IN THE SUPREME COURT FOR THE STATE OF UTAH

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

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

Table of Authorities

Federal Cases

United States Constitution

United States Code

State Cases

State Constitution

State Statutes

Rules

Other

Addenda

Introduction

Mr. Archuleta's death sentence violates *Atkins v. Virginia*, 536 U.S. 304 (2002). The substantive rule of *Atkins*—announced six days after Mr. Archuleta's post-conviction petition was filed—changed the law by excluding intellectually disabled persons from State execution. This Court has asked whether Utah's Post-Conviction Remedies Act ("PCRA") permits the courts to apply such a change in a case that has become final and, if so, under which provision.

The PCRA—both at the time of *Atkins* and Mr. Archuleta's initial post-conviction proceedings, and currently—permits collateral relief based on new, retroactive rules of constitutional law. As explained below, because Mr. Archuleta's death sentence violates the United States and Utah Constitutions, his *Atkins* claim is cognizable under the PCRA and should have been raised by 2003. For the reasons below and in Mr. Archuleta's prior briefing, this Court should remand his case to the district court for a merits determination.

Alternatively, if this Court finds his sentence is illegal on its face, it should remand to the district court with instructions to correct his sentence.

Relevant Procedural History

Mr. Archuleta briefed the procedural history of this case more fully in his opening brief filed with this Court December 19, 2016. (12/19/2016, Opening Brief of Appellant at 6-9.)[1] Here, he reiterates a few procedural facts relevant to the Court's questions.

Mr. Archuleta was sentenced to death in 1989. (Trial ROA 703-06.) His sentence became final in 1993, when this Court affirmed his convictions and sentences, *State v. Archuleta*, 850 P.2d 1232 (Utah 1993), the United States Supreme Court denied certiorari, *Archuleta v. Utah*, 510 U.S. 979 (1993) (mem.), and this Court remitted the case (Remittur, *Archuleta*, 850 P.2d 1232 (No. 900041)). *See generally State v. Guard*, 2015 UT 96, ¶ 30 n.27, 371 P.3d 1, 9 n.27 (quoting *Beard v. Banks*, 542 U.S. 406, 411 (2004)) ("Generally, a conviction becomes 'final' for purposes of our retroactivity analysis when the defendant's right to direct appeal "has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.").

Mr. Archuleta's initial petition for post-conviction relief was timely filed. (PCR I ROA 1-4.) Post-conviction counsel, Ed Brass, filed a Second Amended Petition for a Writ of Habeas Corpus and/or Post-conviction Relief on June 14, 2002 ("initial post-conviction proceedings"). (PCR I ROA 888-1227.) Six days later, the United States Supreme Court decided *Atkins*, 536 U.S. 304. Approximately nine months later, Utah codified the *Atkins* decision in what is now Utah Code § 77-15a-101 (eff. March 15, 2003). The State did not

[1] Citations to items on this Court's docket list the date of the filing, the title of the document, and any relevant pin-cite. All other citations follow the format listed in Mr. Archuleta's Opening Brief.

file responsive pleadings in the post-conviction case until it moved for summary judgment in April 2003. (PCR I ROA 1261-1558, 1255-1259.) Mr. Brass never developed or presented an *Atkins* claim in state court on Mr. Archuleta's behalf.

Following his state court proceedings, Mr. Archuleta raised his *Atkins* claim in a federal habeas petition. (Petition for Writ of Habeas Corpus, *Archuleta v. Bigelow*, Case No. 07-cv-630, Dkt. 58 (D. Utah Dec. 6, 2012).) The United States District Court then granted Mr. Archuleta permission to bring the claim before the Utah courts in a PCRA petition, and he did so ("current post-conviction proceedings"). (*See* 5/24/2017, Reply Brief, Addendum 7.) The State moved for summary judgment on Mr. Archuleta's *Atkins* claim (05/27/2015, Motion for Partial Summary Judgment), then "concluded to withdraw its [summary judgment] motion on the merits of Archuleta's *Atkins* claim" (09/23/2015, Reply Re: Summary Judgment Motion), and asked the state district court to move ahead with a determination of its merits (09/23/2015, Motion to Stay the Summary Judgment Reply and Ruling on the Procedural Defenses). Despite the State's request, the district court *sua sponte* dismissed Mr. Archuleta's *Atkins* claim as time and procedurally barred. (12/19/2016, Opening Brief of Appellant, Addendum 2.)

Mr. Archuleta appealed to this Court. (5/12/2016, Notice of Appeal.) This Court requested supplemental briefing on the issues below.

Supplemental Issues

I. Mr. Archuleta's *Atkins* claim is cognizable under the PCRA.

This Court first asks whether Mr. Archuleta's *Atkins* claim is cognizable under specific provisions of the PCRA and, if so, when the claim accrued.

As described below, Mr. Archuleta's *Atkins* claim was cognizable both during his initial post-conviction proceedings and now, because his death sentence was "imposed in violation of the United States Constitution or Utah Constitution." Utah Code § 78-35a-104(1)(a) (Lexis 2002) (attached as Addendum 1); Utah Code § 78B-9-104(1)(a) (2010). The accrual date of his *Atkins* claim should have been the day *Atkins* was decided, June 20, 2002.

Alternatively, the Court asks whether his *Atkins* claim is cognizable under Utah Rule of Criminal Procedure 22(e) and, consequently, precluded from PCRA litigation. As described below, the PCRA is the appropriate vehicle for Mr. Archuleta's *Atkins* claim.

A. Mr. Archuleta's *Atkins* claim is cognizable under the PCRA because his death sentence violates the United States and Utah constitutions. His state post-conviction counsel, Ed Brass, should have amended his PCRA petition to include and present that claim within one year of the *Atkins* decision.

Mr. Archuleta's death sentence violates the Eighth Amendment to the United States Constitution because he is intellectually disabled. *See Atkins*, 536 U.S. at 320. It violates the Utah Constitution for the same reasons. Utah Const. art. 1, § 9. He is entitled to post-conviction relief, because his sentence violates "the United States Constitution or Utah Constitution." *See* Utah Code § 78B-9-104(1) (a) (2010).

This Court has asked whether Utah Code § 78B-9-104(1)(a) contemplates the ability to seek relief when a new constitutional rule—like the rule of *Atkins*—is developed after a petitioner's sentence becomes final. (3/23/2018, Supplemental Briefing Order at 1-2.) Under both the PCRA that applied at the time *Atkins* was decided, during Mr. Archuleta's initial post-conviction proceedings, and under the current PCRA (as amended in 2008), the answer is yes.

First, during Mr. Archuleta's initial post-conviction proceedings, the applicable PCRA explicitly incorporated, at the very least, federal retroactivity principles. At the time Mr. Brass should have raised Mr. Archuleta's *Atkins* claim, Utah Code § 78-35a-104(1)(a) (Lexis 2002) (Addendum 1) provided that a petitioner could seek relief when his sentence "was imposed in violation of the United States Constitution or Utah Constitution." It explicitly provided that "[t]he question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity." Utah Code § 78-35a-104(2) (Lexis 2002). *See also generally Gardner v. Galetka*, 2004 UT 42, ¶ 14, 94 P.3d 263, 267 (internal citations omitted) (alteration in original) (noting the 1996 passage of the PCRA "impliedly includes the first *Hurst* factor, 'the denial of a constitutional right pursuant to [retroactive] new law.'").

During Mr. Archuleta's initial post-conviction proceedings, when *Atkins* was decided, Utah's retroactivity principles in capital cases were not well developed. But,

"federal principles of retroactivity" were. The controlling federal law was *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). Thus, under Utah Code § 78-35a-104(2), the question of whether Mr. Archuleta was entitled to seek the benefit of *Atkins* should have been decided under the principles of *Teague*.[2]

Under *Teague*, federal courts may not apply new constitutional rules retroactively on collateral review unless the rule is a matter of substantive law. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016) (citing *Teague*, 489 U.S. 288). But, courts must give retroactive effect to new rules "forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id.* (internal quotation marks omitted). The new rule should be applied retroactively if it falls within two exceptions: (1) it places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe"; or (2) it establishes procedures that implicates "the fundamental fairness of the trial," "without which the likelihood of an accurate conviction is seriously diminished." *State v. Whitfield*, 107 S.W.3d 253, 266 (Mo. 2003) (citations and footnotes omitted).

Mr. Archuleta's *Atkins* claim was a matter of "substantive law"—it placed a "'substantive restriction on the State's power to take the life' of a mentally retarded

[2] As explained more below, *Teague* should be considered the "floor" for this Court's retroactivity analysis. In other words, Utah courts may apply broader retroactivity principles. They may not, however, apply narrower principles.

offender." *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Under federal principles, *Atkins* applied retroactively on collateral review. *E.g. Ochoa v. Sirmons*, 485 F.3d 538, 540 (10th Cir. 2007) ("*Atkins* reflects one of the rare instances in which the Supreme Court has announced a new rule of constitutional law that it has also expressly made retroactively applicable to cases on collateral review."); *Hill v. Anderson*, 300 F.3d 679, 681 (6th Cir. 2002) (internal citation omitted) ("In *Atkins*, the Supreme Court held at the end of its term that executing a mentally retarded individual violates the Eighth Amendment's ban on cruel and unusual punishments. This holding applies retroactively; in *Penry v. Lynaugh*, when the question was last before it, the Court recognized that a constitutional rule barring execution of the retarded would fall outside *Teague v. Lane*'s ban on retroactive application of new constitutional rules because it placed the ability to execute the retarded 'beyond the State's power.'"); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005) ("The rule in *Atkins* prohibiting the execution of mentally retarded defendants was made retroactive to cases on collateral review by *Penry v. Lynaugh*, 492 U.S. 302, 330 . . . (1989) (stating that such a rule would apply retroactively to defendants on collateral review))."); *In re Holladay*, 331 F.3d 1169, 1172 (11th Cir. 2003) (explaining in detail why *Atkins* provided "a paradigmatic example of the 'retroactivity by logical necessity'").

Atkins falls within *Teague*'s constitutionally based exceptions to non-retroactivity: it is a "rule prohibiting a certain category of punishment for a class of defendants because

of their status or offense." *Montgomery*, 136 S. Ct. at 728; *see also Whitfield*, 107 S.W.3d at 266. *Atkins* should be given retroactive effect on collateral review.

During Mr. Archuleta's initial post-conviction proceedings, Utah law dictated giving effect to, at least, federal retroactivity principles in cases on collateral review. And federal retroactivity principles dictated giving effect to *Atkins*. Mr. Archuleta's *Atkins* claim was cognizable under Utah Code § 78-35a-104(1)(a) (Addendum 1). As discussed in detail in prior briefing, Mr. Brass ineffectively failed to raise it. (*E.g.* 5/24/2017, Reply Brief, Addendum 7 at 10-12.)

Second, even under the current version of the PCRA, Mr. Archuleta's *Atkins* claim is cognizable under Utah Code § 78B-9-104(1)(a) (2010). This amended version of the PCRA removed the specific reference to state and federal retroactivity principles. It did not, however, do away with them.

A plain reading of section 78B-9-104(1)(a) permits a petitioner to seek relief on any sentence imposed in violation of his constitutional rights. Like the prior version of the PCRA, *see* Utah Code § 78-35a-107(1)-(3) (Lexis 2002) (Addendum 2), the amended PCRA does not explicitly address the accrual dates for claims based on retroactively applicable rules that are truly "new" (those that break from prior precedent). This Court has not specifically addressed "the question of what retroactivity principles apply in the causes of action listed in subsections § 78B-9-104(1)(a) through 104(1)(e)." *Winward v. State*, 2015 UT 61, ¶ 10 n.1, 355 P.3d 1022, 1025 n.1. It has recognized, however, that "the [United States] Supreme Court's retroactivity precedents may possibly act as a floor,

requiring us to allow retroactive application of at least those precedents that would be applied retroactively in a federal habeas case." *Id*.

State courts have the express choice to follow or expand federal retroactivity principles in deciding cases on collateral review. *See generally* Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. *Lane on State Postconviction Remedies*, 44 Ala. L. Rev. 421, 422-23 (1993). *Teague* was decided at a time federal courts sought generally to constrict the scope of federal collateral review, and recognized that federal collateral review of state conviction actions presented unique issues of comity and finality. *Id.* at 436-37. Because "the same rationales do not govern [state courts], the states are left with the prerogative to fashion their rule on issues such as retroactivity without conforming to the federal model." *Id.* at 437. Thus, in collateral review cases, this Court may, with good reason, apply and enforce retroactivity principles even broader than those outlined in *Teague*. *See Whitfield*, 107 S.W.3d at 267 (quoting *California v. Ramos*, 463 U.S. 992, 1014 (1983)) ("This follows from the fact '[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires.'").

On the other hand, the Court may not apply retroactivity principles that are *more* restrictive than those outlined in *Teague. See Whitfield*, 107 S.W.3d at 267 ("It is up to each state to determine whether to apply the rule set out in *Teague*, . . . So long as the state's test is not narrower than that set forth in *Teague*, it will pass constitutional muster."); *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002) (quoting *State v. Fair*, 502 P.2d 1150, 1152 (Or. 1972)) ("[W]e are free to choose the degree of retroactivity or prospectivity which we

believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires.").

Thus, as this Court properly recognized in its Supplemental Briefing Order, "state courts on collateral review must 'give retroactive effect to new outcome-determinative substantive rules of constitutional law' when a state's 'collateral review proceedings permit prisoners to challenge the lawfulness of their confinement.'" (3/23/2018, Supplemental Briefing Order at 1 (quoting *Montgomery*, 136 S. Ct. at 731).) This was true both before and after *Montgomery*, and no provision of the Utah Code was explicitly contrary to these principles during Mr. Archuleta's initial or current post-conviction proceedings. In light of all of the circumstances, for the reasons above, this Court should find that the PCRA's grounds for relief based on unconstitutional sentences encompass, at a conservative minimum, the principles of *Teague*.

Finally, Mr. Archuleta explained in his prior briefing that if this Court finds he is without a remedy under the 2008 amendments to the PCRA, then that version of the PCRA is unconstitutional and this Court should exercise its traditional common-law authority to overlook bars to review in collateral proceedings. (*E.g.* 12/19/2016, Opening Brief of Appellant at 84-87.) Under that analysis, too, the above retroactivity principles apply. The first common-law exception, as outlined in *Hurst*, is "the denial of a constitutional right pursuant to new law that is, or might be, retroactive." *Hurst v. Cook*, 777 P.2d 1029, 1037 (Utah 1989).

