Case No. 20160419-SC

IN THE

UTAH SUPREME COURT

MICHAEL ANTHONY ARCHULETA,
Petitioner/Appellant,

v.

STATE OF UTAH,
Respondent/Appellee.

Brief of Appellee

Appeal from grant of summary judgment and denial of petition for post-conviction relief, in the Fourth Judicial District, Millard County, the Honorable Jennifer A. Brown presiding

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INTRODUCTION

Petitioner Michael Archuleta was convicted of and sentenced to death for the torture-murder of Gordon Church in 1988. Archuleta has already exhausted his state remedies, and this Court has reviewed his case on three occasions. Now embroiled in ongoing federal habeas litigation, Archuleta persuaded the federal court to stay that action so he could return to state court to bring a single claim: that he is intellectually disabled and thus exempt from the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). But Archuleta withheld that claim for more than a decade and forfeited it by not bringing it at his earliest opportunity. It is now barred.

STATEMENT OF JURISDICTION

Michael Anthony Archuleta appeals from a grant of summary judgment denying his petition for post-conviction relief. This Court has jurisdiction under Utah Code Ann. § 78A-3-102(3)(j) (West 2009).

STATEMENT OF THE ISSUES

The post-conviction court ruled that Archuleta's *Atkins* claim was both time and procedurally barred. It ruled that Archuleta could have brought the claim at any time between 2002—when the United States Supreme Court issued *Atkins* and Archuleta's first state post-conviction proceeding was underway—and 2013, when Archuleta's current counsel first identified the issue in a federal habeas corpus petition and signaled their intention to file a state petition. By not bringing the claim during state habeas and waiting more than two years after current counsel identified the issue before filing a successive state petition, Archuleta defaulted the claim and inexcusably allowed the statute of limitations to run.

Issue 1. Did the post-conviction court correctly grant summary judgment and deny Archuleta's *Atkins* claim because it was both time and procedurally barred?

Issue 2. Was summary judgment alternatively correct because Archuleta failed to proffer legally sufficient evidence that he is intellectually disabled?

Standard of Review. This Court reviews a district court's grant of summary judgment for correctness. *Pinder v. State*, 2015 UT 56,¶20, 367 P.3d 968 (citing *Archuleta v. Galetka*, 2011 UT 73,¶25, 267 P.3d 232).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A: Utah Code § 78B-9-101 *et. seq.* (West Supp. 2014); Utah R. Civ. P. 56 (West 2016); Utah R. Civ. P. 65C (West 2016).

STATEMENT OF THE CASE

A. Summary of facts.[1]

On November 23, 1988, Lance Wood took police to Dog Valley where he and Archuleta had murdered Gordon Church and left Gordon's body. There, Wood showed police a blood patch that covered the dirt road. It was approximately eight feet wide and thirteen feet long. The blood had soaked four and one-half inches into the dry, frozen ground. Blood spatter, bone, tissue, hair, a "mucous-type substance," and bits of plastic radiated

[1] The State cites the criminal trial record as "TR," the first post-conviction record as "PCIR," and the record in this case as "R."

outward as far as eleven-feet from the massive blood stain. Police recovered from the murder scene battery cables, wire cutters, a tire jack bent to the point that it would not work, and a tire iron with blood on it from the tip to the crook. TR2096,2107-14,2117-18,2169-2200,2215,2220-29,2240-42,2251,2261-62,2513-31,2535-36,2600-2609.[2]

Wood also pointed out the place under two cedar trees away from the road where he and Archuleta had left Gordon's body. Gordon was naked from the waist down. He had a blood-soaked gag in his mouth and tire chains wrapped around his neck. TR2118-20,2123.

The medical examiner later catalogued Gordon's injuries for the jury. Gordon's "entire left head…was depressed due to multiple fractures…. It was concave or pushed inward." Gordon suffered a blow to the head that resembled an injury more commonly caused by a heavy weight like a car or machinery compressing the head against the ground. The wound was "gaping" and exposed Gordon's "pulpified, bruised and lacerated brain." Further examination of Gordon's brain revealed "multiple areas of bruising, hemorrhage," and "multiple areas" of "tearing or laceration…beneath the

[2] In the following pages, the State extensively recites the crime facts. It does not offer these facts for their morbid and emotional appeal. Rather, it does so because Archuleta demonstrated planning, foresight, and adaptive capacities throughout the crime, undermining his claim to have adaptive functioning deficits.

skull fractures and moderately severe swelling of the brain in response to injury." TR3142-50,3154-60,3176,3190.

Gordon's left elbow was dislocated and his humerus was fractured. He had two shallow cuts in his neck, superficial puncture wounds on his back likely caused by the wire cutters, and a puncture wound with bruising likely caused by the tire iron. Gordon had marks and bruising on his scrotum, penis shaft, and glans consistent with the battery cable clamps being attached to them. The tire iron had been twice forced into Gordon's rectum far enough to transect his liver. TR3143,3160-63,3172-84,3194.

The murder.

Wood and his girlfriend, Brenda Stapley, shared a Cedar City apartment with Archuleta and his fiancée, Paula Jones. TR1695,1701-1702, 2589,2864,2874.

On the evening of November 21, 1988, Archuleta and Wood each argued with their girlfriends and separately left the apartment. TR2878-79,3232-36. Archuleta and Wood later met and started "walking around." They saw two black men that they did not know, and Wood said he wanted to start a fight with them. Archuleta talked Wood out of it. TR3234-36.

They eventually saw Gordon sitting in his Thunderbird, approached him, and offered him money to take them cruising. Wood gave Gordon a

bill, but when Archuleta saw that it was $10, Archuleta took it back and said they would give Gordon money after they got change. TR3236.

Archuleta testified that Gordon eventually suggested driving up Cedar Canyon and selected the spot where they turned off the road. According to Archuleta, when he asked Gordon whether Gordon was homosexual, Gordon admitted that he was. Archuleta testified that he asked Gordon if he wanted to "do it." Archuleta claimed that Gordon agreed and gave Archuleta a condom. Archuleta testified that he put on the condom and Gordon "dropped his clothes." Archuleta claimed that he was about "to enter," then backed off and said he could not do it. TR3246-50.

Archuleta testified that he then walked to the driver's side of the car and lit a cigarette while Gordon and Wood stood by the river talking. He claimed that he saw "a flash," then saw Gordon running with Wood chasing him. After they passed out of sight, Archuleta heard sounds like someone getting hit on the ground. TR3250-51.

Archuleta testified that, when Wood and Gordon returned to the car, Wood had his arm around Gordon's neck. Archuleta testified that Gordon looked hurt. He testified that he saw Wood cut Gordon's neck. TR3251-52.

Archuleta testified that he helped take things out of Gordon's trunk. He denied discussing with Wood what would happen to Gordon, but admitted, "I do believe I said, 'We're in trouble.'" TR3255.

Archuleta testified that he and Wood wrapped tire chains around Gordon and put Gordon in the trunk. Gordon complained about his arm. TR3257-58.

Archuleta testified that he told Wood that they should drop Gordon off and take the car. He admitted, however, that he "thought we were going to keep Gordon in the trunk and take him to Salt Lake where [Wood] wanted to throw the whole vehicle over the cliff." TR3262-65.

A supervisor at a truck stop ten miles north of Cedar City saw the Thunderbird pull in at approximately midnight. She testified that Archuleta paid for the gas put in the Thunderbird and told her that he owned it. TR1801-1805,1807-1810.

While at the station, Archuleta asked, "Gordon, you're not going to kick the lights out are you?" Gordon responded that he would not. TR3263.

Wood was driving when they left the station. Wood was swerving, so Archuleta told Wood to pull over to change drivers. TR3262. Archuleta and Wood continued north. Archuleta claimed that Wood told him to turn

off the car lights and pull off the freeway at Dog Valley. Archuleta testified that they got Gordon out of the trunk, and that he thought Wood removed Gordon's pants and shoes at that time. TR3265-68.

Archuleta testified that Wood hooked the battery cables to Gordon's testicles, then reached into the car and "popped" the hood. Archuleta admitted that he opened the hood the rest of the way and took the cables to hook up to the battery. One cable was missing a clamp. Archuleta denied attaching the cables to the battery, but admitted that he "probably" would have done so if there had been clamps on both cables. TR3268-70.

At this point, Archuleta was thinking that Gordon "probably wasn't going to leave the canyon." He thought about leaving Gordon with Wood, but ultimately did not. He realized he was "up to his neck" already. TR3271.

Archuleta testified that, after the cables did not work, he closed the hood while Wood walked Gordon to the back of the car. Archuleta testified that he saw Gordon fall, and that he went to Gordon and started to unwrap the tire chains. Archuleta claimed that, as he began to unwrap the chains, he heard a smack. According to Archuleta, he looked up to see Wood hitting Gordon's head with the tire jack stand and ratchet. Archuleta

testified that Wood had his foot on Gordon's face while he swung the jack like a golf club. TR3272-75.

Archuleta testified that he grabbed the jack from Wood and threw it as far as possible TR3275. Archuleta testified that they dragged Gordon's body to the passenger side of the car. He testified that he lit a cigarette out of habit and to calm himself down. TR3276-77.

Archuleta claimed that he heard thuds and looked over to see Wood by Gordon's body with Wood's arm moving in a stabbing motion. He testified that Wood was by Gordon's "butt area." According to Archuleta, he saw the tire iron "sticking out the end of [Gordon's] rear." TR3278-79.

Archuleta testified that, when they began carrying Gordon's body to the gravesite, he picked up Gordon's legs. He testified that Wood could not carry "the front," so they switched "mid way" or "maybe not even mid way" to the gravesite. Archuleta testified that, after they covered Gordon under the trees, he dragged his feet on the ground "to cover and mess up the trail" they made and to cover the blood they left as they moved Gordon's body. TR3279-82,3332-34.

Archuleta testified that he used snow to clean the blood from his hands and jacket sleeve. He then used his pants like a towel. He told the

jury that he got blood on his pants from covering their tracks and from carrying Gordon's body "dangling down." TR3282-83.

Archuleta testified that he took Gordon's watch so that he and Wood could use it for time TR3293.

At approximately 5:45 a.m. on November 22, 1988, Archuleta arrived at a Spanish Fork gas station. Archuleta and a companion (the station owner could not identify Wood with any certainty) went into the station. Archuleta purchased gas and spent some time washing up in the restroom. The owner testified that Archuleta did not act strangely, but looked tired, as though he had been working. TR1819-30,1833.

At approximately 7:50 a.m., Archuleta and Wood arrived at Christie Worsfold's apartment in Salt Lake. Worsfold, an acquaintance of Wood's, testified that Wood and Archuleta smelled of alcohol, sweat, and blood, and that they looked as though they had been "working really hard." Worsfold testified that Archuleta's pants had a lot of blood on them around the cuffs, up the sides, on the back, and on the upper rear thigh. When Archuleta walked into her apartment, Worsfold's dog and cat "almost just attacked [Archuleta's] leg." Archuleta told Worsfold that he got the blood on his pants while rabbit hunting. He also acknowledged that he and Wood looked pretty rough and told Worsfold that they stopped at one place

where a lady looked at them "like [they] had killed somebody or something." TR1928-41,1948.

While the two were at Worsfold's, Archuleta did most of the talking. Wood was "kind of looking at the ground." TR1940,1943.

Worsfold took the two to Archuleta's brother's condominium complex. They went to the office and talked to the husband and wife who managed the complex. While there, Archuleta repeatedly tried to reach his brother by telephone and eventually asked to call his father in Salem. He also called a friend and told the friend that he and Wood needed a place to shower. Archuleta told the couple that he had a lot of blood on his clothing from rabbit hunting, that he had killed around 100 rabbits, and that he wanted to get out of the clothing. Archuleta had a television stereo unit that belonged to Gordon. The managers gave him the location of a pawnshop when he said he wanted to sell it. They also gave Archuleta and Wood directions to a Deseret Industries store. Again, Archuleta did most of the talking. TR1665,1945-46,1952-53,1956-65,1974-85,3291.

Archuleta called Jones collect. When he told Jones he was in Salt Lake City, she asked Archuleta what he was doing there. Archuleta told her he decided he needed to see his son Tyler. When Jones pointed out that

Tyler lived in Orem, Archuleta told her he needed to see his brother, Jerry. He told Jones he had not seen Wood. TR2886-87.

Archuleta and Wood arrived at Deseret Industries at approximately 9:15 a.m. Archuleta told the clerk that he had been hunting and wanted to buy a change of clothing. The clerk saw a blood stain on Archuleta's Levis. Archuleta purchased a pair of Levis, changed out of his bloodstained pants, put the bloodstained pants in a bag, and left the store. TR1987-93,1998-2003,3294-95.

Archuleta testified that he and Wood secured a ride from Deseret Industries. He testified that Wood offered to sell the stereo television to the driver for $10, and that he offered to sell it for $5, but the driver declined. He testified that when they got out of the car, he put the television stereo under a viaduct. Wood threw Archuleta's bloody pants into a drainage ditch. TR3294-95.

Archuleta called Jones at about 11:00 a.m. He asked Jones whether she had heard from Wood. She told him she had not. TR2888.

Archuleta testified that he and Wood managed to secure rides from Salt Lake to Spanish Fork. From there, Archuleta called his father, Amos, at approximately 1:00 p.m. and asked his father to pick him up. He told Amos that Wood's car broke down in Salt Lake City, that they rode to Spanish

Fork in the back of a truck, and that they were "pretty cold." When Amos arrived, Archuleta said that he "just wanted to come home to eat." At the house, Amos prepared food for both Archuleta and Wood, but only Archuleta ate. TR2007-2010,3295-3302.

Jones phoned the Archuleta home and Amos told her that Archuleta and Wood were there. Archuleta called her back at about 3:00 p.m. When she asked why Archuleta was with Wood, he responded that they had met on the freeway hitchhiking. TR2889-90.

Amos testified that, on November 22nd, Archuleta wore a watch Amos had never seen before. During the visit, Archuleta went into the basement while Wood and Amos stayed upstairs. On November 25th, Amos went with police into the basement where they recovered Gordon's watch from a shelf in Archuleta's brother's bedroom. TR2010-17,2279.

At approximately 1:30 p.m. on November 22nd, Amos drove Archuleta and Wood to a Payson truck stop. Archuleta threw the keys to Gordon's Thunderbird into a garbage can at a Denny's. Archuleta "hit up" a truck driver for a ride to Cedar City and arrived at the Cedar City 7-11 shortly before 11:45 p.m. Archuleta returned to the apartment, where he and Jones went to bed, had sex, and went to sleep. TR2018-28,2032-36,2891-96,3305-3307.

Wood appeared alone at Tony Siech's apartment. Wood and Siech went to the Cedar City 7-11. There, Wood called Stapley at approximately 12:30 a.m. on November 23, 1988. After talking to Wood, Stapley called Wood's parole officer, who then met Wood. TR1711-12,2051-57,2084-89.

At approximately 3:00 a.m., police kicked down the door of Jones' apartment and arrested Archuleta. TR2895-96.

As described, Wood met with and led police to the murder site and Gordon's body. Police found Gordon's abandoned Thunderbird in Salt Lake City. The car had blood splatter on its left rear panel, rear end, rear bumper, rubber trunk seal, inside trunk lid, upper left hand corner inside the trunk, and underneath the car near the gas tank. The car had striated bloodstains on the right portion of the hood, right passenger door, right portion of the trunk lid, and the roof. The striations suggested someone attempted to wipe the blood off. Police found hair on the rear bumper, underneath the car, and in the trunk's upper left hand corner. TR2293-95,2306-20,2332-33.

Police also took Wood's pants from him and recovered Archuleta's pants from the drainage ditch where they were almost completely submerged in water. A crime laboratory technician identified small bloodstains on Wood's pants. Archuleta's pants showed strong blood

indications from the knee down and some weaker areas toward the top. The lab technician found another area on the back that showed a "very strong positive reaction" for blood. The blood was the same type as Gordon's. TR2350-59,2554-61,2573,2626-32,2880.

The testimony from the various witnesses established that Archuleta and Wood spent approximately three hours at Dog Valley. TR1653-54,2097-2100.

The State charged both Wood and Archuleta with capital murder. They were tried separately. *State v. Archuleta*, 850 P.2d 1232 (Utah 1993) (*Archuleta I*); *State v. Wood*, 868 P.2d 70 (Utah 1994). Each testified at his trial. Each blamed the other for nearly all of the injuries inflicted on Gordon. TR3221-3400,3684-90;PCIR1260.

Archuleta's background.[3]

As explained below, the records in this case show that, from birth to age three, Archuleta suffered deprivation and severe physical abuse. He had burn marks and scars on his body, demonstrated a fear of water temperatures that were more than tepid, hoarded food, and did not like being in rooms with closed doors. Social services removed Archuleta from his birth mother's home when he was three. The Archuletas took Archuleta in as a foster child when he was five. They later adopted him.

A Utah State Hospital report by Eugene Faux, M.D., states that, when Archuleta arrived in the Archuleta home, he was "retarded in many areas of development," elaborating that he ate like an infant, could "only say a few

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[3] The State notes that Archuleta's brief contains no record citations and thus does not comply with rule 24(a)(7), Utah Rules of Appellate Procedure. That rule requires that "[a]ll statements of fact and references to the proceedings below shall be supported by citations to the record." *Id.* Those citations "shall be made to the pages of the original record as paginated pursuant to Rule 11(b)." Utah R. App. P. 24(e). Rather than cite the record as certified under rule 11, however, Archuleta has cited pleadings by title and date. As a non-compliant brief, it could "be disregarded or stricken." Utah R. App. P. 24(k). In the interest of keeping this case moving, the State does not request that the Court strike Archuleta's brief in its entirety, but instead asks the Court to admonish Archuleta's counsel to follow the rules of appellate procedure.

However, Archuleta recites four pages of mental history facts without citation to any identifiable source. Br.Aplt. 30-34. He recites another whole paragraph without citation. *Id.* 9-10. Those pages should "be disregarded or stricken." Utah R. App. P. 24(k).

words," and "seemed to understand little that was said to him." Dr. Faux continued that Archuleta "made significant progress in all development and intellectual spheres since coming to live with the Archuletas," but "remained difficult to manage." R2632-34.[4] Dr. Faux remarked that, in testing, Archuleta gave "absolutely no concrete or simplistic responses." He continued, "In some way the boy has learned to compensate in what results in a rather sophisticated, manipulative child." R2636.

A contemporaneous IQ testing yielded an 83 score, which placed Archuleta in the "dull or slow learner classification." R2637-38. Dr. Faux diagnosed Archuleta with "Mental Retardation (marginal)." *Id*. A later evaluator explained that the contemporary diagnosis would be borderline intellectual functioning. He said that the 83 IQ score put Archuleta in the "upper range of borderline intellectual functioning." R1928. Another later evaluation said that Dr. Faux may have meant "borderline" when he used the term "marginal." PCIR2891A:94-95.

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[4] R2632 refers to the State's Exhibit A, filed below. Exhibit A is a complete set of the Utah State Hospital records that Archuleta produced in the first post-conviction case. The records show additional bates numbers that were originally Archuleta's, but the documents were not arranged chronologically before numbering. The exhibit has the documents arranged chronologically, but that means the duplicate bates numbers are not in order. The State will cite that exhibit with reference to the bates numbers as the record was certified for this appeal.

Dr. Faux's report continued that Archuleta had "a strong tendency to deal with the pleasures of the moment," "takes little thought as to the consequences of his actions," and demonstrated "poor impulse control." *Id*. A staff report states that Archuleta "is very manipulative, but can control his behavior if he wants to." R2639. Another report describes, "We have seen a great deal of manipulative behavior in [Archuleta] since his admission to our unit. He enjoys being the 'boss' of all the rest of the children and causing problems when the attendants are not looking." R2642.

The USH staff reported that Archuleta had "a type of gang-land structure of which he is definitely the 'boss.'" R2645.

A USH social worker reported that Archuleta had "a terrific ability to be a helpful, appropriate individual," but only used "this ability as he perceives it will benefit him and keep him out of trouble." They continued that, "when specific staff members to whom [Archuleta] is responsible are not watching him…he ceases this model behavior and begins setting other children up, physically abusing them." R2652. The social worker noted that Archuleta's mother had "an extreme need" for Archuleta to "function very well," leaving her "wide open for Archuleta to perform in a negative way in order to gain control over her and also get her attention." R2651.

The USH discharge report again noted Archuleta's penchant for behaving himself only when observed and to gain a benefit. It reported that the behavior-modification plans used on Archuleta failed because he "continued his great adeptness at only performing when observed." R2650.

The records include several IQ tests. A 1966 "converted" IQ score was 86. R1861. A 1968 psychological evaluation resulted in a full scale IQ score of 85. *Id*. Another 1968 score was 88. R1863.

One test yielded a full scale score of 99. R1928.

