

2014

## Jimmy Dean Meinhard v. State of Utah : Reply Brief of Appellant

Utah Supreme Court

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IN THE  
SUPREME COURT OF THE STATE OF UTAH

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JIMMY DEAN MEINHARD,  
*Petitioner and Appellant,*

v.

STATE OF UTAH,  
*Respondent and Appellee.*

---

REPLY BRIEF OF APPELLANT

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On appeal from the Third Judicial District Court, Salt Lake County,  
Honorable L.A. Dever, District Court No. 130900232

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*Mr. Meinhard is incarcerated.*

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## Introduction

The State argues that Mr. Meinhard did not preserve his argument that a petitioner is entitled to DNA testing where the DNA testing is likely to lead to evidence that will exonerate the petitioner. But that is precisely the argument Mr. Meinhard advanced in the district court, numerous times. In the district court, the State argued that to be entitled to DNA testing, a petitioner must provide evidence that, coupled with only the DNA test results, will exonerate the petitioner. Mr. Meinhard argued that he need only show that the DNA testing is likely to lead to evidence that will exonerate. Mr. Meinhard preserved the issue.

The State's response otherwise consists of pointing out that the DNA test results might not exonerate Mr. Meinhard, an obvious possibility in every testing case that the statute contemplates. The State asserts that perhaps Mr. Peterson did not fight his killer, or maybe the DNA under the fingernails belongs to someone with whom he had wrestled, or perhaps an "unwary hiker" left the fingerprint. While the DNA test results could lead to evidence consistent with the State's suppositions, the results also have the potential to lead to evidence that exonerates Mr. Meinhard. Mr. Meinhard is entitled to testing to find out.

Indeed, it is worth noting that the State has always believed that the fingernail scrapings and the fingerprint might identify the killer. This is precisely the reason the State tested the evidence in 1997. And although the results back then were inconclusive, there have since been significant advances in DNA testing. In other words, testing can now provide the information the State sought

in 1997 – the killer’s identity. The results therefore have the potential to lead to evidence showing that someone other than Mr. Meinhard killed Mr. Peterson.

### **Preliminary Matter**

Before addressing the merits of the State’s response, it is worth dispelling an assertion that appears throughout the response brief. The State repeatedly characterizes the DNA testing under the DNA Testing Statute as “state-funded” testing. (Resp. Br. at 13,14,15,16,20,23,26,30,31,32,37.) There are two problems with the State’s characterization of the payment mechanism.

First, under the DNA Testing Statute, “state-funded” testing is the only type of post-conviction DNA testing an indigent petitioner may obtain. Utah Code § 78B-9-301(7)(a), (8)(a), (9). The fact that the State must conduct and fund the testing is the legislature’s doing – not Mr. Meinhard’s.

Second, the testing is “state-funded” only if the results are favorable to the petitioner. *Id.* § 78B-9-301(9). If the results are unfavorable, “the court may order the person to reimburse the state for the costs of the testing.” *Id.* §§ 78B-9-301(9), -304(1)(b). Thus, the State must fund only those DNA tests that support exoneration, which is hardly an unjust result. While the State’s view of the funding mechanism is beside the point, it is worth clarifying how the funding mechanism works.

## Argument

In addressing the merits, the State adds to the statutory prerequisites for DNA testing. The State contends that, in addition to the requirements articulated in the statute, a petitioner must show how the DNA test results will be the lynchpin that proves the remainder of his case—a feat that is nearly impossible for a petitioner who cannot predict whose DNA will be revealed in the test. Below, Mr. Meinhard shows how the State’s interpretation is unsupported by—and inconsistent with—the DNA Testing Statute and the PCRA. In fact, the DNA Testing Statute permits testing when the results alone may not exonerate.

What a petitioner must show is the potential utility of the test results. Here, Mr. Meinhard made that showing by pointing out the serious problems with the circumstantial evidence upon which the conviction was based. The conviction was based primarily upon the testimony of Mr. Taylor, the only witness who purported to describe the logistics of the murder.

In the opening brief, Mr. Meinhard pointed out several problems with Mr. Taylor’s story, the most troubling of which is that it leaves unexplained how Mr. Peterson’s body ended up outside of—and several miles away from—his car. In the response brief, the State does not acknowledge these problems, let alone address them, primarily because the response was drafted before this appeal.<sup>1</sup>

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<sup>1</sup> The State’s discussion of the evidence of Mr. Meinhard’s guilt is nearly identical to the discussion it provided in its opposition to Mr. Meinhard’s petition. (*Compare* Resp. Br. at 48-61, *with* R.233-46.) This explains why the State’s response brief fails to address Mr. Taylor’s strong motive and the other evidentiary problems Mr. Meinhard raised in his opening brief. (Op. Br. at 45-47.)



As discussed below, because the DNA test results can lead to new evidence that will explain the evidence at trial and exonerate Mr. Meinhard, the statute permits testing. But first, Mr. Meinhard shows that he preserved this argument.

**I. Mr. Meinhard Preserved His Argument that the DNA Testing Statute Permits Testing When the Results Can Lead to Exonerating Evidence**

Mr. Meinhard's interpretation of the DNA Testing Statute has remained consistent throughout this case. In his petition, Mr. Meinhard argued that he is entitled to DNA testing because the results had the potential to produce exonerating evidence. (R.26.) The State opposed the petition, arguing that the DNA Testing Statute permits testing only where the test results will, by themselves, exonerate the petitioner. (Op. Br. Addendum C at R.222-23,239-43.)

In his reply memorandum, Mr. Meinhard noted that the State's position "conflates two different proceedings" – the DNA testing stage and the relief stage. (R.292, attached at Addendum F.) Mr. Meinhard explained that the DNA Testing Statute provides a "low threshold" for obtaining testing "because a petition for DNA testing simply seeks to gather potentially exonerating information, *not* to conclusively establish factual innocence." (R.292.) He explained that only at the relief stage must a petitioner "satisfy the heightened standard of actually showing factual innocence by 'clear and convincing evidence.'" (R.292.) In other words, the PCRA contemplates that, at the relief

stage, the petitioner presents evidence that he did not have when he requested DNA testing. In support, Mr. Meinhard cited the DNA Testing Statute. (R.292.)

Similarly, at the hearing, counsel for Mr. Meinhard elaborated on the different possible outcomes of the DNA test results and how testing in this case might spark an investigation and identify the killer:

Should there be foreign DNA under the victim's fingernails, if it belongs to Mr. Meinhard, this case is absolutely over and we don't go any further. If it belongs to Mr. Taylor who testified he was not present, that he had nothing to do with the crime, that certainly leads to some questions about the finding in the original trial. If it's the DNA of one of the other alternative suspects, the same is true. If it's a third-party DNA . . . that can be matched to someone in the CODA system, that indeed may provide proof.

(R.449:19.)

The district court rejected Mr. Meinhard's argument, agreeing instead with the State that the DNA Testing Statute permits testing only where the test results can, by themselves, exonerate the petitioner. (Op. Br. Addendum E at R.403-04,421-25.) The court ruled that "the statute is specific in its requirement that it is the DNA evidence — not the DNA evidence plus other new evidence — that must prove the Petitioner's factual innocence." (Op. Br. Addendum E at R.404.)

On appeal, Mr. Meinhard repeated his argument. He acknowledged that, in some cases, "the nature of the crime is such that the DNA test results, by themselves, will demonstrate that the petitioner is factually innocent." (Op. Br. at 26.) But he explained that testing is also appropriate "when it is possible that testing the DNA may lead to evidence, not presented at trial, that will exonerate

the petitioner.” (Op. Br. at 32.) In other words, testing is available under the statute even when the results, by themselves, will not exonerate the petitioner without more evidence. (Op. Br. at 30.) In support, he cited the DNA Testing Statute and the factual innocence statute, section 78B-9-402. (Op. Br. at 26-35.)

In its response brief, the State refers to this argument as the “discovery-tool construction” of the DNA Testing Statute and asserts that Mr. Meinhard did not preserve it. (Resp. Br. at 15-19.) The State notes that, in the district court, Mr. Meinhard cited the DNA Testing Statute but not the factual innocence statute. (Resp. Br. at 17.) From this observation, the State argues that Mr. Meinhard “never suggested that testing under the DNA statute is required whenever the results could seed a later investigation into other evidence that he would eventually present in a subsequent innocence petition.” (Resp. Br. at 17.)

But that was precisely Mr. Meinhard’s argument all along. On appeal, Mr. Meinhard has provided additional statutory support—the factual innocence statute. This is not a “preservation failure.” (Resp. Br. at 19.) As this court has explained, “[a] litigant has no obligation to ‘preserve’ his citation to legal authority. If the foundation of a claim or argument is presented in a manner that allows the district court to rule on it,” the appellant “is free to marshal any legal authority that may be relevant to its consideration on appeal.” *Torian v. Craig*, 2012 UT 63, ¶ 20, 289 P.3d 479. Mr. Meinhard presented his so-called “discovery-tool construction” of the DNA Testing Statute to the district court in a manner

that allowed the court to rule on it, and in fact, the court did rule on it. There is no preservation problem here.

## **II. The State's Interpretation Contradicts the Statutory Language and the Legislative History**

The State argues that a petitioner may not obtain DNA testing unless he has shown that the results alone will establish his innocence. The State's argument is based upon section 78B-9-303, which permits a petitioner to file a motion to vacate his conviction if the DNA test results are "favorable" to him. Under subsection (2)(b), a court must vacate the conviction if "*the DNA test result demonstrates* by clear and convincing evidence that the person is factually innocent." Utah Code § 78B-9-303(2)(b) (emphasis added).

Based upon that language, the State concludes that a petitioner may obtain testing only if the results have the potential to demonstrate factual innocence. (Resp. Br. at 22-23,26,27.) As the State puts it, because "[t]he DNA test result is the only new, noncumulative evidence of innocence the court can consider in granting relief, . . . the test result is *a fortiori* the only new, noncumulative evidence of innocence the court can consider in granting the state-funded testing in the first place." (Resp. Br. at 23.) As discussed below, there are five problems with the State's position.

**The (1)(b) Hearing** - First, the State's reading renders superfluous the hearing contemplated by subsection (1)(b) of section 78B-9-303. That subsection describes the two options available to the State when a petitioner has moved to

vacate his conviction after receiving “favorable” DNA test results. Specifically, the State may either “stipulate to the conviction being vacated,” or it “may request a hearing and attempt to demonstrate through evidence and argument that, despite the DNA test results, the state possesses sufficient evidence of the person’s guilt so that the person is unable to demonstrate by clear and convincing evidence that the person is factually innocent.” Utah Code § 78B-9-303(1)(b).

Under the statute, the (1)(b) hearing is the time for the parties to present evidence concerning – and for the court to decide – whether the DNA test results exonerate the petitioner. This debate happens *after* the DNA testing is conducted, not *before* as the State contends.

The State’s reading eliminates any need for the subsequent hearing. According to the State, for a petitioner to obtain test results, the petitioner must already have proven, as a prerequisite to testing, that favorable test results will exonerate him. But if the petitioner has already *proven* that the test results can exonerate him, the State could never argue later at a (1)(b) hearing that “despite the DNA test results, the state possesses sufficient evidence of the person’s guilt so that the person is unable to demonstrate by clear and convincing evidence that the person is factually innocent.” *Id.* Put simply, the State’s reading leaves nothing to debate at the (1)(b) hearing, and no room to present new evidence there. The court already would have decided the question.

The State's brief illustrates the problem. Indeed, in various attempts to show how the DNA test results might *not* lead to evidence that will exonerate Mr. Meinhard, the State provides many arguments that it should make at a (1)(b) hearing, only *after* Mr. Meinhard receives favorable results.

With respect to the fingernail scrapings, the State argues that because Mr. Peterson did not necessarily scratch his attacker, the killer's DNA will not necessarily be found under his fingernails. (Resp. Br. at 56.) Alternatively, the State argues that DNA under Mr. Peterson's fingernails "could have become lodged [there] . . . in any number of ways, such as during a sporting event or sexual contact." (Resp. Br. at 57.) As for the fingerprint, the State suggests that it could have been left by "an unwary hiker." (Resp. Br. at 60.) The State also describes the various circumstantial evidence it presented at trial, arguing that it proves Mr. Meinhard's guilt. (Resp. Br. at 48-52.) And contrary to the story it presented at trial, the State theorizes that even if Mr. Meinhard did not kill Mr. Peterson, he must have been the getaway driver and was thus "present at the murder" and "not innocent." (Resp. Br. at 62-63.)

In other words, the State "attempt[s] to demonstrate through evidence and argument that, despite the DNA test results, the state possesses sufficient evidence of [Mr. Meinhard's] guilt so that [he] is unable to demonstrate that he is factually innocent." Utah Code § 78B-9-303(1)(b). These are precisely the

arguments that the statute contemplates will be provided at a (1)(b) hearing *after* the DNA tests have been conducted. Not before.

Similarly, the statute provides that, at the hearing, the court will consider “all the evidence presented at the original trial,” along with evidence presented “at the hearing under Subsection 1(b), *including* the new DNA test result.” *Id.* § 78B-9-303(2)(a)(i) (emphasis added). This means the (1)(b) hearing provides an opportunity for both sides to present evidence—beyond the test result—that was not presented at trial. The test results are only *part* of the evidence the court must consider in determining whether the petitioner is factually innocent. In other words, the test results need not alone establish the petitioner’s innocence. And this is true even when the DNA Testing Statute is read in isolation.<sup>2</sup>

The State’s reading denies both parties the opportunity to present evidence in response to the test results. Indeed, the State contends that, “under the DNA statute’s remedy provisions, the court can consider no other kind of ‘new, noncumulative evidence’ beside the DNA test result.” (Resp. Br. at 22.) This reading conflicts directly with the statute.

**Investigation Based Upon the Results** – The second problem with the State’s reading is that it denies both parties the opportunity to conduct an investigation based upon the DNA test results. This is true because the State

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<sup>2</sup> Mr. Meinhard’s interpretation of the DNA Testing Statute does not depend upon the factual innocence statute as the State contends. (Resp. Br. at 24.) Reading the statutes in harmony, however, supports and strengthens Mr. Meinhard’s interpretation. *See infra* pp. 12-14.

contends that the court's innocence determination takes place prior to testing. Critically, the State's reading provides no opportunity for either party to present evidence concerning the significance of the test results.

According to the State, a petitioner and the State must present all of their arguments—including their explanations concerning the significance of the test results—*before* the tests may be conducted. But as discussed above, the statute permits the court to consider new evidence at the (1)(b) hearing. Utah Code § 78B-9-303(2)(a)(i). Thus, according to the State, the parties must present this new evidence *in the petition for DNA testing*.

In other words, under the State's reading, in order to get testing, the petitioner must predict whose DNA may be identified by the tests, investigate those people, and in the petition present evidence and arguments showing that a particular test result will clearly and convincingly exonerate the petitioner. Similarly, the State must *also* predict the possible DNA test results, conduct similar investigations, and present the court with evidence and arguments showing that none of those results would undermine the conviction.

According to the State, this is true regardless of whether the petitioner ultimately files a motion to vacate the petition under section 78B-9-303, or a petition to determine factual innocence under section 78B-9-402. (Resp. Br. at 30.) Indeed, the State contends that a petitioner who seeks DNA testing in support of a petition to determine factual innocence may do so *only after* he has "ma[d]e a



complete proffer under the factual innocence statute, and a DNA test remains the only piece missing from the innocence puzzle.” (Resp. Br. at 30.)

But aside from contradicting the statutory language, the State’s position is impractical. In some cases, the petitioner may be able to narrow the list of people who could have committed the crime, thoroughly investigate them, and provide in his petition all of the evidence showing his innocence. But in other cases, such as random crimes, the petitioner has no way to identify the perpetrator, and he will have no way to investigate the correct person.

The State’s brief illustrates the problem. As discussed above, the State hypothesizes various explanations for why DNA from various people may or may not be found in this case. But without the actual results, both the State and Mr. Meinhard are denied the opportunity to investigate the results and provide a coherent theory that supports Mr. Meinhard’s guilt or innocence. This is precisely why the statute contemplates that, after obtaining DNA testing, the parties will have an opportunity to identify and present new evidence based upon the results.

**The Factual Innocence Statute** – The third problem with the State’s interpretation is that it contradicts the factual innocence statute. The factual innocence statute permits a petitioner to file a petition for determination of factual innocence based upon “newly discovered material evidence . . . that, if credible, establishes that the petitioner is factually innocent.” Utah Code

§ 78B-9-402(1), (2)(i). And the statute provides that “[i]f *some or all* of the evidence alleged to be exonerating is biological evidence subject to DNA testing, the petitioner shall seek DNA testing pursuant to [the DNA Testing Statute].” *Id.* § 78B-9-402(6) (emphasis added). In other words, the statute contemplates that a post-conviction DNA test can provide *part* of the new evidence that establishes the petitioner’s factual innocence. But as discussed above, this is contrary to the State’s theory that a petitioner may obtain DNA testing only if he first proves that the results can alone exonerate him.

The State provides two responses. First, the State inconsistently claims that, under the factual innocence statute, a petitioner *can* seek DNA testing on evidence that will not alone establish innocence, but only if he *first* proves that a favorable DNA test result will, by itself, establish innocence. As the State puts it, “a petitioner would *first* file a factual innocence petition, proffering all of the evidence required under that statute to show factual innocence. . . . Once a petitioner makes a complete proffer under the factual innocence statute, and a DNA test remains the only piece missing from the innocence puzzle, *then* he would file a petition under the DNA statute.” (Resp. Br. at 30.)

This reading conflicts with the statute’s requirements governing factual innocence petitions. The statute requires the petitioner to identify the “specific evidence” that establishes innocence. Utah Code § 78B-9-402(2)(a)(ii). But in the State’s view, the petitioner must file the petition *before* he obtains DNA testing,

receives the results, or discovers the new evidence the results will uncover. A petitioner could therefore never identify in the petition the “specific evidence” that establishes innocence.

Alternatively, the State claims that the factual innocence statute has no bearing on the interpretation of the DNA Testing Statute because the factual innocence statute was enacted years later. (Resp. Br. at 25.) But it is well-settled that “statutes should be construed so that no part or provision will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another.” *State v. J.M.S. (In re J.M.S.)*, 2011 UT 75, ¶ 22, 280 P.3d 410 (alterations omitted). Thus, this court “interpret[s] the provisions of a statute in harmony with other statutes in the same chapter and *related chapters*.” *Id.* (alteration and internal quotation marks omitted). This is true regardless of when the various provisions were enacted. Indeed, there is no support for the State’s proposition that a statute should be read in harmony *only* with the statutes that existed at the time it was enacted. (Resp. Br. at 25.)

In this case, the factual innocence statute expressly contemplates that DNA test results may be only *part* of the evidence that exonerates a petitioner. Reading the factual innocence statute in harmony with the DNA Testing Statute therefore supports the conclusion that a petitioner may obtain DNA testing even when the results alone may not exonerate him.

**“Potential to Produce”** – The fourth problem with the State’s reading is that it gives no meaning to much of the statutory text, including the word “produce.” The DNA Testing Statute permits testing when the petitioner “alleges,” among other things, that “the evidence that is the subject of the request for testing has the potential to *produce new, noncumulative evidence that will establish the person’s factual innocence.*” Utah Code § 78B-9-301(2)(f) (emphasis added). But the State’s reading omits the italicized language. In the State’s view, the statute permits testing only when “the evidence that is the subject of the request for testing has the potential to establish the person’s factual innocence.”

With the relevant language omitted, the State contends that the DNA Testing Statute “fits comfortably among the strictest statutes” governing DNA testing across the country. (Resp. Br. at 37.) Under the State’s altered version of the statute, testing is permitted only where “the evidence logically requires the presence of only the [perpetrator’s] DNA, excluding all others.” (Resp. Br. at 57-58.) Indeed, were the State correct that Utah’s statute required that “the evidence that is the subject of the request for testing will establish the person’s factual innocence,” the State also would be correct that the statute does not permit testing if “there is no possible combination of DNA results that has the potential to exclude Mr. Meinhard as the killer.” (R.449:13.)

And ignoring the relevant language, Utah’s statute *would* be similar to Pennsylvania’s, which requires a petitioner to establish that “DNA testing of the

specific evidence, assuming exculpatory results, would establish . . . actual innocence.” 42 Pa. Const. Stat. § 9543.1(c)(3)(ii)(A). But as for the rest of the statutes the State cites as being the “strictest,” nearly all of them actually permit testing when the test results “may” exonerate the petitioner, “produce” exculpatory evidence, or when the results would be “material” to the identity of the perpetrator. (Resp. Br. at 35 n.10.) In other words, like Utah’s statute, those “strict” statutes do not require that the test results, by themselves, exonerate the petitioner.<sup>3</sup>

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<sup>3</sup> Alaska Stat. § 12.73.020(7) (requiring testing if the petitioner “identifies a theory of defense that would establish the [petitioner’s] innocence”); Idaho Code § 19-4902(e)(1) (“[t]he trial court shall allow the testing” if “[t]he result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent”); Mass. Gen. Laws ch. 278A, § 7(b)(4) (requiring the trial court to allow testing if the petitioner has “demonstrated by a preponderance of the evidence . . . that the requested analysis has the potential to result in evidence that is material to the [petitioner’s] identification as the perpetrator of the crime in the underlying case”); Mich. Comp. Laws § 770.16(4)(a) (“[t]he court shall order DNA testing if . . . the evidence sought to be tested is material to the issue of the convicted person’s identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction”); N.H. Rev. Stat. § 651-D:2(III)(d) (permitting testing if the “DNA results of the evidence sought to be tested would be material to the issue of the petitioner’s identity as the perpetrator of, or accomplice to, the crime that resulted in his or her conviction or sentence”); Or. Rev. Stat. § 138.692(2)(d) (requiring testing where “[t]here is a reasonable possibility that the testing will produce exculpatory evidence that would establish the innocence of the person”); S.D. Codified Laws § 23-5B-1(9)(b) (requiring testing where “[t]he petitioner identifies a theory of defense that . . . [w]ould establish the actual innocence of the petitioner”); Va. Code § 19.2-327.1(A)(iii) (permitting testing where “the testing is materially relevant, noncumulative, and necessary and may prove the actual innocence of the convicted person”); Wyo. Stat. § 7-12-303(c)(ix) (permitting testing where “the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the movant’s actual innocence”).

But when meaning is given to *all* of the statutory language – as it must be – the State’s interpretation fails. The test results need not be able to “prove” the petitioner’s innocence as the State contends, but need only lead to or “*produce*” evidence that might. And the results need not be guaranteed – the statute requires only that there be a “*potential*” that the results will produce exculpatory evidence. When meaning is given to all the language, the statute permits testing where, like here, the test results might lead to evidence that can exonerate the petitioner.

**Legislative Intent** - The fifth problem with the State’s reading, assuming the State has shown that language to be ambiguous, is that it contradicts the legislative history. The legislature did not intend that DNA testing would be available only when “the evidence logically requires the presence of only the [perpetrator’s] DNA, excluding all others,” as the State contends. (Resp. Br. at 57-58.) Instead, the legislature intended testing to be available when the results could show the absence of the petitioner’s DNA, or, in other words, the petitioner was not the “person there” at the scene of the crime. Floor Debate, Feb. 16 (statement of Sen. Hillyard). (A transcript of the floor debates is attached at Addendum G).

Specifically, Senator Hillyard explained that “the science of DNA testing has so progressed to the point that you can go back and take [a] DNA sample and test it to see whether [it] really belongs” to the person convicted for the

crime. Floor Debate, Feb. 19 (statement of Sen. Hillyard). He cited an example of a Virginia case where, after obtaining post-conviction DNA testing, a man on death row was exonerated “within 8 days of being executed” because, with the test results, he was “able to establish that he was not the person there.” Floor Debate, Feb. 16 (statement of Sen. Hillyard). He also explained that, under the DNA Testing Statute, a petitioner would be entitled to a hearing “if [the test result] comes back to show that [he is] not the person with that DNA.” *Id.* In short, the legislature suggested that testing would be available to show the *absence* of the petitioner’s DNA—not only when testing could definitively prove innocence. This contradicts the State’s reading.

Similarly, the legislature did not intend that a petitioner would be required to “make a complete proffer under the factual innocence statute,” and obtain testing only if “a DNA test remains the only piece missing from the innocence puzzle.” (Resp. Br. at 30.) Instead, the legislature made testing available where, like here, the test results might lead to evidence that can exonerate the petitioner.

### **III. DNA on the Fingernail Clippings and on the Fingerprint Can Produce Evidence that Will Establish Mr. Meinhard’s Factual Innocence**

In the remainder of its brief, the State argues that the biological evidence cannot produce new evidence that will establish Mr. Meinhard’s innocence. (Resp. Br. at 40-65.) But as discussed below, because many of the State’s arguments were not drafted in response to the opening brief, the State largely fails to respond to the arguments Mr. Meinhard made in his opening brief.

Before responding to the State's arguments, Mr. Meinhard first discusses these problems.

**A. The State's Brief Does Not Address the Opening Brief Because the State Drafted Its Fact Section Before the Appeal**

In the State's discussion of the biological evidence, the State mischaracterizes Mr. Meinhard's arguments and fails to respond to the evidentiary issues Mr. Meinhard raised in his opening brief. This problem is explained, in part, by the fact that approximately half of this portion of the State's brief is copied, nearly verbatim, from its opposition to Mr. Meinhard's petition below. (*Compare* Resp. Br. at 48-61, *with* R.233-46.)

The most egregious mischaracterization occurs when the State claims that Mr. Meinhard "has provided no theory explaining how the totality of th[e] evidence is in any way consistent with the guilt of another person." (Resp. Br. at 50; *see also* R.236 ("he has not provided any theory explaining how the totality of th[e] evidence is in any way consistent with the guilt of another person"). But as Mr. Meinhard explained, if the DNA test results "identify Mr. Taylor's DNA, that result alone could be enough to exonerate Mr. Meinhard as it would undermine Mr. Taylor's testimony and implicate him as the real killer." (Op. Br. at 50-51.)

Indeed, Mr. Meinhard thoroughly explained how the evidence showed that Mr. Taylor could be the killer. (Op. Br. at 43-48.) Mr. Taylor had a strong motive to kill Mr. Peterson, and there were several troubling aspects of his testimony. Specifically, in the opening brief, Mr. Meinhard explained that



(i) Mr. Taylor said that Mr. Meinhard dragged a body across the front console of a car, a feat nearly impossible for a man in Mr. Meinhard's physical condition; (ii) Mr. Taylor claims that he never saw Mr. Peterson's body, even though he was twice only inches from the car where, he says, Mr. Peterson's body was in the passenger seat; and, most important, (iii) according to Mr. Taylor's story, it was impossible that Mr. Peterson's body ended up where it was found, miles from Mr. Peterson's car. (Op. Br. at 45-46.) The State provides no response to these troubling aspects of Mr. Taylor's testimony and in fact, seems to ignore them.

In his opening brief, Mr. Meinhard also pointed out that, according to Mr. Taylor, Mr. Meinhard never took the body out of the car, making his story incompatible with the physical evidence. (Op. Br. at 46-47.) But the State fails to acknowledge this problem, and instead repeats what it stated to the district court: "Meinhard dragged Peterson's body out of the passenger side of the car and up a dirt trail leading into the hills." (Resp. Br. at 6; R.215 ("Petitioner dragged Peterson's body out of the passenger side of the car and up a dirt trail leading into the hills.")) As Mr. Meinhard explained in his opening brief, Mr. Taylor's testimony does not support this conclusion. (Op. Br. at 46-47.)

Next, with respect to Mr. Meinhard's physical condition at the time of the murder, Mr. Meinhard explained in his opening brief that it would have been "near impossible for a person in Mr. Meinhard's condition" to "stab[] Mr. Peterson to death, and then drag[] the body over the console to the passenger

seat.” (Op. Br. at 45.) Mr. Meinhard explained that this is true because Mr. Meinhard’s “left arm was in a sling and so weak that he sometimes had to move it with his right arm, . . . [h]is leg was held together with pins and rods, and he could not bend his ankle.” (*Id.* (citations omitted).) In short, “Mr. Meinhard could not have moved a body by himself.” (*Id.*)

But in response, the State again fails to acknowledge the problem and copies verbatim what it stated below: “Meinhard fails to acknowledge that the killer used his *right* arm to stab Peterson, not his left. Meinhard also fails to acknowledge that he had almost full use of his right arm by the time of the murder.” (Resp. Br. at 51 (citation omitted); R.237.) The fact that Mr. Meinhard may have been able to use his right arm does not explain how he could — with a severely injured left arm and leg — have dragged a body by himself.

Further, the State accuses Mr. Meinhard of “fail[ing] to acknowledge that his disabilities in part established that it was Meinhard who wiped the car down after the murder” — specifically, the prints in the snow around the car. (Resp. Br. at 52.) This accusation is confusing in light of Mr. Meinhard’s explanation of how the State believed the prints in the snow implicated him in the murder:

First, the State argued that the footprints in the snow around Mr. Peterson’s car implicated Mr. Meinhard because they were large like Mr. Meinhard’s feet, they looked “just like” the abnormal gait caused by his external fixator, and the tread pattern “matched” the pattern on his shoes.

Second, the State pointed to the imprints of the “object” that had been set down in the snow and argued that “[i]t’s very likely that the

bleach odor, after he had splashed it around, was making his asthma act up, and he had to stop” — twice, setting the bleach down both times — “to give himself a shot of medicine because of the asthma.”

(Op. Br. at 15 (citations omitted)). It is unclear how Mr. Meinhard could have better “acknowledge[d]” this circumstantial evidence. Indeed, the State’s accusation is another passage largely copied from its opposition memorandum filed below, not drafted in response to the opening brief. (R.237.)

Similarly, Mr. Meinhard emphasized in his brief that the oral pain medication found near Mr. Peterson’s car was a *different brand* from the medication later found in Mr. Meinhard’s possession. (Op. Br. at 15.) But in response, the State again repeats verbatim what it stated below: “Police found toothache drops and a box for toothache drops in very close proximity to the car,” and “[t]his was the same brand of toothache drops found on Meinhard.” (Resp. Br. at 49 (citation omitted); R.233-34.) This statement contradicts the evidence presented at trial. (C.R.753:11-12,91 (police found Dents brand toothache medicine at the scene, but found Orajel on Mr. Meinhard)). In fact, it also contradicts the State’s closing argument at trial: “The defendant . . . had a new toothache medicine now. Now it was Orajel and not the Dents” which was found at the scene. (C.R.757:49.)

Ultimately, the fact that much of the State’s brief is copied from its petition explains why it fails to respond to many of the points in Mr. Meinhard’s brief.

**B. The Fingernail Clippings Can Produce Evidence that Will Exonerate Mr. Meinhard**

Mr. Meinhard argued that DNA on Mr. Peterson's fingernail clippings could identify his killer. (Op. Br. at 48.) In support, Mr. Meinhard noted that the evidence indicates that Mr. Peterson fought his attacker before his death. (*Id.*) Specifically, the medical examiner identified defensive wounds on Mr. Peterson's body and noted that they were indicative of a "violent struggle," and Mr. Peterson's fingernails were covered in a reddish-brown substance consistent with blood. (*Id.*) Because Mr. Peterson struggled with his attacker, the blood under his fingernails could belong to his attacker. (*Id.* at 48-49.)

Mr. Meinhard also noted that the medical examiner found hairs on Mr. Peterson's hands, and that even though the hairs are not available for testing, they "further support the medical examiner's theory that Mr. Peterson fought his attacker." (*Id.* at 49.) In response, the State argues that Mr. Meinhard's theory "turns on whether hair was recovered from Peterson's hands." (Resp. Br. at 46.) From there, the State concludes that, because "four separate courts rejected Meinhard's claim that hairs were found in Peterson's hand," Mr. Meinhard's argument fails. (*Id.* at 45-46.)

But Mr. Meinhard's theory does not depend upon there having been hairs in Mr. Peterson's hands. Instead, his theory depends upon the blood under Mr. Peterson's fingernails, along with the medical examiner's observation that Mr. Peterson engaged in a "violent struggle" with his attacker. (Op. Br. at 48.)

Together, this evidence suggests that Mr. Peterson fought his attacker, and, therefore, the killer's DNA may be under his fingernails. As Mr. Meinhard explained, the fact that the medical examiner found what he believed were hairs in Mr. Peterson's hands is "further support" for that theory. (Op. Br. at 49.)

Similarly, at the hearing on Mr. Meinhard's petition, the State conceded that "there is a potential that [Mr. Peterson] scratched the attacker." (R.449:16.) In other words, there is a "potential" that the fingernail clippings can lead to the identification of Mr. Peterson's killer and produce evidence that exonerates Mr. Meinhard. That alone satisfies the DNA Testing Statute.

The State agreed in 1997 when it tested the fingernail clippings "to determine whether there is skin or blood from the perpetrator under the fingernails." (C.R.148,284.) The State now contends that it can be "excused" for what it calls an "early misconception that the fingernails might have evidentiary import." (Resp. Br. at 59.) But the potential "evidentiary import" of the fingernail clippings is the same today as it was in 1997. Testing may lead to the identity of the killer. That is precisely why the Utah Rules of Criminal Procedure required the State to test them in the first place. (*See* Resp. Br. at 58-59.) And nothing in the record suggests that the State's stipulation was based upon the "misconception . . . that investigators found hairs in Peterson's hands." (*Id.*)

Further, no court has ever "rejected [Mr.] Meinhard's claim that hairs were found in [Mr.] Peterson's hand" as the State contends. (Resp. Br. at 45.) The

question before the courts was whether the State had violated Mr. Meinhard's constitutional rights by destroying evidence—*not* whether hairs were ever found in Mr. Peterson's hands.

Specifically, after his conviction, Mr. Meinhard moved for a new trial and argued, among other things, that the State's loss of the hairs "violated [his] right to a fair trial." (C.R.669,677.) The district court rejected his constitutional argument, ruling that "the evidence does not support the . . . position that hair samples were lost or removed." (C.R.738.) On appeal, Mr. Meinhard again "assert[ed] that he was denied a fair trial" because of the lost evidence. *State v. Meinhard*, 2001 UT App 304U, \*1. The court of appeals upheld the district court's ruling, concluding that it did not abuse its discretion. *Id.*

Mr. Meinhard then filed a habeas petition in federal court, again arguing that "he was denied due process when the State lost or destroyed" the hairs. (R.271.) But the federal court rejected his argument after concluding that "the state trial court found no evidence was lost," and that Mr. Meinhard failed to meet his burden of showing that the state court's findings were incorrect. (R.271-72.) The Tenth Circuit Court of Appeals affirmed, concluding that "[n]o jurist of reason can disagree with the district court's conclusion that [Mr. Meinhard] failed to make a substantial showing of a violation of a constitutional right." *Meinhard v. Friel*, 118 F. App'x 392 (10th Cir. 2004).

But even if the district court *had* found that the hairs never existed, that finding would not preclude Mr. Meinhard from mentioning the contrary evidence. That finding—like the district court’s finding of Mr. Meinhard’s guilt—would be susceptible to review in a post-conviction proceeding. Indeed, if the district court’s findings were forever unchallengeable, the PCRA could not provide relief to a wrongfully convicted petitioner.

At this stage, Mr. Meinhard has not challenged any of the district court’s findings concerning the hairs. Instead, he seeks only DNA testing of the fingernail clippings. And because that testing has the potential to produce exculpatory evidence, he is entitled to it.

**C. The Fingerprint Can Produce Evidence that Will Exonerate Mr. Meinhard**

DNA on the fingerprint also has the potential to produce exculpatory evidence. As Mr. Meinhard pointed out, Mr. Peterson was killed inside his car, but his body was found outside his car and several miles away. (Op. Br. at 51.) This evidence suggests that the killer dragged Mr. Peterson’s body out of the car, drove the car to the location where it was later found, and then returned later to bleach the inside of the car. Thus, it appears that the killer touched the door handle at least once, possibly leaving his DNA. (*Id.*)

The State claims that and DNA on the fingerprint would be “meaningless” because “[i]t is at least as logical to conclude that the killer accidentally failed to wipe off an already-existing print as it is to conclude that he accidentally left his

own after cleaning the car.” (Resp. Br. at 60.) Alternatively, the State hypothesizes that “the print could have been placed by an unwary hiker after the murder.” (*Id.*)


Indeed, it is possible that the print was left by someone other than the killer. But it is *also* possible that the print belongs to the killer. That possibility is why the State lifted and analyzed the print in 1997. Indeed, the State does not dispute that this was its goal in analyzing the fingerprint. Thus, DNA testing has the potential to lead to evidence that will exonerate Mr. Meinhard. The post-conviction court’s error was not harmless, and Mr. Meinhard satisfied his burden for DNA testing.

### Conclusion

The district court misinterpreted the statutory requirement to obtain DNA testing. Under the correct interpretation, Mr. Meinhard is entitled to DNA testing. This court should reverse and remand for that testing.

DATED this 18th day of December, 2014.

ZIMMERMAN JONES BOOHER LLC



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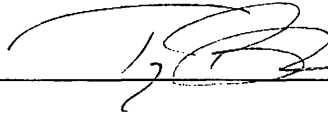
### Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6,986 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

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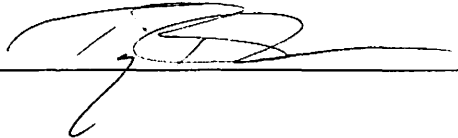
DATED this 18th day of December, 2014.

  
A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

### Certificate of Service

This is to certify that on the 18th day of December, 2014, I caused two true and correct copies of the Reply Brief of Appellant to be served on the following via first class mail, postage prepaid:

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

JIMMY DEAN MEINHARD,  Petitioner,	<b>REPLY MEMORANDUM IN SUPPORT OF VERIFIED PETITION FOR POST-CONVICTION DNA TESTING</b>
vs.	Case No. 130900232
STATE OF UTAH,  Respondent.	Judge L. A. Dever

Petitioner Jimmy Dean Meinhard ("Meinhard"), through his undersigned counsel of record, respectfully submits this Reply Memorandum in Support of his Verified Petition for Post-Conviction DNA Testing.

## SUMMARY

On December 13, 2012, Meinhard filed a Verified Petition for Post-Conviction DNA Testing and a Memorandum in Support of the Petition. Under the Utah Post-Conviction DNA Testing statute (the "Statute"), a Petitioner engages in a two-step process to establish factual innocence – first, the Petitioner requests DNA testing and then, if the DNA testing results are favorable to the Petitioner, he or she may file a subsequent motion to vacate the conviction. *See* Utah Code Ann. §78B-9-301 et seq. Importantly, in the first instance, the Petitioner must only assert factual innocence and show certain threshold criteria that would allow DNA testing. *See* Utah Code Ann. §78B-9-301(2). If the court finds, by a preponderance of the evidence, that the Petitioner meets all of the threshold criteria, then DNA "shall be ordered." *Id.* at §78B-9-301(6)(b). At the DNA testing stage, the Petitioner is not required to prove factual innocence. Rather, the Petitioner is only required to show that DNA testing is appropriate. *Id.*

In his Petition and supporting memorandum, Meinhard establishes, as required by the Statute, that he meets all of the criteria necessary to order DNA testing of biological evidence in his case. The State does not dispute that Meinhard meets six of the seven criteria. However, the State has requested that this Court deny Meinhard's Petition on the basis that such testing does not have the "potential to produce new, noncumulative evidence that will establish [Meinhard's] factual innocence." *Id.* at §78B-9-301(2)(f). In objecting to testing, the State conflates the two steps of the Statute, attacks Meinhard's theory of innocence and argues that testing should be denied because it is not absolutely certain that the test results will establish Meinhard's factual innocence. In so arguing, the State misstates the relevant standard necessary to order testing. No petitioner could ever show, before the fact, that testing would produce certain evidence of innocence. That is why the Statute only requires that testing have the "potential" to produce



evidence of innocence, which is clearly does here. The State's apparent belief that neither the absence of Meinhard's DNA, nor the presence of a third-party's DNA, has the potential to exonerate Meinhard is clearly incorrect and would render the entire post-conviction DNA testing statute meaningless.

In addition, strikingly absent from the State's response is any explanation as to why testing the evidence at issue will harm the State in any way. The interests of justice are served by accuracy, not conviction. If the State believes that the test results do not warrant exonerating Meinhard, the place to make that argument is in the second step of the statutory process -- the proceeding to vacate the conviction based upon factual innocence, not at the threshold request for testing itself. At this stage, because there is the potential that Meinhard was wrongfully convicted and evidence that remains intact could shed light on that question, the interests of justice weigh overwhelmingly in favor of gathering more information, not less. This benefits not only Meinhard, but also the State. Thus, Meinhard respectfully requests this Court to grant his Petition for Post-Conviction DNA Testing.

### ARGUMENT

I. DNA TESTING NEED ONLY HAVE THE *POTENTIAL* TO PRODUCE NEW, NONCUMULATIVE EVIDENCE OF INNOCENCE AND THE EVIDENCE MEINHARD SEEKS TO HAVE TESTED HAS THAT POTENTIAL.

The State devotes much of its response to reciting facts from the record pointing to Meinhard's guilt and attacking Meinhard's theory of innocence. The appropriate point at which the State should make these arguments is when, and if, Meinhard moves to vacate his conviction under §78B-9-303, not at the threshold where Meinhard is simply seeking DNA testing.

To secure DNA testing, the Statute requires only that the Petitioner "assert" his factual innocence and then prove the following criteria by a preponderance of the evidence:

(a) evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted;

(b) the chain of custody is sufficient to establish that the evidence has not been altered in any material aspect;

(c) the person identifies the specific evidence to be tested and states a theory of defense, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support;

(d) the evidence was not previously subjected to DNA testing or, if the evidence was tested previously, the evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing;

(e) the proposed DNA testing is generally accepted as valid in the scientific field or is otherwise admissible under Utah law;

(f) the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's factual innocence; and

(g) the person is aware of the consequences of filing the petition[.]

Utah Code Ann. §§78B-9-301(2)-(6)(b). In this case, the State does not dispute that Meinhard meets six of the seven criteria. However, the State claims that the test results do not have "the potential to produce new, non-cumulative evidence that will establish factual innocence." *Id.*

§78B-9-301(2)(f). The State's insistence that the DNA testing results, and the results alone, must establish factual innocence takes that phrase out of context, is inconsistent with the process and evidentiary standards articulated in the Statute, and would require a level of certainty that no petitioner could ever meet. Indeed, under the State's interpretation, DNA results could never establish innocence, because according to the State, neither the absence of the defendant's DNA nor the presence of an unknown party's DNA is exonerating. If that were the case, the entire post-conviction testing process would be pointless, and no petition would ever be granted.<sup>1</sup>

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<sup>1</sup> "[Where a literal reading of the plain language at issue 'creates an absurd, unreasonable or inoperable result, [courts] assume the legislature did not intend the result....[and] endeavor to discover the underlying legislative intent and interpret the statute accordingly.'" *Miller v. State*, 2009 UT App. ¶ 12 (quoting *State v. Jefferies*, 2009 UT 57, ¶ 8, 217 P.3d 265).



The State's position also conflates two different proceedings under the Statute: a proceeding seeking DNA testing, and a separate proceeding, instituted by a motion to vacate the conviction, seeking a finding of factual innocence. *See id.* at §§ 78B-9-301 to 304. The standard for the first type of proceeding is intentionally low, requiring only that testing have the mere "potential" to produce exculpatory evidence. *Id.* at §§78B-9-301(2)(f); (6)(b) (requiring the "potential" to produce exculpatory evidence and evaluating the entire petition under the preponderance of the evidence standard.) This low threshold is by design, because a petition for DNA testing simply seeks to gather potentially exonerating information, not to conclusively establish factual innocence. *See* C.C. Horton, II, *Utah's DNA Actual Innocence Bill*, 14 Utah Bar J. 12 (2001) (stating that goal of the statute is to "give wide opportunity" for petitioner to seek exoneration). It is only if a petitioner later seeks to vacate his conviction based on the results of the DNA testing that he must satisfy the heightened standard of actually showing factual innocence by "clear and convincing" evidence. *Id.* at § 78B-9-303(2).

At this point, Meinhard is not seeking an adjudication of his factual innocence but only testing of biological evidence that has never been tested in this otherwise highly circumstantial case. Accordingly, he need only show that DNA testing has the "potential" to produce new noncumulative evidence showing his innocence. The State's assertion that subjecting both the fingerprint found on the victim's car and fingernail clippings from the victim to DNA testing does not have the potential to prove his innocence is incorrect. The State argues that the absence of Meinhard's DNA on either the fingernail clippings from the victim or the fingerprint lifted from the car's door handle cannot prove Meinhard's innocence. However, Meinhard's theory of innocence – that he was not present during the murder – would be directly supported by the

absence of his DNA on both pieces of evidence, and would be further supported if a third party's DNA were present.

**a. Fingernail Clippings**

The State asserts that the circumstances of the murder "do not logically require the killer's DNA to be under Peterson's fingernails." The State argues that despite testimony from its medical examiner that the victim had "defensive wounds" indicating a "violent struggle," there is no evidence that suggests the victim inflicted offensive wounds on the attacker. Trial Tr. Vol. 4 at 14, 18. Given that the victim was trying to "ward off attack," it is highly likely that in doing so, he came into direct contact with his assailant, possibly scratching him or her. *Id.*

To support its argument that there is no reason why the assailant's DNA would be under the victim's fingernails, the State offers a list of assertions that are merely red herrings. First, the State argues that there was no blood splatter at the scene other than that from the victim. The State offers no explanation of why blood splatter would be expected to be found when someone is scratched, and it is certainly possible to scratch someone and not draw blood. The State argues that no evidence suggests the presence of foreign DNA under the victim's fingernails, although this can only be determined by DNA testing, which has never been done and which the State is now opposing. The State argues that there is evidence of trauma or damage to the victim's nails, but does not offer any explanation of why it would be expected to see signs of trauma to the victim's nails if he had scratched his killer. The State argues that no other person connected with the case had unexplained defensive wounds, but police did not interview Larry Taylor, a possible alternative suspect, until nearly a month after the murder, giving plenty of time for any defensive wounds to heal. The only way to know for certain whether the assailant's DNA is in fact under the victim's fingernails is to test the fingernail clippings. Again, since Meinhard must only show

that DNA has the *potential* to produce evidence of his innocence, he clearly meets the requirements under the Statute and the nails should be subjected to testing.

**b. Fingerprint**

The State argues that there is no proof that the fingerprint on the car handle bears any relation to the assailant. However, this argument is at odds with the State's treatment of the evidence when it was initially collected. At that time, the State subjected the fingerprint to forensic analysis, but there was insufficient detail to make a visual comparison. Clearly the State believed the print bore some relation to the assailant, otherwise testing it would have been pointless. The fact that the evidence suggests that the assailant returned to the scene and attempted to wipe away physical evidence and that there was one solitary fingerprint on the door handle suggests that it was inadvertently left by the perpetrator. Because Meinhard need only show that there is *potential* for DNA testing to establish his innocence, the fingerprint should be tested.

At a minimum, this testing, of both the fingerprint and the fingernail clippings, has the potential to produce new exculpatory evidence. What the evidence will conclusively prove, however, is not an issue at this stage of the post-conviction process. Accordingly the State's speculative assertions about guilt or how the evidence will or will not establish Meinhard's innocence are premature and provide no basis to deny Meinhard's Petition seeking DNA testing.

**CONCLUSION**

Since the time of his arrest until today, Meinhard has consistently maintained his innocence. DNA testing has the potential to establish whether Meinhard, or some other person, committed this crime – at the very least, it has the potential to produce new non-cumulative

evidence of innocence. Because Meinhard meets this, and all of the other requirements under the Statute, he respectfully requests that this Court order DNA testing of the evidence at issue.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of June, 2013.

s/s Jensie L. Anderson

Jensie L. Anderson  
Elizabeth Fasse  
ROCKY MOUNTAIN INNOCENCE CENTER

Attorneys for Petitioner

**CERTIFICATE *of* SERVICE**

This is to certify that on the 25<sup>th</sup> day of June, 2013, a true and correct copy of the foregoing Reply served e-filed and served by the U.S. Mail, and addressed to the following:

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s/s Jensie L. Anderson

Tab G





UTAH SENATE 2001

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SENATE BILL 172 POST-CONVICTION DNA TESTING

SENATE AND HOUSE HEARINGS 2001

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Transcription of Senate Debates on SB 172: Post-conviction DNA Testing (2001)

Day 33, Senate (February 16, 2001)

[http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=8392&meta\\_id=51292](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=8392&meta_id=51292)

56:28 – PRESIDENT: We will now go to Senate Bill number 172.

56:32 – Senate Bill 172 Post-conviction DNA Testing, Senator Hillyard.

56:40 – SENATOR HILLYARD: Ms. President, (unintelligible) let me tell you, this is a very interesting bill. And if you've been following some of the history that's been happening in this area, I'm glad to say that this bill will adopt Utah into what's happening in the mainstream and even on the cutting edge of one of the issues I've got in this bill. It was actually brought to me by SWAP and the concern is this: someone has been convicted of a serious crime and is in prison and during this time of the conviction, usually a number of years ago, there were DNA samples, but the testing wasn't very specific. If you've been following DNA testing, you know it's become very, very specific now and there's a lot of things they can do on DNA testing that's getting better all the time at the identifying of people. So what's happening is people who, even on the death row, if you've heard of this case, I think it's the Wilkinson case, in Virginia, the man got within eight days of being executed for a murder that he maintained that he did not commit. And so there was a stay and in the process they did a DNA testing with the more sophisticated testing procedures they have now and were able to establish that he was not the person there.

And so the problem we have is that we have no process to do that. So if

you're an inmate at the Utah State Prison convicted of one of these crimes and you've maintained that you are not guilty and now you want to have a testing mechanism, there's nothing in statute on how you really handle it. This bill puts in statute what will happen. A procedure that you have to file information, the information in the court where you were convicted, it goes to the prosecutor, the prosecutor then can give some response to it. You have to indicate that it is the type of case that you're not inconsistent; in other words, if you maintained you did the crime, but you were mentally ill, you would not be able to do this because you've already admitted you did it.

We did put a thing in the bill that provides that if you plead guilty - now this sometimes happens, you sit down with someone and say you've been charged with first degree murder for which the death penalty could be imposed. If you want to plead guilty to a lesser offense and get rid of the death penalty threat, sometimes they do that. So that's taken into consideration, but if you've taken an inconsistent position - you say I did it but that wasn't the reason - now you come back and want a DNA test to prove you didn't do it, you can't do that.

The victim also gets notice. They are involved if they want to be involved in the process. And then there's a procedure done whereby the DNA testing is done on the material. And you have to show that the DNA material was protected so it hasn't deteriorated. And if it comes back to show that you are not the person with that DNA, then it's scheduled for a hearing in front of the judge. It doesn't automatically exonerate you and, again, my first - when I read that I said, Gee, there

ought to be some sort of automatic exoneration, but I asked John Hill, who's director of the Legal Aid, and also Professor Frankel at the University of Utah, who's in charge of what's called the Rocky Mountain Innocence Project, which is heading this, they all felt very comfortable with this language – it'll go back to the court.

The unique thing about this law for Utah is the judge, after a hearing, can come back and exonerate you and find that you, in fact, did not commit the crime. And so, there's some safeguards in this bill to make sure if you are in prison with nothing else to do you cannot just ask for this, there's got to be some sort of showing, some evidence. And if you end up that it doesn't exonerate you, you can be obligated to pay the cost of the DNA testing that's done. And if it comes back inconclusive, then you're not burdened with that as well.

This is a bill that I feel very comfortable with, it has the input of SWAP, the prosecutors, the input of the attorneys who specialize in representing defendants. That I think this puts in place Utah, brings it up to date on the process, but also I think takes it one step further and exoneration, which I think is a good thing to give these people the rights that they need to have.

You'll notice it also has the fiscal note on it, but it's interesting on the fiscal note, as they were talking about the fiscal note, if you do find inmates that are really not guilty - it's the interesting thing about being a prosecutor, their job is not only to convict, but to do justice. There's a special duty on a prosecutor when you do a prosecution, that if they know of exonerating evidence, that they give that to the

defense because - and I was impressed when I dealt with the prosecutors dealing with this, they do not want wrongfully convicted people in prison either. And if a person, because of the state-of-the-art when the conviction occurred some time ago, was not given a full chance, can now come back and find scientific evidence that will exonerate them, then they ought to be given that .

I'd be glad to respond to any questions you may have on the bill, but it's a very important bill.

01:01:05 – PRESIDENT: Discussions or questions of Senate Bill 172...seeing none.

01:01:12 – SENATOR HILLYARD: Seeing none I call for question on the bill.

01:01:15 – President: Okay, we have question whether Senate Bill 172 should be passed for a second time.

01:01:19 – SENATOR HILLYARD: I should say though with emphasis on when you prioritize funding items, this is a bill that really needs to be funded.

01:01:30 – President: Okay, we have a motion before us that Senate Bill 172 shall be read for the third time. Roll call vote.

(Whereupon a roll call vote was conducted)

01:02:29 – President: Senate Bill 172, having received 26 aye votes, no nay votes, and three being absent, be referred to the third reading calendar.

\* \* \*

Day 36, Senate (February 19, 2001)

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24:26 – MR. SECRETARY: Let's go the third reading calendar and we'll start with Senate

Bill number 172.

READING CLERK: Senate Bill number 172 Post-conviction DNA Testing,

24:35 – SENATOR HILLYARD: Thank you. This is the bill I explained on Friday. It involves DNA testing for someone who has been convicted of a crime and is now spending time in prison. And the science of DNA testing has so progressed to the point that you can go back and take that DNA sample and test it to see whether this really belongs to the person involved. It is happening in a number of states, I don't think one has happened here in Utah yet, but this actually puts in the statute the procedures to be followed. It gives protection to both the criminals and to society. This has been agreed to by both the prosecutors and the people in the Innocence Project, the Rocky Mountain Innocence Project. I would just remind everybody, it carries a fiscal note of about \$56,000 so it's important not only you vote for it to get it passed here, but when we prioritize financial bills that it gets your support.

25:21 – PRESIDENT: It has a fiscal note of 54?

25:23 – SENATOR HILLYARD: It has \$56,000 fiscal I believe.

25:25 – PRESIDENT: Fifty-six, okay. Very good. Any questions?

25:29 – SENATOR HILLYARD: And I would simply say, if we have someone on death row, who now this shows they didn't commit the crime, it will save a lot more than \$56,000.

25:36 – PRESIDENT: I'll say.

Any other questions for Senator Hillyard? The question is shall Senate Bill 172 be passed. Roll call vote

(Whereupon a roll call vote was conducted):

26:28 – PRESIDENT: Senate Bill 172 has received 27 aye votes, no nay votes, 2 being absent, passes and will be referred to the House for further action.

\* \* \*

Day 39, House (February 22, 2001)

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02:22:48 – READING CLERK: Senate Bill number 172, Post-conviction DNA Testing.

Lyle Hillyard.

02:22:56 – SPEAKER OF THE HOUSE: Representative Garn.

02:22:59 – REPRESENTATIVE GARN: Motion to circle Senate Bill 172.

02:23:02 – SPEAKER OF THE HOUSE: Motion is we circle Senate Bill 172. Discussion of the Motion? Seeing none, all in favor say aye. Opposed say no. Motion passes, the bill will be circled.

\* \* \*

02:36:59 – SPEAKER OF THE HOUSE: Representative Swallow.

02:37:00 – REPRESENTATIVE SWALLOW: Thank you, Mr. Speaker. Motion to un-circle Senate Bill number 172, Post-conviction DNA Testing.

02:37:04 – SPEAKER OF THE HOUSE: Motion is that we un-circle Senate Bill 172, Post-conviction DNA Testing. Discussion on the motion? Seeing none, all in favor say aye. Opposed say no. Motion passes,

Thank you, Senator Hillyard. We appreciate the extra vote Senator Hillyard.

Representative Swallow.

02:37:28 – REPRESENTATIVE SWALLOW: Thank you. I'd like to invite Senator Hillyard to present the bill as well as long as he's voting.

This is an interesting bill, a good bill I should say, it codifies for the first time under Utah law that post-conviction DNA testing can be actually admitted into a court. Under our statute it provides a procedure for that. It provides for a petition post-conviction by the convicted felon, usually, provides for notice for all parties, including the district attorney. Provides that the court can actually have a hearing and actually exonerate someone if there's, under a clear and convincing standard, if there's evidence that would support the overturning of the conviction. It does have some qualifications. For example, if a defendant actually pleads guilty by reason of some other defense, for example insanity or something, they cannot apply for this. And in the event that the judge will not provide for the exoneration based on the evidence, the judge still can provide for a new trial. Now currently there is no law in place for the admissibility of DNA testing post-conviction, so I think this is good policy and I would urge your support. If you have any questions, I'd be happy to answer those. I do understand that this is a consensus bill between the defense bar and the prosecutors bar.

02:38:52 – SPEAKER OF THE HOUSE: Thank you.

Representative Bigelow

02:38:58 – Representative Bigelow: Mr. Speaker, I reserve the right to make a motion. And I'm just trying to find the fiscal note on this is at \$56,000.

02:39:05 – SPEAKER OF THE HOUSE: I think it's self-appropriating.

02:39:08 – REPRESENTATIVE BIGELOW: And that's what I'm wondering because it showed 56,300 and we showed it at \$56,000.

02:39:17 – SPEAKER OF THE HOUSE: What's \$300 among friends?

02:39:20 – REPRESENTATIVE BIGELOW: Well, then I thank you.

02:39:23 – SPEAKER OF THE HOUSE: Further discussion?

Seeing no further lights, Representative Goodfellow?

02:39:30 – REPRESENTATIVE GOODFELLOW: Would the sponsor yield to a question?

02:39:32 – SPEAKER OF THE HOUSE: Mr. Swallow? Will you yield?

02:39:33 – REPRESENTATIVE SWALLOW: I will.

02:39:34 – REPRESENTATIVE GOODFELLOW: I have a person that's been calling me about...apparently he's been paying child support for like ten years and finally took a DNA test to find out that in fact the child that he's been paying support for is not his and yet, they keep saying that he still has to pay. He's been paying for ten years and therefore there is no out, he has to keep paying even though the child isn't his. Would this bill cover a situation like this?

02:40:05 – REPRESENTATIVE SWALLOW: No, this is just deals with the criminal code, not with civil actions or civil matters.

02:40:17 – SPEAKER OF THE HOUSE: Further discussion?

Seeing none, back to you, Representative Swallow, for summation.

REPRESENTATIVE SWALLOW: Waive summation.

Speaker of the House: Summation is waived. Voting is open on Senate Bill 172.



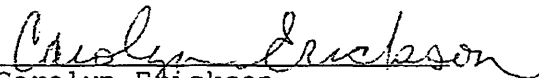
Seeing all present having voted. Voting will be, voting will be closed. Senate Bill 172 having received 68 yes votes and zero no votes passes this body. Will be referred to the Senate for the signature of the President. The foregoing Senate Bill 172 was publicly read by title, thereafter being signed by the Speaker of the House and the President of the House over which he presides. Act of the signing was duly entered upon the journal on this the 22nd day of February, in the year 2001.

(End of requested transcription)

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned recording was supplied to me by the office of Zimmerman Jones & Booher and was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages, to the best of my ability.

Signed this 14<sup>th</sup> day of November, 2014 in Sandy, Utah.

  
Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber