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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

EUGENE McNAIR, Petitioner, vs. STATE OF UTAH, Respondent.	STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND OR SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF Case No. 100901725 Judge Vernice S. Trease

Respondent State of Utah, by and through its attorney, Erin Riley, Assistant Attorney General, hereby submits the following memorandum in support of its motion to dismiss petitioner McNair's second or supplemental petition for post-conviction relief.

PROCEDURAL HISTORY

Petitioner was originally charged with one count of Rape, a 1st degree felony (addendum A). After a preliminary hearing, an amended information was filed which added

one count of Forcible Sodomy, a first degree felony, and one count of Forcible sexual abuse, a second degree felony (addendum B). On November 3, 2006, petitioner pled guilty to one count of Rape, a first degree felony (addendum C). The other two charges were dismissed. *Id.* On January 5, 2007, petitioner was sentenced to an indeterminate term of five years to life in the Utah State Prison (addendum D).

Petitioner did not file any motion to withdraw his plea and did not file any direct appeal. On February 2, 2010, more than three years after his conviction and sentence, petitioner filed a pro se petition for post-conviction relief. The State responded by filing a motion to dismiss. On February 2, 2011, counsel for petitioner filed a second or supplemental petition and memorandum in support of the petition. The State hereby submits this memorandum in support of its motion to dismiss the second or supplemental petition.

FACTS[1]

On May 14, 2006, the victim, H. W., went down the hall to her friend Cassie's apartment to make brownies for her mom for Mother's Day. Cassie was not in the apartment

[1] Because petitioner pled guilty, there are no trial transcripts. Although there was a preliminary hearing, and that hearing was transcribed (addendum E), when respondent received the court file, only a copy of the front page of the transcript was included. The entire transcript was not included. The court clerk has advised counsel for respondent that they cannot find the preliminary hearing transcript. The facts are therefore taken from the probable cause statement (addendum A), and from the presentence report. A copy of the presentence report is included as part of the court file in the underlying criminal case (no. 061903216).

while the victim was making the brownies. While the victim was at Cassie's apartment, petitioner McNair, who was dating Cassie, stopped by and asked if he could get his cigarettes. Petitioner was forty three years old. Petitioner asked the 16 year old victim to sit on the bed with him. He then started rubbing her leg. The victim felt uncomfortable and told him to stop. He did stop, and left the apartment.

But Petitioner returned a short time later, apparently having left the apartment door unlocked. He came inside and began kissing the victim on the neck. The victim told him to stop, but he continued. He pushed the victim down on the bed and held her down. The victim attempted to wiggle and break free, but was unsuccessful. Petitioner penetrated the victim's vagina with two fingers and then inserted his penis into her vagina and forcibly had sex with her.

After Petitioner left, the victim called her mother and told her that Petitioner had raped her. She was difficult to understand because she was upset and crying. The victim's mother told police that they knew Petitioner from when they stayed at the shelter. The victim's mother confronted Petitioner. She reported that Petitioner was apologetic, saying that he did not mean to hurt her.

While talking to the police, the victim said that her stomach hurt and she began throwing up. During a medical exam, a bruise was found on the victim's leg and there was evidence of trauma to her vaginal area.

Although she was not at home, Cassie let the victim use her apartment to bake brownies. While the victim was at her apartment, Cassie received a text message from the victim telling her that petitioner was in the apartment. She sent a text message back, telling petitioner to get out of her apartment. Cassie was concerned about petitioner being in the apartment with the victim because petitioner had recently been making comments about arranging for other men to have sex with the victim for money.

When petitioner was interviewed by the police, he admitted that he had spent some time with the victim at Cassie's apartment, but denied having sexual contact with her. However, when petitioner was interviewed for his PSI report, he admitted that he had sexual intercourse with the victim, but claimed that it was consensual.

SUMMARY OF ARGUMENT

Petitioner McNair did not file his petition for post-conviction relief within one year of the accrual of his cause of action. His petition is therefore untimely. There is no reason why this court should not enforce the time bar. The petition should be denied and dismissed with prejudice because it is time-barred.

Petitioner McNair also did not file any motion to withdraw his plea and did not file any direct appeal. His claims are therefore procedurally barred. This court should rule on the time bar and procedural bar issues before addressing the merits of Petitioner's claims. If the petition is dismissed because it is time-barred or procedurally barred, the Court need not even address the merits.

Even if his claims were not time barred and procedurally barred, Petitioner would still not be entitled to post-conviction relief because his claims are not meritorious.

ARGUMENT

I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF BECAUSE HIS PETITION IS TIME-BARRED.

In the underlying criminal case (no. 061903216), Petitioner pled guilty to one count of Rape on November 3, 2006 and was sentenced on January 5, 2007 (addenda C & D). He did not file his petition for post-conviction relief until over three years later, on February 2, 2010.[2] His petition should be denied and dismissed because it is time-barred.

[2] Petitioner alleges that he filed his petition on January 28, 2010. The court docket shows that the petition was filed on February 2, 2010 (addendum F). Regardless of whether filed on January 28 or February 2, 2010, the petition is still untimely because it was filed more than one year after accrual of the cause of action.