A 1980 evaluator reported that Archuleta's "overall Shipley IQ score" was 71. The report continued that "samplings" from a WAIS examination put Archuleta in the "Dull Normal range," which the evaluator concluded was supported by Archuleta's Shipley abstract score of 80. R1917. The evaluator also reported that Archuleta's contemporaneous "measured educational proficiency" is "below the 6th grade level." But she continued that her testing showed Archuleta "could certainly do better educationally and vocationally than he has so far demonstrated," though "care should be taken not to set unrealistically high goals. *Id*.

One of Archuleta's experts in the first post-conviction case testified that the Shipley scale is an abbreviated scale used for screening. He testified

it is not intended to be a comprehensive assessment like the WAIS examination. PCIR2891A:228-29.

In 1989, the mental health expert hired by Archuleta's defense team concluded that Archuleta's full scale IQ was 96, putting him in "the low normal range of intellectual ability." *Id*. 8.

In sum, between 1966 and 1989, Archuleta's IQ was tested at least six separate times. The five full tests yielded scores of 86, 85, 88, 99, and 96. The outlier low score of 71 was the 1980 Shipley score of 71, which Archuleta's expert explained is an incomplete "screening" test not intended for use as a comprehensive IQ test.

B. Summary of proceedings.

A jury convicted Archuleta and sentenced him to death. On direct appeal, this Court affirmed both the conviction and sentence. *See generally Archuleta I*, 850 P.2d 1232. The United States Supreme Court denied review. *Archuleta v. Utah*, 510 U.S. 979 (1993).

First state post-conviction case[5]

Archuleta's first state post-conviction case began in 1994. On March 3, 1994, the PCI court admitted Ms. Karen Chaney pro hac vice to represent

[5] Much of the detail in this section addresses Archuleta's accusations that the State interfered with his ability to raise the *Atkins* claim in the first post-conviction case.

Archuleta. PCIR656. Chaney filed an amended petition on August 8, 1994. The State filed its answer and motion to dismiss on January 31, 1995, about three months after the PCI court ordered a response. PCIR75.

On October 4, 1996, the PCI court dismissed the amended petition. This Court reversed, *Archuleta v. Galetka*, 960 P.2d 399 (Utah 1998) (*Archuleta II*), and remitted the case on August 14, 1998. PCIR98.

On June 30, 1999, after Archuleta took no action for over ten months, the State moved for a scheduling conference, which the PCI court held on November 17, 1999. At Archuleta's request, the court gave him 30 days to select an investigator and another 180 days for further investigation. PCIR591,607.

Chaney told State's counsel that she could complete and file the second amended petition by July 31, 2000. Consequently, the State agreed to a stipulated scheduling order requiring Archuleta to file his second amended petition by July 31, 2000, and requiring the State to file its response by September 15, 2000. PCIR610.

By motion dated July 31, 2000, Archuleta asked for an extension until August 31, 2000, to file a second amended petition. Archuleta predicated the motion on a medical condition from which Chaney had suffered "for the

past several months." The State stipulated to the 30-day extension. PCIR616.

Instead of filing the second amended petition on the August 31, 2000, deadline, Chaney, on the following day, filed a motion for an unlimited extension. She again relied on her medical problems. For the first time, she also relied on allegations of insufficient investigation funds, the possibility of further delay to challenge the limit on those funds, and document access problems. PCIR669-70.

The PCI court held a scheduling conference on September 20, 2000. At that time, Chaney disclosed that she did not begin experiencing symptoms related to her medical problems until "mid to late spring" 2000. However, she did not disclose when she hired the investigator that the November 1999 scheduling order required her to hire by December 16, 1999. She also represented that Archuleta's expert required an additional six months to complete her work. Chaney offered no explanation why she did not know the expert would require that period when she agreed to the July 31, 2000, deadline or the subsequent thirty-day extension to file the second amended petition. PCIR672-89.

In the end, the PCI court granted Chaney's request for six more months (to March 20, 2001) to complete the investigation and file the second

amended petition. The court directed local counsel to "oversee compliance with the scheduling order hereby adopted." The court further ruled it would grant no additional continuances. *Id*.

On January 23, 2001, Archuleta's local counsel moved to withdraw. He based the motion on his inability to establish contact with Chaney, as well as Chaney's failure to maintain contact with Archuleta's investigator, mitigation specialist, and psychological expert. PCIR647. The State did not oppose local counsel's motion. PCIR651.

The State moved, however, to revoke Chaney's pro hac vice admission. The State founded the motion primarily on (1) Chaney's failure to comply with the PCI court's scheduling orders, including the deadlines she stipulated to; (2) her failure to maintain contact with local counsel and with Archuleta's experts and investigators; and (3) the unjustifiable delay Chaney caused and her failure to meet her professional obligations to proceed with reasonable diligence. On the last, the State cited two significant periods: (1) the fifteen months between the supreme court's remittitur and the November 1999 scheduling conference when Chaney took no action to move the case forward; and (2) Chaney's further delays in prosecuting the case from the November 1999 scheduling conference until local counsel moved to withdraw over a year later because he could not

contact Chaney and she had not contacted Archuleta's experts and investigators. PCIR653,656.

The PCI court granted local counsel's motion to withdraw and the State's motion to revoke Chaney's pro hac vice admission. PCIR706,727-27.

Only thirty-four days later, and without any opposition from the State, the PCI court appointed Mr. Edward Brass to represent Archuleta in the PCI case. PCIR728.

Nineteen days later, a second attorney, Mr. Lynn Donaldson, appeared in a scheduling conference as co-counsel. PCIR757. And seven days after that, Ms. McCaye Christianson also appeared to represent Archuleta. PCIR758-59. The State did not oppose Donaldson and Christianson representing Archuleta.

Archuleta's PCI team filed his second amended petition on June 14, 2002, about eleven months after Brass's appointment. The PCI team raised approximately 120 claims: thirty-seven direct challenges to Archuleta's capital murder conviction and death sentence, and six ineffective-assistance-of-counsel claims. The ineffective-assistance claims included nearly ninety subparts alleging various instances of ineffective assistance of trial and appellate counsel. PCIR888-935.

Six days later, the United States Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002). The Supreme Court held that the Eighth Amendment prohibits executing the intellectually disabled.[6] Archuleta's PCI team did not move to amend the petition to include an *Atkins* claim.

Archuleta's PCI team hired Linda Gummow, Ph.D., and Mark Cunningham, Ph.D., to evaluate Archuleta. R2685-866 (Addendum C). Brass did not recall asking Gummow and Cunningham to evaluate Archuleta to determine whether he was intellectually disabled. But Archuleta's PCI team directed them to investigate "any and all possible mental health defenses." Brass considered both Gummow and Cunningham to be "well experienced in capital litigation." And he relied on their "advice and evaluations" "regarding what claims to pursue." *Id.*

At the PCI evidentiary hearing, Dr. Gummow testified that she had done court work on competency and diminished capacity issues in both civil and criminal cases. She had testified in about ten capital homicide cases. PCIR2891A:9.[7]

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[6] The *Atkins* opinion exempted those who are "mentally retarded," the then-current term for what has since become known as "intellectual disability."

[7] Two transcript volumes are numbered 2891. The State refers to the May 17, 2006, transcript as 2891A, and the May 18, 2006, as 2891B.

Dr. Gummow testified that she met with Archuleta four times, for about three to four hours each time PCIR2891A:12. Dr. Gummow used several test batteries to assess Archuleta. Based on the testing, she concluded that Archuleta suffered from mild global neurocognitive impairment in the areas of spelling, arithmetic, and the ability to write. PCIR2891A:102-108.

Dr. Gummow testified that her scores demonstrated that Archuleta had impaired executive functioning. She testified that executive functioning impairment "can sometimes" cause difficulty in the emotional and cognitive aspects of decision making. On cross-examination, she agreed that the executive impairment she found affected language-based areas. PCIR2891A:12-16,102-108.

The State's expert, Stephen Golding, Ph.D., testified without contradiction that Archuleta scored average or higher on Dr. Gummow's neurological testing designed to assess whether brain damage affected Archuleta's ability to control his behavior. The impairment that Dr. Gummow's testing revealed affected Archuleta's ability to construct sentences and choose context appropriate words. PCIR2891B:56-61.

Dr. Golding also recited examples of Archuleta's ability to reason and control his behavior: (1) Archuleta talked Wood out of starting a fight with 2

strangers; (2) Archuleta had Wood switch drivers because Wood was swerving; and (3) Archuleta thought about leaving Wood and Gordon at the murder site, but recognized that he was up to his neck in things by then. PCIR2981B:62-63,66.

Gummow also tested Archuleta's IQ. Her WAIS-III full-scale IQ score was totally consistent with all prior full-scale tests, yielding a low average IQ of 85. R2855. Dr. Gummow testified that she saw no evidence from the raw data on Archuleta's earlier IQ testing that Archuleta was intellectually disabled. She continued that most persons who tested Archuleta also did not think he was intellectually disabled. And she explained that Dr. Faux may have used the term "marginal" mental retardation to mean borderline. PCIR2891A:94-95.

Dr. Cunningham reviewed Archuleta's social services, USH, and other records; much of the trial record; and the post-conviction mitigation specialist's interviews PCIR2891A:153-55. In his testimony, Dr. Cunningham specifically referred to *Atkins* as a death-penalty exclusion PCIR2891A:161.

Cunningham testified that Archuleta's age-9 verbal IQ score, when adjusted downward for Flynn effect, put Archuleta "closer" to functioning in the intellectually disabled range or on the "cusp" or "edge" of intellectual

disability. PCIR2891A:211-12,2891B:14-15. Dr. Cunningham was unfamiliar with Dr. Gummow's IQ test results, but agreed they reflected Archuleta's IQ "at this time" PCIR2891B:13.

The State originally responded to the second amended petition by moving for summary judgment. PCIR1255-1558. Archuleta did not oppose summary judgment on forty-three claims. PCIR1600-1786. In one claim, he argued that Utah's capital statutes failed to meet the constitutional requirement of narrowing the class of death-eligible murderers. PCIR1688-1698. The first three subsections lifted nearly verbatim an argument that Brass had presented to this Court in *State v. Arguelles*, 2003 UT 1, 63 P.3d 731. The fourth subsection presented a truncated version of an argument that Brass had presented in the same case. PCIR1688-1698,1951-66. Another attorney presented the nearly verbatim arguments to the Utah Supreme Court in *State v. Kell*, 2002 UT 106, 61 P.3d 1019. However, Archuleta did not acknowledge to the PCI court that this Court had rejected all of these arguments in both *Arguelles* and *Kell* before Archuleta repeated them to the PCI court.

In support of his failure-to-narrow claim, Archuleta argued, in part, that Utah's capital murder statute contained too many aggravators to meet the narrowing requirement. He then relied on Justice Durham's "opinion"

and "decision" in *State v. Young*, 853 P.2d 327 (Utah 1993). PCIR1689. However, Archuleta did not disclose that Justice Durham's "opinion" or "decision" was a dissent. He did not acknowledge that the *Young* majority rejected the "too many aggravators" claim that Archuleta was making. PCIR1689.

Archuleta acknowledged that the Tenth Circuit, in 1988, had rejected a too-many-aggravators challenge to the 1973 version of Utah's capital murder statute. He continued, however, that "the Utah death penalty has expanded the field of death eligible murders more than twofold since 1973, and has added aggravating circumstances since *Young* was decided." Archuleta failed to disclose that the Court had repeatedly rejected the too-many-aggravators argument despite the post-10th Circuit case expansion of the list of aggravators, or that the *Young* majority had rejected the same challenge to the identical statute under which Archuleta was tried. PCIR1689-90.

These unsupported claims eventually led to the State filing a Utah R. Civ. P. 11 motion against Archuleta's counsel. Before filing the motion, the State contacted counsel to give them an opportunity to correct the issues on which the State considered filing the motion. Both before and after filing the motion, the State agreed to withdraw some of the rule 11 claims,

dropped some of the claims against Donaldson, and dropped all of the claims against Christianson. And as a result of mediation, the State agreed to drop all requests for monetary sanctions in favor of an order finding a rule 11 violation. On this last, the State later explained that it would proceed only on a request to settle the law for future cases on whether rule 11 applied at all and whether the conduct violated rule 11. Donaldson and Brass moved for rule 11 sanctions against State's counsel for filing the State's rule 11 motion. They made no concessions. PCIR1986-1988,2079,2102-2137,2177-82,2186,2196-97-2199,2202-2212,2497-15,2532-42,2676-2680,2699-2700,2913,3417,Tr.January26,2007:109-11,PCR3417.

The PCI court denied both motions. In the order denying Donaldson's and Christianson's cross-motion against State's counsel, the PCI court said, "Contrary to the views expressed by counsel for Petitioner in their cross-motion, the court believes that the State had a good faith basis for filing its motion for Rule 11 sanctions." PCIR3396.

The PCI court granted summary judgment on most of Archuleta's claims in 2004. And in 2007, after taking evidence and further briefing on Archuleta's challenges to trial counsel's penalty-phase representation, the PCI court denied relief on those, too. PCIR2226,3338. Archuleta appealed PCIR3407.

In the entire period from the June 20, 2002, *Atkins* decision until the 2007 final denial of post-conviction relief, Archuleta never moved to add an *Atkins* claim.

While the merits appeal was pending, Archuleta also filed a motion under rule 60(b), Utah Rules of Civil Procedure, for relief from the post-conviction judgment, as well as motions to reconsider the denial of that motion. The PCI court denied those post-judgment motions. PCIR4896,5319. Archuleta appealed the denial of his post-judgment motions. PCIR5289.

In August 2007, while the state post-conviction appeal was pending, Archuleta asked the federal court to appoint counsel to represent him in federal habeas review in the event his state appeal failed. Archuleta recognized that the State proceedings were ongoing. But he asked for the early appointment "given the numerous complex issues that will require extensive investigation and research." The federal district court appointed counsel the same day. R2857-63.

On June 6, 2008, this Court allowed the last of Archuleta's PCI counsel, Brass, to withdraw. R2090.

In 2011, this Court affirmed the denial of Archuleta's post-conviction petition and post-judgment motions. *Archuleta v. Galetka*, 2011 UT 73, 267

P.3d 232 (*Archuleta III*). The United States Supreme Court denied review. *Archuleta v. Galetka*, 133 S.Ct. 112 (2012).

Federal habeas corpus petition.

Archuleta filed his federal habeas petition in December 2012—five years after the federal court appointed counsel to represent him in the federal habeas proceedings and twenty-five months before he filed the petition at issue here. His first claim is that he is *Atkins*-exempt from his death sentence. *See* docket, federal case no. 2:07-cv-630-TC.

In January 2013—twenty-four months before Archuleta filed this action—the parties agreed to a scheduling order in the federal habeas proceeding. Among other things, Archuleta agreed to file a motion for a contact visit for a neuropsychological examination. Archuleta offered that the he needed a neuropsychological evaluation, in part, to support his *Atkins* claim. R2865-70.

The stipulated order also gave Archuleta thirty days from the date the evaluation was complete to move to stay the federal case under *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005), while Archuleta returned to tate court to exhaust the *Atkins* claim. *Id*.

About one month later—and twenty-three months before he filed the *Atkins* claim in state court—the federal district court granted a motion for a

contact visit with Ricardo Weinstein, Ph.D. The Department of Corrections stipulated to the visit and to the testing conditions in the order. R2873.

About four months later—and nineteen months before he filed the *Atkins* claim in this petition—Archuleta moved to stay the federal case while he returned to the State courts to present the *Atkins* claim. Federal case no. 2:07-cv-630-TC, doc. no. 75.

Archuleta attached a June 1, 2013, report by Dr. Weinstein. Dr. Weinstein reported IQ full scale scores of 81 on the WAIS-IV, and 82 on the C-TONI2. He said these scores fell within the "subaverage range" and were "indicative of Intellectual Developmental Disability." He also reported his "initial assessment" that Archuleta's "adaptive functioning is consistent with the requirements of a diagnosis of intellectual disabilities." But Dr. Weinstein continued that he had yet to come to a final conclusion about whether Archuleta met "the criteria for intellectual disability." R2876-80.

In July 2014—over a year after Dr. Weinstein reached his preliminary conclusions and Archuleta asked for a federal stay to raise his *Atkins* claim here—Archuleta's counsel contacted DOC's counsel to inquire whether DOC would agree to a contact visit with another neuropsychologist, Dale Watson, Ph.D. DOC's counsel arranged a telephone conference with her client and Archuleta's counsel for August 5, 2014. At that conference, DOC

definitively informed Archuleta's counsel that it would not agree to the testing conditions Dr. Watson demanded because they violated DOC security protocols. R2260-90.

After Archuleta and the parties completed briefing and record supplementation on the motion for a federal stay, the State twice submitted the motion for decision. R2887-93. Archuleta took no action to get a ruling on his motion. When the federal court did not rule on the motion for more than ten months, the State sought mandamus relief from the Tenth Circuit. R2895-2907.

On October 14, 2014, the Tenth Circuit concluded that the circumstances—which the State laid out in its petition—warranted a response from the district court and invited the court to file one. The Tenth Circuit allowed thirty days for the response. R2909-10.

On November 12, 2014, the district court issued its twenty-page order staying the federal action while Archuleta presented his *Atkins* claim to the State courts. R923. That date was one year after the briefing and record supplementation were complete and one day before the federal district court's response was due in the State's mandamus action. The order gave Archuleta thirty days "to commence" this action.

The district court responded to the State's mandamus petition that it was moot because it had ruled on the stay motion. R2912-13. The Tenth Circuit dismissed the mandamus action as moot. R2915.

On December 3, 2014—four months after DOC told Archuleta's counsel it would not agree to Dr. Watson's terms for a contact visit and eighteen months after Dr. Weinstein concluded his preliminary assessment—Archuleta moved in federal court for an order allowing that visit. R1982-2001. On January 20, 2015, the federal court denied that motion since the court had already stayed the case. Federal case no. 2:07-cv-630-TC, doc. no. 126.

Successive state post-conviction proceedings

Archuleta filed this successive state petition on December 12, 2014. R20. With it, he filed a motion to waive the filing fees. R1. The post-conviction court, however, rejected the latter and ordered Archuleta to pay a filing fee. The Court stayed all proceedings pending payment. R2174. Archuleta paid the fee a month later. The court lifted the stay on January 14, 2015. R2242.

Rather than raise only the *Atkins* claim that Archuleta relied on to justify the federal stay, Archuleta also included twelve additional claims. *Id.* The State moved to stay its response to the twelve additional claims

while the Court considered Archuleta's *Atkins* claim. R2244. Without receiving any objection from Archuleta, the post-conviction court granted the motion, stayed briefing on the twelve additional claims, and ordered the State to respond to the *Atkins* claim. R2580-82.

Both Archuleta and the State filed motions to permit their experts to have contact with Archuleta to conduct mental evaluations. The main point of disagreement among the parties concerned who the court should permit to examine Archuleta first, although Archuleta also disputed the State's right to evaluate Archuleta at all. As in federal court, Archuleta also sought an order to permit an examination under conditions that the Department of Corrections would not agree to because they violated security protocols. R2180-84,2215-22,2303-32,2409-23,2539-57,2558-65.

The State filed a motion for partial summary judgment, arguing that Archuleta's *Atkins* claim was both time and procedurally barred, and that it failed on the merits because Archuleta failed to proffer legally sufficient evidence of intellectual disability. R3143-3229. Archuleta opposed summary judgment, arguing that, for various constitutional, statutory, and common-law reasons, his *Atkins* claim was not barred; and that he had raised a "reasonable inference" of intellectual disability sufficient to survive summary judgment. R3332-85.

The State then moved to stay its reply in support of summary judgment on its procedural defenses, withdrew its motion on the merits of Archuleta's intellectual disability claim, and asked the court to hold an evidentiary hearing on the merits. R3643-48. Archuleta agreed to the State's motion. R3653.

However, in a plenary memorandum decision disposing of all outstanding motions, the post-conviction court (1) denied the parties' motions for expert contact visits, the State's motion to stay summary judgment reply on its procedural arguments, and the State's motion for evidentiary hearing, and (2) entered summary judgment on Archuleta's *Atkins* claim on the court's own motion. R3748-62 (Addendum B).

The court first concluded that Archuleta had not adequately disputed the State's recitation of the material facts because he had merely "allege[d] in a sweeping fashion that the facts in the State's memorandum are disputed," but did "not indicate which facts he is specifically disputing" and did not "advance any alternative facts." The court thus found the undisputed facts to be as the State recited them and as the record showed them to be. R3750 n4.

The court then ruled that Archuleta defaulted his *Atkins* claim by not raising it during his first post-conviction proceedings. R3753 (citing Utah

Code Ann. § 78B-9-106(d)). It concluded that "because Archuleta could have raised his claim that he is intellectually disabled in his first petition for post-conviction relief case, he is procedurally barred from raising it in a subsequent petition." R3753.

