Case No. 20160419-SC

IN THE

UTAH SUPREME COURT

MICHAEL ANTHONY ARCHULETA,
Petitioner/Appellant,

v.

STATE OF UTAH,
Respondent/Appellee.

Supplemental Brief of Appellee

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INTRODUCTION

This Court requested supplemental briefing on three questions. First, the Court asked alternatively whether (1) Archuleta's *Atkins* claim is cognizable under the PCRA and, if so, under which statutory provision; or (2) whether *Atkins* claims are cognizable under Utah R. Crim. P. 22(e). Second, the Court asked what the proper disposition of this case should be if the *Atkins* claim is not cognizable under the PCRA. Finally, the Court asked whether the district court erred, plainly or otherwise, by relying on the PCRA procedural bars to deny post-conviction relief, after the State had withdrawn its procedural defenses, without notifying the parties that it intended to do so.

The PCRA does provide an avenue for relief for *Atkins* claims brought after the judgment became final, but not under the provisions identified in this Court's Supplemental Briefing Order. Such a claim could not be brought under Utah Code section 78B-9-104(1)(a) because *Atkins* had not issued before Archuleta was convicted and sentenced, and it could not be said that "the conviction *was obtained* or the sentence *was imposed* in violation of the United States Constitution." (Emphasis added). Nor could such a claim be brought under section 78B-9-104(1)(f)(i) because *Atkins* was not "dictated by precedent existing at the time the petitioner's conviction or sentence became final." Indeed, controlling precedent at the time Archuleta's judgment became final dictated the opposite of *Atkins*'s holding. And Utah R. Crim. P. 22(e) only permits facial challenges to a sentence, not as-applied challenges like this one that require evidentiary development.

However, Utah Code section 78B-9-104(1)(f)(ii) permits post-conviction relief for categorical status exemptions, like those identified in *Atkins*, subject of course to all applicable procedural limitations. A petitioner may obtain relief where "a rule announced by the United States Supreme Court…after conviction and sentence became final on direct appeal…decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted." *Id.* Though not obvious from the text,

this provision codifies the United States Supreme Court's "substantive rule" exception to the presumption against non-retroactivity. That exception, the Supreme Court has explained, embraces status exemptions that place categories of people, irrespective of the crime at issue, outside the reach of the State to punish, including *Atkins* claims. Thus, just like the federal framework it codifies, the PCRA's "decriminalization" exception embraces status exemptions—including exemptions from particular punishments—that the Supreme Court announces after finality. This is the proper statutory ground for Archuleta's *Atkins* claim.

If the Court holds that no PCRA provision provides a statutory ground for Archuleta's *Atkins* claim, then the proper disposition is affirmance of the lower court's denial of relief, but on grounds alternative to those identified by the district court. For all the reasons argued in the Brief of Appellee, this Court has no independent authority to act outside the dictates of the PCRA. And denying relief does not violate *Montgomery v. Louisiana*, since that case only stands for the proposition that a state post-conviction regime must apply new exemptions retroactively where that regime is legally open to such claims—it did not hold that the constitution obliges States to be open to claims in the first place. If this Court rules that the PCRA is not open to *Atkins*

claims, then *Montgomery* has nothing to say here. In that case, Archuleta must seek vindication of his federal rights in federal court.[1]

Finally, the district court did not err, plainly or otherwise, by granting summary judgment on procedural grounds. The PCRA explicitly permits the court to apply the bars on its own motion, provided the parties are allowed to address the bars' applicability. Archuleta extensively addressed the procedural bars in his summary judgment papers, and even said neither party should be allowed another word on the matter. Under these circumstances, it was certainly not obviously wrong to use the authority explicitly granted by the PCRA to sua sponte apply the procedural bars. And since the district court's procedural bar rulings were substantively correct, any error was harmless.

[1] The State does not concede that Archuleta would be entitled to relief in federal court. As already argued, Archuleta is not intellectually disabled, and he may be subject to procedural limitations because of the same dilatory tactics that have limited his ability to bring the claim in State court.

ARGUMENT

I.

Atkins claims brought after final judgment are cognizable under Utah Code section 78B-9-104(1)(f)(ii), the "substantive rule" exception to non-retroactivity.

