

2010

Michael Anthony Archuleta v. Hank Galetka : Brief of Appellant

Utah Supreme Court

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MICHAEL ANTHONY ARCHULETA,

Appellant,

VS.

HANK GALETKA, Warden,

Respondent.

Case No.: 940401006

Appellate No. 20100791-SC

APPELLANT'S RULE 60 (B) BRIEF

ORAL ARGUMENT IS REQUESTED

PRIORITY NUMBER 1-APPELLANT IN PRISON/DEATH ROW

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT
MILLARD COUNTY, STATE OF UTAH

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UTAH APPELLATE COURTS
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MICHAEL ANTHONY ARCHULÈTA,

HANK GALETKA, Warden,

Respondent.

Appellate No. 20100791-SC

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I. JURISDICTION STATEMENT

This is an appeal pursuant to the Utah Rules of Appellate Procedure 3 stemming from the Fourth District Court, Millard County, State of Utah, regarding the Court’s final Orders regarding the Memorandum Decision denying the Motion to Set Aside Judgment on or about April 21, 2010, R. p. 4896-4980; the Memorandum Decision denying the Motion to Alter on or about September 13, 2010, R. p. 5261-5285; and the Memorandum Decision denying the Motion to Alter on or about November 8, 2010, R. p. 5319-5323.

II. STATEMENT OF THE CASE

1. The above named Appellant, Michael Anthony Archuleta, ("Michael"), was charged with capital criminal homicide for the November 22, 1988 murder of Gordon Church ("Church"). Addendum, Third Amended Information as Exhibit "1."
2. The case proceeded to trial and Michael was represented during the trial by attorney Michael Esplin ("Esplin").
3. At the conclusion of the guilt phase of the trial, Michael was convicted of criminal homicide, a capital offense.
4. At the conclusion of the sentencing phase of the trial, the death penalty was imposed. *Id.* Warrant of Death as Exhibit "2."
5. Michael then appealed his conviction and sentence and was again represented by Esplin during the direct appeal of his conviction and sentence.
6. The Utah Supreme Court denied Michael's appeal of his conviction and sentence on or about March 25, 1993. *Id. State vs. Archuleta*, 850 P. 2d 1232 (1993) as Exhibit "3."
7. Michael then filed a pro se petition for a writ of habeas corpus in the Fourth Judicial District Court, challenging his conviction on the ground that he had been denied his Sixth Amendment constitutional right to the effective assistance of counsel during the guilt and penalty phases of his trial, as well as on the direct appeal of the conviction. R. p.04, Petition for Writ of Habeas Corpus.
8. Attorney Karen Chaney, representing Michael pro bono, filed an Amended Petition for Post Conviction Relief on or about August 11, 1994. R. p.75, Amended Petition for Post-Conviction Relief.
9. Eventually, in response to Michael's Amended Petition the State moved for summary judgment. R. p.297.

10. After arguments, Judge Davis, District Court Judge granted the State's motion for summary judgment holding, inter alia, that the claims argued in Michael's petition were available to him during the direct appeal; consequently, Michael, having failed to raise them on direct appeal, was procedurally barred from raising them in his Petition for Post Conviction Relief. R. p.546, Findings of Fact and Conclusions of Law.
11. On or about June 26, 1998, the Utah Supreme Court overturned Judge Davis' judgment in the District Court without much discussion but referencing three cases, and remanded the case back to the District Court for further proceedings. Addendum, *Archuleta vs. Galetka*, 960 P. 2d 399 (1998) as Exhibit "7."
12. *Dunn v. Cook*, 791 P.2d 873 (1990), one of the three cases cited by the Court in overturning Judge Davis's ruling, held that a conviction may be collaterally attacked even if the issue was available on appeal if the Appellant can establish unusual circumstances. When the trial attorney is the same attorney involved in the appeal, defenses such as ineffective assistance of counsel are not waived if not asserted on appeal and thus may be pursued in a post conviction relief petition. *Id. Dunn v. Cook*, 791 P. 2d 873 (1990) as Exhibit "8."
13. Attorney Karen Chaney's license to practice pro hoc vice was revoked because of a mental breakdown, thus ending her representation of Michael. See, R. p.725-726, June 7, 2001 Ruling and Order; R. p.706, February 13, 2001 Ruling on Motion; R.p.622, September 8, 2000 Motion for Extension; and R. p.635, September 20, 2000 Hearing Minutes regarding Motion.
14. Attorney Edward Brass ("Brass") was then appointed as new counsel for Michael on or about June 30, 1999. R. p. 728

15. Brass then filed Michael's Second Amended Petition for Post Conviction Relief ("Second Amended Petition"), which was essentially identical in many aspects to the First Amended Petition, on or about June 14, 2002, in the Fourth Judicial District Court, Millard County. R. p. 888, Second Amended Petition.
16. The State of Utah, in response to the Second Amended Petition, again moved for summary judgment on or about April 1, 2003. R. p. 1255.
17. A year later, the State moved for rule 11 sanctions against Brass on or about April 12, 2004. R. p. 1986.
18. On August 25, 2004, the Trial Court granted partial summary judgment on all claims except 33(d)-(t) and 35 (o)-(z), finding that claims 1-30 were procedurally barred pursuant to Judge Davis' previous order. R. p. 2226, Ruling on Motion for Summary Judgment.
19. On March 21 and 22 and on May 17 and 18, 2006, the Trial Court conducted an evidentiary hearing where Ed Brass presented expert testimony alleging trial counsel was ineffective for failing to present mitigating factors during the penalty phase of the trial. See R. p 2753, 2791, 2793, 2891 (transcript), and 2907 (transcript).
20. The Parties then submitted closing arguments on September 14, 2006 and October 31, 2006. See, R. p. 2990, 3009.
21. On or about January 22, 2007, Judge Eyre, after taking evidence and closing arguments on the mitigation issue, denied the Petition for Post-Conviction Relief holding that mitigating evidence presented at the hearing contradicted the trial counsel's trial strategy, as well as Michael's own testimony that he did not inflict any of the injuries to Gordon Church. R. p. 3338, Ruling on Petition.

22. On or about March 9, 2007, the Appellant appealed the decisions of the Court regarding the State's Motion for Summary Judgment, which is pending before the Court. R. p. 3402.
23. The undersigned was appointed as counsel for Michael, and submitted a Motion to Set Aside Judge Eyre's August 25, 2004 and January 22, 2007 Judgments and Motion for a New Trial on or about July 17, 2009. R. p. 3505-3562.
24. Judge Eyre issued a Memorandum Decision denying the Motion to Set Aside Judgment on or about April 21, 2010. R. p. 4896-4980.
25. Appellant filed his Motion to Alter or Amend Judgment on or about May 4, 2010. R. p. 995-5004.
26. A Memorandum Decision was filed denying the Motion to Alter on or about September 13, 2010. R. p. 5261-5285.
27. Appellant filed his Notice to Appeal on or about September 20, 2010. R. p. 5289-5290.
28. Appellant filed his Second Motion to Alter or Amend Judgment on or about September 23, 2010. R. p. 5291-5292.
29. A Memorandum Decision was filed on or about November 8, 2010, R. p. 5319-5323, denying the Second Motion to Alter or Amend Judgment.

III. STATEMENT OF FACTS

The findings of fact found in the Utah Supreme Court's mandatory appeal, "Archuleta I," Addendum as Exhibit "3"; Judge Davis' order granting summary judgment, R. 546; Judge Eyre's order granting summary judgment, R. 2226; and Judge Eyre's denial of post-conviction relief, R. 3338, adequately for the purpose of this appeal, provides a summary of the factual matters before the Court. As such, a factual summary will not be further provided herein.

IV. STATEMENT OF ISSUES/ PRESERVATION OF ISSUES

- I. Whether Michael is entitled to the relief sought in his Motion to Set Aside the Trial Judge's August 25, 2004 and January 22, 2007 rulings and judgments and/or his Motion for New Trial.
- II. Whether or not the trial judge applied the correct standards in addressing Appellant's Motion to Set Aside.
- III. Whether or not the Trial Court erred in denying the Appellant's Rule 59 Motion to Alter or Amend Judgment by allowing him to conduct discovery to address the Rule 60 Motion to Set Aside.
- IV. Whether or not Michael's mistaken reliance on Brass to properly investigate and pursue his post-conviction petition justifies relief from the Judge Eyre's August 25, 2004 and January 22, 2007 rulings and judgments.
- V. Whether or not Brass provided ineffective assistance of counsel or was grossly negligent by failing to investigate, pursue and present the following claims regarding the Appellant's Post-Conviction Relief:
 1. Issues regarding Wood's confession to Jorgensen.
 2. Issues regarding David Homer's testimony.
 3. Issues regarding the failure to contact Gary Hawkins and others regarding subsequent confessions of Lance Wood.
 4. Issues regarding whether Michael is exempt from the death penalty as provided for by *Atkins v. Virginia*, 536 U.S. 304 (2002) and Utah Code §77-15a-101.
 5. Issues regarding Esplin's failure to produce evidence regarding Mr. Wood's personality and psychological assessments.
 6. Issues regarding Esplin's failure to obtain Experts to support Michael's defense against the State's charges.
 7. Issues regarding the mental breakdown of the State's forensic pathologist.
 8. Issues regarding Brass' failure to amend the pleadings.
- VI. Whether Brass prejudiced Michael by introducing prejudicial, rather than mitigating evidence in his Post-Conviction Relief Petition.

- VII. Whether “cumulative error” undermines any confidence that that Michael received a fair trial or competent representation regarding post-conviction matters; therefore entitling Michael to a new trial and/or penalty phase of his trial.
- VIII. Whether or not the death sentence should be outright reversed based upon a lack of confidence that that Michael received a fair trial or competent representation regarding post-conviction matters.
- IX. Whether or not Michael has exhausted his State remedies.

V. SUMMARY OF ARGUMENT

The Appellant filed a petition for post conviction relief challenging his conviction and sentence alleging numerous claims that during his criminal trial, his rights as guaranteed by Article I, Sections 7, 9, 10 and 12 of the Utah Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States were violated. Pursuant to the State’s Motion for Summary Judgment and without fully addressing Michael’s substantive claims and ineffective assistance of counsel claims, the Trial Court on August 25, 2004, R. p.2226, and on January 22, 2007, R. p. 338, dismissed Michael’s Petition for Post-Conviction Relief. Appellant then filed a Motion to Set Aside Judge Eyre’s ruling based upon excusable neglect, gross negligence and in ineffective assistance of counsel. The Trial Court denied the Appellant’s Rule 60(b) Motion. For the reasons stated herein, the Trial Court erred in its conclusions and applied the wrong standard in reaching its conclusions. This Court should grant the Appellant his relief by granting him a new trial and/or sentencing in that the evidence supports Michael’s claims; or in the alternative, this Court should remand the case to the district court for the purpose of addressing the Appellant’s claims using the proper criteria and standards as indicated herein.

VI. LEGAL ARGUMENT

A. This Court Should Set Aside the Judgments of the District Court Pursuant to Rule 60(b)

1. Introduction

In this matter, Michael sought an order setting aside the Trial Court's August 25, 2004 and January 22, 2007 rulings denying Michael's post-conviction petition. In determining whether this motion should be granted, this Court

must not lose sight of the fact that the case before us is a post-conviction petition seeking habeas corpus relief from a death penalty sentence. A post-conviction proceeding is a proceeding of constitutional importance, over which the judiciary has supervisory responsibilities due to our constitutional role. In discharging this role, we must recognize the stakes involved in post-conviction proceedings, take appropriate steps to satisfy ourselves of the reliability of convictions and death sentences, and ensure that a petitioner's fundamental rights are adequately protected.

Menzies v. Galetka, 150 P. 3d 480, 503 (2006).

Motions to set aside are allowed by Utah Rules of Civil Procedure 60(b), which provides as follows:

On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reason[] (1), . . . not more than 3 months after the judgment, order, or proceeding was entered or taken. . . . The procedure for obtaining any relief from a judgment shall **be by motion** as prescribed in these rules or by an independent action. [Emphasis added.]

For the reasons found herein, Michael is entitled to have Judge Eyre's ruling denying Post-conviction Relief set aside pursuant to Rule 60 (b). It is important to note that the Appellant is seeking relief pursuant to Rule 60(b) based on three alternative grounds: 1) mistake, inadvertences, surprise or excusable neglect; 2) counsel provided ineffective assistance of counsel; and 3) counsel was grossly negligent. As the following demonstrates, the Appellant is

entitled to relief on all three grounds justifying relief from Judge Eyre's ruling denying post-conviction relief.

2. The Trial Court Applied the Wrong Standard in Determining Whether Michael was entitled to Rule 60 Relief.

To obtain relief from a judgment or an order, Rule 60 requires the person to pursue the relief by Motion. See Utah Rules of Civil Procedure 60 (b). Utah Rule of Civil Procedure 7 states that an "application to the court for an order shall be by motion which . . . **shall be made in accordance with this rule.** A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought." [Emphasis added.] Rule 7 continues by providing that "motions . . . shall be accompanied by a supporting memorandum." Rule 7 (c)(1). Then Rule 7 sets up a briefing schedule to properly bring the issue before the Court for its ruling. Rule 7(c)(3)(A) mandates the content the memorandum supporting the motion should contain. Although the language of paragraph 7(c)(3)(A) seems to be specific to the content necessary for a Motion for Summary judgment, the rule, as stated and quoted above, also states that all motions must comply with Rule 7. If the "content" requirements of Rule 7 apply, then the memorandum should "contain a statement of material facts . . . which shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials." In fact, Rule 7 contemplates that any fact not "controverted by the responding party" is "deemed admitted." Id. The Rule then mandates that after the briefing has been submitted, then the matter is to be submitted to the Court and the Court at that point may conduct a hearing. See, Rule 7(d) and (e). The Court may then schedule a hearing to allow the parties to make oral arguments or to allow presentation of evidence regarding facts which are disputed. Utah Rule of Civil Procedure 43 provides that upon a motion "based on facts not appearing of record the court may hear the matter on affidavits presented by the respective

parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.”

In analyzing whether the Trial Court was in error, this Court should be mindful of the posture of the case and the issues that were before the Trial Court. The Appellant initiated this action by filing a Petition for Post-Conviction Relief. The State sought and obtained summary judgment for every claim found in the Petition for Post-Conviction Relief with the single exception being the claim regarding whether or not trial counsel provided adequate mitigating investigation. R. p. 2226. Mr. Brass without any legal justification and without Appellant’s authority failed to provide responses to the State’s Motion for Summary Judgment essentially all of the Appellant’s arguments, which resulted in default on virtually all of the Appellant’s claims found in his Petition. R. p. 1600 and 2226. In this matter, the Appellant filed a Rule 60(b) Motion for Relief from Judge Eyre’s two rulings, August 25, 2004 and January 22, 2007, based upon Brass’ ineffective assistance of counsel and gross negligence in allowing default judgment. This Rule 60(b) Motion complied with Rule 7 in all respects by containing evidentiary support for many of the claims which Brass allowed to be dismissed by summary judgment. In this Motion, the Appellant complied with Rule 7 by clearly and succinctly stating the facts upon which he relied, and then supported these facts by affidavits and by citations from sworn testimony found in the record. The Respondent did not dispute the facts nor did he file any counter-affidavits creating any facts in controversy. The Respondent did not argue, nor did the Trial Court find, that the Appellant failed to comply with the rules of civil practice regarding presenting a proper motion before the Court. The State essentially filed no competing affidavits to the Appellant’s factual allegations, nor did it request leave of the Court to pursue discovery or to dispute the evidence presented in support of the Appellant’s Rule 60(b) Motion. The

Respondent did not request a hearing pursuant to Rule 7 or Rule 43, nor did the Court set an evidentiary hearing. In essence, the Rule 60(b) Motion never went past the motion stage. Upon Michael's presentation of the evidence supporting his Rule 60 Motion, the State had the burden to contradict the Michael's evidence supporting his Rule 60 Motion. Since the State failed to object or contradict the evidence, the Trial Court, thus this Court, should consider the evidence the Appellant presented as admitted and true.