The court also concluded that Archuleta's claim was time barred because Archuleta waited to bring the claim for more than a year beyond any conceivable date that the claim accrued. It considered a number of possible accrual dates and concluded that the cause of action was time barred under all of them. For example, the court concluded that, under Utah Code section 78B-9-107(f), Archuleta had until one year after the United States Supreme Court issued *Atkins*, or until June 20, 2003, to file his claim. R3754.

More generously, the court said that Archuleta's cause of action may have accrued in 2006 when his post-conviction mental health expert, Dr. Cunningham, first "testified that Archuleta was on the 'cusp' of being intellectually disabled." R3754.

More generously still, Archuleta's cause of action could have accrued in 2009 when Archuleta's post-conviction appellate attorney, Mr. Slavens, "specifically raised *Atkins* as a reason for the district court to" grant post-judgment relief. R3755. Or it could have accrued when this Court affirmed

the post-conviction judgment in 2011, or when the United States Supreme Court denied certiorari in 2012. R3755.

And most generously of all, the court reasoned that Archuleta's cause of action could have accrued when "Dr. Weinstein examined Archuleta and provided an initial report on November 29, 2012," or in January 2013 when Archuleta's current counsel "informed the federal court that they intended to pursue an *Atkins* claim in state court." R3755-56.

But since "Archuleta did not file his claim until December 2014," Archuleta's claim was untimely "even under the most generous evaluations of when Archuleta knew or should have known of the evidentiary facts in support of his claim." Thus, the court ruled that Archuleta's claim was "precluded from relief" under the Post-Conviction Remedies Act (PCRA). R3755 (citing Utah Code Ann. §§ 78B-9-104(1),-106(e),-107).

The court rejected Archuleta's common law arguments for an exception to the procedural bars. It relied on this Court's rulings, following the 2008 amendments to the PCRA, as well as this Court's 2009 amendment to rule 65C, Utah Rules of Civil Procedure, which collectively have "apparently abrogated" any common law exceptions that existed before the PCRA and rule 65C amendments. R3757 (citing *Taylor v. State*, 2012 UT 5,¶11 n3, 270 P.3d 471; *Pinder v. State*, 2015 UT 56,¶56, 367 P.3d 968).

The court also rejected Archuleta's constitutional arguments challenging the PCRA bars. Far from preventing a petitioner's due process, the PCRA and rule 65C "define the process afforded to defendants and petitioners for pursuing their post-conviction relief claims." R3758. Archuleta failed to cite any authorities that would expand his right to press claims outside that procedural framework, and he neglected the processes he had available to him in the first place. *Id.*;R3753;R3759 & n11.

The court noted that this Court had not expanded a petitioner's pre-2008 right to effective post-conviction counsel to claims filed after 2008. *Id.* (citing *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480). And to the extent that this Court has suggested the possible existence of an inherent judicial power to disregard statutory bars to prevent an "egregious injustice," Archuleta failed to argue that he was entitled to such review. R3759 (citing *Winward v. State*, 2012 UT 85, 293 P.3d 259 (setting forth framework post-conviction petitioner must argue to demonstrate constitutional "egregious injustice" exception to PCRA bars)). In the absence of more concrete guidance from this Court or even an argument from Archuleta, the post-conviction court "decline[d] to create such an exception where our appellate courts have not yet recognized one." R3758.

The court thus denied Archuleta's *Atkins* claim since it was both time and procedurally barred. R3760.

Accordingly, despite the parties' requests for expert evaluations and an evidentiary hearing, the court ruled that no good cause justified further evidentiary development and denied the motions to conduct evaluations. *Id.*

Over Archuleta's objection, R3772, the court certified its partial summary judgment ruling as final and appealable. R3798-3802. Archuleta timely appealed. R3803-05.[8]

SUMMARY OF ARGUMENT

I. Archuleta argues that he is exempt from capital punishment because he is intellectually disabled. The post-conviction court barred his claim because he withheld it for many years before presenting it, and did not present it during his first round of post-conviction review.

As written, the Post-Conviction Remedies act bars Archuleta's claim, and Archuleta does not argue otherwise. Rather, he argues a number of

[8] The court also lifted the stay on Archuleta's twelve remaining claims and ordered briefing to proceed on those. R3760-61. The court ultimately granted the State's second summary judgment motion on those claims, and Archuleta has separately appealed that order in case number 20160992-SC.

common-law, equitable, and constitutional reasons why the procedural bars should not have precluded merits review.

Those arguments all fail for the simple reason that the PCRA occupies the field of post-conviction review, abolished any common-law authority the judiciary had historically exercised in that realm, left the courts with no equitable powers to excuse statutory bars to relief, and comprised a constitutional exercise of Legislative prerogative. This Court's prior cases—such as *Gardner v. State* and *Winward v. State* that suggested the judicial branch has some independent constitutional power in post-conviction review—were wrongly decided at their inception and should be disavowed.

Because the PCRA bars Archuleta's untimely *Atkins* claim, the post-conviction court correctly granted summary judgment and denied the claim.

II. Summary judgment was also supportable on the alternative ground that Archuleta failed to proffer legally sufficient evidence that he is, in fact, intellectually disabled. Under summary judgment standards, Archuleta had to proffer evidence that, if proven and believed, would show he is intellectually disabled. He failed to do this. Despite fifteen years of representation by funded counsel since *Atkins* was decided—eight of those years with federally funded counsel—Archuleta has never proffered an

expert's opinion that he is intellectually disabled. And Archuleta's social and mental health records, personal history, and the crime circumstances do not raise a fact issue on whether he is *Atkins* exempt. Archuleta has consistently tested outside the range of intellectual impairment necessary under the Utah *Atkins* statute, and has consistently shown himself to be adaptive, manipulative, and adept at planning and self-preservation. This includes all of the evidence from even his own experts, who have tested him with IQs ranging from 81 up to as high as 96.

Archuleta's proffer failed as a matter of law to support relief under *Atkins*, and summary judgment was correct.

ARGUMENT

The post-conviction court correctly granted summary judgment, barring Archuleta's *Atkins* claim from merits review. A court must grant summary judgment "if the pleadings" and other evidence show "that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). Summary judgment serves a "salutary purpose in our procedure because it eliminates the time, trouble and expense of" an evidentiary hearing "when, upon the best showing the plaintiff can make, he would not be entitled to a judgment." *Brandt v. Springville Banking Co.*, 353 P.2d 460, 462 (Utah 1960).

To survive summary judgment, a post-conviction petitioner must show that he "could, if given" an evidentiary hearing, "produce evidence which would reasonably sustain a judgment in his favor." *Archuleta III*, 2011 UT 73,¶43, 267 P.3d 232. "Where, as here, the nonmoving party will bear the burden of proving the underlying legal theory at trial, the moving party may satisfy its initial burden on summary judgment by showing that 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any'" show "'that there is no genuine issue of material fact.'" *Jones & Trevor Mktg., Inc. v. Lowry*, 2012 UT 39,¶30, 284 P.3d 630 (quoting previous Utah R. Civ. P. 56(c)). The "burden then shifts to the nonmoving party, who 'may not rest upon the mere allegations or denials of the pleadings,' but 'must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting previous Utah R. Civ. P. 56(e)).

Once the State raises a time or procedural bar defense, the petitioner must prove that they do not bar merits review in addition to proving the elements of his claims. Utah Code Ann. § 78B-9-105(2).

For the reasons argued below, Archuleta's pleaded facts and proffered evidence—presumptively his "best showing"—were insufficient as a matter of law to demonstrate that he is entitled to post-conviction relief.

Archuleta's proffer failed as a matter of law to demonstrate a genuine issue of material fact on either the procedural bars or the merits. Archuleta's *Atkins* claim accrued on June 20, 2002—the day the Supreme Court decided *Atkins*. Utah Code Ann. § 78B-9-107(2)(f). He had until June 20, 2003, to file his claim. His January 2015 petition was over 11 ½ years too late.

Also, because the Supreme Court decided *Atkins* more than 4 ½ years before Archuleta's first post-conviction case ended, he could have raised it in that case, but did not. It is therefore procedurally barred.

Neither Archuleta's proffered facts nor the law supported Archuleta's procedural and constitutional arguments against imposing the bars.

And Archuleta's proffer failed as a matter of law to support relief on the merits. Despite the argument in his brief that he proffered sufficient evidence to withstand summary judgment, he conceded below that he has yet to develop evidence to show that he qualifies for an *Atkins* exemption. And as shown, he has had ample time, resources, and opportunity to do so. He cannot blame the PCRA or prior counsel for his failure.

This Court should thus affirm the lower court's grant of summary judgment denying Archuleta's *Atkins* claim.

I.

Archuleta's *Atkins* claim is barred by a constitutional statute that gave him ample time and opportunity to present the claim earlier.

The PCRA prohibits relief for claims (1) filed more than 1 year after a cause of action accrues, and (2) that could have been, but were not raised in a prior PCRA petition. Utah Code Ann. §§ 78B-9-106(1)(d)-(e),-107(2)(f). Either bar would independently defeat Archuleta's present *Atkins* claim. The post-conviction court correctly ruled that the claim is barred under both.

Archuleta urges this Court to recognize either common-law, equitable, or constitutional judicial authority to disregard the PCRA procedural bars and permit merits review of his *Atkins* claim. But this Court has already decreed by rule that the PCRA sets the boundaries of post-conviction review. Alternatively, as shown below, the Legislature, acting fully within its constitutional prerogative, abolished all common-law or equitable powers Utah courts historically exercised in post-conviction. The Utah Constitution grants the judiciary no independent power to grant post-conviction relief outside legislative enactments. The PCRA thus stands as the sole remedy where an inmate seeks post-conviction review. All claims must comply with its restrictions or be denied. This Court should

disavow any prior opinions that have suggested otherwise and affirm the lower court's summary judgment order.

A. Archuleta's petition is untimely under even the most generous calculation.

The PCRA provides that a person "is not eligible" for post-conviction relief on "any ground…that is barred by the limitation period." Utah Code Ann. § 78B-9-106(1)(e). The PCRA gives a petitioner one year from the date his cause of action accrues to file his petition. *Id*. § 78B-9-107(1). The PCRA provides a flexible framework for determining when a post-conviction cause of action accrues. A "cause of action accrues on the latest of" several possible dates. *Id.* § 78B-9-107(2).[9]

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

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[9] Archuleta says that section 104, permitting post-conviction relief for an unconstitutional sentence, is "broadly stated and does not include a temporal limitation on the constitutional violation." Br.Aplt. 45. If by this Archuleta means that no time-bar applies because section 104 includes none, the plain statutory language is otherwise. Section 104 begins that "[u]nless precluded by Section 78B-9-106 or 78B-9-107," the time and procedural bars, a convicted person may get post-conviction relief from an unconstitutional sentence. Section 104 thus specifically limits relief from an unconstitutional sentence to timely and procedurally proper challenges to the sentence.

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. And because Archuleta seeks relief under the *Atkins* rule, his cause of action accrued on June 20, 2002—the date on which the United States Supreme Court decided *Atkins*. *Atkins*, 536 U.S. 304 (2002). He therefore had until June 20, 2003 to file his petition raising his *Atkins* claim. His January 2015 petition is 11½ years too late.

Under other circumstances, the PCRA provides that a cause of action accrues on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." *Id.* § 78B-9-107(2)(a),(e). Archuleta unquestionably knew about his *Atkins* claim at the very latest by December 6, 2012, the date on which he filed his federal petition for writ of habeas corpus and identified the *Atkins* claim. Even if that represented the date on which he knew or with reasonable diligence should have known of the claim—which the State does not concede—Archuleta had until December 6, 2013 to file the claim. He did not file it until December 12, 2014, more than a year late.

And Archuleta disclosed his plan to pursue a state *Atkins* claim on January 17, 2013, the date on which he agreed to a scheduling order for the federal habeas action that included a deadline for him to move to stay the

federal case while he pursued his *Atkins* claim in the state courts. Calculating from that date, Archuleta's petition was still a year late.

Archuleta actually asked for the federal stay in June 2013. Even calculating from that date, his petition was seven months late.

Because the time bar independently precluded merits review, the post-conviction court properly granted summary judgment on this basis alone.

For the first time on appeal, Archuleta claims that the statute of limitations tolled as a result of his alleged intellectual disability. Br.Aplt. 80. The PCRA allows no exceptions to the time bar, but it does provide a tolling provision for periods of mental incapacity or unconstitutional government interference. Utah Code Ann. § 78B-9-107(3). The post-conviction court knew about the tolling provision and did not apply it because Archuleta had "not alleged that the tolling provision of the statute applies in this case." R3755 n8.

"Under ordinary circumstances," this Court "will not consider an issue raised for the first time on appeal." *Oseguera v. State*, 2014 UT 31,¶15, 332 P.3d 963. The tolling argument Archuleta now urges "was not presented to the district court in such a way that the court had an opportunity to rule on it." *Id.* ¶14. The Court should disregard it.

When "a party seeks review of an unpreserved" argument, he must "articulate an appropriate justification for appellate review," such as plain error. *Id.* ¶15 (quotations and citation omitted). He "must present the justification in" his "opening brief." *Id.* If he does not justify appellate review under the exceptions to the preservation rule, this Court will ordinarily decline to address the unpreserved claim. *Id.*

Archuleta does not even acknowledge his preservation failure, much less justify review under established preservation exceptions. Instead, he apparently claims to have presented it to the lower court. Br.Aplt. 3 (stating Issue IV was preserved by presenting it "in the response to Appellee's motion for partial summary judgment" at "20-22"). To the extent Archuleta claims he made a mental incapacity tolling argument regarding his *Atkins* claim, this is false. The pages he cites relate only to his argument that his current counsel were prevented from filing because of federal statutes regarding appointment of federal counsel. R3357-59. Archuleta's argument

below led the district court to believe he did not consider the statute of limitations to have tolled because of mental incapacity. R3755 n8.[10]

In any event, Archuleta misconstrues and is not entitled to the benefit of the PCRA's tolling provision. Archuleta argues for an outright exemption from the time bar on the basis of the mere existence of an intellectual disability. Br.Aplt. 80-81. That reading is not one that is so obvious that the post-conviction court should have discovered it on its own. Rather, it is obviously incorrect. The statute of limitations does not exempt anyone from its reach, nor does it toll during the entire period of an incapacity. Rather, it tolls only while "the petitioner was *prevented from filing a petition* due to…mental incapacity." Utah Code Ann. § 78B-9-107(3) (emphasis added). Archuleta must show more than an incapacity; he must show it impeded his access to the court. And even then, he is excused from filing only for the period that his incapacity actually impeded his access to the courts.

[10] Archuleta finally made a mental incapacity tolling argument in response to the State's second summary judgment motion addressing his non-*Atkins* claims. R4587. But by then, the *Atkins* claim had been finally denied and appealed. Virtually all of Archuleta's tolling argument, Br.Aplt. 80-82, was lifted from his memorandum opposing the State's second summary judgment motion on his non-*Atkins* claims. R4586-87.

The State does not dispute that intellectual disability could qualify as a "mental incapacity" within the meaning of the tolling statute. And intellectual disability could toll the statute of limitations if it prevented a petitioner from filing a timely petition.

But in essence Archuleta seeks a ruling that if a post-conviction petitioner has a mental incapacity, then no amount of lawyers, funding, or successive petitions could ever satisfy his ability to bring claims or trigger a procedural bar during his incapacity because he will always be unable to fully understand the law or supervise his attorneys while incapacitated. *See, e.g.,* Br.Aplt. 81 (arguing he "lacks the capacity to navigate these issues on his own, or to properly supervise counsel"). And all of this even though Archuleta has never shown that he is intellectually disabled despite having paid counsel and apparently unlimited federal funding to make the showing for the entire fifteen years since *Atkins* issued.

In any event, he does not really argue that his alleged impairments impeded his ability to file. He argues instead that federal restrictions on habeas counsel appearing in state court—not an intellectual disability—were the real culprit that delayed his filing. Br.Aplt. 82-84. Even if everything Archuleta says about the hurdles his counsel faced were true, the PCRA statute of limitations does not toll until *counsel* is ready to file; it

tolls only for any period *Archuleta's incapacity* prevented his timely filing. Archuleta's argument wrongly presupposes that the statute of limitations applies to counsel rather than the petitioner himself.

The statute does not toll because of bureaucratic complications that delayed Archuleta's attorneys, and he does not explain how his alleged mental deficits impeded his access to the court, nor how that impediment should have been so obvious to the post-conviction court that it should have tolled the statute sua sponte. He says only that those deficits "prohibit[] him from a full understanding of the law" and deprive him of the "capacity to navigate these issues on his own, or to properly supervise counsel." Br.Aplt. 81. But that argument says nothing about his attorneys' abilities to access the courts on his behalf and does not establish that he was prevented from filing.

And Archuleta never showed that his federal counsel could not have obtained federal approval earlier to appear in state court and press these claims. After all, the federal court appointed federal counsel in 2007 on their representation that they needed to begin investigating the federal habeas case even before the state post-conviction case ended. *See generally* Docket, 2:07-cv-00630-TC.

Archuleta says his counsel could not appear in state court until the federal court stayed his federal habeas action while he returned to state to exhaust the *Atkins* claim. Br.Aplt. 83 (citing *Harbison v. Bell*, 556 U.S. 180 (2009); *Rhines v. Weber,* 544 U.S. 269 (2005)). But the authorities Archuleta cites impose no such restriction. *Harbison v. Bell* held only that federal statutes authorize federal counsel to appear in state court if the state action is related to the ongoing litigation. *Rhines v. Weber* held only that a federal petitioner may, under certain circumstances, have his habeas action stayed pending exhaustion of a claim in state court. But neither case obliged federal counsel to wait from their appointment in 2007 until the federal court's stay order in 2014 before filing the *Atkins* claim in state court. And they certainly did not so plainly impose such a restriction that the lower court should have recognized it and tolled the limitations period on its own.

In any event, Archuleta did file a petition, despite his alleged incapacity, which he claims has persisted since childhood. And he filed other petitions in the meantime as well, including multiple state petitions, post-judgment motions, briefs in this Court and the United States Supreme Court, and a federal habeas petition. As shown, the state post-judgment motions and the federal habeas petition contained the *Atkins* claim, the latter no later than 2012. Thus, no mental incapacity prevented Archuleta

from formulating and filing his *Atkins* claim because he in fact did so repeatedly. He just did not do so properly or timely in state court.

And if his alleged incapacity did impede counsel's ability to bring his claims sooner, Archuleta does not disclose when the incapacity stopped impeding counsel's ability to file. Eventually counsel did file, and the burden was on Archuleta to demonstrate that he filed the petition timely after the incapacity stopped impeding counsel's ability to file. If Archuleta filed more than a year after the impediment lifted, then the petition would still be untimely. Archuleta failed to meet his burden even if he showed that the statute tolled for some period.

B. The post-conviction court correctly ruled that Archuleta's *Atkins* claim is procedurally barred because he could have raised it in his first post-conviction action.

The PCRA also provides that a person "is not eligible" for post-conviction relief on "any ground…that could have been, but was not, raised in a previous request for post-conviction relief." Utah Code Ann. § 78B-9-106(1)(d). That procedural bar has no exceptions. The post-conviction court correctly ruled that "because Archuleta could have raised his claim that he is intellectually disabled in his first petition for post-conviction relief case, he is procedurally barred from raising it in a subsequent petition." R3753.

Archuleta could have raised his *Atkins* claim in his first post-conviction case. More than 4 ½ years passed between the *Atkins* decision and the final order denying relief in the first post-conviction case. And the United States Supreme Court decided *Atkins* only a few days after Archuleta filed his second amended petition. *Atkins* was one of the biggest cases of that term and any lawyer litigating a capital case would have been aware of it.

But Archuleta never moved to amend his petition to raise an *Atkins* claim. The most likely explanation is that Archuleta had no *Atkins* claim to raise. The record was replete with IQ tests well above the *Atkins* threshold. But because Archuleta could have raised the claim in his prior post-conviction case, it is procedurally barred from merits review in this second post-conviction case.

C. *Atkins* claims are not exempt from the time and procedural bars even though intellectual disability is a categorical death penalty exclusion.

Archuleta argues that procedural and time bars cannot preclude relief for an *Atkins* claim because *Atkins* creates a categorical exclusion from a death sentence. Br.Aplt. 45. Even if this were correct, which it is not, Archuleta did not proffer sufficient evidence to get the benefit of such a rule because, as explained below, he did not proffer sufficient evidence to show

that he is *Atkins* exempt in the first place. Archuleta proffered only a preliminary report from Dr. Weinstein that he *may* meet the criteria for an *Atkins* exemption but required more testing. The remainder of his proffer asked for more time to do further evidentiary development to support the claim. *See* subpoint D and Point II below.

In any event, the law otherwise does not forgive the time and procedural bars for categorical death-penalty exclusions. First, there can be no federal constitutional boundaries on State post-conviction time and procedural limitations. The States have no constitutional obligation to allow post-conviction review at all. *Murray v. Giarratano*, 492 U.S. 1, 6 (1989). Because there is no federal constitutional right to State post-conviction review, there is no federal constitutional boundary on the procedural limits the States choose to impose on it.

