

THE CHILLING EFFECT THAT THE THREAT OF SANCTIONS CAN HAVE ON EFFECTIVE REPRESENTATION IN CAPITAL CASES

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*[L]awyers are most inclined to threaten sanctions when an adversary's position is "not frivolous but [rather, when it] is simultaneously dangerous and vulnerable."*¹

I. INTRODUCTION

The filing of Rule 11 sanctions motions against defense lawyers in capital cases has far-reaching and enduring consequences.² Such

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1. Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues In Death Penalty Cases*, 31 *HOFSTRA L. REV.* 1167, 1170 (2003) (alteration in original) (quoting Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 *F.R.D.* 309, 313 (1990)).

2. Rule 11 of the Federal Rules of Civil Procedure sets forth the procedure and circumstances under which lawyers may be sanctioned for improper conduct. The Rule first requires that all pleadings filed with the court "be signed by at least one attorney of record." *FED. R. CIV. P.* 11(a). Subsection (b) of the Rule sets forth criteria defining wrongdoing:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

A motion for sanctions is a separate action from other pleadings and must "describe the specific conduct alleged to violate subdivision (b)." *FED. R. CIV. P.* 11(c)(1)(A). The motion must be served on the party against whom wrongdoing is alleged. *Id.* The opposing party then has a twenty-one day

motions can be used for harassment, to chill vigorous defense representation, or to dissuade defense counsel from raising and preserving appropriate issues. That tool, however, should never be employed to gain an advantage in litigation, to influence the outcome of the case, or to dissuade opposing counsel from aggressively asserting their claims.

Recently in Utah, the Attorney General's Office filed Rule 11 sanction motions against post-conviction capital attorneys in two cases.³ The Attorney General's complaints target lawyers who have provided the kind of representation envisioned by the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* ("2003 ABA Guidelines").⁴ The sanctions motion condemns the lawyers for raising post-conviction claims that had previously been rejected by courts,⁵ for failing to adequately brief sub-

cure period to respond to the allegations before the moving party can formally file the motion with the court. *Id.* "If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." *Id.*

A court may also initiate sanctions proceedings against an attorney, law firm, or party by entering "an order describing the specific conduct that appears to violate subdivision (b)." FED. R. CIV. P. 11(c)(1)(B). Once the court finds a violation of subsection (b), sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. CIV. P. 11(c)(2). Moreover, a court may impose additional sanctions to deter the objectionable conduct:

Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Id. Monetary sanctions may not be awarded against a represented party for a violation of subsection (b)(2) (arguments for extensions, modifications, or reversal of existing law) or when initiated by the court, if the party voluntarily dismisses the claim before the filing of an order to show cause. FED. R. CIV. P. 11(c)(2)(A) to (B). Finally, Rule 11 sanctions motions are inapplicable to "disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." FED. R. CIV. P. 11(d).

3. Utah has nine people on death row. Ben Winslow, *Lawmakers Review Lethal Injection*, DESERET MORNING NEWS, Apr. 19, 2007, at B04; Death Penalty Information Center, <http://www.deathpenaltyinfo.org/state/> (last visited Jan. 29, 2008). The Utah Attorney General's Office has filed Rule 11 sanctions motions against lawyers representing two of nine: Michael Anthony Archuleta and Taberone Honie. See *infra* note 28 and accompanying text.

4. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter GUIDELINES].

5. This claim is grounded in the notion that arguments made in the post-conviction proceedings have been previously rejected by the courts. The state reasons that raising such arguments, when the appellate courts continually reject them, is the equivalent of unethical and therefore sanctionable conduct. *But see id.* at Guideline 10.15.1, commentary ("'Winnowing' issues in a capital appeal can have fatal consequences. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if the case is lost, counsel should not let any possible ground for relief

claims contained in post-conviction petitions, for arguing for the application of a post-conviction rule of procedure that would allow the court to deny summary judgment, and for not following proper *Bluebook* form in presenting a citation.⁶ As will be discussed below, these claims, on their face, do appear to be the type of activity for which Rule 11 sanctions apply.

This Article focuses on the Rule 11 motion filed in the case of Michael Anthony Archuleta, a Utah death row inmate whose case is presently in state post-conviction review. It will first discuss the difficulty of post-conviction work and the effort necessary by volunteer lawyers who undertake this kind of representation. It will then discuss Archuleta's case, and the extraordinary efforts made by his lawyers in his defense and how the Rule 11 sanctions motions were improperly used to steer the course of the litigation. It will conclude with an overview of the purpose of Rule 11 sanctions motions, how they have been historically employed, and why in this instance, and in similar instances, they are improperly utilized.

II. THE PITFALLS OF VOLUNTEER LAWYERS REPRESENTING DEATH ROW INMATES

In the early morning hours of January 17, 1977, Gary Gilmore was executed by a firing squad in the old cannery at the Utah State Prison.⁷ That sentence was carried out just three months after his conviction and ended a moratorium on executions in this country. Unlike most death cases today, there was no post-conviction review of Gilmore's case, and very limited appellate review. Gilmore's execution is symbolic because it is the first execution in the post-*Furman/Gregg* era.⁸ Since that time, federal and state post-conviction review has become very important in nearly every death penalty case.⁹

go unexplored or unexploited.”).

6. See *infra* note 29-31 and accompanying text.

7. See NORMAN MAILER, *THE EXECUTIONER'S SONG* (1979). Mr. Mailer's book about Gary Gilmore, his crimes, and personal history was a bestseller. *Best Sellers*, N.Y. TIMES, Oct. 28, 1979, § 7 (Book Review), at 52.

