

2010

Michael Anthony Archuleta v. Hank Galetka : Reply Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Thomas B. Brunker; Attorney for Respondent.

James K. Slavens; Attorney for the Appellant.

Recommended Citation

Reply Brief, *Archuleta v. Galetka*, No. 20100791.00 (Utah Supreme Court, 2010).
https://digitalcommons.law.byu.edu/byu_sc2/3062

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT

)
)
)
)
)
)
)
)
)

MICHAEL ANTHONY ARCHULETA,
Appellant,
vs.
HANK GALETKA, Warden,
Respondent.

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

1

TABLE OF CONTENTS

TABLE OF AUTHORITIES	Page 3
I. Jurisdiction Statement	Page 5
II. Statement Of The Case	Page 5
III. Legal Argument	Page 5
A. This Court Should Set Aside the Judgments of the District Court Pursuant to Rule 60(b)	Page 5
1. Rule 60 (b) Standard and Context	Page 5
2. The Appellant has Established a Basis for Rule 60 (b) Relief	Page 11
a. Michael is Entitled to Relief because Brass Performed Below the Standard of a Reasonably Effective Attorney.	Page 14
b. Prejudice is Presumed or Michael has Established Prejudice	Page 18
c. The Appellant has established that there is merit to his claim	Page 21
IV. The Trial Court erred in denying Appellant’s Rule 59 Motion	Page 22
V. Trial Court Failed to Address Whether or not Brass was Grossly Negligent	Page 24
VI. Michael Mistakenly Relied on Brass’ Representation	Page 26
VII. Instances Of Claims Brass failed to Investigate, Pursue or Present Which Establishes Ineffective Assistance of Counsel	Page 26
1. Newly Discovered Evidence of <i>Brady</i> Violations Regarding Lance Wood’s Confessions	Page 26
2. Issues Regarding David Homer	Page 30
3. Failure to Secure Gary Hawkins Testimony Regarding the Confession of Lance Wood	Page 35
4. Mr. Brass’ Failure to Explore Whether Michael is Exempt from the Death Penalty Pursuant to <i>Atkins v. Virginia</i> , 536 U.S. 304	Page 39
5. Failure to Produce Evidence Regarding Lance Wood’s Personality and Psychological Assessments	Page 43
6. Failure to Obtain Experts	Page 44
7. Failure to Disclose Mental Breakdown of State’s Forensic Pathologist Amounts to Brady Violation	Page 48
8. Brass’ Failure to Respond to the State’s Motion for Summary Judgment that Claims 1-30 were Procedurally Barred Constitutes Ineffective Assistance of Counsel	Page 49
9. Brass Prejudiced Michael by Introducing Prejudicial, Rather than Mitigating Evidence	Page 50
VIII. This Court Should Set Aside Judge Eyre’s Partial Summary Judgment Ruling	Page 52
IX. Cumulative Error Spanning Twenty Years Warrants Post Conviction Relief	Page 54

X.	Lack of Competent Counsel	Page 56
XI.	The 2008 Amendments to the PCRA Cannot Apply Retroactively to Archuleta's Substantive Right to Effective Post-Conviction Representation	Page 57
XII.	The State Has Not Carried Its Substantial Burden To Show Why This Court Should Overrule Its Precedent And Deny Archuleta The Right Established In <i>Menzies v. Galetka</i>	Page 62
XIII.	Federal Exhaustion Rules Weigh In Favor Of This Court's Consideration Of Archuleta's Claims Now, Rather Than Waiting For Piecemeal Litigation Hereafter	Page 66
XIV.	State's Motion For Sanctions Should Be Emphatically Denied	Page 68
XV.	Conclusion	Page 72

TABLE OF AUTHORITIES

Cases

2008 amendment to § 78B-9-202(4)	58
Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254	65
<i>Archer v. Utah State Land Bd.</i> , 392 P.2d 622, 624 (Utah 1964)	57
<i>Archuleta v. Galetka</i> , 197 P.3d 650 (Utah 2008)	55
<i>Archuleta v. Galetka</i> , 2008 UT 76, ¶ 18, 197 P.3d 650	65
<i>Archuleta v. Galetka</i> , 960 P. 2d 399 (Utah 1998)	49
<i>Atkins v. Virginia</i> , 536 U.S. 304	39
<i>Bowen v. Riverton City</i> , 656 P.2d 434 (1982)	6
<i>Brown & Root Indus. Serv. v. Indus. Com'n of Utah</i> , 947 P.2d 671, 675 (Utah 1997)	59
<i>Cadlerock Joint Venture II, LP v. Envelope Packaging of Utah, Inc.</i> , 2011 UT App 98, 20090794-CA (UTCA)	9
<i>Carter v. Friel</i> , Case No. 2:02-CV-326-TS (D. Utah Aug. 2, 2007) (Doc. No. 201)	66
<i>Cuyler v. Sullivan</i> , 446 U.S. 335, 348 and 369 (1980)	20
<i>Franklin Covey Client Sales, Inc. v. Melvin</i> , 2000 UT App 110, ¶ 19, 2 P.3d 451	12
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980)	45
<i>Goebel v. Salt Lake City Southern R. Co.</i> , 2004 UT 80, ¶39, 104 P.3d 1185	58
<i>Harolds Stores, Inc. v. Dillard Dep't Stores</i> , 82 F.3d 1533, 1546-47 (10th Cir. 1996)	6
<i>Harrington v. Richter</i> , 131 S.Ct. 770, 787 (2011)	66
<i>Holbrook Co. v. Adams</i> , 542 P.2d 191 (1975)	5
<i>Hoyer v. State</i> , 2009 UT 38, ¶26, 212 P.3d 547	62
<i>Hurst v. Cook</i> , 777 P.2d 1029, 1035 (Utah 1989)	63
<i>Kell v. Turley</i> , Case No. 2:07-CV-359-CW-SA (D. Utah Oct. 8. 2009) (Doc. No. 51)	66
<i>Kyles v. Whitley</i> , 514 U.S. 419, 433 (1995) (<i>quoting Bagley</i> , 473 U.S. at 682)	34
<i>Lafferty v. State</i> , 2007 UT 73, 175 P.3d 530 (Utah 2007)	20
<i>Mason v. Oklahoma Turnpike Auth.</i> , 115 F.3d 1442, 1450 (10th Cir. 1997)	6
<i>Menzies v. Friel</i> , Case. No. 03-CV-92 JC/KBM, 2005 WL 2138653 (D. Utah Sept. 1, 2005)	67
<i>Menzies v. Galetka</i> , 150 P. 3d 480, 503 (2006)	6
<i>Menzies v. Galetka</i> , 150 P.3d 480, (Utah 2006)	7
<i>Morris v. Farnsworth</i> , 259 P.2d 297 (1953)	6
<i>Penry v. Federal Home Loan Bank</i> , 155 F.3d 1257, 1261 (10th Cir. 1998), cert. denied, 119 S.	

Ct. 1334 (1999)	6
<i>Petty v. Clark</i> , 192 P.2d 589, 593-94 (Utah 1948)	59
<i>Pilcher v. State</i> , 663 P.2d 450, 455 (Utah 1983)	59
<i>Rhines v. Weber</i> , 544 U.S. 269 (2005)	66
<i>Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick</i> , 890 P.2d 1017, 1020 (Utah 1995).....	59
<i>Sears vs. Upton</i> , 130 S. Ct. 3259 (2010)	51
<i>State ex rel. Napolitano v. Brown</i> , 982 P.2d 815, 817-19 (Ariz. 1999)	63
<i>State v. Daniels</i> , 2002 UT 2, 40 P.3d 611	59
<i>State v. Dunn</i> , 850 P.2d 1201, 1229 (Utah 1993)	55
<i>State v. Gonzales</i> , 125 P.3d 878 (2005)	55
<i>State v. Holm</i> , 2006 UT 31, ¶16, 137 P.3d 726 (citing <i>Adams v. Swensen</i> , 2005 UT 8, ¶ 8, 108 P.3d 725).....	63
<i>State v. Menzies</i> , 889 P.2d 393, 398 (Utah 1994)	61
<i>State v. Tuttle</i> , 780 P.2d 1203 (Utah 1989)	45
<i>State v. Wood</i> , 648 P.2d 71 (Utah 1981)	45
<i>State v. Young</i> , 853 P.2d 327, 367 (Utah 1993).....	55
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	14
<i>Taylor v. Turley</i> , Case No. 2:07-CV-194-TC (D.Utah Feb. 14, 2008) (Doc. No. 45).....	66
<i>Thomas v. Color County Mgmt.</i> , 2004 UT 12, ¶31, 84 P.3d 1201	58
U.C.A. § 78B-9-202(4) (2008)	57
<i>United States v. Cronic</i> , 466 U.S. 648, 665 n. 38(1989).....	51
Utah Code Ann. § 76-3-207(2)(b)	31
Utah Code Annotated § 77-15a-101	39
Utah Code Section 77-15a-102.....	40
<i>v. Crosby</i> , 545 U.S. 524, 534-35 (2005)	64
<i>v. Galetka</i> , 94 P.3d 263 (Utah 2004).....	67
<i>Wainwright v. Sykes</i> , 433 U.S. 72, 82-84 (1977).....	66
<i>Washington Nat'l Ins. Co. v. Sherwood Assocs.</i> , 795 P.2d 665, 667 (Utah Ct. App. 1990)	58
<i>Washington Nat'l</i> , 795 P.2d at 669	59
<i>Woodford v. Visciotti</i> , 537 U.S. 19, 24 (2002) (per curiam)	66

I. JURISDICTION STATEMENT

The Appellee has not disputed that this Court has jurisdiction over the issues presented on this appeal.¹

II. STATEMENT OF THE CASE

The Appellee has apparently combined the Statement of the Case with the Facts of the Case into a single heading of “Case Statement” in his Brief. The Appellant will rely upon the Statement of the Case he presented in the Appellant’s opening Brief. As to the Statement of Facts, the Appellant will rely for the purposes of this Reply Brief upon what he presented in his initial Brief. In as much the Appellee’s representations are contrary to the Appellant’s representations, the Appellant objects. As such, Appellant will not address these items further herein.

III. LEGAL ARGUMENT

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

1. Rule 60 (b) Standard and Context

This Court must keep in mind the context of this case. On April 1, 2003, the State in this matter filed a Motion for Summary Judgment on all claims presented in the Appellant’s Second Amended Petition for Post-Conviction Relief prepared and presented by Mr. Brass. R. p. 1255. Without conducting any discovery and without performing any meaningful investigation, Mr. Brass filed a Memorandum Opposing Summary Judgment to some of the Claims found in the Petition. On or about February 19, 2004, the State filed a Motion to Strike the Affidavits which

¹ The Appellee argues that there is an issue regarding whether or not the Respondent complied with the Court’s Order that the State prepare an order pursuant to Rule 7 of the Utah Rules of Civil Procedure regarding its ruling on Appellant’s first Rule 59 Motion to reopen the Rule 60 proceedings. The Appellant does not have time to research or to review this issue unless the Motion for a Continuance of the oral arguments is granted. Regardless, the Court denied the Appellant’s Motion which is part of the record.

Brass had presented in support of his Opposition to the Motion for Summary Judgment. Brass never opposed this motion nor corrected any defects found in the affidavits. Specifically noting that the Appellant failed to respond, the Court granted the Motion to Strike the Affidavits of Robert L. Steele and Glen A. Cook and portions of several other affidavits on April 12, 2004. R. p. 1981. The Court granted the State's Motion for Summary Judgment on all claims except the mitigation claim on or about August 25, 2004. R. p. 1600. The Court must not lose sight of the fact, as the trial court did with the urging of the State, that it is this decision of which the Appellant seeks Rule 60(b) relief.

In order to properly assess the Rule 60(b) Motion, this court should consider the standard regarding a Summary Judgment analysis. Judge Eyre granted the State's Motion for Summary Judgment by finding that the Utah Rules of Civil Procedure 56 (c) allows summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." R. p. 2229. The presence of a dispute as to the material facts disallows the granting of summary judgment, even if there is only one sworn statement to dispute averments made by the movant for summary judgment. See *Holbrook Co. v. Adams*, 542 P.2d 191 (1975). Furthermore, the Court must view the evidence and all inferences in favor of the party resisting summary judgment. See, *Morris v. Farnsworth*, 259 P.2d 297 (1953) and *Bowen v. Riverton City*, 656 P.2d 434 (1982). In applying this standard, the Court must examine the factual record and draw reasonable inferences therefrom in the light most favorable to the non-moving party. *Penry v. Federal Home Loan Bank*, 155 F.3d 1257, 1261 (10th Cir. 1998), cert. denied, 119 S. Ct. 1334 (1999). Summary Judgment "is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1450 (10th Cir. 1997). In

assessing whether Summary Judgment is appropriate, the Court is not to “weigh the evidence, pass on the credibility of the witnesses, or substitute [its] conclusions for [those] of the jury.” *Harolds Stores, Inc. v. Dillard Dep't Stores*, 82 F.3d 1533, 1546-47 (10th Cir. 1996). “In order to avoid summary judgment on the claims of ineffective assistance of counsel, Petitioner must demonstrate that there is a genuine issue of material fact with respect to each prong of the test set forth in *Strickland*.” R. p. 2231. A party opposing summary judgment “must set forth specific facts showing that there is a genuine issue for trial.” R. p. 2230.

The Court’s analysis must also be done in the context that before this Court is an individual that the State intends to execute. No greater liberty could ever be at risk which has such constitutional consequence and importance. The Judges of this Court have the “supervisory responsibilities . . . to 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).

Whether or not Brass’ performance fell below an objective standard must not only be analyzed in the context of summary judgment, this Court’s analysis of whether the Appellant received ineffective assistance of Counsel must be done within the framework of the Post Conviction Relief Act (“PCRA”), which requires the Petitioner to bring every claim known or lose the right to make the claim. This is consistent with Utah Rule of Civil Procedure 65(c) which 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, the petitioner is required to bring all claims and any claims not raised become barred absent showing of good cause. This requirement heightens

counsel's obligation to ensure that he/she has thoroughly reviewed the case and then makes sound strategic decisions based upon the thorough review of the record. Michael simply did not receive a thorough review of the record and his claims.

The Appellant sought relief from Judge Eyre's partial judgment pursuant to Utah Rules of Civil Procedure 60(b) based on three alternative grounds: 1) mistake, inadvertence, surprise or excusable neglect; 2) counsel provided ineffective assistance of counsel; and 3) counsel was grossly negligent.

The *Menzies* Court reminded trial courts that Rule 60(b) Motions are designed to be remedial and must be liberally applied." *Id.*, quoting *State vs. Musselman*, 667 P.2d at 1055-56. Furthermore, a district court should be inclined "towards granting relief in a doubtful case to the end that the party may have a hearing." *Id.* at 504, quoting *State vs. Lund*, 11 P.3d 277.