This Court's Supplemental Briefing Order said that "[b]oth parties presume that the Post-Conviction Remedies Act (PCRA) provides an avenue for Mr. Archuleta's *Atkins* claim." Order at 1. But the Court also noted it "is not readily apparent" "which, if any, statutory ground for relief applies." *Id.* 1-2. The Court suggested two possible statutory provisions as grounding an *Atkins* claim like Archuleta's, and noted theoretical problems with each. The first possibility, which "Archuleta apparently assumes," is Utah Code section 78B-9-104(1)(a), where a conviction or sentence were "obtained" or "imposed" in violation of the constitution. *Id.* The second, which the Court attributes to the State, is section 78B-9-104(1)(f)(i), provides relief where a new Supreme Court holding was "dictated by precedent" that existed at the time the petitioner's judgment became final. *Id.* at 2-3.[2]

[2] Counsel for the State is unaware of any instance where he suggested that section 78B-9-104(1)(f)(i) applies here, and if he did make such a suggestion, it was in error and counsel apologizes for it.

As explained below, neither of these sections grounds Archuleta's *Atkins* claim. Nor does Utah R. Crim. P. 22(e), because that rule does not permit as-applied, fact-intensive challenges like this one.

Rather, section 78B-9-104(1)(f)(ii) applies. That section permits relief where a later supreme court holding "decriminalizes the conduct" for which the petitioner was convicted and sentenced. Though not obvious from the text alone, this section codifies the United States Supreme Court's "substantive rule" exception to non-retroactivity. Substantive rules are those that place beyond the reach of the State to punish both (1) categories of conduct (decriminalization), and (2) categories of people (status exemptions). The Supreme Court explained in 1989 that the second is simply an outgrowth of the first, and that explanation was apparent when the Utah Legislature codified the Supreme Court's "decriminalization" exception to non-retroactivity in 2008. So while the provision may superficially appear to apply only when conduct is no longer criminal, the language the Utah Legislature adopted also allowed relief when new rules exclude persons of a particular status from particular punishments—in this case, persons who are intellectually disabled are by virtue of that status beyond the reach of a death sentence.

A. Archuleta's *Atkins* claim is not grounded by either statutory provision this Court identified or by Utah R. Crim. P. 22(e).

Neither PCRA provision this Court identified applies to Archuleta's *Atkins* claim because both of them require controlling case law to have already exempted the intellectually disabled from the death penalty by the time Archuleta was convicted of aggravated murder and sentenced to death. That is not the case. Rather, the controlling case law at that critical time explicitly authorized executing the intellectually disabled. But as argued below, section 78B-9-104(1)(f)(ii) does apply and provide an avenue for raising a post-trial *Atkins* claim.

Utah Code section 78B-9-104(1)(a) authorizes post-conviction relief where "the conviction was obtained or the sentence was imposed in violation of the United States Constitution."[3] This backward-looking language—"was obtained in violation" and "was imposed in violation"—presupposes that the constitution already prohibited the complained-of error. It does not contemplate later-developed law for two reasons.

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[3] Archuleta frames the issue as one of both state and federal constitutional violations. Supp.Br.Aplt. 4 ("It violates the Utah Constitution for the same reasons. Utah Const. art. 1, § 9."). Archuleta did not allege a violation of article 1 section 9 in his opening brief, and that argument is outside the scope if this Court's supplemental briefing order. The Court should disregard this argument.

First, convictions could not be said to have been "obtained in violation" of non-existent law. Later-developed law can certainly invalidate a conviction or sentence, as described below. But it violates the past-simple tenses of "was obtained" and "was imposed" by extending them to some future condition that did not exist when the described action occurred. *See* J. Hodges et al., *Harbrace College Handbook* 83 (11th ed. 1990) ("past time, not extending to the present").

Second, a separate section fully explains when later-developed case law should be applied retroactively. Reading retroactivity principles into section 104(1)(a), as Archuleta does, *see* Supp.Br.Aplt. 5-8, renders the later section dealing with retroactivity either superfluous or contrary to the retroactivity principles that Archuleta asks this court to read into section 104(1)(a). *See* Utah Code Ann. § 78B-9-104(1)(f). This Court construes statutes in a way that gives effect and meaning to all of its parts, which requires it to "avoid interpretations that will render portions of a statute superfluous or inoperative." *Hall v. Dep't of Corr.*, 2001 UT 34,¶15, 24 P.3d 958 (quotation marks and citation omitted). "Thus, when we are confronted with two statutory provisions that conflict, 'the provision more specific in application governs over the more general provision.'" *Carter v. Univ. of Utah Med. Ctr.*, 2006 UT 78,¶9, 150 P.3d 467 (quoting *Hall*, 2001 UT 34,¶15). Here, section

(104(1)(f) on its face limits retroactivity, providing specific circumstances under which new law will allow relief from already-final convictions or sentences. Section 104(1)(a) does not on its face purport to do that. Reading into that section additional instances where new law will justify relief from old sentences will nullify 104(1)(f)'s strict limits. And again, section 104(1)(a) by its plain language does not contemplate relief based on a change in the law.