8. In 1972, the United States Supreme Court held that existing capital punishment schemes violated the Eighth Amendment. See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972). The Court was troubled by how most states imposed the death sentence, which allowed the jury to both consider guilt/innocence and impose punishment as part of the same deliberative process. Four years later, the Court found that modifications in guilt/penalty phase procedures were sufficient to uphold the constitutionality of capital punishment. See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976). Gilmore was the first person executed in the post-*Gregg* era. Lawrence O'Donnell Jr., *When the Police Kill*, N.Y. TIMES, Nov. 26, 1979, at A21.

9. See generally Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*,

Indeed, from 1976 to 1996, sixty-eight percent of all death sentences in this country were reversed either on direct appeal or through the state or federal post-conviction review process.¹⁰ Since the 1996 passage of the Anti-Terrorism and Effective Death Penalty Act, state post-conviction proceedings have assumed added importance because of procedural limits to federal court habeas review.¹¹

The demands of state post-conviction representation are very demanding and onerous because of the incredible complexity and difficulty of the work.¹² This work “requires enormous amounts of time, energy and knowledge.”¹³

4 OHIO ST. J. CRIM. L. 183, 184 (2006) (noting that because state proceedings are usually authoritative in their findings of fact and law in federal habeas petitions, competent counsel is especially important to prevent the return of the prisoner to state courts for an additional round of litigation). Four Justices of the Supreme Court would have found that there is no federal constitutional right to appointment of counsel for indigent death row inmates seeking state post-conviction relief. *Murray v. Giarratano*, 492 U.S. 1, 11-13 (1989) (plurality opinion). Justice Kennedy, who concurred, noted that the Virginia scheme in question allowed access to post-conviction counsel for all death row inmates, and therefore the scheme passed constitutional muster. *Id.* at 14-15 (Kennedy, J., concurring). Interestingly, Justice O’Connor wrote a separate concurrence and joined both the plurality opinion and Justice Kennedy’s concurring opinion. *Id.* at 13 (O’Connor, J., concurring). As a practical matter, however, nearly every state that imposes the death sentence has a mechanism for appointment of counsel in state post-conviction proceedings. *See Freedman, supra*, at 186.

10. *Freedman, supra* note 9, at 184; *see* JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995*, at 4-5 (2000).

11. *Freedman, supra* note 9, at 184 (“Because federal habeas corpus courts were limited in their review of the factual and legal determinations of the state courts, those courts’ final pronouncements on questions of both guilt and sentence routinely became authoritative.”) (footnote omitted).

12. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 *BUFF. L. REV.* 329, 357-58 (1995).

Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.

Id. (footnote omitted).

13. GUIDELINES, *supra* note 4, at Guideline 10.15.1, commentary. The 2003 ABA Guidelines describe the demanding nature of post-conviction representation:

Counsel must be prepared to thoroughly reinvestigate the entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present.

Like trial counsel, counsel handling state collateral proceedings must undertake a

There are strict time limits for filing pleadings, complex procedural rules, and little, if any, pay for lawyers to do the work.¹⁴ Moreover, many states, like Utah, require attorneys to meet minimal requirements, including prior experience in representing homicide defendants and yearly continuing legal education.¹⁵ The 2003 ABA Guidelines likewise set forth minimal qualifications and standards for defense lawyers in capital cases.¹⁶ The lack of reasonable pay and difficulty of the cases has dissuaded many qualified lawyers from accepting capital case appointments.¹⁷

III. MICHAEL ARCHULETA'S CASE

Michael Archuleta is a death row inmate in Utah. Like many people on death row in the United States, Michael's formative years were marked by repeated physical, sexual, and emotional abuse. When adopted in the Archuleta home at the age of five, his adoptive mother noticed "scars on his bottom in a symmetrical pattern of lines crossing other lines at right angles forming a grid. He also had marks on his

thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decision maker at trial made a fully informed resolution of the issues of both guilt and punishment.

Id. at Guideline 1.1, commentary.

14. The 2003 ABA Guidelines note the "notoriously inadequate" compensation for lawyers representing death row inmates. GUIDELINES, *supra* note 4, at Guideline 9.1, commentary; *see* *McFarland v. Scott*, 512 U.S. 1256, 1257-58 (1994) (Blackmun, J., dissenting from denial of certiorari) (discussing how the compensation for attorneys appointed to represent death row inmates is often "perversely low"); Vick, *supra* note 12, at 357-58 (describing the various pressures on attorneys who are representing defendants facing execution).

15. Rule 8 of the Utah Rules of Criminal Procedure sets forth the minimal standards for attorneys who represent capital defendants. For trial level appointments, an attorney must have tried a certain number of felony cases to verdict, must take a requisite number of continuing legal education hours focusing on capital cases, and must be a lawyer for at least five years. The appointing court can also consider whether the attorneys have prior capital experience, whether they have sufficient time to do the case, and the "diligence, competency and ability of the attorneys being considered." UTAH R. CRIM. P. 8. In 1998, the Rule was amended to add qualifications for post-conviction counsel which include continuing legal education, prior experience in post-conviction litigation, a minimum of five years experience in the practice of law, and some trial experience. UTAH R. CRIM. P. 8(e).

16. *See* GUIDELINES, *supra* note 4, at Guideline 5.1.

17. In Utah post-conviction cases, the courts are having difficulty finding qualified lawyers willing to accept appointments. *See* Sara Israelsen, *Attorney Argues Incompetence*, DESERET MORNING NEWS, Oct. 3, 2007, at B01; Pamela Manson, *When Justice Grinds to a Halt*, SALT LAKE TRIB., Oct. 14, 2007, at A1. The reasons offered include the difficulty and complexity of the work, lack of adequate fees and funding, and inadequate training for court-appointed lawyers. Georgia and several other death penalty states have problems similar to Utah's. *See* Brenda Goodman, *Official Quits in Georgia Public Defender Budget Dispute*, N.Y. TIMES, Sept. 7, 2007, at A18.

hands and arms that looked like cigarette burns.”¹⁸ When he moved into the Archuleta home, Michael was terrified of hot or warm bath water, often hoarded food, and was afraid of doors being closed around him.¹⁹ Michael suffered from the classic symptoms of post-traumatic stress disorder along with other mental disorders.