As indicated in the Appellant's opening Brief, Rule 60 (b) requires the movant to pursue the relief by Motion. Utah Rule of Civil Procedure 7 states that a motion must be "accompanied by a supporting memorandum." The memorandum should contain a verified statement of material facts and any fact not disputed is then deemed admitted. After the briefing has been submitted, the Court at that point may conduct a hearing for the purpose of presenting evidence or oral argument. See, Utah Rules Civil Procedure 7(d) and (e) and Rule 43.²

There is no dispute that the Appellant complied with Rule 60 and Rule 7. He supported his motion by citations to sworn testimony and with affidavits from Michael, Mr. Brass, Jeffery Homer, Lance Wood, Les Mabry, Gary Hawkins and James K. Slavens. Michael's and Mr. Brass' Affidavits clearly state, in which the state did not dispute, that Michael requested Mr. Brass to pursue certain claims of which Mr. Brass failed to make any efforts to pursue. See

² See, *Cheap-O-Rooter, Inc. v. Marmalade Square Condominium Homeowners Ass'n*, 2009 UT App 329, 221 P.3d 898 (Utah App. 2009) for the proposition that Rule 7 applies to Rule 60 (b) Motions.

Affidavit of Michael Archuleta, Addendum, Exhibit “29,” R. p. 5032-5046. Affidavit of Ed Brass, Addendum, Exhibit “15,” R. p. 5057-5226.

In short, Michael filed his Rule 60 (b) Motion for relief and adequately supported the Motion pursuant to Rule 7. The State failed to contradict on any level the Appellant’s evidence, even though *Menzies* clearly stands for the proposition that the Court could have conducted an evidentiary hearing and the State could have conducted discovery. *Menzies* at p. 112-116. Because the State failed to dispute Michael’s factual allegations, pursuant to Rule 7, the Court should have deemed Appellant’s factual allegations as true for the purpose of addressing the Rule 60 (b) Motion. Instead the State argued, and the Court adopted, that it was the Petitioner who was obligated to produce additional proof. However, this is not the procedure envisioned by Rule 7 and referenced in *Menzies*. After Appellant had presented appropriate support for his Rule 60(b) Motion, the burden shifted to the Respondent to either contradict the Appellant’s evidence or to request an Evidentiary Hearing. The Respondent essentially did neither but instead determined to make legal arguments and citations from the record. The Appellant’s undisputed evidence demonstrated that he was entitled to Rule 60(b) relief.

In the recent case of *Cadlerock Joint Venture II, LP v. Envelope Packaging of Utah, Inc.*, 2011 UT App 98, 20090794-CA (UTCA), quoting and citing *Menzies*, the Utah Court of Appeals held as follows: "In general, a movant is entitled to have a default judgment set aside under [rule] 60(b) [of the Utah Rules of Civil Procedure] if (1) the motion is timely; (2) there is a basis for granting relief under one of the subsections of 60(b); and (3) the movant has alleged a meritorious defense." *Citing, Menzies v. Galetka*.

The State does not dispute that the Appellant filed his motion timely. Consequently, the question in this matter centers on the second and third steps needed to establish a Rule 60(b)

Motion to Set Aside. Applying this formula to this case, the Trial Court was obligated to first determine whether or not there is a basis for granting relief under one of the subsections of 60(b). In other words, the question was, whether or not Brass was grossly negligent or provided ineffective assistance of counsel in Michael's defense to the State's April 1, 2007 Motion for Summary Judgment. If the Court found there was a basis, then the Court was to then address the third step by determining whether or not the Appellant has meritorious defense to the State's April 1, 2003 Motion for Summary Judgment.

The Trial Court with the urging of the State confused this analysis by combining or otherwise confusing the second and third steps of this process. The Appellant in this matter filed a Rule 60 (b) Motion to set aside the Judge Eyre's Partial Summary Judgment Ruling of August 25, 2004.³ Judge Eyre denied the motion ruling 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.

Emphasis added.

The Court, with the urging of the State, was of the opinion that the Appellant was obligated to prove that Brass was ineffective applying the Strickland two-prong test that "but for" Brass' ineffective assistance of counsel, "there is a reasonable probability that the outcome of Petitioner's **post-conviction proceeding** would have been different." The Court's test combined two steps into one. Instead, the test should be, whether or not Brass' representation was objectively deficient and that, but for Brass' deficient performance, there is a reasonable

³ The Appellant also sought relief from Judge Eyre's January 22, 2007 denial of the Post-Conviction Relief Petition; however, if the Court sets aside the August 25, 2004 ruling, then by operation of law, the January 22, 2007 ruling would also need to be set aside to address Michael's additional claims.

probability that the outcome of Court's Partial Summary Judgment as to all claims except the mitigation claim would have been different. Michael is of the opinion that if Mr. Brass would have properly responded to the State's Motion for Summary Judgment by not relying on the pleading but instead presented his claims as required by Rule 7, which was supplied in support of his Rule 60(b) Motion, there is a reasonable probability that the Judge Eyre's Partial Summary Judgment would have reached a different result. Regardless, the Trial Court obviously did not apply the analysis envisioned by *Menzies*.

The Appellant's basis for relief comes from *Menzies*. Mr. Brass in this case, as he did in *Menzies*, provided ineffective assistance of counsel or was grossly negligent for failing to pursue meritorious defenses or otherwise effectively respond to the State's Motion for Summary Judgment to his Post-Conviction Relief Petition. The Court's and the State's error was they confused the analysis of ineffective assistance of counsel allowed by *Menzies* in a Rule 60 (b) showing of ineffective assistance of counsel in a Motion with a Petition for Post-Conviction Relief pursuant to the PCRA. The Trial Court and the State failed to recognize that the analysis and standard regarding ineffective assistance of counsel in these two distinct requests for relief are completely separate. As to a PCRA analysis, the focus is on whether or not the criminal trial attorney, Mr. Esplin, provided ineffective assistance and in a Rule 60(b) Motion the focus is on whether or not Mr. Brass was ineffective. The Appellant argues that Michael is entitled to his Rule 60 motion for relief in that Mr. Brass provided ineffective assistance of counsel and was grossly negligent in failing to **investigate and pursue viable claims to withstand the State's Motion for Summary Judgment**. The focus regarding a Rule 60(b) Motion only shifts to Mr. Esplin in addressing the third step, which is a very low (pleading standard).

The unanswered question in this matter is what the Trial Court's obligation was after Michael satisfied Rule 7 in presenting his Rule 60 (b) Motion for relief. This Court did not address this issue in *Menzies* because in that case the trial court conducted an evidentiary hearing after the State was granted the opportunity to conduct discovery regarding Mr. Brass' work and communications with Menzies. In order to address these questions, the Court should keep in mind that Appellant argues that if the Court grants his Rule 60 (b) motion Judge Eyre's partial Summary Judgment is vacated and the post-conviction petition runs its course. On the other hand, the Trial Court and the State are of the position that Michael was obligated to "prove" at the Rule 60 (b) posture that he was entitled to post-conviction relief. This position makes no sense when looking at the over-all picture of a Rule 60 (b) motion. If this Court adopts the Court's position and if Michael "proved" that he was entitled to post-conviction relief, then the post-conviction relief petition would be answered as well—the Trial Court would, accepting the standard taken by the State and the Trial Court, then simply grant the post-conviction relief petition and conduct a new trial or a sentencing as the case may be. This position ignores the posture of the case. The Trial Court's position again combines into one step what should be a two-step process: one, should the Rule 60(b) Motion be granted; and two, if granted, should the court grant the post-conviction petition. Certainly, if the State's and the Trial Court's analytical process is accurate, the State should have been required to dispute the movant's evidentiary support and absent such a dispute, the Trial Court must deem the factual allegations as true. And if the Trial Court's analytical process is adopted, the question then becomes how is the Court to resolve questions of fact presented in a Rule 60(b) Motion.

Keeping Rule 60(b) motions in context of the posture of the case, the Court must focus on whether or not Michael presented sufficient evidence to demonstrate that there were viable

issues and evidentiary support which Mr. Brass failed to present in response to the State's Motion Summary Judgment. The fact that Mr. Brass did no investigation to determine what claims were available and failed to make any strategic decisions is enough to "prove" that Mr. Brass did not meet the standard of effective assistance of counsel. In fact, in *Franklin Covey Client Sales, Inc. v. Melvin*, 2000 UT App 110, ¶ 19, 2 P.3d 451, the Court held that an "appeal of a Rule 60(b) order addresses only the propriety of the denial or grant of relief . . . [and] does *not*, at least in most cases, reach the merits of the underlying judgment from which relief was sought." This holding makes sense if Michael was only obligated to demonstrate that Mr. Brass was ineffective because he failed to investigate or pursue viable claims or claims which Michael asked him to pursue and not obligated to prove "the merits of the underlying judgment from which relief was sought."

The Respondent argues that Michael was obligated to "'demonstrate' that his counsel was ineffective under the *Strickland* test." Appellee's Brief, p. 33. The Respondent continues his argument by stating that the word "demonstrate" is defined to mean prove. Furthermore, the Respondent argues that "Archuleta had to prove that post-conviction counsel overlooked or mishandled a post-conviction claim that otherwise had a reasonable probability of succeeding." Appellee's Brief, p. 43.

That argument does not accurately address the distinction between the Appellant's and the Respondent's positions. The Appellant does not dispute that he must "prove" that Mr. Brass was ineffective in the investigation and pursuit of viable claims in Response to the State's April 1, 2003 Motion for Summary Judgment. Instead, the distinction between the two positions is what needs to be proven and what amount of proof is required.

After the Court performs the first step and sets aside Judge Eyre's Partial Summary Judgment, then the Post-conviction Petition will follow its course.

The Appellant argues that the Trial Court analysis in this matter erred in that the Trial Court required the Appellant to prove that he had a meritorious claim regarding the post-conviction petition to satisfy the *Strickland* test. The Court's analysis as to "proof" improperly shifted the focus from Mr. Brass to Mr. Esplin. The question before the Court was whether or not the claims presented in Michael's Rule 60 (b) Motion justified setting aside Judge Eyre's Partial Summary Judgment Ruling of August 25, 2004.

2. The Appellant has Established a Basis for Rule 60 (b) Relief

In *Menzies*, the Appellant argued that he was entitled to effective assistance of counsel based upon three different arguments: "(1) he has a statutory right to the effective assistance of counsel pursuant to Utah Code Section 78-35a-202 (2002); (2) he has a right to the effective assistance of counsel under the Utah Constitution; and (3) he has a right to the effective assistance of counsel under the United States Constitution." *Menzies* at p. 509.⁴ Without ruling whether or not *Menzies* was entitled to effective assistance of counsel pursuant to the other two sources, the Court found that a death-row inmate in post-conviction relief action has a statutory right to the effective assistance of counsel. *Id.* at p. 510. In this matter, Michael argues he is entitled to relief pursuant to 60(b)(6) based upon this Court's findings in *Menzies* which is supported by Brass' ineffective assistance of counsel and/or gross negligence. *Menzies*, 150 P. 2d at 515: "both grounds constitute exceptional circumstances that warrant relief under 60(b)(6)."

⁴ The *Menzies* Court found that the Appellant had a statutory right to effective assistance of counsel. The Court did not address whether or not a person sentenced to death has the right to effective assistance of counsel pursuant to the Utah and the United States Constitution and specifically reserved the issue for another day. *Id.* at p. 511.

As to the ineffective of counsel claim, *Menzie* cited and quoted *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), as the test required to establish the claim of ineffective assistance of counsel. The first prong 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 the relief he sought.⁵ 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." *Menzie*, 150 P.3d at 514.

- a. Michael is Entitled to Relief because Brass Performed Below the Standard of a Reasonably Effective Attorney.

The initial question this Court must address is determining the standard against which this Court should judge Mr. Brass' performance. Appellant cited and quoted at length from the ABA Death Penalty Guidelines as the appropriate standard. *Menzie* recognized the ABA Standard when it said the ABA Guidelines "do represent 'well-defined norms' that provide guidance to courts," *Menzie*, at p. 512, and that "we rely on the ABA Death Penalty Guidelines to the extent they are relevant to our decision." *Id.* at p. 513. The Respondent argued without providing an alternative guideline, that the "ABA Guidelines does (sic) not establish deficient performance." Appellee's Brief, p. 44. The Appellant instead opines that since this Court has

⁵ Again, the Appellant focuses his argument on ineffective of assistance claim in that it appears to be the more stringent test because, unless prejudice is presumed, it requires a showing a prejudice. Both theories are supported by the same facts to establish both theories. Certainly, if Brass provided ineffective assistance of counsel he was also grossly negligent. The Appellant will not argue in depth both positions but adopts the arguments made herein to pursue both theories.

indicated that the ABA Guidelines will be used if they are relevant and since the Respondent failed to provide an alternative guideline, this Court should judge Brass' performance against the ABA standards.

In addressing whether or not Brass met any standard, this Court must consider the claims that Mr. Brass failed to investigate or to pursue. To this end, Michael testified as follows:

1. Ed Brass rarely contacted him, only visited with him three times and generally refused to accept his calls. Appellant's Addendum, Exhibit 29, para 3.
2. Ed Brass did not discuss litigation development or strategy with him. Id. at para. 4 and 5
3. Ed Brass never spoke with him concerning any potential investigation or options regarding mental retardation as a potential defense. Id.
4. Michael asked Ed Brass to investigate whether Lance Wood confessed the murder of Gordon to Gary Hawkins, whether Lance confessed to a Salt Lake Tribune reporter, whether David Homer recanted his testimony, whether documents were presented to a Parole Board regarding the testimony of David Homer and whether Lance Wood confessed to Les Mabrey that he had committed the murder of Gordon Church. Id.
5. Michael never authorized Mr. Brass to not investigate, pursue or preserve any of the claims.⁶ Id.

Mr. Brass confirmed Michael's testimony in his own affidavit. See Ed Brass' Affidavit, Appellant's Addendum, Exhibit 15.

Clearly, Mr. Brass' failures to investigate and pursue these claims, although Michael had requested him to, do not satisfy the standards found in the ABA Guidelines. In fact, it is difficult to imagine any standard which Mr. Brass' effort or lack thereof would satisfy. In response, the Respondent argues that even applying the ABA Guidelines, Mr. Brass satisfied his obligations

⁶ The State argued that it is relevant that in Michael's initial affidavit he stated "I told my post-conviction relief attorney, after my conviction and appeal, that I wanted them to investigate the following." Appellant's Addendum, Exhibit 29, para. 10. The State argues that since the statement did not specifically state that he told Mr. Brass, Michael did not meet his burden that Brass was ineffective because he could not pursue a claim of which he was not aware. This argument is meritless on several levels. Mr. Brass was the attorney at the time and had the responsibility to review all previous counsel's work. Furthermore, Mr. Brass himself articulated the basis of the claim in the Second Amended Petition for Habeas Corpus. Furthermore, Michael amended his Affidavit to specifically indicate that he told Mr. Brass of the claims. Finally, once Michael raised the issue, if the State questioned the Affidavit, it could have requested a hearing or requested discovery as Mr. Brunker knew as a result of his involvement in *Menzie's*.

because Mr. Brass was not “obligated to raise every non-frivolous argument” (id. at 45) and that Mr. Brass simply “abandoned the claims after respondent demonstrated that [the claims] were not meritorious.” Id. at 46. This could potentially be a fruitful argument if the State had developed any evidentiary support for it. Mr. Brass could not consider a claim, make strategic decisions about the claim or even abandon a claim when he did not even do enough review or investigation of the record to obtain a knowledge of the claim or potential claim. The State could not convince Mr. Brass to abandon a claim of which he failed to investigate or of which he had no knowledge. If the ABA Guidelines do not apply—then the State needs to produce a guideline which supports the proposition that post-conviction counsel in a death penalty case is not obligated to review and investigate the entire record so that he could then make strategic decisions whether or not the claim should be pursued or abandoned.