That means state law governs. And because Archuleta filed this petition after 2008, the PCRA governs whether Archuleta's *Atkins* claim is procedurally barred or time barred. Utah Code Ann. § 78B-9-102 (2008) (the PCRA "establishes the sole remedy for any person who challenges a conviction or sentence…who has exhausted all other legal remedies…"); Utah R. Civ. P. 65C (the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence

after the conviction and sentence have been affirmed in a direct appeal under Article I, Section 12 of the Utah Constitution, or the time to file such an appeal has expired"); *Pinder*, 2015 UT 56,¶56 (recognizing that PCRA and rule 65C amendments "repudiated" prior common law exceptions to procedural bars, leaving PCRA as "the 'sole remedy' for post-conviction relief").

The PCRA recognizes no exception to the time and procedural limits for new, categorical death-penalty exclusions such as *Atkins*. Instead, the PCRA accommodates new exclusions by making the procedural and time limits flexible. A new exclusion created after a post-conviction case has ended would not be barred in the immediate next petition filed because it could not have been brought in the prior petition. Utah Code Ann. § 78B-9-106(1)(d) (barring post-conviction relief on claims first raised in a successive petition only if it could not have been raised in a prior petition). Likewise, the one-year period to file a petition on a new exclusion does not begin to run until the case announcing the exclusion has been decided. *Id.* § 78B-1-107(2)(f). This permits merits review for all reasonably diligent petitioners and, contrary to Archuleta's argument, does not unconstitutionally foreclose relief on exemption claims.

But outside that flexibility, the claim is barred. Archuleta cites no case holding otherwise.

State's counsel also could find no federal circuit court decision excepting *Atkins* claims from the procedural and time limits on seeking federal habeas relief. Rather, the Fifth, Seventh, Ninth, and Eleventh Circuits have applied the federal limitations statute and the Eighth Circuit has applied federal procedural default rules to bar merits consideration on *Atkins* claims. *See, e.g., Henderson v. Thaler*, 626 F.3d 773, 777 (5th Cir. 2010) (recognizing that Henderson's *Atkins* claim first raised in a 2006 petition would be time-barred unless equitable tolling sufficiently extended the limitations period); *Beaty v. Schriro*, 554 F.3d 780, 784 (9th Cir. 2009) (denying leave to file a successive petition to raise an *Atkins* claim; the claim would be time barred because Beaty did not bring it within 1 year of the *Atkins* decision); *Woods v. Buss*, 234 Fed. Appx. 409, 411, 2007 WL 1302114 (7th Cir. 2007) (denying a certificate of appealability on Woods' *Atkins* claim because he did not bring it within 1 year of the *Atkins* decision); *In re: Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006) (denying leave to file a successive petition to raise an *Atkins* claim; the claim would be time barred even taking into consideration the applicable tolling period); *Davis v. Norris*, 423 F.3d 868, 878 (8th Cir. 2005) (denying a remand or leave to file a successive

petition because *Atkins* was decided while Davis was litigating his first habeas petition in the district court so he could have raised the Atkins claim then).

Archuleta cites no authority to support his contrary argument. He says that *Atkins* and *Hall v. Florida*, 134 S.Ct. 1986 (2014) (expounding the *Atkins* exclusion) have "written into" them "no restrictions" "limiting a petitioner's ability to raise an intellectual disability claim." Br.Aplt. 46. While true, it does not mean that time and procedural restrictions cannot apply to *Atkins* claims raised in state post-conviction or federal habeas actions. Neither *Atkins* nor *Hall* prohibited such limitations, and no such restrictions were at issue in those cases: *Atkins* and *Hall* were direct review cases, not post-conviction or habeas review cases.

Archuleta also says that no time or procedural bars apply because Utah's *Atkins* statutes allow raising the *Atkins* issue "'at any time'" and "contains no prohibitions or limitations on raising the claim." Br.Aplt. 46. For support, he cites Utah Code section 77-15a-103.

Section 103 does not trump the time and procedural limits to raising a post-conviction *Atkins* claim. It provides only that the "*court* in which a capital charge is *pending* may raise the issue of the *defendant's*" intellectual disability "at any time." *Id*. (emphasis added). By its plain terms, that

provision refers to the criminal case; consequently, it has nothing to do with the limits on relief that apply to a civil post-conviction case. Archuleta's capital charge is no longer "pending." A jury convicted him and sentenced him to death 28 years ago. Archuleta is no longer a "defendant." He is a petitioner seeking relief from his 28-year-old sentence.

Further, section 103 only allows a court to raise an *Atkins* issue at any time. Here, Archuleta is raising the issue. Section 103 does not get him around the procedural limits on his ability to raise the claim in post-conviction review.

Archuleta also reasons that if "procedural and time bars are not appropriate for denying sentencing relief to persons sentenced to death as juveniles, or for the crime of rape, then they are not appropriate for denying relief to persons who are intellectually disabled." Br.Aplt. 46. For support, he cites *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005).

But again, *Roper* only listed specific death-penalty exclusions. It said nothing about whether the States could restrict when a person could seek state relief for those exclusions.

Archuleta also argues that, because the intellectually disabled "are a protected class under federal law,…courts are under no obligation to apply procedural bars which directly conflict with their rights to pursue remedies

for constitutional violations." Br.Aplt. 45. For support, he cites *Lake v. Arnold*, 232 F.3d 360, 369-70 (3rd Cir. 2000). But again, State law, not federal policy, governs the limits on state procedures when there is no federal right to the procedure in the first place.[11]

Finally, the rule Archuleta advocates—that no time or procedural limits could apply to state petitions raising *Atkins* claims—would give death-sentenced petitioners a tool for unjustified delay, a well-recognized problem in death-penalty litigation. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) ("In particular, capital petitioners…might deliberately engage in dilatory tactics" such as withholding theories for relief until an appeal, resulting in another run in district court, "to prolong their incarceration and avoid execution."). Under Archuleta's proposed rule, a death-sentenced petitioner could use an *Atkins* claim to derail an execution by withholding it until the eve of his execution. If no time or procedural bar could block merits review, a court would have to stay the execution and allow the claim

[11] And the *Lake* court's concern does not exist in Utah. The Third Circuit applied federal tolling law to a federal claim raised in federal court to conclude that Lake timely filed her complaint because State tolling law would not consider how Lake's intellectual disability affected her ability to discover her injury. *Lake*, 232 F.3d at 370-72. By contrast, Utah law specifically tolls the 1 year "for any period during which the petitioner was prevented from filing a petition due to…mental incapacity." Utah Code Ann. § 78B-9-107(3).

to proceed regardless of whether the petitioner could have raised it timely. *See Hill*, 437 F.3d at 1081, 1083 (denying as time barred motion to file successive federal petition to raise *Atkins* claim filed nearly four years after *Atkins* was decided and only four days before Hill's scheduled execution).

Beaty illustrates the potential for abuse. The Ninth Circuit recognized that Beaty had passed up many opportunities to present his *Atkins* claim in the years between the *Atkins* decision and his request seven years later for a federal stay to raise the claims in state court and in successive federal habeas litigation. The court continued, "Against this background, it appears that Beaty is engaging in 'needless piecemeal litigation[, or] ... collateral proceedings whose only purpose is to vex, harass, or delay.'" *Beaty*, 554 F.3d at 784-85 & n3. Procedural limits protect against such abuses.

In sum, the PCRA's time and procedural limits do and should apply to *Atkins* claims.

D. Even if PCI counsel were deficient, their representation ended in 2008 and Archuleta did not justify his 2015 filing of the *Atkins* claim.

The PCRA's time bar independently proscribes merits review of an untimely claim. And even if Archuleta's PCI counsel were ineffective, it cannot excuse his untimely filing here.

All of the PCI counsel Archuleta says should have raised an *Atkins* claim ceased to represent him in 2008. By that time, he already had federal habeas counsel who eventually raised an *Atkins* claim in federal court. But they did not file the present *Atkins* claim until December 12, 2014. So even if PCI counsel's representation somehow impeded Archuleta's ability to present his *Atkins* claim in state court, that impediment ended 6 ½ years before he finally did present it. Representation that ended in 2008, even if deficient, cannot justify waiting 6 ½ more years to file a petition raising the *Atkins* claim.

Funding restrictions also do not justify the delay. The Legislature amended the funding statute effective February 8, 2008. And as detailed below, the amended statute provides for funding limited only by what the post-conviction judge considers reasonable. So even though the funding restrictions PCI counsel face ended in 2008, Archuleta waited nearly seven more years to file the present petition. Utah Code Ann. § 78B-9-202.

Further, Archuleta is pursuing this claim in both this Court and federal court with his federally-funded habeas counsel. He has had federally-funded habeas counsel since 2007 when they were appointed to begin working on his federal habeas petition. They included the *Atkins* claim in Archuleta's federal petition filed in December 2012. And despite

having federally-funded counsel since 2007, Archuleta still has not developed the evidence to support his *Atkins* claim. Again, the pre-2008 funding restrictions cannot explain why Archuleta delayed filing this claim in state court until 2015.

Similarly, the last PCI counsel against whom the State sought sanctions withdrew in June 2008. And the rule 11 motion filed in the PCI proceedings against state counsel cannot explain why it took federal counsel over seven years to file the present petition.

Even if post-conviction ineffectiveness could support post-conviction relief, Archuleta's claim would still be time barred. Any PCI ineffectiveness claim would have accrued when this Court affirmed the post-conviction judgment. If Archuleta had a post-conviction ineffectiveness cause of action, it accrued on November 22, 2011. Thus, under the PCRA statute of limitations, Archuleta had until November 22, 2012 to file a successive petition. Utah Code Ann. § 78B-9-107(1). Archuleta did not file this post-conviction petition until December 12, 2014, more than two years after the statute of limitations expired on that overly-generous reading.

E. Archuleta's PCI counsel were not ineffective.

Archuleta asks the Court to excuse any time or procedural barriers in part by arguing that his PCI counsel were ineffective because they did not

raise his *Atkins* claim in the PCI proceeding. Br.Aplt. 47. As explained in the following subpoint, ineffective assistance by counsel in a prior post-conviction proceeding cannot excuse the PCRA's time and procedural bars. But even if it could, it would not help Archuleta. On the undisputed facts, Archuleta's PCI counsel were not ineffective, nor were they stymied by funding restrictions or the State seeking to enforce compliance with ethical and procedural rules.

Archuleta relies on the Sixth Amendment ineffective-assistance standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance under that standard, Archuleta had to prove both (1) that his PCI team performed deficiently, and (2) prejudice.

To prove deficient performance, he would have to prove specific acts or omissions on the *Atkins* issue that were objectively unreasonable. *Id.* at 687-88, 690; *Parsons v. Barnes*, 871 P.2d 516, 521 (Utah 1994). He had to overcome a "strong presumption that [PCI] counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see also State v. Taylor*, 947 P.2d 681, 685 (Utah 1997). "'Surmounting *Strickland*'s high bar is never an easy task.'" *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citation omitted).

To prove prejudice, Archuleta had to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. This means Archuleta had to show a reasonable probability that his PCI team could have prevailed on an *Atkins* claim.

Atkins did not specifically define intellectual disability for purposes of the exemption. But at the time, the DSM-IV defined it to be (1) "[s]ignificantly subaverage intellectual functioning," (2) "[c]oncurrrent deficits or impairments in present adaptive functioning" in at least 2 of a number of specified areas, and (3) onset before age 18. A finding of significant subaverage intellectual functioning required an IQ score of 70 or below, with an error margin of approximately 5 points – up to 75. DSM-IV 41-49.

About nine months later, Utah passed its *Atkins* statute. The Utah statute permits an exemption only if a defendant shows (1) he "has significant subaverage general intellectual functioning [SSGIF] that results in and exists concurrently with" (2) "significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or [] both," and (3) "the subaverage general intellectual functioning and the

significant deficiencies in adaptive functioning" both manifest before age 22. Utah Code Ann. §§ 77-15a-101 to 102. IQ scores aid in determining whether a defendant has SSGIF, but Utah law imposes no absolute IQ score cutoff. *See also State v. Maestas*, 2012 UT 46,¶¶186-218, 299 P.3d 892 (construing and broadly considering operation and constitutionality of Utah's *Atkins* statute).

On the current record, Archuleta has not, as a matter of law, proven either *Strickland* element.

1. On this record, Archuleta did not overcome the strong presumption that his PCI team reasonably omitted an *Atkins* claim.

Archuleta asserts that his records raised "red flag[s]" about a possible *Atkins* exemption to justify investigation into the issue. He relies on his present expert's opinion that those records warranted investigating intellectual disability. Br.Aplt. 61. And he argues that the PCI team was deficient because they failed to do so. *Id*. at 48,57-71.

But Archuleta proffered no evidence that PCI counsel actually failed to investigate a possible *Atkins* claim. His claim fails for that reason alone because the "absence of evidence" about counsel's actual efforts "cannot overcome the 'strong presumption'" that their conduct fell "'within the

wide range of reasonable professional assistance.'" *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013).

And the record does not support Archuleta's assumption that PCI counsel did not investigate the issue. Lead counsel, Ed Brass, acknowledged in a declaration that he did not recall specifically directing the PCI mental health experts to assess Archuleta for an *Atkins* claim. But the PCI team did direct them to investigate "any and all possible mental health defenses." The team relied on the experts' "advice and evaluations" "regarding what claims to pursue." R2685-866. Because the PCI team never raised an *Atkins* claim, their experts presumably did not advise them to.

The PCI experts' testimony at the PCI evidentiary hearing support this conclusion. Dr. Gummow testified that she saw no evidence from the raw data on Archuleta's earlier IQ testing that Archuleta was intellectually disabled. She continued that most persons who tested Archuleta also did not think he was intellectually disabled. As to Dr. Faux's diagnosis of "Mental Retardation (marginal)," she explained that he may have meant borderline. And Dr. Gummow's IQ testing resulted in an 85 full scale score: more than 10 points above the upper limit of the DSM-IV's requirement for

an intellectual disability diagnosis.[12]

In his testimony, Dr. Cunningham specifically referred to *Atkins* as a death-penalty exclusion. He referred to one age-9 IQ subscore that he considered particularly low after adjusting it downward for Flynn effect. But even then, he would say only that the single downward-adjusted score put Archuleta "closer" to functioning in the intellectually disabled range or on the "cusp" or "edge" of intellectual disability. But he did not say that Archuleta was intellectually disabled.

The PCI team was entitled to rely "on the judgment and recommendations of qualified experts with expertise beyond counsel's knowledge." *Archuleta III*, 2011 UT 73,¶129; *see also Cullen v. Pinholster*, 131 S.Ct. 1388, 1405 (2011). The presumption is that they did, and the record supports that presumption.

And even without the experts, the records apparently available to the PCI team would have justified a decision not to investigate an *Atkins* claim at all. With a single exception from an unhelpful screening test not

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[12] Archuleta refers to Dr. Gummow's testimony that she advised doing a "full" neuropsychological evaluation. He continues that despite PCI counsel "eliciting this testimony from his own expert about what he himself needed to do," he failed to do it. Br.Aplt. 64. Archuleta does not explain the last. To the contrary, Dr. Gummow assessed Archuleta under a battery of neuropsychological tests and tested his IQ. Archuleta gives no hint what more needed to be done.

intended to yield a full IQ score, no IQ score in those records fell within the 65 to 75 range the DSM-IV required for a finding of significant subaverage intellectual functioning. In fact, all of the full IQ tests were over 80--with one as high as 96.

Archuleta has not established otherwise. Archuleta points to the 1980 Shipley IQ score of 71. *Compare* Br.Aplt. 35 (referring to Carol S. Tyler, MA, assessment showing "an overall IQ of 71") *with* R781 (referring to Tyler assessment showing "an overall IQ of 71 *on the Shipley Intelligence Scale*") (emphasis added). Archuleta offers no reason why PCI counsel should have relied on this outlier score to the preponderance of scores that were significantly higher, and the record shows why they properly did not. The evaluator who got that score also said that her other testing put Archuleta in the "Dull Normal range." "Dull normal" is not "significantly subaverage." Based on her testing, she reported that Archuleta "could certainly do better educationally and vocationally" than his then-measured sixth grade proficiency. Further, one PCI expert testified that the Shipley test is a screening device only, not a comprehensive IQ assessment.

Archuleta points to findings in the records that he had "borderline or lower level intellectual functioning." Br.Aplt. 61. But the standard is "significantly subaverage general intellectual functioning." Evidence that a

person is less intelligent than average therefore does not constitutionally compel an *Atkins* investigation in all cases. After all, half of the entire population are by definition below average.

Archuleta also relies on a 1974 diagnosis from Dr. Eugene J. Faux, M.D., diagnosing Archuleta "with mental retardation." Br.Aplt. 61. But the PCI team also had available the report of Dr. Howell—Archuleta's trial forensic psychologist—and the assistance of Dr. Gummow—the PCI neuropsychologist. Dr. Faux's actual diagnosis was "mental retardation (marginal)." Dr. Howell explained that this actually referred to what later came to be considered borderline intellectual functioning—a diagnosis different from intellectual disability under the DSM-IV. DSM-IV 740. Dr. Gummow also testified that the "marginal" may have meant "borderline." A contemporaneous IQ examination yielded an 83 score, which placed Archuleta in the "dull or slow learner classification," not "significantly subaverage." R2637-38.

Likewise, the records as a whole do not suggest concurrent deficits in adaptive functioning. Rather, they suggest the opposite. The hospital records in particular describe Archuleta's highly adaptive behavior. They talk about his manipulation of hospital staff by complying with rules as long as staff watched him, then acting out when they did not. They talk

about him organizing the children into a gang-land structure with him as the leader.[13]

Although Dr. Faux reported that, when Archuleta first entered the Archuleta home, he ate like an infant, could "only say a few words," and "seemed to understand little that was said to him," he continued that Archuleta "made significant progress in all development and intellectual spheres since coming to live with the Archuletas." R2637-38.

Even the crime circumstances evidenced Archuleta's real-world adaptability. For example, Archuleta knew enough to make Wood let Archuleta drive when Wood was weaving. This served both safety and detection-avoidance purposes. He warned Gordon not to kick out the taillights after he and Wood imprisoned Gordon in the trunk of his own car. He talked Wood out of starting a fight in Cedar City. He could reflect, before the murder, that Gordon would not leave Dog Valley alive. He knew before the murder that he was fully complicit in very serious crimes, and that what he and Wood were up to was wrong. He knew enough to cover over the blood trail between the murder site and the burial site. He

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[13] Archuleta said below that his limited progress at USH did not result from his unwillingness to make progress. R802. But the USH staff concluded the opposite. They reported that the behavior-modification plans used on Archuleta failed because he "continued his great adeptness at only performing when observed." R2650.

concocted stories about killing rabbits to explain why his pants were soaked with Gordon's blood. He recognized the need to purchase replacements, to take the blood-soaked pants with him after he did, and to dispose of them in a flooded drainage ditch. He did most of the talking at the various stops after he and Wood murdered Gordon. He secured transportation to his brother's condominium complex. He prevailed on the complex managers to allow them to use their phone to first call his brother—who was not home—then his girlfriend. He tried planting an alibi by asking his girlfriend if she had heard from Wood. He negotiated transportation back to Cedar City. He threw the keys to Gordon's car in a garbage can in Payson. And when he left Gordon's watch at his parents' home, he put it in his brother's room, not his own. Archuleta's behavior allays the Supreme Court's concerns in *Atkins* about the intellectually disabled who "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins*, 536 U.S. at 318. Instead, he revealed himself to be a highly adaptive, manipulative, and even reflective person concerned with evading detection.

On this record, Archuleta cannot overcome the strong presumption that his PCI team properly omitted an *Atkins* claim.

2. Archuleta failed to prove a reasonable probability that an *Atkins* claim would have succeeded had PCI counsel raised it.

Archuleta proffered no evidence that he actually qualifies for an *Atkins* exemption. In fact, he acknowledged this below. He said that his experts still needed to complete their evaluations. R805. This concession undermines his argument before this Court that summary judgment was inappropriate because he "allege[d] facts sufficient to support an *Atkins* claim." Br.Aplt. 88.

He proffered no testimony from an expert that he is intellectually disabled, only that he may be. In both of his declarations, Dr. Weinstein specifically declined to make a diagnosis until further testing is completed and information gathered.

Archuleta complains that the post-conviction court wrongly granted summary judgment despite that he "alleged facts which *support his claim* of intellectual disability." Br.Aplt. 40 (emphasis added). But Archuleta had to do more than offer supporting evidence. He had to show that he "could, if given" an evidentiary hearing, "produce evidence which would reasonably sustain a judgment in his favor." *Archuleta III*, 2011 UT 73,¶43. In other words, he had to show that he had proof he is intellectually disabled. He conceded he did not. *See also* R3750 n4 (post-conviction court rejecting

Archuleta's "sweeping" allegation "that the facts in the State's memorandum are disputed" since Archuleta did "not indicate which facts he is specifically disputing nor does he advance any alternative facts").