In support of his Rule 60 Motion, Michael presented his affidavit, in which the affidavit of Mr. Brass concurred and which the state did not dispute, that he never requested or otherwise authorized Mr. Brass not to pursue the issues raised in his petition for post-conviction relief. See Affidavit of Michael Archuleta, Addendum, Exhibit "29," R. p. 5032-5046, and Ed Brass, Addendum, Exhibit "15," R. p. 5057-5226.

Instead of disputing Appellant's factual allegations properly submitted in support of his motions, the Respondent's Opposition to the Appellant's Motion for Rule 60 relief argued that Appellant must "prove prior post-convictions counsel's ineffectiveness before he would be entitled to rule 60(b) relief," R. p. 4648-4751 *Respondent's Opposition* p. 7. In addition, Respondent's Opposition states that *Menzies* "makes clear that Archuleta had to prove that prior post-conviction counsels were ineffective before the Court could grant relief." Id, *Respondent's Opposition* p. 2. There is no support for this position in the Utah Rules of Civil Procedure regarding motion practice.

The Respondent's reasoning and the Trial Court's rulings were in error in that they confused the proof and the necessary analysis required regarding a Post Conviction Relief Petition with the proof and analysis required regarding whether or not Appellant's Rule 60 Motion should be granted. Clearly, relief pursuant to a Post-Conviction Relief Petition can be

based upon a claim of ineffective assistance of counsel. Furthermore, relief pursuant to the Rule 60 Motion can also be based upon ineffective assistance of counsel. The analysis and standard of ineffective assistance of counsel in these two actions are completely separate and distinct. The focus of the Trial Court on the issue of whether or not Michael received ineffective assistance of counsel as it relates to his Rule 60 motion for relief should have been on whether or not Mr. Brass failed to **investigate and pursue viable claims to obtain Post-Conviction Relief**, not whether or not the claims raised “proved” that Michael was entitled to post-conviction relief. In fact the Trial Court held as follows:

Based upon the approach employed by the Supreme Court in assessing the Rule 60(b) motion in the *Menzies* case, it is the Court’s considered view that the burden of proof applicable to Petitioner’s ineffective assistance of post-conviction counsel claims is more than simply a pleading standard. Instead, it requires Petitioner to apply the *Strickland* standard and demonstrate, with respect to each of his claims of ineffective assistance of counsel, that Brass’ representation was objectively deficient and that, but for Brass’ deficient performance, there is a reasonable probability that the outcome of Petitioner’s post-conviction proceeding would have been different.

R. p. 4896, at p. 38.

In analyzing the issues, it is essential to keep in mind the posture of the case. The Appellant had filed a “motion” with appropriate supporting documents taking the position that the Trial Court’s summary judgment should be set aside. *Menzies* Court stated, with regard to a district court’s review of a Rule 60(b) motion, as follows:

It is well established that 60(b) motions should be liberally granted because of the equitable nature of the rule. Therefore, a district court should exercise its discretion in favor of granting relief so that controversies can be decided on the merits rather than on technicalities.

Menzies v. Galetka, 150 P.3d 480, (Utah 2006), *quoting Musselman*, 667 P.2d at 1055-56.

The *Menzies* Court also took the opportunity to remind trial courts that “the law should not be so blind and unreasoning that where an injustice has resulted the [plaintiff] should be without remedy.” *Id.* at 503, *quoting Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979). This

Court instructed district courts that while they do have discretion in determining Rule 60(b) motions that their “discretion is tempered by the fact that the rule is designed to be remedial and must be liberally applied.” *Id.*

The burden imposed by the Trial Court in this matter exceeds what is required by a Rule 60(b) Motion and the other civil rules as they relate to motion practice. In other words, to be entitled to Rule 60(b) relief, Michael simply needs to present viable claims, properly supported, as Rule 7 requires, that if proven would allow him to ultimately prevail. *Menzies* supports this assertion when it held that “[e]ven ‘general denials’ that would allow a litigant to prevail if proven are sufficient,” and when it stated that “[w]hile the record is far from fully developed with regard to Menzie’s claims..., [he] is not required to prove any of his claims or meet an evidentiary threshold in order to demonstrate his claims have merit.” *Id.* at 518, quoting *Erickson*, 882 P.2d at 1149. Furthermore, this Court declared that a litigant seeking rule 60(b) relief based upon ineffective assistance of counsel or gross negligence only “must proffer some defense of at least sufficient ostensible merit as would justify a trial on the issue thus raised” *Id.* at 517 quoting *Downey State Bank v. Major-Blakeney Corp.*, 545 P.2d 507, 510 (Utah 1976).

The Court expressly recognized that proof at this posture “does not set an overly burdensome threshold.” *Id.*, and expounded that, in seeking relief under Rule 60(b), “where a party presents a clear and specific proffer of a defense that, ***if proven***, would [warrant relief] by the claimant . . . it has adequately shown a nonfrivolous and meritorious defense.” *Id.* at 17 (emphasis added), quoting *Lund*, 2000 UT 75, ¶ 29, 11 P.3d 277. The threshold requirement is whether or not the Appellant has alleged in his Rule 60 Motion that he has “meritorious” claims regarding the Petition for Post-Conviction Relief of which Brass was ineffective or grossly negligent in investigating and pursuing. The Trial Court erred by obligating the Appellant to

establish proof that the claims he presented in his Rule 60(b) motion proved he was entitled to post-conviction relief.

The Trial Court in the present case was critical of Appellant for not conducting discovery to prove that he was entitled to post-conviction relief. See, R. p. 5261-5285, Memorandum Decision beginning at Section C. The Court held that the Appellant should have known pursuant to *Menzies* that discovery was available. However, *Menzies* supports the proposition that discovery is available after the court grants the Rule 60(b) Motion, but not the position that discovery should be conducted to “prove” he is entitled to post-conviction relief at the motion stage. Discovery in *Menzies* was conducted while the Trial Court was considering the Post-Conviction Petition not when it was considering the Rule 60 Motion. See, *Menzies* at p. 518-520. In *Menzies*, after default and after the Rule 60 motion, the focus shifted to Mr. Brass’ actions regarding the investigation and pursuit of the post-conviction petition. After *Menzies* filed his Rule 60 Motion with the appropriate affidavits, the **State** disputed the facts regarding Brass’ ineffective assistance of counsel in pursuing the petition for post-conviction relief and sought discovery to defend against the Rule 60 Motion. *Id* at para. 44. Based upon the State’s Motion, the Court then set an evidentiary hearing, apparently by the authority found in Rule 43, “in order to obtain evidence relating to communications between Brass and *Menzies* during the period of Brass’ representation.” *Id*. A hearing was for the singular purpose of addressing Mr. Brass’ action in pursuing Mr. *Menzies*’ post-conviction relief so that the court could address the Rule 60(b) Motion, not whether Mr. *Menzies* could prove there were claims which “proved” that he was entitled to post-conviction relief. In the case-in-hand, the State did not dispute any of the Appellant’s factual allegations, failed to seek discovery and failed to request an evidentiary hearing. Thus, the Trial Court was obligated to accept the evidence Michael presented as true.

The Appellant's evidence clearly supported the proposition that Brass provided ineffective assistance of counsel and/or was grossly negligent in allowing default and in pursuing any and all viable claims that Michael had regarding his post-conviction action.

The Appellant's Rule 60 Motion requested that the Trial Court's judgments granting summary judgment, mostly by default, be opened so that he could pursue viable claims that Mr. Brass failed to pursue or investigate. The evidence provided was simply to demonstrate there was support for the claims that Brass allowed to be dismissed by summary judgment. The Appellant, at this posture of the case, clearly supported the proposition, thus proved, that Mr. Brass was grossly negligent or provided ineffective assistance of counsel in failing to pursue viable claims for post-conviction relief.

The Appellant certainly has established from the existing record that these claims should have been explored but were not. Accordingly, this Court should grant the Appellant relief from Judge Eyre's summary judgment rulings as indicated herein

3. The Trial Court erred in denying Appellant's Rule 59 Motion

In response to the Trial Court's ruling denying his Rule 60(b) Motion, on May 3, 2010, the Appellant filed a Motion pursuant to Rule 59 asking the Court to allow him to pursue discovery and also requested an evidentiary hearing to address the Rule 60 (b) Motion. R. 4988-4989. This motion was supported by the affidavit of James K. Slavens, Esq. R. p. 4990. The Appellant based this request to supplement the evidence through discovery because, as provided in the previous section, the Trial Court had assessed the Appellant the burden of "proving" that he was entitled to post-conviction relief in determining whether or not the Rule 60(b) Motion to Set Aside should be granted. The Court denied the Appellant's Rule 59 Motion. R. p. 5261. As the following demonstrates, the Trial Court's denial of his Rule 59 ruling was in error.

Utah Rule of Civil Procedure 59 allows for a party to move the Court to alter or amend the judgment when it is necessary to take additional testimony or where there is newly discovered evidence, so long as the motion is filed no later than 10 days after entry of the judgment. The Appellant's motion clearly complied with the time requirements of Rule 59. Michael's July 2009 Motion to Set Aside focused on claims that his previous attorney, Ed Brass, provided ineffective assistance of counsel on behalf of the Appellant for the reasons stated in the Motion. As provided previously herein, the Trial Court's denial of Appellant's Motion to Set Aside was based, significantly, on the fact that Michael had not conducted discovery. Particularly, the Trial Court made the finding that "[Appellant] provides the Court with no evidence concerning the actual extent of Brass's investigation on these issues. Nor has Petitioner shown that Brass did not, in fact, investigate what Wood now attests to in his affidavit. Without this evidence, the Court cannot reasonably conclude that Brass performed deficiently." R. p. 4896, *Memorandum Decision*, p. 50. The Court found similarly as to each of the points raised in the July Motion to Set Aside. *See generally, Id.*

However, the explanation for the lack of any statements by Brass with regard to his investigation of the relevant issues in this matter was simple: Brass refused to provide any information. The undersigned left several messages for Mr. Brass requesting that Brass discuss with him his position on each of the issues that were raised in Michael's July 2009 Motion to Set Aside. However, Mr. Brass never returned any of those calls. R. 4990-4994, *Affidavit of James K. Slavens*, para. 15. The Federal Public Defender's Office also attempted to contact Brass to determine his position regarding the issues raised in Appellant's Motion. *Id.* at 17. Again, Brass refused to return any calls. *Id. at para. 16.* In fact, after the Court's ruling denying the Appellant's Rule 60(b) Motion, Appellant's counsel again attempted to contact Mr. Brass, and

again with no success. *Id. at para. 18*. Finally, the Appellant was able to obtain an affidavit from Mr. Brass, which was filed on August 4, 2010, which conclusively answered the Trial Court's question regarding the "actual extent of Brass' investigation on these issues." The Appellant established that Brass had failed to investigate and pursue Michael's claims. R. p. 5057, Addendum, Exhibit "15."

Regarding the Appellant's Rule 59 Motion, the Trial Court held that "[n]evertheless, even excusing and considering Brass's affidavit, Petitioner still has not shown that the Rule 60 (b) proceedings should be reopened." R. p. 5261, at p. 15. The Trial Court also denied the Appellant's request that he be allowed to pursue discovery: "because ordinary prudence would have guarded against Petitioner's misapprehension that compulsory discovery could be used to obtain evidence in support of a Rule 60 (b) motion, he is not entitled to the relief he seeks under Rule 59 based upon surprise." R. p. 5261, at p. 20. Implied in the Trial Court's rulings is that the Court did grant the Rule 59 Motion to the point of at least admitting Mr. Brass' and Michael's Affidavits. See also, R. p. 5253, wherein the Trial Court denied the Respondent's Motion to Strike Mr. Brass' Affidavit.

First, the Trial Court should have granted the Appellant's Rule 59 Motion for the reasons that are contained herein. Second, as the following demonstrates, the Trial Court should have granted the Appellant's Rule 60 Motion based upon the additional information provided in Mr. Brass' and Michael's Affidavits and considered by the Trial Court regarding the Rule 59 Motion.¹

¹ To understand the Trial Court's ruling as references to the Claim number, the Appellant had the following claims: (1) Brass failed to fully explore and present a claim under Brady v. Maryland, 373 U.S. 83 (1963) in relation to Lance Wood's confessions or, in the alternative, failed to investigate trial counsel's ineffective assistance in relation to Wood's confession; (2) Brass failed to properly investigate, pursue, and present evidence indicating that witness David

Considering Mr. Brass' Affidavit, the Trial Court found as follows:

With respect to claim 1 concerning Brass's alleged failure to investigate Lance Wood's "confession," claim 2 concerning Brass's failure to raise a Brady claim, a newly discovered evidence claim, and a suppression of evidence claim in relation to David Homer's alleged recantation, and claim 3 concerning Brass's alleged failure to investigate statements made by Gary Hawkins in relation to Wood's participation in the homicide of Church, even if Brass's affidavit shows that his performance was professionally deficient, the Court independently determined with respect to each of these claims that Petitioner had failed to satisfy the prejudice prong of the *Strickland* standard. See April 21, 2010 Mem. Decision at 50-51, 53-54, and 57-60. Thus, the facts alleged in Brass's affidavit would not have altered the Court's decision on these Rule 60(b) claims.

R. p. 5261 at p. 16.

The Trial Court's ruling, even if it is correct that the Appellant has the burden of "proving" that he is entitled to post-conviction relief before his Rule 60 (b) motion could be granted, simply ignores the United States Supreme Court's ruling in *Sears*. See Discussion found in Section A6, which follows.

As to Claim four, the Trial Court, citing on *Jacobs v. State*, 20 P.2d 382 (2001), ruled that Mr. Brass reasonably relied upon Dr. Gummow and Dr. Cunningham in not pursuing an Atkins' claim. R. p. 5253, p. at 16-17. Regarding this issue, Mr. Brass stated in his affidavit that "I did not recall asking for their evaluation regarding the issue of whether or not Michael Archuleta

Homer recanted his testimony; (3) Brass failed to properly investigate, pursue, and present evidence concerning the testimony of Gary Hawkins; (4) Brass failed to properly investigate, pursue, and present evidence concerning a claim of exemption from the death penalty on the basis of mental retardation; (5) Brass failed to properly challenge trial counsel's representation on the ground that trial counsel did not call an expert to compare the psychological profiles of Petitioner and Wood; (6) Brass failed to properly challenge trial counsel's representation on the ground that trial counsel did not retain a blood spatter expert, an expert to testify that Church was dead or had lost consciousness prior to any torture or abuse, or an expert to testify that the battery cables used against Church would not have produced a significant electrical shock; (7) Brass failed to properly investigate, pursue, and present evidence that the State committed a Brady violation in failing to reveal that Martha Kerr, a Forensic Pathologist for the Utah State Crime Lab who testified for the State concerning blood evidence, suffered a mental breakdown prior to her testimony; (8) Brass failed to amend the second amended petition to include claims 1 through 30 that were previously, but erroneously, denied by the Court as procedurally barred; and (9) Brass prejudiced Petitioner during the post-conviction mitigation case by presenting evidence that was more harmful than helpful.

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.” Addendum, Exhibit “15,” R. p. 5057 at para. 17(c). As the Trial Court recognized, *Jacobs* stands for the proposition that an attorney can reasonably rely on experts’ “conclusions.” However, in *Jacobs*, experts were actually retained during the criminal trial to address the competency of the Defendant. *Id.* at para. 4. That is not the case in this situation. Neither Esplin, Michael’s criminal trial attorney, nor Brass retained an expert for the specific purpose of addressing whether or not Michael suffers from mental retardation. This is quite different than the facts of *Jacobs*.

In *Jacobs*, experts were actually retained for the purpose of determining Jacobs’ competency. The fact of the matter is, Brass was the attorney and had the obligation to investigate and pursue viable claims, not to just send the case to an expert with instructions to “tell me what defenses may be available.” An attorney cannot satisfy his obligations by simply asking an expert, not even an expert relating to mental retardation, to evaluate his/her client and report what legal claims should be pursued based upon that evaluation. Mr. Brass had the obligation to pursue and/or eliminate whether or not *Atkins* provided a viable claim.