Aside from the ABA Guidelines, the *Menzie* court provided further guidance in addressing the question of whether or not Mr. Brass’ performance fell below an objective standard of reasonableness:

1. “[T]his right is designed to ensure that criminal defendants receive a fair and reliable proceedings before life or liberty are taken.” *Menzie*, p. 511.
2. “[T]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper function of the adversarial process that the [proceeding] cannot be relied on as having produced a just result.” Id.
3. “Brass did not communicate with Menzie about the status or progress of his case,” id. at 513, “never conducted any investigation . . . a voluminous record indicating that investigation was necessary in order to develop Menzie’s claims, id. at p. 514 (see also id. at p. 498: “Brass also testified that he was not in a position to know whether the facts were in dispute because he had not investigated Menzie’s claims.”), that the petition filed “on Menzie’s behalf was little more than a repetition of the claims that had been asserted in the first amended petition . . . and Brass did not oppose the State’s motion to dismiss most of Menzie’s asserted claims. In short, Brass gradually defaulted Menzie’s post-conviction case away and never informed Menzie that he was doing so.” Id.
4. “Brass’ willful disregard for Menzie’s case cannot possibly be construed as sound strategy.” Id.

5. “When an attorney willfully disregards a client’s interests, acts in a grossly negligent fashion, or renders ineffective assistance of counsel . . . the judicial system loses credibility as well as the appearance of fairness, if the result is that an innocent party [innocent in the representation aspect] is forced to suffer drastic consequences.” *Id.* at p. 508.

There are several relevant findings this Court made in *Menzies* which apply to the issues of this case. Mr. Brass’ representation, except minor insignificant differences, in this case cannot be distinguished from the Court’s findings quoted above in the *Menzies* case. Second, the *Menzies* Court focused upon Mr. Brass’ investigation and pursuit of *Menzies* claims not his criminal trial attorney’s performance. Third, the Court did not require *Menzies* to “prove” that he had meritorious claims to satisfy the *Strickland* test for a basis of Rule 60(b) Motion. Fourth, what Mr. Brass did or did not do regarding his pursuit of *Menzies*’ claims was developed because on “November 7, the district court scheduled an evidentiary hearing . . . in order to obtain evidence relating to communications between Brass and *Menzies* during the period of Brass’ representation. The State requested that the Court grant permission to conduct discovery in preparation of the evidentiary hearing,” which the Court granted. *Id.* at p. 499. The evidentiary hearing was then conducted as planned. *Id.*

This Court should come to the same conclusion that Mr. Brass failed to provide effective assistance of counsel as it did in *Menzies* because Mr. Brass did not engage into any investigation or perform any strategic analysis on whether or not Michael’s claims should have been pursued.

b. Prejudice is Presumed or Michael has Established Prejudice

First, it is important not to confuse this analysis with the discussion of whether or not the Appellant has presented a meritorious defense.⁷ The Appellee recognizes the difficulty of

⁷ The Respondent argues that the “meritorious defense” terminology is not technically correct in this situation: “Post-conviction petitioners are not defendants; therefore, they are not in the position of raising defenses,

differentiating between analyzing the prejudice prong of *Strickland* with the third step of meritorious claim of the Rule 60 (b) Motion. Appellee’s Brief, p. 35. However, after identifying the difficulty and stating recognition that the Appellant is not obligated to prove a meritorious defense, the Respondent inappropriately argues that the Appellant has the burden of establishing “that counsel overlooked or mishandled a post-conviction claim that probably would have resulted in post-conviction relief.” *Id.*⁸ Instead, the question raised in Michael’s Rule 60(b) Motion is whether or not Brass overlooked or mishandled a post-conviction claim that probably would have resulted in a different ruling regarding Judge Eyre’s Partial Summary Judgment Ruling.

In a *Strickland* analysis regarding a Rule 60(b) Motion, Michael was required to “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Menzies* at p. 514, quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The “proceeding” in this case is the State’s April 1, 2003 Motion for Summary Judgment. The Court defined “reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* This Court held in *Menzies* 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. “[C]onstructive denials of counsel have also been found where, due to

meritorious or otherwise.” The Respondent misses the point. Defense is not to be confused with Defendants. In this situation, the “defense” is in defense of the State’s April 1, 2003 Motion for Summary Judgment—defense has nothing to do with Plaintiff or Defendant. The question is, does the movant of a Rule 60(b) Motion have a defense to the judgment that was granted without properly responding in the first place.

⁸ The Respondent *cites* *Lafferty v. State*, 175 P.3d 530 as support for this position. However, Respondent’s use of this case to support the proposition that the Appellant, in order to satisfy the prejudice prong of *Strickland* in a Rule 60(b) Motion, must demonstrate that Counsel overlooked an issue that “probably would have resulted in post-conviction relief” is inappropriate. *Lafferty* was an appeal from a summary judgment ruling regarding a post-conviction petition based upon a claim of ineffective assistance of counsel not a case arguing ineffective assistance of counsel justifying Rule 60 (b) relief from a Motion for Summary Judgment as the Respondent implies. Respondent’s misrepresentation of the holding of *Lafferty* is a close cousin to Respondent’s claim that Brass should have been subject to Rule 11 sanctions for an inappropriate citation.

counsel's deficient performance, a proceeding itself is forfeited. Justice demands a presumption of prejudice in situations where a 'litigant has been entirely denied the adversary process...'” *Id.*

In *Menzies*, this Court presumed prejudice applying the standard above because “Brass completely failed to provide meaningful adversarial testing because he took no actions to develop *Menzies*' case and did not respond to any of the State's various motions.” *Id.* That is exactly what has occurred in this matter. As will be developed in Section IV below, Michael's Second Amended Petition contained numerous claims and subparts. Mr. Brass conducted little if any investigations regarding the various claims Michael asked him to pursue. Mr. Brass basically only provided evidentiary support regarding the mitigation claim and the legal issues of a few of Michael's claims. He presented little or no evidentiary support needed to support for the claims found in Section IV. This Court must presume prejudice due to the fact that Mr. Brass' lack of action has completely undermined any confidence in the outcome.

The State completely ignores the presumption of prejudice as articulated by *Menzies* and instead argues that Michael failed to demonstrate the “reasonable probability of a more favorable post-conviction outcome.” Appellee's Brief, pg. 34. The Respondent's argument proves the point: Brass failed to even review the record or to investigate any of the requests that Michael asked him to review. With such a failure in effort, any review of whether or not there is a probability of a more favorable outcome to the Post-conviction Petition at this point is purely speculative. That is the very reason that this Court must presume prejudice.

Respondent argues against this presumption by stating that Brass did not completely fail “to subject the opposition's case to meaningful adversarial testing.” Appellee's Brief, p. 36. The Respondent argues Brass provided meaningful adversarial testing because he presented affidavits from Dr. Cunningham and Dr. Gummow which persuaded the Trial Court to allow an

evidentiary hearing regarding the mitigation issue where these two experts were then allowed to testify. This position completely ignores the fact that Brass failed to review any of the voluminous record, allowed the State without any opposition to take by default essentially the entire Petition for Post-Conviction Relief and failed to investigate essentially all of the Claims that Michael asked Brass to pursue. It also completely ignores the fact that Brass failed to keep Michael informed about his case and failed to communicate strategies or otherwise apprise him of the case. Michael wrote three different letters to the Court expressing his concern about Mr. Brass' representation. See Appellant's Addendum, Exhibits 43, 44 and 45. In fact, Mr. Brass, after the mitigation hearing, informed and candidly admitted to the Court that he had provided ineffective assistance to Michael. See Appellant's Addendum, Exhibits 46, 47 and 48. The Respondent also ignores the fact that the one claim that the court allowed Mr. Brass to present in support of his post-conviction was unequivocally rejected by the Trial Court because it was completely contrary to Michael's trial strategy.

The Appellant argued in his initial Brief that 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).⁹ In *Lafferty v. State*, 2007 UT 73, 175 P.3d 530 (Utah 2007), this Court held that to "demonstrate that his counsel had a conflict of interest that infringed his constitutional rights, Lafferty must show that 'an actual conflict of interest adversely affected his lawyer's performance.' To establish an actual conflict, Lafferty must demonstrate that 'counsel was forced to make choices advancing other interests to the detriment of his client.' In cases where an actual detrimental conflict has been established, we will presume prejudice."

As to the presumption resulting from the conflict of interest, the Respondent argues that

⁹ for a discussion regarding the conflict of interest between Mr. Brass and Michael. The Appellant will not further discuss this issue here but will instead rely upon the arguments presented in the initial Brief.

the Appellant failed to establish the existence of conflicts of interest justifying the presumption. The State's arguments completely ignores Mr. Brass' own statements that Michael's and the State's actions in this matter created an unbearable conflict of interest. See, Section VI (A)(6) pg. 36 of Appellant's initial Brief. The State's argument ignores the fact that Mr. Brass himself stated that the fact he was working basically pro bono created a conflict of interest because of Mr. Brass' need for income. The Appellant is of the opinion that the position that a conflict of interest existed between Michael and Mr. Bass has been adequately supported and established in Appellant's initial Brief and will not further comment here.

Accordingly, this Court should presume prejudice and grant the Appellant relief from Judge Eyre's summary judgment rulings as indicated herein.

Even if the Court does not presume prejudice, a claim of gross negligence does not require a showing of prejudice. See discussion found in Section V. Furthermore, Michael has established as to each claim, which is addressed as it relates to each claim, that he was prejudiced in that the Trial Court granted the State's April 1, 2003 Motion for Summary Judgment.

c. The Appellant has established that there is merit to his claim

After demonstrating a basis for a Rule 60(b) Motion, Michael must demonstrate that the movant has a meritorious defense if the Court sets aside the Partial Summary Judgment in question. This Court expressly recognized that proof at this posture is not "overly burdensome" and "where a party presents a clear and specific proffer of a defense that, *if proven*, would [warrant relief] by the claimant . . . has adequately shown a non-frivolous and meritorious defense." *Id.* at 17 (emphasis added), *quoting Lund*, 2000 UT 75, ¶ 29, 11 P.3d 277.

The Respondent does not challenge the Appellant's position that he has established this element. Instead the Respondent seems to rest its entire position upon arguing that the Appellant

cannot and has not satisfied the two prongs of the *Strickland* test. Therefore, the Appellant will not further address the element here but will rely on the arguments found herein and in his initial Brief.

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

As indicated in the Appellant's initial Brief and herein, the Appellant filed a Rule 60(b) motion indicating that there were viable claims of which Brass failed to present to the Trial Court in response to the State's April 1, 2003 Motion for Summary Judgment. The Appellant satisfied Rule 7 and presented evidence sufficient to demonstrate a meritorious defense. The Appellant also presented an Affidavit from Michael indicating that he had told Mr. Brass about the claims and that he had requested that Mr. Brass pursue them. In response, the Trial Court ruled that the Petitioner was obligated to prove "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. 4896 p.11-12

In response, the Appellant filed a Motion pursuant to Rule 59 suggesting surprise that the Court was requiring him to "prove" pursuant to a Rule 60 (b) motion that there was a reasonable probability that the outcome of **the post-conviction proceedings itself would have been different**. If the Trial Court is correct in interpreting *Menzies* to require proof of a different result in the post-conviction relief pursuant to a Rule 60(b) Motion, then the Appellant requested pursuant to his Rule 59 Motion the opportunity to conduct discovery. Furthermore, if the Court could not assume from Michael's Affidavit the fact that he requested that Mr. Brass (as opposed to requiring an affidavit from Mr. Brass) present the claims in Section IV coupled with the fact that the State did not request an evidentiary hearing, then the Appellant wanted an opportunity to conduct discovery.

The Appellant argued “that he proffered no evidence from Brass because Brass refused to return his calls and *Menzies* did not put him on notice that he could rely on compulsory discovery to develop evidence from Brass.” As has been argued herein, the Appellant was surprised that the Court read *Menzies* to mean that he had to “prove” that “but for” Brass’ subpar performance, a different result was probable as it related to the post-conviction relief. Instead, the Appellant was of the opinion that *Menzies* stood for the proposition that he only needed to “prove” that Brass was ineffective in defending against the State’s April 1, 2003 Motion for Summary Judgment. As to the merits of Michael’s defense to the State’s Motion for Summary Judgment, the Appellant believed he only had to meet a low standard (basically a pleading standard) that there was a meritorious defense. Further, the Appellant was surprised that the Court required more than Michael’s affidavit coupled with the fact that Mr. Brass did not pursue viable claims of which he himself had alleged in the Second Amended Petition for Post-Conviction Relief. The Appellant was surprised that after he had presented a *prima facie* case of ineffective assistance of counsel, that the Court did not interpret *Menzies* for the proposition that the Court could conduct an evidentiary hearing regarding the issue and that the State could have sought discovery if it disputed the Appellant’s position. *Menzies*, at p. 112-116. In fact, the Respondent recognized the proposition that if Appellant’s affidavits “raise[d] an issue about deficient performance . . . it would have at most required further evidentiary development.” Appellee’s Brief, p. 42.

Based upon the arguments presented herein, if this Court adopts the Trial Court’s ruling that the Appellant had the burden to “prove” that there is a reasonable probability that the alleged claims would have led to a different result regarding the post-conviction relief as apposed to the Partial Summary Judgment, the Appellant was justifiably confused and surprised about the state

of the law. Such a requirement is contrary to any appellate case regarding Rule 60(b) Motions. If that is the case, this Court should reverse the Trial Court's denial of the Rule 59 Motion and allow the Appellant to conduct discovery to develop a record that "proves" that there is a reasonable probability of a different result in the post-conviction action.

V. Trial Court Failed to Address Whether or not Brass was Grossly Negligent

The Appellant argues that 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. The Appellee in response, without addressing the merits of the claim, argues that "Archuleta led the court into that error" if in the Trial Court's failure to address the gross negligence claim was in error. Appellee's Brief at pg. 17. Furthermore, the Appellee argues that the "district court treated the 60(b)(6) ineffective assistance and gross negligence theories the same because Archuleta said they were." *Id.* Finally, the State argues that Michael failed to preserve the claim at the district court so he should be barred from presenting it here. *Id.*

Michael throughout his Memorandum in Support of his Rule 60(b) Motion clearly stated that he was pursuing both theories of ineffective assistance of counsel and gross negligence. For example, he stated as follows: "Petitioner's reason for seeking relief is . . . that Brass was 'ineffective' or was grossly negligent in presenting all the issues which may justify post-conviction relief," R. , p. 7; "whether or not Brass provided ineffective assistance of counsel or was grossly negligent by failing to investigate, pursue and present the following . . .," R. , p. 5; the Appellant also argued that Brass provided both ineffective assistance of counsel and because his actions were grossly negligent," *id.* at p. 9; he also stated that for the purpose of assisting "in determining both aspects of ineffective assistance of counsel (performance was below standard and prejudiced the Petitioner) and whether Brass' representation was grossly negligent . . .," *id.*

at p. 16; the Appellant stated that the “basis of these motions is that Brass . . . was grossly negligent as enumerated below regarding Michael’s Petition for post-conviction relief . . . ,” Id. p. 21; in Michael’s Reply Brief in Support of the Motion to Set Aside, he stated that his “Motions are requesting that the judgment be opened so that he can pursue viable claims that Brass . . . grossly neglected . . . for failing to investigate and pursue,” R. 4788, p. 11; and finally, Michael argued that “he alleges he too received . . . grossly negligent assistance from his appointed counsel in his state post-conviction proceedings” Id. at p. 13.

The Appellant argued in his initial Brief that a claim of “grossly negligent” is not analyzed pursuant to *Strickland* and thus is not as stringent. In response, the Appellee argues that “Archuleta cites no controlling law that . . . gross negligent permits relief under rule 60(b)(6) on a less stringent showing than that required by *Strickland*.” Appellees Brief, p. 18. *Menzies* is such controlling law which demonstrates the less stringent test. See, *Menzies*, section 2, beginning on p. 515. This Court analyzed Brass’ “gross negligence” regarding his pursuit of *Menzies*’ claim without once referencing any of the prongs of a *Strickland* determination of ineffective assistance of counsel.

Clearly, the Appellant raised the issue that Brass was grossly negligent and that the Trial Court failed to address the issue. 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.

VI. Michael Mistakenly Relied on Brass’ Representation

Michael argued in his initial Brief that he was entitled to relief pursuant to Rule 60 (b) (1) in that he mistakenly relied upon Brass’s representation as his court-appointed attorney. The

Respondent disputed this argument in Section I of the Appellee's Brief, beginning on page 13. The Appellant's position regarding this issue is adequately briefed in his initial Brief in Section VI (A) (5) beginning on page 24 and will not further brief the issue herein; but instead, the Appellant will rely upon the previous argument.

VII. Instances Of Claims Brass failed to Investigate, Pursue or Present Which Establishes Ineffective Assistance of Counsel¹⁰

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

The Appellant presented evidential support that Lance Wood contacted Chris Jorgensen of the Salt Lake Tribune newspaper and confessed his involvement in the murder of Gordon Church. This in turn initiated a series of events all of which were not disclosed to the Appellant, which amounted to a *Brady* violation. Even if the facts of this case do not establish a *Brady* violation, Esplin, Michael's criminal trial attorney, failed to investigate, pursue and present the matter which amounted to ineffective assistance of counsel or gross negligence.

Mr. Brass alleged Lance Wood's confessions in his Second Amended Petition for Post-Conviction Relief in numerous places. See, R. p. 888 Claims 32 (k) and 33 (v). On April 1, 2003, the State moved for Summary Judgment regarding this claim, of which Mr. Brass never responded. He could not respond because he failed to investigate and failed to make any strategic decisions regarding the claim. Based upon Brass' failure to comply with Rule 56 requirements, the Court granted summary judgment as to this claim holding that Michael could not simply "rest upon the mere allegations of denials of his pleading." R. p. 2239.

¹⁰ In 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.

Analyzing this performance pursuant to Rule 60 (b), Michael provided testimony that he asked Mr. Brass to investigate this allegation. Affidavit of Michael Archelta, Addendum, Exhibit 29, para. 10 (b). Despite Michael's request and the fact that he alleged the claim in the Seconded Amended Petition, Mr.Brass failed to analyze or otherwise make a strategic decision whether or not this information should be investigated or presented. Michael Archuleta never gave him permission not to explore these issues. Affidavit of Ed Brass, Addendum, Exhibit 15, para 14.

Summarizing Michael's obligation in this matter and applying it to a Rule 60(b) Motion for Relief, Brass' failure to investigate, to analyze the claim, to make strategic decisions regarding the claim and to discuss the matter with Michael clearly amounted to gross negligence and/or clearly fell below a objective standard and prejudiced Michael. Based upon Brass' lack of effort, this Court must presume prejudice. Even if the Court does not presume prejudice, certainly Mr. Brass' lack of effort prejudiced Michael because a claim that would have survived summary judgment was lost pursuant to Rule 56, PCRA and Rule 65C. Finally, Michael has established that at least he has a meritorious claim regarding the post-conviction petition.

The Respondent argues, in which the Trial Court adopted, 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." Appellee's Brief, p. 56. The State's argument highlights the fundamental error of its reasoning. First, Brass should have known about the claim because he alleged it in Second Amended Petition he presented for Michael. R. p. 888, claims 32(K) and 33(V). He should have known it because the information was contained in the Court case of "In the Matter of the Homicide of Gordon Church" which was compiled contemporaneously with Michael's

criminal trial case. 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 he had perpetrated the murder instead of Michael. 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 proof that Brass acted effectively but instead is just the opposite—proves he was ineffective.

The Respondent further argues that Lance Wood's statement is contrary to every other statement that he had made putting the blame for the murder on Michael. Appellee's Brief pg. 56-57. This response again emphasizes the State's error. This argument only has relevance if the Appellant is obligated in this Rule 60 (b) Motion to "prove" that there is a reasonable probability of a different result in the post-conviction relief. Again, the Appellant is only obligated to establish that there is a reasonable probability that the Court would have reached a different result as to the State's April 1, 2003 Motion for Summary Judgment. The State's argument in response to Michael's evidence simply demonstrates that there exists a question of fact which is a basis for resisting summary judgment pursuant to Rule 59. After surviving summary judgment, the Trial Court will then be obligated to conduct an evidentiary hearing for the purpose of resolving the questions of fact.

The Respondent further speculates that Mr. Brass must have determined not to pursue the claim because Wood's new version of the facts has no credibility. Appellee's Brief, pg. 56. The error in the State's argument is that Mr. Brass' undisputed testimony is that he failed to investigate the issue and failed to make any strategic decision regarding the issue. Furthermore,

the State's argument ignores the fact that Gary Hawkins and Mr. Mabry have also testified that Lance Wood made the same admissions to them. Clearly, a statement against interest should and would carry much more weight than a statement meant to avoid consequences. For example, a jury would not be surprised that Lance made numerous self-serving statements that minimized his involvement in the murder. However, the converse is not so. A trier of fact would have serious questions why a person would confess to acts and crimes that he subsequently denies he did. Clearly, a jury would put much more weight upon even a single confession that he committed the murder made to a Salt Lake Tribune reporter that is expected to be published throughout Utah if not the United States than a hundred statements minimizing his guilt made to a police officer who is motivated to put him to death or a jury deciding his fate.

Regardless, the testimony is for the trier of fact to determine the weight and relevance of the testimony not the State. The State's obligation is to disclose the information and Mr. Brass' obligation is to investigate it and then make informed strategic decisions regarding the information.

Regarding this claim, the Appellant has met his burden in demonstrating a basis for his Rule 60(b) Motion in that Brass was grossly negligent and/or provided ineffective assistance of counsel regarding the response to the State's April 1, 2003 Motion for Summary Judgment. Even if prejudice is not presumed, clearly, Michael was prejudiced in that he lost the claim pursuant to summary judgment because Mr. Brass relied upon the pleading and failed to follow Michael's instructions and investigate this allegation. Finally, the evidence also demonstrates that he has a meritorious claim.

2. Issues Regarding David Homer

The Appellant presented evidence in support of his Rule 60 (b) Motion for Relief that

David Homer had recanted his testimony to Jeff Homer and Les Mabrey that Michael had told him that killing Gordon Church was the “ultimate rush.” Jeff Homer and Les Mabry also indicated that David Homer had told them that the sheriff’s department had “planted” Homer for the purpose of eliciting statements from Michael and that the Sheriff’s department had made certain promises to him in exchange for his testimony and cooperation. See Addendum, Exhibits “27 and 28”, Declaration of Jeff Homer and Les Mabrey.

Michael raised this allegation in the Second Amended Petition for Post Conviction Relief, issues number 12 (d), 33 (u) and 36. R. 900-01 and 925-930. The State on April 1, 2003, moved for Summary Judgment regarding this claim, of which Ed Brass never opposed. As to issue 12 (d) the Trial Court granted summary judgment by default because Mr. Brass failed to argue that it was not procedurally barred because the allegation contained statements that could not have been raised during Michael’s direct appeal because they occurred after the appeal. R. at p. 2237-2239. The Court granted summary judgment as to claims 33 and 36 by default holding that Michael “has not set forth specific facts showing that there is a genuine issue for trial....” R. p. 2239. Michael provided testimony that he asked Ed Brass to investigate this allegation. Affidavit of Michael Archelta, Addendum, Exhibit 29, para. 10(c).

Despite the fact that Michael specifically requested that Mr. Brass investigate the claim and despite the fact that Mr. Brass alleged it in the Seconded Amended Petition, he failed to analyze or otherwise make any strategic decisions whether or not this information should be investigated or presented. In addition, Michael never gave him permission not to explore these issues. Affidavit of Michael Archuleta, Addendum, Exhibit 29, para. 11. Mr. Brass failed to conduct enough investigation to dispute the State’s Motion for Summary Judgment.

Michael's Rule 60 (b) motion argues that Brass's failure to investigate constituted ineffective assistance of counsel and amounted to gross negligence. Brass' failure certainly fails to meet the ABA Guidelines or any guidelines for that matter. Prejudice must be presumed because of Brass' conflict of interest and pursuant to *Menzies* as articulated in Section III (A)(2)(b) herein. Furthermore, even if the Court adopts the State's argument that Michael must establish prejudice, Michael was prejudiced in that the Court granted summary judgment simply because Mr. Brass relied on the pleadings and failed to demonstrate that there was a material question of fact. The claim has merit to the post-conviction relief action in that David Homer's testimony may have very well been the very testimony that swayed the jury to impose the death penalty.

The Respondent argues that this Court should affirm the Trial Court's decision denying relief because Jeff Homer's testimony and Les Mabry's testimony were inadmissible hearsay in that the affidavits were sworn by individuals that had interviewed them. First, Judge Eyre's ruling was in error because the declarations of Jeff Homer and Les Mabry were submitted. See Appellant's Addendum, Exhibits "27" and "28." Even so, Judge Eyre's ruling that the affidavits were inadmissible hearsay was erroneous for the following reasons: 1) Utah Code Ann. § 76-3-207(2)(b) provides as follows: "[a]ny evidence the court considers to have probative force may be received [during sentencing] regardless of its admissibility under the exclusionary rules of evidence."; 2) Utah Rules of Evidence 613 provides for the admission of hearsay when impeaching inconsistent statements of the witness; 3) exemptions to the hearsay rule applied pursuant to Rules of Evidence 807, 803(6) or 804(b)(3); and 4) Utah Rules of Evidence 801(c) allows affidavits containing hearsay to support the claim of ineffective assistance of counsel—not for the truth of the facts asserted in the affidavits. Finally, in *Sears vs. Upton*, 130 S. Ct.

3259, the United States Supreme Court's ruling supports the Appellant's position. *Sears* held that the trial court can consider "hearsay evidence" when determining whether or not the Petitioner is entitled to post-conviction relief: "And the fact that some of such evidence may have been 'hearsay' does not necessarily undermine its value-or its admissibility- for penalty phase purposes."

The Respondent argues that the Appellant failed to establish that Jeff Homer and Les Mabry's testimonies were available to Mr. Brass. The State continued with its argument that this Court can make a "legitimate inference that [Mr. Brass] tried, but could not get the affidavit." The Respondent's argument actually proves the point. First, Mr. Brass was aware of contrary statements because he alleged it in the Second Amended Petition he filed with the Court. R. 888. Michael's affidavit verifies that he asked Mr. Brass to investigate the matter (Appellant's Addendum Exhibit "29" para. 10(c)) and the affidavit of Mr. Brass verifies that he never investigated the matter. Id. at Exhibit "15" para. 16. Mr. Brass could not oppose the State's Motion for Summary Judgment because he did not have the evidence and did nothing to discover it. Instead, the undersigned by complying with the ABA Guidelines, after visiting with Michael, after reading the Second Amended Petition and seeking Mr. Mabrey and Jeff Homer, was able to obtain the affidavits. Mr. Brass provided ineffective assistance of counsel for failing to submit any evidence in response to the State's Motion for Summary Judgment regarding this claim.

The Appellant had argued that David Homer's testimony that Michael had said that killing Gordon was the ultimate high may have been the very thing that set his case apart from Lance Wood, who received a life sentence. The Respondent argues in response that the testimony presented in his case differentiated him from Lance Wood on three levels: one, Michael's pants were blood drenched where Lance Wood's clothing simply had splatter; two,

that the state had presented evidence that Michael was the leader between the two; and three, Michael's post-murder conduct demonstrated his callousness as compared to Lance Wood's conduct. Appellee Brief, p. 64. It is difficult to keep the State's arguments in sync. For example, the Trial Court found, with urging from the State, 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. Yet, the Trial Court found, in addressing another claim, 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. When the argument suits it, the State argues that the blood evidence is important, but not important when it does not suit its position. When the issue is comparing the psychological differences between Lance and Michael, the State argues it does not matter because the State tried Michael based upon an accomplice theory.

However, when it suits the State, it argues that evidence overwhelmingly demonstrates Michael's involvement in the murder. A close look at the State's response succinctly demonstrates the circular nature of the State's case and the house of cards upon which Michael's conviction and sentence rests. The bottom line is the State's defense to the Appellant's arguments at best demonstrates that there are significant questions of fact; which in turn demonstrates that if Mr. Brass had provided effective assistance of counsel and presented facts in dispute of the State's April 1, 2003 Motion for Summary Judgment, there is a reasonable probability that the Trial Court would have reached a different result in its ruling.

The State argues that despite this violation, Michael cannot show prejudice because "the jury would have heard Homer's testimony anyway." State's Brief at 83. First, again, the State is evaluating the "basis" aspect of the Rule 60 motion not on whether or not Brass' performance was below an objective level in defending against the State's Motion for Summary Judgment but

instead is focusing on whether or not Michael can prove he is entitled to post-conviction relief. Regardless, Homer would not have been allowed to testify in the State's case in chief regarding the penalty phase because, pursuant to the reasons articulated in Appellant's initial Brief, Michael's alleged statements to David Homer would have been suppressed. David Homer's testimony was not impeaching, but instead was used in the prosecution's case in chief during the penalty phase and to prove an aggravating circumstance. Furthermore, if David Homer's status as a state actor had been disclosed, Mr. Esplin's decision to whether Michael would testify in the first place could very well have been different. Additionally, in light of this Court's reliance on David Homer's testimony to uphold his death sentence on appeal, Michael easily shows that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *Bagley*, 473 U.S. at 682). In other words, if Brass had performed effectively instead of simply relying on the pleadings, there is a reasonable probability that the claim would have survived summary judgment. At least, Michael has not had the benefit of a judge making that determination. Prejudice is presumed or established by obvious reasons. The Appellant has presented a meritorious defense as to the post-conviction relief petition which satisfies the pleading standard.

3. Failure to Secure Gary Hawkins Testimony Regarding the Confession of Lance Wood

As the Appellant has stated in his initial Brief and herein, Michael's defense in this matter was that Lance Wood inflicted the injuries causing the death of Gordon Church. Michael has produced witnesses in support of his Rule 60 (b) Motion, including Gary Hawkins and Les Mabry, that Lance Wood had confessed in support of Michael's position. Michael has presented to this Court an affidavit indicating that he told his previous counsel about these witnesses and

that he wanted the issue explored. See, Addendum, Exhibit “29”, para. 10(a). Furthermore, Mr. Brass has acknowledged that he failed to investigate the matter, admitted the issue is relevant and that Michael never gave him permission to not pursue the claim. Appellant’s Addendum, Exhibit “15” para. 15.