Without a proffer that Archuleta actually qualified for an *Atkins* exemption, he could not prove a reasonable probability that the PCI court would have vacated his death sentence on an *Atkins* claim if PCI counsel had raised one.

3. The record shows that funding limits and the State's rule 11 motion did not prevent Archuleta from raising his *Atkins* claim in his PCI case.

Archuleta also argues that funding limits and the State's rule 11 motion were "external factors" that "impeded" PCI counsel's ability to represent him. Br.Aplt. 66, 69-70. Again, any impediment ended long before Archuleta filed this action.

In any event, Archuleta proffered no evidence that PCI counsel omitted an *Atkins* claim due to funding limits or the rule 11 motion, and the

record shows otherwise.[14] On funding limits, Archuleta wholly ignores the record evidence, relying instead on Brass's general proffered testimony about the funding difficulties PCI counsel faced. *See, e.g.*, Br.Aplt. 97-98. But this ignores what Brass explained about why PCI counsel did not raise an *Atkins* claim. Brass did not declare that he considered, but declined to raise an *Atkins* claim either because he lacked the funds for it or because the State sought rule 11 sanctions on other claims. Instead, he explained that the PCI team charged two capitally-experienced mental health experts to identify all "mental health defenses." He continued that the PCI team relied on the experts' "advice and evaluations" "regarding what claims to pursue." As detailed above, the experts' testimony suggests they saw no supportable *Atkins* claim. And even after nearly eight years with federally funded counsel, Archuleta still has not shown that one exists. On this

[14] The rule 11 argument seems a quibble, and ordinarily the State would not devote as much attention to it as it does here. But this case must return to federal court when finished here; and when it does, it will return to a federal judge who improvidently made findings—uninvited by Archuleta and unvetted by the State's adversarial input—that the State acted improperly. The State therefore respectfully requests that this Court address the issue, expressly ruling that State's counsel acted in good faith and that the rule 11 proceedings did not affect PCI counsel's ability to bring an *Atkins* claim. Doing so will fortify the Court's final judgment, whatever it is, against later undoing in federal habeas review.

record, the PCI experts' advice, not funding or sanctions motions, apparently led PCI counsel to omit an *Atkins* claim.

On the rule 11 motion, Archuleta says that the PCI court found the State's motion "baseless." Br.Aplt. 69. And he criticizes that "'[d]espite'" the PCI court's "'detailed order denying'" the State's rule 11 motion, "the state immediately filed a notice of appeal.'" Br.Aplt. 98 n18.

While the PCI court denied the State's motion, it did not find it "baseless." Rather, it explained that it "simply disagreed" with the State "on the egregiousness of" PCI "counsel's conduct," and that it concluded only that none of what PCI counsel did rose to the level of a rule 11 violation. It ruled that because the State indeed had a "good faith basis" for filing the motion, State's counsel filed it for "no improper purpose." On that finding, the PCI court denied PCI counsel's rule 11 motion against State's counsel. PCIR3396-97; *see also* PCR1986-89;2138-68;1993-2008;2177-2203;R2917-64,3018-64 (explaining bases for seeking sanctions, such as (1) opposing summary judgment by repeating nearly verbatim an argument without disclosing that this Court had by then twice rejected it; (2) relying on one justice's "opinion" or "decision" in a case on point without disclosing opinion was a dissent; and (3) suggesting that statute at issue had changed without disclosing that this Court had expressly rejected the

argument he made on the statutory version that applied to his case); R2917-64,3018-64 (State's appellate briefs on rule 11 appeal).

Archuleta offers speculation about how the rule 11 motion may have affected PCI counsel's decisions, distortions about the litigation itself, and false implications about the State's motives. But the record supports none of those.

He says that the State sought the sanctions against PCI counsel "'for pursuing claims the state believed were unreasonable and unnecessary, despite'" the PCI team's belief "'otherwise.'" *Id.* at 70 (citation omitted). He continues that there "'is no way to understand the chilling effect'" the rule 11 motion had on PCI counsel's "'ability to zealously advocate.'" *Id.* (citation omitted). Further, he says that the State "'undoubtedly would have considered an *Atkins* claim to be unreasonable and unnecessary as well.'" *Id.* (citation omitted).[15]

But there is a way to understand whether the rule 11 motion chilled Brass's representation on the *Atkins* issue—ask him. Another of Archuleta's

[15] Archuleta quotes this language from the federal court's order granting the *Rhines* stay. The federal court reached the rule 11 issue on its own and without giving the State notice or an opportunity to be heard on it. But Archuleta has made these assertions his own by relying on them for relief here. And as shown later, the statements and implications are wholly baseless whatever the original source.

post-conviction counsel did so and got an explanation why PCI counsel omitted an *Atkins* claim. That explanation included no professed fear that the State might seek sanctions if PCI counsel raised an *Atkins* claim. That apparently was no oversight because Brass offered other testimony about the rule 11 motion. R2685-866.

It is plain that the rule 11 motion did not chill Brass's representation generally: despite the State's agreement to extend that safe-harbor period beyond what rule 11 required, Brass never withdrew or otherwise corrected any of the claims or arguments the State based its motion on.

And if Archuleta means to imply that the State would have sought sanctions if PCI counsel included as *Atkins* claim, the record shows otherwise. The State did not seek sanctions for claims the PCI team supported with a proffer from their experts even though it opposed those claims on the merits.

The State thus respectfully asks this Court to reiterate that State's counsel filed its sanctions motion in good faith, and rule that doing so did not cause Archuleta's default of his *Atkins* claim.[16]

[16] These arguments dispose of Archuleta's argument that the rule 11 motion interfered in PCI counsel's ability to raise an *Atkins* claim. Below, Archuleta distorted the Rule 11 litigation to suggest both sharp practice and improper motives by State's counsel. The State fully addressed those allegations in its summary judgment motion at R3308-11.

F. Ineffective assistance by PCI counsel does not excuse either a time bar or a procedural bar.

The PCRA includes no post-conviction ineffective-assistance exception to an otherwise time or procedurally barred claim. Archuleta does not argue otherwise. Instead, he argues that a right to effective post-conviction counsel that *Menzies v. Galetka*, 2006 UT 81, 150 P.3d 480, read into the PCRA applies to him. Br.Aplt. 47. He says that a later amendment clarifying that the PCRA guaranteed no such right cannot apply because doing so would retroactively extinguish a substantive right.

Rule 65C(a), Utah Rules of Civil Procedure, provides that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal…or the time to file such an appeal has expired." Under this rule, post-conviction courts may only apply exceptions that the PCRA permits. Ineffective-assistance by prior post-conviction counsel is not one.

The PCRA's limitation statute includes no "exception" at all for an untimely filing. Rather, a petitioner must timely file his claim, meaning he must file it within one year from the date it accrued plus any period during which the one year is tolled. The one year is tolled for any period during which a petitioner cannot file his petition due to (1) unconstitutional state

action, or (2) mental or physical incapacity. Utah Code Ann. § 78B-9-107. But there are no "exceptions" that would excuse an untimely filing, let alone one that would allow a filing no matter how many years had passed since the claim accrued or any impediment to filing had been removed—6 ½ in this case.

Likewise, the PCRA excuses a procedural bar for ineffective representation only for claims counsel improperly omitted at trial or on direct appeal. Beyond that, there is no ineffective-assistance procedural bar exception. Utah Code Ann. § 78B-9-106.

Under the controlling rule, then, the post-conviction court could not excuse the time and procedural bars for any ineffective assistance by Archuleta's PCI team.

1. *Menzies* does not excuse Archuleta's untimely, defaulted claim.

Relying on *Menzies*, Archuleta says that the Court should excuse any time or procedural bars because his PCI team were ineffective within the meaning of *Strickland*. But even if he could prove the traditional *Strickland* elements for PCI counsel's representation—which as shown above, the record and his proffer fail as a matter of law to do—and even if *Menzies* could apply to this case—which as shown below it does not—*Menzies*

would not excuse the time and procedural bars because this Court has never excused either on a mere *Strickland* showing.

In *Menzies*, this Court read the statutory right to funded counsel in death-penalty post-conviction cases to include a right to the effective assistance of counsel parallel to the Sixth and Fourteenth Amendment rights that apply in criminal proceedings. And the Court cited *Strickland* on this point. *Menzies*, 2006 UT 81,¶¶78-82,87-100.

But this Court has never excused a procedural default on a mere *Strickland* showing. In fact, Archuleta already raised and lost that argument. In PCI post-judgment litigation, Archuleta relied on *Menzies* to ask the PCI court to set aside the judgment on the same argument he asks for relief from the procedural bars here: PCI counsel was ineffective within the meaning of *Strickland*. This Court held, however, that *Menzies* relief is available only when counsel's representation "amount[ed] to willful and deliberate inaction, complete forfeiture of the entire post-conviction proceeding, or gross negligence." *Archuleta*, 2011 UT 73,¶166 n14 (quotations, citation, and alterations omitted). So as limited in Archuleta's own case, a mere *Strickland* showing is not enough for relief under *Menzies*. And this Court already concluded that Archuleta's PCI counsel's representation did not fall to the level that justified *Menzies* relief. *Id.* ¶167

(denying Archuleta's request for relief under *Menzies* because PCI team did not default Archuleta's entire case); *see also Honie v. State*, 2014 UT 19,¶91, 342 P.3d 182 (noting that, between *Archuleta* and *Kell v. State,* 2012 UT 25,¶18, 285 P.3d 1133, this Court had "essentially limited *Menzies* to its facts" and now allows relief from a post-conviction judgment only in case "of a complete default" by counsel). Archuleta's claim of PCI ineffectiveness within the meaning of *Menzies* is therefore res judicata.

And even if *Menzies* could excuse the time bar, Archuleta has not shown that it would excuse it forever. Any impediment to filing the *Atkins* claim that PCI counsel's representation may have posed ended seven years before Archuleta filed the claim. He has never offered any valid explanation for that delay.

2. The 2008 PCRA amendment clarifying that there is no statutory right to the effective assistance of post-conviction counsel applies to the *Atkins* claim Archuleta first raised in 2015.

After *Menzies* read the statutory provision for funded counsel in death-penalty post-conviction cases to include a right to the effective assistance of counsel, the Legislature amended the funding statute to provide, "Nothing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." Utah

Code Ann. § 78B-9-202(4). Archuleta argues this amendment cannot apply here because, he says, applying it would retroactively extinguish a "substantive" right. Br.Aplt. 38,54.

But under controlling retroactivity law, amended section 202(4) does apply to this case. The courts "apply the law as it exists at the time of the event regulated by the law in question." *State v. Clark*, 2011 UT 23,¶13, 251 P.3d 829. So for example, when a tort or breach of contract are at issue, the law regulating torts or breaches of contract in effect at the time of the tort or breach apply. If a law regulates matters such as filing a motion or an appeal, the law in effect at the time the motion or appeal is filed governs. *Id*. "When it comes to the parties' *procedural* rights and responsibilities…the relevant occurrence for such purposes is the underlying procedural act (e.g., filing a motion or seeking an appeal)." *Id*. ¶14. In that case, the governing law is "the law in effect at the time of the procedural act, not the law in place at the time of the occurrence giving rise to the parties' substantive claims." *Id*.

In *Clark*, the amended statute at issue did not permit the appellant to appeal, even though the unamended statute did. But because no right to appeal existed outside of the statutory right, the amended statute in effect when appellants filed their appeal applied. And because it did not permit

an appeal, the appeal they filed could not proceed. This was true even though the unamended statute, which permitted an appeal, was in effect at the time the conduct at issue in the appeal occurred. *Id*. ¶¶10-11,15.

Under *Clark*, the 2008 PCRA amendment overturning *Menzies* applies to this 2015 case, and Archuleta cannot rely on PCI counsel's ineffective assistance to escape time and procedural bars. *Menzies* never permitted substantive relief for PCI counsel's ineffective assistance. That is, post-conviction counsel's ineffective assistance would not justify post-conviction relief from the underlying conviction. It would only permit by-passing a procedural impediment to considering the merits of a separate claim that may justify post-conviction relief.

And Archuleta only relies on *Menzies* to excuse procedural defects in his 2015 action. The event the *Menzies* rule would address is the State's procedural defenses to Archuleta's 2015 post-conviction case. And until the State raised those procedural defenses in 2015, the event that gave rise to Archuleta's post-conviction ineffective-assistance response to the procedural defenses had yet to arise. Therefore, as in *Clark*, the law in effect when that event occurred in 2015, including the 2008 amendments doing away with *Menzies*, governs this case. That law permits no post-conviction ineffective-assistance exception to the time and procedural bars.

3. Archuleta has not demonstrated the existence of equitable judicial powers in post-conviction proceedings, much less justified the exercise of such powers to create a *Martinez*-like exception.

Archuleta asks this Court to "recognize an equitable remedy analogous to that created by the United States Supreme Court in *Martinez v. Ryan*." Br.Aplt. 91 (citing 132 S. Ct. 1309, 1315 (2012)). In *Martinez*, the Supreme Court held that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's default of a claim of ineffective assistance at trial." *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). This rule applies only where a federal habeas petitioner had to postpone his trial ineffective assistance claims until his "initial-review collateral proceeding." *Id*. at 1318. And this rule stemmed from a well-recognized equitable power federal courts have to "excuse the prisoner from the usual sanction of default" where they could show cause for and prejudice from the default. *Id.*

Archuleta has not shown that Utah courts have a comparable equitable power in post-conviction proceedings. But even if they did, this Court has already promulgated a procedural rule defining the limits of judicial authority: rule 65C, Utah Rules of Civil Procedure. The Utah Constitution gives this Court the authority to "adopt rules of procedure and evidence." Utah Const. art. 8, § 4 ("The Supreme Court shall adopt rules of

procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process.").

In 2009, this Court amended rule 65C(a), Utah Rules of Civil Procedure. It now provides that the PCRA "sets forth the manner and extent to which a person may challenge the validity of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The current rule also deleted language in the prior subsection (c) that allowed a petitioner whose prior post-conviction petition had been denied to file a successive petition raising additional claims if he could demonstrate "good cause" for doing so. *Compare* Utah R. Civ. P. 65C(c) (2008) *with* Utah R. Civ. P. 65C(d) (2010). The Advisory Committee Notes to Rule 65C state that the rule amendments "embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." This Court's rule adopted the PCRA as the medium through which any judicial powers will be exercised.

Although the common law provided "'exceptions' to the limitations of the PCRA," those "exceptions, in turn, were repudiated by the legislature in 2008, in a provision clarifying that the PCRA is the 'sole remedy' for post-conviction relief." *Pinder v. State*, 2015 UT 56,¶56, 367 P.3d 968 (citing Utah Code § 78B–9–102(1); *Taylor v. State*, 2012 UT 5,¶11 n3, 270 P.3d 471 (noting

that Utah Code subsection 102(1) renders the common law exceptions inapplicable for all claims filed on or after May 5, 2008).

Even if the Court had discretion to exercise extra-statutory powers, which it does not, Archuleta has not justified using that discretion in the manner *Martinez* authorized federal courts to apply habeas law. *Martinez* did not create a general right to effective assistance of counsel during post-conviction and a concomitant excuse for all claims defaulted by post-conviction counsel. The explicit holding of *Martinez* and controlling Tenth Circuit precedent exclude all non-trial ineffectiveness claims from the "limited qualification" to the Supreme Court's usually unwavering rule against finding from post-conviction ineffectiveness cause for defaulting a claim. *Martinez* 132 S. Ct. at 1319. The Tenth Circuit held in *Banks v. Workman* that "*Martinez* was equally clear about what it did *not* hold," including circumstances where state "law permitted [the prisoner] to assert his claim of ineffective assistance of trial counsel on direct appeal." 692 F.3d 1133, 1148 (10th Cir. 2012) (emphasis in original). The Tenth Circuit thus refused to excuse Banks's defaulted appellate ineffectiveness claim under the *Martinez* rule. *Id.*

Creating an equitable rule like *Martinez* under Utah post-conviction law would not have any operative effect because Utah post-conviction

proceedings are not "initial review collateral proceedings." Utah law permits convicted persons to raise trial ineffective assistance claims on appeal. *See, e.g., State v. Litherland*, 12 P.3d 92, 98 (Utah 2000); Utah R. App. P. 23B, effective October 1, 1992 (adopting a procedure for a remand to develop additional facts on an appellate challenge to trial counsel's representation). The prohibition from raising trial counsel's ineffectiveness on direct appeal that *Martinez* requires for its new "cause" exception to apply does not exist under Utah law. *Banks*, 692 F.3d 1148 (*Martinez* did not apply to excuse defaulted claims "because Oklahoma law permitted Mr. Banks to assert his claim of ineffective assistance of trial counsel on direct appeal"). In fact, challenging trial counsel's effectiveness on direct appeal has become ubiquitous in Utah.

Thus, the *Martinez* exception does not apply in Utah even under federal law because defendants may challenge their trial attorney's effectiveness on appeal. Archuleta has offered no reason to import into Utah law an inapplicable federal habeas doctrine that does no work here because the defects it remedies do not exist in Utah in the first place.

Archuleta possibly implies that federal limitations on his ability to bring claims in federal habeas in fact compel this Court to hear those claims now. *See, e.g.*, Br.Aplt. 90 (stating "Federal law requires that all claims in a

federal habeas petition that arises from a state court proceeding must first have been presented to a state court"). While it is true that federal law generally prohibits a federal petitioner from presenting claims that he did not first exhaust in state court, *see* 28 U.S.C.A. 2254 (b)(1)(A), that limitation does not impose any obligations on courts of this state to hear any claims. Nor could it. State post-conviction remedies are governed by state, not federal, law. States have no constitutional obligation to allow post-conviction review at all. *Murray*, 492 U.S. at 6. Because there is no federal constitutional right to state post-conviction review, there is no federal constitutional or statutory boundary on the procedural limits the states choose to impose on it.

G. Archuleta's constitutional challenges to the PCRA's time and procedural bars do not justify reaching the merits of his claims.

Archuleta says that if the PCRA precludes merits review of his *Atkins* claim, then it is unconstitutional and the Court "should exercise its traditional common law authority over collateral proceedings." Br.Aplt. 84. He says that, if the PCRA cuts off merits review of his Atkins claim or does not include a right to the effective assistance of post-conviction counsel, then it unconstitutionally (1) suspends the writ of habeas corpus, (2) denies

him due process, and (3) results in cruel and unusual punishment. The PCRA violates none of these constitutional limitations.

Much of Archuleta's constitutional challenge rests on precedent stating that the Utah Constitution assigns to the judiciary all authority over post-conviction review. *See, e.g.*, Br.Aplt. 85-86 (citing *Tillman v. State*, 2005 UT 56, 128 P.3d 1123; *Gardner v. Galetka*, 2004 UT 42,¶17, 94 P.3d 263; *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989)). This means, he says, that the Legislature may not impose greater restrictions on post-conviction review than this Court has imposed. He argues that, because the PCRA imposes greater time and procedural bar restrictions on merits review, the Court should apply the pre-PCRA common law procedural rules. Br.Aplt. 84.

The State disagrees with that precedent. *See* subpoint 3 below. But even if it is sound, the PCRA does not encroach on constitutionally-based judicial authority. As noted, this Court has already decided that Utah courts will exercise whatever authority they have over post-conviction remedies by applying the PCRA. The Advisory Committee Notes to Rule 65C state that it "is the committee's view that the added restrictions which the Act places on post-conviction petitions do not amount to a suspension of the writ of habeas corpus." By itself, current rule 65C(a) defeats any claim that the PCRA encroaches on the judiciary's constitutional writ power.

Archuleta argues under *Winward v. State* that the judiciary retains independent constitutional ownership of the writ sufficient to override the PCRA's limitations. *Id.* at 83; *id.* at 86 (citing *Winward v. State*, 2012 UT 85,¶18, 293 P.3d 259). And he suggests that constitutional power is coextensive with common-law habeas procedure.

Archuleta fails to show entitlement to relief under *Winward* for three basic reasons. First, Archuleta comes nowhere close to satisfying the test for the "egregious injustice" exception discussed in *Winward*—if such an exception even exists. Second, Archuleta asks this Court to improperly substitute his own policy preferences into the statutory scheme. Third, *Winward* was incorrectly decided at its inception.

