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**TO:** Nevada Advisory Commission on the Administration of Justice

**FROM:** Thomas & Mack Legal Clinic, William S. Boyd School of Law and the Rocky Mountain Innocence Center

**DATE:** September 15, 2008

We write on behalf of the Rocky Mountain Innocence Center (RMIC) and the Thomas & Mack Legal Clinic at the William S. Boyd School of Law. The RMIC serves prisoners raising claims of wrongful conviction in Nevada, Utah and Wyoming. The Thomas & Mack Legal Clinic has recently formed an Innocence Clinic to collaborate with the RMIC in investigating claims of wrongful conviction in Clark County.

We support the "Preservation of Biological Evidence" legislation proposed by the Nevada Advisory Council for Prosecuting Attorneys (NVPAC) because it would strengthen the ability to correct wrongful convictions in the State of Nevada. No one is served when an innocent person is convicted and imprisoned. The crime victim receives neither justice nor closure; law enforcement officials fail to remove a dangerous criminal from the street; and precious public funds are wasted on prosecuting and imprisoning the wrong person.

To make these remedies more effective and to make Nevada eligible to receive federal grant money, we propose the following amendments to both the proposed legislation and to existing law:

- An amendment to the proposed "Preservation of Biological Evidence" statute to include all felonies upon motion to the judge. As currently proposed, the legislation would require the preservation of biological evidence only in homicide or sexual offense cases. We propose that judges be given discretion to order the preservation of biological evidence in other felony cases, as needed. This amendment would not require the automatic preservation of all biological evidence in all felony cases.

- Amendments to the existing "Post-Conviction DNA Testing" statute (N.R.S. 176.0918), to allow DNA testing of physical evidence in all felony cases. The current statute limits testing to capital cases where DNA evidence is in the possession and control of the state upon a showing that there is a reasonable possibility that DNA testing would change the result of the trial. We propose that post-conviction DNA testing should also be allowed in felony cases that can meet the existing statute's "reasonably possibility" standard.

Taken together, these two amendments will make the state of Nevada eligible to apply for federal funding under the Justice for All Act of 2004, which established the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program for the purpose of improving or expanding state DNA testing capabilities.

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**Overview of Recommended Amendment to the Proposed Legislation for the "Preservation of Biological Evidence."**

We recommend that the proposed legislation for the "**Preservation of Biological Evidence**" be expanded, so that judges may have discretion to preserve biological evidence in cases of felony convictions beyond homicide and sexual offenses. Our proposed amendment inserts an additional subsection to provide: "***Upon the motion of a person convicted of any felony***, the court may order the preservation of any biological evidence used in the criminal case to be preserved for the period of time the convicted remains incarcerated or until the sentence is carried out." Our amendment would give judges the discretion to order the preservation of biological evidence on a case-by-case basis. This amendment *does not* mandate the preservation of all biological evidence for all felony cases. (See Appendix A).

**Overview of Recommended Amendments to the "Post-Conviction DNA Testing" Statute (NRS 176.0918).**

We recommend that **NRS 176.0918**, which was passed last legislative session, be expanded so that courts have the discretion to order DNA testing in cases of non-capital felony convictions. The existing statute is currently limited to inmates serving death sentences. Under N.R.S. § 176.0918, "***A person convicted of a crime and under a sentence of death***," may petition the court to request DNA testing be performed on biological evidence within state custody as long as the court finds that "***a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition.***" Our amendment would extend this remedy to non-capital felony cases that meet this standard. We propose an additional amendment to clarify that petitions can be filed when advancements in DNA technology make it reasonably possible that a different result might occur on re-testing under a newer method. (See Appendix B).

**Need for Expansion of N.R.S. § 176.0918**
The limitation to prisoners on death row of Nevada's existing "Post-Conviction DNA Testing" statute is problematic for two main reasons.

First, nationwide only 17 of the country's 220 DNA exonerations have involved prisoners on death row. The vast majority of exonerees were wrongly convicted of non-capital offenses, such as rape. This disparity in exonerations is likely due to the larger number of people convicted of crimes but not sentenced to death. The disparity may also reflect the greater scrutiny applied by prosecutors in capital cases. In effect, the existing statute deprives most prisoners of a critical mechanism for proving their innocence. This is especially problematic for prisoners who were wrongfully convicted prior to the advent of DNA testing technology in the 1980's.