Michael raised this allegation in the Second Amended Petition for Post Conviction Relief, claim number 33 (v). R. 925. The State moved for Summary Judgment regarding this claim, of which Ed Brass never responded. The Court granted summary judgment as to this claim by default holding that Michael had failed to dispute the State’s Motion for Summary Judgment. R. p. 2239.

Despite the fact that Michael specifically requested that Mr. Brass investigate the claim and despite the fact that Mr. Brass himself had alleged the claim in the Second Amended Petition, Mr. Brass failed to analyze or otherwise make any strategic decisions whether or not this information should be investigated or presented. In addition, Michael never gave him permission not to explore these issues. Affidavit of Ed Brass, Addendum, Exhibit 15, para 15. Mr. Brass failed to conduct enough investigation to dispute the State’s Motion for Summary Judgment.

Michael’s Rule 60 (b) motion argues that Brass’s failure to investigate constituted ineffective assistance of counsel and amounted to gross negligence. Brass’ failure certainly fails to meet the ABA Guidelines or any guidelines for that matter. Prejudice must be presumed because of Brass’ conflict of interest and pursuant to *Menzies* as articulated in Section III. (2)(b) herein. Furthermore, even if the Court adopts the State’s argument that Michael must establish that he was prejudiced, Michael was prejudiced in that the Court granted summary judgment simply because Mr. Brass relied on the pleadings and failed to present evidence that there was a

material question of fact. The claim has merit to the post-conviction relief action in that Lance Wood, the only other person at the scene of the murder, has acknowledged that Michael's versions as to what happened was accurate.

The State responds with the dubious point that the Petitioner did not specifically say in his original affidavit that he specifically told Ed Brass about Gary Hawkins.¹¹ First, Mr. Brass himself alleged in the Second Amended Petition that Lance Wood had confessed to taking responsibility for the murder of Gordon Church. What is relevant is that none of Michael's attorneys, even though Michael asked them to pursue the issue, ever investigated or ever made a strategic decision or pursued any other witness about Lance's confessions in furtherance of the issue. Second, if the State thinks this is a disputed fact, *Menzies* makes it clear that the State could have requested discovery and could have requested an evidentiary hearing to address Mr. Brass' pursuit, or lack thereof, of the allegations he made in the Second Amended Petition. The bottom line is, this attorney followed the request of the Petitioner, complied with the ABA Standards and found and interviewed Gary Hawkins and was able to obtain an affidavit from him. There is no reason that Michael's previous attorneys could not have done the same thing—but did not.

Next, the State argues that even if Gary Hawkins' testimony is true, it does not meet the burden necessary for post-conviction relief based upon newly discovered evidence. Appellee's Brief, p. 70. Gary Hawkins' testimony, if true, is substantial in supporting 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 testimony that Wood had confessed to him that he inflicted all of the injuries. It also indicates that Mr. Wood's

¹¹ The Appellant corrected this inappropriate consideration in that he amended his Affidavit to make it clear that he actually not only told all his attorneys, but specifically told Mr. Brass to investigate the claim. See Addendum, the Second, Exhibit "29."

confession to Mr. Jorgenson 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 Hawkin's testimony brings together the other testimony regarding Michael's theory of the case and makes it all credible. The bottom line is if Brass had properly investigated the matter and presented the evidence to the Trial Court, Michael's evidence would have created a question of fact. There is a reasonable probability that Judge Eyre's Partial Summary Judgment would have been different.

The State also argues that Michael failed to establish a reasonable probability that Brass could have succeeded on a post-conviction claim based on Hawkins' declaration." Appellee Brief, p. 69. The State supports this argument by indicating that Michael did not establish when Lance Wood confessed to Gary Hawkins, thus questioning its relevancy. This argument is disingenuous in that the State did produce an Affidavit from Captain Mary Ann Reding. See Appellee, Appendix, Addendum Q. Captain Reding indicates that Michael and Gary would have interacted for 58 days between November 1994 and January 1995. Again, the State did nothing to refute or contradict Mr. Brass' actions or seek any discovery or request an evidentiary hearing which *Menzies* clearly allows.

The State argues that even considering the evidence presented by Michael, the overwhelming evidence presented at Michael's trial demonstrates that Michael is not entitled to post-conviction relief. That may very well be the case; however, that argument is not the point. The question presented in the Rule 60 (b) Motion is whether or not there is a reasonable probability of a different result regarding Judge Eyre's Partial Summary Judgment.

The State also argues in support of its position that the following evidence overwhelms Gary Hawkin's testimony in the following particulars: 1) the State tried Michael as an

accomplice to the murder; 2) Paula Jones testified that Michael told him they were “equals” in the murder; 3) the amount of blood on Michael’s pants proved he perpetrated the murder; 4) Wood’s confession to Gary Hawkins and Les Mabry and Jorgansen is against the great weight of his sworn testimony; and 5) the weight of the evidence that Michael controlled Lance and that he was the leader between the two. Appellee’s Brief, p. 71-72. First, the State’s response simply proves Michael’s point. Had Brass provided objective effective assistance of counsel, had followed Michael’s instructions and properly investigated this matter, instead of relying on the pleadings, he could have presented the evidence submitted in support of the Rule 60(b) Motion in response to the State’s Motion for Summary Judgment. Michael’s evidence as opposed to the State’s evidence would have demonstrated that there was a question of fact as to the claim. With this dispute in facts, there is a reasonable probability that Judge Eyre’s Partial Summary Judgment might have been different. Second, each of the State’s asserted discrepancies regarding the criminal trial testimony of Gary Hawkins is addressed in the various sections of Michael’s initial Brief and herein, which if read and applied in its totality demonstrates that the State’s case is a house of cards that could easily tumbled if Michael is allowed to submit each of the claims to the trier of fact regarding the post-conviction relief. The State’s argument at best demonstrates that there is certainly a question of fact, which by operation of law obligates the Trial Court to deny the Motion for Summary Judgment.

The fact that Mr. Brass did not fully explore this issue during Michael’s post conviction relief petition constitutes gross negligence and/or ineffective assistance of counsel in that his performance fell below an objective standard and prejudice is presumed. Even if prejudice is not presumed, clearly there is a reasonable probability that if Brass had not simply relied on the pleadings and complied with Rule 56 and Rule 7, Judge Eyre’s Motion for Summary Judgment

would have been different. As to the third step of a Rule 60(b) Motion, Michael has presented that he has a meritorious claim.

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

In Appellant's Petition for Post-Conviction Relief Claim 33 (k), Mr. Brass himself alleged that Mr. Esplin failed to retain an expert to investigate, review and evaluate Appellant's mental health issues. In Claim 33 (l), Michael alleged that trial counsel failed to obtain and arrange for psychological, neuropsychological and other testing. See R. p. 888 also claims 33 (m) and 37.

The Appellant in his Rule 60 (b) Motion argued that Brass failed to pursue an exemption from the death penalty for those individuals who are charged with capital offenses who have been determined by the trial court to be mentally retarded pursuant to Utah Code Annotated § 77-15a-101. Even though Dr. Cunningham and Dr. Gummow indicated that Michael might fit the statutory definition of mental retardation, Brass provided ineffective assistance of counsel for failing to specifically explore, investigate and ultimately raise the issue of an *Atkins* defense with the Court.

In response, the State argues that the Trial Court was correct when it determined that Appellant failed to present evidence that he could meet the standard necessary for an *Atkin's* defense. Appellee's Brief, p. 73, citing R. p. 4958. Again, the Appellant at this posture of the case is not required to establish that he is entitled to post-conviction relief based on this claim. Pursuant to a Rule 60 (b) Motion, the Appellant is only obligated to demonstrate that Brass was ineffective or grossly negligent in pursuing the claim in response to the State's April 1, 2003 Motion for Summary Judgment. The fact of the matter is that Brass never retained an expert to specifically address the issue of whether or not Michael met the statutory definition of "mentally

retarded” found in Utah Code Section 77-15a-102. Certainly, Dr. Gummow and Dr. Cunningham provided sufficient information to put Mr. Brass on notice that there may be an *Atkins* claim requiring that Mr. Brass obtain an expert to address the issue. Mr. Brass provided ineffective assistance of counsel for failing to pursue an *Atkins* claim. Furthermore, Brass never consulted with Michael before implementing a strategy in his post-conviction relief that he brutally murdered Gordon Church when Michael’s position has consistently been that he did not participate in the murder.

The State supports its position by arguing that the Appellant failed to “demonstrate deficient performance.” Appellee’s Brief, p. 73. The State supports this position by arguing that “neither Dr. Cunningham nor Dr. Gummow specifically addressed the statutory *Atkins* standard, contrary to Archuleta’s suggestion otherwise.” *Id.* at 74. The Appellant cited and quoted relevant testimony from both doctors which indicated that Michael had mental health issues that might meet the statutory defense against the death penalty. The State contradicts Michael’s position by arguing that the doctors did not actually testify that Michael was mentally retarded or that his IQ was in the range of mental retardation. First, the State fails to cite from the record the support for much of its assertions. Second, Utah Code Section 77-15a-102 does not set mental retardation at a minimum IQ level. Instead it defines mental retardation as “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.” As the State has aptly pointed out, Dr. Cunningham and Dr. Gummow were not experts qualified to provide an opinion as to whether or not Michael met this statutory definition. However, their expertise and opinion regarding this issue was of a nature that Mr. Brass should have recognized the need to explore whether or not the Appellant satisfied

the statutory definition that would have been a complete bar to the death penalty.

The State argues that this Court should reject the Petitioner's position because the Appellant failed to "prove" that there was a reasonable probability that Michael could obtain post-conviction relief with the claim. Again, the Petitioner at this point is not obligated to meet the burden of establishing an *Atkins* claim. Instead, he has the burden of establishing that there is evidence to support the claim (pleading burden) and that Mr. Brass failed to pursue it. Furthermore, the Petitioner lacks the resources to retain an expert to address this issue at this posture of the case. But the fact remains, which is undisputed by the State, whether or not Michael is entitled to an *Atkins* defense has never been addressed. The Petitioner has presented sufficient evidence to indicate that there is support for the position that Mr. Brass provided ineffective assistance of counsel or was grossly negligent in failing to explore the issue.

The State also argues that the Petitioner has not demonstrated that Mr. Brass did not actually explore this issue. The record, however, supports the proposition that Mr. Brass failed to pursue this issue. Mr. Brass testified that he did not recall asking Dr. Cunningham or Dr. Gummow whether or not Michael suffered from mental retardation. An effective attorney would insure that a defense, if established, would be a bar to the death penalty was explored, especially after he learned what his two experts said about Michael's mental health. This never happened. Mr. Brass was the attorney who knew what defenses were available—the experts were not.

The *Atkin*'s issue has never been properly addressed by the Court. Brass provided ineffective assistance of counsel for failing to explore, investigate and ultimately raise this issue with the Court. 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.

Michael's Rule 60 (b) motion argues that Brass's failure to investigate whether or not an *Atkins* issue exists constituted ineffective assistance of counsel and amounted to gross negligence. Brass' failure certainly fails to meet the ABA Guidelines or any guidelines for that matter. Prejudice must be presumed because of Brass' conflict of interest and pursuant to *Menzies* as articulated in Section III (A)(2)(b) herein. Furthermore, even if this Court adopts the State's argument that Michael was prejudiced, Michael was prejudiced in that the Court granted summary judgment simply because Mr. Brass relied on the pleadings, failed to properly plead the defense and failed to demonstrate that there was a material question of fact regarding whether or not Michael suffers from mental retardation as defined by the Statute. As to the third step in a Rule 60(b) Motion, the claim has merit to the post-conviction relief action in that the defense is an absolute bar to the death penalty. In fact, a failure to adequately address the *Atkins* defense should be a per se finding of ineffective assistance of counsel in a case where the state is seeking the death penalty.

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

In Appellant's Petition for Post-Conviction Relief Claim 33 (m), the Appellant alleged that Mr. Esplin failed to retain an expert to investigate, review and evaluate Appellant's mental health issues as well as other significant persons and their impact on Michael. R. p. 923. See also Claim 33, which referenced that the Claim might expand upon further discovery and investigation. R. p. 920. Michael's defense in this matter was that Lance Wood inflicted the injuries on Gordon Church. The State's case was that Michael instead was the aggressor, controlled Lance Wood in the murder and scared Lance.

The State opposes Appellant's claim arguing as follows: 1) the documents only "identify Wood as a forger and thief who refused to obey society's rules; 2) Wood's documents contain no

evidence of violence; 3) Michael's records, on the other hand, contain a history of violence; and 4) The evidence presented at trial that Lance Wood was the aggressor and Michael was the follower.

The State's argument simply supports the position that there are material questions of fact as to this claim. The Appellant is certainly not taking the position that the State cannot present a contrary view and support that contrary view; instead, the Appellant argues that Wood's reports as presented coupled with the testimonies of Gary Hawkins, Les Mabrey and Jeffrey Homer supports the assertion that Lance Wood and not Michael was the leader between the two. After the competing evidence is presented, the trier of fact can make an informed decision. The Appellant is simply of the position that he received ineffective assistance of counsel because Mr. Brass failed to explore and present this claim even though he claimed it in the Second Amended Petition.

Michael's Rule 60 (b) motion argues that Brass's failure to investigate there is psychological evidence which supports the proposition that Lance Wood's psychological makeup indicates that he was the aggressor and controlled Michael constituted ineffective assistance of counsel and amounted to gross negligence. Brass' failure certainly fails to meet the ABA Guidelines or any guidelines for that matter. Prejudice must be presumed because of Brass' conflict of interest and pursuant to *Menzies* as articulated in Section III (A)(2)(b) herein. Furthermore, even if this Court adopts the State's argument that Michael must establish that he was prejudiced, Michael was prejudiced in that the Court granted the State's Summary Judgment forever barring the claim simply because Mr. Brass failed to properly plead, investigate and support the defense. Mr. Brass failed to demonstrate that there were material questions of fact regarding whether or not Michael was the aggressor in this matter. The claim has merit to the

post-conviction relief action in that it supports Michael's defense in this matter and contradicts the State's theory of the case and the reason a death penalty is justified.

6. Failure to Obtain Experts

In Michael's Post Conviction Petition Claim number 23 (as a substantive claim) and 36 (as an ineffective assistance of counsel claim), Michael claimed that the State did not sufficiently establish the offense of aggravated murder. This post-conviction claim was based upon the fact that the State had not established that Gordon Church was alive during much of the attack. R. 911-912. In Claim 32 (h), Michael claimed that Mr. Esplin provided ineffective assistance of counsel for failing to request funds and failed to obtain forensic experts to testify on his behalf.

The State moved for Summary Judgment regarding these claims, of which Ed Brass failed to respond. Mr. Brass could not have presented factual evidence to demonstrate that there was a material question of fact regarding the claims because he failed to investigate the claim, failed to make any strategic decisions regarding the claim and failed to retain appropriate forensic experts. Based upon Brass' default, the Court granted summary judgment as to this claim holding that Michael could not simply "rest upon the mere allegations of denials of his pleading." R. p. 2239.