1. Even if there is an egregious injustice exception to the PCRA's procedural bars, Archuleta does not qualify.

Archuleta cites *Tillman*, 2005 UT 56,¶22, for the proposition that the common law exceptions to the procedural bar enumerated in *Hurst*, 777 P.2d at 1033, remain in effect because the power to review the writ is vested in the judiciary. Br.Aplt. 85. He then jumps directly into *Winward*'s three-part test to establish an egregious injustice, ultimately arguing that his case is one that would satisfy the common law exception for "a claim overlooked in good faith with no intent to delay or abuse the writ," *id.* at 91, articulated in *Hurst* and its predecessors. *See Hurst*, 777 P.2d at 1037. Of course, this

Court already determined that Archuleta's first state post-conviction effort did not qualify for the *Hurst* exceptions and that his effort to relitigate them constituted "an abuse of the writ" of habeas corpus. *Archuleta III*, 2011 UT 73,¶34 n4.

But Archuleta commits two other fundamental errors. First, he overlooks the fact that this Court has already recognized the Legislative repudiation of *Hurst* and explicitly held that the 2008 amendments to the PCRA eliminated the *Hurst* exceptions so that they only apply to "claims filed before May 5, 2008." *Pinder*, 2015 UT 56,¶56. Archuleta fails to even acknowledge, much less confront, *Pinder.*

Second, he conflates satisfying the *Hurst* exception with satisfying *Winward*'s far more stringent egregious injustice exception. *Winward* requires Archuleta to (1) show "as a threshold matter…his case presents the type of issue that would rise to the level that would warrant consideration of whether there is an exception to the PCRA's procedural bars," (2) "fully brief the particulars" of the exception he seeks, and (3) "demonstrate why the particular facts of his case qualify under the parameters of the proposed exception." *Winward*, 2012 UT 85,¶18. Archuleta fails all three.

As discussed in Point II, below, Archuleta did not overcome even the basic requirement to defeat summary judgment by producing evidence

sufficient to create an issue of material fact. He fails to meet *Winward*'s threshold test for this reason alone.

Yet *Winward* requires a much more significant evidentiary showing than the relatively low burden required to overcome summary judgment. *Winward* required Archuleta to "'point[] to sufficient factual evidence or legal authority to support a conclusion of *meritoriousness*.'" *Id*. ¶20 (quoting *Adams v. State*, 2005 UT 62,¶20, 123 P.3d 400) (emphasis added). Archuleta proffered legally insufficient evidentiary support for a meritorious *Atkins* claim. If there is an egregious injustice exception to the procedural bars, it would only lie for palpable error that would shock the conscience were it not addressed. As *Winward* says, Archuleta must show his petition has "'an arguable basis in fact,' which would 'support a claim for relief as a matter of law.'" *Winward*, 2012 UT 85,¶20 (quoting *Adams*, 2005 UT 62,¶19). This is a high evidentiary threshold that would essentially require Archuleta to show that *he* was entitled to summary judgment. He is, of course, far from satisfying that standard.

Because this is a threshold test, the Court need not even proceed to the other two *Winward* requirements.

Archuleta argues that he qualifies for the historical exception to the procedural bars for "a claim overlooked in good faith with no intent to

delay or abuse the writ." Br.Aplt. 91. But that is one of the *Hurst* exceptions that have been squarely repudiated. He traces no historical antecedents that tie that exception back to the constitutional writ. Though he makes much of this Court's assertion of constitutional authority over the traditional writ of habeas corpus, he does not even cite *Pinder*, which unequivocally holds that the very *Hurst* exception he relies on is no longer available for any claims filed after May 5, 2008. *See Pinder*, 2015 UT 56,¶56. And *Winward* itself rejected the notion that the common law doctrines operated within its framework. *Winward*, 2012 UT 85,¶20 n5 (stating "if a petitioner cannot prove that he would prevail under" the common law "former interest of justice exception, which we expressly abandoned after the 2008 amendments to the PCRA, then a petitioner certainly cannot qualify under a more rigorous standard such as 'egregious injustice'") (citations omitted).

But even if the common law applied within *Winward*'s framework, to trigger a court's duty to consider any common law procedural bar exception, Archuleta must first prove that PCI counsel did not withhold the *Atkins* claims for tactical reasons. "'[C]laims that are withheld for tactical reasons should be summarily denied.' This language imposes a separate and distinct procedural determination for successive post-conviction claims that is made before we reach an analysis under the 'good cause' common

law exceptions." *Gardner v. Galetka*, 2007 UT 3,¶26, 151 P.3d 968 (citation omitted). Archuleta bears the burden on this threshold question. *Taylor v. State*, 2012 UT 5,¶50, 270 P.3d 471.

Archuleta acknowledges the common law bar to considering tactically withheld claims, Br.Aplt. 92-93, but he wholly ignores his burden to show this claim was not tactically withheld. The Court should not declare the PCRA unconstitutional in favor of common law rules that Archuleta has not even attempted to show the Court can consider in the first place.

And as detailed above, it appears PCI counsel did withhold the *Atkins* claim for tactical reasons. That is, he instructed his experts to look for all mental health defenses and followed their advice on which claims to raise. Although the experts testified about intellectual disability, neither testified that Archuleta was intellectually disabled. The neuropsychologist testified she saw nothing in the raw data on Archuleta's historical IQ testing to evidence intellectual disability, and her testing put him well outside the range to support such a diagnosis.

Likewise, there is no reason to create a state constitutional right to the effective assistance of post-conviction counsel because Archuleta has not shown that it would excuse the procedural bar here. Rather, any

impediment to raising the *Atkins* claim posed by PCI counsel's representation ended 6 ½ years before he finally filed it. Archuleta offers no reasoned basis why that further, extensive delay should be excused.

And as shown above, Archuleta's proffer, viewed with the record, fails as a matter of law to meet either element of an ineffective-assistance claim. The Court must decline to create a new constitutional right to the effective assistance of post-conviction counsel because it would not excuse the time and procedural bars here even if it existed. *Carter v. State*, 2012 UT 69,¶38, 289 P.3d 542 (declining to decide whether the 2008 amendment that the funding statute creates no right to effective assistance of post-conviction counsel because Carter did not show his post-conviction counsel were ineffective).

2. The PCRA procedural bars, including its prohibition on post-conviction ineffective counsel claims, are constitutional.

Archuleta has already lost his claim that the Sixth Amendment guaranteed him the right to effective PCI counsel; and he already lost the claim that his previous statutory right was violated. Thus, Archuleta's real argument is that it would be good policy to give death-sentenced inmates a Sixth Amendment-equivalent right to the effective assistance of post-conviction counsel, and that the contrary PCRA provision must therefore be

unconstitutional. But in assessing whether the Legislature has exceeded its constitutional authority, the question is not whether the Legislature's decision was "wise policy." *State v. Angilau*, 2011 UT 3,¶10, 245 P.3d 745. Rather, the Legislature has the authority to make policy determinations; a court's role is to implement those policies. *See, e.g., Nevares v. M.L.S.*, 2015 UT 34,¶50 n16, 345 P.3d 719.

Of course, the Legislature's policy-making role cannot infringe on rights the constitution guarantees. But a court may not usurp that role by using the constitution to override Legislative policy in favor of policy a court considers superior.

Here, the Legislature has defined the scope of representation provided to death-sentenced post-conviction petitioners. Archuleta argues only that it would be better policy to constitutionalize a different right. But he has not shown by reference to the framers' intent, particular traditions of the State, the common law, or the law in other jurisdictions that the Utah constitution actually guarantees that right. He therefore has not shown that the Legislature exceeded its policy-making role. Instead, he asks the Court to use the constitution—specifically the Court's unrelated writ powers—as a prop to override the Legislative policy in favor of one he considers superior. The Court may not do that.

Further, Archuleta challenges the Legislative policy by asking the Court to draw an insupportable inference about what the policy is—to provide only incompetent counsel to assure that death-sentenced inmates will lose their post-conviction cases. Br.Aplt. 78. The PCRA's plain language directly contradicts Archuleta's supposition about the Legislature's policy. The PCRA funding statute provides for (1) counsel who meet minimum qualifications established by this Court through its rule making authority, and (2) attorney fees and litigation costs limited only by what the post-conviction court deems reasonable. Utah Code Ann. § 78B-9-202(2) & (3)(a),(c),(e). In fact, it provides for what Archuleta says it should—competent, funded counsel.

And contrary to Archuleta's argument, creating a Sixth Amendment-like right to the effective assistance of post-conviction counsel will not promote efficiency. Experience has shown it will instead encourage the opposite. After *Menzies* and before the 2008 PCRA amendments, four death row inmates, including Archuleta, relied on *Menzies* either to reopen a closed first post-conviction action or to permit a second round of post-conviction review. *See Taylor v. State*, case no. 20090771; *Kell v. State*, case no. 20090998; *Carter v. State*, 20090432; and *Archuleta v. Galetka*, case no. 20100791. In fact, this successive petition is Archuleta's second attempt at

successive post-conviction review founded on alleged ineffective assistance by PCI counsel.

As these cases show, creating a right to effective assistance of post-conviction counsel will not speed the end to litigation. Rather, it will encourage endless litigation over whether the right was satisfied. Subsequent counsel will always find some way to fault prior counsel's representation as a way to claim that the right was violated. Even if she fails, the litigation will still delay the process to a petitioner's unfair advantage. *Rhines*, 544 U.S. at 277-78 ("In particular, capital petitioners…might deliberately engage in dilatory tactics" such as withholding theories for relief until an appeal, resulting in another run in district court, "to prolong their incarceration and avoid execution.").

That was the problem with the post-*Menzies* litigation that the 2008 amendment addressed. And it addressed the problem with a properly balanced approach. It guaranteed qualified and funded counsel, but headed off using performance as a means of protracted litigation.[17]

[17] As this case demonstrates, even allowing funded counsel does not assure efficiency. Archuleta has had federally funded counsel since 2007. Yet he did not file his State *Atkins* case until almost eight years later. And even after eight years, he conceded he has yet to develop proof that he meets the *Atkins* exemption.

3. There is no "egregious injustice" exception to the PCRA's procedural bars, and this Court's cases suggesting otherwise should be expressly repudiated.

As discussed above, the 2008 amendments revised the PCRA to make it the exclusive source for post-conviction remedies in Utah. *See Pinder*, 2015 UT 56,¶56. Despite the explicit language of the PCRA and cases interpreting it as providing the "'sole remedy' for post-conviction relief" in Utah, *id.*, arguments persist that common law remedies must somehow remain available. Petitioners like Archuleta have been encouraged by *Winward* and its predecessor, *Gardner v. State*, 2010 UT 46, 234 P.3d 115. In each of those cases, the State did not concede that some vestige of the common law exceptions to the procedural bars might have survived the 2008 amendments in cases of egregious injustice—by virtue of the judiciary's constitutional writ authority.

The State, Archuleta, and the post-conviction court all agree that the post-conviction court did not have authority to disregard this Court's directive in rule 65C to apply the PCRA procedural bars. *See* Br.Aplt. 84 n15; R3759-60. This Court has reserved for itself sole authority to consider extra-statutory exceptions to the PCRA procedural bars. *Gardner*, 2010 UT 46,¶¶93-94 (stating "*this court* retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would

result in an egregious injustice"). All other courts must follow rule 65C and the PCRA.

But that reality has not stopped extensive litigation in the lower courts over the existence of an "egregious injustice" exception to the PCRA procedural bars. Many post-conviction petitioners have made such claims, and in each instance the State has had to fully brief the question. *See, e.g., Maestas v. State,* district case no. 130907856; *Lynch v. State*, district case no. 150900245; *Brown v. State,* case no. 20150266-CA; *Collum v. State*, 2015 UT App 229, 360 P.3d 13; *Benavidez v. State,* district case no. 130901184; *Jacob v. State*, district case no. 130901368; *Lucero v. State,* district case no. 130404567, appellate case no. 20150197-CA; *Sandoval v. State*, district case no. 130907469, appellate case no. 20150617-CA; *Williams v. State,* case no. 20140135-CA; *Dyches v. State*, district case no. 140901822; *Leger v. State*, district case no. 130500137; *Noor v. State*, district case no. 130907566, appellate case no. 20160797-CA; *McNair v. State*, district case no. 100901725. And in each instance that has reached final resolution, the lower courts have declined to reach the question because they have no authority to disregard rule 65C.

The "egregious injustice" question thus multiplies litigation in the district courts even though only this Court can decide it. The State thus

suggests that deciding the question once and for all would broadly serve judicial economy.[18]

In *Winward* and *Gardner*, as here, the claims at issue were a hodgepodge of previously-litigated or otherwise procedurally defaulted claims unsupported by any new evidence of any significance. Like Archuleta's claim here, the claims in *Winward* and *Gardner* were so weak that this Court could easily avoid the difficult constitutional question by merely finding that, whatever might have survived the 2008 amendments—if anything—the claims in those particular cases did not rise to the level of an egregious injustice. As discussed, Archuleta's *Atkins* claim does not rise to the level of an egregious injustice either and he also fails to satisfy *Winward*'s three-prong test. However, the analytical underpinning for the *Winward* test is also incorrect and should be overruled.

[18] The State acknowledges that this Court may be inclined to invoke constitutional avoidance principles since, as shown, Archuleta could not benefit from a constitutional holding. *See Gardner*, 2010 UT 46,¶93 (noting this Court's "obligation to 'avoid addressing constitutional issues unless required to do so'" (quoting *State v. Anderson*, 701 P.2d 1099, 1103 (Utah 1985)). The State also acknowledges that Archuleta failed to preserve his *Winward* argument. *See* R3759 (post-conviction court stating *Winward* factors not "explicitly addressed" and declining to reach them). But for the reasons stated, the State expressly asks the Court to reach the issue anyway, repudiate prior statements indicating judicial ownership of post-conviction remedies, and deny Archuleta relief on statutory grounds.

The *Winward* opinion purported to avoid deciding whether an egregious injustice exception to the PCRA's procedural bar exists. Yet the court also stated that it "would be improvident for us to address our constitutional authority to consider the merits of claims that are barred by the PCRA's procedural limitations in a case that does not raise a meritorious claim" and then set out its three-pronged "framework for considering a petitioner's claim that he qualifies for an exception." 2012 UT 85,¶¶16-19. This analysis resulted in the oddity of establishing a test to determine whether a petitioner qualifies for an exception that has never been determined to exist. Justice Lee's concurrence in the judgment in *Winward* pointed this out and provides a useful approach for thinking through what portions, if any, of the common law of habeas corpus survived the PCRA's 2008 amendments.

Post-conviction relief is "a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review" and it "is not part of the criminal proceeding itself." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). As a result, the constitutional rights that attach to criminal trials, pleas, and direct review, do not attach to the post-conviction process. In fact, "States have no obligation to provide this avenue of relief." *Id*; *accord Murray*, 492 U.S. at 8. Because the post-conviction process is a

creation of state law not mandated by the constitution, states have plenary power to regulate it or do away with it altogether.

While it is true, as Archuleta points out, that the Utah Constitution's suspension clause necessarily vests the power to review and adjudicate the writ of habeas corpus with this Court, Br.Aplt. 85, he conflates the historical writ—which is protected in the constitution—with the post-conviction relief process—which is entirely a creature of statute, subject to regulation. He places heavy reliance on *Tillman*, 2005 UT 56, for the proposition that the common law exceptions discussed in *Hurst*, 777 P.2d 1029, survive despite the PCRA. Br.Aplt. 85. But the language he cites predates the 2008 amendments and was "repudiated by the legislature in 2008, in a provision clarifying that the PCRA is the 'sole remedy' for post-conviction relief." *Pinder*, 2015 UT 56,¶56.

With that in mind, the critical question is whether post-conviction review is part of the constitutional writ enshrined in the Utah Constitution. If it was, then there is arguably some area of "lingering judicial power" beyond the PCRA that belongs solely to the Utah Supreme Court that *may* include the power to find an egregious injustice exception to the PCRA's bars. *Winward*, 2012 UT 85,¶49 (Lee J., concurring). If it was not, then the PCRA's statement that it is the sole remedy for post-conviction review in

Utah usurps no constitutional authority belonging to this Court and nothing, including the power to find an egregious injustice, survived the PCRA's 2008 amendments.

This is critical because there is no doubt that the notion of an egregious injustice exception was not embedded in the constitutional writ, but was conceptually invented in *Gardner* and expounded in *Winward*. In fact, the phrase "egregious injustice" only appears in four cases before it appeared in *Gardner* in 2010. Only two of those were criminal cases, and in each the phrase was used to describe the "egregious injustice" that would result from allowing a convicted person to go free because of technical noncompliance with the timeframes set out for sentencing. *See State v. Tyree*, 2000 UT App 350,¶7, 17 P.3d 587; *State v. Helm*, 563 P.2d 794, 797 (Utah 1977). That alone shows there was no longstanding tradition of allowing noncompliance with the procedural bars based on an egregious injustice. But there was nothing analogous to it embedded in the writ either.

As laid out below, historically there was no post-conviction, post-appeal error review process at all. For most of its history, the writ of habeas corpus was an extremely limited procedure for challenging confinement when no other judicial process was available. At the time the Utah

Constitution was drafted and ratified, the framers understood it only in this limited fashion. The "privilege of the writ of habeas corpus" enshrined in Article I, section 5 of the Utah Constitution encompassed almost none of the avenues for relief later developed at common law or currently enumerated in the PCRA.

Neither did the federal common-law writ by the 19th Century. In *Ex parte Kearney*, 20 U.S. 38 (1822), the United States Supreme Court addressed an application for the writ at a time when there was no right of appeal from the federal circuit courts to the Supreme Court in criminal cases. The Court noted that if "this Court cannot *directly* revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose, that [the writ] was intended to vest it with the authority to do it indirectly?" *Id*. at 42. It then noted that the writ is not intended to act as a form of appeal to review errors, stating "[i]f this were an application for a *habeas corpus*, after judgment of an indictment for an offence within the jurisdiction of the Circuit Court, it could hardly be maintained, that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner." *Id*. at 43.

The Court then turned to an English case setting out that the writ was limited to challenges of the jurisdiction of the court, concluding that the writ

"can do nothing, when a person is in execution by the judgment of a Court having competent jurisdiction." *Id*. at 44. It then specifically declined to expand the scope of the writ, stating instead it was "entirely satisfied to administer the law as we find it." *Id*. at 45. That was the scope of the writ of habeas corpus as originally incorporated into American law and the United States Constitution. *Accord Ex parte Watkins*, 3 Pet. 193, 207, 7 L. Ed. 650 (1830) (denying petition for writ of habeas corpus from a convicted prisoner because the "judgment of the circuit court in a criminal case is of itself evidence of its own legality"); *see generally*, 6 Wayne R. LaFave, Criminal Procedure, § 28.1(a), at 6-7 (2nd ed. West 2004).

The first expansion of the federal writ came in 1867, but not from expansion of the common law. Rather, Congress passed an act making the writ available to all cases of detentions in violation of the constitution, laws, or treaties of the United States. *Felker v. Turpin*, 518 U.S. 651, 659 (1996). Yet even as late as *Thompson v. Harris*, 144 P.2d 761 (Utah 1943), *cert. denied*, 324 U.S. 845 (1945), this Court stated "[o]n habeas corpus this court is generally limited to the question of whether the committing court had jurisdiction to try and commit." *Id*. at 765. Although the *Thompson* court did note federal cases in which the writ had been held to apply, post-conviction, to petitioners "deprived of one of [their] constitutional rights such as due

process of law," it did not explicitly hold that the writ had expanded in Utah to encompass such claims. *Id*. at 766. Thus, the federal writ expanded statutorily along a separate track from the state writ, which remained much narrower, much longer.

A large body of common law built up around the kinds of claims that could be brought in the post-conviction process since the adoption of the Utah Constitution, including rules surrounding procedural default and methods for overcoming those defaults in successive post-conviction petitions. However, much of that development has occurred since the 1940s and virtually none of it rests on the historical nature of the writ, but instead constitutes a body of judicially developed post-appeal process wholly unrelated to the writ itself and well within the power of the legislature to regulate. Most importantly, none of it includes an egregious injustice or other analogous exception to statutory bars.

In assessing the scope of the right guaranteed by the Utah Constitution, courts must first look to the language's plain meaning. Courts also may look to the "framers' intent, the common law, particular traditions of our state, and decisions by our sister states and federal counterparts." *State v. Poole*, 2010 UT 25,¶12, 232 P.3d 519.

The state constitutional convention debates show that the Utah Constitution's framers understood the writ only in its narrow historical terms. In discussing article I, section 5's proscription on suspending the writ of habeas corpus, the framers characterized it as an issue of "depriving [a person] of his liberty without [the writ's] particular redress." State of Utah Constitutional Convention at 253. The framers continued that the writ should be suspended "if the emergency is grave enough" to give "those in authority the use of their best judgment" and "not to be forced to give any reason for their acts." *Id.* at 256.

Thus, the text of the Utah Constitution itself shows that the framers understood the writ to redress only incarceration without process. By explicitly permitting suspension of the writ during times of "rebellion or invasion," the framers agreed that the government should have the authority to incarcerate someone without giving any reason and, as a corollary, to remove the means to challenge that incarceration.