For the first time, during state post-conviction proceedings, Michael’s attorneys hired a forensic psychologist who conducted a thorough investigation into Michael’s background and history as a means of completing a mitigation work-up.²⁰ Michael’s problems could be traced to a history of family dysfunction. His birth mother was the oldest of thirteen children in a family that “was well known to both law enforcement and social service agencies.”²¹

Ruth Sandoval [Michael’s mother] at the age of eighteen [when Michael was two] gives the appearance of a hardened, thirty-year-old street walker. The Court is familiar with practically all of her associates as these girls who have also been at the Industrial School and most of whom have been deprived of their children . . . Miss Sandoval’s recent police record includes an arrest . . . for being a disorderly person, . . . for public intoxication and destruction of property[, and] . . . for drunk foul and abusive language.

As early as 1962 [the year of Michael’s birth], Ruth was considered a hopeless case. Since then she has gone on to become a known prostitute, alcoholic, and probably narcotic’s [sic] addict. Ruth is unable to read or write and expresses no interest in improving herself; and, in fact, is not able to acknowledge anything faulty in her behavior.²²

None of this mitigation information was discovered or presented at

18. Affidavit of Stella Archuleta at 1-2, Archuleta v. Galetka, Case No. 94-0401006-HC (Utah Dist. Ct. June 12, 2002) (on file with author).

19. *Id.* at 2.

20. As in many death penalty cases, Archuleta’s trial attorney, who operated with limited funding, did not present an accurate or complete portrayal of the mitigating evidence that existed: “The defense provided neither expert testimony nor argument to explain the concept of mitigation, the continuum of moral culpability, or the choice shaping effects of multiple adverse developmental factors.” Affidavit of Mark D. Cunningham, Ph.D. at 6, Archuleta v. Galetka, Case No. 94-0401006-HC (Utah Dist. Ct. June 13, 2002) (on file with author).

21. *Id.* at 7.

22. *Id.* at 9-10. The type of mitigation evidence discovered in the post-conviction investigation of Archuleta’s case is the very type of evidence that resonates most strongly with jurors in imposing a sentence less than death. *See* Wiggins v. Smith, 539 U.S. 510, 516-38 (2003) (post-conviction investigation of the accused revealed evidence of a nightmarish childhood, borderline mental retardation, and good conduct in prison, which resulted in reversal of death sentence); Williams v. Taylor, 529 U.S. 362, 395-99 (2000) (failure to discover and present evidence of disadvantaged background, borderline mental retardation, abuse at hands of father, and failure to interview family members is ineffective assistance of counsel).

Michael's trial and he was sentenced to death. The Utah Supreme Court affirmed the conviction.²³ Three Utah lawyers were eventually appointed to represent Michael in state post-conviction proceedings.²⁴ The pro-bono appointment occurred after his initial post-conviction lawyers were discharged. Despite limited resources and no compensation, the trio filed a very detailed and expansive petition on Michael's behalf, raising forty-two claims to his capital murder conviction and death sentence.²⁵ The most important claims were grounded in ineffective assistance of counsel assertions dealing primarily with failure to investigate and present important mitigation evidence at the penalty phase.

Assistant State Attorney General Thomas Bruner represented the State of Utah in all death penalty post-conviction proceedings in this case. Bruner filed a motion and supporting memorandum for summary judgment on all the claims raised in Archuleta's petition.²⁶ Archuleta, through his volunteer lawyers, filed a response to the summary judgment motion which included affidavits and other attachments primarily addressing penalty phase arguments in the context of failing to discover and present important mitigation evidence.²⁷

Soon after Archuleta's response to summary judgment was filed, the Assistant Attorney General filed a sanctions motion pursuant to Rule 11 of the Utah Rules of Civil Procedure against the three lawyers appointed to represent Archuleta.²⁸ The state alleged three bases upon which sanctions should be granted against Archuleta's lawyers:

1. The attorneys failed to brief several claims raised in the

23. *State v. Archuleta*, 850 P.2d 1232 (Utah 1993), *cert. denied*, 510 U.S. 979 (1993); Affidavit of Mark D. Cunningham, *supra* note 20, at 6.

24. The three lawyers were Edward K. Brass, L. Clark Donaldson, and McCaye Christianson.

25. Second Amended Petition for a Writ of Habeas Corpus and/or Post-Conviction Relief, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. June 14, 2002) (on file with author).

26. Memorandum of Law in Support for Summary Judgment, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. 2002) (on file with author).

27. Response to Motion for Summary Judgment, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. 2002) (on file with author).

28. Amended Motion for Sanctions Pursuant to UTAH R. CIV. P. 11, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. Apr. 12, 2004) (on file with author). The State asked that the volunteer lawyers pay sanctions in the amount of several thousand dollars to the state. Memorandum in Support of Motion for Sanctions Pursuant to UTAH R. CIV. P. 11, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. Apr. 12, 2004) (on file with author). The State initially asked for \$2574 in attorneys' fees, and "an additional sanction sufficient to deter others from parroting failed arguments and presenting numerous meritless claims in order to delay the already lengthy review process for presumptively valid capital murder convictions and death sentences." *Id.* at 13-14. The State has since withdrawn its request for monetary sanctions and now merely wants the court to "impose an appropriate sanction to discourage future abuses by these attorneys and attorneys similarly situated." Amended Motion for Sanctions, *supra*, at 3.

second amended petition and therefore such claims lacked merit;²⁹

2. The attorneys cited a civil rule of procedure that was adopted after the initiation of his case to argue that the court should not summarily dismiss the post-conviction petition;³⁰ and
3. In arguing that the Utah Supreme Court should “consider anew” the constitutionality of Utah’s death penalty statute, they merely cited to an opinion in an earlier case using the judge’s name and neglected to put the word “dissent” in parenthesis.³¹

IV. DUTIES OF COUNSEL IN A DEATH PENALTY CASE

Most states now require lawyers, who undertake the representation

29. In the several hundred pages of pleadings and attachments filed on Archuleta’s behalf, the attorneys conceded that because of time and resource constraints, they focused on what they viewed as the more important claims. Any neglect in fully briefing the identified claims was due to a lack of “time and money.” Answer to Respondent’s Motion for Sanctions Pursuant to UTAH R. CIV. P. 11 at 20, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. Apr. 27, 2004) (on file with author).