Second, Nevada's statute ignores the devastating impact to innocent prisoners who were wrongfully convicted of a non-capital offense. Most felonies carry sentences that effectively rob innocent individuals of a significant portion of their free life, as well as their homes, jobs, and families. These individuals are equally deserving of the opportunity to prove their innocence. Thus, regardless of the length of the sentence, post-conviction DNA testing should be available for all prisoners with a credible and provable claim of innocence.

**Fiscal Impact of Expansion of N.R.S. § 176.0918**

Most states recognize that post-conviction DNA testing is necessary to free an innocent person in prison, discover the true perpetrator, and most importantly, to provide justice and safety to crime victims and the public. The concern of most states has, therefore, not been *whether* to provide access to testing but rather *how much* the access to DNA testing will cost.

Prior to passing post-conviction DNA testing legislation, many states have raised concerns about the costs relating to a potential "flood of litigation." However, in every state with post-conviction DNA statutes, these concerns have proven to be unwarranted. For example, Nevada's neighboring states of Utah, Arizona, and Wyoming have not experienced any flood of post-conviction DNA testing petitions after passing their legislation. Arizona has had fewer than twenty petitions for testing since 2000; Utah has had had seven since 2002; and in Wyoming, which passed its statute earlier this year, there have been no petitions for testing, and none are foreseeable in the near future. Even extremely populous states like California, which has more than 170,000 prisoners, currently average only ten petitions each year.

A likely reason for the low number of prisoners seeking DNA testing is that the petitioners must meet strict requirements before being granted access to the evidence and testing needed to prove their innocence. All post-conviction DNA testing statutes require petitioners to demonstrate that a credible claim of innocence exists. Law-school based innocence projects that generally handle these cases implement a further screening process. For example, the Rocky Mountain Innocence Center (RMIC), with which the Thomas & Mack Legal Clinic is now collaborating in Nevada, employs an extensive screening process that can take many years to complete. The screening process includes an inquiry into the circumstances of the crime, the law enforcement investigation, the trial, and the claim of innocence. Because of the RMIC's strict mission and limited resources, it only accepts cases with credible, compelling, and provable claims of factual innocence. The RMIC also stresses to all prisoners who seek help that DNA test results indicating guilt will damage their chances for parole and hurt any other bases for appeal. This serves as a deterrent to many prisoners seeking post-conviction DNA testing.

The Rocky Mountain Innocence Center has worked closely with prosecutors in both Utah and Wyoming to create post-conviction DNA testing statutes. In both states, these statutes have passed unanimously and with the full support of law enforcement officials and crime victims. Prosecutors in each Utah and Wyoming who were initially concerned about a flood of litigation are now available to speak to this Commission about the absence of any such flood in their respective states. They offer testimony on the importance of post-conviction DNA testing to maintaining accuracy, fairness, and integrity in their state criminal justice systems.

**If Enacted, Our Proposals Make the State of Nevada Eligible to Apply for Federal Funding For Under the Justice for All Act of 2004**

Taken together, our amendment to the proposed "Preservation of Biological Evidence" legislation and our amendment to the current "Post-Conviction DNA Testing" statute will make the State of Nevada eligible to apply for federal grant money under the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program. The Bloodsworth grant program was adopted in 2004 as part of the Innocence Protection Act, which was included in the federal Justice for All Act of 2004. The purpose of the Bloodsworth grant program is to encourage states to improve and implement post-conviction DNA testing and evidence preservation programs because the

government places a high value on exonerating innocent people who were wrongfully convicted. The grant program was approved for 5 years, with a total budget of $25,000,000. Thus $5,000,000 per year is to be divided among the states that submit applications to the Department of Justice's Office of Justice Programs (OJP). The OJP admininisters the funding and all fifty states are eligible to apply. States may use the funds for various aspects of DNA testing and evidence preservation. This year, three states including Arizona have been approved for funding, with Arizona likely to receive around $1.1 million.

To be eligible for these federal funds, a state must demonstrate that it has established satisfactory evidence preservation and DNA testing programs. Under the Bloodsworth grant program, applicant states must demonstrate that any person convicted of a state felony and under a sentence of imprisonment or death has the opportunity for DNA testing of biological evidence pursuant to state statutes, practices, rules, or regulations. The state must show that it implements post-conviction DNA testing in a way that ensures a reasonable process for resolving prisoners' claims of actual innocence. Additionally, the Bloodsworth grant program requires applicant states to demonstrate that they preserve biological evidence used in the prosecution or investigation of a state felony offense. The applicant state must show that it takes reasonable measures in all of its jurisdictions to preserve such evidence through statute, rule, regulation, or practice (See Appendix C).

Preservation of biological evidence and access to DNA testing are connected. It makes little sense to preserve evidence in cases in which it will not be available for DNA testing. Likewise, DNA testing is a meaningless remedy in cases where the evidence has been destroyed. The preservation statute as proposed by the Nevada Advisory Council for Prosecuting Attorneys mandates preservation of biological evidence in sexual assault cases without expanding the post-conviction testing statute to include non-capital homicide and sexual assault cases. As written, the state will be legally bound to preserve evidence to which prisoners serving non-capital homicide and sexual assault sentences will have no legal access for testing. It makes more sense to expand both the preservation and testing statutes to felony cases so that Nevada can become eligible for federal grant money.

**Arizona Post-Conviction DNA Testing Statute**

This year, the OJP awarded Arizona funding under the Bloodsworth grant program. Nevada may look to Arizona's post conviction DNA testing and evidence preservation statutes as a guideline as to what standards of preservation and DNA testing are acceptable under the grant program.

Arizona's post-conviction DNA statute states that "***any person convicted of a state felony offense may file a petition to the court where the conviction occurred for post conviction DNA testing***." (See Appendix D). The same statute simply states that if a convict files a petition for DNA testing, the state must preserve any evidence in its control that could be subject to DNA testing and create an inventory of this evidence for the court. Thus, the OJP did not require Arizona to have a mandatory or highly complex system of evidence preservation and DNA testing. The OJP found that Arizona's general and fairly simple statute allowing convicted felons to move for DNA testing and evidence preservation satisfied the requirements that all persons convicted of felonies have a reasonable chance to be exonerated, and that reasonable measures were taken to preserve evidence.

## APPENDIX A

### Amendment to the Proposed Legislation for the "Preservation of Biological Evidence"

Proposed Legislation for the "Preservation of Biological Evidence" as Submitted by NVPAC

1. Upon the conviction of a defendant for homicide or for any sexual offense, any biological evidence used in the criminal case shall be preserved for the period of time the person convicted remains incarcerated or until the sentence is carried out.

2. Upon the motion of a person convicted of homicide or any sexual offense, the court may order the preservation of any other specifically-identified biological evidence, not otherwise subject to preservation under subsection (1), for the period of time the person convicted remains incarcerated or until the sentence is carried out.

3. For purposes of this section, the term 'biological evidence' means semen, blood, saliva, hair, skin tissue, or other identified biological material removed from physical evidence.

4. The requirements of this section shall apply to any government agency that may be in possession of biological evidence.

5. Biological evidence subject to the requirements of this section may be consumed for testing upon notice to the person convicted.

Proposed Legislation for the "Preservation of Biological Evidence" with the Amendment Submitted by UNLV

1. Upon the conviction of a defendant for homicide or for any sexual offense, any biological evidence used in the criminal case shall be preserved for the period of time the convicted remains incarcerated or until the sentence is carried out.

**2. Upon the motion of a person convicted of any felony, the court may order the preservation of any biological evidence used in the criminal case to be preserved for the period of time the convicted remains incarcerated or until the sentence is carried out.**

~~2.~~ **3.** Upon the motion of a person convicted of homicide~~,~~ ~~or~~ any sexual offense, **or any other felony,** the court may order the preservation of any other specifically-identified biological evidence, not otherwise subject to preservation under subsection (1) **and subsection (2)**, for the period of time the person convicted remains incarcerated or until the sentence is carried out.

~~3.~~ **4.** For purposes of this section, the term 'biological evidence' means semen, blood, saliva, hair, skin tissue, or other identified biological material removed from physical evidence.

~~4.~~ **5.** The requirements of this section shall apply to any government agency that may be in possession of biological evidence.

~~5.~~ **6.** Biological evidence subject to the requirements of this section may be consumed for testing upon notice to the person convicted.

## APPENDIX B

### Amendment to the Current "Post-Conviction DNA Testing" Statute (N.R.S. 176.0918)

Nev. Rev. Stat. 176.0918 (2003). Petition requesting genetic marker testing of evidence by person sentenced to death: Authorized; procedure; when granted; remedy not exclusive

1. A person convicted of a **felony** ~~crime and under a sentence of death~~ who meets the requirements of this section may file a post conviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction ~~and sentence of death~~. **If the case involves a sentence of death,** the petition must include, without limitation, the date scheduled for the execution, if it has been scheduled.

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:

(a) The Attorney General; and

(b) The district attorney in the county in which the petitioner was convicted.

3. If a petition is filed pursuant to this section, the court shall determine which person or agency has possession or custody of the evidence and shall immediately issue an order requiring, during the pendency of the proceeding, each person or agency in possession or custody of the evidence to:

(a) Preserve all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section;

(b) Within 30 days, prepare an inventory of all evidence within the possession or custody of the person or agency that may be subjected to genetic marker analysis pursuant to this section; and

(c) Within 30 days, submit a copy of the inventory to the petitioner, the prosecuting attorney and the court.

4. Within 30 days after the inventory of all evidence is prepared pursuant to subsection 3, the prosecuting attorney may file a written response to the petition with the court.

5. The court shall hold a hearing on a petition filed pursuant to this section.

6. The court shall order a genetic marker analysis if the court finds that:

(a) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(b) The evidence to be analyzed exists; and

(c) The evidence was not previously subjected to **a genetic marker analysis involving the petitioner unless**:

**(1) The result of the prior analysis was inconclusive;**

**(2) The evidence was not subjected to the type of analysis that is now requested, and the new analysis may resolve an issue not resolved by the prior analysis; or**

**(3) The requested analysis would provide results that are significantly more accurate and probative of the identity of the perpetrator.**

~~(1) A genetic marker analysis involving the petitioner; or~~

~~(2) The method of analysis requested in the petition, and the method of additional analysis may resolve an issue not resolved by a previous analysis.~~

7. If the court orders a genetic marker analysis pursuant to subsection 6. the court shall:

(a) Order the analysis to be conducted promptly under reasonable conditions designed to protect the interest of the State in the integrity of the evidence and the analysis process.

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions, when possible; and

(2) Satisfy the standards for quality assurance that are established for forensic laboratories by the Federal Bureau of Investigation.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

(d) Order the production of any reports that are prepared by a forensic laboratory in connection with the analysis and any data and notes upon which the report is based.

(e) Order the preservation of evidence used in a genetic marker analysis performed pursuant to this section for purposes of a subsequent proceeding or analysis, if any.

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner:

(a) The petitioner may bring a motion for a new trial based on the ground of newly discovered evidence pursuant to NRS 176.515; and

(b) The restriction on the time for filing the motion set forth in subsection 3 of NRS 176.515 is not applicable.

9. The court shall dismiss a petition filed pursuant to this section if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.

10. For the purposes of a genetic marker analysis pursuant to this section, a person under sentence of death who files a petition pursuant to this section shall be deemed to consent to the:

(a) Submission of a biological specimen by him to determine his genetic marker information; and

(b) Release and use of genetic marker information concerning the petitioner.

11. The expense of an analysis ordered pursuant to this section is a charge against the Department of Corrections and must be paid upon approval by the Board of State Prison Commissioners as other claims against the State are paid.

12. The remedy provided by this section is in addition to, is not a substitute for and is not exclusive of any other remedy, right of action or proceeding available to a person convicted of a crime and under sentence of death.

**13. Following any motion filed under this section, the district attorney shall provide notice to the victim that the motion has been filed, the time and place of any hearing that may be held as the result of the motion, and the disposition of the motion.**

## APPENDIX C

## *THE KIRK BLOODSWORTH POST-CONVICTION DNA TESTING GRANT PROGRAM AND ITS REQUIREMENTS (AS SET OUT IN THE JUSTICE FOR ALL ACT OF 2004)*

**SEC. 412. KIRK BLOODSWORTH POST-CONVICTION DNA TESTING GRANT PROGRAM.**

(a) IN GENERAL- The Attorney General shall establish the Kirk Bloodsworth Post-Conviction DNA Testing Grant Program to award grants to States to help defray the costs of post-conviction DNA testing.

(b) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated $5,000,000 for each of fiscal years 2005 through 2009 to carry out this section.

(c) STATE DEFINED- For purposes of this section, the term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

**SEC. 413. INCENTIVE GRANTS TO STATES TO ENSURE CONSIDERATION OF CLAIMS OF ACTUAL INNOCENCE.**

For each of fiscal years 2005 through 2009, all funds appropriated to carry out sections 303, 305, 308, and 412 shall be reserved for grants to eligible entities that--

(1) meet the requirements under section 303, 305, 308, or 412, as appropriate; and

(2) demonstrate that the State in which the eligible entity operates--

(A) provides post-conviction DNA testing of specified evidence--

(i) under a State statute enacted before the date of enactment of this Act (or extended or renewed after such date), to persons convicted after trial and under a sentence of imprisonment or death for a State felony offense, in a manner that ensures a reasonable process for resolving claims of actual innocence; or

(ii) under a State statute enacted after the date of enactment of this Act, or under a State rule, regulation, or practice, to persons under a sentence of imprisonment or death for a State felony offense, in a manner comparable to section 3600(a) of title 18, United States Code (provided that the State statute, rule, regulation, or practice may make post-conviction DNA testing available in cases in which such testing is not required by such section), and if the results of such testing exclude the applicant, permits the applicant to apply for post-conviction relief, notwithstanding any provision of law that would otherwise bar such application as untimely; and

(B) preserves biological evidence secured in relation to the investigation or prosecution of a State offense--

(i) under a State statute or a State or local rule, regulation, or practice, enacted or adopted before the date of enactment of this Act (or extended or renewed after such date), in a manner that

ensures that reasonable measures are taken by all jurisdictions within the State to preserve such evidence; or

(ii) under a State statute or a State or local rule, regulation, or practice, enacted or adopted after the date of enactment of this Act, in a manner comparable to section 3600A of title 18, United States Code, if--

(I) all jurisdictions within the State comply with this requirement; and

(II) such jurisdictions may preserve such evidence for longer than the period of time that such evidence would be required to be preserved under such section 3600A.

Subtitle B--Improving the Quality of Representation in State Capital Cases

## APPENDIX D

# ARIZONA'S POST-CONVICTION DNA TESTING AND EVIDENCE PRESERVATION STATUTE

**Ariz. § 13-4240**: Post-Conviction Deoxyribonucleic Acid Testing, (sub-sections H and I address evidence preservation procedures).

**A.** At any time, a person who was convicted of and sentenced for a felony offense and who meets the requirements of this section may request the forensic deoxyribonucleic acid testing of any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence.

**B.** After notice to the prosecutor and an opportunity to respond, the court shall order deoxyribonucleic acid testing if the court finds that all of the following apply:

1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing.

2. The evidence is still in existence and is in a condition that allows deoxyribonucleic acid testing to be conducted.

3. The evidence was not previously subjected to deoxyribonucleic acid testing or was not subjected to the testing that is now requested and that may resolve an issue not previously resolved by the previous testing.

**C.** After notice to the prosecutor and an opportunity to respond, the court may order deoxyribonucleic acid testing if the court finds that all of the following apply:

1. A reasonable probability exists that either:

(a) The petitioner's verdict or sentence would have been more favorable if the results of deoxyribonucleic acid testing had been available at the trial leading to the judgment of conviction.

(b) Deoxyribonucleic acid testing will produce exculpatory evidence.

2. The evidence is still in existence and is in a condition that allows deoxyribonucleic acid testing to be conducted.

3. The evidence was not previously subjected to deoxyribonucleic acid testing or was not subjected to the testing that is now requested and that may resolve an issue not previously resolved by the previous testing.

**D.** If the court orders testing pursuant to subsection B, the court shall order the method and responsibility for payment, if necessary. If the court orders testing pursuant to subsection C, the court may require the petitioner to pay the costs of testing.

**E.** The court may appoint counsel for an indigent petitioner at any time during any proceedings under this section.

**F.** If the court orders testing pursuant to this section, the court shall select a laboratory that meets the standards of the deoxyribonucleic acid advisory board to conduct the testing.

**G.** If the prosecutor or defense counsel has previously subjected evidence to deoxyribonucleic acid testing, the court may order the prosecutor or defense counsel to provide all the parties and the court with access to the laboratory reports that were prepared in connection with the testing, including underlying data and laboratory notes. If the court orders deoxyribonucleic acid testing pursuant to this section, the court shall order the production of any laboratory reports that are prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

**H.** If a petition is filed pursuant to this section, the court shall order the state to preserve during the pendency of the proceeding all evidence in the state's possession or control that could be subjected to deoxyribonucleic acid testing. The state shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense and the court. if evidence is intentionally destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt, for a knowing violation.

**I.** The court may make any other orders that the court deems appropriate, including designating any of the following:

1. The type of deoxyribonucleic acid analysis to be used.

2. The procedures to be followed during the testing.

3. The preservation of some of the sample for replicating the testing.

4. Elimination samples from third parties.

**J.** If the results of the postconviction deoxyribonucleic acid testing are not favorable to the petitioner, the court shall dismiss the petition. the court may make further orders as it deems appropriate, including any of the following:

1. Notifying the board of executive clemency or a probation department.

2. Requesting that the petitioner's sample be added to the federal combined dna index system offender database.

3. Providing notification to the victim or family of the victim.

**K.** Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the postconviction deoxyribonucleic acid testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this article or the Arizona Rules of Criminal Procedure.