The need to incarcerate someone without any reason has nothing to do with post-appeal collateral attack on a criminal conviction or sentence. Conviction and sentence constitute the most compelling reason to incarcerate a person: the person has been found guilty of and sentenced for committing a crime. *Ex parte Watkins*, 3 Pet. 193, 207 (stating the "judgment

of the circuit court in a criminal case is of itself evidence of its own legality"). And unlike enemies of the state who could be held without process during times of emergency, criminal defendants automatically receive judicial review of their incarceration by preliminary hearing, arraignment, trial, direct appeal, and the whole panoply of procedures and associated rights available to criminal defendants.

The focus of the framers' debate demonstrates that they understood habeas corpus to be a means to challenge pre-conviction incarceration, not a means to challenge the validity of a conviction or sentence imposed after trial and affirmed on appeal. This, of course, was entirely consistent with the larger body of federal habeas common law—as distinct from Congressional expansion of the writ—extant during the nineteenth century.

Nevertheless, this Court later expanded the scope of the constitutional writ of habeas corpus to incorporate post-appeal review of a conviction or sentence for constitutional error. In *Hurst v. Cook*, the Court recognized that "[i]nitially, the Writ was not available to collaterally attack a criminal conviction, except on the ground that the court lacked jurisdiction or that a sentence was unlawful." 777 P.2d at 1034. But it continued, "habeas corpus has become a procedure for assuring that one is not deprived of life or liberty in derogation of a constitutional right, irrespective

of whether the error was categorized as jurisdictional or nonjurisdictional." *Id*.

To support its recitation of the evolution of habeas corpus, the *Hurst* court relied on *Thompson v. Harris*, which, as discussed above, merely referenced federal cases expanding the writ without expressly incorporating them into Utah law. *See Thompson*, 144 P.2d at 766 (citing *Bowen v. Johnston*, 306 U.S. 19 (1939); *Johnson v. Zerbst*, 304 U.S. 458 (1938)). Neither the *Hurst* court nor the *Thompson* court undertook to discern whether the Utah framers understood habeas corpus to incorporate post-conviction, post-appeal review of a criminal conviction for constitutional error. Those cases merely referenced federal cases and both substantially post-dated ratification of Utah's constitution (*Thompson* by more than forty years and *Hurst* by more than ninety). And nothing in the debates indicates that the Utah framers intended to track the federal writ's development. *See Poole*, 2010 UT 25,¶12 ("In evaluating the Utah Constitution, we have rejected a presumption that 'federal construction of similar language is correct.'") (citation omitted). Finally, the framers gave no hint that they meant either to commit the constitutional writ to keep lock-step with the federal writ or to incorporate federal statutory expansion of the common law.

Prior to *Thompson*, the Utah Supreme Court did not rely on habeas corpus for broad post-appeal review of a criminal conviction's constitutional validity. Twelve years after ratification, this Court recognized that a person in confinement on "judicial process" could use habeas corpus only as a means to challenge whether the issuing court had jurisdiction to issue the process. *Winnovich v. Emery*, 93 P. 988, 993 (Utah 1908). The Court emphasized that the "writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of review, unless some statute specially authorizes this to be done." *Id*. And *Winnovich* involved the validity of pre-trial bindover. *Id*. at 993-94. It was not a post-appeal review case.

Pre-*Thompson* cases that did rely on the writ for a post-appeal review applied a far more restrictive review than the federal cases the *Thompson* court cited. For example, the supreme court in *Connors v. Pratt* set aside a conviction on habeas review because the information on which it was based was "of no force or effect." 112 P. 399, 400 (Utah 1910). The court also relied on habeas corpus to set aside a sentence that exceeded that which the relevant statutes permitted in *Roberts v. Howells,* 62 P. 892, 892-93 (Utah 1900).

Similarly, *In re Maxwell*, 57 P. 412 (Utah 1899), and *In re James McKee*, 57 P. 23 (Utah 1899), reviewed the entire judicial regime upon which the prosecutions proceeded to determine if "the petitioner was tried and convicted" under "legal proceedings." *McKee*, 57 P. at 28. Specifically, the court considered whether a criminal case may proceed under information, rather than indictment. *Id.*; *see also Maxwell*, 57 P. at 414-15 (holding that proceeding by information, rather than indictment, did not violate constitution). *McKee* and *Maxwell* concerned whether the prosecution as a whole proceeded under constitutionally permissible legal machinery, not whether any technical error invalidated the convictions within an otherwise valid legal proceeding. The Court did not countenance habeas proceedings as a collateral attack of convictions or sentences. It was not until *Thompson* that this Court referenced the possibility of post-conviction, post-appeal review addressing trial-related errors.

In short, over the past seventy years, this Court slowly developed a body of common law post-conviction relief that began with *Thompson* and culminated in *Hurst*. But all of it was beyond the boundary of the constitutional writ and therefore fully subject to regulation. The 2008 amendments to the PCRA do not encroach on the scope of the constitutional

writ of habeas corpus, but merely regulate the body of post-conviction law residing beyond the scope of the constitutional writ.

The United States Congress has done the same with the federal writ. The United States Supreme Court has already found congressional regulation of using the writ for post-conviction review is constitutional because it has "long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law,'…and we have likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 518 U.S. at 664. The same is true under Utah law.

The PCRA is therefore the "sole remedy" for post-conviction relief in Utah and nothing remains of the common law remedies and procedures that developed from *Thompson* forward, other than what was expressly provided in the PCRA. This did not include an egregious injustice exception to the procedural bars. *Winward*, *Gardner,* and any other cases suggesting otherwise are therefore incorrect and should be overruled.

* * * *

For these reasons, Archuleta's constitutional arguments do not justify excusing the PCRA's time and procedural bars.

II.

Alternatively, Archuleta failed to proffer legally sufficient evidence that he is intellectually disabled.

The post-conviction court did not address whether Archuleta proffered evidence that was legally sufficient to withstand summary judgment since the *Atkins* claim was so clearly barred. This Court may affirm on any appropriate ground that appears in the record, including Archuleta's inadequate proffer that he is in fact intellectually disabled. *See Insight Assets, Inc. v. Farias*, 2013 UT 47,¶7, 321 P.3d 1021 (quoting *Bailey v. Bayles*, 2002 UT 58,¶10, 52 P.3d 1158).[19]

To prove that he is exempt from his death sentence due to intellectual disability, Archuleta had to prove (1) he "has significant subaverage general intellectual functioning that results in and exists concurrently with" (2) "significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or [] both," and (3) "the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning" both manifest before age 22. Utah Code Ann. §§ 77-15a-101 to 102. Because Archuleta bore the ultimate burden if the case were to go to an

[19] Below, Archuleta said that Utah's *Atkins* statute is unconstitutional to the extent that it may define an *Atkins* exemption more narrowly than a clinical intellectual disability diagnosis. But he has explicitly declined to challenge the statute on appeal, and this Court should consider the statute as written. Br.Aplt. 44 n8.

evidentiary hearing, he also bore the ultimate burden on summary judgment. *See Orvis v. Johnson*, 2008 UT 2,¶10, 177 P.3d 600; *Jones & Trevor Mktg., Inc.*, 2012 UT 39,¶30. If the "best showing he can possibly make" would not entitle to Archuleta to relief on his *Atkins* claim, then the post-conviction court correctly granted summary judgment to "eliminate[] the time, trouble and expense of" an evidentiary hearing. *Brandt v. Springville Banking Co.*, 353 P.2d 460, 462 (Utah 1960); Utah R. Civ. P. 56.

Rule 65C required Archuleta to file a petition stating "in plain and concise terms, all of the facts that form the basis" of his claim that he is entitled to an *Atkins* exemption. Utah R. Civ. P. 65C(d)(3)(C). And it required him to attach the evidentiary support showing he qualifies for the exemption. Utah R. Civ. P. 65C(e). "PCRA petitions are held to 'a somewhat higher standard than the general pleading standard found in rule 8(a)' of the Utah Rules of Civil Procedure." *Rippey v. State*, 2014 UT App 240,¶12, 337 P.3d 1071 (citing *McNair v. State*, 2014 UT App 127,¶9, 328 P.3d 874).

What Archuleta proffered both in his petition and in response to the State's summary judgment motion—apparently the "best showing he can possibly make"—failed as a matter of law to prove that he is *Atkins*-exempt from his death sentence and therefore entitled to relief from his sentence.

Archuleta's own experts said only that he *may* qualify for an intellectual disability diagnosis. Dr. Weinstein declared that his "initial adaptive behavior assessment *does not preclude* findings consistent with the requirements of a diagnosis of" intellectual disability. He declared that Archuleta's historical IQ scores vary widely and most "fall within the range of intellectual functioning that would qualify for the definition of Intellectual Disability." These scores, he says, call for a current assessment as they "*do not preclude* a finding of" intellectual disability. Archuleta's R1978 (emphasis added).

But in the end, he conceded that he is "not currently able to offer a definite opinion regarding Mr. Archuleta's present cognitive status." And he opined only that Archuleta "*may* qualify for a diagnosis of intellectual disability. *Id*. (emphasis added).

Archuleta essentially recognized that what he proffered was not enough. He said his counsel were "attempting to gather all of the information required for a reliable clinical diagnosis of his condition." R805. He asked the post-conviction court to give him more time and an opportunity to amend his petition because his counsel were "still in process of completing" his evaluation." *Id*.

Archuleta's request for more time and to amend were not enough to withstand summary judgment. First, he did not present either request in an actual motion, and his request to amend was formally deficient because it included no proposed amended petition. Utah R. Civ. P. 7(b)(2) (requiring applications for an order to be made by motion); *Puttuck v. Gendron*, 2008 UT App 362,&23, 199 P.3d 971 (motions to amend a complaint must include a proposed amended complaint).

Archuleta thus acknowledged the legal deficiency of his proffer, and he simultaneously failed to dispute any of the State's statement of facts. Archuleta bore the "burden of establishing a factual dispute to overcome summary judgment." *Monavie, LLC v. Iverson*, 2012 UT App 141,¶2, 279 P.3d 843 (per curiam). Any fact statement he did not specifically identify and dispute with admissible evidence—in this case, all of the State's fact statements—were "deemed admitted for the purposes of the motion." Utah R. Civ. P. 56(a)(4). The lower court correctly granted summary judgment because (1) Archuleta failed to dispute the facts with admissible evidence, and (2) the State showed that the undisputed facts entitle it to judgment as a matter of law because Archuleta's proffer failed as a matter of law to show that he could succeed on his claim. *Id.* 56(e); *see also* R3750 n4 (concluding Archuleta had not adequately disputed the State's recitation of material

facts because he merely "allege[d] in a sweeping fashion that the facts in the State's memorandum are disputed," but did "not indicate which facts he is specifically disputing nor does he advance any alternative facts").

And Archuleta did not file a rule 56(d) motion identifying any specific facts with which he disagreed but for which he needed more time and discovery to generate a genuine dispute. *See* Utah R. Civ. P. 56(d). Although Archuleta consistently maintained the need for further evidentiary development, he did not resist summary judgment on a procedurally appropriate ground that would have permitted the post-conviction court to allow that development. And Archuleta can hardly blame the State for that deficiency, particularly in light of the State's request to stay ruling on the procedural bars until after further evaluations and an evidentiary hearing.

But even if Archuleta had made a procedurally appropriate request, Archuleta could never have justified it. Archuleta first presented the *Atkins* claim on the merits in his December 2012 federal habeas petition.[20] Federal rules required him to "specify all the grounds for relief" and to "state the

[20] Archuleta first raised an *Atkins* issue in his PCI rule 60(b) motion, claiming that the PCI team was ineffective for omitting it. As detailed above, this Court rejected the ineffective-assistance claim on grounds that did not implicate the merits of the *Atkins* claim.

facts" supporting each. *See* Rules Governing Section 2254 Cases (c)(1),(2). By the time Archuleta first presented his *Atkins* claim, he had had the assistance of federally-funded habeas counsel for nearly 5 ½ years to develop the facts supporting it. He did not file the current state petition for over two more years, even though nothing about the federal action preventing him from doing so. But even now he says he has not completed his investigation nor explained why 7 ½ years gave him insufficient time to present completed evaluations on the *Atkins* issue.

In the end, Archuleta's best argument was that he "*alleged* facts which *support his claim* of intellectual disability." Br.Aplt. 40 (emphasis added). But that misstates Archuleta's burden to survive summary judgment. When the moving party meets its initial burden on summary judgment, "the burden then shifts to the nonmoving party, *who may not rest upon the mere allegations or denials of the pleadings*, but must set forth specific facts showing that there is a genuine issue for trial." *Jones & Trevor Mktg., Inc.*, 2012 UT 39,¶30 (quotations and citation omitted) (emphasis added). To survive summary judgment, Archuleta had to do more than allege facts; he had to show that he "could, if given" an evidentiary hearing, "produce evidence which would reasonably sustain a judgment in his favor." *Archuleta III*,

2011 UT 73,¶43. He had to show that he could prove he is intellectually disabled. He did not, and summary judgment was thus correct.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on March 23, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 25,954 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

_____

ANDREW F. PETERSON
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CERTIFICATE OF SERVICE

I certify that on March 23, 2017, two copies of the Brief of Appellee were ☑ mailed ☐ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

_____

Addenda

Addendum A

Utah Code Annotated § 77-15a-101. Intellectually disabled defendant not subject to death penalty--Defendant with subaverage functioning not subject to death penalty if confession not corroborated

(1) A defendant who is found by the court to be intellectually disabled as defined in Section 77-15a-102 is not subject to the death penalty.

(2) A defendant who does not meet the definition of intellectually disabled under Section 77-15a-102 is not subject to the death penalty if:

(a) the defendant has significantly subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning;

(b) the functioning described in Subsection (2)(a) is manifested prior to age 22; and

(c) the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession.

Utah Code Annotated § 77-15a-102. "Intellectually disabled" defined
As used in this chapter, a defendant is "intellectually disabled" if:

(1) the defendant has significant subaverage general intellectual functioning that results in and exists concurrently with significant deficiencies in adaptive functioning that exist primarily in the areas of reasoning or impulse control, or in both of these areas; and

(2) the subaverage general intellectual functioning and the significant deficiencies in adaptive functioning under Subsection (1) are both manifested prior to age 22.

Utah Code Annotated § 77-15a-103. Court may raise issue of intellectual disability at any time

The court in which a capital charge is pending may raise the issue of the defendant's intellectual disability at any time. If raised by the court, counsel for each party shall be allowed to address the issue of intellectual disability.

Utah Code Annotated § 77-15a-104. Hearing--Notice--Stay of proceeding--Examinations of defendant--Scope of examination--Report--Procedures

(1) (a) If a defendant proposes to offer evidence concerning or argue that he qualifies for an exemption from the death penalty under Subsection 77-15a-101(1) or (2), the defendant shall file and serve the prosecuting attorney with written notice of his intention as soon as practicable, but not fewer than 60 days before trial.
(b) If the defendant wishes to claim the exemption provided in Subsection 77-15a-101(2), the defendant shall file and serve the prosecuting attorney with written notice of his intention as soon as practicable, but not fewer than 60 days before trial.

(2) When notice is given under Subsection (1), the court raises the issue, or a motion is filed regarding Section 77-15a-101, the court may stay all proceedings in order to address the issue.

(3) (a) The court shall order the Department of Human Services to appoint at least two mental health experts to examine the defendant and report to the court. The experts:
(i) may not be involved in the current treatment of the defendant; and
(ii) shall have expertise in mental retardation assessment.
(b) Upon appointment of the experts, the defendant or other party as directed by the court shall provide information and materials to the examiners relevant to a determination of the defendant's mental retardation, including copies of the charging document, arrest or incident reports pertaining to the charged offense, known criminal history information, and known prior mental health evaluations and treatments.
(c) The court may make the necessary orders to provide the information listed in Subsection (3)(b) to the examiners.
(d) The court may provide in its order appointing the examiners that custodians of mental health records pertaining to the defendant shall provide those records to the examiners without the need for consent of the defendant or further order of the court.
(e) Prior to examining the defendant, examiners shall specifically advise the defendant of the limits of confidentiality as provided under Section 77-15a-106.

(4) During any examinations under Subsection (3), unless the court directs otherwise, the defendant shall be retained in the same custody or status he was in at the time the examination was ordered.

(5) The experts shall in the conduct of their examinations and in their reports to the court consider and address:

(a) whether the defendant is mentally retarded as defined in Section 77-15a-102;

(b) the degree of any mental retardation the expert finds to exist;

(c) whether the defendant has the mental deficiencies specified in Subsection 77-15a-101(2); and

(d) the degree of any mental deficiencies the expert finds to exist.

(6) (a) The experts examining the defendant shall provide written reports to the court, the prosecution, and the defense within 60 days of the receipt of the court's order, unless the expert submits to the court a written request for additional time in accordance with Subsection (6)(c).

(b) The reports shall provide to the court and to prosecution and defense counsel the examiners' written opinions concerning the mental retardation of the defendant.

(c) If an examiner requests of the court additional time, the examiner shall provide the report to the court and counsel within 90 days from the receipt of the court's order unless, for good cause shown, the court authorizes an additional period of time to complete the examination and provide the report.

(7) Any written report submitted by an expert shall:

(a) identify the specific matters referred for evaluation;

(b) describe the procedures, techniques, and tests used in the examination and the purpose or purposes for each;

(c) state the expert's clinical observations, findings, and opinions; and

(d) identify the sources of information used by the expert and present the basis for the expert's clinical findings and opinions.

(8) Within 30 days after receipt of the report from the Department of Human Services, but not later than five days before hearing, or at any other time the court directs, the prosecuting attorney shall file and serve upon the defendant a notice of witnesses the prosecuting attorney proposes to call in rebuttal.

(9) (a) Except pursuant to Section 77-15a-105, this chapter does not prevent any party from producing any other testimony as to the mental condition of the defendant.
(b) Expert witnesses who are not appointed by the court are not entitled to compensation under Subsection (10).

(10)(a) Expenses of examinations of the defendant ordered by the court under this section shall be paid by the Department of Human Services.
(b) Travel expenses associated with any court-ordered examination that are incurred by the defendant shall be charged by the Department of Human Services to the county where prosecution is commenced.

(11)(a) When the report is received, the court shall set a date for a hearing to determine if the exemption under Section 77-15a-101 applies. The hearing shall be held and the judge shall make the determination within a reasonable time prior to jury selection.
(b) Prosecution and defense counsel may subpoena to testify at the hearing any person or organization appointed by the Department of Human Services to conduct the examination and any independent examiner.
(c) The court may call any examiner to testify at the hearing who is not called by the parties. If the court calls an examiner, counsel for the parties may cross-examine that examiner.

(12)(a) A defendant is presumed to be not mentally retarded unless the court, by a preponderance of the evidence, finds the defendant to be mentally retarded. The burden of proof is upon the proponent of mental retardation at the hearing.
(b) A finding of mental retardation does not operate as an adjudication of mental retardation for any purpose other than exempting the person from a sentence of death in the case before the court.

(13)(a) The defendant is presumed not to possess the mental deficiencies listed in Subsection 77-15a-101(2) unless the court, by a preponderance of the evidence, finds that the defendant has significant subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning and that this functioning was manifested prior to age 22. The burden of proof is upon the proponent of that proposition.
(b) If the court finds by a preponderance of the evidence that the defendant has significant subaverage general intellectual functioning that exists concurrently with significant deficiencies in adaptive functioning and that

this functioning was manifested prior to age 22, then the burden is upon the state to establish that any confession by the defendant which the state intends to introduce into evidence is supported by substantial evidence independent of the confession.

(14)(a) If the court finds the defendant mentally retarded, it shall issue an order:

(i) containing findings of fact and conclusions of law, and addressing each of the factors in Subsections (5)(a) and (b); and

(ii) stating that the death penalty is not a sentencing option in the case before the court.

(b) If the court finds by a preponderance of the evidence that the defendant possesses the mental deficiencies listed in Subsection 77-15a-101(2) and that the state fails to establish that any confession is supported by substantial evidence independent of the confession, the state may proceed with its case and:

(i) introduce the confession into evidence, and the death penalty will not be a sentencing option in the case; or

(ii) not introduce into evidence any confession or the fruits of a confession that the court has found is not supported by substantial evidence independent of the confession, and the death penalty will be a sentencing option in the case.

(c) (i) A finding by the court regarding whether the defendant qualifies for an exemption under Section 77-15a-101 is a final determination of that issue for purposes of this chapter.

(ii) The following questions may not be submitted to the jury by instruction, special verdict, argument, or other means:

(A) whether the defendant is mentally retarded for purposes of this chapter; and

(B) whether the defendant possesses the mental deficiencies specified in Subsection 77-15a-101(2).

(iii) This chapter does not prevent the defendant from submitting evidence of retardation or other mental deficiency to establish a mental condition as a mitigating circumstance under Section 76-3-207.

(15) A ruling by the court that the defendant is exempt from the death penalty may be appealed by the state pursuant to Section 77-18a-1.