In sum, the version of the PCRA applicable at the relevant time of Mr. Brass's initial post-conviction proceedings explicitly allowed the consideration of new constitutional rules by incorporating federal principles of retroactivity. The current version of the PCRA lacks that explicit provision, but does not remove that consideration, nor does any case law interpreting it. To read into these statutes a limitation barring the application of all new constitutional rules in collateral review cases would violate *Teague*, *Atkins*, and *Montgomery*. *See Montgomery*, 136 S. Ct. at 731-32 ("If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires. . . . States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge."). No precedent requires such a reading, and this Court should not adopt one.[3] Thus, Mr. Archuleta's *Atkins* claim is cognizable under the PCRA because his sentence violates "the United States Constitution or Utah Constitution."

This leaves the question of when Mr. Archuleta's *Atkins* claim—considered under § 78-35a-104(1)(a) (Lexis 2002) (Addendum 1) or § 78B-9-104(1)(a) (2010)—accrued. Neither version of the PCRA gives any accrual date for claims based on new, retroactive law. For the reasons above, under either version of the statute, this Court cannot impose restrictions on retroactivity that are narrower than federal principles. *E.g. Whitfield*, 107 S.W.3d at 267. The accrual date is the day *Atkins* was decided.

[3] By contrast, in *Montgomery*, Louisiana's post-conviction relief statute did not provide any basis for "collateral review of sentencing errors." *Montgomery*, 136 S. Ct. at 726.

B. Utah Code § 78B-9-104(1)(f)(i) does not apply, because the "new rule" announced in *Atkins* was not dictated by precedent existing at the time Mr. Archuleta's conviction became final. Utah Code § 78B-9-104(1)(f)(ii), as the State has conceded, may apply.

Mr. Archuleta's *Atkins* claim is not cognizable under Utah Code § 78B-9-104(1)(f)(i). First, this specific ground for relief, as currently worded, did not exist at the time Mr. Brass filed Mr. Archuleta's initial post-conviction proceedings. *See generally* Utah Code § 78-35a-104 (Lexis 2002) (Addendum 1). Second, the ground for relief that is now in effect does not encompass truly "new" rules that are announced while a petitioner's case is on collateral review.

Section 78B-9-104(1)(f)(i) became part of the PCRA in 2008. 2008 Utah Laws 1845, 1845-46. It provides that a petitioner may seek relief "under a rule announced by the United States Supreme Court, the Utah Supreme Court, or the Utah Court of Appeals after conviction and sentence became final on direct appeal" when "the rule was dictated by precedent existing at the time the petitioner's conviction or sentence became final." Utah Code § 78B-9-104(1)(f)(i). "[D]ecisions that are dictated by precedent—those that merely apply the principle that governed a prior decision to a different set of facts—are retroactive on collateral review so long as the precedent they rest on predates the conviction being challenged." *Winward*, 2015 UT 61, ¶ 11, 355 P.3d at 1025 (internal quotation marks omitted) (quoting *Chaidez v. United States*, 568 U.S. 342, 347-48 (2013)).

The United States Supreme Court created a "new" rule when it decided *Atkins*. The case specifically abrogated *Penry*, 492 U.S. 302, which held, "mental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude

today that the Eighth Amendment precludes the execution of any mentally retarded person[.]" *Id.* at 340. *See Atkins*, 536 U.S. at 321.

Further, when the Utah legislature codified *Atkins* in Utah Code §§ 77-15a-101-06, it acknowledged that it was enacting new law that was not dictated by precedent until *Atkins* was decided. *See* Sentencing in Capital Cases Amendments, 2003 Utah Laws Ch. 11 (55th Leg., 2003 Gen Sess.) (S.B. 08) ("This act modifies the Criminal Code by providing that persons found by the court to be mentally retarded are not subject to the death penalty. . . . This act is in response to the recent U.S. Supreme Court case *Atkins v. Virginia*[.]"). Thus, from 1989 until 2002, the law was clear that the Eighth Amendment did not bar the execution of intellectually disabled persons. *See Penry*, 492 U.S. at 340. *Atkins*, and its codification into Utah law, was a "new rule."

Thus, on its face, section 78B-9-104(1)(f)(i) does not apply to Mr. Archuleta's *Atkins* claim, because the rule was both novel and announced while his case was on collateral review. For this reason, the claim, under this subsection, does not have an "accrual date."

Section 78B-9-104(1)(f)(i)'s language, if considered on its own and not in context, fails to encompass the principles of *Teague*. *Teague* bans the retroactive application of new *procedural* rules, and provides two key constitutional exceptions to that ban. *See generally Chaidez*, 568 U.S. at 347. Indeed, this Court has recognized that, despite the language of subsection (1)(f)(i), "[d]ecisions 'not *dictated* by precedent' announce new rules, and apply retroactively on collateral review only in certain narrow circumstances." *Winward*, 2015

UT 61, ¶ 11, 355 P.3d at 1025 (quoting *Chaidez*, 568 U.S. at 347). As discussed above, an *Atkins* claim falls most logically under section 78B-9-104(1)(a), because it is a new *substantive* claim. If, however, the Court considers it *procedural* in nature, it would nevertheless fall within the "narrow circumstances" this Court alluded to in *Winward.*

Although Mr. Archuleta's *Atkins* claim is not cognizable under Utah Code § 78B-9-104(1)(f)(i), the State also suggested in its briefing that the claim is cognizable under Utah Code § 78B-9-104(1)(f)(ii). (3/23/2017, Brief of Appellee at 47-48 ("Under certain circumstances, for example, the PCRA permits relief for a post-appeal rule announced by the Supreme Court. *Id.* § 78B-9-104(1)(f)(ii). And for petitions that depend on a rule announced after direct appeal, the cause of action accrues on the date the post-appeal rule is announced. *Id.* § 78B-9-107(2)(f). The State concedes that the *Atkins* rule wholly exempting the intellectually disabled from a death sentence permits relief under this provision.")).

Utah Code § 78B-9-104(1)(f)(ii) (2010) provides that a petitioner may seek relief when a new constitutional rule "decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted."[4] Mr. Archuleta, while still eligible for conviction under Utah's aggravated murder statute, would not be eligible for a death sentence after *Atkins*. Thus, even if *Atkins* were a "procedural" rule, it essentially put a

[4] This provision seems to generally incorporate a portion of *Teague*'s exceptions to the non-retroactivity of new procedural rules.

death sentence out of reach in a case like Mr. Archuleta's, and section § 78B-9-104(1)(f)(ii) would apply to his claim on collateral review.

Under this provision, the accrual date would still be the date *Atkins* was decided. This is because the prior version of the PCRA—§ 78-35a-104(a) (Lexis 2002) (Addendum 1)—encompassed *all* new, retroactive rules by simply incorporating federal retroactivity principles. So, even if the Court considers Mr. Archuleta's *Atkins* claim an exception to *Teague*'s ban on retroactively applying procedural rules, that analysis was available and should have applied at the time of *Atkins* and during the initial post-conviction proceedings.

C. Mr. Archuleta's claim is more properly brought under the PCRA, because it relies on evidentiary development. If this Court disagrees, however, given the weight of the evidence, it has the authority to consider correcting his sentence under Utah Rule of Criminal Procedure 22(e).

Utah Rule of Criminal Procedure 22(e) allows a court to correct a sentence that, among other things, "exceeds the statutorily authorized maximums." Utah R. Crim. P. 22(e)(1).[5] It permits the court to "correct an illegal sentence, or a sentence imposed in an illegal manner, at any time," and "applies to sentences that are manifestly or patently illegal." *State v. Candedo*, 2010 UT 32, ¶ 9, 232 P.3d 1008, 1012 (internal citations and

[5] A new version of Rule 22 will become effective May 1, 2018. *See* 2018 Utah Court Order 0030 (C.O. 0030). The changes effected are not material here, except that they will re-number the subsections of the Rule. Mr. Archuleta cites the Rule and subsections as currently in effect.

quotation marks omitted).[6] This "also encompasses . . . constitutional violations." *Id.* at ¶ 13.

"Because an illegal sentence under Rule 22(e) includes constitutional violations, an appellate court must allow a petitioner to raise constitutional, as well as jurisdictional and statutory challenges to his or her sentence under Rule 22(e)." *Id.* at ¶ 11; *see also State v. Houston*, 2015 UT 40, ¶ 22, 353 P.3d 55, 65, as amended (Mar. 13, 2015). Here, Mr. Archuleta's sentence is illegal because it violates the maximum allowable sentence for an intellectually disabled person according to the United States and Utah constitutions.

As described above, however, the PCRA is the more appropriate avenue for relief in this case. Rule 22(e) is most appropriate when a petitioner challenges "'facial defects' that 'could easily be corrected without the need for factual development in the original trial court.'" *Houston*, 2015 UT 40, ¶ 24 (citing *State v. Prion*, 2012 UT 15, ¶ 22, 274 P.3d 919, 925). A defendant may seek relief under Rule 22(e) when challenging an unconstitutional sentence where the defendant brings a facial challenge to a sentence, rather than an as-applied inquiry. *Houston*, 2015 UT 40, ¶ 26, 353 P.3d at 66-67. Where there is a need for factual development in the trial court, Rule 22(e) does not apply. *Id.* at ¶ 27. *See also State v. Robertson*, 2016 UT App. 53, ¶ 6, 370 P.3d 578, 580.

[6] *Candedo* addressed a prior version of Utah Rule of Criminal Procedure 22(e) which used the term "illegal sentence." *See Candedo*, 2010 UT 32, ¶ 9, 232 P.3d at 1012. The current version of Rule 22 removed the term "illegal sentence" to incorporate the specific language of Utah's cases interpreting Rule 22. *See generally id.* at ¶ 12.

Here, Mr. Archuleta sought to develop factual evidence supporting his *Atkins* claim before the state district court. That evidentiary development would have included evidence that he is exempt from the death penalty under the United States and Utah constitutions.

Based on this Court's interpretation of Rule 22(e) in *Houston*, Mr. Archuleta's *Atkins* claim is more properly raised under the PCRA. For that reason, it is not precluded from PCRA litigation under Utah Code § 78B-9-102(2)(b).

On the other hand, Mr. Archuleta has presented the state courts with significant evidence of his intellectual disability. If this Court determines that evidence, on its face, proves his intellectual disability and, thereby, the illegality of his sentence, it may grant relief as described below. Rule 22(e) "'allows an appellate court to vacate [an] illegal sentence' even if the legality of the sentence was never raised in the proceedings below. . . . [P]reservation rules do not apply in the context of a rule 22(e) challenge 'because an illegal sentence is void and, like issues of jurisdiction [may be raised] at any time.'" *Houston*, 2015 UT 40, ¶ 20, 353 P.3d at 65 (footnotes omitted) (quoting *Candedo*, 2010 UT 32, ¶ 9, 232 P.3d at 1012).

II. If this Court finds that Mr. Archuleta's *Atkins* claim is not cognizable under the PCRA, or is more properly raised in a request to correct his sentence under Utah Rule of Criminal Procedure 22(e), it should remand the case to the district court.

As explained above, the PCRA provides an avenue to raise Mr. Archuleta's *Atkins* claim. If this Court determines that Mr. Archuleta's *Atkins* claim is not cognizable under specific provisions of the PCRA, the PCRA would be unconstitutional and this Court

should exercise its authority over the writ of habeas corpus to permit Mr. Archuleta's *Atkins* claim to be heard on its merits. *See Montgomery*, 136 S. Ct. at 729 (state courts must "give retroactive effect" to new substantive rules of constitutional law).

Alternatively, if this Court determines that Mr. Archuleta's *Atkins* claim is cognizable under Rule 22(e), and not under the PCRA, it should remand this case to the district court with instructions to consider Mr. Archuleta's claim under that Rule and to correct his sentence.

A. If Mr. Archuleta's *Atkins* claim is not cognizable under the PCRA, that statute is unconstitutional and this Court should exercise its inherent constitutional authority over the writ of habeas corpus to remand the case to the district court for a merits determination.

If this Court determines that the PCRA did not and does not provide any avenue for Mr. Archuleta to raise his *Atkins* claim, it should exercise its constitutional authority over the writ of habeas corpus to remand his *Atkins* claim to the district court.

If, under the circumstances in this case, the Court determines that the PCRA did not and does not permit petitioners to seek collateral relief based on new, retroactive constitutional rules, and this Court finds there is no remedy available to Mr. Archuleta, this would violate his constitutional rights. *See Montgomery*, 136 S. Ct. 731; *Whitfield*, 107 S.W.3d at 267. The result would be the State's execution of an intellectually disabled person in violation of the Eighth Amendment to the United States Constitution and Article I, § 9 of the Utah Constitution.

For the reasons explained in detail in Mr. Archuleta's opening and reply briefs, the legislature's attempt to entirely extinguish this Court's power over the writ of habeas corpus is unconstitutional if it does not permit this Court to exercise discretion to apply the common-law exceptions or to excuse time and procedural bars to remedy an egregious injustice.[7] (12/19/2016, Opening Brief of Appellant at 84-99.) Mr. Archuleta respectfully relies on his prior briefing and arguments on this point.

B. If this Court determines that Utah Rule of Criminal Procedure 22(e) is the appropriate mechanism for Mr. Archuleta to raise his *Atkins* claim, it may grant relief and remand this case to the district court.

For the reasons above, Mr. Archuleta's *Atkins* claim is more appropriately cognizable under the PCRA. Nevertheless, if this Court finds that Mr. Archuleta must raise it under Utah Rule of Criminal Procedure 22(e), it would be foreclosed from review under the provisions of the PCRA. Utah Code § 78B-9-102(2)(b). In that event, the Court should exercise its discretion to remand this case to the district court with instructions to correct Mr. Archuleta's illegal sentence or, at the very least, consider his claims under Rule 22(e). *See Houston*, 2015 UT 40, ¶ 20, 353 P.3d at 65 (quoting *Candedo*, 2010 UT 32, ¶ 9, 232 P.3d at 1012) (appellate courts may vacate illegal sentences at any time, regardless of issue preservation, "'because an illegal sentence is void'"); *see also generally Montgomery*, 136 S. Ct. at 726-27 (noting Louisiana's post-conviction statutes did not permit retroactive

[7] *See generally Hurst*, 777 P.2d at 1037 ("A showing of good cause that justifies the filing of a successive claim may be established by showing (1) the denial of a constitutional right pursuant to new law that is, or might be, retroactive.").

application of new constitutional rules in cases on collateral review, but its mechanism for correcting "illegal sentence[s]" did).

If this Court determines that Mr. Archuleta's *Atkins* claim must be raised under Rule 22(e)(1)(A), because it exceeds the statutorily authorized maximum punishment for someone who is intellectually disabled, nothing would prohibit Mr. Archuleta from re-filing his *Atkins* claim under Rule 22. There is no time limit for filing a motion under Rule 22(e)(1)(A). *See* Rule 22(e)(2) ("A motion under (e)(1)(C), (e)(1)(D), or (e)(1)(E) shall be filed no later than one year from the date the facts supporting the claim could have been discovered through the exercise of due diligence. *A motion under the other provisions may be filed at any time*.") (emphasis added). *See also State v. Telford*, 2002 UT 51 ¶ 5, 48 P.3d 228, 230 ("[R]ule 22(e) claims are not restricted by time limits for bringing notice of appeal. Nor are they waived by failure to raise them at the first opportunity before the district court."); *State v. Fairchild*, 2016 UT App 205, ¶ 29, 385 P.3d 696, 704 (noting Rule 22(e) claims "are not limited by our preservation requirement").

III. The district court improperly dismissed Mr. Archuleta's PCRA petition without providing notice and an opportunity to be heard. This was plain error.

After moving for summary judgment on Mr. Archuleta's *Atkins* claim (05/27/2015, Memorandum in Support of Motion for Partial Summary Judgment), the State asked to file a reply (07/27/2015, Motion for Leave to File a Reply Memorandum in Support of Summary Judgment). In its reply, instead of responding to Mr. Archuleta's opposition to partial summary judgment, the State indicated that "For various reasons, including changes

in the law since the State initially filed its summary judgment motion, the State has concluded to withdraw its [summary judgment] motion on the merits of Archuleta's *Atkins* claim." (09/23/2015, Reply Re: Summary Judgment Motion at 1.) Later, during oral argument, the State told this Court that "for a host of strategic reasons that I'm not prepared to necessarily disclose publicly, we believed that the surest and quickest way to . . . protect the finality of this judgment was to proceed to the merits." (1/10/2018, Oral Argument Tr. at 59-60 (Addendum 3).[8]) Despite all this, the district court denied the State's motion to stay and dismissed Mr. Archuleta's petition *sua sponte* on procedural grounds. (*See* 12/19/2016, Opening Brief of Appellant, Addendum 2.) The district court found that if it were to accept the State's withdrawal of its summary judgment motion as to the merits, "the petition has no answer." (*See* 12/19/2016, Opening Brief of Appellant, Addendum 2 at 2.)

Despite the district court's language to the contrary (12/19/2016, Opening Brief of Appellant, Addendum 2 at 2-3), it did not give the parties notice and an opportunity to be heard before its *sua sponte* dismissal of Mr. Archuleta's *Atkins* claim. *See* Utah Code § 78B-9-106(2)(b). The district court determined that because both parties briefed some procedural and time bar issues in their memoranda on summary judgment, they had an opportunity to be heard. This was incorrect. The district court failed to provide notice to

[8] Mr. Archuleta requested an expedited transcription of the January 10, 2018 oral argument proceedings. The resulting transcript contains errors, including errors identifying various speakers throughout the course of the argument. Mr. Archuleta does not represent that the transcript is entirely correct. On this specific point, however, he believes it accurately reflects the State's assertions.

the parties that it intended to dismiss the petition *sua sponte*, it failed to give the parties an opportunity to brief whether *sua sponte* dismissal was appropriate or authorized given the State's changed position regarding a merits determination,[9] it failed to give the parties an opportunity to address crucial constitutional issues, and it failed to permit oral argument on any of these points. The court decided, without the parties' input, to bypass the important constitutional issues before it.

For these reasons, the district court's *sua sponte* dismissal of Mr. Archuleta's petition on procedural grounds, without providing notice or an opportunity to be heard, was plain error. To establish plain error, an appellant must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant." *State v. Bond*, 2015 UT 88, ¶ 36, 361 P.3d 104, 115 (citation and internal quotation marks omitted). Here, the district court ignored the language of the statute, failed to hear the parties on the important issues above, and bypassed important statutory and constitutional issues.

The error resulted in the court's dismissal of Mr. Archuleta's *Atkins* claim without any merits determination. Especially where both the State and Mr. Archuleta agreed that a merits determination was warranted, the court should have allowed argument from both

[9] As an example, federal habeas law regarding the review of state convictions and sentences deems "exhaustion" or preservation requirements waived, or the State estopped from relying on them, if "the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3).

sides on, at the very least, the district court's authority to dismiss the claim *sua sponte*. Given what is at stake for Mr. Archuleta, the error was not harmless.

The district court's failure to provide notice and an opportunity to be heard requires a reversal of its dismissal of Mr. Archuleta's petition. *See, e.g.*, *Bluemel v. State*, 2011 UT App 133, ¶ 5, 253 P.3d 1128, 1129 (remanding because trial court failed to provide petitioner notice and an opportunity to be heard in accordance with Utah Code § 78B-9-106(2)(b)); *Esparza-Recendez v. State*, 2012 UT App 344, ¶ 6, 293 P.3d 377, 378 (same); *Schwenke v. State*, 2014 UT App 103, ¶ 4, 326 P.3d 684, 685 (same).

Conclusion

For the reasons above, Mr. Archuleta's *Atkins* claim was cognizable under the PCRA and it accrued on the day *Atkins* was decided. Alternatively, if this Court determines Mr. Archuleta's *Atkins* claim is proven on its face, it should remand to the district court with instructions to correct Mr. Archuleta's illegal sentence under Utah Rule of Criminal Procedure 22(e). The district court's failure to give the parties notice and an opportunity to address all of the issues in this complex case was plain, reversible error. For the reasons in this and prior briefing, this Court should reverse the district court's grant of summary judgment and remand with instructions for it to grant relief or to consider the merits of Mr. Archuleta's *Atkins* claims.

Respectfully submitted this 25th day of April, 2018.

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s/ Charlotte G. Merrill
Charlotte G. Merrill

Certificate of Compliance

This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because it contains 6,111 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

s/ Charlotte G. Merrill
by Charlotte G. Merrill

Certificate of Service

I hereby certify that on this 25th day of April, 2018, the original and nine copies of the foregoing Supplemental Opening Brief was filed electronically with the Clerk's Office and two copies were mailed via First Class Mail, postage prepaid, to the following:

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ADDENDUM 1

2002 Utah Code Ann. § 78-35a-104

2002 Utah Code Archive

UTAH CODE ANNOTATED > TITLE 78. JUDICIAL CODE > PART IV. PARTICULAR PROCEEDINGS > CHAPTER 35a. POST-CONVICTION REMEDIES ACT > PART 1. GENERAL PROVISIONS

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

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

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

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

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

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

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

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

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

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

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

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

History

C. 1953, 78-35a-104, enacted by L. 1996, ch. 235, § 4.

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ADDENDUM 2

2002 Utah Code Ann. § 78-35a-107

2002 Utah Code Archive

UTAH CODE ANNOTATED > TITLE 78. JUDICIAL CODE > PART IV. PARTICULAR PROCEEDINGS > CHAPTER 35a. POST-CONVICTION REMEDIES ACT > PART 1. GENERAL PROVISIONS

§ *78-35a-107*. Statute of limitations for post-conviction relief

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

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

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

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

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

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

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

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 78-12-35 and 78-12-40 do not extend the limitations period established in this section.

History

C. 1953, 78-12-31.1, enacted by L. 1995, ch. 82, § 1; renumbered by L. 1996, ch. 235, § 7.

End of Document

ADDENDUM 3

IN THE UTAH SUPREME COURT

MICHAEL ANTHONY ARCHULETA,	:	Case No. 20160419-SC
	:	
Petitioner/Appellant,	:	
	:	
v.	:	
	:	
STATE OF UTAH,	:	
	:	
Respondent/Appellee.	:	With Keyword Index

ORAL ARGUMENT JANUARY 10, 2018

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* * *

INDEX

SALT LAKE CITY, UTAH - JANUARY 10, 2018

UTAH SUPREME COURT

(Transcriber's note: Identification of speakers may not be accurate with audio recordings.)

P R O C E E D I N G S

JUSTICE PEARCE: Good morning, counsel.

This is the Archuleta case. We have two cases. I'm not sure which is the first and which is the second, or how counsel wants to proceed on these cases. I'm assuming you want separate argument with the normal time restraints. Would anyone like to speak to that? What would be the preferred course for you?

MS. MERRILL: Good morning, Your Honor. I'm Charlotte Merrill for Mr. Archuleta.

I had planed, just based on the calendar, to first take the *Atkins* argument.

JUSTICE PEARCE: Okay.

MS. MERRILL: Just to be candid, I don't have a long, complicated argument to take up much of the court's time for the second. So I don't anticipate using my full time for the second argument, but I - if it's, with the Court's permission and the State's, I'd like to take the *Atkins* argument first.

JUSTICE PEARCE: Okay.

MR. PETERSON: That makes sense to us.

JUSTICE PEARCE: Okay. So I think then we'll just proceed with *Atkins* first with the normal time limits, and then – or the – and then we'll move to the non-*Atkins* claims with – again with the normal time limits, treating them as two separate cases.

Let's begin with counsel's appearances.

MS. MERRILL: Good morning, again, Your Honor. Charlotte Merrill from the Federal Public Defender for appellate, Michael Arch – Anthony Archuleta, and with me is co-counsel, Leticia Marquez.

JUSTICE PEARCE: Welcome.

MR. PETERSON: Andrew Peterson and Aaron Murphy for the State.

JUSTICE PEARCE: Welcome.

And I see, Ms. Merrill, that you're reserving three minutes?

MS. MERRILL: Yes. Yes, Your Honor.

JUSTICE PEARCE: Let's start.

MS. MERRILL: Good morning, again, Mr. Chief Justice, Associate Chief Justice, members of the court. May it please the court, my name is Charlotte Merrill. Again, I represent Michael Anthony Archuleta.

Mr. Archuleta was entitled to the effective assistance of post conviction counsel in his initial post conviction proceedings, but his counsel was conflicted,

underqualified, and underfunded and missed serious red flags that he was intellectually disabled and thus, ineligible for execution.

In the current proceedings, the district court eviscerated his right to PCR counsel by applying the 2008 PCR amendments to time and procedurally bar his *Atkins* claim.

JUSTICE HIMONAS: What are the red flags that he missed that Mr. Archuleta is intellectually disabled?

MS. MERRILL: There's quite a list of them, but to sort of keep them short for the court. First, is a long family history of intellectual disability outlined in the records before the district court. So –

JUSTICE HIMONAS: Have – have that – did – is there any indication that counsel didn't investigate the family history? I mean, having other members of the family suffer from intellectual disability, that seems –

MS. MERRILL: No. That not – that, on it's own, Your Honor –

JUSTICE HIMONAS: Right.

MS. MERRILL: – wouldn't necessarily bring an *Atkins* claim. That's just sort of the beginning of the evidence.

JUSTICE HIMONAS: So that's why I asked you about the red flags. Not the yellow ones.

MS. MERRILL: Right. The red flags would be definitely his multiple diagnoses of intellectual disability

as a child and young adult in the Utah State Hospital records, including a diagnosis at age 12.

The other serious red flags are his –

JUSTICE DURRANT: Do we know if he had those records?

MS. MERRILL: Mr. Archuleta? Yes, he did. They did have those most – those records, Your Honor.

JUSTICE PETERSEN: So I just want to be sure I'm clear on your argument. So you're specifically talking about – about Mr. Brass, that portion of the representation?

MS. MERRILL: Correct.

JUSTICE PETERSEN: Okay. So on that petition, talk to us about what version of the PCRA you think applies and why.

MS. MERRILL: The PCRA that was in effect at the time. The reason is –

JUSTICE DURRANT: At what time?

MS. MERRILL: At the time of that initial amended PCR petition that Mr. Brass filed. The reason is is that to apply any other version of the PCRA would be to completely obliterate the right to effective assistance of Mr. Brass.

JUSTICE PETERSEN: So the pre '08 PCRA should apply?

MS. MERRILL: Correct.

JUSTICE PETERSEN: What standard should we apply for effective assistance of counsel in the post conviction

setting, if we agree with you that he had a right to post conviction effective assistance of counsel?

MS. MERRILL: I think that would be *Strickland*, Your Honor.

JUSTICE PETERSEN: You think it would be the same standard?

MS. MERRILL: Yes.

JUSTICE PETERSEN: Okay.

JUSTICE DURRANT: I mean, *Strickland* –

MS. MERRILL: And I think –

JUSTICE DURRANT: *Strickland* grows out of the Sixth Amendment.

MS. MERRILL: Right.

JUSTICE DURRANT: Right? And there isn't a Sixth Amendment right to post conviction counsel?

MS. MERRILL: Well, here, Your Honor, I think there are a couple of reasons that the right to effective assistance of counsel rises to a constitutional level. There are two specific reasons.

The first is that because he had that statutorily created right, to take it away would violate due process. But the second is that –

JUSTICE DURRANT: Okay, but *Strickland* isn't a due process standard. It's a Sixth Amendment standard. Let me reask my question. The U.S. Supreme Court has conclusively

held that there is no Sixth Amendment right to counsel in a post conviction proceeding. And you agree with that, I assume?

MS. MERRILL: Yes, Your Honor.

JUSTICE DURRANT: And is there a Utah Supreme Court authority to the contrary?

MS. MERRILL: Well, I would look to –

JUSTICE DURRANT: There couldn't be, right? We're bound by what the Utah – the U.S. Supreme Court has said about the Sixth Amendment.

MS. MERRILL: Well, Yes, Your Honor, but I would look to *Martinez v. Ryan* to answer your question because even though that is not a due process or Sixth Amendment right, the court, nevertheless, uses the *Strickland* standard to determine whether counsel has been effective, you know. So that – I think that is the standard there.

The second reason, though, that I think there is a constitutional right to the post – effective assistance of post conviction counsel is explained in the Tenth Circuit's decision in *Hooks v. Workman*. Because *Atkins,* post conviction was the first time *Atkins* could have been raised. It's effectively the trial on the *Atkins* issue. So it's the same as that being his *Atkins* trial. So the court should afford him a constitutional Sixth and even Eighth Amendment right to effective assistance of counsel in that initial post

conviction proceeding.

JUSTICE PEARCE: Is that unique to an *Atkins* claim, or would you say that would arise for any new claim that has not been adjudicated prior?

MS. MERRILL: I haven't thought that all the way through, but I would certainly say that it applies to a categorical bar, something like *Atkins* or *Roper*.

JUSTICE DURRANT: Could you help me understand what that means, a categorical bar because this is a theme that appears throughout your brief?

MS. MERRILL: Uh-huh (affirmative).

JUSTICE DURRANT: I mean, at one level - I mean, I understand the idea that *Roper* and *Atkins,* you know, establish Eighth Amendment grounds for barring the imposition of the death penalty, but why - you know, why elevate those constitutional rights over say a Fourth Amendment right?

Let's say there's an unpreserved Fourth Amendment challenge. And that if the Fourth Amendment challenge had been brought, there wouldn't even be a conviction. I mean, that's a categorical bar in that sense.

The person whose Fourth Amendment right wasn't raised couldn't even have been found guilty, under my hypothetical, if a motion to suppress had been filed. So why - you know, why would we elevate an Eighth Amendment right over a Fourth Amendment right in terms of establishing this

categorical bar that you've argued for?

MS. MERRILL: I think based on the U.S. Supreme Court's own language, which calls *Atkins* a categorical bar, and just, you know, to keep it simple. If he is intellectually disabled, he may not be executed. The same as-

JUSTICE DURRANT: So my point is if the Fourth Amendment requires only reasonable search and seizure, you know, then the Fourth Amendment prohibits the imposition of the death penalty as well for someone whose Fourth Amendment rights have been violated.

I just don't get the logic of - I mean I understand the language 'categorical' appears in *Roper* and *Atkins*, but I don't understand the logic of elevating the Eighth Amendment over other guarantees and protections in the constitution.

MS. MERRILL: Uh-huh (affirmative), and I can understand that point, Your Honor.

And I think to get back and tie that into Justice Pearce's question, you know, it may be that there are some other claims where the initial time you can raise it is the PCR.

I would think a Fourth Amendment claim has existed for quite - for quite some time. So you could raise that in the trial, and your right would be there in the trial.

This is specific to the time *Atkins* was decided. So I don't think the court needs to reach today whether this

would get to any other claims.

JUSTICE DURRANT: Well, but you are asking us to reach it, because you're asking us – see, the point of framing this as a categorical bar is you're asking us to recognize something in the Eighth Amendment and in *Atkins* that overrides the procedural bar and the time bar in the PCRA, right? That's part of your – that's one of the ways that you're trying to get around the decision that was made against your client by the district court.

MS. MERRILL: Only in a very limited sense, Your Honor. Only for a client whose post conviction was pending at the time *Atkins* was decided. Not now and forever.

JUSTICE HIMONAS: Can I try it this way? If it's a 4th – let's say you go to trial and there's a Fourth Amendment problem, and it's preserved, and the appellate court on review says, "Despite the fact that there was a Fourth Amendment problem, we find that it's harmless beyond a reasonable doubt."

MS. MERRILL: Uh-huh (affirmative).

JUSTICE HIMONAS: The Fourth Amendment is not a categorical bar. There is no such analysis that takes place with respect to somebody who is a 12-year-old convicted of a crime for which the Supreme Court has said the death penalty may not apply, or to somebody who's intellectually disabled. We don't – we don't weigh. We don't check whether they're

really prejudice. It's just categorically, these people – our Supreme Court has said may not be put to death.

MS. MERRILL: I agree, Your Honor. I think that answers that question.

JUSTICE DURRANT: Can't we categorically say that someone whose due process rights were violated at trial cannot be put to death?

JUSTICE HIMONAS: We could, but we haven't, right?

MS. MERRILL: Right.

JUSTICE HIMONAS: Sorry. I didn't –

JUSTICE DURRANT: You should have answered Justice Lee's question. I'd rather have counsel's answer.

JUSTICE HIMONAS: I – I'm sorry.

JUSTICE DURRANT: Justice Himonas and I can talk about this later.

MS. MERRILL: You'd rather I don't look this way?

JUSTICE DURRANT: Yeah.

JUSTICE HIMONAS: Well, sometimes, we talk to each other, counsel, through these questions.

MS. MERRILL: Yes. I mean, I agree. That's –

JUSTICE DURRANT: But, I mean, it just doesn't seem to me to be enough of an answer to say that we haven't phrased it in this way.

The U.S. Supreme Court hasn't yet decided the question that you're asking us to decide, right? It hasn't

said, “That what we meant by categorical is the U.S. Constitution, the Eighth Amendment overrides time bars and procedural bars,” and I think that’s a pretty – that would be a pretty big step for that court to take.

And if it were going to take it, I think it would have to distinguish – it would have to explain why the Eighth Amendment matters more than the due process clause, or the equal protection clause, or the right to counsel, or, you know, the Fourth Amendment, you know, any of the other things that we can imagine that apply at trial. I just don’t know what the logic of that opinion would be.

MS. MERRILL: Yeah. I – and I agree, and forgive me for being a little slow to pick up, Justice Lee, but I understand that, and that – I agree that that’s not what the U.S. Supreme Court has decided, but that is also not what this court has to decide today.

JUSTICE DURRANT: But it is one of the arguments you’re making in your brief?

MS. MERRILL: It is, yes.

JUSTICE HIMONAS: In Montgomery v. Louisiana, does the Supreme Court, if it doesn’t say what Justice Lee suggested, does it come close to saying it?

MS. MERRILL: Yes.

JUSTICE HIMONAS: When it says, “It follows, as a general principle, that a court has no authority to leave in

place a conviction or sentence that violates a substantive rule, regardless or whether the conviction or sentence became final before the rule was announced?"

MS. MERRILL: Yes, and I think that –

JUSTICE HIMONAS: So if we have no authority to leave it in place, does that take away are ability to enforce procedural or time bars?

MS. MERRILL: I'm sorry. Could you repeat that last part of your question?

JUSTICE HIMONAS: If you take that language at face value and have no authority to leave it in place, does that undermine our ability to enforce PCRA procedural or time bars?

MS. MERRILL: I think the answer, as I'm understanding the question, is yes, but the – what I think the court can focus on is that it doesn't even need to get that far to overcome the time of procedural bars here.

The court has its own independent constitutional authority to recognize exceptions to those bars, and it should do that to give effect to not only his Eighth Amendment right not to be executed, but also to his statutory and constitutional –

JUSTICE DURRANT: Where does that –

MS. MERRILL: – right.

JUSTICE DURRANT: Where does that independent

authority come from? We have a comprehensive statute enacted by the legislature, which governs post conviction review, which in my estimation, occupies this field, overrides the common law.

It seems to me that there are two possibilities there. Either we go with the statute, or we conclude that the statute is unconstitutional. I can't see any room. I don't understand the logic for any room for any common law exceptions. Either we apply the statute, or we say the statute's unconstitutional. Isn't that right?

MS. MERRILL: Respectfully, I disagree. I think the Court can find that the PCRA is generally, on its face, constitutional. You can have time and procedural bars, but not without any room for this court to find any exception ever, even in the case of injustice.

JUSTICE DURRANT: But the exception would have to be that the statute is unconstitutional. I mean, this statute speaks as comprehensively and as clearly, in my view, as it possibly could in saying, "These are your remedies. This is your post conviction remedy. These are the exceptions. These are the exceptions to the exceptions."

I mean, this is super, super detailed, super, super clear. I mean I get that in the past, we've kind of kicked this can down the road and, you know, declined in the *Winward* case to decide whether we continue to have common law power.

Common law power, in this field, just doesn't make sense. It's either constitutional or it's not.

MS. MERRILL: And I think that sort of gets to the point, Your Honor, is that the court has to decide that question.

JUSTICE PEARCE: Do you make a constitutional case –

MS. MERRILL: Even after –

JUSTICE PEARCE: – by (inaudible)?

MS. MERRILL: Yes.

JUSTICE PEARCE: How – or do you make a common law case for exceptions?

MS. MERRILL: I think they're interrelated, Your Honor. The constitutional authority, to start there, is the separation of powers and open clauses provisions of the Utah Constitution.

JUSTICE DURRANT: Wasn't the same argument that Justice Lee's outline made in the AEDPA cases –

MS. MERRILL: I'm sorry?

JUSTICE DURRANT: – before the federal courts? And haven't the federal courts held that they have – they retain equitable common law authority, even though there's kind of a similar listing of when – when the claim is accrued, and when it's told? Nevertheless, every circuit in the United Supreme – United States Supreme Court have said their remains an equitable exception.

MS. MERRILL: Yes, and it has further exceptions, you know, including court created. Not necessarily court created, but court recognized exceptions –

JUSTICE DURRANT: So the federal courts –

MS. MERRILL: – like *Martinez*.

JUSTICE DURRANT: – with – well, the federal courts, with their version of the PCRA, have no problem saying that the statute may remain in place. You don't have to declare – throw the baby out with the bath water to be, you know, a cliche, but you can, and we can still retain common law authority.

MS. MERRILL: Yes, Your Honor. Those two are absolutely reconcilable. I think that court has – this court has recognized that.

JUSTICE HIMONAS: And the federal courts don't have the same language that we have in our Article VIII, right? I mean...

MS. MERRILL: Right, and I think in *Dunn v. Cook* this court recognized that it's habeas power is even broader than the federal right.

JUSTICE DURRANT: All right. "The Supreme Court shall have original jurisdiction to issue all extraordinary writs."

Now, in 1984 when that was past, the Writ of Habeas Corpus was alive and well in Utah.

MS. MERRILL: Right.

JUSTICE DURRANT: So if we look at the time that the amendment – or the constitution was amended – at what the passers or, you know, thought, they would have understood that there was a robust Habeas Corpus Writ – extraordinary writ in existence at the time.

MS. MERRILL: Yes, Your Honor. And that –

JUSTICE PETERSEN: When does –

MS. MERRILL: I'm sorry.

JUSTICE PETERSEN: Oh, I'm sorry.

MS. MERRILL: No.

JUSTICE PETERSEN: Go ahead.

When does – when should we exercise that though? What's the line? Because after *Atkins*, any inmate could say, "I have an intellectual disability." Does there – should then, if that were to happen in Utah, should we exercise our power to disregard any bars and hear that claim, or what level are you suggesting that it should rise to before we do exercise that authority?

MS. MERRILL: I think the court can absolutely keep it more limited to that, and I think there are two alternatives for this court. The first is to not apply the 2008 PCRA amendments, because of the effective assistance of counsel – the right that would otherwise not be – have any effect.

But the second is to recognize the *Winward Exception*, which is an egregious injustice.

JUSTICE DURRANT: But *Winward* didn't say that exception exists.

MS. MERRILL: Right, but the court recognized it may have the power to create that exception.

The court doesn't even need to reach *Winward*, if it doesn't apply the 2008 PCRA amendments here. So that, you know, it was just two alternatives for how the court could reach when this specific set of circumstances comes before the court.

And just to reemphasize, this would be very limited to when you had the right between 1996 and 2008, or within one year after *Atkins* came out, and that's when the PCR was happening.

JUSTICE PETERSEN: Do you - what version of the PCRA do you think applies to the current petition that is before us, the 2014 petition?

MS. MERRILL: As a general matter on its face without anything else, the 2008 amendments would apply, but applying them here would retroactively extinguish his right to effective post conviction counsel.

JUSTICE PETERSEN: Are you arguing that Archuleta should have the right to effective assistance of counsel throughout any post conviction litigation because he had it

at one time? So for him, it can never be taken away?

MS. MERRILL: No, Your Honor.

JUSTICE PETERSEN: Okay.

MS. MERRILL: For example, we are arguing that he has the effective assistance to our assistance – our – the effective assistance of us in this second PCR.

Simply, in the first PCR when that right was recognized under *Menzies* and also through *Hooks v. Workman*.

JUSTICE PETERSEN: Okay.

JUSTICE LEE: Well, but to say that he has the effective – you say the effective assistance of us, I mean, as a factual matter, I'm guessing you're highly effective, okay, but that's separate whether he had the right to effective assistance of counsel.

Under the pre amendment PCRA, he had that right. Are you arguing that because he has – Justice Peterson asked – that because he had it before then, he had that right to effective assistance of counsel throughout the PCRA process?

MS. MERRILL: Throughout the first PCRA process.

JUSTICE LEE: Okay, just the first process?

MS. MERRILL: Yes, Your Honor. Yes.

And I'd like to come back and answer your question about the court's constitutional authority over the writ.

This Court has recognized it repeatedly begin – before *Thompson* and, you know, through *Hurst/Gardener*. So

it's not only the Court's independent, constitutional obligation to review these claims and sentences, but there's also Mr. Archuleta's Eighth Amendment right. And to say there is no remedy, regardless, would violate the suspension clause. So all of those things, I think, give this Court separate, independent constitutional authority.

And I'd just like to make –

JUSTICE PEARCE: Yeah, I – if I could just –

MS. MERRILL: Sure, yeah.

JUSTICE PEARCE: – explore one aspect of that that I touched on a little bit? I understand how common law habeas is relevant to the extent it informed any constitutional references to habeas jurisdiction or power. Okay? But I don't understand how standing alone – those common law rights, relative to habeas, are not supplanted by the PCRA. I mean, to me, if the – if there's an argument to be made with – relative to exceptions, it seems like it would have to be constitutionally grounded.

MS. MERRILL: That's right, Your Honor.

JUSTICE PEARCE: Do you want to respond to that?

MS. MERRILL: And I think you really have to trace back the court's habeas power. The court had consti – independent, constitutional power over the Writ of Habeas, and there was also a PCRA – a PCR right to relief, and then that became the sole remedy.

So I think cases like *Hurst* recognized, and even *Peterson* recognized, that it still may exist. The court retains that power over the writ, even though this has become one remedy now.

JUSTICE DURRANT: Well, wouldn't we have to – I think you just eluded to to this, but to answer this question, we'd have to look at the historical scope of the habeas right to ask whether the PCRA resulted in the suspension of the constitutionally guaranteed right of habeas. Have you evaluated that question?

I addressed this in a separate opinion in the *Winward* case, and gave at least, at that point in time, my sense of the historical understanding of the nature of the habeas right. Is that addressed in your briefing?

MS. MERRILL: It is, Your Honor, and just to answer briefly. To find that the court's power is nothing more than an initial – what was the initial habeas writ would undo all of this court's jurisprudence about what its power is to over – to oversee the writ. So I would just look to this court's own line of cases regarding –

JUSTICE DURRANT: Are you talking about cases where we've articulated egregious injustice as a common law exception?

MS. MERRILL: Just the cases, including *Hurst/ Gardner* that recognize the court's independent,

constitutional authority to –

JUSTICE HIMONAS: So –

MS. MERRILL: – oversee that.

JUSTICE HIMONAS: – as in *Gardner* admittedly dicta, though, by Justice Wilkins, right? That that, for example, a limit to only one post conviction petition would be unconstitutional?

MS. MERRILL: Yes.

JUSTICE HIMONAS: Is that what you're referring to?

MS. MERRILL: Yes.

JUSTICE HIMONAS: Before you sit down, you had started giving me the red flags saying you referenced the multiple diagnoses of intellectual disability or Archuleta as a youth. What were the other red flags that you – that you were about to give me?

MS. MERRILL: The other red flags were his IQ scores. And if you look to the declaration of Dr. Watson, he says that many of those scores are within the significantly sub-average range when you evaluate them carefully, and that he also meets, not – he over-meets the – in the required three domains of adaptive functioning. So those scores were all there.

JUSTICE DURRANT: When did that evidence first become available to you or to Mr. Archuleta?

MS. MERRILL: Well, that evidence, oh, was available

to us when we undertook the testing once we had filed our initial habeas petition, but post conviction counsel certainly could have done the same thing.

JUSTICE DURRANT: All right. And so why doesn't that make it procedurally barred or time barred?

MS. MERRILL: It – without some exception, it would be procedurally time –

JUSTICE DURRANT: Okay.

MS. MERRILL: – barred.

JUSTICE PETERSEN: I would like to just followup a little bit on that. In terms of deciding when a claim has accrued for the time bars –

MS. MERRILL: Uh-huh (affirmative).

JUSTICE PETERSEN: – one thing that strikes me is that, in this case, it seems that intellectual disability is something that you may need an expert diagnosis. The lawyers, who were trial counsel, said we met – that they had met with Archuleta on many occasions, and he testified and he seemed to be able to function well.

So in the trial, you had an expert who said he had ADHD at the sentencing phase. Then at the time that Mr. Brass had a hearing, he had two experts who also analyzed Mr. Archuleta. One said that he had a mild global neurocognitive impairment. Neither of them really came out and said, "Our opinion is he has an intellectual disability," and I think

Mr. Brass relied on the opinions of those experts.

There are certainly those red flags that you talk about – or some yellow flags, as Justice Himonas pointed out, but those don't all necessarily mean someone would be intellectually disabled. You may need an expert diagnosis.

So what I'm wondering with, in a case like this, is if lawyers rely on experts, as they're allowed to do, and they reasonably rely on an expert, and the experts look at all the information and come up with a different diagnosis. They don't say that the person's intellectually disabled. Is there an argument that the claim hasn't accrued until someone, who has the requisite knowledge, says, "Those past experts were wrong. He actually is intellectually disabled?"

Has – is there an argument that the claim, possibly even as to this point, has not actually accrued because no one who is able to do so, has actually diagnosed Mr. Archuleta with intellectual disability?

MS. MERRILL: I think you could make that argument in a different case, Your Honor.

JUSTICE PETERSEN: Okay.

MS. MERRILL: If there were – if the experts were all properly given all the information they needed, and funded, and *Atkins* had been out, and everyone had flagged it and thought about it, that might – and there was something surprising, that might be the case.

But in this case, the accrual date really was a year after *Atkins*. That – the state says that we agree with that, and I think it just muddies the waters to really question if there are any other accrual dates in this case. It was 2003 when Mr. Brass was on the case, and he missed it.

JUSTICE PETERSEN: So you think that – and when I'm looking at accrual dates, I'm looking at two things. First, when the rule came out, and that's clearly *Atkins*. So the claim accrued in terms of when the rule was known at the time that *Atkins* came out, but also the question of when the facts were known or reasonably should have been known.

So you – your position is that within a year of *Atkins*, that there were facts that should have been known to make an *Atkins* claim, even though no expert had yet really labeled Mr. Archuleta as having an intellectual disability, the facts should have been known.

MS. MERRILL: Yes, Your Honor.

JUSTICE PETERSON: Okay.

MS. MERRILL: And to just give you an example, this court recognizes in a past opinion. Dr. Gummow said there are all these flags about fetal alcohol exposure, and that is one of the leading causes of intellectual disability.

She also said, "I'm not medically trained to figure out whether he actually – he suffers from a disease on the fetal alcohol spectrum." So those things existed at the

time, and counsel should have recognized that, especially since *Atkins* came out six days after the PCR petition.

JUSTICE PETERSEN: Okay.

JUSTICE PEARCE: Can I detain you for just a second and go back to something you said earlier? I want to make sure I understand your argument.

So do you take the position that we can recognize an egregious injustice exception as we've noted in *Winward* or as we eluded to in *Winward* without declaring the PCRA unconstitutional?

MS. MERRILL: Yes, Your Honor.

JUSTICE PEARCE: Okay. Analytically, how do we do that?

MS. MERRILL: The – a time and procedural bar is not necessarily on its face unconstitutional. The court just retains the power to find exceptions the same as in the federal cases that Justice Himonas eluded to.

So the court would, you know, simply find that in the case of an egregious injustice, if you meet the standards set out in *Winward*, then the court can, nevertheless, find the procedural bars of the 2008 PCRA overcome.

JUSTICE HIMONAS: Isn't it kind of an as applied with respect to just the bar? Not the whole act, but with respect to the bar, that it would be unconstitutional as applied in this particular case, if we weren't going to

recognize that we retain some ultimate authority in the – however you want to phrase it – outstanding egregious case or however the AEDPA cases have phrased it?

MS. MERRILL: Yes, I agree, Your Honor.

And I think the only reason that you would have to get to the constitutionality of the PCRA is if there were no exceptions.

JUSTICE DURRANT: But you're not – you're not just arguing it could be declared unconstitutional as applied? You're also saying there is some residual common law power?

MS. MERRILL: I think those two things fit together, Your Honor.

JUSTICE DURRANT: No, they don't. The common law is very different from the constitution. So...

MS. MERRILL: Well, this Court has recognized that it – the common law exceptions it created had independent constitutional significance. In other words, that if there is no way to review any claim past a year – and this – regardless of how egregious the injustice is, that takes away from this court –

JUSTICE DURRANT: Okay, but there's no –

MS. MERRILL: – any power.

JUSTICE DURRANT: – there's no egregious injustice clause in the constitution, right? There's a due process clause. There's an equal protection clause. There's a –

MS. MERRILL: But there is a suspension clause, which gives the court power over the writ.

JUSTICE DURRANT: Right, but I mean, I think this goes back to Justice Pearce's question. So – and Justice Himonas's. Are you arguing that the only basis for an exception would be a determination of unconstitutionality as applied, or are you saying, regardless of whether it's unconstitutional as applied, this Court still has the power to make stuff up that doesn't appear either in the constitution or in the statute? Cause that's what the common law is.

When we exercise common law power, we're making policy. Typically, we do so in fields not occupied by the statute, not occupied by – or by the legislature, and not occupied by the constitution. All right, so which one of those are you arguing?

MS. MERRILL: That the PCRA is only constitutional to the extent that this court can find exceptions to it. To do otherwise, would abolish the writ, and that's actually what the State has argued in their briefing, that this Court has no power left over the writ.

JUSTICE LEE: Yeah, it might go to the occupied field question though. To the extent we have constitutionally grounded habeas authority or power, and to the extent that that – that the PCRA is not coextensive with

that, the PCRA can be constitutional as far as it goes, but not necessarily occupied at full scope of our constitutional habeas power of it.

MS. MERRILL: Yes, Your Honor.

JUSTICE LEE: Does that get at it?

MS. MERRILL: Yes.

JUSTICE HIMONAS: In fact, you argue for both. It's not – as presented to you by Justice Lee, he gave it to you as an either/or – a binary decision, but that's not how you've presented it. You've suggested that it – as the chief has, that it may – there may be residual common law authority, and in addition, if not, it's also unconstitutional. You've argued for both. I don't...

MS. MERRILL: Your – I – the PCRA is constitutional to the extent these exceptions still exist. If there is no exception, then that would violate the suspension clause.

JUSTICE DURRANT: And if we disagree with you on that, that it doesn't violate the suspension clause, do you have a freestanding common law argument?

So the way the Chief just framed it is the way I think about it, that that sort of freestanding common law question would depend on, "Can we read this statute somehow as not occupying the field?" Is there something in the text and the structure of the PCRA that would tell us, "Well, no, the legislature meant to leave to this Court some residual

power to fill in the gaps?" I don't see how we can find that in the statute.

MS. MERRILL: Right. I think, you know, to be candid, this statute was a direct reaction to the court exercising these powers, and thus says in the statute, "It is the sole remedy."

JUSTICE DURRANT: Right.

JUSTICE PEARCE: And is your argument based just on the suspension clause, or do you also raise an argument under Article VIII of the constitution and our separate authority over writs there?

MS. MERRILL: Yes. It's –

JUSTICE PEARCE: Yes, it's both?

MS. MERRILL: Yes, it's both.

JUSTICE DURRANT: You cite to Article VIII in your opening brief, if I recall?

MS. MERRILL: Yes, Your Honor.

I'll move all this.

JUSTICE LEE: Thank you, Ms. Merrill.

MS. MERRILL: Thank you very much.

JUSTICE LEE: Mr. Peterson?

MR. PETERSON: Chief Justice and justices of the Supreme Court, may it please the court, Andrew Peterson for the State.

Regardless of which lens we view Archuleta's *Atkins*

claim through – whether it be statutory bars, constitutional powers, common law remedies, or even *Strickland* standards, one inescapable fact disqualifies Archuleta from receiving relief on his *Atkins* claim. And that is that the Arizona Federal Defender was appointed to represent Mr. Archuleta in 2007. All of the legal and factual bases for the *Atkins* claim were apparent to them then, and certainly no later than 2012 when they filed their federal habeas petition. And yet, they waited more than at least two years and as many as seven years –

JUSTICE HIMONAS: Were they allowed –

MR. PETERSON: – to file the claim.

JUSTICE HIMONAS: – to file in state court –

MR. PETERSON: Yes, they certainly –

JUSTICE HIMONAS: – before this?

MR. PETERSON: – were, and they have done so, both in this case and in three other capital habeas cases in federal court. Those include the *Honie* matter, the *Carter* matter, and the *Keale* matter. I'll start with Archuleta's.

In 2012 when this court issued its judgment and long before Mr. Archuleta filed his *Rhines Motion* in federal court, the Arizona Federal Defenders Office asked for permission to represent Mr. Archuleta in circ proceedings and in further proceedings before this court.

Ken Murray from the Arizona Federal Defenders

Office, under the supervision of Jon Sands, did appear for Archuleta and file that circ petition. I'm unaware if there are other proceedings that occurred in this court. Presumably, what he meant by further proceedings, would have been a petition for a rehearing - something along those lines. That was unrelated to the *Rhine's* stay, and was, in deed -

JUSTICE PETERSEN: I'm sorry. When was that? I -

MR. PETERSON: That was - that was in April, 2012.

JUSTICE PETERSEN: Okay.

MR. PETERSON: And that is apparent on the docket, both in the Supreme Court and in federal court.

So historically, they have also appeared for other capital habeas petitioners. In Mr. *Honie's* case, they asked in August, 2007, which is round about the same time that they were appearing for Mr. Archuleta, to represent Mr. Honie in state court, and that was eight years before even filing the federal petition. Certainly, before the *Rhine's* motion was presented, and this was contemporaneous, as I say, with Mr. Archuleta's case. They asked for permission in *Mr. Honie* and *Mr. Archi - Mr. Honie's* and *Mr. Carter's,* and *Mr. Keale's* cases. They - they just didn't ask in this case.

JUSTICE PEARCE: So what would the delay mean if we recognize an egregious injustice exception?

MR. PETERSON: I'm sorry?

JUSTICE PEARCE: I say, “What would be the import of that delay if we were to recognize an egregious injustice exception?”

MR. PETERSON: Well, to –

JUSTICE PEARCE: Would it have any – any relevance whatsoever?

MR. PETERSON: It does. Because under the win – under the *Winward* framework that set out what the preconditions for even making that showing are, he would have to show that he could, at the very least, satisfy the common law bars, and those include things like not tactically withheld and not over – overlooked in good faith without a purpose to delay. But the circumstances of this case make it very clear that this *Atkins* claim is solely for the purpose of delay.

JUSTICE HIMONAS: Don’t you have a finding from the federal district court that that is, in fact, not the case?

MR. PETERSON: Yes, and this court is not bound by that.

JUSTICE HIMONAS: I understand we’re not bound by it, but we do have a federal district court that has found that Mr. Brass was ineffective. We have found that good cause for the delay in filing the claim, correct? And we have found – excuse me, I’ve lost my train of thought.

So at least those two items.

MR. PETERSON: Certainly, the federal court's order makes their case for them. On the first – on Mr. Brass's representation, I have two responses to that. The first is kind of a quibble with the federal court. That didn't proceed on any adversarial briefing, and Mr. Archuleta didn't even ask him to make – ask her to make that finding. That is an untested finding.

JUSTICE HIMONAS: I'm not suggesting to you that it's binding. I get that, but she does have to evaluate whether there's good cause or not.

MR. PETERSON: Yes.

JUSTICE HIMONAS: And one of the things that she does is fairly carefully determine that Mr. Brass (A) had a conflict, and (B) was ineffective in this particular regard.

MR. PETERSON: And on the latter –

JUSTICE HIMONAS: And I just wonder about, you know, this Court making a pronouncement in the face of an unambiguous finding of ineffective assistance of counsel. So you'd have to presume, don't you, for purposes of this argument, that Mr. Archuleta is, in deed, intellectually disabled?

MR. PETERSON: No, certainly not.

JUSTICE HIMONAS: So –

MR. PETERSON: Because Mr. Archuleta never proffered evidence sufficient to –

JUSTICE HIMONAS: Well, let's - let's -

MR. PETERSON: - to meet that.

JUSTICE HIMONAS: You - I know you make the argument in the last couple of pages of the briefing. But if you - if we were to find that there's a disputed issue of fact -

MR. PETERSON: Sure.

JUSTICE HIMONAS: - all right? For purposes of our analysis, we would have to proceed as if he's intellectually disabled.

MR. PETERSON: If there were a disputed fact, sure.

JUSTICE HIMONAS: Right. So give me that? Then if that's the case - and we also have a finding that counsel was ineffective, you're asking the Court to issue a decision that says an intellectually disabled person who had ineffective assistance of counsel and despite a categorical bar to that person's execution, that the court is powerless to do anything about it?

MR. PETERSON: There are, of course, a number of questions bound up in that.

JUSTICE HIMONAS: Yes.

MR. PETERSON: And one of them is Justice Pearce's question which is, "what would the delay from the Arizona Federal Defenders Office bringing this claim of what effect -

JUSTICE HIMONAS: Sure.

MR. PETERSON: - would that have under the egregious

injustice standard?

And the point is that under the common law, you can bar substantial constitutional claims if they're tactically withheld or if they're not overlooked in good faith –

JUSTICE DURRANT: Again, didn't –

MR. PETERSON: – with a reason for delay.

JUSTICE DURRANT: – didn't Judge Campbell, though, find that they were not delayed for bad faith, I mean, for the purposes of delay?

MR. PETERSON: Yes.

JUSTICE DURRANT: Do I recall that?

MR. PETERSON: She – she did find that, and – but as to Mr. Brass's representation in defaulting the claim, in the first place, all of the bases for that default and the bases for the underlying substantive claim were available to counsel as early as 20 – seven – 2007.

I mean, Mr. Brass's effectiveness in *Menzies* was fresh. The *Atkins* claim itself was presented in the 60(b) motion in this case. The combination of the *Atkins* claim and Mr. Brass's effectiveness were the most recent litigation in this case when the Arizona Federal Defenders appeared. So they had every reason and every incentive to bring that claim then, and it's not like they would have to start with, you know, several years of investigation to discover these things. This was the talk of the town with respect to Mr.

Brass.

JUSTICE PEARCE: Can I ask you a question about AEDPA cases that Justice Himonas –

MR. PETERSON: Yes.

JUSTICE PEARCE: – mentioned earlier?

Do they tell us anything about the viability of an egregious injustice exception to the PCRA?

MR. PETERSON: No, certainly, they don't. I – there are substantial differences between AEDPA and the PCRA.

The PCRA purports to occupy the field. It says that it's the sole remedy. There's no similar language in AEDPA, and the – but the pertinent courts have never held that AEDPA occupies the field.

The *Martinez* exception, for example, was simply an extension of long and well-established equitable powers that the federal courts had always exercised and that congress did not take away from the federal courts, but they have recognized in *Volker v. Turpin* that congress could do so if it wanted to. Congress giveth and congress taketh away. Post conviction is a matter left to – to congress.

JUSTICE HIMONAS: And how – how do you see that relating to the suspension clause or the language of Article VIII of the Utah Constitution?

MR. PETERSON: All of those depend on how you define the scope of the writ. Certainly, the legislature cannot

suspend the writ, except in the enumerated circumstances, and certainly, the legislature cannot take the writ away from judiciary. That's undisputed. But when we say what the writ is, we're talking about different things. We're – this is a language game now, and –

JUSTICE LEE: But are we talking about different things, both for suspend clause and for Article VIII? I mean, could there be different scopes of the writ under each of those clauses, given the fact that judicial article was codified in 1984?

MR. PETERSON: I don't see how it does that. Article VIII simply scooped up whatever writs did exist constitutionally and put them in the hands of the – of the Supreme Court under a single term, extraordinary writ. There's been no argument, and I'm aware – I'm unaware of any cases that would suggest that Article VIII changed the definition of what the writ is. So there has to be something else. There has to be something during the common law evolution of the writ that changed what the ratifiers of the constitution intended by insuring the –

JUSTICE HIMONAS: But it's not the ratifiers that matter, right? I mean, it's 1984. What did the writ look like in 1984 when the court was given original jurisdiction over all extraordinary writs? And it wasn't only jurisdiction over that, for example, over all certified

questions. Could the legislature say, “Well, court, you’re only going to hear civil and not criminal certified questions?”

MR. PETERSON: No.

JUSTICE HIMONAS: Right. So could it say, “You’re not going to hear other writs that kind of were vibrant and alive at the time of – in 1984?”

MR. PETERSON: I’m not sure I understand that question, but –

JUSTICE HIMONAS: The Writ of Habeas or the Great Writ was alive and well in 1984. About the same time as the passage, this court in preparing an opinion wrote that the Writ of Habeas Corpus can be used to attack a judgment of conviction in the event of an obvious injustice.

MR. PETERSON: And the court gave that power to itself. That power was never granted to it by the people.

JUSTICE HIMONAS: Well – well –

JUSTICE DURRANT: Well, that was at the time of the adoption of the article. That’s how the court had described the writ. So doesn’t the article, at that time when it gives the court power over all extraordinary writs, enshrine that principle?

MR. PETERSON: With respect, Your Honor, I don’t –

JUSTICE DURRANT: How can that possibly be?

MR. PETERSON: Because the nature of the writ was

well understood when the – the suspension clause itself was created. It's more specific in meaning and scope than Article VIII, and the –

JUSTICE DURRANT: You're suggesting that Article VIII is just prescribing jurisdiction in its –

MR. PETERSON: It's jurisdiction, and it's essentially a naming convention. It brings all of the writs and makes sure that this Court has jurisdiction over them, but it doesn't change the nature of any of them. It certainly doesn't purport to do that.

JUSTICE DURRANT: Can I take you on a really brief detour here?

MR. PETERSON: Certainly, please.

JUSTICE DURRANT: This is sort of not relevant, but I can't help but wondering about it.

Can you educate us just really briefly on AEDPA in terms of what happens if this Court were to decide that the time bar and procedural bar – we were to affirm here? What happens under AEDPA then –

MR. PETERSON: The –

JUSTICE DURRANT: – in the federal proceed –

MR. PETERSON: – federal court is prohibited from reaching the merits of any claim that was defaulted in state court, but the default has to be an independent and adequate state law ground.

In other words, the state procedural default rules couldn't look to federal law like *Strickland*, for example, to be considered an independent and adequate state law ground for defaulting the claim. And – but so long as there is an independent and adequate state law ground like this procedural bar here – other examples would be like preservation faults on direct appeal and that sort of thing.

So long as it is independent and adequate in federal court be – the federal court cannot reach the merits of it, unless they show some other procedural default, and that's when the *Martinez* exception could hypothetically come into play.

JUSTICE DURRANT: But short of *Martinez*, the State will be arguing that the *Atkins* claim is barred under AEDPA?

MR. PETERSON: Yes.

JUSTICE HIMONAS: Is – are the procedural bars jurisdictional?

MR. PETERSON: No, because again the federal courts have recognized inequitable power to excuse the defaults.

JUSTICE DURRANT: Not under AEDPA. Under – under the PCRA. Are the procedural and time bars under the PCRA, jurisdictional?

MR. PETERSON: Oh, I don't even know what that term means, Your Honor. The term jurisdiction has been used in so many ways that it certainly –

JUSTICE HIMONAS: So let's –

MR. PETERSON: – is –

JUSTICE HIMONAS: Let me give you a hypothetical like in the *Loge* case that you may or may not be familiar with that reached a decision in last year. Let's say there is a direct appeal pending at the same time.

MR. PETERSON: Well, it's –

JUSTICE HIMONAS: Does the – does the district court have the judicial authority to consider a PCRA claim?

MR. PETERSON: No. But on its plain language, it prohibits the court from considering the petition until there's been a conviction and sentence, and that was –

JUSTICE HIMONAS: Well, you have a conviction and a sentence.

MR. PETERSON: Well, and the appellate remedies have been exhausted, I'm sorry, until it becomes final on appeal.

JUSTICE PETERSEN: I wanted to ask a few questions similar to what I asked the other side. So do you agree that the current version of the PCRA applies to the petition before us right now?

MR. PETERSON: Yes, certainly.

JUSTICE PETERSEN: The 2014 decision?

And what about the petition at the time that Mr. Brass was counsel? What version of the PCRA applies?

MR. PETERSON: The earlier versions. Clearly, the

pre 2008 PCRA applied.

JUSTICE PETERSEN: Do you agree –

MR. PETERSON: This matters –

JUSTICE PETERSEN: Oh, sorry. Go ahead. Nope, you can answer it.

MR. PETERSON: If you have a question, please ask it.

JUSTICE PETERSEN: What I'm wondering, and go ahead and answer, but if you could address this also is just your position on whether then we need to reach this ineffective assistance claim.

MR. PETERSON: You already have. You did that the last time he was here.

JUSTICE PETERSEN: Wasn't that more, though, just under 60(b)?

MR. PETERSON: Well, it was, but it defines the scope of what right Mr. Archuleta had under *Menzies*. It said that the *Menzies* right to effective assistance of counsel is the right to have your post conviction counsel not default the case.

JUSTICE PETERSEN: So you think *Menzies* is the standard and not *Strickland*?

MR. PETERSON: Right, and this court has said that a couple of times in limiting the scope of *Menzies* since then.

JUSTICE HIMONAS: I mean, that sort of has to follow

from the proposition that there is no Sixth Amendment right to post conviction counsel. I mean, the only argument that there's a right to counsel is *Menzies*.

MR. PETERSON: *Menzies* construed the PCRA as –

JUSTICE HIMONAS: Right.

MR. PETERSON: – it stood at the time.

JUSTICE HIMONAS: Right.

MR. PETERSON: And other cases have construed *Menzies*, and this Court has construed Mr. Archuleta's *Menzies* claim and denied it – resolved it against him. He's asking for this court to overturn that – that determination from the last judgment.

JUSTICE HIMONAS: Have other state supreme courts that have considered a one or three year time bar held those time bars as applied to be unconstitutional if they were strictly enforced?

MR. PETERSON: I'm not – I'm just not familiar with sister state law on PCRA type of claims, Your Honor –

JUSTICE HIMONAS: Thank you.

MR. PETERSON: – but the – certainly, AEDPA is one-year statute of limitations.

JUSTICE HIMONAS: Yeah, but as you know, that's a little bit different, as well, because you're suggesting that it does not fully occupy the habeas field.

MR. PETERSON: Right.

JUSTICE HIMONAS: And the court has gone out of its way to say we are maintaining equitable exceptions for cases that arguably are just like this one.

MR. PETERSON: Sure, but they've also been equally careful about saying, "But if congress were to take this all away from us, that's the end of the party."

JUSTICE HIMONAS: Yeah. How is that - that's an interesting, but isn't that just pure dicta until they're confronted with that case? They get to make that pronouncement in advance?

MR. PETERSON: They were ruling on the constitutionality of the - of AEDPA. So I don't think that's-

JUSTICE HIMONAS: But under a circumstance where it doesn't fully occupy the field, right? So you can say that if you think they're going to make a future pronouncement in case congress expands it to fully occupy the field?

MR. PETERSON: The holding was that habeas corpus is not post conviction review, and AEDPA -

JUSTICE HIMONAS: Right.

MR. PETERSON: - occupies the field of -

JUSTICE HIMONAS: Okay. Second. The U.S. Constitution does not have the same language that we have in Article VIII?

MR. PETERSON: Right, sure.

JUSTICE HIMONAS: Okay.

MR. PETERSON: But the development of the writ in Utah is, of course, very important to consider.

The debates surrounding adoption of the suspension clause – the framers went out of their way not to deviate from sister states and the federal constitution. So as to be – to make it clear that the suspension clause was not innovating. But they use that term. "We don't want to innovate. We don't want this to be interpreted in any way – in any material way differently from how the federal and the state constitutions were operating."

JUSTICE HIMONAS: Would you acknowledge that at least federal writ, as it was understood in 1896, was broader than perhaps just a jurisdictional writ?

MR. PETERSON: The – it was statutorily.

JUSTICE HIMONAS: Yeah, and –

MR. PETERSON: And that was well understood.

JUSTICE HIMONAS: Yes, but it – and that's important to me, because really the question isn't what the framers of the constitution thought, is it, from a original perspective? Isn't the question what the public, who are at large, would have understood the term habeas corpus to mean?

MR. PETERSON: Certainly, it would.

JUSTICE HIMONAS: Isn't that informed by what the federal standard was at the time?

MR. PETERSON: It is absolutely what the ratifiers

of the constitution meant. We the people write constitutions, not judges or framers –

JUSTICE HIMONAS: It's not – I'm saying it's not the ratifiers. It's the people.

MR. PETERSON: Well, that's who I mean. It's the people who voted for the constitution.

JUSTICE HIMONAS: Yes.

MR. PETERSON: And the historical use of the writ, at the time, encompassed – it embraced only pre-process confinement. The debates are replete with discussions about making the government justify holding somebody in the first place, and everybody understood the criminal judgment was the best –

JUSTICE HIMONAS: So there –

MR. PETERSON: – justification for holding someone.

JUSTICE HIMONAS: Aren't there decisions from the U.S. Supreme Court from 1880 indicating that when we're talking about jurisdiction or the kind of the jurisdictional limit, that a sentence that was illegally imposed is beyond the court's jurisdiction, and, therefore, subject to the Writ of Habeas Corpus?

MR. PETERSON: Yes. The court is not authorized to issue a judgment that goes beyond what the legislature authorizes them to do.

JUSTICE HIMONAS: Or the constitution?

MR. PETERSON: Or the constitution, certainly.

JUSTICE HIMONAS: Right. It would be an illegal sentence, correct?

MR. PETERSON: Sure.

JUSTICE HIMONAS: And in 1880, the U.S. Supreme Court – it said, "That is subject to the Writ of Habeas Corpus."

MR. PETERSON: Again, after the statutory amendment that congress gave them that power.

JUSTICE PEARCE: Was the statute sort of – I mean, is habeas a common law proposition? Because AEDPA is not habeas, right?

MR. PETERSON: Not in the – not in the sense that I'm using it here.

JUSTICE PEARCE: And what about the –

MR. PETERSON: I mean, it's called habeas now, but it's well understood in federal law that that's just a wink and a nod to what habeas used to be.

JUSTICE PEARCE: What about the – the late 1800's statute? I mean, what was that called and was it understood to sort of define the scope of the historical Writ of Habeas Corpus, or was it some legislative right?

MR. PETERSON: Well, if I can find it here. The 18 – the mid 18 – mid to late 1800 *Scotis* cases all make reference to the statute, which I'm sorry, I don't have it at

my fingertips.

JUSTICE PEARCE: That's okay.

MR. PETERSON: As the basis for reviewing – for reaching inside the judgment and reviewing any ordinary error.

And this court's cases, clear up until *Thompson* in the '40's, made it clear that we were just talking about reviewing jurisdiction. And even in *Thompson*, the court did not hold that there's a right to review the constitution –

JUSTICE HIMONAS: You said earlier. I don't know what jurisdiction means, and I thought that was an interesting comment, because right, we have to ask the question, what did they mean by –

MR. PETERSON: And – and – and what...

JUSTICE HIMONAS: – jurisdiction?

MR. PETERSON: Yes.

JUSTICE HIMONAS: And the U.S. Supreme Court had said, "The court is without jurisdiction to enter an illegal sentence," right?

MR. PETERSON: Yes.

JUSTICE HIMONAS: Okay.

MR. PETERSON: But the – what was meant by jurisdiction in those cases was the power of the tribunal to issue a judgment in the first place.

JUSTICE PEARCE: Yeah, and –

MR. PETERSON: So –

JUSTICE LEE: – you had no power. The Ute Tribunal have no power to issue an illegal sentence.

MR. PETERSON: Sure.

JUSTICE PEARCE: You have no jurisdiction to do so. So when you say it's limited to, you know, jurisdiction at the time, that would encompass this case?

MR. PETERSON: It was not understood to review a constitutional error within –

JUSTICE HIMONAS: No, we – we –

MR. PETERSON: – judgment. It was understood to – to –

JUSTICE HIMONAS: We don't need to quibble about it here. We might be interpreting those matters differently.

MR. PETERSON: But that's – that's entirely possible.

Your Honors, I see that I'm out of time. If I can answer any further questions, I'd be happy to do so.

JUSTICE DURRANT: I mean, it sounds like what you're saying in response to Justice Himonas is that jurisdiction is a term that gets used in different ways, and that sometimes jurisdiction just means the power to do something, and you recognize that courts don't have the power to issue an illegal sentence. But you're suggesting that – that in terms of the scope of the historical Writ of Habeas Corpus,

jurisdiction meant something different?

MR. PETERSON: It meant the validity of the legal machinery giving rise to the – to the judgment in the first place.

It didn't – it didn't have reference to the presence or absence of constitutional error in reaching that judgment. The courts, including this court, drew a very firm line on that distinction, that they simply would not reach in.

JUSTICE HIMONAS: That went to convictions, not sentences. I mean, respectfully, I think, as I said, we'll probably agree to disagree about what jurisdiction meant with respect to the review of illegal sentences.

MR. PETERSON: Perhaps, one useful way to think of the sentence problem is that if you have a statute that criminalizes an act and gives a five year maximum sentence, and the tribunal issues a 10 year sentence, rather than a five year sentence, well, certainly five years of that sentence are authorized, and the court does have jurisdiction to sentence someone to five years. But every year after that is a sentence that has been – that's being served without any process at all, because no tribunal ever had power to issue that sentence.

JUSTICE PEARCE: Maybe, I can try it this way. If Mr. Archuleta is, in deed, intellectually disabled, would a

district court in the state of Utah have the authority to sentence him to death?

MR. PETERSON: Not if he raises the claim in a procedurally appropriate way.

JUSTICE PEARCE: I'm saying, assume that he is intellectually disabled. It's raised.

MR. PETERSON: Uh-huh (affirmative).

JUSTICE PEARCE: They have no authority to do that, right?

MR. PETERSON: Not in the first instance.

JUSTICE PEARCE: And would we have, under the traditional Writ Habeas Corpus, if a court had done that and for whatever reason, it was missed on direct appeal, would we have the ability to review that?

MR. PETERSON: Not if it didn't meet the common law exceptions to the real writ itself, like tactically withheld and not overlooked in good faith.

You can bar - for example, if he did raise it at trial, let's say, and - but then later a little more evidence - a creed of evidence accumulated that made a slightly better case for intellectual disability. Even under the - this court's common law rules, relitigation of that claim would be barred, even if he -

JUSTICE PEARCE: Okay.

MR. PETERSON: - has a very strong showing.

And once you admit that relitigated claims, of whatever quality – of whatever meritoriousness, can be barred, because they had been already litigated, then you're admitting that intellectual disability and exclusions claims can be barred. And then it's just a matter of drawing a policy line between those that can and those that can't be barred, and the legislature has drawn that line –

JUSTICE PEARCE: How do you –

MR. PETERSON: – at reasonable diligence.

JUSTICE PEARCE: How do you square what you've said with *Montgomery*?

MR. PETERSON: I'm just not up on *Montgomery*, Your Honor. I don't have that at the top of my – my mind.

Are there other questions I can address?

We ask the court to affirm.

JUSTICE LEE: Thank you, Mr. Peterson.

Ms. Merrill?

MS. MERRILL: Thank you, Your Honors. I'll try to keep this very brief. I know I'm well beyond my time. I'd just like to respond to two points that the state raised.

JUSTICE LEE: I'll interrupt –

MS. MERRILL: The first is –

JUSTICE LEE: I'll interrupt you for –

MS. MERRILL: Sure, please.

JUSTICE LEE: – a second. You're not beyond your

time.

MS. MERRILL: Oh, thank you.

JUSTICE LEE: You have your full rebuttal time.

MS. MERRILL: Thank you.

The first point is the State said that this *Atkins* claim has no purpose, except delay. The State agreed in the district court that there should be a merits determination. So I think that's really the end of that question.

JUSTICE DURRANT: A mer – they agreed – they argued procedural bar and time bar? What do you mean by they agreed that there should be a merits determination?

MS. MERRILL: They agreed that the merits should be decided before the procedure and that we should go to a full hearing. They withdrew their challenges to the merits.

JUSTICE HIMONAS: In fact, it's more than that, right? I mean, they – they asked the court to stay the decision on the procedural bars so they could go to a merits determination, and the court, sua sponte without – without giving the parties notice, issued a decision on the procedural bar, despite the State's request.

MS. MERRILL: Yes, Your Honor.

So this is not –

JUSTICE HIMONAS: All right. Now, the court was empowered to do that, but the court went on to make a finding that notice was sufficient because it had been previously

argued, but there wasn't an opportunity for oral argument. There wasn't an opportunity to actually challenge the district court's decision or authority to do this sua sponte.

MS. MERRILL: That's right, Your Honor.

JUSTICE HIMONAS: Whether the statute authorizing that is constitution or unconstitutional itself. She –

MS. MERRILL: That's right, Your Honor.

JUSTICE HIMONAS: Totally on her own?

MS. MERRILL: Yes, Your Honor.

JUSTICE DURRANT: But you're not now challenging her authority to do that or the legal propriety of her having done that, are you?

MS. MERRILL: We haven't raised that. We've responded to the time of procedural bars.

JUSTICE DURRANT: Of course.

MS. MERRILL: We also believe the *Atkins* issue – the underlying issue has merit, and –

JUSTICE HIMONAS: Sure, and –

MS. MERRILL: – that the State has –

JUSTICE HIMONAS: – frankly, in our death penalty jurisprudence, it doesn't matter whether you've raised it or not. We have – since 1931 that we may sua sponte in a death penalty case raise any issue that would reflect a manifest injustice or prejudice.

MS. MERRILL: Yes, Your Honor.

JUSTICE HIMONAS: Whether it's preserved or raised on appeal, have we not?

MS. MERRILL: Yes, Your Honor.

The second point that I would like to –

JUSTICE DURRANT: So is there a basis for us to reverse and remand on that question? I mean, if the statute does give the district judge the authority to do this sua sponte, and she says, "Look, you've already been heard on this. There's no prejudice in my proceeding to decide it sua sponte, even though both parties would rather have me address the merits question first?" I mean, is that a reversible error in your view?

MS. MERRILL: Off the top of my head, I don't know the answer to that question, Your Honor.

JUSTICE HIMONAS: But she not only did that, right, she then said, "I'm not going to address all of your constitutional arguments either?"

MS. MERRILL: Right.

JUSTICE HIMONAS: "I'm going to grant summary judgment, I'm going to do it sua sponte, I'm not going to give you an opportunity to be heard on me doing it sua sponte, and I'm going to say that I'm just going to punt to the Supreme Court on some of your proceed – on some of your constitutional arguments."

MS. MERRILL: That's right, Your Honor.

And I think to be fair, my reading of the order is that the court was unsure what its power was and decided to sideline everything.

JUSTICE HIMONAS: They probably decided that it doesn't have to decide issues that are – that are squarely presented to it. It can just say, "I'll defer to the higher court."

MS. MERRILL: It did defer it, Your Honor.

The other point that I'd like to address is just to really clear up this question about habeas council's diligence in federal court. The State itself in dis – the federal court actually argued that we did not have the authority to come back to state court, and I think it just takes a reading of *Hardison v. Bell*.

We have to file the federal petition, and this isn't a case where we allow the whole federal case to go forward before we ever came back to state court. We flagged the *Atkins* claim first, because we knew it was important and asked to come back.

We proceeded under a scheduling order that the State agreed to, and we came back to state court within 30 days of being allowed permission from the federal court, and I think the court can just look to page – starting at page 4 of the reply brief for what happened there.

And the final point is just that 60(b) did not

decide these claims. It simply decided that there was not – looking to *Honie* and this case itself, and not an entire default of the PCR. It didn't decide the merits of the *Atkins* claim or these –

JUSTICE DURRANT: But the only right to –

MS. MERRILL: – procedural issues.

JUSTICE DURRANT: – counsel that the *Menzies* court recognized was that right that was addressed in the 2011 Archuleta opinion, right? I mean, it doesn't establish – *Menzies* doesn't establish a broader right to counsel under the PCRA, does it?

MS. MERRILL: It held that there was a statutory right under the PCRA to the effective assistance of post conviction counsel.

JUSTICE DURRANT: Right, and then it –

MS. MERRILL: It has –

JUSTICE DURRANT: And then it established a standard for determining what that right consisted of, right?

MS. MERRILL: Well, the court limited that in later 60(b) cases, but it did – that's not the case that's before this Court, which is a post conviction proceeding.

It – and I think that makes sense, because 60(b) isn't the way to raise these claims and get around claims in a motion 15 days after trial. The appropriate thing is to bring this in a PCR petition.

Thank you, Your Honors.

JUSTICE LEE: Thank you, counsel.

MR. PETERSON: Your Honor?

JUSTICE LEE: Yes. Mr. Peterson?

MR. PETERSON: The State would request a very brief surrebuttal on the question of why we withdrew the summary judgment on the procedural issue.

JUSTICE LEE: Yeah.

MR. PETERSON: That was brought up [inaudible] –

JUSTICE LEE: I think that's fair, given that –

MS. MERRILL: I don't have any objection, Your Honors.

JUSTICE LEE: – you raised that. Thank you.

Mr. Peterson?

MR. PETERSON: Thank you, Chief Justice.

The first thing I would point out on that question is that when we asked for a merits determination of the *Atkins* claim, we never conceded the issue – the question of a fact dispute or the question of the bars. We – we insisted in that memorandum that we continue to believe that there was no fact dispute.

The decision to ask for a merits review cannot be interpreted as a – as an admission that we thought that there was something to this claim.

In the absence, of what we viewed as any impalpable

justice here – palpable justice here, the state's primary interest here is the finality of this conviction.

And in the district court at the time, it appeared tactically that the surest way to do that to ensure finality of this conviction was to proceed directly to the merits and to get a state judgment on that question, but we also –

JUSTICE DURRANT: Might that not have helped us in the many important issues that are presented to us in this case, to have had a determination on the merits of the *Atkins* claim?

MR. PETERSON: I don't see how they would. It would only matter if you believed, for example, the tolling argument. That the intellectual disability somehow tolled the statute, but the bar is independent of his actual disability.

JUSTICE DURRANT: Well, I suppose that the constitution arguments could be mooted if there were a determination on the merits?

MR. PETERSON: I see what you're saying.

JUSTICE DURRANT: That he didn't qualify under *Atkins*, regardless under the undisputed facts?

MR. PETERSON: Yes.

And at any rate for a host of strategic reasons that I'm not prepared to necessarily disclose publicly, we believed that the surest and quickest way to obtain and

protect the finality of this judgment was to proceed to the merits, and that that would also have finality –

JUSTICE DURRANT: And I guess, in part, what I'm asking you now is whether the surest and quickest way for this Court to proceed, in light of this case, might not be the reverse and remand on this narrow question. Would it help us to resolve or possibly to avoid some of the constitutional questions?

MR. PETERSON: On appeal now, the easiest and surest way is to enforce the PCRA procedural bars as they are, because the district court got it right. There's nothing wrong with what the district court did.

JUSTICE HIMONAS: How did the district court get it right when it declined to rule on some of the constitutional arguments?

MR. PETERSON: Well, that was also correct, because this court has reserved the –

JUSTICE HIMONAS: You mean so when I was downstairs–

MR. PETERSON: – consti –

JUSTICE HIMONAS: – as a district court when I got difficult constitutional arguments, I could just say, "No, I'd rather not have to decide that. That's kind of messy. I'll let the Supreme Court do that?"

MR. PETERSON: Where the Supreme Court has told you that only the Supreme Court has the authority to render a

constitutional decision in that domain, yes.

JUSTICE DURRANT: Where have we said that?

MR. PETERSON: You have said in both *Gardner* and *Winward* that this Court has authority to consider the question of whether there is a constitutional –

JUSTICE HIMONAS: Does that mean we can –

JUSTICE DURRANT: I cannot understand the logic of that proposition. That makes zero sense to me. All of our judges take an oath to follow the constitution.

MR. PETERSON: But all of the judges are not part of this court. Only you are.

JUSTICE LEE: Yeah. I mean –

MR. PETERSON: And – and this court has also promulgated Rule 65(c), which has told all the inferior courts to follow the PCRA. The lower court was simply not free to disregard that.

JUSTICE HIMONAS: You and I may disagree about what Rule 65(c) actually says, and, of course, our appellate rules – well, never mind.

MR. PETERSON: But I just wanted to make it clear that we did not concede the issue of meritorious –

JUSTICE DURRANT: I just think that – I mean, that dicta – whatever we might have said about we have some sort of exclusive authority to rule on the constitutionality of a statute, I can't wrap my head around it. It doesn't make any

sense to me.

MR. PETERSON: It said this court. This court is a very specific court.

JUSTICE DURRANT: Okay, again maybe we've said it. Just help me with the logic of it. It makes no sense to me.

MR. PETERSON: Well, if –

JUSTICE DURRANT: And in what other area is it ever the case that only the highest court in a judicial system has the power to interpret the – a provision of the constitution?

MR. PETERSON: It's – it –

JUSTICE DURRANT: I do not understand that.

MR. PETERSON: It's two things. It's this Court's ultimate jurisdiction over all writs, and this Court's rule making authority.

JUSTICE DURRANT: Well, our rule making authority is to make rules, and we did that.

JUSTICE LEE: Well, it's clear we have that authority, ultimately.