As to Claim 5, the Court ruled that “[w]ithout a definitive showing that a comparison of Petitioner’s and Wood’s psychological profiles constitutes evidence contradicting the State’s theory of the case, Brass’s affidavit simply does not show that his performance in representing Petitioner in this respect was deficient.” R. p. 5261 at p. 18. The Court continued by arguing that even if Brass’ performance was deficient, Michael failed to establish that he was prejudiced. *Id.* Again, without restating in detail the Appellant’s argument, the standard of proof, in light of *Sears* and the cases cited herein, was too stringent. Michael “might be prejudiced by his

counsel's failures" to have consulted an expert in order to determine whether or not the claim should have been pursued.

As to Claim 6, first, the Trial Court held that Brass was not obligated to pursue "claims that were procedurally barred under the PCRA." Id. at p. 19. For the reasons stated in the Appellant's initial Appellant's Brief and in Section 8 below, starting on page 69, Claim 6 is not procedurally barred. Second, the Trial Court held that "Petitioner had to show that trial counsel was ineffective in failing to hire the foregoing experts." Id. at 19. Again, this ruling applied an inappropriate burden and is contrary to *Sears* where it held that defense counsel is obligated to retain an expert to assist in determining what theory to pursue. The fact that defense counsel hired no expert regarding the blood evidence amounts to ineffective assistance of counsel, especially since the "blood evidence" was the very evidence used to determine Michael's involvement in the murder.

As to Claim 7, the Trial Court held that the Appellant had failed to establish the prejudice prong of *Strickland*. Id. at 20. Without restating the arguments contained herein, the Trial Court's standard of proof was too onerous and is opposite to the holding in *Sears*.

The Trial Court had also erroneously based its denial of Appellant's Rule 60(b) Motion in finding that "[b]ecause Petitioner has neither argued nor demonstrated that a hearsay exception applies that would allow for the admissibility of Steele's and Voas's affidavits, Petitioner cannot show that he has any basis on which to argue that Brass was ineffective in not raising either a Brady or newly discovered evidence claim based upon Homer's statements." R p. 4896, *Memorandum Decision*, p. 55. However, the Appellant had supplemented the July 2009 Motion to Set Aside with the Affidavits of Mr. Jeffery Homer and Mr. Les Mabry. Copies of the Affidavits were attached as Exhibit "B" to the Memorandum in Support of the Motion to Alter,

which had previously been filed R p 4995

Even if the Trial Court's initial decision denying Michael's Rule 60(b) Motion was correct, the Trial Court after reviewing Michael's, Brass', Jeffrey Horner's and Les Mabrey's affidavits should have granted Michael his Rule 60(b) relief. At least, the Trial Court should have allowed Michael to conduct discovery.

4. Trail Court Failed to Address Whether or not Brass was Grossly Negligent

The Court never addressed the Appellant's claim that Mr Brass was grossly negligent as alleged in his pursuit of the Appellant's Motion for Rule 60 Relief. In *Menzie*, the Court held that "relief under 60(b)(6) may also be sought where a lawyer's performance is grossly negligent and therefore not excusable under rule 60(b)(1)." *Menzies* at p 515. This is important because a claim of "grossly negligent" is not analyzed pursuant to *Strickland*. Although the Appellant sought relief based upon this claim, the Trial Court never analyzed this additional basis for relief. For the reasons provided herein, the Appellant has established that Brass was grossly negligent. This Court should either find that the evidence supports the proposition that Brass was grossly negligent or remand the case to the Trial Court for the purpose of addressing whether or not the Appellant is entitled to relief in that Brass was grossly negligent.

5. Michael Mistakenly Relied on Brass' Representation

To obtain relief under 60(b)(1), a party must show that the judgment was the result of "mistake, inadvertence, surprise, or excusable neglect," that the motion for relief from judgment was timely, and that the case involves a meritorious defense or an issue worthy of adjudication. *Menzies*, 150 P 3d 480 (2006). As this brief indicates, Mr Brass clearly failed to investigate, pursue and present claims supporting Michael's post-conviction relief, thus he provided ineffective assistance of counsel and/or was grossly negligent. Michael should be excused for

his mistaken reliance on Brass to properly investigate, pursue and present all relevant claims. Clients who rely on counsel who fail to perform are entitled to relief under 60(b)(1). Michael mistakenly relied on Brass to provide the legal representation to which he was clearly entitled. Michael's reasonable reliance on Brass, coupled with his status as a death row inmate, explains his inability to litigate his post-conviction relief claims himself; therefore, he qualifies for relief under 60(b)(1). As articulated herein, Michael is entitled to Rule 60(b) relief in that he has meritorious claims, which, if proved, would prevent the State from executing him and entitle Michael to post-conviction relief.

In *Menzies*, the Utah Supreme Court held that "it is well established that 60(b) Motions should be liberally granted because of the equitable nature of the rule." *Id.* At 502. Therefore a district court should exercise its discretion in favor of granting relief so that a controversy can be decided on the merits rather than on technicalities. In addressing the appropriate "reason," pursuant to Rule 60 (b) that applies to a Motion to Set Aside for ineffective assistance of counsel in a post-conviction relief, the Supreme Court held "that rule 60(b)(6) applies to *Menzies*' arguments [that the judgment should be set aside] and therefore do not address *Menzies*' arguments under the other asserted subsections of rule 60(b)." *Id.* at 502.

A "judgment entered due to attorney misconduct may be set aside under this subsection [60(b)(1)] only if the conduct is *excusable*." *Menzies*, 150 P. 3d 507, citing *Mini Spas v. Indus. Comm'n*, 733 P.2d 130, 132 (Utah 1987). The focus of the Appellant's position regarding this aspect of the Appellant's request for relief is on the words "if the conduct is excusable." The rule, nor this holding, does not specify whether or not the "conduct" refers to the attorney or to the person the attorney is representing. The question then is whether the Court's analysis should focus on Michael's conduct or Brass' conduct regarding the Appellant's Rule 60(b) Motion. If

the Court's focus is on Brass' conduct, a judgment under this provision should be upheld only if "the attorney exercised 'due diligence,' defined as conduct that is consistent with the manner in which a reasonably prudent attorney under similar circumstances would have acted." Id. The Appellant is not arguing as to his Rule 60(b)(1) motion for relief that Brass' actions were excusable—in fact just the opposite. However, Rule 60(b)(1) allows and contemplates relief if Michael's conduct was excusable. In this situation, Michael excusably relied upon Brass to pursue his claims, but he did not. Michael, although he attempted, had no means nor possessed the financial resources to verify that Brass was pursuing his claims. Addendum, Exhibit "29," R 5032, Affidavit of Michael Archuleta.

The Trial Court in this matter found that the Appellant's Rule 60(b)(1) was untimely. See, R p 4896, at p 21. Rule 60(b)(1) does require the motion to be brought within three months. However, in this matter, the Appellant seeks relief based upon Ed Brass' negligence, gross negligence and ineffective assistance of counsel. The Appellant has presented sufficient evidence to support such a finding regarding Mr. Brass' representation. Any untimeliness of motions was not through any fault of the Appellant but because of the fault of his attorney.

In *State v. Johnson*, 635 P 2d 36, 38 (Utah 1981), the Utah Supreme Court adopted a procedural mechanism to restore a right to appeal when the defendant was prevented from bringing a timely appeal through no fault of his own. The Court provided relief from ineffective assistance of counsel by directing the defendants to file a motion for resentencing in the trial court so that the thirty-day time period for bringing an appeal set forth in rule 4(a) of the Utah Rules of Appellate Procedure would begin to run anew. *Id.* at 38. *Johnson* was overturned in *Manning v. State*, 122 P 3d 628 (Utah 2005), where the Court held

Accordingly, we hold that, upon a defendant's motion, the trial or sentencing court may reinstate the time frame for filing a direct appeal where the defendant can prove, based on

facts in the record or determined through additional evidentiary hearings, that he has been unconstitutionally deprived, through no fault of his own, of his right to appeal. Such circumstances would include: (1) the defendant asked his or her attorney to file an appeal but the attorney, after agreeing to file, failed to do so, *see Johnson*, 635 P.2d 36; (2) the defendant diligently but futilely attempted to appeal within the statutory time frame without fault on defendant's part, *see id.*; or (3) the court or the defendant's attorney failed to properly advise defendant of the right to appeal.

Clearly, the Petitioner in this case has established that any deadline that was missed was because of the ineffective assistance of counsel; Petitioner's untimely filing of the Rule 59 and 60 motions was not because of any fault attributed to him. Based upon the principles found herein and on *Manning*, Michael is entitled to have this Court consider the Petitioner's Rule 60(b)(1) Motion.

6. Michael is Entitled to Relief because Brass Provided Ineffective Assistance of Counsel and/or because Brass was Grossly Negligent²

In this matter, Michael is not arguing that Brass' conduct constitutes "excusable neglect" but that "he willfully failed to comply with his most basic obligations" as articulated in the ABA Guidelines and adopted by this Court. *Id.* Michael's allegations are that Brass' actions are "inexcusable" and create "an extraordinary situation which cannot fairly or logically be classified as mere 'neglect.'" Thus if this Court finds that Michael is not entitled to relief pursuant to 60(b)(1) because of his reasonable reliance on Brass, Michael is entitled to relief pursuant to 60(b)(6) because Brass provided both ineffective assistance of counsel and because his actions were grossly negligent. *Menzies*, 150 P. 2d 515: "both grounds constitute exceptional circumstances that warrant relief under 60(b)(6)."

² It is important to note, that the Appellant is arguing both theories—that Brass was grossly negligent and also provided ineffective assistance of counsel. The same evidence and argument support both theories of relief. The Appellant will not argue in depth both positions but adopts the arguments made herein under both theories. It is important, however, to note that the Appellant is of the opinion that the determination of whether or not Brass was grossly negligent does not require the more stringent analysis of *Strickland*. In other words, it is possible for this Court to determine that the Appellant has not met the *Strickland* test but has met the grossly negligent test.

In *Menzies*, the Court found that Menzie, a death-row inmate in post-conviction relief action, has a statutory right to the effective assistance of counsel. The Court then addressed the issue of whether *Menzies*' counsel had demonstrated that Brass' performance was ineffective or grossly negligent. It is important to note that *Menzies*' counsel, Brass, is the same Brass who filed the Second Amended Petition in this case and represented the Appellant in the evidentiary hearing regarding the Second Amended Petition.

The analytical framework for assessing ineffective assistance of counsel was developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), wherein the Court established a two-step inquiry. A finding of ineffective assistance of counsel requires a showing that counsel performed below the standard of a reasonably effective attorney, and second, that counsel's errors prejudiced the Defendant from receiving a fair trial and/or sentence. As to the first prong, the Court found that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result." *Menzie*, 150 P. 3d at 511 quoting, *Strickland*, 466 U.S. at 686. As to the second prong, the Court found that "if a litigant is constructively denied the assistance of counsel in a proceeding in which he or she is entitled to counsel, the adversary process itself is rendered inherently unreliable, and prejudice is presumed." *Menzies*, 150 P.3d at 514.

In the federal context, the right to the effective assistance of counsel is premised on a defendant's right to counsel under the Sixth Amendment to the United States Constitution. *Strickland*, 480 U.S. at 687, 104 S.Ct. 2052. As the United States Supreme Court has noted, this right is designed to ensure that criminal defendants receive a fair and reliable proceeding before

life or liberty are taken. *Id.* at 686, 104 S.Ct. 2052; see also *Roe v. Flores-Ortega*, 528 U.S. 470, 482, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (noting that “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair [proceeding]” (citation and internal quotation marks omitted)). This fairness is “derive[d] from the adversarial nature of our justice system, which is premised on the ‘well-tested principle that truth - as well as fairness - is best discovered by powerful statements on both sides of the question.’” *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir.2005) (quoting *Penon v. Ohio*, 488 U.S. 75, 84, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988)); see also *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052 (recognizing “the law's presumption that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions”).

The Court’s inquiry regarding whether Brass’ performance fell “below the standard” and whether Michael was prejudiced must be analyzed as it applies to the post-conviction relief.

After a conviction and an unsuccessful appeal, the convicted person

may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon ... ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution or based upon ... newly discovered material.

Utah Code Section 78-35a-104 (1996) or, as modified, Utah Code Section 78B-9-104 (1) (2008).

The Post Conviction Remedies Act also states that, in order for the Court to grant relief from a conviction or sentence, the Appellant must establish “that there would be a reasonable likelihood of a more favorable outcome in light of the facts provided in the post-conviction proceedings, viewed with the evidence and facts introduced at trial or during sentencing.” Utah Code Annotated §78B-9-104(2). But see prior statute, Utah Code Section 78-35a-104 (i)(iv)(1996): “no reasonable trier of fact could have found the Petitioner guilty of the offense or subject to the sentence received.”

Furthermore, Utah Rule of Civil Procedure 65(c) states, in part, that a petition for post conviction relief “shall set forth all claims that the petitioner has in relation to the legality of the conviction or sentence. Additional claims relating to the legality of the conviction or sentence may not be raised in subsequent proceedings except for good cause shown.” In other words, petitioner is required to bring all claims and any claims not raised become barred absent showing of good cause. Accordingly, it is necessary that counsel for the Appellant, in the petition for post conviction relief, include all claims that would attack the legality of the Appellant’s conviction and/or sentence. As this Motion established, Brass failed to present evidence in support of Michael’s claims and failed to raise all claims.

Brass’ performance fell below the standard and amounted to gross negligence. ABA Death Penalty Guideline 10.15.1 specifically details the duties of post-conviction counsel. This guideline imposes on post-conviction counsel the duty to “fully discharge the ongoing obligations imposed by these guidelines.” Addendum, Exhibit “13,” ABA Death Penalty Guideline 10.15.1(E) (2003). One of these obligations is the duty to “maintain close contact with the client regarding litigation developments.” *Id.* Guideline 10.15.1(E)(1). This duty is discussed in depth in guideline 10.5, which states that counsel “should maintain close contact with the client,” guideline 10.5(A) (2003), including discussing with the client “the progress of and prospects for the factual investigation, and what assistance the client might provide.” Guideline 10.5(C)(1). Counsel should also keep the client informed of “litigation developments,” guideline 10.15.1(E)(1), including “litigation deadlines and the projected schedule of case-related events,” guideline 10.5(C)(6). The commentary to guideline 10.5 makes clear that counsel is obligated “at every stage of the case to keep the client informed of developments and progress in the case.”

and that “the failure to maintain such a relationship is professionally irresponsible.” Guideline 10.5 cmt.

In addition to the duty to communicate, guideline 10.15.1 also imposes on counsel the duty “to continue an aggressive investigation of all aspects of the case.” Guideline 10.15.1(E)(4). Likewise, guideline 10.7 provides that “[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” Guideline 10.7(A). As the commentary to guideline 10.7 notes, counsel has a “duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.” Guideline 10.7 cmt. The duty to investigate extends to the penalty phase, and counsel has a “duty to investigate and present mitigating evidence.” Guideline 10.7 cmt.; see also *Williams v. Taylor*, 529 U.S. 362, 395-96, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding that counsel was ineffective for failing to uncover and present mitigating evidence).

These parallel tracks of investigation also apply in post-conviction proceedings, where post-conviction counsel has a duty to investigate, pursue and present “the facts underlying the conviction and sentence, as well as such items as trial counsel's performance.” ABA Death Penalty Guideline 10.15.1 cmt. Counsel also has a duty to investigate the entire case in order “to discover mitigation that was not presented previously [and] also to identify mental health claims.” Guideline 10.15.1 cmt.

Finally, guideline 10.15.1 provides that “post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation.” In addition, guideline 10.8 provides that “Counsel at every stage of the case, exercising professional judgment,” must “consider all

legal claims potentially available” and “thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted.” Guideline 10.8(A)(1)-(2).

As the Court is aware, much of the legal standard outlined above is derived directly from the Utah Supreme Court’s holding in *Menzies v. Galetka*, 150 P.3d 480 (Utah 2006). In reviewing the procedural and substantive posture of this case, the undersigned took notice of the Utah Supreme Court’s findings that Brass, the attorney in question in this case, was less than effective and grossly negligent in his representation of Menzies in his post-conviction relief petition. In fact, the Utah Supreme Court stated that “Brass’ representation in [that] case was deplorable,” *id.* at 495, and that his “actions were inexplicable failures....” In addition to the Court’s findings, Brass himself filed an affidavit that states that “I do not understand the complex procedural rules governing capital cases in state and federal post-conviction....” Addendum, Affidavit of Edward K. Brass as Exhibit “16.”

Accordingly, the undersigned viewed the work done for Michael’s post conviction relief with great skepticism. Obviously, in order to comply with the ABA Guidelines noted above the undersigned could not, in good conscience, solely rely on the research done by prior appointed counsel, nor pursue the same path and reargue the points which were obviously unpersuasive to the District Court. In fact, the Utah Supreme Court’s findings in *Menzies*, coupled with the ABA Guidelines, clearly requires Michael’s attorney to read the entire trial and appellate record in Lance Wood’s case; read the entire trial and appellate file in Michael’s case; read the entire Millard County Prosecutor’s file; read the media court file which included information regarding Chris Jorgensen; meet with Appellant constantly to keep him informed of the progress of the case and to seek his input and approval regarding strategy; search for, locate and interview various witnesses regarding meritorious claims, including Chris Jorgensen, Lance Wood, Gary

Hawkins, Torin Plum, David Homer, Jeff Homer, Les Mabery, explore the need for experts, such as blood spatter experts, and to consider and thoroughly investigate, pursue and present all meritorious claims pursuant to post conviction relief

In the process of complying with the duties imposed by the ABA Guidelines, several omissions and/or errors were discovered which indicated that Brass' performance fell below the standard imposed upon counsel in capital punishment cases and/or post-conviction relief cases. In fact, it was obvious that Brass failed to properly evaluate any aspect of Michael's trial counsel's representation, other than his presentation of mitigation testimony. These omissions and errors are enumerated herein and demonstrate that Brass provided ineffective assistance of counsel and was grossly negligent by failing to comply with the ABA Guidelines and standards adopted in *Menzies*.

To assist in determining both prongs of determining ineffective assistance of counsel (performance was below standard and prejudiced the Appellant) and whether Brass' representation was grossly negligent, it is important to keep in mind the State's, and Michael's, theories of the case. During the trial, the State's theory of the case was that this horrendous murder was perpetrated by both Michael and Lance Wood. In essence, the State attempted to show Michael's involvement in the murder was contrary to his testimony with evidence of the following: (1) Church's blood found on Michael's clothing, (2) testimonies of Michael, as well as Lance Wood, (3) statements by both Michael and Lance Wood given at various times during the investigation, (4) testimony of witnesses indicating that Michael and Wood were together on the night of Gordon Church's death, (5) testimony of witnesses who saw them after the murder, (6) testimony that Michael was the aggressor, and (6) the shocking nature of Gordon Church's death. The State advanced the theory that Michael was the aggressor and the more dominate

personality between him and Lance Wood, i.e., Lance Wood was scared of Michael.

As for the defense, Michael's theory and testimony was that Lance Wood was the aggressor and therefore more culpable for Church's murder than was Michael. Addendum, Summary of Michael's testimony as Exhibit "18." Michael's testimony established, if believed by the trier of fact, that he was at most an accomplice to the murder, which would make the imposition of a death sentence disproportional to the crime committed by Michael, as well as being disproportional to the sentence imposed in Lance Wood's case. This case contained a substantial amount of forensic evidence. However, the only forensic evidence submitted by the State indicating Michael's involvement was the blood found on Michael's clothing. On the other hand, the forensic evidence demonstrating Lance Wood's involvement was extensive. Addendum, *State vs. Wood*, 868 P. 2d 70 (1993), as Exhibit "17." At trial, Esplin presented no expert testimony nor presented any witnesses (other than Michael) to support Michael's theory or to contradict the State's theory.

Michael wrote three different letters to the Trial Court which informed the Court that Brass was not providing effective assistance of counsel. See Addendum, February 9, 2005 letter, as Exhibit "43", March 1, 2005 letter as Exhibit "44" and October 6, 2005 letter as Exhibit "45." Michael expressed to the Court that Brass was not visiting with him (spent a total of half an hour in two visits), was not keeping him informed about his case (had not sent him any papers) and would not take his calls (Brass' secretary would just hang up when he called). *Id.* Michael asked the Court to send him a docket so that he could find out what had been done on his case and also asked the Court to call Brass and basically order him to keep Michael informed about his case. In fact, in the March 1 letter, Michael states that Menzie told him that Mr. Bruner had stated to the *Menzie's* trial court that he needed more time because he was filing a second motion to

compel discovery in Archuleta's case. Michael expressed frustration to the Court that he did not even know that there had been a first motion to compel. Michael was very worried that his Petition would be dismissed because of Brass' inaction for the reasons the Petition was dismissed by the trial court in the *Menzie* case.

In response to Michael's letters, Brass, on or about October 26, 2005, filed a Motion asking that he be allowed to withdraw as Michael's attorney. See Addendum, Motion for Leave to Withdraw, as Exhibit "46." In the Motion, Brass expressed frustration and mental strain from being exposed to the State's Motion for Sanctions. Brass' frustration and emotional strain was exacerbated because of Michael's letters complaining about his ineffective assistance of counsel. Brass claimed that Michael's October 26 letter placed him "in the potential position of being a witness to contravene the statements of the letter." *Id.* at para. 2. Brass also complained that he was in reality working pro bono and that he did not have the time, resources and emotional strength to adequately represent Michael. *Id.* at para. 3. In fact, Brass argued that Michael's "attack" on his office manager created a conflict of interest and was reason enough to justify his withdrawal. *Id.* at para. 5. Brass continued in support of his request to withdraw by stating that because of the emotional and financial strain caused by his representation of Michael, Michael "would be better served by the appointment of an attorney or attorneys with the time, resource, and staff to visit him as often as he wishes and to accept his collect calls when he desires." *Id.* at para. 6. Brass filed a second Motion to Withdraw on or about March 16, 2006. See Addendum, Motion for Leave to Withdraw, as Exhibit "47." In the second Motion, Brass reiterated the fact that Michael's letter created a conflict of interest in that he was placed in "an ethically intolerable position and one that prevents counsel from devoting full attention to the issues." *Id.* at para. 6.

In this case before this Court, Brass filed a Memorandum in Support of Motion to Permit

Withdrawal of Counsel and to Remand to the Trial Court for the Appointment of Substitute Counsel on Appeal (“Memorandum in Support”). Addendum, Memorandum in Support, as Exhibit 48. The following excerpts support the position that the Appellant is entitled to the relief that he seeks in his Motion to Set Aside and/or Motion for a New Trial.

- a. “Archuleta’s lawyers asserted in response [to Respondent’s Motion for Sanctions Pursuant to Utah R. Civ. R. 11], inter alia, that the claims which were not actively pursued after summary judgment were left unaddressed due to lack of time and resources.” (R. 2017, 2031: “The realities of the case and the situation required that he attempt to prioritize the claims in terms of his focus.” Id. at p. 5.
- b. “The record of this case contains numerous potential claims of deficient performance by Brass. As is detailed in the pleadings filed in the trial court, Brass was not qualified to represent Archuleta without co-counsel because he did not understand the complexities of the law, as demonstrated by his affidavit to that effect filed in another capital post-conviction case (R. 2321, 2319-2345, 2652-59). For much of the litigation of the post-conviction case in the trial court, Brass was acting alone as counsel for Archuleta (R. 1969, 2349-50, 2380, 2418), and without sufficient time and funding (R. 1973-74). Several of Archuleta’s claims were not pursued by his attorneys for lack of time and resources (R. 2017, 2031). Brass did not seek additional time or funding or file an affidavit under Utah R. Civ. P. 56(f) to obtain additional time or discovery to oppose summary judgment.” Id. at p. 12-13.
- c. “One of the most critical conflicts which should be explored by substitute counsel is whether Brass’ performance on Archuleta’s behalf was limited to Archuleta’s detriment by Brass’s apprehension that if he zealously represented Archuleta in keeping with ABA standards and other professional norms, the Attorney General’s Office would consider his conduct sanctionable and file additional motions, which Brass would have to litigate, again at the expense of his private practice and personal finances and life.”

Brass’ response not only demonstrated ineffective assistance of counsel and gross negligence, but coupled with the State’s Motions for Sanctions, Brass’ financial burdens, and Michael’s complaints, raised to the level of creating a conflict of interest. When counsel labors under a conflict of interest, prejudice pursuant to the *Stickland* test is presumed. *Cuyler v. Sullivan*, 446 U.S. 335, 348 and 369 (1980). The Trial Court, only addressing the argument that the State’s Rule 11 sanctions caused a “conflict of interest,” found that the “Petitioner has not, therefore, shown that Brass was suffering from a conflict of interest while representing Petitioner” R. p. 4896, at p. 44. However, the Trial Court’s finding completely ignores Brass’ own

comments found in his Memorandum in Support of Motion to Permit Withdrawal of Counsel and to Remand to the Trial Court for the Appointment of Substitute Counsel on Appeal where Brass admitted a conflict of interest because of the financial burden Michael's case created and Michael's letters in criticizing Brass' efforts in pursuing the post-conviction petition. Addendum, Memorandum in Support, as Exhibit 48. The Trial Court also neglected to consider the fact that the evidentiary hearing regarding the mitigation issues occurred after the State's February 26, 2004 Motion for Sanctions. This Court should presume prejudice based upon Brass' admission that there was a conflict of interest.

Brass' representation met the Strickland test of ineffective assistance of counsel or constituted gross negligence by failing to comply with the ABA Guidelines as follows:

- 1) Brass failed to maintain contact with Michael;
- 2) Brass failed to discuss strategy with Michael, i.e. failed to discuss or obtain approval to present evidence that Michael's childhood damaged him to the point that he cannot be fixed, and that Michael would inevitably kill;
- 3) There is no evidence that counsel reviewed both Wood's and Michael's court files, failed to review the prosecutor's file in both cases, and failed to review or was even aware of the media file.
- 4) Brass failed to investigate, pursue and present witnesses that claimed that David Homer had recanted his testimony; that David Homer had been "planted"; and that the State had failed to disclose reports of the interviews;
- 5) Brass failed to investigate, pursue and present witnesses that indicated that Wood had confessed that he had acted alone in killing Gordon Church;
- 6) Brass failed to investigate, pursue and present mental illness issues and a possible Atkins' claim;
- 7) Brass failed to investigate, pursue and present evidence regarding Wood's psychological and personality make-up;
- 8) Brass failed to investigate, pursue and present expert witness testimony;
- 9) Brass lacked adequate funding and lacked co-counsel to adequately pursue Archuleta's claims;
- 10) Brass was concerned about pursuing claims which might garnish the wrath of the State in a Motion for Sanctions;
- 11) Brass failed to investigate, pursue and present the issues found herein.

The Respondent, which the Trial Court adopted, argued that the Appellant failed to "prove" that he was entitled to Rule 60 relief in that he failed to establish that he was entitled to

post-conviction relief. The response to this argument is detailed in Section A2 above and will not be restated herein. However, the recent United States Supreme Court of *Sears vs. Upton*, decided June 29, 2010, 09-8854 (FEDSC), is insightful to the issues before this Court. In *Sears*, the Supreme Court was critical of the trial court's stringent analysis of the prejudice prong of the *Strickland* standard for determining ineffective assistance of counsel: "And more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The 'reasonableness' of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not." The *Sears* Court also held that a court, to a certain extent, is obligated to "speculate" when determining whether or not the Defendant was prejudiced: "That same standard applies-and will necessarily require a court to 'speculate' as to the effect of the new evidence- regardless of how much or how little . . . evidence was presented during the initial penalty phase."

The *Sears* case cannot be distinguished from this case. Clearly, Brass failed to properly investigate and pursue the claims as identified herein that his criminal trial attorney was ineffective. As set forth herein, the undersigned seeks to set aside the Trial Court's order denying Michael's Second Amended Petition for post conviction relief, or allow him to open the Second Amended Petition so that Michael can address all his claims. For the reasons stated herein, this Court should conclude that 1) Michael justifiably relied upon Brass to pursue his post-conviction relief; 2) that Brass failed to provide effective assistance of counsel; or 3) was grossly negligent as provided herein.

B. Instances Of Claims Brass failed to Investigate, Pursue or Present Which Establishes Ineffective Assistance of Counsel³

1. Newly Discovered Evidence of *Brady* Violations Regarding Lance Wood's Confessions

On or about April 21, 1989, Lance Wood contacted Chris Jorgensen of the Salt Lake Tribune newspaper and confessed his involvement in the murder of Gordon Church. Regarding this conversation, Lance Wood states as follows:

1. While waiting for trial from the jail, I called Marcus Taylor, my court appointed attorney, and told him that he was fired and that I was going to take the blame for all the injuries inflicted upon Gordon Church.
2. I was under the impression that all my phone calls were being recorded and/or listened in on because there was no mechanism for attorney/client calls.
3. Shortly after this conversation with Marcus Taylor, about 10 or 15 minutes later, Captain Decker brought me out of my jail cell to meet with Sheriff Ed Phillips and with the Prosecutor, Warren Peterson.
4. My Attorney was not present for this meeting.
5. As far as I know, I nor anybody else obtained permission from Marcus Taylor to speak with me.
6. Somehow, they were aware that I had fired my attorney.
7. At the meeting, Sheriff Phillips and Warren Peterson indicated that they had heard that I was taking the entire blame for the murder and that I was taking the position that Mr. Archuleta had not been involved.
8. I told them that was accurate.
9. Mr. Peterson and Sheriff Phillips then proceeded to influence me from admitting that I had inflicted all of the injuries on Mr. Church.
10. We met for about 30 minutes and during this time, they were adamant that I should not take the blame for what happened.
11. They were persistent in convincing me not to take the blame and only let me leave after I agreed not to take the position that Michael had not inflicted any of the injuries.
12. They told me that they knew that Michael was involved and that it would not be right to let him walk free.
13. Mr. Peterson and Sheriff Phillips convinced me not to take the blame.
14. I was surprised, based upon this conversation that the State continued to seek the death penalty against me.

³ In Section A2 of this Brief, the Appellant argues that the Trial Court applied the wrong standard when addressing whether or not Michael is entitled to his Rule 60 (b) Motion. The Appellant will not set forth this same argument as it applies to each specific claim—but by this reference will incorporate the Appellant's argument the Trial Court implemented the wrong standard as it applies to each specific claim. Furthermore, in Section A4 of this Brief, the Appellant addressed the Trial Court's ruling regarding the Appellant's Rule 59 Motion and the additional evidence presented in Michael Archuleta's and Ed Brass' Affidavits as to each specific claim. The Appellant will not set forth the same argument here regarding each specific claim—but by this reference will incorporate the Appellant's Rule 59 argument as it applies to each specific claim.

15. After this meeting, I then told my girlfriend, Brenda Stapley, to get a hold of a news reporter and to tell him that I wanted to talk to him.
16. I told Brenda to tell him that I had something to say that would be worth his time
17. Later, Brenda gave me Mr. Jorgenson's telephone number and I called him from the jail.
18. I represented to Mr. Jorgenson that I wanted to plead guilty to inflicting all of the injuries to Mr. Gordon Church and that Michael did not participate in the murder.
19. I do not recall whether or not I provided details to Mr. Jorgenson regarding the specific acts inflicted upon Mr. Church or whether or not I simply indicated generally that I wanted to plead guilty to inflicting all the injuries to Mr. Church.
20. Mr. Jorgenson may have asked me specifically about each injury, including the rectal injury, and that I acknowledged affirmatively that I wanted to plead guilty to each injury.
21. None of Mike Michael's attorneys have ever contacted me to discuss any details about this case.

Addendum as Exhibit "19."

After the conversation with Lance Wood wherein he confessed his involvement in the murder of Gordon Church, Mr. Jorgenson called Warren Peterson, the Millard County Prosecutor, to advise him of Wood's confession. Warren Peterson responded to Jorgenson by stating that Wood's statements were false. *Id.* September 14, 1989 Ruling as Exhibit "20."

On or about June 8, 1989, the State of Utah sent a subpoena to Chris Jorgensen, which he moved to quash. *Id.* as Exhibit "21." In response to Mr. Jorgenson's motion to quash the subpoena, on September 26, 1989, Judge Ballif denied the Motion and ordered Mr. Jorgenson to surrender the tape and any transcription of the conversation to the prosecutor's office and to submit to a deposition on October 10, 1989 *Id.* September 14 Order, as Exhibit "20."

There is no dispute that Mike Esplin, Michael's trial attorney, was present at all hearings before the Court regarding the State's efforts to obtain Mr. Jorgensen's taped conversation with Lance Wood and the efforts to quash the subpoena. However, Esplin may have missed the significance of the confession because Warren Peterson represented to the Court that Wood's confession to Jorgensen was that he was holding Gordon Church while Michael killed him. Obviously, this testimony would not be beneficial to Michael's case or defense. Furthermore, it should be remembered that Esplin was preparing for a trial that was just weeks away.

On or about October 9, 1989, just 42 days before Michael's trial, Mr. Holman, the attorney for Chris Jorgensen, filed with the court a Settlement Stipulation Regarding the Subpoena for Deposition of Chris Jorgensen between Mr. Jorgensen and the prosecutor's office. *Id.*, letter dated October 9, 1989 as Exhibit "22." This Court should note that there was a carbon copy of the letter sent to Warren H. Peterson. *Id.* However, there is no indication or proof of service that either Mike Esplin or Marcus Taylor (counsel for Michael and Wood respectively) were sent a copy of the Settlement Agreement.

The Settlement Agreement in pertinent part provides as follows:

"Chris Jorgensen will provide to prosecutors for the State of Utah a transcription of the conversation conducted on or about the afternoon of April 21, 1989 between Chris Jorgensen and an individual believed to be Lance Conway Wood and a tape recording of that conversation."

"Jorgensen also agrees to submit to an interview by prosecutors for the State of Utah . . . on October 11, 1989."

"The State of Utah shall not disclose the contents of the transcript or tape-recording of the conversation between Mr. Jorgensen and Lance Conway Wood to any person or entity except, where necessary, to the court and to counsel for the alleged perpetrators of the homicide of Gordon Ray Church, nor shall the statements by the attorneys for the State of Utah to counsel for Chris Jorgensen and the Kearns-Tribune Corporation provided for in Paragraph 8 of this stipulation be disclosed except, where necessary, to the Court."

Addendum, Settlement Agreement as Exhibit "23."

Lance Wood's confession is relevant to Michael's Rule 60(b) Motion in that Brass failed to investigate and pursue this claim. It is relevant to this post-conviction relief because it demonstrates that the State failed to disclose to Michael the following: (1) that Sherriff Phillips and Captain Decker met with Lance Wood and failed to provide a report of same to Michael; (2) neither counsel for Lance Wood nor Michael Archuleta was a party to this agreement; (3) the State failed to disclose to Michael what was discussed in the October 11 meeting the State had with Jorgensen, (4) the State failed to provide a tape recording of Wood's confession and failed to disclose a transcription of the conversation; (5) the State did not provide any tape recordings

of Lance Wood's phone call made from the jail to Marcus Taylor wherein he indicated his desire to confess to the murder of Gordon Church. See, Addendum, Motion for Discovery and Supplemental Response to Motion for Discovery State's Response to the Discovery Request, as Exhibits "24" and "25."

It is important to note that the undersigned has reviewed every box and file in the prosecutor's office regarding both Lance Wood's and Michael's case and has not been able to locate either the tape recording or the transcript of the conversation. Addendum, Affidavit of James K. Slavens as Exhibit "26." It is also interesting to note that the State did not use Lance Wood's confession as impeachment in his own trial. *Id.* If Lance Wood had confessed that he held Gordon Church while Michael killed him, as Warren Peterson represented to the Court he said, the State would certainly have used that statement to impeach Lance Wood's claim of innocence. The fact that the state failed to impeach Lance Wood with this alleged statement supports what Lance now states, via his affidavit, that Lance did not confess as Warren Peterson represented; instead Wood confessed to Jorgensen, as Wood testifies, that Michael did not cause any injuries related to Church's death.

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny, makes clear that prosecutors have a continuing constitutional duty to disclose all material evidence that is favorable to a defendant. Clearly, the State violated this duty by failing to disclose the above evidence to Michael. Because of that violation, Michael is entitled to a new trial, or alternatively, to a reduced sentence of life imprisonment. *See also, Tillman v. State*, 128 P.3d 1123 (2005).

In *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), the United States Supreme Court identified the three components necessary to establish a *Brady*

prosecutorial misconduct claim (1) the evidence at issue is “favorable to the accused, either because it is exculpatory, or because it is impeaching”, (2) the evidence was “suppressed by the State, either willfully or inadvertently”, and (3) prejudice ensued *Id.* at 281-82, 119 S Ct 1936

Clearly, applying the *Brady* test, Wood’s confession is favorable to Michael’s defense because it supports Michael’s theory of the case--which he held from the beginning of the investigation--that he did not participate in the murder but that Wood committed the murder. This evidence is “favorable to the accused” in both the guilt phase and the penalty phase. Clearly, Sheriff Phillip’s meeting with Lance Wood should have been disclosed to Michael’s attorney. Also, Lance Wood’s conversation with Mr. Jorgensen should have been disclosed to Michael and his attorney. The State’s interview with Mr. Jorgensen should also have been disclosed to Michael. This is true even if the State believed that Mr. Wood was being deceptive in his representations. The State is obligated to disclose any and all evidence which supports Michael’s theory of the case, and then, Michael’s attorney can determine how and whether to use the evidence in support of his defense. This case is replete with instances where evidence was obtained by the State, but discarded, simply because the evidence did not “fit” the State’s theory of the case.

Alternatively, even if the facts of this case do not establish a *Brady* violation, Esplin failed, if he knew, to investigate, pursue and present the matter and amounted to ineffective assistance of counsel or gross negligence. Brass was ineffective and committed gross negligence during the post-conviction relief action by not fully investigating the files and discovering Wood’s confession and bringing it before the Court. Brass was also ineffective and grossly negligent for failing to interview Lance Wood and presenting his affidavit as evidence.

As the above demonstrates, Brass' performance fell "below standard" and prejudice is presumed because of Brass' conflict of interest. Furthermore, prejudice is established because Lance Wood's confession would have collaborated Michael's trial strategy. The Appellant has submitted other witness statements where Wood also confessed to them. Brass failed to fully explore and present the alleged Brady violation, or in the alternative, explore Esplin's ineffective assistance of counsel regarding Wood's confessions. Even though Michael had informed Brass that Wood had confessed to several individuals, Brass made no effort to interview Wood to determine his testimony. For this reason, the Trial Court should have granted Michael's Rule 59 and Rule 60 Motions.

The Trial Court denied Michael's claim in part by finding that "Petitioner has not demonstrated that Brass should have known in 2002 what Wood in 2009 attested were the facts prior to Petitioner's trial concerning Wood's desire to 'plead guilty' to inflicting all of the injuries on Church." R. p. 4896, p. 48. This statement from the Trial Court points out the fundamental error of the Trial Court's reasoning. First, the Appellant's claim asserts a *Brady* violation in that the State never disclosed the information to Esplin, Michael's criminal trial counsel. Michael told Brass that he wanted Brass to pursue the claim in his petition for post conviction relief that Wood had made various confessions that Wood had perpetrated the murder. Addendum, Exhibit "29." Brass never pursued or investigated the claim, which is the reason that we have Wood's statement in 2009 instead of 2002. The fact that the statement in affidavit form was finally obtained in 2009 is not justification that Brass acted effectively but instead is just the opposite—proves he was ineffective.

The Trial Court also emphasized, to support its conclusion, a finding that "Petitioner himself had previously stated to his fiancée, Paula Jones, that he and Petitioner were equally

responsible for Church's death." R. 4896, p. 49, 50, 56 and 58. The Trial Court fails to cite from the record where Michael allegedly made that statement. There is support for the proposition that Paula Jones had testified that Michael had told her that "they" had killed Church. However, it is a huge leap in logic to take from Paula's testimony, who was not present at the time of the attack, that Michael may have used the word "they" in describing the death to the position that Michael admitted that he was "equally responsible" for Gordon's death.

Regarding this claim, the Appellant has met his burden in demonstrating that he is entitled to his Rule 60 Motion to Set Aside Judge Eyre's ruling granting the State its Motion for Summary Judgment.

2. Issues Regarding David Homer

In support of its position that the death penalty was an appropriate sentence for Michael's conviction, the State presented testimonial evidence from David Homer ("Homer"). Homer was a State inmate that knew Michael while they were both incarcerated in Iron County. However David Homer happened to be incarcerated in the Millard County jail at the time Michael was arrested for the murder of Gordon Church.

Homer testified in the penalty phase that Michael had told him that killing Gordon was the "ultimate rush." Addendum, Exhibit "38," Criminal Trial Transcript, p. 3574 1.15-20. Michael indicated to all his attorneys that Homer had recanted his testimony and had indicated to them that the Sheriff's department "planted" Homer and made certain promises to him in exchange for his testimony and cooperation. Addendum, Exhibit "29," Affidavit of Michael Archuleta. One such person to whom Homer has stated that his testimony was false is Leslie Mabrey, who knew both Michael and Homer.

Les Mabrey's relevant testimony is as follows:

- a While performing my janitorial duties, I often overheard the conversations of other inmates and law enforcers or jail personnel at locations inside and outside the jail See Addendum, Affidavit of Les Mabrey as Exhibit "27 "
- b Fellow inmate David Homer was known in the Millard County Jail as an informant or a snitch
- c On one occasion I overheard a conversation between Homer and Sheriff's Officer Robert Dekker while Homer was washing Dekker's police car Dekker told Homer he would "look out" for Homer when Homer went before the parole board provided that Homer could get some dirt on Archuleta Homer agreed, stating that he would have to be moved into Archuleta's section to accomplish the task Homer was moved to Archuleta's section of Millard County Jail soon thereafter
- d After Homer was moved to Archuleta's section, Homer told me he was gathering data against Archuleta, and stated, "I've got a real good little thing going here " He said he intended to use his testimony against Archuleta "to manipulate my way out of here "
- e Homer bragged that it was his testimony that had gotten Archuleta the death penalty Homer boasted about the expression on the judge's face when Homer told the jury that Archuleta had claimed that killing Church had been the "ultimate rush "
- f After Homer had told me about fabricating his testimony, I tried to contact Archuleta's defense attorney, Mike Esplin, several times, but Esplin did not respond
- g Wood responded that he was not a rat but had merely done what he could to get the best deal Wood went on to claim that it was he who struck the "fucking homo" and then rammed a tire iron "up his ass just like he liked it " Wood went on to say he did not know why he had killed Church but that sometimes you just get crazy and do things by instinct
- h I personally reported what Wood had said to Dekker However, Dekker told me that his hands were tied because Wood had led authorities to Church's body, although Dekker admitted Wood had only been trying to save his own skin

Additionally, Jeff Homer's affidavit corroborates Les Mabrey's statement that Homer confessed that he lied during his testimony

- a I am the brother of David Homer, who testified at Michael Archuleta's trial David Homer testified that while he and Archuleta were housed at the Millard County Jail prior to Archuleta's trial, Archuleta spoke to him about the murder of Gordon Church David Homer testified that Archuleta told him that killing Church was "the ultimate rush "
- b After my brother and I were released from unrelated prison terms, we met at our mother's house and took a drive into the canyons During this outing, my brother told me that Archuleta had not made the statements that David Homer had attributed to him at trial My brother told me that his testimony was a complete fabrication He told me that he testified that Archuleta liked killing Church, but that Archuleta never told him that

- c. Millard County Sheriffs officers intentionally put my brother into the section of the jail with Archuleta to gather information. The law enforcement officials wanted my brother to establish premeditation so Archuleta would get the death penalty. It is my understanding that they had decided in advance what they wanted my brother to say. My brother told me he was placed in there for a specific purpose, to gather information.
- d. My brother became close to Millard County Sheriffs officials and was afforded many privileges. My brother, who was a trustee, was taken to church and school functions and gave motivational speeches at the behest of the sheriff to groups of teenagers. The speeches were designed to warn teens away from a life of crime. My brother was invited to Sheriff Ed Phillips' home and ate dinner with the sheriff's family during his incarceration in Millard County.
- e. Millard County law enforcers were intent on convicting Archuleta and sentencing him to death because the victim came from a very prominent family. Sheriffs officials and prosecutors were close to the victim's family.
- f. My brother told me that an officer named Dekker told him, "I want that cocksucker (Archuleta) on Death Row." Further, my brother told me that Decker had stated that he "wanted to shoot him (Archuleta) myself."
- g. My brother, David Homer, believed his cooperation with law enforcers might help him get out of prison sooner. My brother never expressed any regret for having falsely testified against Archuleta. My brother disliked Archuleta because he believed Archuleta was a homosexual. My brother told me he believed Archuleta "got what he deserved."

Addendum, Declaration of Jeff Homer, as Exhibit "28."

The evidence referenced above was discovered after Michael's conviction and sentence to death which, if true, is very relevant on several levels. First, David Homer's testimony that Michael told him that killing Church was the "ultimate high" may have been the very testimony that distinguished Wood, who received a life sentence, from Michael who received the death penalty. This newly discovered testimony in and of itself justifies setting the sentence aside. Second, the State "planted" David Homer in Michael's cell for the purpose of interrogating him without the aid of counsel. This act violated Michael's right to a Miranda warning and justifies suppressing David Homer's testimony. Third, Mabrey's and Jeffrey Homer's testimonies, as well as the testimony of others, supports Michael's defense that Wood committed the murder. Fourth, the State's failure to disclose the meetings with David Homer to Michael amount to a *Brady* violation.

As this Court is well aware, the government may not deliberately elicit incriminating statements from a defendant after he has invoked his Sixth Amendment right to counsel. *Maine v. Moulton*, 474 U.S. 159, 88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 65 L. Ed. 2d 115. In *United States v. Henry*, a defendant awaiting trial made incriminating statements to a fellow inmate, who was acting as a paid government informant, and who testified against the defendant at trial. *Id.* The Court held that the informant's statements were inadmissible because the government violated the Defendant's Sixth Amendment right to counsel “[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel.” *Id.* at 274, 65 L. Ed. 2d at 125.

Similarly, in *Maine v. Moulton*, the defendant made incriminating post-indictment statements to a co-defendant who, unbeknownst to Defendant, had made a deal with the State to testify against the defendant and was wearing a recorder during a meeting with the Defendant. 474 U.S. 159, 88 L. Ed. 2d 481. The Court held that the government violated the Defendant's Sixth Amendment rights by violating its “affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by counsel.” *Id.* at 171, 88 L. Ed. at 493. The primary concern of this line of decisions is “secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.” *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 91 L. Ed. 2d 364, 384 (1986).

Thus, if the State did in fact “plant” David Homer to obtain information from Michael, the State violated his Sixth Amendment right because the State obtained incriminating statements from Michael after the right to counsel had attached. If that is the case, David Homer’s very crucial testimony should have been suppressed, entitling Michael to post conviction relief.

Furthermore, as indicated above, Lance Wood made the same confession at least to Mr

Jorgensen, Gary Hawkins and Leslie Mabrey, that he acted alone in killing Church. This evidence is crucial because Wood's confession supports Michael's trial position that Wood inflicted all of the injuries causing the death of Gordon Church. This testimony amounts to new evidence supporting Michael's account of what happened at Dog Valley.

Finally, if the testimony is true, Mr. Mabrey's and Jeffrey Homer's testimonies establish a Brady violation. Captain Dekker should have prepared a report regarding his encounters with David Homer, and the State should have disclosed the information to the Appellant. *See* Legal Analysis regarding Brady violations found in previous Section.

Applying the facts of this case to the law above, it is clear that Brass should have taken steps to do the following: (1) subpoena Mr. Homer's parole documents to determine if Millard County provided a "favorable" word for him; (2) subpoena the Millard County Jail records to determine where the inmates were housed to determine if the inmate transfers supported Mr. Mabrey's statement; (3) take the depositions of and produce David Homer, Les Mabrey, Jeff Homer and Torin Plum as witnesses during the evidentiary hearing; (4) pursue a Brady violation for the State not providing a report regarding Captain Dekker's contact with Mr. Homer and his contact with Mr. Mabrey. *See* Exhibit "13," *ABA Guidelines 10.15.1(E)(4) & 10.7*.

It should be noted that Michael raised this allegation, in Issue Number 12 (d) of both the First and Second Amended Petitions for Post Conviction Relief. The Trial Court granted summary judgment as to this issue finding that it was procedurally barred and should have been raised during Michael's direct appeal. However, it appears that the Court's summary judgment order as to David Homer's testimony was an oversight. Issue 12 (d) alleges that subsequent to David Homer's testimony and conviction of Michael and the direct appeal in this matter, witnesses have come forward and indicated that David Homer has admitted that he committed

perjury. This Court should overturn the Trial Court's Summary Judgment ruling as to this issue. At least, Brass should not have allowed the claim to be lost by default.

Michael, on numerous occasions, informed his previous attorneys that several witnesses had told him that David Homer had recanted his testimony, and Michael requested that the attorneys find these people to verify their statements. Addendum, Affidavit of Michael Archuleta as Exhibit "29." The fact that Mr. Brass did not explore this issue during the post conviction relief was ineffective assistance of counsel or amounted to gross negligence. As such, Michael should be allowed to open up this matter to explore this claim of ineffective assistance of counsel pursuant to Rule 60 and Rule 59.

The Trial Court rejected, in part, the Appellant's Rule 60 (b) Motion as to this issue by finding as follows:

However, in the Court's view, the mere absence of Homer's testimony, when considered in the context of all the aggravating evidence demonstrating (1) that Petitioner was at least as responsible for the murder of Church as was his co-defendant Wood, and (2) the utter brutality and callousness of the murder, would not have resulted in a single juror altering his or her sentencing decision in favor of death.

R. p. 4896 at 54.

First, as argued herein, because of Brass' conflict of interest, this Court should simply presume prejudice. Second, the Trial Court's reasoning is in error because we actually have a jury that was presented the same "aggravating evidence" that Wood and Archuleta were co-conspirators and evidence of the "utter brutality and callousness of the murder" that found for a life sentence instead of the death sentence. It appears that the single difference between what was considered by the Wood jury and the Archuleta jury was Homer's testimony. The position that "a single juror" would not have altered his/her verdict cannot be supported because we have a jury that did just that.

Finally, the Trial Court found that even if Michael's statements violated the protection of Miranda, "they are admissible to impeach conflicting testimony by the defendant " Id at 54 However, this position is contrary to the law. The Trial Court relied upon *Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) and *State v. Troyer*, 910 P.2d 1182, 1190 (1995), to support the proposition that any statement Michael made to David Homer could have been used for impeachment purposes. However, the cases cited by the Trial Court do not support this proposition. Instead, these cases stand for the proposition that voluntary statements a Defendant makes to the **police** in the absence of an attorney that otherwise violates the Fifth and Sixth Amendments are admissible for impeachment purposes This case is different in that the Miranda violation was to a jail-house snitch-not a police officer. Jail-house snitches are notoriously unreliable, where police officers are not Even if this is not an exception to *Harvey* and *Troyer*, the State has the burden of establishing that the trustworthiness of the evidence satisfies legal standards before the testimony can be submitted. As the Petitioner has clearly demonstrated herein, David Homer lacks any trustworthiness. Certainly, the Trial Court would need to conduct a "trustworthy" analysis before Homer's testimony could be admitted for impeachment purposes Without this determination, it would be inappropriate at this posture to declare it trustworthy.

Again, in summary, Brass= performance or lack thereof is the only issue as to whether or not Appellant is entitled to relief pursuant to the Rule 60 and 59 motions. The Appellant is not required to prove *Brady* violations for the relief or that there is "newly discovered evidence" justifying post-conviction relief for Rule 59 and 60 As the above demonstrates, the Court should grant the Appellant his relief so that the *Brady* and/or newly-discovered claims can be

pursued, discovery conducted and then the Court allowed to determine the claim based upon its merits

3 Failure to Contact Gary Hawkins Regarding the Confession of Lance Wood

As stated herein, Michael's defense in this matter was that Mr Wood inflicted all of the injuries causing the death of Gordon Church Michael, during the time he was represented by Brass, informed Brass that Lance Wood had confessed to Gary Hawkins, among others as indicated herein, that he had inflicted all of the injuries causing the death of Gordon Church Apparently, Michael's efforts fell on deaf ears

Gary Hawkins, a former inmate at the Idaho State Prison and the Utah State Prison, has signed an affidavit testifying as to the following

- 1 During, the last eighteen years I became acquainted with both Lance Wood and Michael while incarcerated in the Idaho State Prison and the Utah State Prison
- 2 I first served time in the Idaho State Prison and became familiar with Lance Wood
- 3 Lance Wood had the reputation in the prison as being a rat or a narc
- 4 Lance Wood also had the reputation that he had deferred blame regarding his murder charge to his crime partner
- 5 Most of the prison inmates would not associate with Lance Wood because of his reputation
- 6 I did not care about the games that most of the inmates played and had no objection to associating with Lance Wood
- 7 Lance Wood and I became acquainted, and I associated with him extensively
- 8 Lance Wood never talked to me about the actual murder act during this period of time
- 9 During or about June of 1991, I was transferred to Utah State Prison
- 10 There I met, associated with and became acquainted with Michael
- 11 Michael had the reputation of being a follower
- 12 I never knew Michael to ever get in trouble with the prison officers or with other prisoners
- 13 Michael never discussed with me anything about the murder act
- 14 Michael's reputation, which was affirmed by my own observations, was that he was not very smart
- 15 In or about January of 1996, I was sent back to Idaho State Prison and became reacquainted with Lance Wood
- 16 Based upon my observations and interactions with Lance Wood, there is no question in my mind that Lance is the more resourceful of the two
- 17 Lance Wood bragged to me on numerous occasions about how he had outsmarted the police by reversing his actions with that of Mike Archuleta's actions

18. Lance Wood indicated to me that he was writing a book about the murder.
19. Based upon my observations, Lance Wood was writing a book.
20. Lance Wood indicated that in the book, his character reversed roles with the co-defendant, which fooled the police.
21. Lance Wood indicated to me that he had sent the book for publishing.
22. Lance Wood indicated to me that he and his girlfriend had done acid just prior to the murder.
23. Lance Wood on numerous occasions referred to Michael as being stupid.
24. On one occasion, Lance Wood acted out the murder for me.
25. Lance Wood demonstrated to me how he killed Gordon Church.
26. During this re-creation, Lance Wood actually demonstrated how he repeatedly swung in a golf swing motion, a metal object at Gordon Church's head.
27. I have been in prison for over 18 years, and during that time, I have talked to all kinds of criminals, murderers, child molesters and etc.
28. I have never witnessed what I observed in Lance Wood's demeanor.
29. As he was acting out the killing of Gordon Church, Lance Wood said things as if he were actually speaking to Gordon Church.
30. I cannot recall Lance Wood's exact words, but they were very hateful words directed towards Gordon Church being gay and getting what he deserved.
31. Lance Wood also acted out how he shoved the tire iron up Gordon Church's anal cavity and made the comment, as if he were actually talking to Gordon Church, "got a little more than what you bargained for."
32. Lance Wood's facial features could not be faked but instead had the appearance as if he had actually gone back in his mind to the time the murder was committed.
33. Lance Wood's facial features displayed pure anger and hatred.
34. I do not recall Lance Wood ever actually said that Michael did not inflict any of the injuries, but instead Lance Wood simply described how he had done the killing.
35. Lance Wood never described to me that Michael had inflicted any of the injuries on Gordon Church.
36. Although Lance Wood only talked once about the actual murder, on numerous occasions, Lance consistently described several other aspects of his involvement.
37. Lance Wood on numerous occasions bragged about how he had tricked the police into believing that Michael had performed the acts that he had actually performed.
38. He has repeatedly stated how easy it was to trick the police.
39. I asked Lance Wood how he could live with someone else being executed for something that he did.
40. Lance did not respond but sat down as if it affected him.
41. I have no reservations in testifying that of the two, Lance Wood was the leader and much more capable of switching the roles and that Mike Archuleta lacked the sophistication in fabricating such a story

See Addendum, Affidavit of Gary Hawkins as Exhibit "30."

If Gary Hawkins' testimony is found to be true, it constitutes new evidence that supports Michael's version of what happened at Dog Valley. Further, it supports Mr. Mabrey's and Mr.

Homer's testimonies that Wood had confessed to them that he inflicted all of the injuries. It also indicates that Mr. Wood's confession to Mr. Jorgensen not only occurred but was accurate. Finally, it is evidence that disputes the State's case that Michael was more aggressive and the leader between him and Wood.

The fact that Mr. Brass did not fully explore this issue during Michael's post conviction relief petition constitutes ineffective assistance of counsel. As such, Michael's Rule 59 and 60 motions should be granted based upon Brass' ineffective assistance of counsel.

The Trial Court denied Appellant's claim taking the same position as it did on other claims: 1) that Michael failed to present evidence that he told Brass about Gary Hawkins, R. p. 4896 at p. 56; 2) that he told Paula Jones that he was equally responsible for Church's murder, *id.*; and 3) that because of the depravity of the murder, even with Mr. Hawkins' testimony a different result could not be expected, *id.* at 59. As to point one, Michael's Amended Affidavit makes it clear that he told Brass about Gary Hawkins. Addendum, Exhibit "29." As to points two and three, see the discussion in Section 3 above, beginning on page 51, regarding Paula Jones' testimony and whether or not a single juror would have found differently with the additional testimony. Furthermore, Gary Hawkins' testimony, if true, substantially supports Michael's trial and sentencing theories. Gary Hawkins' testimony constitutes new evidence that supports Michael's version of what happened at Dog Valley. Further, it supports Mr. Mabrey's and Mr. Homer's testimonies that Wood had confessed to them that he inflicted all of the injuries. It also indicates that Mr. Wood's confession to Mr. Jorgensen not only occurred but was accurate. Finally, it is evidence that disputes the State's case that Michael was the aggressor and the leader between him and Lance. Gary Hawkins' testimony solidifies the other testimony regarding Michael's theory of the case and supports its credibility.

The fact that Mr Brass allowed default as to this issue and did not fully explore this claim during Michael's post conviction relief petition constitutes ineffective assistance of counsel and gross negligence. As such, Michael's Rule 59 and 60 motions should be granted based upon Brass' failure to properly investigate and present these claims.

4. Mr. Brass' Failure to Explore Whether Michael is Exempt from the Death Penalty Pursuant to *Atkins v. Virginia*, 536 U.S. 304

In support of the Second Amended Petition, Brass retained Dr. Cunningham and Dr. Gummow and solicited their testimony to support the position that Michael's criminal trial attorney provided ineffective assistance of counsel regarding his presentation of mitigating circumstances. Addendum, Affidavits of Dr. Cunningham and Dr. Gummow, as Exhibits "31" and "32." The retained experts focused on mitigation evidence regarding whether at "the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental illness." Addendum, Utah Code Section 76-3-207 as Exhibit "33." Trial Court rejected Brass' claim that Esplin was ineffective in presenting mitigation and held Dr. Cunningham's and Dr. Gummow's testimony, in summary, contradicted Michael's trial testimony that he did not participate in the murder. In other words, Judge Eyre found that the expert's testimony not only failed to establish ineffective assistance of counsel, but that it would have been an ineffective strategy for Esplin to contradict Michael's trial testimony by introducing, in mitigation, that Michael's past created a person which ultimately would kill regardless of intervention. With that finding, the Trial Court could not grant Michael's post-conviction request which faulted Esplin for not switching the strategy during the penalty phase to a position of explaining why Michael committed a murder which he maintains he did not commit. For reasons stated herein, Brass' use and focus of these witnesses was misplaced and

amounted to ineffective assistance of counsel. .

Initially, Brass never consulted with Michael regarding implementation of a strategy explaining why he might have brutally murdered Gordon Church when it had been Michael's position that he did not participate in the murder, a position that he continues to maintain. Addendum, Affidavit of Michael Archuleta as Exhibit "29." More importantly, there is a separate basis for post conviction relief that Brass should have explored with the retained experts. Dr. Cunningham and Dr. Gummow emphasized repeatedly during their testimony that Michael has severe mental issues which upon proper exploration would have established the statutory definition of mental retardation, which gives rise to an *Atkins* claim.

In *Atkins v. Virginia*, 536 U.S. 304, the United States Supreme Court found that executing a mentally retarded person violates the Eighth Amendment to the United States Constitutional protection against excessive punishments. The Supreme Court noted that multiple state legislatures had barred the practice of executing mentally retarded defendants. *Atkins* at 313-317. The Court found that executing mentally retarded defendants did not measurably advance either of the two main justifications for imposition of a death sentence, i.e. retribution and deterrence. *Atkins* at 321; see also *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

The court in *Atkins* intentionally did not provide a specific I.Q. score cut-off point for mental retardation or even identify a particular way of making that determination. *Atkins*, 536 U.S. at 317. The *Atkins* Court's view was that the best measure of intellectual functioning remains a matter of fact to be resolved on the trial court level, based on the evidence of each individual case. *Id.*

"Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they 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. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan.”

Id. at 318.

When *Atkins* was decided, the United States Supreme Court left the states to implement the ruling as each saw fit. As would be expected, there are many different definitions of mental retardation employed by the various states which still employ the death penalty. Some states give specific IQ numbers which either presumptively rule in, or rule out, persons who might qualify as mentally retarded, while some states utilize the definitions provided by professional organizations working in the field of mental retardation.

In response to the Supreme Court’s holding in *Atkins*, the Utah State Legislature enacted section 77-15a-101, et. seq. in 2003 which allows a Utah defendant to seek exemption from the death penalty if that defendant meets the definition of mental retardation in this specific statutory context. The term “mentally retarded” is defined in section 77-15a-102 as a condition in which an individual 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.

In discussions regarding this legislation and the legislature’s interpretation of *Atkins* on the Utah Senate floor, Senator Gladwell explained the issue with the following statement: “[w]hat *Atkins* said was not so much that the mentally retarded cannot form the intent to commit a heinous crime but that the mentally retarded are a group of unfortunate citizens who live among us, about 1-3% who taking everything in context of where they live, [their] inability to perceive life as we do. . . . [I]t just is simply cruel and unusual for us to execute them and the [C]ourt

actually said this is an excessive an excessive application of the 8th Amendment if we're allowing them to be executed ” Utah State Legislature General Session, S B 8 (Feb 5, 2003) (statement of Sen David Gladwell), see Tr Senate Debate at 22

The process of determining whether or not a person is mentally retarded pursuant to 77-15a-102, is clearly delineated in the statute Prior to beginning that factual analysis, it is appropriate to consider the standard of review established for this issue Utah Code Annotated section 77-15a-104(12)(a) states that “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 ” Utah Code Ann §77-15a-104(12)(a) (2003) (emphasis added)

A preponderance of the evidence is defined by Black's Law Dictionary as “that degree of proof which is more probable than not ” Black's Law Dictionary 1182 (6th ed 1990) In other words, it is evidence which is more convincing than the evidence which is offered in opposition to it, it shows that the fact sought to be proved is more probable than not Utah State Senator David Gladwell, in discussing the preponderance of evidence standard in the transcribed legislative history for this statute, described it as “the very lowest standard of proof, it's fifty percent plus a penny essentially ” See Tr Sen Deb at 4

Subsection (b) provides that a finding of mental retardation only operates to exempt the person from a death sentence and not for any other purpose or adjudication See Utah Code Ann § 77-15a-104(12)(b) (2003) This subsection carries exceptional importance in the case at bar “Mental retardation” in this context is not the same as the classic clinical definition used to qualify a person, for example, seeking public benefits or services Rather, it is a more broadly defined concept designed to include persons who might not otherwise qualify based solely on a

numeric score.

Dr. Cunningham and Dr. Gammo, experts retained in this matter, have both come to the conclusion that Michael *does* have significant adaptive functioning difficulties in the area of reasoning and impulse control. Michael clearly has diminished “capacity 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.” The following are a few examples drawn from their testimony which demonstrate this fact:

1. Michael’s IQ, taking into account the Flynn effect, was 71 or 72, a score within mental retardation range. Addendum, May 17, 2006 *Bench Trial Transcript*, Vol. II, p. 211-212 as Exhibit “34.”
2. There is significant evidence in Michael’s history to justify a concern about Michael’s neuropsychological functioning. *Id.* at p. 229.
3. A full neuropsychological assessment that included a full scale intellectual assessment to comprehensively assess the functional adequacy of Michael’s brain function. *Id.* 231 and 58-59.
4. Michael’s history clearly demonstrates that there is organic brain damage. *Id.* at 48.
5. Michael’s history indicated that he suffered mental retardation. *Id.* at 93-94.

Utah Code Annotated § 77-15a-101 provides an exemption from the death penalty for those individuals who are charged with capital offenses but who have been determined by the trial court to be mentally retarded. This issue has not been properly addressed by the Court. Brass provided ineffective assistance of counsel for failing to explore, investigate and ultimately raise the issue of *Atkins* defense with the Court. The *Atkins* defense would not be contrary to Michael’s testimony as to what happened at Dog Valley and would not characterize Michael as a monster pre-disposed to murder. As such, Michael’s Motion to Set Aside Judgment, pursuant to Utah Rules of Civil Procedure 59 and 60(b), must be granted so that Michael’s *Atkins* claim can be pursued.

The Trial Court found that Appellant failed to present evidence that he could meet the

standard necessary for an *Atkin*'s defense. R. p. 4896 at 63. Again, the Appellant at this posture of the case is not required to establish that he is entitled to post-conviction relief, only that Brass was ineffective or grossly negligent in pursuing the claim. The fact of the matter is that Brass never retained an expert regarding the issue of whether or not Michael met the statutory definition of "mentally retarded" found in Utah Code Section 77-15a-102. This fact constitutes ineffective assistance of counsel pursuant to *Sears* as discussed in Section A6 above.

5. **Failure to Produce Evidence Regarding Lance Wood's Personality and Psychological Assessments.**

Again, Michael's defense in this matter was that Lance Wood inflicted the injuries on Gordon Church. The State's case was that Michael was the aggressor and controlling person in this matter. The State presented evidence that Wood was scared of Michael and that Michael was the leader with Wood being the follower. Esplin should have retained an expert to compare Michael's and Lance's personality and psychological assessments. Such a comparison would have contradicted the State's evidence and supported Michael's theory of the case. Specifically, Esplin failed to produce evidence that:

- 1) Michael's IQ taking into account the Flynn effect was 71 or 72, a score within mental retard range. *See*, Evidentiary Hearing Transcript, Vol. II, p. 211-212.
- 2) There is significant evidence in Michael's history to justify a concern about his neuropsychological functioning. *Id.* at p. 229.
- 3) Michael's history clearly demonstrates that there is organic brain damage. *Id.* at 48.
- 4) Michael's history indicates that he suffered mental retardation. *Id.* at 93-94.
- 5) Mr. Wood had the following psychological and personality assessments: Addendum, Department of Corrections 90-day Diagnostic Report, as Exhibit "35."
 - a. Dr Long's diagnostic impressions indicate "conduct disorder, socialized aggression."
 - b. The "Aggression Types are characterized by a repetitive and persistent pattern of aggressive conduct in which the rights of others are violated. This could be through the use of physical violence of persons or property outside the home involving confrontation with the victim."
 - c. Wood was characterized as follows: "Low frustration tolerance, irritability and temper outbursts are often present."
 - d. Dr. Long also suggested that Lance Wood had Narcissistic Personality

Disorder.

- e. Lance Wood's total IQ was 97, much higher than Michael's I.Q of 71 or 72.
- f. Lance Wood's father described him as "a con artist." He can usually get people to do whatever he wants just by manipulation." Addendum, Lance Wood's Presentence Report, as Exhibit "36."

Furthermore, both Michael's parents and his sister, Stella Archuleta, testified that before Michael moved to Cedar City, Lance called them repeatedly trying to get a hold of Michael.

Addendum, Affidavit of Stella Archuleta as Exhibit "37." This evidence clearly demonstrates that Wood was not scared of Michael as maintained by the State. Finally, Gary Hawkins, who knew both Wood and Michael from prison, has stated that of the two, Wood is much smarter and controlling. Wood is much more capable of formulating a plan to deceive the police.

Addendum, Affidavit of Gary Hawkins, as Exhibit "30."

Michael's trial counsel did not present any evidence regarding Lance Wood's psychological make-up, nor compare it to Michael's make-up. Trial counsel provided ineffective assistance of counsel by failing to rebut the State's evidence that Michael was the aggressor and main actor in the murder. The fact that Brass did not fully explore and present this issue during his efforts in the post conviction relief process constitutes ineffective assistance of counsel and gross negligence. As such, Michael should be allowed to open up this matter to explore the claim in his post-conviction relief petition.

6. Failure to Obtain Experts

Michael's testimony at the trial was that Lance Wood had actually inflicted the injuries which led to Gordon Church's death. In support of this position, and to explain the blood found on his pants, Michael testified that the blood found was the result of carrying Gordon Church's dead body up a hill and placing him under a tree. Michael also testified that Church's blood may have been found on his clothing because he was close enough to Church while Wood inflicted

the injuries. Finally, Michael testified that he was actually able to stop Wood from repeatedly striking Church by grabbing the jack and tossing it from the scene. Addendum, Summary of Michael's testimony, as Exhibit "18."

On the other hand, the State argued at Michael's trial and sentencing in support of the death sentence that the charge of capital murder was justified because "the death was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture or serious physical abuse, or serious bodily injury of the victim before death...", Addendum, Jury Instruction No. 12, as Exhibit "39." Furthermore, the State argued that the amount of blood found on his cloths meant that Michael had to have been involved in Church's murder to a greater extent than as he testified. The State also produced a blood expert who testified that Gordon Church's blood droplets covered the back of the vehicle and interior trunk lid of the vehicle. Exhibit "38" as Criminal Trial T. p. 2732. The blood expert testified that at the time Church was attacked, he was on the ground directly behind the vehicle's bumper (inches) on the driver's side. *Id.* at 2751. This is important because the blood spatter droplets from Gordon Church's body were towards the vehicle. No person could have safely stood between the victim and the trunk of the car except the person committing the actual attack. The State's blood spatter expert, Dr. Robert Bell, testified that he found blood spatter on Lance Wood's jacket. *Id.* at 2757. He further testified that the "blood source [found on Wood's jacket] would have to be slightly in front of his feet off at a distance... of anywhere from two to four feet in front of the wearer of [Lance's jacket] and slightly to the person's left." *Id.* at 2761-62. No blood spatter was found on Michael, only found on Wood. *Id.* at 2575-2576. A very viable conclusion that can be made from this testimony is that Wood committed the injuries inflicted on Church, otherwise blood spatter would have been found on Michael's clothing.

In addition, Michael testified that he stopped Lance Wood from further striking Gordon Church. Addendum, Summary of Michael's testimony, as Exhibit "18." The blood spatter expert provided testimony which supports Michael's testimony as follows:

There appears to be a single, isolated drop of what appears to be blood striking the jacket from, again, the up to down trajectory. And it appears as though it would be if you were standing upright, it would have been coming over in this area here, to the right of the individual. It's probably more consistent with a drop of blood as a result of parabolic arcing."

Q: "Could it be a drop of blood falling from an instrument?"

A: "Yes."

Exhibit "38," Criminal Trial Transcript, p. 2772

This testimony supports Michael's testimony regarding his involvement and that he stopped Wood in mid-swing when Wood was attacking Church. The weapon, car jack, was clearly stopped while being held upwards over Wood's head allowing for a drop of blood to fall on Wood's shirt. This particular testimony clearly supports Michael's testimony that he stopped Wood from striking Church, either physically or by yelling,

Also in support of Michael's trial testimony, there was abundant forensic evidence that indicated that Wood had committed the murder. For example, Church's hair was entwined in Wood's shoelaces and that Wood's footprint matched the indentation in Church's head. Addendum, *State vs. Wood*, as Exhibit "17." On the other hand, the State's forensic evidence regarding Michael's involvement was limited to the blood found on Michael's pants.

In response to the evidence produced by the State, Michael's counsel did not produce any expert testimony which could have established that Michael's testimony of what occurred was credible, or even plausible. Expert testimony should have been produced to explain that the blood on Michael's pants, was consistent with his testimony that he carried Church away from the spot where and after the injuries to Church had been inflicted. Esplin should have retained an expert to testify that the blood spatter found on Wood's clothes and on Wood's shoes and the

other forensic evidence was consistent with Wood delivering the blows to Church, that the single drop of blood on Wood's shirt was consistent with Michael's testimony that he stopped Wood at one point from repeatedly delivering blows to Church with the tire jack and that the blood on Michael's pants was consistent with him carrying Church after he had been murdered.

The undersigned has retained a blood spatter expert for consultation purposes and he has verified that Michael's testimony would support Michael's position regarding the source of blood on his clothing and his involvement in the case. The consultant further indicated that in 1989, blood spatter expert testimony was a relatively new science. For this reason, Michael should have retained his own expert for consultation. Finally, the consultant stated that for a blood spatter expert, 40 hours of training is very basic. Addendum, Affidavit of James K. Slavens, as Exhibit "26."

In another line of reasoning that Brass/Esplin should have retained an expert, if Gordon Church was already dead or unconscious during much of the attack, the State would have failed to establish that the death was caused in a heinous manner. Instead, the State would have only established the crime of abuse or desecration of a dead human. *See* Utah Code §76-9-704. Michael's defense should have retained an expert to review the evidence and render an opinion as to the theory that Church was already dead or had lost feeling prior to a substantial part of the attack. Clearly, the testimony presented at trial indicated that several of Church's injuries could have resulted in death and/or unconsciousness. The State's witnesses testified as follows: 1) "these injuries were crushing skull fractures," Exhibit "38" as Criminal Trial Transcript p. 3151"; 2) "so he died fairly quick from the head injuries, *id.* at p. 3183; 3) "In fact, not only is it probable- or is it possible, it's probable that Church immediately lost [consciousness]; is it not? A. yes," *id.* at p.3190; 4) "Now, as a result of losing consciousness, does the person also lose

feelings? A. That's generally—you lose pain—feeling the pain, as a general rule,” id. at p. 3191; 5) the State's expert would not give an opinion “whether Church lost consciousness,” id. at 3201. We do not know which injury caused the death and whether Gordon Church was dead or unconscious during much of the attack. The State certainly had no interest in establishing that Church may have died or lost feeling during most of the attack.

Furthermore, the Utah Supreme Court, in *State v. Wood*, 648 P.2d 71 (Utah 1981), cert. denied, 459 U.S. 988 (1982), *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *State v. Tuttle*, 780 P.2d 1203 (Utah 1989), has stressed the importance of narrowing the classification of capital cases in order to distinguish them from other ruthless, brutal murders. The initial head injuries to Mr. Gordon Church were sufficient and probably caused him to lose consciousness at the outset. If so, the victim would not have suffered any additional pain and suffering once he lapsed into a state of unconsciousness. Thus, pursuant to *Wood*, since Gordon had lost consciousness or had died prior to most of the attack, this case is distinguishable from other ruthless and brutal murders.

In addition, in support of its position that the crime was committed in a heinous, cruel or atrocious manner, the State presented evidence that Michael was involved in hooking battery cables to Gordon Church's testicles. The State presented this evidence regarding the use of battery cables to demonstrate that Michael attempted to “electrocute” Gordon Church. It is important to note that hooking up battery cables to Church's testicles is the only offensive act, testified to by Michael, that he made towards Church at Dog Valley where the murder occurred. Addendum, Exhibit “38,” Trial Transcript, p. 3269-3270. The jury should have been informed during the guilt and penalty phase of the fact that Church could not have suffered any electrical shock from a car battery. The vehicle would have to be running in order to produce any

electrical charge. Addendum, Affidavit of Kevin Tracy as Exhibit “40.” Furthermore, a vehicle battery’s output is only twelve (12) volts whereas a typical wall outlet in a home is one-hundred and ten (110) volts. Twelve (12) volts is not a substantial enough electrical output to create anything more than a slight tingle and would not cause any injury. In fact, whether the vehicle was running at the time Michael attached battery cables to Church’s testicles, or whether the ignition was off, there would be no shock, burn or injury under either set of facts. *Id.*

The Trial Court found that it did not believe that any expert suggested by the Appellant would have changed the verdict in either the guilt or penalty phase. See generally R. p. 4896 at p. 70-72. First, as argued herein, the Court applied the wrong standard; second, because of Brass’ conflict of interest, this Court should simply presume prejudice; and third, the Trial Court’s reasoning is in error because we actually have a jury that was presented the same “aggravating evidence” that Wood and Archuleta were co-conspirators and evidence of the “utter brutality and callousness of the murder” that found for a life sentence instead of the death sentence. The position that “a single juror” would not have altered his/her verdict cannot be supported because we have a jury that did just that; impose a life sentence.

The fact that Michael’s trial counsel failed to retain experts to address the above issues, amounts to ineffective assistance of counsel as was stated in *Sears*, supra Section A3. This is important in that the Appellant’s Motion is based upon the fact that Brass did not explore this issue regarding experts in the Second Amended Petition for post conviction relief. This again amounts to ineffective assistance of counsel or gross negligence. This Court should grant Michael’s Motion to open the Court’s denial of post-conviction relief so that this issue can be explored.

7. Mental Breakdown of State’s Forensic Pathologist Amounts to Brady Violation

Martha Kerr (“Kerr”) was a Forensic Pathologist for the Utah State Crime Lab and called by the State as an expert on the blood evidence presented at Michael’s criminal trial. Her office handled the chain of evidence, the blood typing, and more importantly the blood spatter evidence in this case. The blood evidence was the only substantial physical/forensic evidence putting Michael at the scene of the crime. Michael has recently discovered that Kerr experienced a mental breakdown prior to her trial testimony. This fact was never disclosed to Michael and amounts to a Brady violation.

The following denotes Kerr’s history in regards to her mental illness:

1. In July 1987, Kerr experienced her first of many psychiatric hospital stays. Addendum, September 14, 1999 letter, as Exhibit “41 ”
2. In February 1988, Kerr experienced a second psychiatric episode that again required the attention of professional mental health treatment. *Id.*
3. In June 1989, Kerr resigned from the crime lab. *Id.*
4. Sometime in 1989, Kerr had a major breakdown while providing a deposition by Fred Metos, Defense Attorney in another Capital case, and required mental health treatment. *Id.*
5. Kerr was taking medication to treat her mental illness. *Id.*
6. Kerr ultimately obtained a Worker’s Comp claim based on her mental health case. *Id.*
7. Kerr is on Social Security disability based upon her diagnosis of Schizophrenia, paranoid and other functional psychotic disorders. *Id.*

Kerr has stated that she feels a number of files of which she worked between 1984 and 1989 had been altered. Addendum, May 4, 2007 letter, as Exhibit “42.” A letter dated April 10, 2007 from Kerr to Tom Stevenson, a Prosecuting Attorney in the Brad Perry homicide in Box Elder, reads as follows:

“In conclusion, due to apparent technical and nontechnical forgery, falsification, and manipulation of case log books and reports represented as those I generated during my time with the Utah State Crime Laboratory and the destruction of crucial records for the period of time under review by both the Laboratory and the Bureau of Criminal Identification, specifically, the sign-in sheets for the 2nd floor Calvin L. Hampton Complex and the Laboratory’s own sign-in log, I would ask that my name be removed from the witness list on this new evidence and case.

Furthermore, I recommend a more extensive scientific examination and investigation should be conducted not only with the Brad Perry homicide in mind but

also, **any others I worked on that are affected.**”

Kerr was the forensic blood expert in this case and testified at trial regarding the blood evidence found at the crime scene, on the vehicle and on Wood’s and Archuleta’s clothes. Addendum, Exhibit “38.” Clearly, Kerr was under duress and under the influence of medication because of her mental illnesses during her analysis of the evidence and during her testimony at Michael’s trial. Her statements since the trial indicates that she is of the opinion that the evidence in this case and others were falsified and/or fabricated and needs review.

Regardless of whether Kerr is now credible or believable, the State had the obligation to disclose to Michael that Kerr had this mental breakdown and was under the influence of medicine. This failure amounts to a *Brady* violation. See discussion in Section B1 above.

The Trial Court found that “even if Kerr’s testing of the blood and testimony at trial are suspect, ultimately it was not material to the resolution of the case.” R. p. 4896 at p. 73. However, the blood evidence is very significant in deciding between the State’s theory and Michael’s theory of the case. The Trial Court found, in addressing another claim, that because of the amount of blood found on Michael’s pants, he must have been an active participant in the murder. See R. p. 4896 at p. 58: “which was in turn supported by physical evidence that Petitioner ‘had a great deal of blood on his pants,’ the jury could have found Petitioner guilty notwithstanding evidence contained in the Hawkins declaration.” *Quoting* Archuleta, 850 P 2d at 1236. The Trial Court’s position, which adopted the Respondent’s position, that the blood evidence is not important because of all the other evidence supporting the heinousness of Church’s death, succinctly demonstrates the circular nature of the State’s case and the house of cards upon which Michael’s conviction and sentence rests. For example, the Trial Court found that the Hawkin’s affidavit, as well as the other witnesses’ testimony regarding Wood’s

confessions, is not relevant because of the amount of blood found on Michael's pants; however, Martha Kerr's mental breakdown is not important because the amount of blood found on Michael's pants is not relevant; and finally that Michael did not need to retain a blood expert "whose testimony will add little, if anything, to effective cross-examination and cogent arguments based upon the evidence" because the blood evidence is not important. R. p. 4896 at p. 68.

The State's *Brady* violation regarding the disclosure of Marth Kerr's mental breakdown coupled with the other errors identified herein establishes that Michael is entitled to post-conviction relief and/or to have the Trial Court's denial of Michael's post-conviction relief set aside.

8. Brass' Failure to Respond to the Sate's Motion for Summary Judgment that Claims 1-30 were Procedurally Barred Constitutes Ineffective Assistance of Counsel

Michael filed his First Amended Petition on or about August 11, 1994. In response, the State filed a motion to dismiss and a motion for summary judgment, which was granted by the District Court. However, Michael appealed the District Court's order granting summary judgment to the Utah Supreme Court, which overturned the District Court holding that the "district court erred in ruling that the petition for a writ of habeas corpus, which was based on the allegation of ineffective assistance of counsel at trial and on appeal, was barred." *Archuleta v. Galetka*, 960 P. 2d 399 (Utah 1998). See, Addendum, Exhibit "7." When Michael filed his Second Amended Petition, which included the same claims 1 through 30 as were presented in the First Amended Petition, the State again moved for summary judgment, which Brass did not oppose. The District Court, in its Ruling on Motion for Summary Judgment, entered on or about August 25, 2004, recognized that "Claims 1 through 30 in the second amended petition were all previously raised in Appellant's first amended petition filed on August 11, 1994." Addendum,

Ruling on Motion for Summary Judgment, as Exhibit “14.” The District Court granted the State’s unopposed motion for summary judgment regarding Claims 1 through 30, holding that “with the exception of the Petitioner’s ineffective assistance of counsel claim, the [Utah Supreme] Court left undisturbed Judge Davis’s [district court] ruling that the other claims in the first amended petition were procedurally barred.” *Id.*

However, a reading of the three cases cited by the Supreme Court makes it clear that the Trial Court misinterpreted this Court’s ruling. This Court made clear in *Dumm v. Cook*, 791 P.2d 873 (1990), one of the cases cited, that “[t]he doctrines of waiver and res judicata do not stand as an unyielding bar to the litigation of claims that either once were or could have been litigated in a prior proceeding.” *Id. at 875.* The Court further explained that the function of a writ of habeas corpus as a post-conviction remedy serves as a collateral attack to constitutionally flawed convictions and that “[p]rotection of life and liberty from unconstitutional procedures is of greater importance than is res judicata.” *Id.*

Certainly this Court did not intend for its silence in its ruling, reversing and remanding the Judge Davis’ summary judgment order, to be interpreted as an affirmation of the dismissal of counts 1-30 on the grounds that such claims were waived by Michael by failing to raise them during the direct appeal. This Court instead clearly stated that litigation of claims of unconstitutional procedures are “of greater importance than is res judicata.” *Id.* This language does not imply that claims 1-30 were procedurally barred.

Accordingly, the District Court erred in granting summary judgment finding that claims 1 through 30 were procedurally barred. Brass provided ineffective assistance of counsel by failing to defend against the State’s motion for summary judgment as to Claims 1 through 30. In addition, Brass should have reviewed and sought to reintroduce claims 1 through 30 of the

Second Amended Petition Pursuant to Utah Rule of Civil Procedure 15, claiming “ineffective assistance of counsel.”

9. Brass Prejudiced Michael by Introducing Prejudicial, Rather than Mitigating Evidence.

Essentially, Brass’ approach in the Second Amended Petition boiled down to arguing that the trial counsel should have introduced evidence that Michael’s history created a monster-like person that would inevitably kill and that Michael was damaged to the point that he cannot be rehabilitated. As mentioned in Section 1 above, and supported by the affidavit of Michael, Brass did not discuss with nor receive permission from Michael to pursue this strategy. Obviously, employing a strategy during the post conviction relief appeal that is diametrically opposed to Michael’s testimony during the trial is, to say the least, ineffective and prejudicial to Michael’s interests.

Judge Eyre, in dismissing Michael’s post-conviction relief, noted the contradicting positions taken by Michael. During his criminal trial, Michael claimed he did not participate in Church’s murder. Yet the mitigation evidence indicated that because of his upbringing, he was destined to murder. Such contradicting mitigation evidence was prejudicial to Michael and perhaps solidified the appropriateness of the death sentence. The District Court found that Brass’ theory of mitigation at the penalty phase amounted to essentially asking the jury to find him “less morally culpable for a murder he specifically told the jury he did not commit,” and that much of the evidence Brass contends should have been presented was “two-edged,” that “it would likely have been interpreted as aggravating rather than mitigating *insofar as it strongly suggests that [Michael] would be dangerous in the future.*” [Emphasis added.] In other words, the argument advanced by Brass for Michael’s post conviction relief was more helpful to the State than it was to Michael.

Brass' actions amounted to ineffective assistance of counsel and supports the Appellant's Rule 60 and 59 Motions.

C. Cumulative Error Spanning Twenty Years Warrants Post Conviction Relief

Even if this Court finds that no single error occurred, the undersigned contends that the trial court's errors, as well as Brass' ineffective assistance of counsel, constitute cumulative error. In *State v. Gonzales*, 125 P.3d 878 (2005), the Court held that pursuant to the "cumulative error doctrine, we will reverse only if the "cumulative effect" of the several errors undermines our confidence . . . that a fair trial was had."

In assessing a cumulative error claim, the Court must "consider all the identified errors, as well as any other errors [the court] assumes may have occurred," to determine if the errors undermined confidence that the Appellant/Michael had a fair trial. *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (citations omitted); see also, *State v. Young*, 853 P.2d 327, 367 (Utah 1993).

The errors enumerated herein certainly undermine any confidence that the Appellant/Michael received a fair trial and/or a fair sentence. Consequently, Michael is entitled to a post-conviction relief. In fact, the Trial Court and this Court have already held that the following errors occurred:

(1) This Court found that the prosecutor violated his duty to engage in continuous discovery by failing to disclose to Michael the substance of Anna Luce's testimony that he was wearing a knife in a scabbard strapped to his right hip when she saw in the evening of the murder. However, the Court found that this was harmless error. *Utah vs. Archuleta*, 850 P.2d 1232, 1242.

(2) This Court also found that the trial court improperly directed verdict, in the guilt phase, to the issue of whether or not the murder occurred in the commission of, or flight after committing the crime of object rape. The Court indicated that even with this circumstance eliminated, Michael's conviction of capital murder stands because the jury found three other circumstances. *Id.* at 1245.

(3) This Court also found that the trial court improperly admitted evidence, in the penalty phase, regarding object rape. The Court indicated that even with this aggravating circumstance eliminated, Michael's conviction of capital murder stands because the remaining aggravating circumstances outweighed the mitigating circumstances. *Id.* at 1245.

Michael recognizes that the Court cannot reconsider the findings that the errors enumerated above constituted harmless error as the issues have already been ruled upon on appeal. However, this Court can take into account the errors found on appeal coupled with the errors found here in resolving the issue of whether or not Michael is entitled to his Rule 60(b) Motion and resolving the issue of whether a single juror could possibly have changed his/her position regarding Michael's conviction or sentence.

For the reasons provided herein, and those previously adjudicated, this Court should find cumulating error justifying Michael's Rule 60(b) Motion and also justify Post-Conviction Relief from his conviction and death sentence.

D. Lack of Competent Counsel

This Court, in *Archuleta v. Galetka*, 197 P 3d 650 (2008), held as follows:

"We find that the unavailability of competent and willing counsel impedes prompt, constitutionally sound resolution in capital cases, we may be forced to hold that the lack of such counsel is sufficient grounds for outright reversal of a capital sentence and remand for the imposition of a sentence of life in prison without the possibility of parole. *Id.* at 654

As stated above, the cumulative effect of the errors made by Michael's counsel over the past twenty years is proof positive that Michael has not been afforded effective assistance of counsel as required by the Sixth Amendment to the Constitution of the United States. Many, if not all, of the errors outlined above cannot be corrected and have forever undermined any scintilla of confidence in the fairness of Michael's trial, conviction, and sentence necessary to impose the heaviest of all penalties – death.

During the trial, Michael's counsel, Michael Esplin, was ineffective for the reasons delineated in this motion and for those raised in the First and Second Amended Petitions for post conviction relief. Michael's second attorney, Karen Chaney, suffered a nervous breakdown

during her representation in this post conviction relief action. In fact, this Court revoked her right to practice in Utah on a pro hoc vice status. Addendum, Various Court Documents, as Exhibits “9,” “10,” “11,” and “12.” Michael’s third attorney, Brass, failed to provide effective assistance of counsel for all the reasons set forth above. Previously the Supreme Court characterized, as stated above, Brass’ representation in a previous post conviction relief case as “deplorable,” and Brass himself admitted that he “had no training in federal habeas law,” and that he does “not understand the complex procedural rules governing capital cases in state and federal post-conviction.” Addendum, Affidavit of Ed Brass as Exhibit “16.”

The undersigned is now Michael’s fourth appointed attorney. The undersigned is overwhelmed by the responsibility of reviewing over 20 years of representation, especially in light of the fact that many of the files cannot be found and of which are not accounted. In essence, the undersigned cannot imagine how this Court could find that there is any effective means to provide meaningful representation for Michael or a review of his representation at this point. This Court cannot have any confidence that Michael has received effective assistance of counsel. The history of this case speaks for itself. This is such a case that this Court should hold that the unavailability of counsel has impeded a sound resolution of this capital offense. This lack of counsel is sufficient grounds for revoking Michael’s sentence of death and imposing a life sentence.

E. Exhaustion of State Remedies

Finally, the Court should grant Archuleta’s Rule 59 and 60 motions for the purpose of addressing all of his claims for the sake of judicial economy. As this court is well aware, the federal courts, based on the principle of comity, will not entertain issues presented for post conviction relief until the Appellant has exhausted his state remedies. *See, Tillman v. Cook*, 215

F.3d 1116 (2000).

The exhaustion of remedies doctrine prevents Michael from seeking a remedy for the claims set forth above in Federal Courts until all his claims or remedies have been exhausted in Utah's state courts. Should this Court refuse to set aside its grant of summary judgment in this matter to allow Michael the opportunity to amend his Petition for Post Conviction Relief to include the above stated *Brady*, *Atkins* and ineffective assistance of counsel claims, it is almost certain that the Federal Courts will remand the case to the state court for adjudication or bar review altogether. *See*, 28 U.S.C. 2254; *see also*, *Vasquez v. Hillery*, 474 U.S. 254 (1986)(those seeking collateral relief in federal court have an obligation to exhaust state remedies before seeking relief in federal court).

The State, which the Trial Court adopted, disagrees arguing that it believes that the federal courts will not, *as a matter of federal law*, allow Petitioner to return to the Utah courts to seek relief on his claims. It asserts that his claims will not be cognizable in federal court as a matter of federal law. R. p. 4648, Opposition at 125, citing 28 U.S.C. ' 2254(a). The State argues that the federal courts will not reach the merits of his claims in any event because the federal doctrines of exhaustion and procedural default would prevent it from doing so. *Id.* at 125-26, citing 28 U.S.C. ' 2254(b); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Gardner v. Galetka*, 568 F.3d 864 (10th Cir. 2009)). Finally, it asserts that it may waive the exhaustion requirement with respect to these claims once Petitioner files a federal habeas petition. *Id.* at 127, citing 28 U.S.C. ' 2254(b)(3).

The State's contentions, thus the Trial Court's ruling, based on federal law are irrelevant for two reasons. First, they are questions of federal law, not state law, and the Trial Court had no authority to pass on them. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005) (noting that whether

to use the stay-and-abeyance procedure is within the discretion of a federal district court); *Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J., concurring) (noting that procedural default is a question of federal law); *Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999) (noting that exhaustion is a question of federal law). Second, the State=s positions are inherently speculative. The State presumes that Petitioner’s claims will reach the federal courts having never been previously presented to the Utah state courts. But that presumption is demonstrably untrueCPetitioner is raising them now, before the Trial Court and now this Court, in his motions and appeal pursuant to Rules 59 and 60. This Court should not presume to predetermine how the federal courts will apply federal exhaustion and procedural-default rules to the procedural posture in which Petitioner is presenting his claims to this Court. Guessing how a federal court sitting in habeas would treat a claim that has never before been presented to the state courts cannot be considered in determining whether this Court should exercise the discretion afforded it now pursuant to Utah state and procedure law and whether it should conduct further proceedings as necessary to reach the merits of his claims.

To be sure, assuming that Appellant presents his *Brady*, *Atkins*, and *Wiggins* claims to the federal courts in a federal habeas petition, the federal courts will have to decide whether Rules 59 and 60 are vehicles that are “available” as a matter of Utah law for presenting those claims for adjudication on the merits. *Cf. Boerckel*, 526 U.S. at 847-48; *Swoopes v. Sublett*, 196 F 3d 1008, 1010-11 (9th Cir. 1999) (citing *State v. Sandon*, 777 P.2d 220, 221 (Ariz. 1989); *State v. Shattuck*, 684 P 2d 154, 157 (Ariz. 1984)). Appellant submits that it would be more economical for this Court to express a view on that question now, before he files a federal habeas petition, so that he will not have to return to state Court to ask for its views after he has filed a federal habeas petition. This Court would also thereby help to resolve an unsettled question of Utah procedure

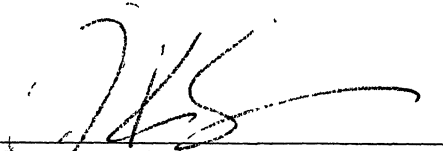
that has emerged in the wake of *Menzies v. Galetka*, 2006 UT 81, 150 P 3d 480, and provide guidance to the federal courts that will ultimately be required to determine whether the principles of federal-state comity that drive the exhaustion requirement will permit them to afford Appellant merits review of his claims in that forum

In the interest of judicial economy, this Court should grant the Appellant's Rule 60 and Rule 59 Motion for the purpose of exploring issues raised herein.

VII. CONCLUSION

For the reasons provided herein, this Court should set aside the Trial Court's order denying the relief sought in the Second Amended Petition for post conviction relief and allow Michael to pursue the claims raised and alluded to herein, or grant him post-conviction relief, and for any and all other relief deemed just and proper.

DATED this 4 day of February, 2011.


James K. Slavens, Esq
Attorney for Appellant

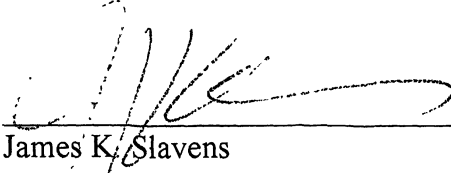
CERTIFICATE OF SERVICE

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 February 10, 2011

DOCUMENT SERVED: Appellant's Rule 60 (b) Brief

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