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August 12, 2010

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Honorable Richard Cordray  
Ohio Attorney General  
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In Re: Eric Anthony Brunner

Dear Governor Strickland and Attorney General Cordray:

I received your letter that outlined your request that my office consent to DNA testing in the case of *State of Ohio v. Eric Anthony Brunner*. Despite the fact that this convicted rapist has served his justly deserved sentence, and has raised his DNA issue multiple times before the trial court, you still feel that justice would be served by ignoring these court decisions and agreeing to yet further testing. Your letter was a surprise to me as I am sure it was to the six other prosecutors, urging them to accede to your request. Your letter, however, has several troubling aspects to it. Before addressing them, I wish to brief you on aspects of the *Brunner* case that his unnamed attorneys may have conveniently omitted in their briefing to you.

Brunner was convicted in 1996 of raping one woman and attempting to rape another. Identification was not an issue in the case since not only did both women know Brunner, but the rape victim was his first cousin. Brunner knocked on their door late at night seeking a place to call it a night. Once the women fell asleep, however, Brunner attacked the one woman, who fought off his attack and ran to another room of the residence, locking herself inside. The other woman soon awoke to find Brunner on top of her, forcing himself on her. Despite her efforts to resist him, Brunner was able to vaginally rape her. This woman was eventually able to break free from Brunner, and ran into the locked room where the other woman had sought refuge. Once these women determined that Brunner was no longer in the residence, they called the police.

Honorable Ted Strickland  
Honorable Richard Cordray  
August 12, 2010  
Page 2

At trial, both women testified and identified Brunner as their attacker at trial. A rape kit that was performed on the rape victim was introduced at trial. This woman testified at trial that she had had consensual sex with another man a few days before Brunner's assault. The vaginal swab that was performed as part of the rape kit showed the presence of semen, but only blood typing analysis was performed at that time. This typing was inconclusive as to the source of the semen, and this evidence was presented to the jury. Thus, the semen sample found within the rape victim had no bearing or impact on the jury's verdict, i.e., whether Brunner was the source or not was not relevant to the jury's finding of guilt. Brunner's convictions were subsequently upheld on direct appeal.

In 2004, the trial court conducted a classification hearing, after which it ruled that Brunner qualified as a sexual predator. The evidence presented at this hearing included a psychological evaluation conducted by a court appointed licensed psychologist. During the testing and evaluation, Brunner expressed no remorse for his crimes or any empathy for his victims. Brunner was asked by the psychologist about his juvenile sexual criminal record, he responded that he taught a boy who had put his mouth on Brunner's penis a lesson by urinating on him. The psychologist concluded that Brunner fit the profile for a "power assertive rapist," and that he is an opportunist rapist. On two separate evaluations to assess Brunner's potential for recidivism, the psychologist determined that Brunner scored at the highest levels on the evaluations, indicating a very high risk to reoffend. The trial court's classification was upheld on direct appeal.

Finally, Brunner, through his counsel (the Ohio Public Defender's Office), has requested of the trial court that it order DNA testing on the vaginal swab obtained from the rape victim as part of the rape kit. Brunner has made this request not once, not twice, but three times. These requests have included a request for Y-STR DNA testing. The trial court has denied the requests for two basic reasons: identification was not an issue in the case given the relationship of the victims to Brunner, and the semen evidence had no impact on the outcome of the trial since it did not point to Brunner as the source. Brunner, through his attorneys, opted not to appeal any of these three rulings of the trial court.

Instead, Brunner has come to you through apparently new counsel. If the accounts in the newspapers statewide are correct, his new counsel are the attorneys of the so-called Ohio Innocence Project. You have apparently heard them without giving us the opportunity of responding to any of their self-serving representations. Your approach is particularly troubling to me as a prosecutor. I will now, however, raise with you the points I would have raised with you had you contacted me before you chose this particular course of conduct.

Honorable Ted Strickland  
Honorable Richard Cordray  
August 12, 2010  
Page 3

First, I am baffled at the nebulous legal standard you have apparently adopted to review claims regarding DNA testing. You apparently have determined that the legal standards established by the Ohio General Assembly and the courts are inadequate to address the issue of DNA testing. You assert that further DNA testing has 'the potential to clarify guilt,' will establish 'finality, is the best method for determining 'certainty.' As you should know, none of these standards, are the legal standards governing these requests. Instead, the legal standard is whether further DNA evidence will result in exculpatory evidence that would materially change the outcome of the trial. In Brunner's case, the trial court applied this correct standard and determined that further DNA testing would not satisfy this standard. Brunner's counsel – the Ohio Public Defender's Office – apparently agreed since they did not appeal the trial court's rulings.

Second, you are naive if you think that further DNA testing will provide certainty and finality to this case. The Ohio Innocence Project has a history of pursuing their cases regardless of what the evidence shows. In this case, as the trial court correctly determined, a DNA result that excludes Brunner as the source of the semen would have no impact on the outcome of the trial since it was not alleged at trial that he was the source. The rape victim admitted that she had had consensual sexual relations with another man several days before her rape, and this man could have been the source of the semen. Brunner, in fact, may not have ejaculated at all while he was raping his victim. The fact that the Ohio Innocence Project has ignored this logic by pursuing Brunner's case with you indicates quite clearly that they will continue with this case regardless of the results. Having lost in the courts, the attorneys will no doubt attempt to court the favor of public opinion with their continued mission of destroying the very finality and certainty of the criminal justice system that you claim further testing will somehow bring.

Third, you assert that we, as law enforcement officers, have an obligation to convict the guilty and set the innocent free. It is my belief that it is the constitutional obligation of a prosecutor to strive to ensure that only the guilty are properly charged and convicted, after being afforded due process, and that the innocent are not even charged, much less convicted. Ensuring that the innocent are not charged, convicted, and imprisoned is one of the several goals of the criminal justice system. The proposition that you assert – that we all should be dedicated to setting the innocent free – sounds like a battle cry of the Ohio Innocence Project that reflects a bias and prejudice of the criminal justice system that it is inherently broken and cannot be fixed from within. I consider this an insult to the high ethical standards that I hold for myself and my staff, as well as the high ethical standards that I know my fellow prosecutors statewide hold themselves to.

Honorable Ted Strickland  
Honorable Richard Cordray  
August 12, 2010  
Page 4

Fourth, you express an opinion that people such as Brunner, who have already served their prison sentences, have an interest in obtaining greater certainty regarding their convictions. People such as Brunner had ample and adequate legal counsel and representation to protect and further that interest. Brunner already has certainty regarding his convictions since he knows he committed those savage and vicious acts for which he was convicted. While I have an obligation as a prosecutor to ensure that the innocent are not charged and that the guilty are accorded all the protections of the law provided under due process, I know of no obligation to use the limited resources of my office to help criminal defendants obtain certainty to their cases. My obligation is to represent the people at large, who also have an interest in certainty and finality. Our current system of due process is designed to bring that level of certainty to the criminal justice process. The Ohio Innocence Project does not agree with that legal standard, which does not surprise me. Your apparent concurrence with their position is troubling. Forgotten in your letter is our obligation to the victims of the criminals like Brunner, an obligation that is rightfully put upon us as law enforcement officials under the Ohio Constitution – Article I, Section 10a. Those of us in the prosecution trenches are well aware of this obligation since we deal directly with the victims of crime. They deserve certainty and finality in their cases as well, a certainty and finality that Brunner and his attorneys seek to deny them.

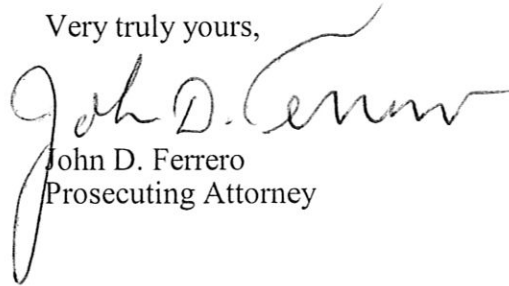
Fifth, you acknowledge in your letter that I am not obligated to comply with your request – “that’s a question for the courts.” As I have outlined above, the courts have already spoken on the issue. Brunner and his attorneys apparently have no respect for these rulings of the court. Perhaps these rulings of the courts in this case were conveniently omitted in the presentation Brunner’s attorneys made to you. Brunner has exhausted all of his state remedies and has served his sentence. Your request does not apply any recognizable legal standard for further testing, but instead asserts that this is a matter of public policy. I am governed, however, by the legal standards set forth in the United States and Ohio Constitutions, as well as the statutes and rules governing criminal matters in Ohio. I am not governed by a nebulous and ill-defined standard of public policy in making important legal decisions governing criminal prosecutions. To do otherwise would be to undermine the current criminal justice system and replace it with a system of ‘fairness in the eye of the beholder.’ This ‘public policy’ system would only interject chaos into the criminal justice system and seriously damage the certainty and finality that are linchpins to the system.

In conclusion, further DNA testing in Brunner’s case would only promote the confidence and certainty of Brunner and his new attorneys that they have a willing partner with your offices in undermining the certainty and finality of Ohio’s criminal justice system and in promoting their self-serving agenda in this regard. There is no reason for continued and further testing in this case. The results will not be outcome determinative.

Honorable Ted Strickland  
Honorable Richard Cordray  
August 12, 2010  
Page 5

If you believe, after careful review of the facts that the criminal justice system has failed this convicted rapist and sexual predator, then you are empowered with the authority to take appropriate actions. My office will assist you in any such review. If you need further information regarding Brunner's case, my office will assist you in that regard as well. Finally, if you have any questions regarding my position in this matter, please contact me.

Very truly yours,



John D. Ferrero  
Prosecuting Attorney

JDF/klo

pc: file