A. The petition is untimely because it was not filed within one year of when the cause of action accrued.

Utah's Post-Conviction Remedies Act (PCRA) contains a one year statute of limitations. Under the PCRA, a "petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued." Utah Code Ann. § 78B-9-107(1) (West 2009). For purposes of the PCRA, a cause of action accrues on the latest of the following dates:

> (a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;
>
> * * *
>
> (e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based;

Utah Code Ann. § 78B-9-107(2).[3]

1. The petition is untimely because it was not filed within one year of the last day for filing an appeal.

Petitioner did not file any direct appeal. Therefore, his cause of action accrued on "the last day for filing an appeal from the entry of the final judgment of conviction, if no

[3] A cause of action may also accrue on the date of entry of the decision of the appellate court, the last day for filing a certiorari petition, or entry of denial of certiorari or entry of the decision on certiorari review, or the date on which a new rule as described in subsection 78B-9-104(1)(f) is established. None of those dates apply to Petitioner because he did not appeal and no new rule is applicable.

appeal is taken." Utah Code Ann. § 78B-9-107(2)(a). Petitioner was sentenced on February 2, 2007. After a criminal conviction, an appeal "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment." Utah R. App. P. 4(a). Petitioner therefore had until March 4, 2007 in which to file a notice of appeal. Since he did not file any appeal, his post-conviction cause of action accrued on that date and he had one year in which to file a post-conviction petition. In other words, a timely post-conviction petition had to be filed on or before March 5, 2008. Petitioner did not file his post-conviction petition until February 2, 2010. His petition is therefore almost 2 years too late.

2. The petition is untimely because it was not filed within one year of when petitioner knew of the evidentiary facts on which it is based.

A cause of action may also accrue on "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." Utah Code Ann. § 78B-9-107(2)(e).

Petitioner's claims are based on the DNA crime lab report that he says he received on January 5, 2009 (pet. p. 7). However, if Petitioner has exercised reasonable diligence, Petitioner should have known about the lab report much earlier.

Nevertheless, the petition was not filed until February 2, 2010, more than one year after January 5, 2009. Therefore the petition is still untimely even if the cause of action accrued on January 5, 2009.

3. The petition is untimely because it is not based on newly discovered evidence.

Petitioner has not specifically alleged that his claims are based on newly discovered evidence. However, petitioner alleges that he requested a copy of the DNA Crime Lab report from his attorney. He states that he received a copy of the lab report on January 5, 2009 (pet. p. 7).

The DNA lab report petitioner received on January 5, 2009 does not qualify as newly discovered evidence under the PCRA. The PCRA states that a petitioner may filed a petition for post-conviction relief based upon a claim of newly discovered evidence because "neither the petitioner *nor petitioner's counsel* knew of the evidence at the time of trial or sentencing." Utah Code Ann. § 78B-9-104(1)(e)(i) (emphasis added). Petitioner's claim does not qualify as newly discovered evidence because his counsel knew about the DNA lab report at the time of trial, or in this case, at the time of entry of the plea.

Moreover, even if the lab report qualified as newly discovered evidence, the petition would still be untimely. Petitioner states that he received a copy of the lab report on January 5, 2009, but he did not file his petition until more than one year later, on February 2, 2010. Therefore his petition would still be untimely.

B. Petitioner has not asserted any reason to toll the one year time limit.

The PCRA one year "limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity. The petitioner has the burden of proving by a preponderance of the evidence that the petitioner is entitled to relief under this Subsection (3)." Utah Code Ann. § 78B-9-107(3). Petitioner has not asserted that he is entitled to tolling under this provision.

C. There is no reason this Court should not enforce the PCRA one-year time limit.

Because respondent has asserted that petitioner's claims are time-barred, petitioner has the burden to disprove that his petition is time-barred. "The respondent has the burden of pleading any ground of preclusion . . . but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence." Utah Code Ann. § 78B-9-105.

Petitioner acknowledges that his petition is late. He concedes that "[t]he present post-conviction petition may be less than one month past the limitation period." (supp. pet. p. 15). Petitioner nevertheless argues that this Court cannot enforce the PCRA's time bar. Petitioner is mistaken.

1. PCRA Background

In 1993, before enactment of the PCRA, the Utah Court of Appeals found that an "inflexible three-month limitation on the right to petition for a writ of habeas corpus [was] unreasonable." *Currier v. Holden*, 862 P.2d 1357, 1371 (Utah App. 1993), *rhrg denied, cert. denied*, 870 P.2d 957 (1994). It therefore found that the statute was unconstitutional under the open courts provision. *Id*. at 1372.

After the decision in *Currier*, the Utah legislature passed the Post-Conviction Remedies Act. The Act extended the statute of limitations period to one year, defined various accrual dates, and allowed judicial discretion for accepting petitions after the one-year had expired. Utah Code Ann. §78-351-107 (1996).

In order to "be constitutional, a statute of limitations must allow a reasonable time for the filing of an action after a cause of action arises. . . . a statute of limitations does not, per se, offend Article I, Section 11 because the State has a legitimate interest in placing a reasonable time limit on when an action can be brought." *Currier*, 862 P.2d at 1368, (cites omitted).

"State legislatures possess the discretion to enact statutes of limitations, and these statutes are presumptively constitutional. A statute of limitations is constitutionally sound if it should allow a reasonable, not unlimited, time in which to bring suit." *Avis v. Board of*

Review, 837 P.2d 584, 587 (Utah App. 1992), (cites omitted), *cert. denied*, (1993). Utah's Post-Conviction Remedies Act allows a reasonable time period - one year after accrual of the cause of action - in which to bring suit.

Like Utah's PCRA, the federal statutory provision for federal habeas corpus relief also includes a one-year limitations period. The federal rule provides that: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C.A. § 2244(d).

Numerous federal courts have addressed the issue of whether the federal one-year limitation is an unconstitutional suspension of the Writ of Habeas Corpus in violation of the United States Constitution, article I, section 9. "Every court which has addressed the issue – i.e., whether, as a general matter, § 2244(d) constitutes an unconstitutional suspension of the writ – has concluded that it does not." *Wyzykowski v. Dept. of Corrections*, 226 F.3d 1213, 1217 (11th Cir. 2000).

Over a decade ago, the Utah Supreme Court suggested in dicta that a statute of limitations on post-conviction petitions may be unconstitutional. *See Julian v. State*, 966 P.2d 249, 254 (Utah 1998). In *Julian*, the constitutionality of the PCRA's statute of limitations was not at issue. *Id.* Nevertheless, the Utah Supreme Court stated that "if the proper showing is made, the mere passage of time can *never* justify continued imprisonment

of one who has been deprived of fundamental rights." 966 P.2d at 254. The Court added, "[i]t necessarily follows that *no* statute of limitations may be constitutionally applied to bar a habeas petition." *Id.*

However, the Utah Supreme Court effectively disavowed the *Julian* dicta in *Adams v. State*, 2005 UT 62, ¶ 17, 123 P.3d 400. In *Adams*, the district court dismissed the petition for post-conviction relief as untimely under the PCRA's statute of limitations. *See id.* at ¶¶ 4, 7. Adams claimed that the PCRA's statute of limitations was unconstitutional. *Id.* at ¶ 9. In resolving Adams's claims, the Utah Supreme Court did not rely on its prior language in *Julian* to hold that the PCRA's statute of limitations was unconstitutional. *Id.* at ¶ 9. On the contrary, the Utah Supreme Court declined to reach the constitutional issue, choosing instead to interpret the "interest of justice" exception. *See id.* The Court affirmed the dismissal of two of Adams's three claims as untimely under the PCRA's statute of limitations, holding that he had failed to satisfy the "interests of justice exception" for the two claims. *See id.* at ¶ 27.

Therefore, contrary to the dicta in *Julian*, the Utah Supreme Court has affirmed the dismissal of post-conviction claims based solely on the statute of limitations.

The PCRA was again amended in 2008. The "interests of justice" exception was deleted and a tolling provision was added instead. The statute now states that "[t]he

limitations period is tolled for any period during which the petitioner was prevented from filing a petition due to state action in violation of the United States Constitution, or due to physical or mental incapacity." Utah Code Ann. § 78B-9-107(3).

2. The former "Interests of Justice" exception is not available to Petitioner McNair.

Petitioner acknowledges that the "interests of justice" exception was removed from the PCRA in 2008 (supp. pet. p. 15). He nevertheless argues that the "interests of justice" exception is still available to him. *Id*. He is mistaken.

The "interests of justice" exception is no longer part of the statute, and the Utah Supreme Court has never constitutionalized the "interests of justice" exception. The PRCA's amended statute of limitations only bars post-conviction claims that a petitioner fails to pursue with reasonable diligence and unobstructed by unconstitutional state action. Petitioner has not shown that he has any right to broader access to post-conviction review.

a. The Utah Supreme Court has not constitutionalized the "interests of justice" exception.

Relying primarily on *Julian v. State*, 966 P.2d 249 (Utah 1998), petitioner argues that no statute of limitations may be applied to bar his untimely petition (supp. pet. p. 13). Petitioner is mistaken.

When the *Julian* court analyzed the "interests of justice" exception in a one-year limitations statute that preceded the PCRA, it rejected the State's argument that the statutory language should be narrowly construed. The court held that reaching the merits of a meritorious post-conviction claim would always be in the "interests of justice." *Julian*, 966 P.2d at 253-54. The *Julian* court commented "that no statute of limitations may be constitutionally applied to bar a habeas petition." *Id*. at 254. However, that language was not controlling because Julian did not directly challenge the time-bar's constitutionality, and the supreme court granted relief on the basis of statutory construction. *Id*. *See Swart v. State*, 1999 UT App 96 ¶ 3, 976 P.2d 100 (recognizing that the comment about the constitutionality of a limitations statute was dicta only). *See also Adams v. State*, 2005 UT 62 ¶ 9, 123 P.3d 400 (recognizing the principal that the court should not reach a constitutional issue when it can resolve an issue on statutory grounds); *Specter Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable").

After *Julian*, the supreme court next considered the "interests of justice" language in *Frausto v. State*, 966 P.2d 849 (Utah 1998). Unlike Julian, Frausto directly challenged the time-bar's constitutionality. *Id*. at 851. The *Frausto* plurality author quoted his language

from *Julian* that "'no statute of limitations may be constitutionally applied to bar a habeas petition.'" *Id*. (Russon, J., with one justice concurring). However, that opinion did not carry a majority. Two justices concurred only in the result, *id*. at 851, and one wrote separately that he "disagree[d] with the main opinion's holding that 'a petitioner's failure to comply with a statute of limitations may never be a proper ground upon which to dismiss a habeas corpus petition,'" *id*. at 852. *Swart*, 1999 UT App 96 ¶ 3 (recognizing that the language at issue did not carry a majority).

Finally, in *Adams*, the supreme court again relied on its interpretation of the statutory "interests of justice" language. *Adams*, 2005 UT 62 ¶¶ 8-9, 14-15. In fact, the court expressly declined to address Adams' constitutional challenge to the time-bar because it resolved the case on statutory grounds. *Id*. at ¶ 9.

b. The Supreme Court has never held that the statute of limitations would be unconstitutional without an interest of justice exception.

The supreme court has never held that a time-bar to a post-conviction claim would be unconstitutional without an "interests of justice" exception. The Court's real concern in cases addressing prior statutes of limitations was a lack of sufficient flexibility in the time-bar provisions found to be unconstitutional.

As currently written, the PCRA will time-bar a claim only when a petitioner fails to pursue it with reasonable diligence and unobstructed by unconstitutional state action or mental or physical impairment. For claims seeking relief based on newly discovered evidence, the one-year limitations period does not begin to run until "the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based." Utah Code Ann. § 78B-9-107(2)(e).

Also, the Legislature did not eliminate any exception for a late filing. Rather, it merely replaced the "interests of justice" exception with the tolling provision. It is true that the tolling provision is narrower than the "interests of justice" provision as ultimately interpreted by the supreme court. The supreme court read the "interests of justice" provision to require an inquiry into a petition's meritoriousness as well as the reasons for its tardy filing. *Adams*, 2005 UT 62 ¶ 16. But the supreme court has never held that the state constitution requires a time-bar exception that considers a petition's meritoriousness.

And Petitioner has not established that he has any right to proceed on a post-conviction claim that he did not file within one year of the date on which he claims he discovered the supporting facts and where no unconstitutional State action or mental or physical incapacity precluded a timely filing.

3. The Utah Supreme Court has made clear that the judiciary will review criminal convictions in post-conviction proceedings within the confines of the PCRA.

Precedent dictates that the Utah Constitution gives to the judiciary power over post-conviction, post-appeal review of a criminal conviction. *See, e.g., Gardner v. Galetka*, 2004 UT 42 ¶ 17, 94 P.3d 263 ("the power to review post-conviction petitions '[q]uintessentially ... belongs to the judicial branch of government'") (quoting *Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989) (discussing the scope of the writ of habeas corpus in the Utah constitution)). In reliance on that conclusion, the supreme court has reasoned that "'the legislature may not impose restrictions which limit [post-conviction relief] as a judicial rule of procedure, except as provided in the constitution.'" *Gardner*, 2004 UT 42 ¶ 17 (citation omitted).[4]

But that precedent does not render the PCRA statute of limitations unconstitutional. To the contrary, the supreme court, through its rule making authority, has determined that the judiciary will exercise its constitutional power over post-conviction cases within the confines of the PCRA.

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[4] The State challenges the validity of that precedent. However, the State acknowledges that this Court obviously is bound to follow it.

In 2010, the supreme court amended Utah R. Civ. P. 65C. Rule 65C(a) now provides that the PCRA "sets forth the manner and extent to which a person may challenge the validity of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010).

The Advisory Committee Notes to Rule 65C state that the rule amendments "embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." They continue that "[i]t is the committee's view that the added restrictions which the Act places on post-conviction petitions do not amount to a suspension of the writ of habeas corpus." By itself, rule 65C(a) defeats petitioner's claim that he is entitled to post-conviction relief even though his petition is untimely.

4. Only the Supreme Court has rule-making authority.

Petitioner argues that his petition is not time barred because he alleges that "[t]he Utah Supreme Court and district courts have constitutional authority to correct egregious injustices caused by procedural bars." (supp. pet. p. 10). Petitioner's assertion is only half right. In *Gardner v. State*, 2010 UT 46, ¶¶ 93-94, 658 Utah Adv. Rep. 7, the Utah Supreme Court recognized an "egregious injustice" exception to the PCRA's statute of limitations. Even assuming that Petitioner's claims implicate the "egregious injustice" exception, only the Utah Supreme Court can apply that exception because it is the only court with rule-making

authority. *Gardner* and Rule 65C, Utah Rules of Civil Procedure, require this Court to apply the PCRA as written, including the one-year statute of limitations.

a. District Courts must enforce the PCRA time bar.

The Utah Supreme Court's opinion in *Gardner*, and rule 65C, Utah Rules of Civil Procedure, establish that this Court must apply the PCRA as written. The Utah Supreme Court recognized in *Gardner* that there may be a circumstance where it would be an "egregious injustice" to deny a petitioner relief even though his petition is untimely or otherwise procedurally barred. *See* 2010 UT 46, ¶¶ 93-94. However, *Gardner* also establishes that only the Utah Supreme Court has the authority to consider exceptions to the PCRA's time and procedural bars because only that court has rule-making authority. Because this Court must follow the Utah Supreme Court's rules, it lacks authority to read into the PCRA an "egregious injustice" exception.

In 2009, the Utah Supreme Court amended Rule 65C, Utah Rules of Civil Procedure. Rule 65C governs actions under the PCRA. Utah R. Civ. P. 65C(a). The 2009 amendments declare that "[t]he [PCRA] sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal . . . or the time to file such an appeal has expired." *Id.* The amendments also deleted language in the prior subsection (c) that allowed a petitioner whose

prior post-conviction petition had been denied to file a successive petition raising additional claims if he could demonstrate "good cause" for doing so. *Compare* Utah R. Civ. P. 65C(c) (2008) *with* Utah R. Civ. P. 65C(d) (2010).

The advisory committee notes to Rule 65C explain that "[t]he 2009 amendments embrace Utah's Post-Conviction Remedies Act as the law governing post-conviction relief." *Id.* Advisory Committee Note. The notes also explain that [i]t is the committee's view that the added restrictions which the Act places on post-conviction petitions do not amount to a suspension of the writ of habeas corpus." *Id.* (citing *Felker v. Turpin*, 518 U.S. 651, 664 (1996)).

The Utah Supreme Court addressed the recent amendments to the PCRA and Rule 65C in *Gardner v. State*, 2010 UT 46, 658 Utah Adv. Rep. 7. Approximately twenty years after his conviction and death sentence became final on direct appeal, and at least a decade after learning the factual basis of his claims, Gardner filed his third petition for post-conviction relief. *Id.* at ¶¶ 11, 46, 65, 79, 88. The State argued that Gardner's claims were untimely. *Id.* at ¶ 49. The State also argued that the claims were procedurally barred because Gardner could have raised them in his prior petitions. *Id*. Gardner responded that his claims were not untimely or procedurally barred, but even if they were, the Utah Constitution provides for exceptions to the time and procedural bars. *Id.* at ¶ 50.

The district court agreed that Gardner's claims were both untimely and procedurally barred. *Id.* at 51. It refused to consider whether any exception to these bars applied because it concluded that those exceptions "were no longer available as a result of recent amendments to the PCRA." *Id.* at ¶ 53. The Utah Supreme Court affirmed. *Id.* at ¶ 57.

Gardner confirms that Utah courts must enforce the PCRA's time bar. *See* 2010 UT 46, ¶¶ 58-61. Citing to the PCRA's statute of limitations, the court noted that the PCRA "establishes a number of procedural requirements." *Id.* at ¶ 58 (citing UTAH CODE ANN. § 78B-9-107 (2008)). The court then explained the PCRA's statute of limitations in detail. *See id.* at ¶¶ 60-61 (citing UTAH CODE ANN. § 78B-9-107 (2008)). The court then declared, "[w]e will affirm a district court's grant of summary judgment in favor of the State on a petition for post-conviction relief when the petitioner's claim fails to meet the requirements of this provision." *Id.* at ¶ 61 (citing *Kell v. State*, 2008 UT 62, ¶¶ 17, 19-20, 194 P.3d 913). By amending Rule 65C, the Utah Supreme Court has established that the PCRA governs. Because this Court is bound to follow Rule 65C, it must apply the PCRA's statute of limitations as it is written.

In *Gardner*, the Utah Supreme Court did note that while Rule 65C "embrace[s]" the PCRA as governing post-conviction relief, "**this court** retains constitutional authority, even when a petition is procedurally barred, to determine whether denying relief would result in

an egregious injustice." *Id.* at ¶ 93 (emphasis added). Later, that same paragraph referred specifically to "**this court's authority** to apply an exception" to the PCRA's procedural rules. *See id.* (emphasis added). The Supreme Court's reference to "this court" obviously referred to the Utah Supreme Court. The Supreme Court declined to delineate any standards for what would constitute an "egregious injustice" because it held that, whatever circumstances might satisfy the exception, Gardner had not demonstrated "that any such exception would apply to him." *Id.*

The Utah Supreme Court is the only court than can consider exceptions to the PCRA because it is the only court with rule-making authority. The Utah Constitution gives the Utah Supreme Court the authority to "adopt rules of procedure and evidence." UTAH CONST. Art. 8, § 4 ("The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process"). There is no corresponding provision conferring rule-making authority on the district courts.

The Utah Supreme Court amended Rule 65C to recognize the PCRA as controlling. *See* Utah R. Civ. P. 65C(a). However, because the Supreme Court has rule-making authority, it can suspend Rule 65C when application of the PCRA's procedural rules would result in an "egregious injustice." *See Gardner*, 2010 UT 46, ¶ 93.

This Court does not have rule-making authority. Rather, it must follow the Rules that the Utah Supreme Court has promulgated. Currently, Rule 65C requires this Court to apply the PCRA as written. *See Gardner*, 2010, UT 46, ¶¶ 58-61; Utah R. Civ. P. 65C(a) & advisory committee note. Therefore, this Court must reject Petitioner's claim that it can excuse his untimely filing under an "egregious injustice" exception.

b. Even if this Court could read into the PCRA an "egregious injustice" exception, Petitioner has failed to establish that the exception would apply to him.

Even if this Court could apply an "egregious injustice" exception, Petitioner has failed to demonstrate that he would meet that exception. It would not be an "egregious injustice" to dismiss this petition as untimely where Petitioner simply failed to file his petition within one year of when his cause of action accrued, and has not asserted any reason or excuse for that failure. There is nothing unjust, let alone egregiously unjust, about dismissing this Petition as untimely.

II. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF BECAUSE HIS CLAIMS ARE PROCEDURALLY BARRED

Even if the petition were not time barred, petitioner would still not be entitled to relief because his claims are procedurally barred. Under the Post-Conviction Remedies Act, a petitioner is not entitled to relief upon any ground that "could have been but was not raised at trial or on appeal." UTAH CODE ANN. § 78B-9-106(c).

A. Petitioner's claims are procedurally barred because he did not file any motion to withdraw plea.

Petitioner alleges that he received ineffective assistance of counsel because his "trial counsel did not inform him of the DNA report prior to his plea." (supp. pet. at 4). Respondent does not concede that Petitioner's allegation is accurate. However, assuming solely for purposes of this memorandum that petitioner's allegation is accurate, it still does not entitle him to post-conviction relief.

Petitioner was aware that DNA testing was being performed. His blood was taken for the test, and he knew that a court hearing was continued because the DNA results had not yet been received (addendum F, hearing on 9-12-06; and see Pet.'s aff. ¶ 11 attached as addendum G). Petitioner certainly knew when he entered his plea whether his counsel had advised him of the DNA results. Therefore, petitioner could have filed a motion to withdraw his plea prior to being sentenced.

"[A] request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced." Utah Code Ann. §77-13-6 (West 2008). No motion to withdraw plea was ever filed. Petitioner's claim is procedurally barred because it could have been raised by filing a motion to withdraw plea. *See Benvenuto v. State*, 2007 UT 53, ¶¶ 14-15, 165 P.3d 1195, and *Loose v. State*, 2006 UT

App 149, ¶¶ 13 & 39, 135 P.3d 886, *cert. denied* 150 P.3d 58. If a motion to withdraw plea had been filed and denied, Petitioner could have appealed that decision.

B. The "unusual circumstances" exception is no longer available.

Petitioner argues that this Court may excuse any procedural default for "unusual circumstances." (supp. pet. p. 16). But the unusual circumstances procedural bar exception is no longer available. The "unusual circumstances" analysis was encompassed by the "good cause" procedural bar exception formerly included in rule 65C. *Tillman*, 2005 UT 56, ¶ 20 (citing prior Utah R. Civ. P. 65C(c)). However, effective in January 2010, the Utah Supreme Court amended rule 65C. The amendment eliminated the "good cause' language that encompassed the "unusual circumstances" procedural bar exception.

Further, the amendment provides that the PCRA "sets forth the manner and extent to which a person may challenge the legality of a criminal conviction and sentence after the conviction and sentence have been affirmed in a direct appeal." Utah R. Civ. P. 65C(a) (2010). The advisory committee note states that the amendment "embraces" the PCRA "as the law governing post-conviction relief." *See Burns v. Boyden*, 2006 UT 14, ¶ 16 n.6, 133 P.3d 370 (advisory committee notes "merit great weight in any interpretation of [the] rules"). Thus, the "unusual circumstances" exception no longer exists. The language on which it was based was written out of rule 65C. And section 78B-9-106, which the supreme court now

"embraces" as the law governing post-conviction relief, does not encompass the exception. The cases cited and referred to by Petitioner do not establish otherwise, since they all predate the 2010 amendment to rule 65C.[5]

In any event, the only unusual circumstance Petitioner argues is that he is in prison. Being in prison is not an unusual circumstance. Nearly all of the petitioners who file petitions for post-conviction relief are in prison. Even if the unusual circumstances exception still existed, being in prison does not qualify as an unusual circumstance which would excuse a procedural bar.

III. THE COURT MUST RULE ON THE TIME BAR AND PROCEDURAL BAR ISSUES BEFORE ADDRESSING PETITIONER'S CLAIMS ON THE MERITS

As amended in 2010, rule 65C requires the Court to rule on the time bar and procedural bar issues before addressing Petitioner's claims on the merits. It provides that, "if a court comments on the merits of a post-conviction claim, it shall first clearly and expressly determine whether that claim is independently precluded under Section 78B-9-106." Utah R. Civ. P. 65C(b). Section 106 defines the time bar and procedural bar rules.

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[5] *Hurst v. Cook*, 777 P.2d 1029 (Utah 1989); *Julian v. State*, 966 P.2d 249 (Utah 1998); *Tillman v. State*, 2005 UT 56, 128 P.3d 1123; *Gardner v. Galetka*, 2004 UT 42, 94 P.3d 262; *Martinez v. State*, 602 P.2d 700 (Utah 1979); *Loose v. State*, 2006 UT App 149, 135 P.3d 886; *Benvenuto v. State*, 2007 UT 53, 165 P.3d 1195.

Utah Code Ann. § 78B-9-106. *See e.g. Grady v. U.S.*, 269 F.3d 913, 916 (8th Cir. 2001) (statute of limitations issues should be resolved before the merits of individual claims).

IV. EVEN IF REVIEWED ON THE MERITS, PETITIONER WOULD NOT BE ENTITLED TO POST-CONVICTION RELIEF BECAUSE HE HAS NOT ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner alleges that he received ineffective assistance of trial counsel because his attorney "failed to inform McNair of the exculpatory DNA report." (supp. pet. p. 4). As addressed above, this claim is time barred and procedurally barred. However, even if addressed on the merits, petitioner would not be entitled to relief because he has not established that he received ineffective assistance of counsel.

First, the DNA report was not exculpatory. In fact, it was inculpatory, because it found Petitioner's DNA on the victim's neck. This confirmed that Petitioner was present and confirmed the victim's statement that Petitioner kissed her on the neck. The fact that the vaginal swabs and perineal/anal swabs only showed the victim's DNA is merely neutral. It does not inculpate or exculpate the Petitioner.

Second, Respondent does not concede that counsel failed to inform Petitioner of the DNA report. However, assuming solely for purposes of this memorandum that counsel did not inform Petitioner of the results of the report, Petitioner still has not established ineffective assistance of counsel because he cannot establish prejudice.

Under the Post-Conviction Remedies Act (PCRA), "[t]he petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Utah Code Ann. § 78B-9-105(1). Petitioner has failed to meet this burden.

A. The DNA lab report

A copy of the DNA Crime Lab Report is attached as addendum H. It states that the evidence submitted consisted of Q1, Q2 and Q3, which were vaginal swabs, perineal/anal swabs, and neck swabs. *Id.* p. 2. Also submitted were V1 - a blood standard from the victim, and S1 - a blood standard from petitioner McNair. *Id*. It then provides tables showing the results of the DNA analysis, and provides a written conclusion. *Id.*

The tables and the written conclusion show that the vaginal swabs and perineal/anal swabs only show a single female source which matched samples from the blood standard of the victim. Since the swabs were taken from the victim, it is no surprise that they match the blood sample taken from the victim. The fact that there was no DNA from petitioner on those swabs does not establish that the victim was not raped. It merely establishes that no one else's DNA was found on those swabs besides the victim's.

In addition, the swabs taken from the victim's neck were consistent with the blood sample taken from petitioner (addendum H). In other words, the DNA report confirms the victim's statement that one of the things petitioner did was kiss her on the neck.

B. *Strickland* applies to collateral challenges to guilty pleas based on claims of ineffective assistance of counsel.

The PCRA permits post-conviction relief for ineffective assistance of counsel. Utah Code Ann. § 78B-9-104(1)(d). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366 (1985). To be entitled to post-conviction relief on a claim of ineffective assistance of counsel, a petitioner must establish not only that his counsel's performance was deficient, but also that he was prejudiced. *Strickland*, 466 U.S. at 693**.** Therefore, in order to be entitled to post-conviction relief, petitioner must establish that his counsel's performance was objectively unreasonable and that but for his counsel's behavior, he would not have pled guilty.

1. Deficient performance.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, *and see Kell v. State*, 2008 UT 62, ¶28, 194 P.3d 913; *Allen v. Friel*, 2008 UT 56, ¶ 21, 194 P.3d 903. When considering whether counsel performed deficiently, a court must assess counsel's decisions from

counsel's "perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Petitioner must meet that burden based on the standards of practice in Utah when he entered his guilty plea in 1996, based on the facts and the law available to counsel at that time. *See Wiggins*, 539 U.S. at 524 (assessing counsel's performance against Maryland practice standards at the time of trial);and *State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993)("a defendant bears the burden of demonstrating why, on the basis of law in effect at the time of trial, his or her trial counsel's performance was deficient").

Petitioner alleges that his counsel "rendered deficient assistance, when he failed to inform McNair of the exculpatory DNA report." (supp. pet. p. 4). At one point, Petitioner also alleges that his counsel failed to rely on the exculpatory DNA report (supp. pet. p. 8). This is an entirely different claim than the claim that his counsel did not tell him about the DNA report. As addressed above, the DNA report was not exculpatory. But more significantly, Petitioner presents no facts or evidence to support the supposition that his counsel did not rely on the DNA report. Petitioner cannot merely assume that his counsel did not rely on the report. In fact, *Strickland* requires that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Respondent does not concede that Petitioner's trial counsel failed to advise Petitioner of the results of the DNA lab report, or failed to rely on the DNA report himself. However, assuming solely for purposes of this memorandum that counsel did not rely on the results and did not advise Petitioner of those results, that fact alone does not necessarily establish deficient performance. When confronted by the victim's mother, Petitioner did not deny committing the crime. The victim's mother reported that Petitioner was apologetic, saying that he did not mean to hurt her. When petitioner was interviewed for his PSI report, he admitted that he had sexual intercourse with the victim, but claimed that it was consensual. Petitioner never states what he told his counsel about the crime (see Pet.'s aff. attached as addendum G). If petitioner told his counsel he had sex with the victim, and wanted to plead guilty, counsel may not have discussed the DNA report because it was not necessary.

Even assuming that counsel did not rely on the DNA report and failed to advise Petitioner of the DNA report, and that not doing so was deficient performance, Petitioner still has not established ineffective assistance of counsel because he has not established prejudice.

2. Petitioner has failed to establish prejudice.

When asserting a claim of ineffective assistance of counsel, a petitioner must establish not only that his counsel's performance was deficient, but also that he was prejudiced. *Strickland*, 466 U.S. at 693**.** Even assuming, solely for purposes of argument, that the

petition was not time-barred or procedurally barred, and that Petitioner could establish deficient performance, Petitioner would still not be entitled to post-conviction relief because he has failed to establish prejudice.

In the guilty plea context, prejudice is proven if the defendant shows that, but for counsel's error, he would not have pled guilty. "[I]n order to satisfy the 'prejudice' requirement, [Petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Moench v. State*, 2004 UT App 57, ¶21; 88 P.3d 353*; Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994); *and Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001).

But a petitioner's assertion that he would not have pled guilty is not sufficient to establish prejudice. "[M]ere allegation that he would have insisted on trial but for his trial counsel's errors, although necessary, is ultimately insufficient to entitle him to relief. Rather, we look to the factual circumstances surrounding the plea to determine whether [he] would have proceeded to trial." *United States v. Clingman*, 288 F.3d 1183, 1186 (10th Cir. 2002) (citation omitted). "[C]ourts applying this standard will often review the strength of the prosecutor's case as the best evidence of whether a defendant in fact would have changed his plea and insisted on going to trial." *Miller*, 262 F.3d at 1072. "It is not necessary for the

defendant to show that he actually would have prevailed at trial, although the strength of the government's case against the defendant should be considered in evaluating whether the defendant really would have gone to trial if he had received adequate advice from his counsel." *Miller*, 262 F.3d at 1069.

Actual prejudice is weighed against the totality of evidence before the trier of fact. *Strickland*, 466 U.S. at 695. The determination as to a whether petitioner has met the prejudice prong must include consideration of all of the facts and circumstances of the case. This includes information such as whether the petitioner had confessed, or given a statement to the police, the strength of the State's case, (such as corroborating medical evidence and DNA evidence), whether the plea offer was to a reduced charge, or whether other charges were dismissed, and the likelihood of conviction on the greater charge or additional charges if petitioner had gone to trial.

In this case, Petitioner was charged with one count of Rape, a 1st degree felony, one count of Forcible Sodomy, a 1st degree felony, and one count of Forcible Sexual Abuse, a 2nd degree felony (addenda A & B). Petitioner pled guilty to only one count of Rape, a 1st degree felony (addenda C). Even if counsel had advised Petitioner of the results of the DNA lab report, it is likely that counsel still would have advised Petitioner to pled guilty, and likely that Petitioner would still have decided to plead guilty to one first degree felony charge,

rather than go to trial and risk being convicted of two first degree felonies and one second degree felony. *See e.g. State v. Martinez*, 2001 UT 12, ¶ 19, 26 P.3d 203 ("there's no doubt ... that [defendant] got a better deal than he would have gotten . . . if he were tried. Had counsel known the first degree conviction could not be reduced, he would not have advised defendant any differently. He still would have advised defendant to plead guilty.") (additional quotation omitted).

It is likely that Petitioner still would have pled guilty because the lab report inculpated Petitioner by finding his DNA on the victim's neck. It also confirmed the victim's version of events, when she stated that Petitioner kissed her on the neck. In addition, a bruise on the victim's leg and trauma to her vaginal area also supported the victim's version of events. When Petitioner was confronted by the victim's mother, he did not deny committing the crime. The victim's mother reported that Petitioner was apologetic, saying that he did not mean to hurt her. Finally, when petitioner was interviewed for his PSI report, he admitted that he had sexual intercourse with the victim. Petitioner has failed to assert that he did not also make this same admission to his own counsel.

"Surmounting *Strickland's* high bar is never an easy task" and it is particularly difficult with this type of claim because "petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v.*

Kentucky, 130 S.Ct. 1473, 1485 (2010). Petitioner cannot meet that standard. He therefore cannot meet the *Strickland* prejudice requirement and cannot establish ineffective assistance of counsel.

In light of the victim's testimony at the preliminary hearing, and the corroborating physical evidence, including the medical exam showing a bruise on the victim's leg and evidence of trauma to the victim's vaginal area, Petitioner's lack of denial when confronted by the victim's mother and the DNA report confirming the victim's statement that petitioner kissed her on the neck, petitioner cannot establish that he was prejudiced by his counsel's performance, and therefore cannot establish that he received ineffective assistance of counsel.

CONCLUSION

Based on the facts, the law, and the arguments set forth above (as well as in respondent's first motion to dismiss), respondent respectfully requests that this Court deny and dismiss with prejudice the petition and supplemental petition for post-conviction relief filed by petitioner McNair.

DATED this ____ day of July, 2013.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

_____
Erin Riley
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of July, 2013, I served a copy of the foregoing STATE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS SECOND OR SUPPLEMENTAL PETITION FOR POST-CONVICTION RELIEF, by causing the same to be mailed, via first class mail, postage prepaid, to the petitioner in the post-conviction case as follows:

Chaudhry Ali
924-E Lowell Ave.
Salt Lake City, Utah 84105

(counsel for Petitioner McNair)

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