(16) Failure to comply with this section does not result in the dismissal of criminal charges.

Utah Code Annotated § 77-15a-105. Defendant's wilful failure to cooperate--Expert testimony regarding intellectual disability is barred

(1) If the defendant files notice, raises the issue, or intends to present evidence or make an argument that the defendant is exempt from the death penalty under this chapter, the defendant shall make himself available and fully cooperate in any examination by mental health experts appointed by the Department of Human Services and any other independent examiners for the defense or the prosecution.

(2) If the defendant wilfully fails to make himself available and fully cooperate in the examination, and that failure is established to the satisfaction of the court, the defendant is barred from presenting expert testimony relating to any exemption from the death penalty under this chapter.

Utah Code Annotated § 77-15a-106. Limitations on admitting intellectual disability examination evidence

(1) The following may not be admitted into evidence against the defendant in any criminal proceeding, except as provided in Subsection (2):

(a) any statement made by the defendant in the course of any mental examination conducted under this chapter, whether the examination is with or without the consent of the defendant, and any testimony by the expert based upon the defendant's statement; and

(b) any other fruits of the defendant's statement under Subsection (1)(a).

(2) Evidence under Subsection (1) may be admitted on an issue regarding a mental condition on which the defendant has introduced evidence.

Utah Code Annotated § 78B-9-101. Title

This chapter is known as the "Post-Conviction Remedies Act."

Utah Code Annotated § 78B-9-102. Replacement of prior remedies

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

(2) This chapter does not apply to:

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

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

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

Utah Code Annotated § 78B-9-103. Applicability--Effect on petitions

Except for the limitation period established in Section 78B-9-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Utah Code Annotated § 78B-9-104. Grounds for relief--Retroactivity of rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The court may not grant relief from a conviction based on a claim that the petitioner is innocent of the crime for which convicted except as provided in Title 78B, Chapter 9, Part 3, Postconviction Testing of DNA, or Part 4, Postconviction Determination of

Factual Innocence. Claims under Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence of this chapter may not be filed as part of a petition under this part, but shall be filed separately and in conformity with the provisions of Part 3, Postconviction Testing of DNA or Part 4, Postconviction Determination of Factual Innocence.

Utah Code Annotated § 78B-9-105. Burden of proof

(1) The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The court may not grant relief without determining that the petitioner is entitled to relief under the provisions of this chapter and in light of the entire record, including the record from the criminal case under review.

(2) The respondent has the burden of pleading any ground of preclusion under Section 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Utah Code Annotated § 78B-9-106. Preclusion of relief--Exception

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

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

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

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

Utah Code Annotated § 78B-9-107. Statute of limitations for postconviction relief

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

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

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

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

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

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

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

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

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

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

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

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

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

Utah Code Annotated § 78B-9-108. Effect of granting relief--Notice

(1) If the court grants the petitioner's request for relief, it shall either:
(a) modify the original conviction or sentence; or
(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.
(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.
(c) If the respondent gives notice of intent to appeal the court's decision, the stay provided for by Subsection (2)(a) shall remain in effect until the appeal concludes, including any petitions for rehearing or for discretionary review by a higher court. The court may lift the stay if the petitioner can make the showing required for a certificate of probable cause under Section 77-20-10 and URCP 27.
(d) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Utah Code Annotated § 78B-9-109. Appointment of pro bono counsel

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

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

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

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

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

Utah Code Annotated § 78B-9-110. Appeal--Jurisdiction

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section 78A-3-102 or 78A-4-103.

Utah Code Annotated § 78B-9-201. Post-conviction remedies--30 days

A post-conviction remedy may not be applied for or entertained by any court within 30 days prior to the date set for execution of a capital sentence, unless the grounds for application are based on facts or circumstances which developed or first became known within that period of time.

Utah Code Annotated § 78B-9-202. Appointment and payment of counsel in death penalty cases

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

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

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

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

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

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

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

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

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

(d) The court may authorize the petitioner to apply ex parte for the funds permitted in Subsections (3)(b) and (c) upon a motion to proceed ex parte and if the petitioner establishes the need for confidentiality. The motion to proceed ex parte must be

served on counsel representing the state, and the court may not grant the motion without giving the state an opportunity to respond.

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

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

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

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

(i) if the court has granted a motion to file ex parte applications under Subsection (3)(d), the petitioner shall serve the motion to exceed the maximum amounts on an assistant attorney general employed in a division other than the one in which the attorney is employed who represents the state in the postconviction case; if the court has not granted a motion to file ex parte applications, then the petitioner must serve the attorney representing the state in the postconviction matter with the motion to exceed the maximum funds;

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

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

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

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

(6) Subject to Subsection (2)(a) the court shall appoint counsel to represent the petitioner for the first petition filed after the direct appeal. For all other petitions, counsel may not be appointed at public expense for a petitioner, except to raise claims:
(a) based on newly discovered evidence as defined in Subsection 78B-9-104(1)(e)(i); or
(b) based on Subsection 78B-9-104(1)(f) that could not have been raised in any previously filed post trial motion or postconviction proceeding.

Utah R. Civ. P. 56 Summary Judgment

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Utah R. Civ. P. 65C Post-conviction relief.

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

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

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

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

(1) whether the petitioner is incarcerated and, if so, the place of incarceration;
(2) the name of the court in which the petitioner was convicted and sentenced and the dates of proceedings in which the conviction was entered, together with the court's case number for those proceedings, if known by the petitioner;
(3) in plain and concise terms, all of the facts that form the basis of the petitioner's claim to relief;
(4) whether the judgment of conviction, the sentence, or the commitment for violation of probation has been reviewed on appeal, and, if so, the number and title of the appellate proceeding, the issues raised on appeal, and the results of the appeal;
(5) whether the legality of the conviction or sentence has been adjudicated in any prior post-conviction or other civil proceeding, and, if so, the case number and title of those proceedings, the issues raised in the petition, and the results of the prior proceeding; and

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) If a claim is not frivolous on its face but is deficient due to a pleading error or failure to comply with the requirements of this rule, the court shall return a

copy of the petition with leave to amend within 20 days. The court may grant one additional 20 day period to amend for good cause shown.
(h)(4) The court shall not review for summary dismissal the initial post-conviction petition in a case where the petitioner is sentenced to death.

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

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

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

(l) **Hearings.** After pleadings are closed, the court shall promptly set the proceeding for a hearing or otherwise dispose of the case. The court may also order a prehearing conference, but the conference shall not be set so as to delay unreasonably the hearing on the merits of the petition. At the prehearing conference, the court may:
(1) consider the formation and simplification of issues;
(2) require the parties to identify witnesses and documents; and

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

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

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

(o) **Orders; stay.**

(1) If the court vacates the original conviction or sentence, it shall enter findings of fact and conclusions of law and an appropriate order. If the petitioner is serving a sentence for a felony conviction, the order shall be stayed for 5 days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial, pursue a new sentence, appeal the order, or take no action. Thereafter the stay of the order is governed by these rules and by the Rules of Appellate Procedure.

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

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

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

which the trial court shall determine the amount, if any, to charge for fees and costs.

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

Addendum B

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Material Facts[4]

In December 1989, a jury convicted Petitioner Michael Anthony Archuleta of first degree murder and sentenced him to death. Petitioner appealed his conviction and sentence, which were affirmed by the Utah Supreme Court on March 25, 1993. *See State v. Archuleta,* 850 P.2d 1232 (Utah 1993). On March 3, 1993, the court appointed Ms. Karen Chaney pro hac vice and Mr. Eckersley as local counsel to represent Mr. Archuleta in his first post-conviction relief case. Archuleta filed an initial petition on March 10, 1994, and an amended petition on August 11, 1994. The district court dismissed the amended petition on October 4, 1996; however, the Supreme Court reversed the dismissal and remitted the case back to the district court on August 14, 1998. Subsequently, the district court granted Mr. Eckersley's motion to withdraw as local counsel and the State's motion to revoke Ms. Chaney's pro hac vice admission to the bar.

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

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

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

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

In August 2007, while the appeal was pending in state court, the federal district court appointed counsel to represent Archuleta in his federal habeas proceedings. On February 1, 2008, Mr. Brass asked permission to withdraw from the state court proceedings, and on August 27, the district court appointed new counsel to represent Archuleta on the appeal in state court, Mr. James Slavens.

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

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

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

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

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

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

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

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

b. Discussion

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

Second, a person is not eligible for relief if the claim is barred by the limitation period established in the PCRA. *See* § 78B-9-106(e). Under the statute of limitations, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code § 78B-9-107(1). In relevant part,[7] a cause of action accrues on the latest of the following dates: "(e) the date on which petitioner knew or should have known, in the exercise of

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

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

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

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

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

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

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

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

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

[8] Under section 78B-9-107(3), the limitations period is tolled "for any period which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Petitioner has not alleged that the tolling provision of the statute applies in this case.

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

1. Good Cause Exceptions

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

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

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

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

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

Thus, even if Archuleta is correct that the judiciary retains the constitutional authority to apply the *Hurst* common law exceptions, the Utah Supreme Court has apparently abrogated the exceptions in light of the amendments to the PCRA and rule 65C. Accordingly, without further guidance and direction from our appellate courts, this Court concludes the *Hurst* common law exceptions do not provide relief from the procedural limitations on post-conviction relief claims for petitions that are filed after May 5, 2008. Because Archuleta did not file his petition until December 2014, his claims are procedurally barred.

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

2. Constitutional Issues

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

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

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

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

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

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

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

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

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

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

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

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

4. The Remaining Claims in the Petition

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

order.

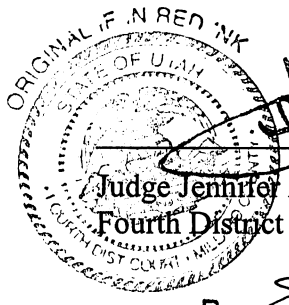
ORDER

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

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

DATED this 2nd day of Feb, 2016.

BY THE COURT:



Judge Jennifer A. Brown
Fourth District Court

By Shari Stephenson
STAMP USED AT DISCRETION OF JUDGE

CERTIFICATE OF DELIVERY

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

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Deri Stephenson
Deputy Clerk

Addendum C

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

MICHAEL ANTHONY ARCHULETA,

Petitioner,

AFFIDAVIT OF EDWARD K. BRASS

vs.

HANK GALETKA, Warden,
Utah State Prison,

Case No.

Respondent.

STATE OF UTAH)
)ss.
County of _____)

Edward K. Brass, being first duly sworn, deposes and states as follows:

1. I, Edward K. Brass, swear and affirm that I represented the Appellant in the above referenced case during his evidentiary hearing regarding his post-conviction relief action and that I make this Affidavit based upon my personal knowledge and belief. I do so without access to any information contained in the files that were available to me when I was counsel for this case. The only information I have to refresh my recollection is certain exhibits provided to me when I was provided a draft of this affidavit. It has been some years since I reviewed these materials.

2. I understand and have personal knowledge of the facts alleged herein. All statements in this Affidavit are true and accurate to the best of my personal knowledge and belief.

3. Although I have training in the form of seminars with respect to the capital punishment and habeas relief, I do not believe that any one person has all of the information necessary to properly represent a person in post conviction death proceedings. This is a complex area of the law, particularly in the relationship between state and federal law and one that rarely occurs in my practice. I would not and do not feel comfortable in representing a person in such proceedings without additional help and sufficient resources

4. It was for this reason that I requested L. Clark Donaldson to assist me in this particular case. He in turn solicited the assistance of McCaye Christianson. These are individuals with experience in post conviction relief and death penalty cases. I believe Mr. Donaldson may have solicited the assistance of others as well.

5. Both of these individuals withdrew from the case for various reasons, which severely hindered me because of the time requirements which capital cases demand and the assistance they provided because of their training and experience regarding the complexities of post-conviction relief.

6. Each of them left this case because of other, better paying employment opportunities.

7. In this matter, I received many boxes of information complied by Mr. Archuleta's previous attorneys.

8. I reviewed the documentation that was complied within these boxes but did not independently investigate the matter nor did I hire another to investigate any issue or potential issue outside what was provided in the materials supplied to me by previous attorneys.

9. More specifically, I did not independently investigate any of the following:

   a. Read and review Michael Archuleta's criminal trial transcripts;

   b. Read and review Lance Wood's criminal trial transcripts;

   c. Read and review the Court files, including but not limited to the following:

      i. Michael Archuleta's criminal court file;

      ii. Lance Wood's criminal court file;

      iii. Lance Wood's post-conviction actions;

      iv. In the matter of the Criminal Investigation of: The Homicide of Gordon Ray Church;

      v. Media file.

10. It is my opinion that the law regarding post-conviction relief actions bars presenting any issues in the post conviction action that could have been brought on appeal but were not presented. Indeed, part of the Rule 11 sanctions motion that was ultimately filed in this matter, as I recall, was that we were attempting to relitigate issues which had already been considered and rejected.

11. In this matter, funds and time were very limited and thus decisions were made regarding what issues would be investigated and pursued based upon those considerations.

12. Michael Archuleta never gave me permission to abandon or to not investigate his case.

13. The State's pursuit of Rule 11 sanctions had the following effect upon me:

   a. The necessity of responding to the motion all the way to the Supreme Court wasted valuable time and resources that could have been better expended on this case.

b. I received very little compensation in this matter in that the money appropriated to the case had already been consumed by prior counsel and what money was paid for attorney's fees were used to pay the costs and travel of the mitigation experts who testified in this case.

c. I am in private practice and have and had many clients who expect me to work on their cases.

d. I expended a great deal of limited energy and resources to address the Rule 11 accusations. Including, but not limited to, having other attorneys review and draft responses to the various proceedings that occurred relative to those matters.

e. The pursuit of the Rule 11 sanctions created a conflict of interest between Michael and me because I was forced to marshal my limited time between his case, my private paying clients and dealing with the Rule 11 actions. Further, the potential for conflict existed in Mr. Archuleta's desire to pursue certain issues versus the State's opinion and belief that we should somehow be punished for raising issues that the State deemed barred or frivolous.

f. The information presented in Exhibits 46, 47 and 48, which are attached, is accurate to the best of my ability and were filed with my review and approval.

14. Mr. Slavens presented information to me regarding the allegation that Lance Wood confessed to a reporter with the newspaper that he had perpetrated all the injuries on Mr. Church and that Michael Archuleta was not involved in inflicting any injuries.

a. In responding, I reviewed Exhibits 19, 20, 21 and 22, which are attached.

b. I do not recall previously reviewing these Exhibits, and it seems to me that if I had seen them before, I would have recalled the information indicated within the documents.

c. I do not recall knowing or being informed that Lance Wood confessed to the newspaper that he had committed the murder or that there might be a tape recording of this confession.

d. I do not recall knowing or being informed that there was a separate court case of "In the matter of the Criminal Investigation of: The Homicide of Gordon Ray Church." I certainly did not review any documents in that court file or Exhibits 19, 20, 21 and 22.

e. If I had known about this confession, and if I had the resources to do so, I would have had an investigator interview Wood.

f. I would agree that if Lance Wood did indeed confess as indicated and there was a tape recording of the confession, the matter should have been investigated further and either resolved or presented the issues with the court, depending on an assessment of Woods' credibility.

g. I would agree that if the prosecutor had this information, as well a tape recording of the confession, at the time of Michael Archuleta's trial, and did not provide this information during discovery, a possible Brady violation should have been investigated.

h. I did not analyze or otherwise make a strategic decision whether or not this information should be investigated or presented.

i. Michael Archuleta never gave me permission not to explore this issue.

15. Mr. Slavens presented information to me that Gary Hawkins stated that Lance Wood had confessed to him that he had perpetrated all the injuries on Mr. Church and that Michael Archuleta was not involved in inflicting any injuries.

a. In responding, I reviewed Exhibit 30, which is attached.

b. I do not recall knowing or being aware that Lance Wood confessed to Gary Hawkins that he had committed the murder.

c. If I had known about this confession, and had adequate resources to do so, I would have had an investigator speak to Hawkins.

d. Upon reviewing this affidavit, it appears that the issue is worthy of further investigation and either resolved or presented to the Court, depending on Hawkins credibility.

e. I would agree that if Lance Wood did indeed confess to Gary Hawkins as indicated in his affidavit, the matter should have been investigated further and presented to the court.

f. I did not analyze or otherwise make a strategic decision whether or not this information should be investigated or presented to the court.

g. Michael Archuleta never gave me permission not to explore this issue.

16. Mr. Slavens presented information to me regarding the allegation that David Homer had recanted his sentencing testimony that Michale Archuleta had told him that killing Gordon Church was the "ultimate rush." I reviewed the affidavits of Les Mabrey and Jeff Homer indications that David Homer had told them that he fabricated his testimony and that the Millard County Sheriff's Office had "planted" David Homer in his jail cell while awaiting trial to obtain a confession from Michael Archuleta.

a. I reviewed Exhibits 27 and 28, which are attached.

b. I do recall Michael Archuleta had told me that David Homer had recanted his testimony.

c. I recall the name of Les Mabrey but do not recall the name of Jeff Homer.

d. I made no effort to investigate this matter or to speak to Les Mabrey or Jeff Homer regarding their potential testimony.

e. I would agree that if Jeff Homer and Les Mabrey are willing to testify as indicated in their affidavits, the matter should have been investigated further and presented.

f. I would agree that if the prosecutor had this information, at the time of Michael Archuleta's trial, and did not present the information to the defendant, a Brady violation should have been explored.

g. I did not analyze or otherwise make a strategic decision whether or not this information should be investigated or presented.

h. Michael Archuleta never gave me permission not to explore this issue.

17. Mr. Slavens inquired regarding what legal analysis I explored regarding a possible *Atkins* claim that Micahael Archuleta suffered from mental retardation.

a. In responding, I reviewed the affidavits of Dr. Cunningham and Dr. Gummow which are Exhibits 31 and 32.

b. I relied upon the advice and evaluation of these two experts regarding what claims to pursue.

c. I did not recall asking for their evaluation regarding the issue of whether or not Michael Archuleta suffered from mental retardation. Rather, we directed the

experts, who are both well experienced in capital litigation, to investigate any and all possible mental health defenses for Mr. Archuleta.

d. I do not recall either of these experts advising me that Michael Archuleta suffered from mental retardation.

e. If Mr. Archuleta suffers from mental retardation, that specific fact was not made known to me.

f. Michael Archuleta never gave me permission not to explore this issue.

18. Mr. Slavens presented to me for review two different Pre-Sentence Reports for Lance Wood and inquired as to whether or not I considered comparing the psychological profiles of Lance Wood and Michael Archuleta.

a. In responding, I reviewed Exhibits 35 and 36, which are attached.

b. I do not recall ever reviewing these Pre-Sentence Reports nor do they seem familiar to me.

c. I do not recall investigating this issue nor do I recall analyzing whether or not this issue should be explored.

d. I would agree that the State's theory of the case was that Michael Archuleta was the aggressor between he and Lance Wood in this murder, and if there was evidence contradicting this position, it should have been explored.

e. Michael Archuleta never gave me permission not to explore this issue.

19. Mr. Slavens inquired of me regarding the reasons that I did not pursue the use of a blood spatter expert and the use of an expert in determining exactly when Gordon Church lost feeling during the attack or may have died.

a. I did not pursue or otherwise investigate these issues because it was my understanding they were issues that were resolved and exhausted because they could have been raised on Michael Archuleta's initial appeal.

b. Furthermore, I did not have the time or resources to go back and explore these issues.

c. Furthermore, the funds that I was allowed were limited and entirely consumed in paying the mitigation experts that were used. In fact, I used some of the funds that were paid for attorney's fees to pay for the mitigation experts.

d. We may have abandoned a pursuit of these experts simply because we did not have the time or the resources to retain experts in these areas.

e. Finally, it is my opinion that if there is evidence to support the position that Lance Wood was the aggressor in this murder, the opinion of experts in these areas should be explored.

20. Mr. Slavens inquired about the reasons that I did not pursue any issues regarding Martha Kerr, who was an expert the State called during the criminal trial.

a. I recall being informed that Martha Kerr had suffered a mental breakdown prior to her testimony at the criminal trial.

b. I did not analyze whether or not to pursue this issue.

c. I determined that the time and resources that would have been used to pursue this issue were not cost effective–the money would be better spent exploring the mitigation issue.

d. I would agree that if the prosecutor had this information at the time of Michael Archuleta's trial and did not provide this information during discovery, a Brady violation should have been investigated and resolved.

DECLARATION PURSUANT TO SECTION 78B-5-705

I declare under criminal penalty of the State of Utah that the foregoing is true and accurate to the best of my understanding and recollection.

DATED this 31 day of July, 2010.

Edward K. Brass

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Utah, resident of and with my office in Fillmore, UT; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof on August 4, 2010.

DOCUMENT SERVED: Affidavit of Ed Brass

ATTORNEYS SERVED: Mail

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