Michael's Rule 60 (b) motion argues that Brass was grossly negligent or provided ineffective assistance of counsel in that Brass failed to investigate, pursue or make strategic decisions regarding whether or not forensic experts should have been retained to address whether or not Gordon Church was alive during most of the attack, whether or not blood evidence supported Michael's testimony of what occurred and an expert regarding the harm that would be caused by battery cables. Brass' failure certainly fails to meet the ABA Guidelines or any guidelines for that matter. Prejudice must be presumed because of Brass' conflict of interest and

pursuant to *Menzies* as articulated in Section III (A)(2)(b) herein. Furthermore, even if this Court adopts the State's argument that Michael must establish that he was prejudiced, Michael was prejudiced in that the Court granted summary judgment simply because Mr. Brass relied on the pleadings, failed to properly plead the defense and failed to demonstrate that there were material questions of fact regarding the claim raised in the Second Amended Petition. Forensic experts would have assisted in Michael's defense to the State's Motion for Summary Judgment as to the various claims found in the Petition. The claim has merit to the post-conviction relief action in that the experts are beneficial in supporting Michael's defense and to address the State's theory of why the death penalty is warranted.

The Appellant argues that his attorney should have retained an expert to address the issue as to when Gordon Church died and/or lost consciousness. The testimony established at trial clearly indicates that Gordon may have been unconscious or dead during much of the attack. Any injuries after death or consciousness are not relevant to the issue of whether or not the State met its burden of proof that the death was caused in a heinous manner. See *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), which stresses the importance of narrowing the classification of capital cases in order to distinguish them from other ruthless or brutal murders.

The State argues that the Appellant did not "proffer the evidence he contends his trial counsel should have developed and presented." Appellee's Brief, p. 80. In addition, the Respondent argues that the Appellant did not support his allegation with legal support. *Id.* p. 80-81. The Appellant cited and quoted sufficiently from the criminal trial testimony presented under oath. The Appellant addressed the factual allegations which supported his claims by

quoting the testimony of the State's witnesses as follows: 1) "these injuries were crushing skull fractures," Exhibit "38" 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. As to the legal justification, see Section IV of Appellant's Brief in Case Number 20070416.¹²

As to Appellant's position that an expert should have been retained to explain that an electrical shock could not have been transferred from the vehicle to Gordon Church's body via battery cables, the State basically argues that given the weight of the testimony presented at trial regarding Michael's involvement in the torture and murder of Gordon Church, expert testimony regarding the electrical current would have been insignificant. Appellee's Brief, p. 82-84. However, Michael's Rule 60 (b) Motion must be considered in its totality. Simply considering one claim in isolation does not do justice to the entire Motion. In response to each claim, the State makes the same argument that the claim is insignificant. However, at some point, the State's argument becomes circular leaving a case of which has no foundation. The fact of the matter is that Mr. Brass did not investigate the matter and failed to obtain experts in order to pursue and support the claims articulated in the Second Amended Petition. The significance of

¹² The Oklahoma Supreme Court has held that "absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met" *Cheney v. State*, 909 P 2d 74, 80 (Okla. 1995). The Supreme Court of New Jersey has indicated that "the torture and aggravated-assault basis for the death penalty *cannot apply where no pain was suffered* despite the murderer's intent to inflict it, because 'there would be too many possible presentations by the prosecution, each conceivably turning on theoretical reconstructions of intent'" *State v. Perry*, 590 A 2d 624, 646 (N.J. 1991) (quoting *State v. Ramseur*, 524 A 2d 188, 230 (N.J. 1987) (emphasis added). And the Tennessee Supreme Court has held that "torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious" *State v. Williams*, 690 S.W. 2d 517, 529 (Tenn. 1985) (emphasis added). See also *State v. Amaya-Ruis*, 800 P 2d 1260, 1285 (Ariz. 1990) "A finding of cruelty requires that the victim be conscious at the time of the offense in order to suffer pain and distress. When evidence of consciousness is inconclusive, a finding of cruelty is unsupported" *State v. Hunt*, 371 N.W. 2d 708, 721 (Neb. 1985). Murder not especially heinous, atrocious, cruel, and did not manifest exceptional depravity by ordinary standards of morality and intelligence when victim was rendered unconscious within a short time of defendant's intrusion into victim's home. For these states, the physical abuse or torture perpetrated upon the victim requires that the victim not only be alive, but consciously aware of the pain being inflicted.

the State's proffered evidence in opposition to Michael's proffered evidence is nothing more than proof that there is a question of fact thus invalidating Judge Eyre's Partial Summary Judgment.

Citing from the existing record of sworn testimony, Michael argued in his initial Brief that his attorney should have retained a blood expert to assist in his defense. In response to most of Michael's claims for relief, the State has argued that the amount of blood found on Michael's cloths meant that Michael had to have been involved in Church's murder to an extent greater than as he testified. The fact that the State, and the Trial Court for that matter, has used this argument extensively highlights why it is important that Michael retain an expert for the purpose of addressing this argument.

In support for the Rule 60 (b) Motion and position that it was Lance who committed the murder, the Appellant provided testimony from the State's blood analysis expert regarding the following: the blood spatter evidence found on Gordon's vehicle; the positioning of Gordon's body in relation to the vehicle; blood spatter found on Lance's clothing; and the lack of blood spatter on Michael's clothing. The Appellant argued that the State's blood expert's testimony seemed to support Michael's version that Lance committed the murder; thus, Michael's attorney should have retained an expert to testify on his behalf regarding this issue.

The State's response argues that "Archuleta has not shown that Brass could have proven *Strickland* prejudice." Appellee's Brief, p. 86. Again, if prejudice is not presumed, prejudice is established in that the Appellant is seeking relief from Judge Eyre's Partial Summary Judgment pursuant to Rule 60. Mr. Brass failed to explore and present any defense to the State's Motion for Summary Judgment regarding Michael's viable claims. Brass provided ineffective assistance

of counsel or was grossly negligent in that he failed to retain experts to support the claims presented in the Second Amended Petition.

7. Failure to Disclose Mental Breakdown of State's Forensic Pathologist Amounts to Brady Violation

Appellant, pursuant to a Rule 60 (b) Motion, argued that Mr. Brass was grossly negligent or provided ineffective assistance of counsel for failing to present to the Trial Court, in response to the State's April 1, 2003 Motion for Summary Judgment, the fact that Martha Kerr ("Kerr"), a Forensic Pathologist for the Utah State Crime Lab and who testified as an expert on the blood evidence, experienced a mental breakdown prior to her trial testimony. The State in response argues that Kerr's testimony played no role in Judge Eyre's Partial Summary Judgment. Appellee's Brief, p. 89.

Again, the blood testimony is very relevant to whether Michael's version of facts versus Lance's version of events is the accurate version. Regardless of what relevance the State believes the required disclosure has, the fact is, the State was obligated to disclose the information and then Michael could determine the significance of the evidence. Even if Kerr's testimony itself did not play a role, she has stated that the State should be concerned that someone in her office may have tampered with evidence during the time period relevant to this matter. Appellant's Addendum, Exhibit 41. This fact is significant. Mr. Brass should have explored and investigated the issue—but he failed to take any action. He certainly failed to present the evidence in response to the State's Motion for Summary Judgment. This amounts to ineffective assistance of counsel or gross negligence. Prejudice should be presumed. Even if this Court requires Michael to establish prejudice, Brass' failures to properly investigate and defend against the State's Motion for Summary Judgment essentially caused Michael to lose virtually all of his post-conviction claims by default.

8. Brass' Failure to Respond to the State'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 this Court. This Court overturned the District Court's decision citing three different cases and 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). On remand, the State again filed a Motion for Summary Judgment arguing that the language quoted above meant that only the claims based upon ineffective assistance of counsel survived the appeal. Mr. Brass failed to challenge the State's Motion for Summary Judgment. Based upon this failure, the Court granted the State's Summary Judgment to the substantive challenges of Michael's conviction by default. R. 2239-2239. Mr. Brass' failure to dispute the State's reading of the Supreme Court's ruling constitutes ineffective assistance of counsel. Prejudice should be presumed. Regardless, Michael was prejudiced in that the substantive challenges found in claims 1-30 were lost by default. As Appellant's initial Brief indicates, Appellant has a meritorious defense to the State's position that the claims are procedurally barred.

The State responds by simply arguing that the Supreme Court's language quoted above means that only the claims alleging ineffective assistance of counsel survived the appeal. What is curious is that the State fails to discuss or distinguish the three cases cited by the Utah Supreme Court in its ruling which the Petition has demonstrated suggests a contrary

interpretation.¹³ If the Utah Supreme Court had meant, as the State argues, that only the ineffective assistance of counsel claims survived the appeal—it would have said as much. Furthermore, this Court would not have directed the district court’s attention to the three cases which indicates the parameters of the procedural bar doctrine, which is not limited to claims that could have been brought on appeal.

For the reasons indicated herein and his initial Brief, the Appellant is entitled to his Rule 60 (b) relief.

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

In its ruling on Petition for Writ of Habeas Corpus, Judge Eyre recognized that at “both phases of trial, Petitioner’s theory was that the torturous murder of Church was committed by Lance Wood and that Petitioner played a minor role in Church’s death. R. 3338 p. 9. The mitigation case presented by Mr. Brass convinced the Trial Court that development factors identified at the mitigation hearing “placed Petitioner at a high risk of engaging in violent criminal activity and that Petitioner’s psychological damage had a ‘clear nexus’ to Church’s murder.” Id. at p.25. Further, the Court noted that the mitigating evidence Mr. Brass presented “would likely have been interpreted as aggravating rather than mitigating insofar as it strongly suggests that Petitioner would be dangerous in the future.” Id at 31.

The Appellant alleged in his Rule 60 (b) Motion that he takes exception to Mr. Brass’ presenting him as a monster likely to kill again posed as mitigation evidence. Mr. Brass never discussed with Michael the approach. Mr. Brass failed to investigate any of the other claims of his petition for relief nor did he retain any other expert. How could Mr. Brass satisfy his obligation to only make “[s]trategic choices[] after thorough investigation of law and facts

¹³ In fact, based upon the heading of the Appellee’s Brief, it appears that the Respondent failed to even read the Appellant’s argument.

relevant to plausible options....” when he had completely failed to review the record and investigate the claims. *United States v. Cronin*, 466 U.S. 648, 665 n. 38(1989). It is not surprising that Mr. Brass lacked the ability to make strategic choices when he failed to conduct a thorough review of the case. It is little wonder that he failed to present a mitigation case that was consistent with Michael’s testimony or the facts of this case. Mr. Brass’ actions must be determined as ineffective assistance of counsel in that he failed to consult Michael and presented a mitigation case which conflicted with Michael’s testimony and position as to what occurred in the murder.

In *Sears vs. Upton*, 130 S. Ct. 3259 (2010), the United States Supreme Court held as follows: “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.” That describes the situation here: Mr. Brass’ haphazard choice without taking into account all the aspects of the case cannot be considered effective assistance of counsel. How could any decision made by Mr. Brass be considered effective, when Mr. Brass failed to independently investigate any of Michael’s case.

The State argues that the Appellant’s argument fails because “it is difficult to conceive what is left, and Archuleta has not identified it.” Appellee’s Brief, p. 92. At this posture, the Appellant does not have the burden to prove the claim. However, the Appellant is of the opinion that had Mr. Brass investigated and pursued the claims he presented in the Second Amended Petition and read the files indicated above, he would have had enough information to make a

sound strategic decision as to the mitigation case that should have been presented to the Court. Had Brass retained experts to deal with the various issues as alleged herein, then he could have made a decision that was based upon the facts and evidence of this case. That never happened. The consequence was a mitigation case that caused the Trial Court to comment that such a mitigation presentation characterized Michael as an individual very likely to have been the perpetrator of this crime and in the future may be a danger to society, exactly what the State wanted to do. Michael never agreed to such a strategy.

VIII. This Court Should Set Aside Judge Eyre's Partial Summary Judgment Ruling

The Respondent stated that it appeared that Michael was arguing “that the Court should set aside the post-conviction judgment so that he may pursue the claims that he argues Brass was ineffective for omitting.” Appellee’s Brief, pg. 92. The Respondent continues by arguing that the “district court’s ruling was similar to an order granting summary judgment.” The Respondent argues that the Court’s ruling regarding the Rule 60(b) motion simply found that the Appellant was not entitled to the relief he sought as a matter of law. Continuing with the State’s argument, if this Court finds contrary, then the Respondent should be allowed to conduct discovery apparently for the purpose of developing a record regarding what Mr. Brass did and did not do in his representation of Michael.

This Court should note that the State’s request made in this section was after the State criticized Michael’s position that he was not required at this posture to “prove ineffective assistance until after the court set the judgment aside.” Appellee Brief, pg. 32. In fact, the Appellee argued contrarily that *Menzies* made “plain that rule 60(b)(6) relief for post-conviction counsel’s ineffective assistance requires a petitioner to prove ineffective assistance under *Strickland*.” Id. at 35. The State’s request found herein was also made after it criticized

Michael's position that since the "case was 'simply at the pleading stage,' Archuleta only had to show 'that there is enough evidence (a pleading standard) to support the idea that Ed Brass provided ineffective assistance of counsel because he failed to investigate and explore claims.'" Id. at 31. The State continued its criticism of Michael's position that *Menzies* stood for the proposition that Michael could engage discovery for the purpose of proving ineffective assistance of counsel. Id. at 39.

Now, in this Section, the State has adopted Michael's position that it so soundly criticized and by arguing that this Court should simply send the matter back to the Trial Court for the purpose of developing the record regarding Mr. Brass' representation. That time has passed. As the Respondent so succinctly stated: "[a]s *Menzies* reported, respondent [the State, who was represented by Mr. Bruner at least on appeal] moved for and was granted permission to conduct discovery in the rule 60(b) litigation." Id. at 38. The discovery requested by the State in *Menzies* was for the very purpose of addressing Mr. Brass' representation which ultimately led to an evidentiary hearing regarding the issue. In this case, however, the State [Mr. Bruner] failed to challenge Appellant's evidence nor did it request an evidentiary hearing; thus, this Court should not remand for the purpose of developing any further record regarding Mr. Brass' representation. Instead, this Court should set aside Judge Eyre's Partial Summary Judgment and allow Michael to pursue his Post-conviction Petition.

The State's request, however, demonstrates the Trial Court's error in this matter. The Trial Court's focus should have been on Mr. Brass' performance. The Trial Court should have instead addressed whether or not a probability exists that the Court would not have granted Partial Summary Judgment regarding the claims presented in Michael's Rule 60(b) Motion had Mr. Brass properly responded to the State's April 1, 2001 Motion for Summary Judgment with

the evidentiary support which was produced in compliance with Rule 7 in opposition to the State's Motion for Summary Judgment.

There should be no further discussion regarding Mr. Brass' performance in this matter. The time to dispute that issue has passed. Instead, this Court should send the matter back to the district court with the direction that the Trial Court should address the claims found herein as it relates to the post-conviction petition. The State and the Appellant should be allowed to conduct discovery regarding these claims, and after discovery, either party could seek summary judgment regarding the claims if they believe such a motion is justified.

IX. Cumulative Error Spanning Twenty Years Warrants Post Conviction Relief

The Appellant alleged in Claim 43 and in his Rule 60(b) Motion that 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.

On April 1, 2003, the State moved for Summary Judgment regarding this claim, of which Mr. Brass never opposed, as required by Rule 56. He could not oppose the Motion because he failed to investigate and failed to make any strategic decisions regarding the claims. Based upon Brass' default, the Court granted summary judgment as to this claim holding that Michael "has not set forth specific facts showing that there is a genuine issue for trial in relation to each of the above enumerated claims, summary judgment on each of these claims is appropriate." R. p. 2239.

Michael's Rule 60 (b) motion argues that Brass's failure to investigate and pursue this claim constituted ineffective assistance of counsel and amounted to gross negligence. Brass' failure certainly fails to meet the ABA Guidelines or any guidelines for that matter. Prejudice must be presumed because of Brass' conflict of interest and pursuant to *Menzies* as articulated in

Section III (A)(2)(b) herein. Furthermore, even if the Court adopts the State's argument that Michael was required to demonstrate prejudice, Michael was prejudiced in that the Court granted summary judgment simply because Mr. Brass relied on the pleadings and failed to demonstrate that there was a material question of fact. The claim has merit to the post-conviction relief action and must be considered so that the Trial Court can look at all the evidence in total submitted for each claim and then relate the evidence to each claim in addressing the question of whether or not Michael is entitled to post-conviction relief based upon cumulative error.

In support of his claim of cumulative error, the Appellant cited *State v. Gonzales*, 125 P.3d 878 (2005), *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) and *State v. Young*, 853 P.2d 327, 367 (Utah 1993). Without addressing the merits of Appellant's argument or addressing the cases cited, the Respondent simply argues that the Appellant has not presented "any real" analysis and that Appellant has simply left this court with the burden of making the argument. Appellee Brief, p. 94. The Appellant's argument speaks for itself, and he will not further respond here. However, it appears that is more accurate to state that the Respondent is the party that has provided no analysis and left this court to make his argument.

X. Lack of Competent Counsel

The Appellant argues that pursuant to this Court's holding in *Archuleta v. Galetka*, 197 P.3d 650 (Utah 2008) that the unavailability of competent and willing counsel is sufficient grounds for outright reversal of a capital sentence and remand for the imposition of a sentence of life in prison.

The Respondent argues that Archuleta is not entitled to competent and willing counsel because there is no federal constitutional right to representation in state post-conviction proceedings. This argument is addressed more fully in Section XI which follows.

In support of the argument, Respondent focuses on the actual language found in *Archuleta* to only apply in situations addressing the defense or appellate counsel of a criminal case, not a civil post-conviction action. This narrow and strict interpretation of the Court’s language ignores the context of the *Archuleta* opinion--context which gives definition to the language used. Instead, interpreting the language in context, the very issue before the *Archuleta* Court was the issue of whether Archuleta's post-conviction counsel should or could be sanctioned. Throughout the opinion, the Court referenced Mr. Brass not as “post-conviction counsel” but as “defense counsel.” *See, e.g., id.* at ¶ 11 (“The moment allegations of a personal violation are filed against capital defense counsel, the interests of attorney and client diverge”); ¶ 13 (referring to the challenged actions post-conviction counsel at the heart of the Rule 11 sanctions motion as having been done by *defense* counsel); ¶ 14 (referencing the claims in the post-conviction petition and the arguments of *defense* counsel in defending the validity of the presentation of such claims). Clearly, in *Archuleta*, Mr. Brass was counsel for Archuleta’s civil post-conviction action not his defense attorney in the criminal trial. Thus, the Court was clearly including civil capital post-conviction review as part of the criminal death penalty process in Utah and considered that process to be included in its discussion of the duties and responsibilities of counsel in the defending and appealing capital cases. This is consistent with the Court’s understanding of the unique nature of the review process in capital cases, as shown by its reference to “capital cases, including post-conviction proceedings” being criminal or quasi-criminal proceedings. *Id.* at ¶ 10, n. 1.

Michael, as both this appeal and his Rule 60(b) motion clearly demonstrates, has been afforded nothing more than ineffective assistance of counsel through this process. Lest this Court’s language in *Archuleta* be deemed as mere rhetoric, Michael implores this Court to

recognize the injustice that ineffective assistance of counsel has to this point rendered, and instead grant the relief he seeks. 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, both in the civil and criminal arena. This lack of counsel is sufficient grounds for revoking Michael's sentence of death and imposing a life sentence pursuant the holding of this Court in Archuleta.

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.

XI. The 2008 Amendments To The PCRA Cannot Apply Retroactively To Archuleta's Substantive Right To Effective Post-Conviction Representation.

In *Menzies*, this Court held that the PCRA's provision for counsel conferred a right to effective assistance of post-conviction counsel. *Menzies*, 2006 UT 81, ¶82. This Court also held that a capitally-sentenced defendant who received such ineffective assistance of counsel could justify setting aside a Motion for Summary Judgment based upon the ineffective counsel's representation and gross negligence. 2006 UT at ¶¶ 109-11.¹⁴

Following *Menzies*, Respondent's counsel urged the state legislature to amend the PCRA and in 2008, the Act was amended to include the provision that, "[n]othing in this chapter shall be construed as creating the right to the effective assistance of post-conviction counsel, and relief may not be granted on any claim that post-conviction counsel was ineffective." U.C.A. § 78B-9-202(4) (2008). Now, the State argues that this provision applies retroactively to Michael's post-conviction case, and that Michael must be denied the relief afforded in *Menzies*. The district court rejected the State's argument because, "[g]enerally, 'the facts and the law in a given

¹⁴ The Appellant in *Menzies* also argued that he was entitled to effective assistance of counsel pursuant to the Utah and United States Constitution. See footnote 4.

lawsuit are to be applied as of the date of the filing of the original complaint.” (R. 4923 (quoting *Archer v. Utah State Land Bd.*, 392 P.2d 622, 624 (Utah 1964))). Nevertheless, the State argues that *its* response to this Court’s decision in *Menzies* (that is, seeking and obtaining legislative amendments) should apply retroactively to cases pending at the time this Court issued its decision and announced the substantive right to effective representation.

First, the State fails to show or even argue that the 2008 legislative amendment *expressly* provides that section 202(4) applies retroactively to post-conviction cases initiated prior to the effective date of the 2008 legislation. Utah Code Section 68-3-3 states that, “[a] provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive.” This Court has repeatedly held that, “[a] statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively.” *Goebel v. Salt Lake City Southern R. Co.*, 2004 UT 80, ¶39, 104 P.3d 1185; *see also Thomas v. Color County Mgmt.*, 2004 UT 12, ¶31, 84 P.3d 1201 (Durham, C.J., concurring) (“Utah courts follow the general rule that ‘a statute generally cannot be given retroactive effect unless the legislature expressly declares such an intent in the statute.’” (quoting *Washington Nat’l Ins. Co. v. Sherwood Assocs.*, 795 P.2d 665, 667 (Utah Ct. App. 1990))). The 2008 amendment to § 78B-9-202(4) contains no such declaration and, by its silence, the State concedes that it does not.

Nevertheless, the State argues that its legislative response to *Menzies* should still deprive Archuleta of the right to effective post-conviction representation because the right is merely “procedural.” The State argues the amendment found in Section 202(4) is merely procedural because it would not affect Michael’s underlying claims of post-conviction action itself and therefore does not narrow or eliminate a substantive basis for post-conviction relief. The State’s argument ignores the fact that the amendment would destroy Michael’s right to Rule 60(b) relief,

which is exactly the relief he seeks now by way of this appeal.

The State attempts to compare Michael's ability to seek Rule 60(b) relief and vacate his post-conviction judgment by way of this Court's decision in *Menzies* to the procedural amendment found in *State v. Daniels*, 2002 UT 2, 40 P.3d 611. In *Daniels*, this Court found that a 1997 amendment changing a requirement of jury unanimity to impose a sentence of life without parole to a requirement that only ten jurors agree was merely procedural and could be applied retroactively to murder trials pending in the district court. *Id.* at ¶41. This Court found the 1997 amendment to be merely procedural because, "[i]t has nothing to do with the substance of defendant's crime or the amount of punishment specified for it." *Id.* In other words, the defendant in *Daniels* had the right to a jury verdict, and the 1997 amendments merely provided a "different mode or form of procedure for enforcing [that] substantive right[]." *Pilcher v. State*, 663 P.2d 450, 455 (Utah 1983).

By contrast, in *Menzies*, this Court declared that death-sentenced individuals had the right to effective representation in their post-conviction proceedings and that this substantive right could be vindicated in a motion filed under Rule 60(b). *Menzies*, 2006 UT 81, at ¶¶ 82, 109. "Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause of action." *Washington Nat'l*, 795 P.2d at 669 (quoting *Petty v. Clark*, 192 P.2d 589, 593-94 (Utah 1948)). The State's 2008 amendment attempts to *destroy* this vested right and therefore cannot, by definition, be merely procedural. *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017, 1020 (Utah 1995) ("[O]nly procedural changes which do not enlarge, *eliminate*, or *destroy* vested or contractual rights may be applied retroactively." (emphasis added) (internal quotation omitted)). Statutory amendments are "purely procedural only where they provide a 'different mode or form

of procedure for *enforcing* substantive rights”” *Brown & Root Indus. Serv. v. Indus. Com’n of Utah*, 947 P.2d 671, 675 (Utah 1997) (quoting *Washington Nat’l*, 795 P.2d at 667 (internal quotation omitted)). The 2008 amendment does not provide a different mode for enforcing the right to effective counsel set forth in *Menzies*, but attempts to wholly *destroy* that right.

The amendment is substantive and therefore cannot be applied retroactively to prohibit Archuleta any avenue of relief from the judgment against him. In *Brown & Root Industrial Service v. Industrial Commission of Utah*, this Court found that an amendment that would effectively bar and completely eliminate injured workers’ claims for medical coverage did more than provide a mere “different mode or form of procedure for enforcing substantive rights.” 947 P.2d at 676. Likewise, retroactive application of Section 202(4) would actually and completely bar Michael’s claim that he received ineffective assistance of post-conviction counsel and would completely eliminate his ability to seek relief through his Rule 60(b) Motion. His substantive right, as that right was announced by this court in *Menzies*, would be legislatively eliminated and that is why the 2008 amendment is substantive, and cannot be applied retroactively.

The State’s argument that the 2008 amendment is a mere “clarification” of the legislative intent behind the earlier statute is simply another way of arguing that this Court “got it wrong” in *Menzies*, issued an “absurd” decision, and the State was required to go to the legislature to “clarify” the law in a way this Court could understand. The State’s efforts did not “clarify” this Court’s holding, and instead was an attempt to legislatively reverse a Utah Supreme Court decision which recognized a substantive right to capital-sentenced petitioners seeking post-conviction review.¹⁵

¹⁵ The State’s legislative attempts after this Court’s decision in *Menzies* are comparable to the losing party’s legislation in *Disconnection of Certain Territory from Highland City*, 668 P.2d 544, 548-49 & n.3 (Utah 1983). In *Highland City*, the mayor of Highland City, upset over losing in the district court, sponsored the bill for the statute which changed the factors a district court could consider in disconnection proceedings. On appeal, the city argued that this Court should apply the legislation retroactively. This Court found the legislation to be substantive because “[c]hanges of this magnitude” did not merely “provid[e]

The fallacy in the State’s argument is that in *Menzies*, this Court did not rely on legislative motivation to judicially recognize that the statutory right to counsel includes the right to *effective* representation in capital post-conviction proceedings. *Menzies*, 2006 UT 81, at ¶ 82. The analysis was pursuant to a Rule 60(b)(6) “catch all” basis for relief. Recognizing the importance of capital post-conviction proceedings and the “high stakes inherent in such proceedings—life and liberty—,” this Court used its “constitutional authority over such cases” to judicially recognize a statutory right to effective representation. *Id.* at ¶ 83. This Court relied on its judicial power and its refusal “merely to pay lip service to this legislatively created protection by holding that a petitioner in a post-conviction death penalty proceeding is only entitled to ineffective assistance of appointed counsel.” *Id.* at ¶ 82. This Court does not need “clarification” to tell it what it is judicially able to do.

If the Court does apply the legislation retroactively, then now is the time to consider whether or not Michael has a Utah or United States Constitutional right to effective assistance of counsel in a quasi criminal case where the State intends to take the greatest liberty of all: life. See *Menzies* at p. 511.

XII. The State Has Not Carried Its Substantial Burden To Show Why This Court Should Overrule Its Precedent And Deny Archuleta The Right Established In *Menzies V. Galetka*.

The Respondent in this case is asking this Court to overturn *Menzies*. “Those asking [this Court] to overturn prior precedent have a substantial burden of persuasion . . . mandated by the doctrine of stare decisis.” *State v. Menzies*, 889 P.2d 393, 398 (Utah 1994) (“*Menzies* (1994)”) (citation omitted). This Court has stated that it will not overturn its own precedent “unless clearly convinced that the rule was originally erroneous or is no longer sound because of

a different mode or form of procedure for enforcing substantive rights.” *Id.* at 549 (internal quotations omitted).

changing conditions *and* that more good than harm will come by departing from precedent.” *Id.* at 399 (quoting John Hanna, *The Role of Precedent in Judicial Decision*, 2 Vill. L.Rev. 367, 367 (1957) (emphasis added)); accord *Hoyer v. State*, 2009 UT 38, ¶26, 212 P.3d 547. The State has not met its burden nor demonstrated any sound reason why this Court should suddenly overrule its well-reasoned 2006 *Menzies* decision.

The State argues that this Court’s holding, that a death-sentenced inmate has a statutory right to effective representation in post-conviction proceedings, was erroneous and “absurd.” *See*, Appellee’s Brief at 28. The basis for the State’s argument is its position that the Court misunderstood the legislature’s motivation in enacting Section 202 of Utah’s PCRA. The focus of the State’s proof of the legislature’s motivation are the words of one state representative during a House floor debate, that Section 202 could entitle Utah to speedier *federal* habeas proceedings under the opt-in provisions of the federal Anti-terrorism and Effective Death Penalty Act (“AEDPA”).¹⁶ Thus, the State argues, any procedural right this Court may extend to such a petitioner which might slow down *state* post-conviction proceedings (such as ensuring adequate representation of the petitioner) is in conflict with this legislative (or at least that one legislator’s) purpose, i.e., to speed through post-conviction review no matter the devastating consequences.¹⁷

First, as explained above, this Court did not rely on legislative history to extend Section

16 Chapter 154 of the AEDPA provides a state with certain procedural benefits in capital federal habeas cases if the State has “opted in” to its provisions. 28 U.S.C. §§ 2261-2266. A state with a post-conviction procedure can opt in by establishing a system for the appointment of counsel to represent capital defendants in state post-conviction proceedings. Utah has never established that its post-conviction system complies with the requirements for opt-in status. However, AEDPA may very well also create a statutory right to effective assistance of counsel.

17 Additionally, the federal opt-in statute can be analyzed as a quid pro quo type of legislation. The federal statute offers states a deal that if they provide adequate and well-represented state post-conviction review, then a speedier federal post-conviction review would be granted in return. *See generally Ashmus v. Woodford*, 202 F.3d 1160, 1163 (9th Cir. 2000). The State concedes that the original section 202 was sought and obtained to take advantage of the federal government’s offer. But now, the State argues that it should get it both ways: it urged legislation to obtain the benefits of speedier federal post-conviction review, but asks that the state courts merely pay lip-service to the state statute and accept inadequate, incompetent, and negligent representation during state post-conviction review. In other words, the State wants the quo, without giving the quid. *Cf. United States v. Garner*, 767 F.2d 104, 119 (5th Cir. 1985) (“[T]he government cannot have its proverbial cake and eat it too.”).

202's provision for appointed and compensated counsel to include the right to effective representation. This Court's holding in its 2006 *Menzies* opinion was based on its well-reasoned understanding of a substantive protection of "the constitutional guarantees of life and liberty," that it could extend to a death-sentenced citizen and its acknowledgment that it "simply cannot allow [such a citizen's] sentence to be carried out without allowing him to exercise his right to post-conviction review." *Id.* at ¶110 (citing *Hurst v. Cook*, 777 P.2d 1029, 1035 (Utah 1989)). Such review is meaningful only if the citizen is fully entitled to effective assistance of counsel. It also seems to set up unequal protection of the law based upon the luck of the draw regarding court appointed attorneys.

The fact that the state legislature, or, in this case, one state representative, may have been motivated to enact Section 202 to "opt in" to certain procedural benefits in federal habeas cases does not trump this Court's constitutional authority to oversee procedural protections of capital-sentenced petitioners in its state post-conviction proceedings. *See, e.g., State ex rel. Napolitano v. Brown*, 982 P.2d 815, 817-19 (Ariz. 1999) (striking statutory time limits, enacted to allow Arizona to utilize opt in provisions of the AEDPA, as unconstitutionally violating state separation of powers).

Furthermore, whatever the motivation of one House representative may have been in enacting Section 202, the result is that Section 202 unambiguously grants a death-sentenced petitioner the right to counsel in post-conviction proceedings. Only when a statute is ambiguous will a court look to other interpretive tools such as legislative history. *State v. Holm*, 2006 UT 31, ¶16, 137 P.3d 726 (citing *Adams v. Swensen*, 2005 UT 8, ¶ 8, 108 P.3d 725). The right was unambiguously created and therefore the Court need not look to what motivated the legislature to create that right. Because that right was created by the legislature, this Court's use of its

constitutional authority to recognize the inherent statutory right to effective counsel was appropriate. Consideration of legislative (or one legislator's) motivation to attack this Court's decision is not.

Next, rather than attempting to establish that "more good than harm will come by departing from precedent," *Menzies* (1994), 889 P.2d at 399, the State merely complains that it is being "bogged down" by the pleadings in four capital cases in the four years since this Court issued its holding in *Menzies*. This Court has previously addressed and refuted the State's complaint. In *Menzies*, the Court explained that, "Utah's post-conviction legislation and associated rules contain appropriate limitations to assist courts in streamlining post-conviction review in death penalty cases. . . . We are confident that the judiciary, relying on this framework as well as the common law, can properly advance post-conviction death penalty litigation while ensuring that petitioners receive the protections to which they are legally entitled." *Menzies*, 2006 UT 81, at ¶ 84. In this case, the State's examples of being "bogged down" are merely evidence of Utah's judiciary system at work, analyzing this Court decision and carefully crafting limitations to this Court's holding.

As this Court explained in *Menzies*, protections are inherent in Rule 60 rule through which Michael seeks relief as set forth in this Court's *Menzies* decision. *Id.* at ¶¶ 71-78. The United States Supreme Court has also recognized these same procedural protections against the State's concerns of "endless litigation." *Gonzalez v. Crosby*, 545 U.S. 524, 534-35 (2005) (internal quotations and citations omitted). Thus, as this Court first explained in *Menzies*, the State's concerns of "endless litigation" are answered by the procedural protections of the very rule that Michael seeks to invoke.

The State fails to carry its burden to show either that this Court's holding in *Menzies* was

originally erroneous or that more good than harm will come from departing from its recent establishment of a much-needed remedy to what this Court has recognized as a systemic problem in its capital post-conviction review. This Court recently expressed its concern regarding the lack of competent capital defense counsel, and the resultant effect on this Court's ability to feel satisfied in its review of capital convictions, when it stated that, "[o]ur judicial oath to support, protect, and defend the Constitution must, of necessity, include the requirement that we take measures within our authority and responsibility to see that the mandates of the Constitution are observed." *Archuleta v. Galetka*, 2008 UT 76, ¶ 18, 197 P.3d 650. At present, the right and remedy established by this Court in *Menzies* is one of the few measures within the judiciary's authority to do so. Contrary to the State's argument, more harm than good will be had if this Court overrules its important, well-analyzed precedent.

XIII. Federal Exhaustion Rules Weigh In Favor Of This Court's Consideration Of Archuleta's Claims Now, Rather Than Waiting For Piecemeal Litigation Hereafter

This Court should allow consideration of Archuleta's claims, overlooked in his Second Amended Petition due to the ineffectiveness of Brass, to prevent piece-meal litigation of those claims in the future and further judicial efficiency and economy. The State's argument that this Court need not worry about future litigation because the federal court will simply consider the unexhausted claims as "procedurally barred" under the federal statute, does not take into account the track record of capital federal habeas cases in the District of Utah, the uncertainty of Utah's post-conviction law and how it will be analyzed under the federal exhaustion law, or recent activity in the United States Supreme Court which indicates the high court is possibly reconsidering its position on the right to effective representation in state post-conviction

proceedings.¹⁸

The Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254, is the federal statute which controls and forms the basic structure of federal habeas jurisdiction. The statute is “designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.” See, *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011). Pursuant to this statutory authority, a federal habeas petitioner challenging a state conviction and/or sentence must, with certain exception, first attempt to present his claim to the state’s highest court. 28 U.S.C. §§ 2254(b) & (c). If the state court rejects the claim on procedural grounds, the claim is barred in federal court unless one of the exceptions to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84 (1977), applies. If the state court denies a claim on the merits, the federal court will consider the claim pursuant to Section 2254(d), owing the appropriate deference to the state supreme court’s ruling. See *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court held that a federal district court should stay a “mixed” federal habeas petition, that is one containing both exhausted and unexhausted claims, and allow the petitioner the opportunity to exhaust his claims in the state court. See *id.* at 271-72, 278.

The State informs the Court that it need not worry about future piece-meal litigation because the federal district court will not stay Archuleta’s future federal habeas proceedings and allow him to return to state court to exhaust these claims. The State should be asked if it can give a single example of a Utah capital case in which the petitioner, in federal court, was denied

¹⁸ Additionally, it should be noted that although the State cites numerous older cases in which the federal court refused to recognize a right to effective state post-conviction representation to excuse a procedural default, the United State’s Supreme Court has recently granted certiorari in a case on the question of, *inter alia*, whether such ineffective representation could establish “cause” to excuse the procedural default. *Maples v. Thomas*, ___ S.Ct. ___, 2011 WL 940889 (U.S. Mar. 21, 2011). More tellingly, the United States Supreme Court has recently taken the extraordinary measure of staying the executions of two inmates to reconsider the issue of whether a death row inmate has the right to competent and effective representation in state post-conviction proceedings. *Foster v. Texas*, ___ S.Ct. ___, 2011 WL 1238627 (U.S. Apr. 5, 2011); *Cook v. Arizona*, ___ S.Ct. ___, 2011 WL 1234018 (Apr. 4, 2011).

a request to do so. *See, e.g. Kell v. Turley*, Case No. 2:07-CV-359-CW-SA (D. Utah Oct. 8, 2009) (Doc. No. 51) (granting petitioner's motion to stay federal habeas proceeding); *Taylor v. Turley*, Case No. 2:07-CV-194-TC (D. Utah Feb. 14, 2008) (Doc. No. 45) (same); *see also id.* (Doc. No. 69) (Jan. 13, 2010) (denying Respondent's motion to reconsider order staying federal proceedings); *Carter v. Friel*, Case No. 2:02-CV-326-TS (D. Utah Aug. 2, 2007) (Doc. No. 201) (staying federal proceedings); *Menzies v. Friel*, Case. No. 03-CV-92 JC/KBM, 2005 WL 2138653 (D. Utah Sept. 1, 2005) (same). As a further example of the delay caused by piecemeal litigation, the federal district court held Ronnie Lee Gardner's federal case in abeyance and ordered Gardner to return to state court. *Gardner v. Galetka*, 94 P.3d 263 (Utah 2004). This track record contradicts the State's overly-optimistic assumption that the federal district court in Michael's case will refuse to stay and abate his case and not send him back to state court to exhaust all of his claims.

Finally, as set forth *supra* at footnote 18, recent activity by the United States Supreme Court indicates the high court may be reconsidering its position on the right to effective representation in state post-conviction proceedings and how ineffective representation interplays with federal exhaustion rules. Thus, there is a high probability that if this Court refuses to consider the merits of these claims now, by way of Michael's Rule 60(b) motion, the claims will be presented again at a future date, frustrating the purposes of both Utah's and the federal post-conviction statute's preference for streamlined litigation.

If, however, the State is correct that the federal district court will refuse to consider the merits of Michael's unexhausted claims, by labeling these claims procedurally defaulted, then an even worse travesty will be approved by this Court. Michael's unexplored claims will never be given consideration by any court, state or federal, due to the fact that the Utah state courts

appointed him ineffective counsel. These claims test the State's case in aggravation against Michael and directly question his level of culpability in the crime and his mental issues. This Court should not use federal procedural default rules as a way to simply sweep these important issues and questions under the proverbial rug in an effort to expedite his death. Michael has presented this Court with an avenue and the ability to consider his claims now, in a way that promotes judicial economy and streamlined litigation. For this reason, this Court should reverse the district court's denial of Michael's motion with instructions to grant the Rule 60(b) motion and consider his claims on the merits after appropriate investigation, discovery and funding.

XIV. State's Motion For Sanctions Should Be Emphatically Denied

The Appellant's attorney was appointed in August of 2008 regarding a case that was approximately 20 years old and at the time was before the Utah Supreme Court for its third time with countless prior counsel. That is only half the story—Lance Wood's case being the other half. Since this appointment, the undersigned has fully reviewed a voluminous record that only a 20-year death penalty case could produce—and then there was Lance Wood's case. He has fully briefed two different cases before this Court and fully pursued a Rule 60(b) Motion at the same time in the district court. There can be no question that the undersigned has worked extensively on this case and made every effort to comply with the ABA Guidelines. He reviewed every box and file in the prosecutor's office regarding both Lance Wood's and Michael Archuleta's case, reviewed four different extensive court files, reviewed every transcript for both defendants and reviewed all of the boxes which could be obtained from the countless prior counsel.

Furthermore, he has sought, found and obtained testimony from various witnesses. This Court cannot lose sight of the fact that the Appellant has not written one letter to the Court expressing concern that his case is being properly investigated and pursued nor has he expressed concern

that he is being consulted regarding strategic decisions. The review of Michael Archuleta's records and files as well as Lance Wood's records and files has been an overwhelming endeavor.

Counsel's practice is of a nature that mandates that he cannot devote his entire attention to this case for the following reasons:

- a. He is a sole practitioner;
- b. He must continue to engage with different clients so that his income flow is not disrupted when there is no work to perform on the current case;
- c. He has financial obligations that mandate that there is no disruption in the income stream;
- d. To meet his financial obligations, the undersigned must take cases in several different jurisdictions with different judges;
- e. The work on this case was compounded by the fact that he had to meet the needs of his other clients and to maintain the income stream necessary to meet his financial and family obligations.

In this matter previously on appeal, the Court expressed concern about the availability of competent counsel willing and able to engage their services in cases such as this. If the Court sets such strenuous and unyielding guidelines, and allows the State to constantly threaten monetary sanctions, then the result is certain: competent counsel will not take these cases. This Court needs to send a resounding message to the State's attorney that it will not tolerate such petty threats of sanctions regarding such a petty matter. The two-week request for an extension (believed to be before oral arguments were even set) that was not even fully used does not justify the time and efforts that State's Motion for Sanctions has taken to address. In fact, this Court has previously admonished Appellee's counsel for this very issue:

The voluminous record in this case is also extensive and includes a multitude of legal arguments as well as references to portions of the record relating to the entire twenty-year history of the case. Resolving a case of such as this is a time-intensive task. Yet the parties chose to add to that task by filing the two motions discussed above, each of which also involved extensive briefing. In fact, the briefing on these two motions alone far exceeds the quantity of briefing we frequently receive on entire cases. We do not consider such voluminous briefing on extraneous issues to be particularly good use of judicial resources. We therefore admonish both the parties in this case and parties appearing before us in the

future to constrain their litigiousness to issues both relevant and material to the matters before this Court.”
Menzies at 501.

It is hard to articulate what could be of such significant importance which justifies the wasting of judicial resources that has been expended requesting monetary sanctions because of a two-week request for additional time to finalize a Brief 78 pages in length that addresses a case that expands over 20 regarding a matter has such consequential impact. A man’s very life hangs in the balance.

It should go without saying that the undersigned fully understands that his work will be reviewed by this court as well as federal courts to determine whether the State has the right to put Michael to death. The weight and the pressure of potential consequences of this matter is compounded by the fact the State has and continues to threaten monetary sanctions on petty matters and regarding issues of which the State itself is also guilty. These threats must cease.

The Appellee complained and objected to a two-week continuance in the matter. Yet, the State has substantially delayed the resolution of this matter. The State has been obligated to respond twice regarding the Appellant’s Rule 60 Motion, once before this Court and once at the trial court. On both occasions, the Appellee requested an enlargement of time to respond. As before this Court, see record; as to the Trial Court see entry dated August 10, 2009. In addition, the Trial Court issued a decision regarding the Petition for Post-Conviction Relief on January 22, 2007. The Appellant timely filed an appeal; however, the appeal was delayed before this Court because the State pursued sanctions against counsel for the Appellant (Ed Brass). Both the Trial Court and this Court denied the State’s pursuit of sanctions. However, the State’s pursuit of sanctions was not without consequence regarding the resolution of the issues before this Court. There cannot be any dispute that the State’s pursuit of sanctions, delayed the undersigned’s

appointment until August 27, 2008, which amounts to over 19 months for the single purpose of accommodating the State's fruitless effort to pursue sanctions against Mr. Brass. A reasonable assumption that can be made from this delay is that the State believes that a delay in "justice" is excused for 19 months so that Appellee's counsel can pursue his personal agenda against Michael's attorney. This 19-month pursuit failed to resolve a single issue regarding Michael's post-conviction relief. Yet, the State represents to this Court that the undersigned's request for 14-day extension in January of 2011, is of such monumental consequence in the delay of this 20 plus-year case that this Court should impose monetary damages to vindicate justice for the victim's and the people's rights.

This Court has already admonished Appellee's counsel against pursuing motions regarding extraneous matters. Yet with this Court's admonishment, the State has pursued and continues to pursue one as petty as this request for monetary sanctions. The undersigned is of the opinion that this Court needs to send an even stronger message to Appellee's counsel that such motions are a waste of judicial resources.¹⁹

XV. Conclusion

For the reasons provided herein, this Court should set aside the Trial Court's Partial Summary Judgment denying the relief sought in the Second Amended Petition for post conviction relief based upon Brass' ineffective assistance of counsel and/or gross negligence as articulated herein 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 6th day of May, 2011.

¹⁹ In his request for a continuance, Appellee's counsel indicated that if the Court would grant his Motion, he felt that extension would be sanction enough against the undersigned. Even though he was granted essentially all the time that he requested, he still seeks monetary sanctions.



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 May 6, 2011

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

ATTORNEYS SERVED: via U.S. Mail

Thomas B. Brunker
Christopher Ballard
Mark L. Shurtleff
Utah Attorney General
Heber Wells Bldg.
160 E. 300 S., 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854



James K. Slavens