Based on their plain language, and to give full effect to both sections 104(1)(a) and (1)(f), section 104(1)(a) must be read to set a general proscription against applying new law to grant relief from already-final convictions. Section 104(1)(f) entirely dictates the circumstances under which that presumption must give way to allow relief based on new case law. Read together these sections show the Legislature's purpose to severely limit the circumstances under which new law can upset convictions and sentences that were valid under the law when they were entered. Finding implied allowances in section 104(1)(a) that exceed the express limits in section 104(1)(f) would violate that purpose.

This Court also understood the State to argue that section 104(1)(f)(i) permitted relief for an *Atkins* claim. It does not. As stated, later-developed case law can upset a final judgment where the United States or Utah Supreme

Court announces a new rule that (1) "was dictated by precedent existing at the time the petitioner's conviction or sentence became final"; or (2) "decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted." Utah Code Ann. § 78B-9-104(1)(f)(i),(ii). As shown below, the second provides grounds for relief on an Atkins claim. The first does not.

The first gives force to those new decisions "that merely apply the principle that governed a prior decision to a different set of facts" and "are retroactive on collateral review so long as the precedent they rest on predates the conviction being challenged." *Winward v. State*, 2015 UT 61,¶11, 355 P.3d 1022 (quotations and citations omitted). Although easily misunderstood as an *exception* to non-retroactivity, strictly speaking it is an *application* of non-retroactivity, since a later holding "dictated by precedent" was in fact already the law.

This section clearly does not apply to *Atkins* claims where the judgment became final before the *Atkins* decision. At the time Archuleta's judgment became final, *see State v. Archuleta*, 850 P.2d 1232 (Utah 1993), a United States Supreme Court decision had explicitly held that the constitution does not prohibit executing the intellectually-disabled. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). That remained the rule until 2002 when the Supreme Court

decided *Atkins v. Virginia. See* 536 U.S. 304 (2002). *Atkins* did not purport to rely on the principle that governed *Penry* or any other case; rather, it relied on the changing consensus against executing the intellectually disabled, as revealed primarily in recent legislative enactments representing the will of the people. *See id.* at 314 (noting "[m]uch has changed since" *Penry*). This change and the resulting consensus, *Atkins* held, had constitutional significance requiring an Eighth Amendment prohibition against executing the intellectually disabled. But it was a clear break with the rule in effect when Archuleta's conviction became final.

Atkins was not "dictated by precedent," and that exception to non-retroactivity does not supply a statutory ground for Archuleta's *Atkins* claim. Archuleta agrees. Supp.Br.Aplt. 12.

In addition to statutory grounds, the Court's supplemental briefing order asked whether *Atkins* claims are cognizable under Utah R. Crim. P. 22(e). Archuleta and the State agree that rule 22(e) does not support relief for claims that require evidentiary development to prove; in other words, it is a basis for relief only from a facially invalid sentence. Supp.Br.Aplt. 15-17; *see also State v. Houston*, 2015 UT 40,¶26, 353 P.3d 55 ("We therefore hold that under rule 22(e), a defendant may bring constitutional challenges that attack the sentence…as a facial challenge rather than an as-applied inquiry.").

Archuleta's sentence is not facially invalid; to invalidate it, he would have to factually prove that he is intellectually disabled. The claim is therefore not cognizable under rule 22(e).[4]

B. Utah Code section 78B-9-104(1)(f)(ii) codifies *Teague*'s "substantive rule" exception to the bar against retroactivity, which embraces categorical exemptions.

Atkins proscribes executing the intellectually disabled. This Court has asked the parties whether and what provision of the PCRA allows for *Atkins* relief from a death sentence imposed before *Atkins* was decided. The provisions the Court has identified do not provide that relief.

But section 104(1)(f)(ii) does. That subsection allows an avenue for relief when a new Supreme Court rule "decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted." Utah Code Ann. § 78B-9-104(1)(f)(ii). While the language appears to apply only to conduct, the notion was taken from Supreme Court jurisprudence that also allows relief based on new status exceptions to criminal punishment. As

[4] Archuleta argues in the alternative that the evidence of his intellectual disability is so weighty that this Court could accept it at face value and reach the *Atkins* claim under rule 22(e) without any evidentiary development. Supp.Br.Aplt. 17. But Archuleta has never proffered a report for any expert finding that he is intellectually disabled. And the evidence he has proffered has not been vetted by adversarial testing. It cannot be accepted at face value without violating the State's right to a fair adjudication.

explained below, this provision codifies the Supreme Court's "substantive rule" exception to the principle of non-retroactivity.

Although not obvious from the text itself, this provision was adopted against a legal backdrop that included clear United States Supreme Court pronouncements under that exception that equated decriminalization and status exemptions for retroactivity purposes. By codifying that exception, section (1)(f)(ii) provides a statutory ground for status exemption claims where the Supreme Court has exempted a class of individuals from punishment, even though the exemption arose after the petitioner's judgment became final.

This Court held in *Winward* that by enacting section 104(1)(f)(i), the Legislature intended to codify federal dictated-by-precedent retroactivity jurisprudence under *Teague v. Lane* and its progeny. *Id.* ¶12 (citing *Teague v. Lane*, 489 U.S. 288, 301 (1989)). This was because (1) the phrase "dictated by precedent" "is quoted almost verbatim from the U.S. Supreme Court's decision in *Teague*"; and (2) the phrase "'dictated by precedent' had become the established federal standard for distinguishing between old rules and new rules for purposes of determining whether a Supreme Court decision applies retroactively on collateral review." *Id.* ¶11. And when "a word or phrase is transplanted from another legal source, whether the common law

or other legislation, it brings the old soil with it." *Id.* ¶12 (quotations and citation omitted). Thus, the Court held that all of the "Supreme Court's decisions applying *Teague*" govern the meaning of "dictated by precedent" under the PCRA. *Id.*

Just as the "dictated by precedent" notion was lifted from *Teague*, so too was the exception for a new rule that "decriminalizes the conduct that comprises the elements of the crime for which the petitioner was convicted." Utah Code Ann. § 78B-9-104(1)(f)(ii). The Supreme Court in *Teague* adopted wholesale a framework for deciding retroactivity questions suggested long before by Justice Harlan. *Teague*, 489 U.S. at 310 (saying "we now adopt Justice Harlan's view of retroactivity for cases on collateral review"). The starting point for that framework—reflecting a deep concern for "the principle of finality which is essential to the operation of our criminal justice system"—is that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 309-10. Just like the PCRA, non-retroactivity is presumed under federal law.

But Justice Harlan's view admitted of two exceptions, which *Teague* adopted. The first of those exceptions applies where a new rule places "certain kinds of primary, private individual conduct beyond the power of

the criminal law-making authority to proscribe." *Id.* at 311 (quotations and citation omitted). This has become known as the "substantive rule" exception, *see Montgomery v. Louisiana,* 136 S.Ct. 718, 728 (2016), which allows not only retroactive "constitutional protection to an actor's primary conduct," but also "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." *Penry*, 492 U.S. at 329.[5]

The Supreme Court has explained that the substantive rule exception in *Teague* applies with equal force to both decriminalization of primary conduct and status exemptions. "In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all." *Id.* at 330. "In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and…finality and comity concerns…have little force." *Id.* "Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense," including, if the

[5] The second exception, the "watershed rule" exception allowing retroactive application of rules that are deemed implicit in fundamental fairness itself, was not codified in the PCRA, and is not at issue here.

court had not held otherwise in *Penry*, a rule forbidding execution of the intellectually disabled. *Id.*; *accord Montgomery*, 136 S.Ct. at 729 (explaining theoretical identity between categorical exemptions and decriminalization).

The Utah Legislature enacted the "decriminalizes" exception to non-retroactivity in 2008, nineteen years after both *Penry* explained that *Teague*'s first exception covers status exemptions and *Teague* set forth what has become the established framework for deciding retroactivity under federal law. This Court has already held that the Legislature imported *Teague* when, against the same legal backdrop, it enacted the "dictated by precedent" rule. *Winward*, 2015 UT 61, ¶¶11-12. "Seeing no contrary intent in the statute's text or history," this Court should "therefore conclude that the legislature intended section 104(1)(f) to allow new PCRA petitions based on" new status exemptions, since the same result would obtain "under the U.S. Supreme Court's decisions applying *Teague*." *Id.* ¶12.

Moreover, sister states and federal courts have unanimously held that *Atkins* created a new substantive rule of constitutional law retroactively applicable to cases on collateral review. And many of them did so before the Legislature codified *Teague*'s first exception.[6]

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[6] *See, e.g., Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1310-12 (11th Cir. 2015); *Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002);

Archuleta agrees that section 104(1)(f)(ii) provides a statutory ground for retroactive application of new exemption claims. Supp.Br.Aplt. 14-15.

For exactly the same reasons this Court held in *Winward* that *Teague*'s "old soil" founds the PCRA's "dictated by precedent" language, it should hold that same soil founds the PCRA's "decriminalizes" language. The Legislature did not mean to keep consistent with *Teague* in section 104(1)(f)(i) but not in section 104(1)(f)(ii). The same retroactivity framework governs both. Thus, the PCRA provides an avenue for petitioners, whose judgments became final before *Atkins* was decided, to get relief from their death sentences if they are intellectually disabled.

Of course, the gates to that avenue, though open to the reasonably diligent, are closed to those who try and enter late. Under section 78B-9-107(2)(f), Archuleta's cause of action accrued, and the one-year limitation

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Hill v. Anderson, 300 F.3d 679, 681-82 (6th Cir. 2002); *Duncan v. State*, 925 So. 2d 245, 250-51 (Ala. Crim. App. 2005) (citing *Clemons v. State*, 55 So. 3d 314, 318-20 (Ala. Crim. App. 2003)); *Engram v. State*, 200 S.W.3d 367, 369 (Ark. 2004); *Head v. Hill*, 587 S.E.2d 613, 621 (Ga. 2003); *Pizzuto v. State*, 202 P.3d 642, 650 n.4 (Idaho 2008); *Williams v. State*, 793 N.E.2d 1019, 1027 (Ind. 2003); *Bowling v. Commonwealth*, 163 S.W.3d 361, 370 (Ky. 2005); *State v. Dunn*, 831 So. 2d 862, 882 n.21 (La. 2002); *Russell v. State*, 849 So. 2d 95, 145-48 (Miss. 2003) (by implication); *Johnson v. State*, 102 S.W.3d 535, 539 n.12 (Mo. 2003); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002); *Pickens v. State*, 74 P.3d 601, 603 (Okla. Crim. App. 2003); *Franklin v. Maynard*, 588 S.E.2d 604, 606 n.6 (S.C. 2003).

period started, the date *Atkins* was decided. Archuleta agrees. *See* Supp.Br.Aplt. 4 ("The accrual date of his *Atkins* claim should have been the day *Atkins* was decided, June 20, 2002."); *id.* 11,20,28 (same).[7]

Since his claim accrued in 2002, the statute of limitations expired in 2003.

The supplemental briefing order asked whether *Montgomery* added some additional retroactivity burden upon the state post-conviction regime. Order at 1. Because the PCRA already codified the *Teague* retroactivity framework at least as early as 2008, *Montgomery* did not require the states do anything the PCRA did not already do. It adds nothing to this case. *Montgomery* stands only for the proposition that, to the extent a state post-conviction regime is open to federal constitutional claims, that regime must implement the retroactivity framework identified in *Teague*. "The Court now

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[7] Of course, the current statute of limitations, together with its enumerated accrual dates, did not take effect until the Legislature passed the current version of the PCRA in 2008. Archuleta argues that the 2002 PCRA accommodated federal retroactivity principles, and that his cause of action therefore accrued when *Atkins* issued in 2002. Supp.Br.Aplt. at 5. The State has no reason to dispute that.

But if the pre-2008 PCRA did not accommodate post-finality exemption claims, then Archuleta's cause of action accrued at the latest on 5 May 2008, the effective date of the current statute of limitations. *See, e.g., Pinder v. State*, 2015 UT 56, ¶56, 367 P.3d 968. In that case, Archuleta had until 5 May 2009 to file his *Atkins* claim, and it was still several years too late.

holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery*, 136 S.Ct. at 729.

As shown, the PCRA already did this. Archuleta could have availed himself of the rule in *Atkins* as early as 2002 and at the latest by 2008 when the Legislature codified *Teague* into the PCRA. *Montgomery* therefore did not restart the clock for Archuleta to seek state post-conviction relief under a new retroactivity rubric.

And just because both the PCRA and *Montgomery* require retroactive application of *Atkins*'s substantive rule, that does not mean that Archuleta could wait as long as he wanted before filing a petition. *See State v. Merrill*, 2005 UT 34,¶45, 114 P.3d 585 (stating "we do not consider fundamental a defendant's right to maintain a perpetual grip on all procedural levers to" exercise fundamental rights). *Montgomery* did not hold that states are prohibited from imposing reasonable procedural limits on bringing retroactive claims, or that once a substantive rule is announced it remains perpetually open. Indeed, the rule in federal courts has been unanimously the opposite: *Atkins* claims are subject to procedural bars. *See, e.g., Prieto v. Zook*, 791 F.3d 465, 469 (4th Cir. 2015); *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).

The PCRA permitted Archuleta an entire year to bring his *Atkins* claim, but he did not. His delay forfeited any claim to *Atkins*'s substantive rule.

II.

If Archuleta's claim is not cognizable under the new rule decriminalization provision, then Archuleta has no remedy in state court and the judgment of the lower court must be affirmed.

As shown, the PCRA provides an avenue to obtain relief on an *Atkins* claim that ripened after final judgment, subject to procedural limitations designed to enforce the petitioner's reasonable diligence. But if the PCRA is not open to this type of claim, then for all the reasons argued in the State's opening brief, Archuleta has no remedy in state court. The PCRA occupies the field of post-conviction remedies, and the judiciary has no independent writ authority to substantively review a criminal judgment issued by a court of competent jurisdiction.

Montgomery does not say otherwise. Rather, it requires state courts to apply federal law only if "a state collateral proceeding is open to a claim controlled by federal law" in the first place. *Montgomery*, 136 S.Ct. at 732. But where a state proceeding is not open, *Montgomery* did not require it to be. In his dissent in *Montgomery*, Justice Thomas noted the significance of this

qualification. "Only when state courts have chosen to entertain a federal claim can the Supremacy Clause conceivably command a state court to apply federal law." *Id.* at 749 (Thomas, J., dissenting). "As we explained last Term, private parties have no constitutional right to enforce federal laws against the States." *Id.* (cleaned up). "Instead, the Constitution leaves the initial choice to entertain federal claims up to state courts, which are 'tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.'" *Id.* (quoting *Osborn v. Bank of United States*, 9 Wheat. 738, 821, 6 L.Ed. 204 (1824)). The majority did not dispute this.

Thus, if the Legislature closed Utah courts to post-finality *Atkins* claim, that was in its constitutional prerogative.

That does not mean, however, that no court anywhere could have remedied Archuleta's claim. Federal courts have power to remedy federal claims. When "there is an absence of available State corrective process," a federal court may grant a petition for writ of habeas corpus "on the ground that [the petitioner] is in custody in violation of the Constitution…of the

United States." 28 U.S.C. § 2254(a),(b)(1)(B)(i). Federal courts are open to federal claims.[8]

Archuleta argues that if the PCRA provides no avenue for relief, then this Court could "remand this case to the district court with instructions to correct Mr. Archuleta's illegal sentence or, at the very least, consider his claims under Rule 22(e)." Supp.Br.Aplt. 19. Rule 22(e) is a procedure applicable only in the criminal case. But Archuleta invoked this Court's appellate jurisdiction over an appeal from a civil post-conviction proceeding, not the criminal case. The Court therefore has no jurisdiction to remand to the criminal case. And as noted, rule 22(e) does not apply here because "correcting" Archuleta's sentence would require taking extensive evidence to determine whether he is intellectually disabled.

III.

Dismissal was proper because the summary judgment papers fully satisfied due process, and if there were some technical noncompliance with Utah Code section 78B-9-106(2)(b)'s notice provision, the error was harmless.

Finally, the supplemental briefing order asks whether the district court erred "when it dismissed the petition" "without providing the parties prior

[8] Federal petitions are subject, of course, to the petitioner's reasonable diligence. *See, e.g., id.* § 2244(d)(1) (imposing one-year limitation period). The State does not concede that Archuleta is entitled to a federal habeas writ.

notice that it was going to do so?" Order at 3. The Court also asked whether the dismissal constitutes plain error. *Id.*

Utah Code section 78B-9-106(2)(b) gives courts the power to dismiss PCRA petitions on time or procedural bars even when those bars have never been raised or briefed by the parties. And by requiring that a court not "raise a procedural bar or time bar on its own motion" without giving "the parties notice and an opportunity to be heard" the legislature incorporated well-established procedural due process protections. *See, e.g., Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *accord Am. W. Bank Members v. State*, 2014 UT 49,¶23, 342 P.3d 224 (noting "procedural due process generally requires notice and a hearing"). Although bedrock principles, the notice and hearing requirements are not inflexibly applied.

Questions about procedural due process ask "whether the notice is 'reasonably calculated, *under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Bivens v. Salt Lake City Corp.*, 2017 UT 67,¶30, ___ P.3d ___

(quoting *Jackson Constr. Co. v. Marrs*, 2004 UT 89,¶10, 100 P.3d 1211). Procedural due process is not concerned with exactitude or strict adherence to prescribed procedural mechanics. It is not "a technical concept that can be reduced to a formula with fixed content unrelated to time, place, and circumstances." *In re Worthen*, 926 P.2d 853, 877 (Utah 1996). "Rather, 'the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved.'" *Id.* (quoting *Rupp v. Grantsville City*, 610 P.2d 338, 341 (Utah 1980)). Where a party is aware of the issue and has had "an opportunity to be heard in a meaningful way," *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983), he has had all the process he is due.

The procedural posture here is unusual only in that, after full briefing on the time and procedural bars, the State decided to withdraw its summary judgment motion. But the trial court, having read the papers, found Archuleta's *Atkins* claims so clearly barred that "it would be a waste of judicial resources to proceed with an answer from the State, conduct discovery, and hold an evidentiary hearing." Order at 2. And because full briefing had already occurred, the trial court concluded that "both parties

have had an opportunity to be heard."[9] It was therefore appropriate to rule without further and redundant notice or briefing. This was entirely reasonable and correct.

The question is not, as Archuleta frames it, whether he had an "opportunity to brief whether *sua sponte* dismissal was appropriate or authorized," Supp.Br.Aplt. 22, but whether he had an opportunity to brief the substantive issues of the time and procedural bars. Section 78B-9-106(2)(b)'s notice and hearing requirement relates to the applicability of the time and procedural bars being raised by the court, not the court's power to raise them at all. The statute explicitly gives the district court authority to raise the bars sua sponte, and it would make no sense to construe the statute to require the parties be allowed to address that authority. That would serve no purpose. The statute clearly contemplates the parties be afforded the opportunity to be heard on the applicability of the bars—that is what matters to them.

And here, Archuleta unquestionably had that opportunity. Indeed, he filed 280 pages of briefing and exhibits on that very question. And once his brief was filed, he actively opposed the State's effort to file a reply brief. As he wrote in his opposition to the State's motion for leave to file a reply, the

[9] Notably, neither party had requested oral argument on the summary judgment motion.

"case has proceeded in accordance with the rules, and in accordance with how summary judgment is contemplated in post-conviction. *Briefing is complete*." PCR3616 (emphasis added). From Archuleta's perspective, when he filed that opposition in July 2015, everything that needed to be said to the court about the applicability of the time and procedural bars had been said. Not only had *he* said all he had to say, he believed *neither party* had any right to say anything more.

It is hard to imagine a more robust "opportunity to be heard" than this. In a typical case, where nothing has been previously raised by the parties, a court must give prior notice before a sua sponte dismissal under 78B-9-106(2)(b). But here, the State's summary judgment motion already provided that notice and the extensive briefing on the motion was the opportunity to be heard. Additional notice by the court and briefing by the parties was entirely unnecessary "under all the circumstances" of this case. *Bivens*, 2017 UT 67, ¶30.

Archuleta cites three cases to show the district court did not provide proper notice. Supp.Br.Aplt 23. Those cases are all inapposite. Each of them resulted from summary dismissal of a PCRA petition for time or procedural bars after the trial court's initial review under Utah R. Civ. P. 65C(h), and before the State was ordered to respond. Because rule 65C(h) permits

summary dismissal without prior notice only where a petition or claim is "frivolous on its face" because of specified types of defects, not including time or procedural bars, those cases each hold that summary dismissal based on time or procedural bars is improper under that specific procedure. In each case, the court of appeals required the trial court to give the petitioner "notice and an opportunity to be heard in accordance with Utah Code section 78B-9-106(2)(b)." *Schwenke v. State*, 2014 UT App 103,¶¶3-4, 326 P.3d 684 (procedural bar); accord *Esparza-Recendez v. State*, 2012 UT App 344, 293 P.3d 377 (time bar); *Bluemel v. State*, 2011 UT App 133, ¶3, 253 P.3d 1128 (procedural bar). None of these cases address the situation here, where the issues had already been extensively briefed by the parties prior to the court's ruling; and the rule 65C(h) procedure improperly employed in those cases was not employed here.

The process here was fair and "just to the parties," *In re Worthen*, 926 P.2d at 877, who already had and took the opportunity to make any arguments and present any evidence they desired. Even now, in his supplemental brief, Archuleta does not articulate any specific arguments or evidence relating to the time and procedural bars that he claims he would have presented had he only been given an additional chance to make them.

And to what end?

Even if this Court were inclined to find error based on the lack of an additional notice from the trial court, that error was in no way plain because it was neither "obvious to the trial court" nor "harmful." *See State v. Bond*, 2015 UT 88, ¶36, 361 P.3d 104. As discussed above, the trial court clearly considered section 78B-9-106(2)(b) and reached the very reasonable conclusion that the parties had already fully litigated the issue and required no further notice or opportunity to be heard.

And Archuleta had already argued that no further briefing on the time and procedural bars should be permitted. Certainly, no case law clearly alerted the trial court that it could not rely on section 78B-9-106(2)(b) under these circumstances. Surely it cannot be said that the trial court's decision that no further notice or briefing was required was so inherently incorrect that it should have been obvious to the trial court that it was wrong.

And there is no conceivable harm here anyway. Reversal on this issue accomplishes nothing. On remand, all the trial court need do is provide a formal notice of its intent to rule on the time and procedural bars on its own motion, afford the parties the opportunity to file briefs—which they have already done—and then rule on the issues. But again, Archuleta has not identified any argument that he would have raised in response to a court notice of the time-and procedural-bar issues that he did not raise in response

to the State's time-and procedural-bar arguments. Presumably then, he has nothing to add to the 280-pages of briefing he has already filed. Error that, when corrected, places a party in the exact position they already occupy is the quintessence of harmless error.

In *Kell v. State,* this court affirmed summary judgment on harmless error grounds where the district court granted summary judgment without even a *motion* by the State, much less a response by Kell. *See Kell v. State*, 2008 UT 62, ¶45, 194 P.3d 913. The Court held that, while it "is error for a trial court to sua sponte grant summary judgment on an issue when neither party has sought summary judgment on that issue," that error "will not constitute grounds for reversal unless the losing party demonstrates that it was prejudiced by the grant of summary judgment." *Id.* ¶46. Because Kell could not as a matter of law prevail on the sua sponte denied claims, the procedural error was harmless.

Archuleta's only argument under the plain error prejudice standard is this: "Given what is at stake for Mr. Archuleta, the error was not harmless." Supp.Br.Aplt. 23. He does not explain what he means, but presumably he means that nothing can be harmless where a death sentence is at stake. But the relevant alleged error is procedural, not substantive. The question is "should the court have sua sponte applied the procedural bars without prior

notice?" The question is not "is Archuleta's death sentence valid?" Thus, since more notice and argument would end in the same result—application of the procedural bars—any error is indeed harmless. Archuleta's argument that the "stakes" mean the alleged error was not harmless would require the Court to hold that nothing can be harmless in a death penalty case. That is obviously untrue.

Because it can be harmless error to sua sponte grant summary judgment without any briefing by the parties, as in *Kell*, a death-penalty case, then *a fortiori* it is harmless error to grant summary judgment where the parties have already said everything they want to about the underlying issues. This Court should disregard the alleged procedural error.

CONCLUSION

For the foregoing reasons, and the reasons urged in the State's Brief of Appellee, this Court should affirm.

Respectfully submitted on May 30, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 6, 500 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Andrew F. Peterson
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Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on May 30, 2018, the Brief of Appellee was served upon counsel of record for appellant by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melissa Walkingstick Fryer

Addendum

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.

(g) the petitioner committed any of the following offenses while subject to force, fraud, or coercion, as defined in Section 76-5-308:

(i) Section 58-37-8, possession of a controlled substance;

(ii) Section 76-10-1304, aiding prostitution;
(iii) Section 76-6-206, criminal trespass;
(iv) Section 76-6-413, theft;
(v) Section 76-6-502, possession of forged writing or device for writing;
(vi) Sections 76-6-602 through 76-6-608, retail theft;
(vii) Subsection 76-6-1105(2)(a)(i), unlawful possession of another's identification document;
(viii) Section 76-9-702, lewdness;
(ix) Section 76-10-1302, prostitution; or
(x) Section 76-10-1313, sexual solicitation.

(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.