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Bryan Taylor
Policy Director
Office of the Governor of the State of Alabama
State Capitol
600 Dexter Avenue
Montgomery, Alabama 36130

Dear Mr. Taylor:

Thank you for your request for guidance on how the Governor's Office should approach requests for post-conviction DNA testing in capital cases. Especially since Alabama is one of the few states without a statute allowing for access to post-conviction DNA testing,¹ it is crucial that the Governor's Office have a just and sound policy on when such requests should be granted.

Requests for post-conviction DNA testing are made in a few different contexts, such as to develop evidence in support of a motion to vacate a conviction or to modify a sentence, or in support of a request made directly to the executive for commutation, clemency, or other relief. In capital cases where a governor, as opposed to the courts, is considering whether to authorize DNA testing, testing should be authorized where such testing has the potential – assuming that testing will produce an exclusion² – to raise

¹ Currently, 42 states have legislation allowing defendants post-conviction access to DNA testing. The states that do not have such legislation are Alabama, Alaska, Massachusetts, Mississippi, South Carolina, South Dakota, Oklahoma, and Wyoming.

² Exclusions can occur in three distinct contexts.

First, testing can produce an exclusion on a material piece of evidence where this exclusion is by itself enough for relief.

Second, there are cases in which testing produces an exclusion and additionally identifies a third-party suspect either through a match of the DNA profile to the profile of a known alternate suspect or through a "cold hit" to a convicted offender's profile in the state or federal DNA databases. As of December 2006, there were almost 4 million convicted offender profiles in the national DNA databank system, available at <http://www.fbi.gov/hq/lab/pdf/codisbrochure.pdf>, and to date, CODIS has aided over 45,000 investigations nationwide through databank hits, including almost 1,800 in Alabama alone. See FBI, CODIS - Investigations Aided, available at <http://www.fbi.gov/hq/lab/html/codis2.htm>. Jeffrey Deskovic and Douglas Warney are just two examples of defendants who were exonerated when a DNA profile developed

doubts about the conviction or the appropriateness of the sentence. Instances where testing should be granted include, but are not limited to, where testing could possibly produce evidence that casts doubt on: the defendant's culpability or participation in the crime; the extent of such culpability or participation; or a finding of any aggravating circumstances. Obviously, testing should be conducted where it could possibly refute forensic evidence used to convict the defendant. In addition, testing should be authorized, irrespective of whether the state or defense introduced that forensic evidence as an exhibit at trial, if it meets the above criteria.

It is important to note that the standard we are suggesting deliberately bases decisions as to whether to grant DNA testing on the impact that a DNA exclusion(s) would have on a given case and not the likelihood that DNA testing will produce an exclusion(s). This is crucial, because so many DNA exonerations have involved cases where evidence of the defendant's guilt seemed solid and overwhelming, only to be proven wholly unreliable through DNA testing.³ Our fifteen years of litigating DNA cases has taught us that there is simply no way to know prior to the DNA testing whether the DNA results will be exculpatory or inculpatory.

Finally, in light of these suggested guidelines, we very much hope that you will reconsider your decision to deny DNA testing in the Thomas Arthur case. As you know, the Innocence Project has reviewed the facts of the case and has contacted your office to request DNA testing on certain items collected from the crime. We believe that the Arthur case easily fits within the category of cases where DNA testing should be granted. Unlike prosecutors or defense attorneys, we are not proclaiming the guilt or innocence of

through post-conviction testing "cold hit" to a convicted offender who had not been suspected of having committed the crime. In both cases, the convicted offender who was identified through the CODIS match subsequently confessed and pled guilty.

Finally, there are cases in which an exclusion on a single piece of evidence would not be sufficient for relief, but where an exclusion on multiple pieces of relevant items plus the identification of the same foreign profile on those multiple items can cumulatively justify relief. Such results, where DNA testing establishes that the same genetic profile exists on a number of relevant items of evidence, are referred to as "redundancies" and have resulted in several exonerations. For example, Kenneth Wyniemko was convicted in 1994 of rape and exonerated in 2003 after a redundant profile was obtained on numerous pieces of evidence. Saliva from a cigarette butt, on nylons that had been stuffed into the rape victim's mouth, and on blood and skin scraped from beneath the victim's fingernails yielded a single male profile that excluded Kenneth Wyniemko as the source of the DNA. While the results from each piece of evidence alone would not necessarily have been sufficient to exonerate Wyniemko, the combined effect of the results of the sophisticated DNA testing performed in 2003 caused the original prosecutor to concede that "the DNA absolutely excludes him" as the perpetrator. See Kim North Shine, "DNA Tests Exonerate Man After Nearly A Decade in Prison, Suspect Is To Be Set Free," Detroit Free Press, June 12, 2003.

³ For example, Kirk Bloodsworth was exonerated in Maryland in 1993 after being sentenced to die and serving eight years in prison for the grisly rape and murder of a nine-year-old girl. He was convicted based on the testimony of five eyewitnesses, all of whom identified Mr. Bloodsworth as the man they saw with the little girl prior to her murder. In addition, prosecutors presented evidence that Mr. Bloodsworth had made incriminating statements and mentioned crime details to police that were not publicly known. DNA testing revealed that he was not the source of sperm found on the victim's underwear, proving that this seemingly airtight evidence was wrong. See Nat'l Instit. Just., Off. Just. Programs, U.S. Dept. Just., Pub. No. 161258, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial, at 35-37 (June 1996), available at <http://www.ncjrs.gov/pdffiles/dnaevid.pdf>.

Mr. Arthur. Instead, we are advocates for utilizing science to ascertain the truth. Here, science is capable of determining the truth. In fact, DNA testing has the potential to conclusively prove that Mr. Arthur was not the perpetrator of this crime and to identify the real killer. Judy Wicker, the wife of the murder victim, testified under oath while on trial for conspiring to murder her husband that her husband was murdered by a lone African-American gunman who broke into their home, raped her, and then shot her husband. Mr. Arthur was convicted when, years later, she changed her story in exchange for an early release from prison and stated that she had in fact hired Mr. Arthur to kill her husband and that the original story about the unknown perpetrator who had raped her and killed her husband was a fabrication. DNA testing has the potential to resolve which of Judy Wicker's sworn versions is true. For example, testing on semen in Judy Wicker's rape kit, contact DNA that may have been left by the perpetrator on Mrs. Wicker's clothing during their struggle, and "Negroid" hairs found in her car, could reveal a DNA profile that excludes Mr. Arthur and also "cold hit" in the DNA database to a person who fits the original description that the victim gave to police. In addition, testing on these same items could reveal a common "redundant" profile that excludes Mr. Arthur. Even without a CODIS "cold hit," if testing reveals that the "Negroid" hair in the car was from the same person who also deposited semen detected in the rape kit or blood or skin cells on Mrs. Wicker's clothing, such a redundancy would provide compelling evidence of Mr. Arthur's innocence.

Notably, such testing can be authorized without even delaying the execution, since the execution date is currently set for December 6, 2007 and testing could be completed in less than four weeks. We very much hope that you will authorize testing without further delay so that it can be completed before the execution date.

We trust that this information is useful to you as you consider the DNA testing request in the case of Thomas Arthur and any others that come before you. We are happy to speak in more depth about these suggested guidelines and are available to you if you have any further questions.

Sincerely yours,

A handwritten signature in black ink that reads "Peter Neufeld". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Peter Neufeld
Olga Akselrod