30. Archuleta’s original petition was filed in 1994. Second Amended Petition, *supra* note 25, at 2. The second amended petition, upon which the Rule 11 sanctions motion is based, was filed in June 2002. *Id.* at 1. In the interim period, the Utah Legislature passed the Utah Post-Conviction Remedies Act (“UPCRA”). UTAH CODE ANN. §§ 78-35a-101 to 202 (2002). Concurrent with the passage of the UPCRA, the Utah Supreme Court adopted changes to the rules of civil procedure governing death penalty post-conviction cases. *See* UTAH R. CIV. P. 65C(g)(4). Pursuant to the later amendment, Archuleta’s attorneys argued the court should not “summarily dismiss[] post-conviction petitions in capital cases.” Memorandum of Law in Opposition to Summary Judgment at 7, *Archuleta v. Galetka*, Case No. 94-0401006-HC (Utah Dist. Ct. Oct. 20, 2003) (on file with author). The State claimed it was sanctionable to argue that a rule adopted after the filing of the initial petition was applicable in this case, and that even if applicable, it did not apply to summary judgment proceedings. Memorandum in Support of Motion for Sanctions, *supra* note 28, at 9-10.

31. The objectionable argument appeared in Archuleta’s response to the state’s motion for summary judgment. In that argument, Archuleta’s attorneys asserted that the Utah Capital Murder Statute failed to “sufficiently narrow the class of death eligible murders and distinguish them with reasonable bases from non-capital murders.” Memorandum of Law in Opposition to Summary Judgment, *supra* note 30, at 81. They then explain that Utah Supreme Court Justice (now Chief Justice) Durham adopted such a position in *State v. Young*, 853 P.2d 327, 398-99 (Utah 1993) (Durham, J., concurring in part and dissenting in part). They explained the reasoning underlying Justice Durham’s decision and specifically asked the Utah Supreme Court to “consider anew whether the list of statutory aggravators truly serves the constitutional narrowing function essential to the evenhanded imposition of the death penalty.” Memorandum of Law in Opposition to Summary Judgment, *supra* note 30, at 82 (emphasis added). The State apparently asserted that asking the court to consider anew the constitutionality of the statute was misleading because Mr. Archuleta’s lawyers failed to put the term “dissent” in parenthesis. Memorandum in Support of Motion for Sanctions, *supra* note 28, at 5, 10-13. The state also claimed that the argument was unethical because it had been raised and rejected in other Utah post-conviction cases. *Id.* at 12.

of indigent defendants in death penalty cases, to perform the legal services in a professional and ethical manner under the guidelines and standards set forth in the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.³² In 1989, the American Bar Association adopted the first objective standards for performance of defense counsel in death penalty cases.³³ In the subsequent fourteen years, the ABA monitored attorney performance in death penalty cases and commissioned an effort by national experts to improve and amend the 1989 Guidelines. The result was the issuance in 2003 of comprehensive amendments to the Guidelines.³⁴ The Guidelines have long served as an appropriate guide in determining the reasonableness and effectiveness of an attorney's performance in death penalty cases.³⁵

Among guidelines for the defense through all stages of death penalty litigation, Guideline 10.15.1 of the 2003 ABA Guidelines set forth specific standards for post-conviction counsel.³⁶ Importantly, this Guideline requires post-conviction counsel to raise any and all arguably meritorious claims:

32. The United States Supreme Court has repeatedly referred to the ABA Guidelines in determining what is reasonable attorney performance. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Florida v. Nixon*, 543 U.S. 175, 191 (2004); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). Several federal circuit courts of appeals and federal district courts have likewise cited to the 2003 ABA Guidelines in evaluating attorney performance. *See, e.g.*, *Stevens v. McBride*, 489 F.3d 883, 895 (7th Cir. 2007); *Anderson v. Sirmons*, 476 F.3d 1131, 1145 (10th Cir. 2007); *Outten v. Kearney*, 464 F.3d 401, 419 (3d Cir. 2006); *Dickerson v. Bagley*, 453 F.3d 690, 697 (6th Cir. 2006); *Hedrick v. True*, 443 F.3d 342, 350 (4th Cir. 2006); *Summerlin v. Schriro*, 427 F.3d 623, 629-30 (9th Cir. 2005); *Smith v. Dretke*, 422 F.3d 269, 279 (5th Cir. 2005). Several state courts have also referred to the ABA Guidelines in evaluating standards of practice in death penalty cases. *See, e.g.*, *State v. Morris*, 160 P.3d 203, 219 n.10 (Ariz. 2007); *Henry v. State*, 937 So. 2d 563, 573 (Fla. 2006); *Torres v. State*, 120 P.3d 1184, 1189 (Okla. Crim. App. 2005); *Commonwealth v. Spatz*, 896 A.2d 1191, 1226 (Pa. 2006); *Commonwealth v. Hall*, 872 A.2d 1177, 1194 n.3 (Pa. 2005) (Saylor, J., dissenting); *Ard v. Catoe*, 642 S.E.2d 590, 597-98 (S.C. 2007); *Menzies v. Galetka*, 150 P.3d 480, 512-13 (Utah 2006).

33. *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter 1989 GUIDELINES].

34. *See* GUIDELINES, *supra* note 4. The 2003 ABA Guidelines were passed unanimously by the ABA House of Delegates without a single dissenting vote. *See* Eric M. Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 912 (2003).

35. *See Wiggins*, 539 U.S. at 522-23 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and noting that the Court has long referred to the ABA Guidelines as “guides to determining what is reasonable”); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing ABA standards for criminal justice in discussion of counsel's obligations). The *Hofstra Law Review* devoted the majority of its Summer 2003 issue to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. *See ‘The Guiding Hand of Counsel’: ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 903 (2003).

36. *See* GUIDELINES, *supra* note 4, at Guideline 10.15.1.

As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues. These include not only challenges to the conviction and sentence, but also issues which may arise subsequently. Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications. Counsel should also be aware that any change in the availability of post-conviction relief may itself provide an issue for further litigation. This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.³⁷

Indeed, the importance of raising any potential claim a client might have becomes clear since the failure to raise claims, even in the face of prior adverse rulings, might result in waiver, and ultimately, execution.³⁸

The 2003 ABA Guidelines, which require counsel to raise all arguably meritorious claims, have their genesis in the Rules of Professional Conduct.³⁹ Rule 3.1 generally allows an advocate to bring

37. *Id.* at Guideline 10.15.1, commentary; see *Mason v. Meyers*, 208 F.3d 414, 417 (3d Cir. 2000) (noting that “it is essential that habeas petitioners include in their first petition *all* potential claims for which they might desire to seek review and relief”); Freedman, *supra* note 9, at 184-85; see also, e.g., GUIDELINES, *supra* note 4, at Guideline 10.8. The commentary to Guideline 10.8 notes that:

One of the most fundamental duties of an attorney defending a capital case . . . is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial.

. . . .
 . . . [Indeed] counsel should be sure to litigate all of the possible legal and factual bases

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case. . . . [C]ounsel also has a duty to preserve issues calling for a change in existing precedent Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.

GUIDELINES, *supra* note 4, at Guideline 10.8, commentary (emphasis added) (quotation and footnotes omitted).

38. See, e.g., *Smith v. Murray*, 477 U.S. 527, 533-39 (1986) (counsel’s failure to raise Fifth Amendment claim resulted in waiver of claim and execution of client as the Supreme Court later overruled established precedent by lower courts). In *Smith v. Murray*, Smith’s counsel never raised the Fifth Amendment claim because the Virginia Supreme Court had always rejected it. *Id.* at 531. If Smith had simply raised that claim, even though established precedent was against him, he would have succeeded and not been executed. The failure to raise the claim, however, constituted waiver. See *id.* at 533.

39. The *Model Rules of Professional Conduct* provide:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer

all claims, so long as those claims are not frivolous.⁴⁰ Importantly, the comment to Rule 3.1 notes that “the law is not always clear and never is static,” and therefore, account must be taken of the law’s potential for change.⁴¹ As such, the filing of defenses “is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. . . . [Nor is such action frivolous] even though the lawyer believes that the client’s position ultimately will not prevail.”⁴²

V. FRIVOLOUS CLAIMS

A “frivolous” claim is generally thought to be one which is “obviously false on the face of the pleading.”⁴³ In the context of an *in forma pauperis* section 1983 action, the United States Supreme Court has defined a “frivolous claim as one based on an ‘indisputably meritless’ or ‘outlandish’ legal theory, or one whose ‘factual contentions are clearly baseless,’ such as a claim describing ‘fantastic or delusional scenarios.’”⁴⁴ Subsequent Supreme Court opinions define frivolous claims as those that “rise to the level of the irrational or wholly incredible.”⁴⁵

A frivolous or unethical claim or assertion is materially different

for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

MODEL RULES OF PROF’L CONDUCT R. 3.1 (2007).

The Utah Rule is almost identical to the ABA Model Rule. *Compare* UTAH RULES OF PROF’L CONDUCT R. 3.1 (2007) *with* MODEL RULES OF PROF’L CONDUCT R. 3.1 (2007). In fact, the *Utah Rules of Professional Conduct* are based on the *Model Rules of Professional Conduct*. *See* UTAH RULES OF PROF’L CONDUCT (2007) (compiler’s notes) (referencing the *Model Rules of Professional Conduct*).

40. The *Model Rules of Professional Conduct* also authorize a lawyer to “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer.” MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2007). Moreover, a lawyer should “take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” *Id.* “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” *Id.* This language is similarly found in UTAH RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (2007).

41. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (2007). Again, this language is similarly found in the UTAH RULES OF PROF’L CONDUCT R. 3.1 cmt. 1 (2007).

42. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2007); UTAH RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2007).

43. *See* Freedman, *supra* note 1, at 1171 (quoting D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 18 (1977)).

44. *Id.* (quoting *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989) (construing 28 U.S.C. § 1915(d) (1948)).

45. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *see* Freedman, *supra* note 1, at 1171-72.

than an unsuccessful one.⁴⁶ A lawyer in a capital post-conviction case has a duty to raise all “arguably meritorious issues.”⁴⁷ That includes claims filed in the petitions, arguments asserted in other pleadings, and arguments made during oral argument. The failure to do so “can have fatal consequences.”⁴⁸ An attorney in a death penalty case “must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.”⁴⁹

To be frivolous, a claim must be outlandish, fantastic, or delusional, or rise to the level of irrational or wholly incredible.⁵⁰ More often than not, practitioners in death penalty cases must file claims under strict deadlines and sometimes before full investigation into factual and legal claims can be completed.⁵¹ The *Archuleta* lawyers informed the court that time and resources were at a premium and additional money and discovery were essential to more fully develop the claims.

This claim is based upon the following facts, “and others to be developed after further investigation, discovery, exercise of the Court’s compulsory process and hearing, and is presented within the limited funds provided under the Utah Administrative Code.”⁵² It is hard to imagine how any of the claims filed on Archuleta’s behalf could not be justified by “an extension, modification or reversal of existing law.”⁵³

46. See *Denton*, 504 U.S. at 33.

47. GUIDELINES, *supra* note 4, at Guideline 10.15.1, commentary.

48. *Id.*

49. *Id.* at Guideline 10.8, commentary.

50. Many commentators have noted that it is nearly impossible to file a frivolous claim in a death penalty case. See, e.g., Freedman, *supra* note 1, at 1177-79 (describing the necessity of making seemingly “frivolous” arguments in death penalty cases); Julia E. Boaz, Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349, 357 (1985) (noting how “few capital appeals are legally frivolous”); see also GUIDELINES, *supra* note 4, at Guidelines 10.8, 10.15.1 (discussing necessity of raising any and all conceivable issues at all stages of a death penalty case).

51. See 1989 GUIDELINES, *supra* note 33, at Guideline 2.1, commentary.

Representing a death-sentenced client in postconviction proceedings is as demanding as—or, if that is possible, even more demanding than—the tasks faced by other capital counsel. Especially when a death warrant has been signed, counsel is subjected to demands virtually impossible to meet physically, economically, temporally and emotionally. Seeking to ward off imminent execution while continuing to challenge the validity of the client’s conviction and sentence [m]ay require filing pleadings almost simultaneously in several courts (often some distance apart).

Id.

The commentary to Rule 3.1 recognizes that “[t]he filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.” MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 2 (2007).

52. This statement is included in all the claims made in Archuleta’s Second Amended Petition for a Writ of Habeas Corpus and/or Post-Conviction Relief, *supra* note 25.

53. UTAH RULES OF PROF’L CONDUCT R. 3.1 (2007).

Moreover, if the 2003 ABA Guidelines set the base standards for attorney performance, then it is difficult to see how Archuleta's lawyers did not act in conformance with those standards.⁵⁴

A. Frivolous Legal Arguments

An argument for a particular interpretation of law is an appropriate way to proceed in a death penalty case.⁵⁵ Such arguments are commonplace, and indeed, frequently result in a beneficial change of law.⁵⁶ In the *Archuleta* case, the lawyers simply asked the court to interpret a rule change in a way beneficial to their client. That appears consistent with the type of advocacy contemplated by the 2003 ABA Guidelines.⁵⁷

The State of Utah attempts to elevate a disagreement with or advocacy for the application of a procedural statute into a basis for sanctions. If this were the law, litigation in virtually every case would come to a standstill because adversaries could seek sanctions based on the simple disagreement with the other party's statutory interpretation. Presumably, the winning party in the litigation would also be the winning party in the sanctions game. Fortunately, that interpretation of the Rules of Professional Conduct⁵⁸ and Rule 11 has been rejected.⁵⁹ Likewise, the 2003 ABA Guidelines also reject this view.⁶⁰

54. In her note in the *Yale Law Journal*, Julia Boaz describes how between 1976 and 1983, the federal courts of appeals ruled in favor of capital defendants 73.2% of the time. She uses this statistic to argue that a legally frivolous claim in a capital case is very rare. Boaz, *supra* note 50, at 357-59.

55. See generally GUIDELINES, *supra* note 4, at Guideline 10.8 (noting that counsel who decide to assert a particular legal claim should "tailor[] the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction").

56. An excellent example of this occurred in the case of *Atkins v. Virginia*, 536 U.S. 304 (2002), where the court reversed long-standing precedent in finding it unconstitutional to execute mentally retarded offenders. Atkins's lawyers continued to press the claim at all levels despite being confronted with contrary precedent. If they had dropped their claim, Atkins would have undoubtedly been executed. *Id.* at 309-10.

57. The spirit and intent of the 2003 ABA Guidelines suggest that practitioners be creative and aggressive in their representation of the capital client. See GUIDELINES, *supra* note 4, at Guideline 10.8, commentary ("Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case."); J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. MIAMI L. REV. 341, 347 (2005) (the *Model Rules of Professional Conduct* suggest that "counsel can aggressively represent the client's interests, even in the face of adverse authority, provided counsel has a good faith basis for going forward. . . . [C]ounsel must bear in mind that virtually all changes in case law result either from the impact of legislation or from the willingness of advocates to challenge existing doctrine.").

58. The *Model Rules of Professional Conduct* and the associated commentary recognize that attorneys are likely to raise or argue claims that will ultimately be unsuccessful. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2007) (noting that good faith arguments in support of a client's

B. Legal Arguments Concerning Constitutionality of a Statute

In the *Archuleta* litigation, the State viewed the inclusion of claims decided earlier or claims inconsistent with present law as unethical and sanctionable.⁶¹ In most post-conviction proceedings, there is an inevitable challenge to the constitutionality of a particular state's death penalty statute.⁶²

The form in which that challenge occurred in *Archuleta* was to ask the Utah Supreme Court to reconsider an argument concerning the constitutionality of Utah's death penalty statute.⁶³ Such an argument is consistent with the duties of post-conviction counsel and in line with valid arguments for a change in law. The United States Supreme Court's recent reversal of long-standing precedent in two death penalty cases illustrates this point.⁶⁴ Indeed, the Supreme Court is always reevaluating and correcting earlier precedents.⁶⁵

position are "not frivolous even though the lawyer believes that the client's position ultimately will not prevail"). Moreover, in criminal cases, the Model Rules recognize that advocates should be allowed to assert claims that "otherwise would be prohibited by [Rule 3.1]." *Id.* at cmt. 3.

59. Professor Monroe Freedman, in an article published in the *Hofstra Law Review*, described how amendments to Rule 11 adopted in 1993 have substantially reduced sanctions claims in civil cases. Freedman, *supra* note 1, at 1170. Professor Freedman posits that the amendments have likely reduced sanctions actions because the amendments made imposition of sanctions discretionary with the judge, provided that sanctions claims must be made in a separate motion, and added the safe harbor provision, giving the opposition twenty-one days to withdraw the arguably frivolous claim. *Id.* at 1170-71.

60. The 2003 ABA Guidelines recognize the necessity of raising all arguably "meritorious issues." GUIDELINES, *supra* note 4, at Guideline 10.15.1, commentary ("When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited.").

61. See Memorandum in Support of Motion for Sanctions, *supra* note 28, at 7-8.

62. The best example of the success of this argument is illustrated by *Furman v. Georgia*, 408 U.S. 238 (1972), in which the Supreme Court found most death penalty statutes to be unconstitutional. As recently as this past term, the Court reversed three death penalty cases from Texas after finding constitutional fault with that state's statutory sentencing scheme. See *Brewer v. Quarterman*, 127 S. Ct. 1706, 1714 (2007); *Smith v. Texas*, 127 S. Ct. 1686, 1698-99 (2007); *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 1675 (2007). For several years, the Texas lawyers continually lost in the lower courts, but nonetheless continued to raise the claim until finally succeeding in the Supreme Court. See *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006), *rev'd*, *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007); *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006), *rev'd*, *Smith v. Texas*, 127 S. Ct. 1686 (2007); *Cole v. Dretke*, 442 F.3d 494 (5th Cir. 2005), *rev'd*, *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007).

63. In their book, *Understanding Lawyers' Ethics*, professors Monroe Freedman and Abbe Smith articulately explain the necessity of raising claims previously rejected by courts. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 97-99 (3d ed. 2004). They cite to *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), which reversed the long-established rule preventing a consumer from receiving damages against a manufacturer for damages. Even though the same argument had been repeatedly rejected by courts, MacPherson nonetheless raised the argument with the aim of trying to convince the court to reach a different result.

64. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court reversed *Penry v. Lynaugh*,

Death penalty cases are particularly prone to reversal.⁶⁶ This is perhaps due to the changing public consensus regarding the death penalty. In both *Atkins v. Virginia*,⁶⁷ and in *Roper v. Simmons*,⁶⁸ the Court invalidated the death penalty against mentally retarded persons and juveniles. In both cases, the Court noted the national consensus against execution of persons in each class.⁶⁹ In each of these cases, the lower courts continually rejected petitioner's arguments.⁷⁰ Not discouraged, these parties continued to argue those claims which ultimately resulted in reversal by the United States Supreme Court.⁷¹

As such, if any court in this country were to adopt Utah's position, there could never be cases like *Atkins* or *Ring* since continual advocacy for a change in existing law would be unethical.

In *Archuleta*, the lawyers asked the court to "consider anew whether the list of statutory aggravators truly serves the constitutional narrowing function essential to the evenhanded imposition of the death

492 U.S. 302 (1989), and held that the Constitution bars the execution of mentally retarded offenders. Further, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court reversed its prior ruling in *Walton v. Arizona*, 497 U.S. 639 (1990), and found that a jury, not a judge, must ultimately decide the issue of life or death. "Depending on how one counts the cases, the Supreme Court has overruled its own decisions 200 to more than 300 times. On at least 16 occasions, this has happened within three years. At other times, the most venerable of precedents have fallen, including at least ten cases that were overruled after as many as 94 to 126 years." FREEDMAN & SMITH, *supra* note 63, at 97-98. If the Utah Supreme Court someday finds the death penalty statute unconstitutional, Archuleta would likely be denied relief if his lawyers did not raise this claim.

65. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 67 (2004); Sullivan, *supra* note 57, at 341-42 (2005) ("The Supreme Court's decision in *Crawford v. Washington* demonstrates that appellate courts are susceptible to the need to correct even their own errors, suggesting that appellate lawyers should not despair when confronted by adverse decisions that will, arguably, doom their arguments.") (footnote omitted). Something as simple as a change in the composition of a state or federal appellate court can result in reversal. See Sullivan, *supra* note 57, at 361. Professor Sullivan points to Chief Justice Rehnquist's analysis in *Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991), where he argued that the prior holding was the result of a narrow majority and that the holding had not withstood the test of time. Sullivan, *supra* note 57, at 362-63.

66. See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

67. 536 U.S. at 321.

68. 543 U.S. 551, 578-79 (2005).

69. *Id.* at 564 (noting the "evidence of national consensus against the death penalty for juveniles"); *Atkins*, 536 U.S. at 316 (noting evidence and studies have shown that mentally retarded offenders are "categorically less culpable than the average criminal").

70. *Roper*, 543 U.S. at 559; *Atkins*, 536 U.S. at 310.

71. See Freedman, *supra* note 1, at 1177-79 (discussing how claims that have previously been decided should always be raised in post-conviction proceedings given the high rate of reversals in such proceedings). Although Professor Freedman uses the term "frivolous" in describing arguments in death penalty cases, that term is in quotes. Professor Freedman explained that because of the serious consequences in a death penalty case, it is critical to raise "any and all conceivable errors," even those that "might otherwise be deemed . . . frivolous." *Id.* at 1178-80 (quotation omitted).

penalty.”⁷² This seems clearly within the type of ethical argument encouraged by the Rules of Professional Conduct.⁷³ This is the type of argument for which a good faith extension or reversal of existing law is merited.⁷⁴ In *Archuleta*, it seems the lawyers did exactly what the rules provide for; pointed out an opinion of one justice on the Utah State Supreme Court who agreed with their position; and asked the court to reconsider that position. Often times, a minority or dissenting opinion is the starting point for overruling precedent.⁷⁵

C. Ethical Guidelines Require Habeas Counsel to Preserve All Potential Claims

The fundamental problem with filing sanctions motions in death penalty cases is that it does not account for the necessity of raising every conceivable issue. A death penalty case is not like “run of the mill” civil litigation.⁷⁶ Death penalty litigation is unique, quasi-criminal, and has grave consequences if error occurs. Accordingly, it is the duty of counsel in death penalty cases to assert legal claims with the unique characteristics of the death penalty scheme in mind.⁷⁷

As noted above, ethical guidelines, including the 2003 ABA Guidelines, require that post-conviction counsel preserve all potential claims.⁷⁸ The Guidelines acknowledge that the investigation in death penalty cases, in all stages of the proceedings, never ends.⁷⁹ And, the

72. Memorandum of Law Opposing Summary Judgment, *supra* note 30, at 82.

73. See Sullivan, *supra* note 57, at 341-42 (noting that “appellate courts are susceptible to the need to correct even their own errors, suggesting that appellate lawyers should not despair when confronted by adverse decisions that will, arguably, doom their arguments”). In *Ring v. Arizona*, Justice Scalia, in an opinion concurring in reversing earlier precedent, stated, “I have acquired new wisdom . . . or, to put it more critically, have discarded old ignorance.” 536 U.S. 584, 611 (2002) (Scalia, J., concurring).

74. If *Archuleta*’s attorneys failed to raise this argument and Justice Durham’s “dissent” someday becomes the majority position, then it is likely *Archuleta* will be denied relief. See FREEDMAN & SMITH, *supra* note 63, at 103-04 (discussing how omitting seemingly weak claims can result in waiver and imposition of the death penalty).

75. See Sullivan, *supra* note 57, at 355 (“The history of appellate practice shows that dissents often evolve into majority positions and reliance on dissenting opinions to ask for overruling existing authority provides a reasonable, good faith starting point for the argument.”). Interestingly, if the Justice Durham dissent were the majority position, then *Archuleta* would have never been prosecuted for capital murder because the statute would be unconstitutional.

76. FREEDMAN & SMITH, *supra* note 63, at 102-04 (because death is different, counsel must “raise every issue at every level of the proceedings that might conceivably persuade even one judge in an appeals court or in the Supreme Court, in direct appeal or in a collateral attack on a conviction or sentence”).

77. See GUIDELINES, *supra* note 4, at Guideline 10.8.

78. See *id.* at Guidelines 10.8, 10.15.1.

79. See *id.* at Guideline 10.7 (noting that the obligation to conduct independent investigation into the guilt and penalty issues arises at every stage of death penalty litigation).

Utah Rules of Professional Conduct, like the ABA Model Rules, acknowledge that it is at times impossible to complete all factual investigation before filing certain pleadings. However, as long as there is a good faith belief that an issue may be supported, the rules of ethics are met.⁸⁰ Indeed, even Rule 11 does not go so far as to suggest that every fact must be known prior to the filing of a claim.⁸¹

VI. CONCLUSION

The filing of sanctions motions against lawyers representing death row inmates will undoubtedly chill vigorous advocacy.⁸² Already in Utah, attorneys have expressed reluctance to accept appointments in one state post-conviction case.⁸³ Although the Ninth Circuit Court of Appeals imposed sanctions against a lawyer in a criminal case, it nonetheless recognized the dangers that such a precedent sets:

[W]e are hesitant to exercise our power to sanction under Rule 38 against criminal defendants and their counsel. With respect to counsel, such reluctance, as evidenced by the absence of authority imposing sanctions against defense counsel, primarily stems from our concern that the threat of sanctions may chill a defense counsel's willingness to advance novel positions of first impression. Our constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims that could conceivably invalidate his client's conviction. Indeed, whether or not the prosecution's case is forced to survive the "crucible of meaningful adversarial testing" may often depend upon defense counsel's willingness and ability to press forward with a claim of first impression.⁸⁴

Rule 11 sanctions motions should be reserved for those cases where

80. See UTAH RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2007) (noting the filing of defenses "is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. . . . [Nor is such action] frivolous even though the lawyer believes that the client's position ultimately will not prevail").

81. See UTAH R. CIV. P. 11(b)(3) (allowing identification of issues that "are likely to have evidentiary support after . . . further investigation").

82. Fortunately, in the *Archuleta* case, the trial court found no violation of Rule 11. The court held an evidentiary hearing on January 26, 2007, where Professor Monroe Freedman testified on behalf of Archuleta's lawyers.

83. See *Menzies v. State*, No. 03-0106629 (Utah Dist. Ct.). At a hearing held on July 25, 2007, a representative from the Utah Court Administrator's Office addressed the court regarding his attempts to find qualified lawyers to accept an appointment to represent Menzies. The court administrator informed the court that lawyers cited two reasons for turning down the case: (1) A lack of resources for attorney fees and investigation; and (2) the prospect of being subject to Rule 11 sanctions.

84. *In re Becraft*, 885 F.2d 547, 550 (9th Cir. 1989) (footnote omitted).

the claims or assertions are “meritless,” “outlandish,” or “clearly baseless.” Challenges in death penalty litigation, whether at the trial level or in post-conviction, seldom, if ever, reach that level. Lawyers representing death row inmates face significant challenges, limited resources, and untold stress. Having to face and respond to a collateral attack in the form of Rule 11 sanctions undermines the reasonable functioning of the system. As noted by the Ninth Circuit Court of Appeals, “[o]ur constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims.”⁸⁵ The filing of Rule 11 sanctions motions in cases like Archuleta’s will inevitably have far-reaching consequences to other death row inmates in Utah and possibly elsewhere.⁸⁶ That, sadly, may impact the quality of advocacy and discourage qualified lawyers from accepting appointments in these already difficult cases.

85. *Id.*

86. Despite losing at the trial level in both cases, the Attorney General’s Office has appealed the Rule 11 ruling in the *Archuleta* case to the Utah Supreme Court.