authority to the legislature. In the Utah constitution, the suspension clause is found in Article 1, the Declaration of Rights, which enumerates

This is well within the traditional use of a writ of habeas corpus. The basic definition of the writ is that it is "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." HABEAS CORPUS, Black's Law Dictionary (10th ed. 2014). It is well established that a challenge to a conviction or sentence is a proper use of the writ. This was recognized by this Court in *Thompson v. Harris*, 144 P.2d 761 (Utah 1943). Respondent makes the incongruous argument that "[a]lthough the *Thompson* court did note federal cases in which the writ had been held to apply, post-conviction, to petitioners 'deprived of one of [their] constitutional rights such as due process of law,' it did not explicitly hold that the writ had expanded in Utah to encompass such claims." (Brief of Appellee at 109, quoting *Thompson*, 144 P.2d at 766.) This is exactly what this Court found, writing "the writ will lie if the petitioner has been deprived of one of his constitutional rights such as due process of law." *Thompson*, 144 P.2d at 766 (citing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) and *Bowen* v. *Johnston*, 306 U.S. 19 (1939)).) There was no question that the writ may be used to raise a claim of constitutional violation in either the charging documents and procedures, trial and conviction, or sentence. *See id*. at 763 (petition for writ of habeas corpus challenging sentence was properly before the court).

Respondent quotes this Court in *Winnovich v. Emery*, an early case, for the language that "[t]he writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of review, unless some statute specially authorizes this to be done." (Brief

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rights guaranteed to individual citizens. This further supports the fact that the framers of the Utah constitution intended any authority over writs to be withheld from the legislature. (*See* Opening Brief of Appellant at 85.)

of Appellee at 114, quoting 93 P. 988, 993 (Utah 1908).) Respondent is suggesting that this proves that writs of habeas corpus could not be used for post-conviction review. Again, the quoted language does not establish this, nor does any other part of *Winnovich*. First, the fact that the case dealt with issues of pre-trial review does not foreclose the use of the writ of habeas corpus for other matters. Second, Respondent overlooks the differences between various writs. A writ of habeas corpus is an extraordinary writ, and jurisdiction over it is explicitly reserved to Utah courts. *See* Utah Const. Art. VIII, § III. A writ of review is not an extraordinary writ. It is a writ issued to review records of a lower court's proceedings, such as a writ of certiorari. Thus, what *Winnovich* is saying is that writs of habeas corpus cannot substitute for appellate review—an uncontroversial point that does not support Respondent's argument.

Respondent cites two other early cases to argue that "cases that did rely on the writ for a post-appeal review applied a far more restrictive review than the federal cases the *Thompson* court cited." (Brief of Appellee at 114.) These cases, in effect, undermine Respondent's entire argument. Regardless of whether Utah was more restrictive historically than federal courts in granting writs of habeas corpus for illegal or unconstitutional sentences, it is plain that Utah courts have, since their inception, made proper use of the writ of habeas corpus to engage in post-conviction review of the legality of sentences. In *Conners v. Pratt*, this Court considered a challenge to the imprisonment of a petitioner who had been convicted of two crimes. 112 P. 399, 399 (Utah 1910). The petitioner challenged both sentences, but conceded the legality of one sentence. *Id*. This Court found that it "may pass upon the legality of both" sentences, observing that "[t]he

question a long time ago was presented" to other courts, which had resolved it similarly. *Id*. at 400, citing *Ex parte Badgley*, 7 Cow. 472 (New York 1827) and *Ex parte Gibson*, 31 Cal. 619 (Cal. 1867). Respondent's description of the other case requires no rebuttal: "The court also relied on habeas corpus to set aside a sentence that exceeded that which the relevant statutes permitted in *Roberts v. Howells,* 62 P. 892, 892-93 (Utah 1900)." (Brief of Appellee at 114.) The writ of habeas corpus has been properly used as a post-conviction remedy to challenge the legality of imprisonment for hundreds of years.

Respondent also cites *In re Maxwell*, 57 P. 412 (Utah 1899), and *In re James McKee*, 57 P. 23 (Utah 1899), arguing that they "concerned whether the prosecution as a whole proceeded under constitutionally permissible legal machinery, not whether any technical error invalidated the convictions within an otherwise valid legal proceeding," that this "Court did not countenance habeas proceedings as a collateral attack of convictions or sentences," and that "[i]t was not until *Thompson* that this Court referenced the possibility of post-conviction, post-appeal review addressing trial-related errors." (Brief of Appellee at 115.) Respondent has misrepresented the claims raised in both cases, saying they were only concerned whether a trial could proceed on information rather by indictment. (*Id*.) While this was an issue in *Maxwell*, the petitioner there also raised a claim regarding the number of jurors required by the federal constitution. *See Maxwell*, 57 P. 412, 413. The requisite number of jurors was the only issue raised in *McKee*; the fact that he was charged by information was not challenged at all. *McKee*, 57 P. 23, 23-54. Both cases are post-conviction cases addressing claims of trial-related errors. *See id.; see also Maxwell*, 57 P. 412, 413. Thus, the foundation of Respondent's

argument regarding these cases is wholly false. Even if Respondent had accurately characterized the claims raised, it would still be wrong to rely on them for the conclusion Respondent asserts. Courts generally only address the questions raised to them by the petitioners. Even if these cases had dealt with the issue of proceeding by information rather than indictment, there is nothing in these cases to suggest that claims raised by the writs at issue are the only types of claims that could have been raised. Respondent's logic fallaciously relies on an absence of fact to try and prove a positive assertion.

Review of these cases demonstrates that Respondent is wrong in its assertion that *Thompson* and post-*Thompson* cases in Utah represent a deviation from historical use of writs of habeas corpus.[18] (Brief of Appellee at 110.) Review of the PCRA's grounds for relief show they generally only allow for relief on a claim of either state or federal constitutional violations, violations of state law, or on the ground of actual innocence based on newly discovered evidence. Utah Code § 78B-9-104(1)(a)-(f).[19] As shown by a closer review of the cases cited by Respondent, challenging the illegality of a conviction or sentence is a well-established traditional and historical use of the writ. Therefore, in

[18] The other cases discussed by Respondent are United States Supreme Court cases *Ex parte Kearney*, 20 U.S. 38 (1822), and *Ex parte Watkins*, 28 U.S. 193 (1830). (Brief of Appellee at 108-09, 111-12.) The limitations on power to grant writs in these cases is not related to anything inherent in writs of habeas corpus, but is a matter of the federal constitutional grant of jurisdiction to the Supreme Court. As shown above, contemporaneous state courts that did not have the same restrictions on their jurisdiction readily engaged in considering petitions for writs of habeas corpus in the form of post-conviction challenges. *See*, *e.g.*, *Watkins*, 28 U.S. at 201 ("This application is made to a court which has no jurisdiction in criminal cases (3 Cranch, 169;) which could not revise this judgment; could not reverse or affirm it, were the record brought up directly by writ of error.").

[19] The exception is §78B-9-104(1)(g), which allows for petitioners to seek relief from convictions of certain crimes if committed "while subject to force, fraud, or coercion."

Utah, a petition filed under the PCRA is a petition for writ of habeas corpus, and the judiciary has exclusive authority over the issuance of such writs. Respondent has offered no accurate evidence otherwise.

This Court has already recognized its authority over writs and that petitions for relief under the PCRA are, all but in name only, petitions for writs of habeas corpus. *See Hurst*, 777 P.2d at 1033-34; *see also Tillman*, 2005 UT 56, ¶ 22 (this Court has quintessential authority over writs of habeas corpus allowing it to apply its common law precedents). "The function of a writ of habeas corpus as a post-conviction remedy is to provide a means for collaterally attacking convictions when they are so constitutionally flawed that they result in fundamental unfairness and to provide for collateral attack of sentences not authorized by law." *Id*. at 1034-35. This function is what Mr. Archuleta has asked this Court to perform with regard to his *Atkins* claim. If Mr. Archuleta is intellectually disabled, as his proffer shows, then his sentence of death is in violation of both Utah law and the Eighth Amendment to the United States Constitution. Given that his cause of action arose after his conviction and direct appeal were final, his only path to relief is through a writ of habeas corpus, which he has sought in his PCRA petition. This is the purpose that such petitions are designed for. *Id*. Respondent would have this Court disavow such avenues for relief.

Respondent argues against the implementation of a historical role of writs of habeas corpus, and espouses a neutered version that constricts the availability to seek relief for even blatantly illegal sentences. Respondent exhibits no concern about whether convictions or sentences are just or even legal, only whether they are technically

jurisdictional. At every step in the current state proceedings, Respondent has pursued every argument to avoid an adjudication of the underlying facts and merits of Mr. Archuleta's claim.

The most important question raised by Respondent's argument is one it fails to ask: what is the practical outcome? In Mr. Archuleta's case, the outcome would be to put an intellectually disabled person to death, in violation of the Eighth and Fourteenth Amendments. Respondent would have this Court endorse an approach which elevates process—determined in a vacuum—above the constitutional rights of specific individuals, which it is this Court's duty to protect.

The reason the writ of habeas corpus is so essential to the administration of justice is that in many cases—such as this one—it is the only way for a court to grant relief where it is warranted. Respondent advocates a system of cold cruelty—one that disregards facts, law, justice, mercy, and the complex intersection where they all meet.

CONCLUSION

Based on the foregoing, the opening brief, and the record before this Court, Mr. Archuleta respectfully requests that this Court grant him relief—that he be given the opportunity to have his *Atkins* claim determined on its merits and relief granted by being exempted from execution under Utah law and the federal constitution.

Respectfully submitted this 24th day of May, 2017.

Jon M. Sands
Federal Public Defender

David Christensen
Charlotte G. Merrill
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Assistant Federal Public Defenders

By: s/ David Christensen
David Christensen

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 12,276 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

s/ David Christensen
by David Christensen

CERTIFICATE OF SERVICE

I certify that, on this 24th day of May, 2017, I filed the attached document with the Utah Supreme Court Clerk. A copy is also being sent by first class mail to the following:

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Addendum 1

Archuleta v. State
20160419-SC

STAYED,DEATH_PENALTY,NOIPT,PRISONER

US District Court Electronic Case Filing System
District of Utah (Central)
CIVIL DOCKET FOR CASE #: 2:07-cv-00630-TC

Archuleta v. Crowther
Assigned to: Judge Tena Campbell
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 12/06/2012
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

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Date Filed	#	Docket Text
12/06/2012	58	PETITION for Writ of Habeas Corpus by Michael Anthony Archuleta. (Attachments: # 1 Exhibit 1-27)(Murray, Ken) (Entered: 12/06/2012)
12/07/2012	59	NOTICE FROM THE COURT: Case number for this case is now **2:07cv00630-TC** due to the filing of 58 Petition for Writ of Habeas Corpus. (rks) (Entered: 12/07/2012)
12/07/2012	60	RESPONSE to Motion re 52 MOTION Reconsider Order Disqualifying Counsel re 51 Order on Motion to Disqualify Counsel, Memorandum Decision filed by Petitioner Michael Anthony Archuleta. (Christensen, David) (Entered: 12/07/2012)
12/12/2012	61	ERRATA to 58 Petition for Writ filed by Petitioner Michael Anthony Archuleta . (Attachments: # 1 Exhibit 12)(Murray, Ken) (Entered: 12/12/2012)
12/20/2012	63	ORDER to Respond to 58 Petition for Writ. Proposed case mgmt schedule due 1/17/13. Signed by Judge Tena Campbell on 12/20/12 (alt) (Entered: 12/21/2012)
12/21/2012	62	REPLY to Response to Motion re 52 MOTION Reconsider Order Disqualifying Counsel re 51 Order on Motion to Disqualify Counsel, Memorandum Decision filed by Respondent Steven Turley. (Brunker, Thomas) (Entered: 12/21/2012)
01/15/2013	64	ORDER denying 52 Motion to Reconsider 51 Order Disqualifying Counsel. Signed by Judge Tena Campbell on 1/15/13 (alt) (Entered: 01/15/2013)
01/17/2013	65	Joint MOTION for Scheduling Order ~~re 63 Order */Proposed Case Management Schedule*~~ filed by Petitioner Michael Anthony Archuleta. (Murray, Ken) Modified on 1/23/2013: updated motion relief (alt) (Entered: 01/17/2013)
01/23/2013	66	ORDER granting 65 Motion for Scheduling Order/Case Mgmt Schedule. Signed by Judge Tena Campbell on 1/23/13 (alt) (Entered: 01/23/2013)
02/04/2013	67	NOTICE of of Delay in Filing Motion for Expert Contact Visit by Michael Anthony Archuleta re 66 Order on Motion for Scheduling Order (Christensen, David) (Entered: 02/04/2013)
02/05/2013	68	**PLEASE DISREGARD - ENTRY ERROR** ~~Supplemental BRIEF re 66 Order on Motion for Scheduling Order */Stipulation and Motion for Order for Expert Contact Visit* filed by Petitioner Michael Anthony Archuleta. (Attachments: # 1 Text of Proposed Order)(Murray, Ken)~~ Modified on 2/5/2013 by adding error text after call from counsel (jlw) (Entered: 02/05/2013)
02/05/2013	69	MOTION ~~re 66 Order on Motion for Scheduling Order */Stipulation and Motion for Order* *for Expert Contact Visit* filed by Petitioner Michael Anthony Archuleta. (Attachments: #

		1 Text of Proposed Order)(Murray, Ken) Modified on 2/26/2013: edited text (alt) (Entered: 02/05/2013)
02/26/2013	70	ORDER granting 69 Motion for Expert Contact Visits. Signed by Judge Tena Campbell on 2/26/13 (alt) (Entered: 02/26/2013)
05/20/2013	71	MOTION for Extension of Time to File Motion for Stay No Later Than 06/21/2013 (Attachments: # 1 Text of Proposed Order) (Murray, Ken) Modified on 5/21/2013 ; changed event from Notice (Other) to Motion for Extension of Time (asp). (Entered: 05/20/2013)
05/21/2013	72	RESPONSE to Motion re 71 MOTION for Extension of Time filed by Respondent Steven Turley. (Brunker, Thomas) (Entered: 05/21/2013)
05/23/2013	73	ORDER granting 71 Motion for Extension of Time. Signed by Judge Tena Campbell on 05/23/2013. (asp) (Entered: 05/23/2013)
06/03/2013	74	NOTICE of Appearance by Andrew F. Peterson on behalf of Steven Turley (Peterson, Andrew) (Entered: 06/03/2013)
06/21/2013	75	MOTION to Stay and Memorandum in Support */Motion to Stay and Hold Habeas Proceedings in Abeyance* filed by Petitioner Michael Anthony Archuleta. (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order)(Murray, Ken) (Entered: 06/21/2013)
07/12/2013	76	REQUEST to Submit for Decision re 75 MOTION to Stay and Memorandum in Support */Motion to Stay and Hold Habeas Proceedings in Abeyance* filed by Petitioner Michael Anthony Archuleta. (Murray, Ken) (Entered: 07/12/2013)
07/12/2013	77	NOTICE of Withdrawal of Request to Submit by Michael Anthony Archuleta re 76 Request to Submit for Decision (Murray, Ken) (Entered: 07/12/2013)
07/19/2013	78	MOTION for Leave to File Overlength Memorandum in Opposition to Petitioner's Motion to Stay and Hold Proceedings in Abeyance filed by Respondent Steven Turley. (Peterson, Andrew) Modified on 7/22/2013 ; changed relief from for Leave to File Document to for Leave to File Excess Pages (asp). (Entered: 07/19/2013)
07/22/2013	79	DOCKET TEXT ORDER granting 78 Motion for Leave to File Excess Pages. So ordered by Judge Tena Campbell on 7/22/13 (docket text only - no attached document) (alt) (Entered: 07/22/2013)
07/22/2013	80	MEMORANDUM in Opposition re 75 MOTION to Stay and Memorandum in Support */Motion to Stay and Hold Habeas Proceedings in Abeyance* filed by Respondent Steven Turley. (Peterson, Andrew) (Entered: 07/22/2013)
08/08/2013	81	REPLY to Response to Motion re 75 MOTION to Stay and Memorandum in Support */Motion to Stay and Hold Habeas Proceedings in Abeyance* filed by Petitioner Michael Anthony Archuleta. (Murray, Ken) (Entered: 08/08/2013)
08/15/2013	82	NOTICE FROM THE COURT : Alfred C. Bigelow is substituted for Steven Turley as the Respondent in this suit. (asp) (Entered: 08/15/2013)
08/15/2013	83	SUBSTITUTION OF COUNSEL David A. Christensen replacing Ken Murray as counsel on behalf of Michael Anthony Archuleta. (Christensen, David) (Entered: 08/15/2013)
08/15/2013	84	ORDER for Records. Signed by Judge Tena Campbell on 8/15/13 (alt) (Entered: 08/15/2013)
08/15/2013	85	NOTICE OF REQUIREMENTS for appearance phv mailed to attorney L. Marquez and C. G. Merrill, for Petitioner Michael Anthony Archuleta (alt) (Entered: 08/15/2013)

08/16/2013		Remark: 85 PHV Requirements waived by Chief Deputy Clerk (alt) (Entered: 08/16/2013)
08/19/2013	86	MOTION to Reconsider re 84 Order and Memorandum in Support filed by Respondent Alfred C. Bigelow. (Peterson, Andrew) (Entered: 08/19/2013)
08/30/2013	87	MOTION for Leave to File Surreply in Opposition to Petitioner's Motion to Stay and Hold Habeas Proceedings in Abeyance and Memorandum in Support filed by Respondent Alfred C. Bigelow. (Peterson, Andrew) (Entered: 08/30/2013)
09/04/2013	88	MOTION for Admission Pro Hac Vice of Leticia Marquez and Charlotte Merrill , Registration fee $ 15. filed by Petitioner Michael Anthony Archuleta. (Attachments: # 1 Exhibit A-B)(Christensen, David) (Entered: 09/04/2013)
09/05/2013	89	RESPONSE to Motion re 86 MOTION to Reconsider re 84 Order filed by Petitioner Michael Anthony Archuleta. (Christensen, David) (Entered: 09/05/2013)
09/09/2013	90	MOTION to Seal *Records Provided to Dr. Weinstein* re 84 Order filed by Petitioner Michael Anthony Archuleta. (Attachments: # 1 Text of Proposed Order)(Christensen, David) Modified on 9/12/2013: corrected carry-forward text (alt) (Entered: 09/09/2013)
09/09/2013	91	ORDER granting 88 Motion for Admission Pro Hac Vice of Leticia Marquez and Charlotte Merrill. Signed by Judge Tena Campbell on 9/6/13 (alt) (Entered: 09/10/2013)
09/12/2013	92	ORDER granting 87 Motion for Leave to File Surreply. Signed by Judge Tena Campbell on 9/12/13 (alt) (Entered: 09/12/2013)
09/13/2013	93	RESPONSE to Motion re 90 MOTION to Seal *Records Provided to Dr. Weinstein* re 84 Order filed by Respondent Alfred C. Bigelow. (Brunker, Thomas) (Entered: 09/13/2013)
09/23/2013	94	REPLY to Response to Motion re 86 MOTION to Reconsider re 84 Order *to Provide Records* filed by Respondent Alfred C. Bigelow. (Peterson, Andrew) (Entered: 09/23/2013)
09/24/2013	95	REPLY to Response to Motion re 90 MOTION to Seal *Records Provided to Dr. Weinstein* re 84 Order filed by Petitioner Michael Anthony Archuleta. (Christensen, David) (Entered: 09/24/2013)
09/26/2013	96	REPLY to Response to Motion re 75 MOTION to Stay *and Hold Habeas Proceedings in Abeyance Surreply in Opposition* filed by Respondent Alfred C. Bigelow. (Peterson, Andrew) (Entered: 09/26/2013)
10/02/2013	97	ORDER granting 86 Motion to Reconsider 84 Order - that order is stricken; denying 90 Motion to Seal. Petitioner is to file a CD (or CDs) containing the state court record with the Clerk of the Court no later than 10/18/13. Signed by Judge Tena Campbell on 10/2/13 (alt) (Entered: 10/02/2013)
10/18/2013	98	State Court Records Received from counsel for Michael Anthony Archuleta pursuant to 97 Order (records are contained on two CD's; image files not formatted for uploading to docket - discs will be kept in permanent storage) (alt) (Entered: 10/18/2013)
11/04/2013	99	RESPONSE re 98 File Received, filed by Alfred C. Bigelow. (Peterson, Andrew) (Entered: 11/04/2013)
01/07/2014	100	REQUEST to Submit for Decision re 75 MOTION to Stay *and Hold Habeas Proceedings in Abeyance* filed by Respondent Alfred C. Bigelow. (Peterson, Andrew) (Entered: 01/07/2014)
04/09/2014	101	Stipulated MOTION Expert Contact Visit filed by Petitioner Michael Anthony Archuleta. (Attachments: # 1 Text of Proposed Order)(Christensen, David) (Entered: 04/09/2014)

04/15/2014	102	ORDER granting 101 Motion for Contact Visit with Dr. J. Davies, MD. Signed by Judge Tena Campbell on 4/14/14 (alt) (Entered: 04/15/2014)
05/08/2014	103	ERROR: WRONG DOCUMENT ATTACHED - ~~REQUEST to Submit for Decision re 75 MOTION to Stay *and Hold Habeas Proceedings in Abeyance* filed by Respondent Alfred C. Bigelow. (Peterson, Andrew)~~ Modified on 5/12/2014: added error text (alt) (Entered: 05/08/2014)
05/08/2014	104	REQUEST to Submit for Decision re 75 MOTION to Stay *and Hold Habeas Proceedings in Abeyance* filed by Respondent Alfred C. Bigelow. (Peterson, Andrew) (Entered: 05/08/2014)
10/14/2014	105	ORDER of USCA 10TH Circuit "The district court is invited to respond to the mandamus petition within thirty days of the date of this order." (alt) (Entered: 10/14/2014)
10/23/2014	106	NOTICE FROM THE COURT Scott Crowther is substituted for Alfred C. Bigelow as the Respondent in this suit. (jwt) (Entered: 10/23/2014)
11/12/2014	107	ORDER granting 75 Motion for Limited Stay pending resolution of state court Atkins proceedings. Signed by Judge Tena Campbell on 11/12/14 (alt) (Entered: 11/12/2014)
11/18/2014	108	ORDER of USCA 10th Circuit dismissing mandamus petition (alt) (Entered: 11/18/2014)

PACER Service Center			
Transaction Receipt			
05/15/2017 19:25:07			
PACER Login:	fpd00100	**Client Code:**	archuleta-christensen
Description:	Docket Report	**Search Criteria:**	2:07-cv-00630-TC Start date: 12/1/2012 End date: 11/30/2014
Billable Pages:	6	**Cost:**	0.60

Addendum 2

Archuleta v. State
20160419-SC

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

MICHAEL ANTHONY ARCHULETA, Petitioner, vs. ALFRED C. BIGELOW Warden of the Utah State Prison, Respondent.	Case No. 2:07-cv-630-TC **Joint Proposed Case Management Schedule** **Death Penalty Case** Judge Tena Campbell

Pursuant to this Court's Order dated December 20, 2012 (Dkt. No. 63), the parties jointly submit this proposed case management schedule.

EVALUATION OF PETITIONER:

1. Petitioner has announced his intention to file a motion seeking an order that will allow Petitioner to have a comprehensive neurological examination completed. (*See* Dkt. No. 58 at 77-78). Petitioner submits that such an examination is necessary to support his claim that he suffers from mental retardation/intellectual disability (Dkt. No. 58, Claim One), as well as his claim that he received constitutionally ineffective representation during the penalty phase of his trial proceedings (Dkt. No. 58, Claim Three). By February 4, 2013, Petitioner shall file his motion to allow the neurological examination, serving both Respondent and counsel for the Utah Department of Corrections ("UDOC").
2. Respondent and/or counsel for the UDOC will file any response in opposition by February 25, 2013.[1]
3. Petitioner will file his reply by March 11, 2013.
4. If the Court grants the motion, Petitioner will work diligently to complete the evaluation and submit a report, if any, within 180 days of issuance of the order, but reserves the right to request additional time subject to the availability of Petitioner's expert.

[1] Because UDOC is not currently independently involved in this habeas litigation, UDOC has not been asked to agree to this joint proposed case management schedule. Petitioner would not object to UDOC seeking additional time to respond.

MOTION FOR REMAND:

5. Within 30 days of the completion of the neuropsychological evaluation and reception of the expert's findings, Petitioner will file either (a) a motion seeking a remand to the state court, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to exhaust his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), or (b) a notice that he is withdrawing Claim One.
6. If Petitioner seeks a remand to exhaust a claim under *Atkins*, Respondent will file his response in opposition, if any, within 30 days thereafter.
7. Petitioner will file his reply within 17 days thereafter.
8. If a remand is granted, Petitioner will provide status reports every 90 days, unless directed otherwise by the Court.
9. If Petitioner does not seek a remand for exhaustion and withdraws Claim One, or if there is a remand and relief is ultimately denied by the state courts, the habeas proceedings will proceed.

AMENDMENT OF PETITION:

10. If there is no remand, or within 90 days of a final denial of relief by the state courts if there is a remand, Petitioner will file an amended petition.
11. Within 180 days of Petitioner filing his amended petition, Respondent will file his response. The parties will work together to lodge the state court record with the Court within that same time period.

12. If Respondent files a dispositive motion in addition to his response, Petitioner will respond pursuant to the applicable rules and any orders of the Court.

13. Within 30 days of the filing of Respondent's response, Petitioner will file a reply.

DISCOVERY:

14. Within 90 days of the filing of the reply, the parties will file their respective motions for discovery, if any, including their proposed schedules.

15. Within 180 days of the Court's discovery order resolving any disputes and/or adopting the proposed schedules, the parties will complete discovery.

EVIDENTIARY HEARING:

16. Within 60 days of the close of discovery, Petitioner will file a motion for an evidentiary hearing, if necessary.

17. Respondent's opposition to the motion, if any, will be filed within 60 days of the filing of Petitioner's motion for an evidentiary hearing and will work together to create a briefing schedule on these issues.

18. Petitioner will file his reply within 30 days of the filing of the opposition to the motion.

19. If the Court holds an evidentiary hearing, the parties will seek post-hearing briefing on the issues addressed at the hearing.

20. Upon a final ruling by the Court on the evidentiary hearing issues, the parties will seek briefing on any remaining non-hearing issues and will work together to create a briefing schedule on these issues.

Respectfully submitted this 17th day of January, 2013.

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/s/ Ken Murray
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CERTIFICATE SERVICE

I hereby certify that on this 17th day of January, 2013, I electronically filed the foregoing document to the Clerk's Office using the CM/ECF system.

/s/ Stephanie Bame
Legal Assistant

Addendum 3

Archuleta v. State
20160419-SC

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

MICHAEL ANTHONY ARCHULETA, Petitioner, v. ALFRED C. BIGELOW, Warden, Utah State Prison, Respondent.	Order for Records Case No. 2:07-CV-630 Judge Tena Campbell

Under the Case Management Schedule submitted by the parties and adopted by the court, the state court record would not be lodged with the court until Respondent Alfred C. Bigelow[1] files the state's response to Mr. Archuleta's Petition for Writ of Habeas Corpus. (See Docket Nos. 65 and 66.)

But the court needs the record sooner than that because Mr. Archuleta and the state refer to the record in their filings about Mr. Archuleta's Motion to Stay and Hold Habeas Proceedings in Abeyance, which is pending before the court. (See Docket Nos. 75, 80, and 81.)

To facilitate the court's review of Mr. Archuleta's motion to stay, the court directs Mr. Archuleta to file a CD (or CDs) with the records that were given to Dr. Ricardo Weinstein. (See Docket No. 75 at 7-11.) The court also directs the state to file a CD (or CDs) with the state court record (including transcripts, pleadings, and other materials related to Mr. Archuleta's trial, direct appeals, and post-conviction efforts, as well as any pro se filings, submissions, and correspondence by Mr. Archuleta).

[1] As the Warden for the Utah State Prison where Mr. Archuleta is housed, Mr. Bigelow is the named respondent for the State of Utah. The court will refer to him as "the state."

The CDs should be filed conventionally with the Clerk of the Court no later than September 6, 2013, and courtesy copies of the CDs should be sent to the court's chambers.

SO ORDERED this 15th day of August, 2013.

BY THE COURT:

Tena Campbell
United States District Judge

Addendum 4

Archuleta v. State
20160419-SC

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

MICHAEL ANTHONY ARCHULETA, Petitioner, v. ALFRED C. BIGELOW, Warden Utah State Prison, Respondent.	:	MOTION AND MEMORANDUM TO RECONSIDER ORDER TO PROVIDE RECORDS Case No. 02:07-CV-00630 TC Honorable Tena Campbell

Respondent, through counsel, hereby moves this Court to reconsider its order to provide records. *See* doc. no. 84.

BACKGROUND

This Court adopted the parties' proposed scheduling order. *See* doc. nos. 65 & 66. The scheduling order required the parties to work together to lodge the entire state record during the 180 days Respondent had to prepare his plenary response to the petition. *See* doc. no. 65 at 3.

Archuleta filed his motion to stay and hold in abeyance his habeas corpus petition under *Rhines v. Weber*, 544 U.S. 269 (2005). *See* doc. no. 75. Respondent filed a memorandum in opposition. *See* doc. no. 80. Archuleta then replied to Respondent's memorandum in opposition. *See* doc. no. 81.

This Court determined that it required the state record sooner in order to evaluate Archuleta's motion for a stay and abeyance. *See* doc. no. 84 at 1. The Court ordered Archuleta to lodge a CD with electronic copies of "the records that were given to Dr. Ricardo Weinstein," Archuleta's *Atkins* expert. *Id.* The Court ordered Respondent to file CD's with electronic copies of "the state court record (including transcripts, pleadings, and other materials related to Mr. Archuleta's trial, direct appeals, and post-conviction efforts, as well as any pro se filings, submissions, and correspondence by Mr. Archuleta)." *Id.* The Court gave the parties until no later than 6 September 2013 to lodge the record with the court. *See id.*

MEMORANDUM

Respondent respectfully requests that the Court reconsider its order to lodge the record by 6 September 2013. Because of the enormity of the record the Court has identified, and because of inadequate resources, Respondent does not have the ability to comply within the time the Court has permitted.

This case extends back almost 25 years to November 1988. Archuleta received a full jury trial, followed by a full direct appeal in the Utah Supreme Court. *See State v. Archuleta*, 850 P.2d 1232 (Utah 1993) (*Archuleta I*), *cert. denied*, *Archuleta v. Utah,* 510 U.S. 979 (1993). Archuleta then prosecuted a post-conviction petition in state court, and appealed when his petition was finally dismissed, partly on summary judgment and partly on the merits after an evidentiary hearing. *See Archuleta v. Galetka*, 2011 UT 73, 267 P.3d 232 (*Archuleta II)*. While the merits post-conviction appeal was pending, Archuleta filed post-judgment motions under Utah R. Civ. P. 60(b) and 59. *See id.* Respondent does not currently know exactly how large the record is, but expects it to exceed 8 banker's boxes of pleadings, transcripts, exhibits, briefs, etc.

Respondent does not currently have possession of the record in Archuleta's case. To obtain the record, Respondent has filed a motion to take possession of the record from the state court. Respondent normally expects the

clerk of the state court to take at least two weeks to prepare and transmit the record, and Respondent has no control over the state court's internal processes for managing the record request. But where, as here, the record is in a rural district with a smaller staff and the necessity of shipping the record, that time can extend much longer. Thus, it is likely that this Court's deadline will already have passed before Respondent even obtains the record.

This Court has ordered Respondent to reduce the record to digital format. Thus, once Respondent does obtain the record, counsel for Respondent, together with a limited support staff, must process that record. Processing the record includes cataloguing what was received, identifying any known gaps in the record, scanning each volume and labeling it for easier access. Without this effort, the record would constitute a heap of meaningless electronic data, unusable by this Court or the parties.

For these reasons, Respondent normally requires two to three months to process a death penalty record. Besides the size and complexity of the record, Respondent also has very limited personnel resources. The Criminal Appeals Division of the Utah Attorney General's Office has two full-time and one part-time support professionals to assist all 16 attorneys in the division. Their time is

allocated among the entire case-load of the division, including all direct appeals, all state post-conviction matters, and all federal habeas corpus matters. This also includes all active capital cases—including, for example, *Kell v. Turley*, 2:07-CV-359, whose state court record is due to be lodged with the Federal District Court on 3 September 2013. Moreover, the lead capital case support professional will be terminating employment with the division during the month of September, and her considerable efficiency and expertise will be unavailable to counsel for Respondent in processing this record.

Respondent recognizes the Court's concern for evaluating Archuleta's *Rhines* motion within the context of what was presented in state court. Respondent thus will make every effort to provide the record. But given the above-enumerated constraints, Respondent simply cannot comply with the order under the current time-frame.

Thus, Respondent proposes the following three alternatives. First, this Court could order the parties to provide the relevant portions of the record that they cited in their *Rhines* memoranda. This would take considerably less time to compile and process, and could likely be accomplished within 45 days of receiving the record from the state court.

Second, this Court could order that the original scheduling order remain in

force, and that the parties will work together to lodge the record while Respondent prepares his response to the petition. The Court could then wait to rule on the *Rhines* motion until receipt of the entire record and Respondent's full response to the petition. Respondent has argued that Archuleta's *Atkins* claim is already time-barred in state court. *See* doc. no. 80. Archuleta has argued that the time bar is inapplicable to his *Atkins* claim because it is a "status claim." *See* doc. nos. 75 & 81. Either way, waiting until plenary briefing on the petition will not affect Archuleta's ability to present this claim in state court because the claim is either already barred, or it is not barrable.

Third, if the Court intends to resolve the *Rhines* motion before plenary briefing on the petition, and requires the entire record to do so, it could order the parties to lodge the record within 90 days of 6 September 2013. Respondent can most likely process and transmit the record within that time.

CONCLUSION

For these reasons, Respondent respectfully moves this Court to reconsider its order to provide the full state court record by 6 September 2013.

DATED 19 August 2013.

JOHN E. SWALLOW
Utah Attorney General

/s/ Andrew F. Peterson

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Addendum 5

Archuleta v. State
20160419-SC

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

MICHAEL ANTHONY ARCHULETA, Petitioner, vs. ALFRED C. BIGELOW, Warden of the Utah State Prison, Respondent.	No. 2:07-cv-630-TC PETITIONER'S RESPONSE TO MOTION TO RECONSIDER ORDER TO PROVIDE RECORDS **Death Penalty Case** Judge Tena Campbell

Michael Anthony Archuleta, through counsel, responds to Respondent's Motion to Reconsider Order to Provide Records. In that motion, Respondent states that the size and

complexity of the state court record, in combination with limited personnel resources, would prohibit Respondent from complying with this Court's order to submit the state court record within the time ordered. *See* doc. no. 86 at 3-5. Respondent proposes several alternatives to this Court's order. *See id*. at 5-6.

Mr. Archuleta's counsel is in possession of the state court record and has reduced it to a digital format. In order to facilitate this Court's ruling on the pending *Rhines* stay, Mr. Archuleta is willing to submit to the Court his copy of the record, upon completion of a final review to ensure completeness and accuracy. This final review is already underway and can be finished by September 20, 2013. Thus, the record should be ready for submission upon this Court's order in deciding this motion, should the Court agree to accept this option.

This option will allow the case to proceed according to the Case Management Schedule stipulated to by the parties and adopted by this Court. *See* doc. nos. 65 and 66. According to that schedule, litigation on the *Rhines* motion is to be completed prior to Mr. Archuleta amending his petition or the Respondent filing a response. *See* doc. no. 65 at 3. The parties have conferred and are in agreement that it would be best to follow the Case Management Schedule, and that allowing Mr. Archuleta to submit the record would best facilitate this. Respondent, in its reply on the motion to reconsider, may request a reasonable period to review the state court record as submitted by Mr. Archuleta, and an opportunity to supplement it if necessary. Mr. Archuleta would agree that such an approach would be appropriate.

Mr. Archuleta opposes any alternative plan that would delay resolution of the *Rhines* stay until the time that Respondent files the response to his petition. Such a delay would undermine the intent of Mr. Archuleta's motion to stay and hold the proceedings in abeyance, which is to exhaust his *Atkins* claim in state court before proceeding with this federal habeas case. It would impose effort and expend time on the part of the Court and the parties that may ultimately be unnecessary.

Respectfully submitted: September 5, 2013.

Jon M. Sands
Federal Public Defender

/s/ David Christensen
David Christensen
Assistant Federal Public Defender

Attorney for Petitioner Archuleta

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2013, I electronically filed the foregoing document to the Clerk's Office using the CM/ECF system which sent notification of such filing to the following registrants:

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Addendum 6

Archuleta v. State
20160419-SC

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

MICHAEL ANTHONY ARCHULETA, Petitioner, v. ALFRED C. BIGELOW, Warden, Utah State Prison, Respondent.	ORDER FOR DOCUMENTS Case No. 2:07-CV-630 Judge Tena Campbell

As anticipated by the parties and the court, Petitioner Michael Anthony Archuleta filed a Motion to Stay and Hold Habeas Proceedings in Abeyance. (See Docket No. 75.) In their briefing about that motion, the parties repeatedly referred to records from Mr. Archuleta's underlying state court proceedings. But none of those records were attached as exhibits to the parties' papers, and none of them have been otherwise filed with the court.

To facilitate its review of the parties' arguments about the motion to stay, the court ordered Respondent Alfred C. Bigelow[1] to file the state court record with the court in advance of the date anticipated by the Case Management Order, and it ordered Mr. Archuleta to file the documents that were provided to his expert, Dr. Ricardo Weinstein. (See Docket Nos. 65 and 84.)

Both parties filed motions in response to the Order for Records. (See Docket No. 86 and 90.) The state asked the court to reconsider the order for logistical reasons, among them that the Utah Attorney General's Office has not obtained the state court record from the rural district

[1] Mr. Bigelow is the named respondent for the State of Utah. The court will refer to him as "the state."

court where the record is located, and that processing the record once it was obtained would take more time than anticipated by the court's order. (See Docket No. 86 at 3-4.) Mr. Archuleta asked the court for permission to file the records given to Dr. Weinstein ex parte and under seal. (See Docket No. 90.)

The parties have worked together to resolve both of these issues.

In response to the difficulties identified by the state in terms of obtaining the state court record, Mr. Archuleta represented that he has a copy of the state court record, in digital format, and that he would provide it to the court and to the state. (See Docket No. 89.) The state accepted this solution, and requested that it be given fourteen days after its receipt of the record to review the record for completeness and accuracy, as well as the opportunity to supplement the record with other relevant state record materials, if necessary. (See Docket No. 94 at 2.)

In response to Mr. Archuleta's request that the records provided to Dr. Weinstein be filed ex parte and under seal, the state represented that it does not need to see Mr. Weinstein's records at this time, and that it does not oppose Mr. Archuleta's request to file them in a protected manner. (See Docket No. 93.)

Given the agreement of the parties, and for good cause shown, the court GRANTS the motion to reconsider. (See Docket No. 86.)

The court STRIKES the previous Order for Documents. (See Docket No. 84.)

In its place, the court directs Mr. Archuleta to file a CD (or CDs) containing the state court record (including transcripts, pleadings, and other materials related to Mr. Archuleta's trial, direct appeal, and post-conviction efforts, as well as any pro se filings, submissions, and correspondence). The court recognizes that Mr. Archuleta's copy of the record may not be certified by the state court as complete, and that additional records may be added to it in the

future. The CD (or CDs) should be filed with the Clerk of the Court no later than October 18, 2013, and courtesy copies of the CD (or CDs) should be directed to the court's chambers and to the state. The court directs the state to review the state court records provided by Mr. Archuleta and to make any supplements to it, if necessary, by November 4, 2013.

At this point, Mr. Archuleta does not need to provide the court with copies of the records that were provided to Dr. Weinstein. It appears that many of those records are a subset of the state court record that Mr. Archuleta is already providing to the court. (See Docket No. 75 at 7-11.) If, after reviewing the state court record, the court determines that additional records are necessary to complete its evaluation of Mr. Archuleta's pending motion to stay, the court will order them. The motion to submit records ex parte and under seal is DENIED, without prejudice, as moot. (See Docket No. 90.)

SO ORDERED this 2nd day of October, 2013.

BY THE COURT:

Tena Campbell
United States District Judge

Addendum 7

Archuleta v. State
20160419-SC

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

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

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

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

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

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

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

I. Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Applicable Law

A. Rhines Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 981-82 (citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Atkins Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Conclusion

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

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

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

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

SO ORDERED this 12th day of November, 2014.

BY THE COURT:

Tena Campbell
United States District Judge