MR. PETERSON: Uh-huh (affirmative).

JUSTICE LEE: Did we affirmatively say, "And no district court has this authority?"

MR. PETERSON: By necessary implication, yes. That – I mean, this Court means not other courts. That it –

JUSTICE DURRANT: Well, there's another way to read that, which is this Court has the authority. It doesn't

imply that other courts don't have the authority. Unless you say this Court and no other court. I mean, this Court –

MR. PETERSON: Well, that –

JUSTICE DURRANT: – does retain that authority.

MR. PETERSON: That would be –

JUSTICE DURRANT: That's an obvious statement.

MR. PETERSON: – a belt and suspenders more specific helpful way to say it, but if I say I –

JUSTICE DURRANT: But you're arguing for an interpretation that is –

MR. PETERSON: – I don't mean we.

JUSTICE DURRANT: – that is completely upside down, right?

MR. PETERSON: No.

JUSTICE DURRANT: I mean, no – no?

I mean, this is an expressio unius question. Does the expression of the one exclude the other?

MR. PETERSON: In context of the Court's totality of constitutional powers, it clearly does.

JUSTICE DURRANT: No, I think it clearly doesn't, because it's – you know, expressio unius is a presumption, and everybody recognizes that sometimes the expression of the one doesn't exclude the other. And in the context of a judicial system in which all judicial officers take an oath to follow the constitution, I can't understand how you could

take that statement out of context.

I mean, I don't mean to just be accusing you. I mean, it sounds like maybe district judges, at least this one, interpreted it in that way as well. It just doesn't strike me as a good interpretation, in light of the fact that all judges take an oath to follow the constitution and to dispose of claims before them.

You know, for a trial judge to say, "I don't have the authority to decide whether there's a violation of the Utah Constitution" is mind-boggling to me.

MR. PETERSON: That's our argument, Your Honor. I - I -

JUSTICE LEE: Okay, we'll take a look at that.

JUSTICE PEARCE: And, Mr. Peterson, before you sit down, we started down this road when, I believe, Justice Lee asked you if there was any impediment to this Court sending this back down for the *Atkins* hearing, and you were attempting to convince us that we shouldn't, but I'm not sure we got an answer to the question. Is there any reason why we can't, in the State's view?

MR. PETERSON: Well, not a theoretical limitation. It would just be a waste of everybody's time, because it's barred.

JUSTICE PEARCE: So we shouldn't?

MR. PETERSON: You should not. I mean -

JUSTICE PEARCE: But we can?

MR. PETERSON: Certainly.

JUSTICE PEARCE: Okay, thank you.

JUSTICE LEE: Thank you.

And, Ms. Merrill, you're entitled to the last word on this issue, if you'd like to have it.

MS. MERRILL: Your Honor, I – with the Court's permission, if it's okay. I'm ready to just move on.

JUSTICE LEE: Okay. Well, let's move to the second case then.

MS. MERRILL: May it please the court? Here I am again.

JUSTICE LEE: All right.

MS. MERRILL: I don't want to get too far into the court's lunch time and spend a lot of extra time. I think most of the –

JUSTICE HIMONAS: You should spend some time.

MS. MERRILL: I will.

JUSTICE HIMONAS: All right. Let me start you with this. With respect to this issue, did you raise the tolling argument? You didn't raise the tolling argument with respect to the *Atkins* claim, correct?

You did not argue that the intellectual disability of Mr. Archuleta under the PCRA should count as tolling, right? Or that the ineffective assistance of counsel should

count towards – and that the PCRA – one of your periods should be tolled?

MS. MERRILL: As to this argument, yes, I think we did.

JUSTICE HIMONAS: You did? As to the second argument, but not as to the first, right? As to the *Atkins* argument?

MS. MERRILL: The PCRA ineffectiveness, yes. The intellectual disability by itself –

JUSTICE HIMONAS: I'm sorry.

MS. MERRILL: – I think, no. I think that's what you're getting at.

JUSTICE HIMONAS: Yes. So I'm saying with respect to the second – the subsequent argument, as I understand it and reviewed it, you raised the tolling provision then, but not with respect to the *Atkins* claim?

MS. MERRILL: Yes, Your Honor.

JUSTICE HIMONAS: And so are we in a position that if we go forward with the second set first and find that it is tolled or that there is a basis for tolling, that we apply that to the *Atkins* provision?

MS. MERRILL: I think the Court can do that. Yes, Your Honor.

JUSTICE HIMONAS: Or do we separately take them and say, "Well, yeah, it's tolled here. But because it wasn't

raised with respect to this 54(b) granted one" – I mean, this seems like, frankly, an argument of why 54(b) was inappropriate in this case, but that's a different issue.

MS. MERRILL: I think, as you have already mentioned in –

JUSTICE HIMONAS: Perhaps, inappropriate, I should say.

MS. MERRILL: – capital cases, you can address that as to both issues, and I think it's worth just backing up really quickly to give a very short explanation of how this second appeal comes before the court.

Mr. Archuleta brought the *Atkins* claim before the post conviction court and because these additional claims weren't fully developed, including with *Atkins* evidence that's relevant to them, he brought those claims in post conviction as well.

And then over his objection, the post conviction court certified *Atkins* separately, and also permitted the State not to respond at all to the merits briefing.

So that's sort of the background of how that comes before the court.

I think to get back to your question, Justice Himonas, you can apply the tolling to both cases. These don't necessarily be – need to be considered absolutely separately.

JUSTICE HIMONAS: Okay. We could – even absent the fact you've raised it with respect to the second issue, if it – if we believed it would result in a manifest injustice, we could do it sua sponte, even though you didn't argue for it on appeal?

MS. MERRILL: Yes, Your Honor.

The only other thing I'd really like to highlight is the *Atkins* evidence is especially relevant, even to the trial counsel ineffectiveness here. Even if it wasn't a categorical bar at the time, the *Atkins* evidence was, nevertheless, relevant, not only to culpability, but to the case for life.

So in considering the ineffectiveness of counsel – oh, excuse me – claims as a whole under *Strickland* in the accumulative error, the Court should also take that evidence into account.

JUSTICE PETERSEN: The Habeas Court said that using kind of a – the time tolling provisions, that most of these claims were raised by you in the federal court two years before you brought the petition here in state court and found that, thus, it was – they were all time barred.

And I understand your explanation that that was due to your not being able to appear here, and a stipulated scheduling order and – but how do we have the authority to sort of create an exception for whatever was happening

procedurally in the federal court when we have this one year time bar?

MS. MERRILL: I think that sort of goes back to what we were talking about earlier, Justice Petersen, about what the accrual date is, and so I think I just have to take a really short step backwards and go through that time line.

The time that these ineffectiveness claims again could have been raised was post conviction. It was blown then. So the court has to find that you can overcome that time of procedural bar.

And the question then is whether there's a reasonable justification for delay to apply those exceptions, and as outlined in the brief, I think the course of the federal proceedings is a reasonable justification.

And as Justice Himonas pointed out, the federal district court, you know, found we've proceeded with a reason - within a reasonable time. So I think that that is the, sort of course of analysis for that.

JUSTICE HIMONAS: Was the stay order from the federal court, wasn't it just to allow you to pursue the *Atkins* claim?

MS. MERRILL: That's right, Your Honor.

JUSTICE HIMONAS: And so how do we - how do we get around that?

MS. MERRILL: Well, the state - the court gave the -

Mr. Archuleta permission to go back to state court in a limited stay to – it didn't – it limits the time of the stay, not the purpose of the post conviction.

And because the *Atkins* rel – evidence is relevant to all those claims, you know, we felt the need to raise them, because if we go back to federal –

JUSTICE HIMONAS: So what is the stay order say –

MS. MERRILL: – court – I'm sorry.

JUSTICE HIMONAS: I'm sorry to interrupt, but what does the stay order say on its face?

MS. MERRILL: I –

JUSTICE HIMONAS: Does it not purport to limit Mr. Archuleta's return to state court to the right to bring an *Atkins* claim?

MS. MERRILL: No, Your Honor.

And I think the – forgive me for not having it off the top of my head, but the cases in the briefing explain that you're not limited to bringing just that claim.

JUSTICE HIMONAS: But the stay order itself also doesn't say that?

MS. MERRILL: That's right.

JUSTICE HIMONAS: Okay.

MS. MERRILL: I don't – not off the top of my head. I'm sorry that I've – too many things in my head this morning.

JUSTICE HIMONAS: Okay. You've had a lot of to juggle. Thank you.

MS. MERRILL: Thank you.

But, you know, if we returned to federal court without having brought those claims, they would be barred. So we, you know, did our best to bring that - the claims that were also related to the *Atkins* evidence to the post conviction court.

If the Court doesn't have any further questions, I'm willing to reserve the remainder of my time.

Thank you.

JUSTICE LEE: Thank you, counsel.

MR. MURPHY: Thank you. May it please the court, Aaron Murphy on behalf of the State.

I think there are a couple of factual details that are really critical in sort of separating out these non-*Atkins* claims from the *Atkins* claims, because they really are different.

First of all, Justice Lee, to your point. The *Rhines* stay that we sought in federal court had nothing to do with these non-*Atkins* claims. It was limited, and it - to the *Atkins*. It was all about *Atkins*.

JUSTICE DURRANT: What does the stay order say? Does it say you may return to state court only to assert an *Atkins* claim?

MR. MURPHY: I, unfortunately, don't – don't have that order in front of me, but the – but the entirety of that litigation was all about *Atkins*.

But what's really important about that is that this – this idea that they were prohibited from appearing in state court or even really seeking permission to appear in state court without a *Rhines* stay is just patently untrue.

They actually sought permission to appear in state court prior to filing a *Rhines* motion, even prior to filing the federal petition in this very case, and Mr. Peterson eluded to it.

Earlier in April of 2012, the federal petition was filed in December of 2012, and in April of 2012, they sought permission from the federal court to appear in state court to address issues in front of this court. It's not clear what they ever did with that, but that was granted. It was freely granted.

They asked in *Honie* to go back in time to 2007. The timing is critical here. In – they were appointed to represent *Honie* on August 23rd, 2007. They were appointed to represent Archuleta on August 24th, 2007, the exact same time.

Seven days later in the *Honie* case, and eight years before they ever even filed the federal petition, they asked for permission to represent *Mr. Honie* in state court, and it

was granted. It had nothing to do with *Rhines*. It had nothing to do with anything. They just asked, and they got permission.

In *Carter* after a *Rhines* stay had been denied, two years later they again sought permission to appear in state court and represent *Carter* in state court. Again, freely granted. The same thing happened in *Keale*. So these lawyers no full well that they can ask for permission to appear in state court, and at least in this district, it appears to be freely granted. I'm unaware of any instance where they've been denied a request to appear in state court.

And so the question becomes why, in 2007, when the PCRA case was done, Brass's performance was over in this case. He was – his work was concluded. The *Menzies* opinion was already issued saying that Brass had been deplorable in the *Menzies* case, and the sum and substance, sum and substance of their claims here really amount to, "Well, Brass was terrible in *Menzies.* He was handling this case at the same time. He must have been terrible here too." That's – that's the essence of the claim.

Menzies was out – was out in December of '06. The PCRA case was done in January of '07. They come in in August of '07, and that's a time when the prior version of the PCRA was in effect. You had the *Menzies* opinion that hadn't really been limited to its facts yet.

I mean, everything that they needed to know to bring these claims that are at issue in this appeal they knew then, and they didn't bring them until December of 2014. And they were not subject to *Rhines* stay. *Rhines* had nothing to do with their permission to come back to this court and raise these claims. And in my mind, then that's the essence of strategically withheld claims.

Had they brought these claims in 2007 or 2008 when they might have been timely, that litigation would have run its course in three, four, five years. I mean, these cases take a while, and they wouldn't have gotten any delay out of bringing them then. They might have been timely, but it wouldn't have actually advanced their cause, because the cause is delay.

I mean, they filed their federal petition in 2012. We're standing here in 2018 and really nothing's happened in the federal case, because we've been litigating these the whole time. I mean, that's already a victory for their client.

I mean, that's the exact thing that the Supreme Court was warning about in *Rhines*. That you have these kind of inverted goals when you're talking about capital litigation, right? You know, a wrongly imprisoned criminal defendant who has claims has every incentive to bring those claims early and to pursue them aggressively.

It's the opposite if you have a guilty person on death row, and that person has every incentive to wait until the last possible minute to bring claims to gum up the works of litigation, and it's been very effective here. I mean, we're many, many, many years past the conviction. And even in the federal court, we're six years into the litigation, and effectively nothing has happened.

And I think that the district court was absolutely right in this case, at least on these claims, which is all I'm here to talk about, that they knew about these at the absolute latest when they filed them in the federal petition, because those claims were identical to the ones at issue here, and they still waited two years.

And this notion of the *Rhines* stay - all of that has absolutely no connection to these claims at all. They could have brought them, at least, in 2012, and, you know, by my assessment, they could have brought them in 2007, and they should have. And I think they're absolutely barred here, and that's certainly the State's position.

And - and I think because of the way the district court resolved these claims in saying that, "Look, I'm just going to pick the absolute latest conceivable date and time and just apply the PCRA from that point in time."

I think that the most the court really can do on these claims, if for some reason you don't - you don't accept

what I'm saying here, is to remand for a determination on these claims of whether some earlier bar might apply to these claims, and that's why we brought a motion for summary disposition because we think it's so clear that there's really not a whole lot to talk about on these claims.

Obviously, the *Atkins* issue is different, as we've all just seen, but if there no further questions, we'd ask you to affirm.

JUSTICE LEE: Thank you, Mr. Murphy.

MS. MERRILL: Thank you, Your Honors.

I'd just like to really quickly hit two more points here. The first is the notion that this is a victory for Mr. Archuleta. Sitting on death row while intellectually disabled is not a victory.

The second is to the 2007 appointment. Mr. Archuleta had state funded counsel at the time who did his 60(b). He went through those proceedings within a reasonable time, which is what the 60(b) court found under 60(b)(6), and then again, as we've already talked about, proceeded diligently through federal court. That's in the reply brief at page 4.

And with that, if the court doesn't have any further questions, I'd be happy to answer any.

JUSTICE LEE: Well, thank you to all –

MS. MERRILL: Thank you.

JUSTICE LEE: – counsel. This case has been well briefed and argued, and we're appreciated – appreciative of the high – the high level of advocacy we've seen here.

We'll take this matter under advisement, and the court is now adjourned.

(Whereupon the court is adjourned)

(Transcript completed on April 6, 2018)

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CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber