

No. 1951985

In the SUPREME COURT of ALABAMA

EX PARTE THOMAS D. ARTHUR,

In re: State of Alabama,

Petitioner,

v.

Thomas D. Arthur,

Respondent.

Opposing Rehearing of this Court's
Order Granting Stay of Execution

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC.

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SUMMARY OF THE ARGUMENT

DNA testing has exposed deeply rooted, systemic problems with the country's criminal justice system, demonstrating with unprecedented certainty that more innocent people suffer in prison or await execution than most lay citizens and legal scholars have ever imagined.¹ Analysis of DNA exonerations has revealed a variety of common causes for wrongful convictions, including careless or fraudulent forensic evidence, perjured testimony, prosecutorial misconduct, and careless and inadequate defense counsel.²

The Innocence Project pioneered the post-conviction DNA litigation model that has to date exonerated over 215 innocent people and served as counsel or provided critical assistance in the majority of these cases. Currently, the Project represents over 220 individuals seeking post-conviction DNA testing, or relief from their convictions

¹ DNA exonerations have "laid bare" the "fabric of false guilt." Barry Scheck, Peter Neufeld & Jim Dwyer, Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted, xv (2000).

² See generally Barry Scheck, Peter Neufeld & Jim Dwyer, Actual Innocence: When Justice Goes Wrong and How to Make It Right 163-202 (2002).

based on DNA test results, in dozens of states.³ Indeed, many Innocence Project clients have been exonerated after DNA testing conclusively demonstrated that evidence initially adjudged as "overwhelming" was in fact deeply flawed.

The Innocence Project files this *amicus* brief in opposition to the State's Motion for a Rehearing of this Court's decision to stay Thomas Arthur's execution because, despite the State's contentions, the DNA evidence that is available in this case could help demonstrate Arthur's innocence and could also determine whether Bobby Ray Gilbert's confession is true. In light of the State's clear misunderstanding as to the value of DNA testing in Arthur's case, Amicus files this brief to explain the mechanics of DNA testing and how it could be helpful in Arthur's case, provide examples of other individuals exonerated by DNA testing, and provide guidance on the appropriate steps that should be taken by State officials to locate the missing rape kit.

³ The Project does not represent Thomas Arthur and takes no position on his guilt or innocence.

ARGUMENT

- I. The Sophisticated DNA Testing Sought by Arthur Has the Scientific Potential to Determine Conclusively Whether Gilbert's Confession is Truthful, Whether Arthur is Guilty or Innocent and to Identify the True Perpetrator Through a DNA Databank Hit.
-

In the years since Arthur's trial, the power and precision of modern DNA technology has led to a remarkable consensus throughout the justice system - among prosecutors and defense attorneys, conservatives and liberals alike - regarding the benefit of broad access to DNA testing at all stages of criminal proceedings. The Alabama Legislature determined in 1994 that "DNA testing, profiling, and analysis allows a more certain and rapid identification of such offenders as well as the exoneration of those wrongfully suspected or accused." Ala. Code § 36-18-20(c).⁴ In the words of former Attorney General John Ashcroft, who was by no means "soft on crime," DNA is "nothing less than

⁴ Indeed, in 1998, Ronnie Mahan and his brother Dale were exonerated as a result of post-conviction DNA testing. After the Mahans gained access to the biological evidence, swabs from the rape kit were tested and excluded both brothers, the victim's husband, and another man named as a possible contributor. Examination of pubic hairs collected also excluded the Mahan brothers. See <http://www.innocenceproject.org/Content/203.php> (lasted visited Aug. 19, 2008).

the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent."⁵

A. New Methods of DNA Testing and the CODIS Database

In 2008, this "truth machine" is powered by a vast array of advanced forensic technologies and databases that were simply unheard of at the time of Arthur's trial in 1991. These new technologies have the scientific potential to provide powerful new evidence in support of Arthur's claim that he did not murder Troy Wicker, as well as to determine conclusively whether Bobby Ray Gilbert, who confessed to the murder a few days before Arthur's scheduled execution on July 31, is telling the truth.

In the forensic DNA context, Short Tandem Repeat DNA testing ("STR-DNA") has, over the last decade, become the "gold standard" for testing and analysis. Among the principal advantages of STR-DNA testing is that it permits the successful amplification and analysis of extremely minute amounts of human DNA, to an extent far beyond what was possible with early-generation methods of DNA testing

⁵ Transcript of news conference, March 4, 2002, available at <http://www.usdoj.gov/archive/ag/speeches/2002/030402newsconferencednainitiative.htm> (last visited Aug. 19, 2008).

utilized in the 1990s. As such, it is particularly suited to forensic DNA typing in post-conviction DNA cases that are decades old, in which the evidence to be tested may have degraded over time.⁶

Given the size of the world's current population, a complete STR DNA profile obtained from forensic evidence is "effectively unique." *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group, Nat'l Instit. Of Justice, Office of Justice Programs, U.S. Dep't of Justice (Nov. 2000) at 25.* For example, the statistical probability of an STR DNA match between two unrelated persons in the Caucasian American population is estimated at 1 in 575 trillion. *Id.* at 19. STR DNA testing was first validated for use in forensic laboratories nationwide in 1999 and is now used by every major governmental DNA laboratory at the local, state and national level in the United States.

⁶ See, e.g., Tamyra R. Moretti, Ph.D. and Bruce Budowle, Ph.D., The CODIS STR Project: Evaluation of Fluorescent Multiplex STR Systems, presented at the 50th Annual American Academy of Forensic Science Meeting, Feb. 9-14, 1998 ("STR typing results can be routinely achieved from typical forensic specimens, including degraded and low quantity DNA samples.... STR typing is robust, accurate, highly sensitive and suitable for forensic application.")

Even more recent advancements in STR-DNA testing, which have been particularly suited to forensic DNA testing in the post-conviction context, include Y-STR testing (which isolates and analyzes male DNA found on the Y chromosome) and Mini-STR testing (which uses specialized primers to target strands of DNA that are particularly resistant to degradation). The first peer-reviewed studies on the use of Y-STR DNA forensic typing "kits" (known as "Y-PLEX") were not published until 2003 -- long after Arthur's trial.⁷ The current "gold standard" of Y-STR testing -- a system called "Y-filer," which tests a full complement of 17 Y-STR DNA markers, or "loci" -- was not validated for forensic use until two years later, in 2005.⁸ The "kits" for Mini-STR forensic testing were not validated for forensic use until 2007.⁹

⁷ Sudhir K. Sinha et al., Development and Validation of a Multiplexed Y-Chromosome STR Genotyping System, the Y-Plex 6, for Forensic Casework, 48 J. FORENSIC SCI. 93 (Jan. 2003).

⁸ Julie J. Mulero et al., Development and Validation of the AmpFl-STR Y-filer PCR Amplification Kit: A Male-Specific, Single-Amplification 17 Y-STR Multiplex System, 51 J. FORENSIC SCI. 64 (Jan. 2006).

⁹ See Applied Biosystems Advances Forensic Science with the World's First Commercial Chemistry for Analyzing Degraded DNA, available at <http://press.appliedbiosystems.com/corpcomm/applerapress.nsf/ABI/DisplayPress/4733974134A2D79588257280007F802D?OpenDocument&type=abi>

STR DNA testing also provides the backbone for the Combined DNA Index System ("CODIS" or "NDIS"). CODIS is a vast national database of STR-DNA profiles maintained by the FBI, and currently includes more than six million unique DNA profiles from known felony offenders and unsolved crimes nationwide. The profiles include those collected in federal criminal prosecutions and investigations, as well as an integrated database of DNA profiles collected by individual states in accordance with CODIS regulations. Alabama maintains a DNA database that includes, among other things, DNA records of "[p]ersons confined as of May 6, 1994 under a sentence of imprisonment or involuntary incarceration or confinement in a prison, jail, or other incarceration facility as a result of any felony conviction." Ala. Code § 36-18-24.¹⁰

Any unidentified forensic DNA profile that contains a sufficient number of DNA loci and otherwise satisfies the general CODIS regulations can be "uploaded" into the NDIS

(announcing commercial availability of MiniFiler STR kit, February 2007) (last visited Aug. 19, 2008).

¹⁰ Both Arthur and Gilbert were confined for felony convictions as of May 6, 1994, so both of their DNA profiles should be in this database.

system. The uploading process will (a) permit a near-instantaneous computerized comparison of that profile against the more than six million offender profiles available in CODIS as of June 2008 and (b) retain the profile in the NDIS system, so that it will be automatically compared to subsequently-added DNA profiles from convicted offenders and crime scenes. See CODIS-NDIS Statistics, <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited Aug. 19, 2008).¹¹

B. Applying DNA Technology to the Facts At Hand

The State's opposition to Arthur's request for DNA testing is based on a fundamental misunderstanding of what DNA testing can demonstrate in this case and how it has been used to establish the innocence of hundreds of wrongfully convicted inmates throughout the country, including 16 men who spent time on death row. The State has repeatedly claimed that DNA testing cannot establish Arthur's innocence, and now the State argues that "it is

¹¹ 157,932 of these offender profiles are from Alabama. CODIS has aided in 2,127 investigations in Alabama as of June 2008. CODIS-NDIS Statistics, <http://www.fbi.gov/hq/lab/codis/stats.htm#Alabama> (last visited Aug. 19, 2008).

very unlikely that Arthur's DNA will match any of the requested items." (State's Application for Rehearing ("App.") at 1-2.)

Despite the State's position, there are several scenarios in which DNA testing can conclusively establish Arthur's innocence and demonstrate that he was wrongfully convicted and nearly executed. Most importantly, because Judy Wicker initially reported to the police and testified at her own trial that she was assaulted and raped by the same person who killed her husband, the rape kit that was collected shortly after the crime should be subjected to DNA testing. While DNA testing of the rape kit has always held the possibility of identifying the actual perpetrator, the recent detailed confession of Bobby Ray Gilbert greatly enhances the probative value of the rape kit.

In addition to the rape kit, there are several other pieces of physical evidence appropriate for DNA testing. These items include a wig worn by the perpetrator, Judy Wicker's clothing, and hairs collected from the crime scene and Judy Wicker's car. Each of these items of evidence has

the potential to establish Arthur's innocence and identify the actual perpetrator.

1. *The Rape Kit*

The rape kit is the most critical piece of forensic evidence collected in this case, and it should be subjected to advanced DNA testing. Examining the rape kit can: (1) demonstrate conclusively which version of events Judy Wicker told police and the courts is accurate; (2) corroborate or disprove Bobby Ray Gilbert's detailed confession; and (3) potentially identify the actual perpetrator through a match to a convicted offender in the DNA databank. The State's argument that the rape kit is not relevant because it will not contain Arthur's DNA is misplaced. App. at 24.) It is not the absence of Arthur's DNA in the rape kit that is probative. Rather, it is the presence of DNA from someone other than Judy Wicker's husband, including any DNA from Bobby Ray Gilbert or another individual identified through the CODIS database, that is relevant and exculpatory in this case.

Even before Bobby Ray Gilbert's detailed confession, it was clear that DNA testing of the rape kit was needed to

answer definitively whether Arthur committed this crime. The State has argued that DNA testing of the rape kit is not needed because Judy Wicker recanted her initial account of the crime and testified that she was not raped by an unknown perpetrator. Contrary to the State's position, Judy Wicker's evolving testimony supports testing the rape kit, as it is the best evidence to determine which version of events she offered in this case is accurate (if any). Specifically, a routine DNA test on the rape kit can determine if Judy Wicker's initial story to the police of being raped by an unknown intruder is true.¹²

Independent of corroborating or disproving Judy Wicker's evolving account of the crime, a DNA test of the rape kit is even more important now, given the detailed confession of Bobby Ray Gilbert, in which Gilbert claims he had unprotected sex with Ms. Wicker shortly after he

¹² Shortly after Judy Wicker changed her initial testimony and testified against Arthur, she received an early release from her own life sentence for this crime. Such testimony by a highly incentivized government witness provides additional support for Arthur's request for DNA testing. In more than 15% of DNA exonerations, an informant or jailhouse snitch testified against the defendant. See also Rob Warden, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row, CENTER ON WRONGFUL CONVICTIONS: NORTHWESTERN U. SCH. OF L., Winter 2005, available at

murdered her husband. Such a test could conclusively determine the validity of Gilbert's confession by comparing the DNA profile from the rape kit to Gilbert's DNA.

Finally, if foreign DNA is identified in the rape kit, and if that DNA is not consistent with Gilbert, Troy Wicker, or Arthur, the foreign profile can be uploaded in CODIS in order to obtain a match to a known offender. Not only would such a result contradict Judy Wicker's statement to the police and testimony at Arthur's trial, it could also identify the actual perpetrator.

2. *The Wig*

It is very likely that the wig that Arthur seeks to have tested will contain significant quantities of DNA belonging to the perpetrator who wore it during the murder. This is so even though no hairs were purportedly recovered from inside the wig. Identifying the DNA on the inside of the wig is of obvious import, as the wig is a central piece of evidence in both Judy Wicker's and Bobby Ray Gilbert's account of the crime.

<http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches> (last visited Aug. 19, 2008).

According to Judy Wicker's testimony at Arthur's third trial,¹³ on the morning of the murder, she met Arthur out past the airport and picked him up in her Buick Riviera. She further testified that Arthur wore "an Afro" wig while at the Wicker home, where he destroyed things and then shot Troy Wicker in the bedroom.

According to Gilbert, Judy Wicker picked him up in the parking lot of a trade school, gave him an "Afro wig" to wear, and drove him to the Wicker residence. (Gilbert Affidavit, ¶ 8.) Gilbert then killed Troy Wicker, ransacked the house, and had sex with Judy Wicker "up against a wall in the hallway." (Id. ¶ 11.) Gilbert then drove Judy Wicker's car back to the trade school parking lot, all the while wearing the "Afro wig." (Id. ¶ 12.)

Under either version of events, the "Afro wig" was worn by the perpetrator for an extended period of time. It is very likely that the perpetrator was sweating, because he was engaged in relatively strenuous activities. Thus,

¹³ At her own trial, Judy Wicker testified that an African-American man assaulted her and killed her husband. She changed her story after her conviction was affirmed on direct appeal and agreed to testify against Arthur in exchange for early parole.

the DNA found in the wig could include sweat, skin cells and dandruff. The DNA profile identified from this biological material in the wig could be compared to Gilbert's and Arthur's DNA. Linking Gilbert to the wig based on his DNA would provide scientific support for his confession, confirm that Judy Wicker again committed perjury, and demonstrate Arthur's innocence.

DNA testing of the sort Arthur seeks here has been used successfully in the course of other criminal investigations. See, e.g., U.S. v. Williams, 07-CR-437-BR, 2008 U.S. Dist. LEXIS 20943, at *9 (D. Or. Mar. 17, 2008) (DNA from multiple people recovered from wig worn during robbery); U.S. v. Haas, 184 Fed. Appx. 230, 235 (3d Cir. 2006) (Barry, J., dissenting) (evidence against Haas was powerful in part because his "DNA was on the wig" worn during the crime);¹⁴ see also U.S. v. McCarthy, 244 F.3d 998, 1000 (8th Cir. 2001) (state criminalist inspected a

¹⁴ In an analogous context, authorities have recently had much success in identifying perpetrators based on DNA profiles obtained from ski masks worn during the crimes. "Evidence invisible to the naked eye can be the key to solving a residential burglary, sexual assault or murder ... [for example] the perspiration on a rapist's mask ... may hold the key to solving a crime." Using DNA to Solve Cold Cases, Nat'l Inst. of Justice, Office of Justice Programs, U.S. Dep't of Justice, July 2002, at 1.

stocking cap recovered from getaway car, found an abundance of dandruff, and compared the genetic material he derived from the dandruff to the profile he derived from defendant's blood sample); Taylor v. State, No. 06A05-0711-CR-644, 2008 Ind. App. 1678, at *4 (Ind. Ct. App. Aug. 4, 2008) (DNA found on sweatband of cap worn by perpetrator matched defendant's DNA profile).

It is clear that the wig that Arthur seeks to subject to DNA testing has the scientific potential to produce an exculpatory -- or inculpatory -- result. Under either Gilbert's story or Judy Wicker's story, it is very likely that DNA will be present on the inside of the wig. The STR DNA profile can quickly and easily be compared to that of Gilbert and Arthur, as well as uploaded to the CODIS database for a wider search.

3. *Judy Wicker's Clothes*

DNA analysis of Judy Wicker's bloody and torn clothes could identify a foreign DNA profile that supports Arthur's claim of innocence.

The State's assertion that "the blood on Judy Wicker's shirt will match her DNA" (App. at 5) may be correct, but

this does not mean that subjecting her clothing to DNA testing could not identify additional DNA samples. The one thing that Judy Wicker has consistently maintained is that she was assaulted by the person who killed her husband. Whether she was raped or knocked out, it is reasonable to believe that the perpetrator's DNA, in the form of sweat, blood or skin cells, would have been left on her clothing as a result of the assault. See, e.g., State v. Lee, 976 So. 2d 109, 140 (La. 2008) (DNA evidence from attacker's sweat recovered from victim's dress); State v. Hannon, 703 N.W.2d 498, 503-04 (Minn. 2005) (forensic scientist obtained DNA profile from blood on perpetrator's shirt that matched the victim and a DNA mixture from sloughed-off cells on the shirt collar that contained DNA from two individuals, including the perpetrator). Testing her clothes for DNA samples could thus yield useful evidence.

4. *Hairs From the Crime Scene and Judy Wicker's Car*

During the investigation, the State collected hairs from the crime scene and from Judy Wicker's abandoned car. The State argues that the hairs collected from the crime scene are not probative because it is unlikely that they

were left by Arthur "because he was completely covered" during the crime. (App. at 4.) In addition, the State argues that the hairs found in Judy Wicker's car are not relevant because they are African-American hairs that will not match Arthur's. (App. at 5.) Once again, the State fails to consider the probative value of DNA results from the hairs that exclude Arthur. For example, a full STR DNA profile can be obtained from skin cells attached to any one of the hairs. If this profile is consistent with Gilbert's or that of another convicted offender in CODIS, that would provide compelling evidence of Arthur's innocence and again reveal Judy Wicker as a perjurer.

5. *Redundant DNA Results*

While each of the items of evidence has the possibility of identifying a single DNA profile that could conclusively demonstrate Arthur's innocence through a match to Gilbert or to another convicted offender in CODIS, there is also the possibility that a consistent DNA profile is identified on several pieces of evidence. For example, if a consistent male DNA profile is identified on a combination of the rape kit, the wig, Judy Wicker's

clothes, and the hairs, that would provide compelling evidence of Arthur's innocence, even if the actual perpetrator is not identified through CODIS.

II. DNA Testing Has Been Used Effectively to Exonerate the Innocent and Convict the Guilty.

DNA testing has exonerated many individuals who were convicted on the basis of "overwhelming" evidence, which was later discredited. Two examples are provided below.¹⁵ If these defendants had not been given the opportunity to prove their innocence, they could have spent the rest of their lives in prison or, even worse, they could have been executed, and the real perpetrators -- who were conclusively matched by the same DNA tests that Arthur seeks here -- might never have been identified, thereby leaving the public at risk of additional acts of brutality.

A. Christopher Ochoa and Richard Danziger

Christopher Ochoa and Richard Danziger were convicted on the basis of seemingly overwhelming evidence for the rape and murder of Nancy DePriest. Christopher Ochoa was brought to the Austin, Texas police station for questioning

¹⁵ For additional examples of defendants who were exonerated by DNA, see <http://www.innocenceproject.org/know/Browse-Profiles.php>.

a few weeks after the murder, where, after a long interrogation, he gave a detailed confession, telling the police that he committed the crime with his friend, roommate, and fellow employee Richard Danziger. See Mark Donald, Lethal Rejection, Dallas Observer, Dec. 12, 2002. Ochoa pled guilty to the crime and later testified at Danziger's trial. Id. Danziger was convicted on the basis of Ochoa's testimony, in addition to the expert testimony of a state hair examiner who concluded that a single pubic hair found near the victim's body was "microscopically similar" to Danziger's. See Mark Wrolstad, Hair-Matching Flawed as a Forensic Science: DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide, Dallas Morning News, Mar. 31, 2002, at 1A. Ochoa and Danziger remained in prison for more than a decade until post-conviction DNA testing conclusively exonerated them and identified the actual perpetrator. See Donald, supra.

B. Kirk Bloodsworth

Another DNA exoneration in the face of seemingly "overwhelming" evidence of guilt is that of Kirk Bloodsworth, who was convicted and sentenced to death in

1985 for the rape and murder of a nine-year-old girl. See EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, 35-37 (1996), available at <http://www.ncjrs.org/pdffiles/dnaevid.pdf>. Bloodsworth was a twenty-two year-old man who had recently been honorably discharged from the United States Marine Corps and who had never been arrested. See Larry King Live (CNN television broadcast July 21, 2005).

At trial, prosecutors introduced extensive eyewitness and physical evidence of Bloodsworth's guilt. See Connors, supra. Five eyewitnesses testified that they were certain that Bloodsworth was the man they saw with the victim just prior to her murder. Id. Police officers testified that during Bloodsworth's first police interrogation, he identified a weapon used in the crime that was not known to the public at the time. Id. Bloodsworth's acquaintances testified that he said he had done something "terrible" that day. Id. The prosecution presented evidence that the police had received an anonymous call informing them that Bloodsworth was seen with the victim earlier that day and that a shoe impression found near the victim's body was the

same size as Bloodsworth's. Id. Bloodsworth was found guilty and sentenced to death. Id.

In 1993, however, Bloodsworth became the first death row inmate in the nation to be exonerated and released based on post-conviction DNA testing, when those tests excluded him as the source of the semen samples from the crime scene. Alisa Bralove, Baltimore County Accepts Plea Deal in 1984 Murder of Rosedale Girl, Daily Rec., May 21, 2004.

III. A Proper Search for the Rape Kit Must Be Undertaken.

In opposing Arthur's most recent request for a stay of execution to obtain DNA testing of the rape kit in light of Gilbert's confession, Clay Crenshaw of the Attorney General's Office stated under oath that the State is unable to locate the most critical piece of evidence in Arthur's case -- the rape kit that was collected from Judy Wicker on the day of the crime. It is clear from the Crenshaw's affidavit that a thorough search for the rape kit has not been performed. Rather, the Attorney General's Office only recently called several of the agencies that may have possessed the rape kit at one time. Furthermore, the State

has presented no explanation for how the most critical evidence in a capital murder case can be misplaced when it has been continuously in the custody or control of law enforcement.

Notwithstanding the State's position that the rape kit cannot be located and "has no relevance to this crime" (App. at 5), a thorough search must be made. Many people have been exonerated as a result of DNA evidence that state officials initially claimed was missing. Two remarkable DNA exonerations from July 2006 provide vivid illustrations. On July 6, 2006, Innocence Project client Alan Newton of the Bronx was freed from prison after 22 years of wrongful imprisonment for rape. Newton had sought DNA testing for twelve years, during which time both he and the court were told that repeated searches of police evidence facilities (where the rape kit was last held in 1985) had yielded no evidence. In July 2005, however, a newly assigned prosecutor on the case asked the Commanding Officer of the police warehouse to make a renewed search, and provided him with additional documentation from her file indicating the specific storage bin where the evidence

had last been stored twenty years ago. Sure enough, when a hand search of that bin was performed, the rape kit was found inside it. DNA testing on that evidence thereafter conclusively proved Newton's innocence, and he was exonerated by a joint motion by our office and the Bronx District Attorney's Office in July 2006.

The second such case that came to light in July 2006 is that of Johnny Briscoe of St. Louis, Missouri. In 2000 and 2001, officials at the St. Louis County Police Department Crime Laboratory told Briscoe's attorneys that, after a thorough search, no DNA evidence could be located from the rape for which he was convicted in 1982. In 2006, however, when a supervisor ordered a renewed search of the lab, cigarette butts from the crime scene were located in a freezer. DNA testing on those items not only excluded Briscoe as the source, but led to a hit in the DNA database to the DNA profile of a convicted rapist, already serving life in prison for another sexual assault elsewhere in the state.¹⁶

¹⁶ For additional examples of individuals exonerated after "missing" evidence was located, see the Affirmation of Jason Kreag, Aug. 20, 2008, attached hereto as Exhibit A.

As part of the process of searching for the rape kit in Arthur's case, the State should provide contemporaneous documentation as to the chain of custody of the rape kit from the time it was collected. Agencies routinely keep such documents even in low-level prosecutions involving much less serious consequences than the death penalty. Indeed, such documentation is essential to ensure that evidence collected during an investigation is adequately preserved for use during a given prosecution, and it is also used when evidence from old cases is destroyed. For example, in instances of destruction, state agencies routinely document and inventory the exact items of evidence that are destroyed, to avoid the very position the State now asserts it is in with respect to critical evidence that can be used to establish Arthur's innocence. Such routine practices were undoubtedly used in Arthur's case, and the State should be required to produce the chain of custody documents and not be allowed to simply assert that the rape kit cannot be located based on a few phone calls.

If it turns out that after a thorough search the State produces the contemporaneous documents illustrating that the rape kit was destroyed, this would raise serious questions about Arthur's death sentence. Despite the State's repeated claims that DNA testing cannot demonstrate Arthur's claim of innocence, there is absolutely no doubt that testing the rape kit, the best and most probative evidence available, has the potential to confirm Gilbert's confession and demonstrate Arthur's innocence.

CONCLUSION

For the foregoing reasons, the Innocence Project urges this Court to DENY the State of Alabama's Application for Rehearing of this Court's Order Granting Thomas D. Arthur a stay of execution.

August 20, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2008, I caused to be served by United States Mail, first class, postage prepared, a copy of the attached Brief of *Amicus Curiae* on:

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Jason Kreag

EXHIBIT A

freed from prison by post-conviction DNA testing. The Innocence Project has either directly represented or assisted with the representation of more than half of these individuals.

3. Our experience litigating hundreds of post-conviction DNA access cases over the last fifteen years has led us to the firm conclusion that absent conclusive proof of destruction of each and every item of potential DNA evidence in a case, one or more such items fully capable of resolving, beyond any doubt, the petitioner's guilt or innocence may still be in State custody. This conclusion has been the direct result of our experience in numerous cases in which evidence that has been reported as lost or destroyed has later been discovered intact after a more diligent search. Indeed, when such evidence has in fact been destroyed, there will usually be specific documentation of the destruction of every item, even if the evidence was destroyed in bulk. If there is not, one simply cannot have confidence that the evidence is truly gone.

4. Evidence has been ultimately located in such

places as the back of a storage closet, the trial judge's locker, and between the wall and a prosecutor's desk. In addition, sometimes evidence is labeled under the victim's name rather than the defendant's name, or is simply misfiled within or among other unrelated case evidence boxes, but is eventually discovered when a truly diligent search is performed. In other cases, after evidence was located in the *original* storage location, it became clear that prior searches by officials were half-hearted or perhaps not performed at all. A few of the many specific examples of such discoveries are set forth below.

5. Two remarkable DNA exonerations from July 2006 provide vivid illustrations. On July 6, 2006, Innocence Project client Alan Newton of the Bronx was freed from prison after 22 years of wrongful imprisonment for rape. Mr. Newton had sought DNA testing for twelve years, during which time both he and the court were told that repeated searches of police evidence facilities (where the rape kit was last held in 1985) had yielded no evidence. In July 2005, however, a newly assigned prosecutor on the case asked the Commanding Officer of the police warehouse to

make a renewed search, and provided him with additional documentation from her file indicating the specific storage bin where the evidence had last been stored twenty years ago. Sure enough, when a hand search of that bin was performed, the rape kit was found inside it. DNA testing on that evidence thereafter conclusively proved Mr. Newton's innocence, and he was exonerated by a joint motion by our office and the Bronx District Attorney's Office in July 2006.

6. The second such case which came to light in July 2006 is that of Johnny Briscoe of St. Louis, Missouri. In 2000 and 2001, officials at the St. Louis County Police Department Crime Laboratory told Mr. Briscoe's attorneys that, after a thorough search, no DNA evidence could be located from the rape for which he was convicted in 1982. In 2006, however, when a supervisor ordered a renewed search of the lab, cigarette butts from the crime scene were located in a freezer. DNA testing on those items not only excluded Mr. Briscoe as the source, but led to a hit in the DNA database to the DNA profile of a convicted rapist, already serving life in prison for another sexual

assault elsewhere in the state.

7. The previous year (2005) also yielded three such cases in the Innocence Project's docket. In Ohio, Arvil Davenport's motion for DNA testing was dismissed after State officials reported and affirmed under oath that they had diligently searched the courthouse, police department storage warehouse, coroner's office, hospital, and other locations, but could not locate the evidence. In December 2004, six months after the case was dismissed, an investigator from the prosecutor's office was in the Clerk of Courts Records Center, a location that none of the parties had thoroughly searched, looking for evidence in another case, and discovered a manila envelope with the parties' names from the Davenport case. That envelope turned out to contain a number of swabs and slides from the original rape kit. In Oklahoma, Roger Palmer had also filed a motion for DNA testing that was dismissed after officials reported they could not locate the evidence; when our office filed a Freedom of Information Act request for documentation pertaining to the items' chain of custody, however, officials managed to locate the box containing the

rape kit in the course of responding to that request. And in June 2006 in Alabama, a single slide containing spermatozoa from a rape-murder case for which IP client LaBarron Miller was convicted in 1981 was located inside a paper file in the Department of Forensic Sciences, the agency that had conducted the autopsy. Although the lab's policy was not to preserve such slides, the lab director had agreed to pull the file to trace the items' custody/destruction, and only then discovered the preserved slide inside that file, a full *twenty-four years* after it was supposed to have been destroyed.

8. Other such cases have led to the exoneration and release from prison of innocent individuals, a result that would never have been possible had thorough searches not been performed. Innocence Project client Calvin Johnson was convicted of rape in Georgia in 1983. The practice in Clayton County at the time was that the court stenographer would keep all evidence entered as an exhibit at trial. When the stenographer from Mr. Johnson's case retired, he asked what he should do with the closet-full of evidence he had accumulated, and was told to throw it away. A District

Attorney noticed the boxes of evidence in a parking lot dumpster outside the courthouse, and decided they should be preserved. Calvin Johnson later received DNA testing of evidence which had been thrown in the dumpster, but salvaged just before its destruction, and was exonerated in 1999 after 16 years in prison.

9. When Marvin Anderson of Virginia sought post-conviction DNA testing, he was also told that the rape kit from his case had been destroyed. A special search in 2001 by Dr. Paul Ferrara, Director of the Virginia Division of Forensic Science, revealed that the criminalist who had performed the conventional serology tests in Mr. Anderson's case in 1982 had broken lab protocol and, instead of returning the slides containing semen samples to the rape kit, had scotch-taped them into the lab notebook. The combination of this breach of procedure and dedicated search led to the discovery of evidence which, once subjected to DNA testing, exonerated Mr. Anderson in 2001.

10. The evidence from Terry Chalmers' case also reappeared after law enforcement officials promised it was lost. Mr. Chalmers was convicted of rape in New York in

1987, and later sought DNA testing of the rape kit from his case. The prosecuting attorneys submitted affidavits swearing that after diligent searches they could not find the evidence. However, the evidence was later located and DNA testing exonerated Mr. Chalmers in 1995.

11. Another example of evidence discovered only after repeated searches comes from the case of John Willis, of Illinois. Mr. Willis was convicted of a series of rapes in 1993. One of the victims, after being orally raped by her attacker, spat semen into tissue paper, which was later recovered by the police. After being submitted for serological testing, the tissue paper had been checked out to the District Attorney. When Mr. Willis requested DNA testing, the District Attorney was unable to locate this evidence. However, further searching uncovered a slide which had been prepared during the initial serological testing; DNA testing of the slide exonerated Mr. Willis in 1999.

12. In South Carolina, Edward Lee Elmore was convicted twice by juries of a 1982 rape/murder, and had been on South Carolina's death row for 20 years. In 1995, in an

appellate hearing on Mr. Elmore's request for post-conviction DNA testing on pubic hairs found at the scene, William Earl Wells, the chief forensic investigator of the South Carolina Law Enforcement Division, who had examined slides from the case, testified under oath that he had found no hairs on the slides, and that after his examination, he had transferred the slides back to the local police department. On the basis of this testimony, the appellate court denied Mr. Elmore a new trial.

However, in 1998, the South Carolina Supreme Court ordered a more extensive search, and the slides, with the pubic hairs, were located in Mr. Wells' file cabinet. DNA testing on the hairs excluded Mr. Elmore as their source.

13. In North Carolina, Dwayne A. Dail was found guilty in 1988 of first-degree burglary, first-degree sexual offense, first-degree rape, taking indecent liberties with a minor and lewd and lascivious behavior and was sentenced to two life sentences plus 18 years. For years, communications from the Wayne County Clerk of Court, law enforcement, and the city attorney indicated that all evidence from the case -- including a rape kit, bed sheets,

a nightgown, and hair evidence -- had been destroyed. However, earlier this year, it was discovered that an investigating officer in the case had actually kept evidence relating to the case in his office. This evidence was not catalogued in any tracking system and was only discovered upon the officer's retirement. Based on DNA testing of semen recovered from the victim's nightgown, Dail was proven innocent and exonerated in August of 2007.

14. These examples represent only some of the cases in which evidence which was initially reported as lost or destroyed subsequently was found and subjected to DNA testing.



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New York ,NY