IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

STATE OF TENNESSEE	)	
	)	
v.	)	**SHELBY COUNTY**
	)	**S.Ct. No. 1 (Original Appeal No.)**
PERVIS T. PAYNE	)	

RESPONSE TO MOTION TO RE-SET EXECUTION DATE

Petitioner Pervis T. Payne respectfully requests that this Court deny the State's Motion to Re-set Execution Date. Mr. Payne submits that there is currently pending litigation which may affect both the State's ability to execute him as well as the procedure the State would use at any execution. Specifically, Mr. Payne currently has pending an appeal of a State court decision regarding DNA analysis Mr. Payne requested to establish his actual innocence of the crimes for which he has been convicted. In denying Mr. Payne's original DNA petition, the State court specifically found that the petition had not been filed for the purpose of delay, thus entitling Mr. Payne to an appeal on the merits of the State court's denial of relief. In addition, Mr. Payne currently has pending a motion in federal court filed under Rule 60(b) of the Federal Rules of Civil Procedure. Finally, Mr. Payne has a grievance pending with the Tennessee Department of Corrections regarding the lethal injection procedures. In the event that grievance is denied, Mr. Payne having at that time exhausted his administrative remedies, Mr. Payne anticipates filing in federal court a 42 U.S.C. § 1983 action challenging the lethal injection protocol. Because these actions are pending and could affect the fact and manner of any execution of Mr. Payne, this Court should, at this time, deny the State's motion.

Alternatively, should this Court determine that now is an appropriate time to set an execution date, Mr. Payne respectfully requests that this Court set a date far enough in the future

to allow judicious consideration of the above-described pending actions, as well as enough time for a meaningful clemency proceeding should that be necessary.

I. Mr. Payne's DNA Petition

On September 7, 2006, Mr. Payne filed in Criminal Court for Tennessee's 30th Judicial District a DNA petition seeking testing of (1) discarded bloody clothing; (2) bloody clothing worn by Mr. Payne and the victims; and (3) the vaginal swabs taken from one of the victims. Payne v. State, Nos. 87-04408, 87-04409, 87-04410 (Div. III) (Petition for Post-Conviction DNA Analysis). The DNA Petition was filed in order to establish Mr. Payne's innocence in that exculpatory DNA results would have led to Mr. Payne not being prosecuted and/or not being given the sentence of death. The State responded to the petition, arguing that the only purpose of the petition was to unreasonably delay Mr. Payne's execution and that Mr. Payne could not establish that a reasonable probability existed that Mr. Payne's prosecution or sentence would have been different had exculpatory DNA results been available.

On March 29, 2007, the Criminal Court, Division III, issued an Order Denying Petition for Post-Conviction DNA Analysis, attached hereto as Exhibit A. In the Order, Judge Colton found that Mr. Payne failed to demonstrate that a reasonable probability of a different result had exculpatory DNA results been available at the time of trial. However, Judge Colton specifically concluded that Mr. Payne's petition was not filed for the purpose of delay, noting that Mr. Payne "has met the requirements established under the fourth prong of the [DNA] statute [the application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.]"

The order denying Mr. Payne's DNA petition is an appealable order and Mr. Payne filed a Notice of Appeal on April 16, 2007. Judge Colton having found that the purpose of the DNA Petition was not to unreasonably delay the execution of Mr. Payne's sentence, the Court of Criminal Appeals will consider the merits of Mr. Payne's petition for DNA analysis. Because this appeal is appealable as of right and because it is being pursued to prove Mr. Payne's innocence and not for unreasonable delay, this Court should allow Mr. Payne his right to a full appeal. As such, the Court should not set an execution date in Mr. Payne's case so long as his DNA Petition is pending.

II. Mr. Payne's Rule 60(b) Motion

On April 30, 2007, while Governor Bredesen's moratorium remained in effect, Mr. Payne submitted a Rule 60(b) Motion in the district court for the Western District of Tennessee, asserting that he was entitled to equitable relief from the district court's judgment on Mr. Payne's 1998 habeas corpus claim. In addition, Mr. Payne is seeking additional discovery to determine the reasons that the State did not provide exculpatory evidence so that he may prove his entitlement to equitable relief.

On May 14, 2007, the district court entered an order reopening Mr. Payne's habeas challenge and ordering the State to respond to Mr. Payne's Rule 60(b) motion by May 29, 2007, attached hereto as Exhibit B. Given the pending nature of this action and the upcoming date for the State's response, it would be premature to set Mr. Payne's execution date while this action remains pending.

In addition, there is significant uncertainty within the Sixth Circuit regarding Rule 60(b) jurisprudence and Mr. Payne should not have a date set for execution so long as this uncertainty

remains. Specifically, the Sixth Circuit is unsettled on the scope of equitable relief available to a habeas petitioner under Rule 60(b) as well as on the standard applicable to claims, like Mr. Payne's, that fraud taints the judgment denying him habeas relief. In two cases, the Sixth Circuit has stayed execution dates to allow for thoughtful, unhurried consideration of the extent to which Rule 60(b) applies in those cases. Abdur'Rahman v. Bell, Sixth Circuit No. 02-6548; Johnson v. Bell, Sixth Circuit No. 05-6925. Mr. Payne is in a similar situation and this Court should therefore refrain from setting an execution date at this juncture.

III. Mr. Payne's Tennessee Department of Corrections Grievance

In addition to the already pending claims Mr. Payne has in state and federal courts, Mr. Payne also has filed a grievance with the Tennessee Department of Corrections with regard to the recently-adopted lethal injection protocol. On April 30, 2007, new execution protocols were adopted by the Tennessee Department of Corrections pursuant to an Executive Order issued on February 1, 2007 by Governor Bredesen. On May 7, 2007, Mr. Payne filed a grievance with regard to the new protocol, objecting to their use in his execution. As of the date of filing, Mr. Payne's grievance has not been ruled upon. Regardless of how the Department of Corrections rules on Mr. Payne's grievance, this Court should not set an execution date for Mr. Payne until Mr. Payne's concerns have been ruled upon. If the Tennessee Department of Corrections determines that Mr. Payne's grievance is meritorious, that act will effectively stay Mr. Payne's execution until the Department of Corrections adopts new protocol that address the concerns raised in Mr. Payne's grievance. Conversely, if the Department of Corrections rejects Mr. Payne's grievance, Mr. Payne will have exhausted his administrative remedies and plans to pursue a separate action under 42 U.S.C. § 1983 in federal court challenging the use of the new

protocols in his execution. In either event, it is currently premature for this Court to set a date of execution for Mr. Payne so long as Mr. Payne's grievance is pending.

Assuming that Mr. Payne's grievance will be denied by the Department of Corrections, Mr. Payne has begun preparing a federal action challenging the use of the new lethal injection protocol pursuant to 42 U.S.C. § 1983. Mr. Payne previously filed a similar action challenging the old lethal injection procedures, but that action was rendered moot by Governor Bredesen's executive order revoking those procedures. In the previous action, Mr. Payne alleged, among other things, that the lethal injection process likely to be used by the state – injections of three chemicals, sodium thiopental (an anesthetic), pancuronium bromide or Pavulon (a paralytic agent), and potassium chloride – did not sufficiently protect Mr. Payne's constitutional rights. Specifically, Mr. Payne contended that the anesthetic could be inadequate to render Mr. Payne completely unconscious, and, as a result, he would be alive, conscious, and paralyzed (by the Pavulon) as he slowly suffocates to death and suffers the searing pain of the potassium chloride injection. Federal courts across the country have taken these allegations seriously, and have determined that evidentiary hearings are necessary to resolve the factual disputes they involve. See Taylor v. Crawford, 457 F.3d 902 (8th Cir. 2006); Brown v. Beck, 445 F.3d 752 (4th Cir. 2006) (Michael, J., dissenting) (discussing evidentiary hearing held on North Carolina's proposed protocol modification); Morales v. Hickman, 438 F.3d 926 (9th Cir. 2006). The issue remains open in the Sixth Circuit.[1]

Because the new protocols use the same lethal injection method and administration procedures, Mr. Payne's potential § 1983 challenge would address these same issues. Mr. Payne respectfully submits that until his grievance is ruled upon and, if necessary, the federal courts

[1] Although the Sixth Circuit noted, in the context of an appeal of a temporary restraining order, that Philip Workman did not have a high probability of success in his challenge of the new procedures, the court never reached the merits of Workman's claim. Workman v. Bredesen, No. 07-5562 (6th Cir. May 7, 2007).

considering a potential lethal injection challenge have had an opportunity to give consideration similar to that provided in other circuits, there should be no date for his execution.

IV. Conclusion

Because Mr. Payne's DNA petition is before the Court of Criminal Appeals on its merits, because Mr. Payne's Rule 60(b) Motion is before the district court for the Western District of Tennessee, and because Mr. Payne has not exhausted his administrative or legal remedies in challenging the State's method of execution, Mr. Payne respectfully requests that this Court deny the State's Motion to Re-Set Execution Date. If this Court nonetheless chooses to set a date for Mr. Payne's execution, Mr. Payne respectfully requests that it set a date far enough in the future to allow for judicious consideration of the claims he presents in the above-described proceedings, as well as enough time for a meaningful clemency process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 14, 2007, a copy of the foregoing was hand-delivered to Joseph F. Whalen, Associate Solicitor General, 425 Fifth Avenue North, Nashville, Tennessee 37243.

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS
DIVISION III

PERVIS PAYNE **Petitioner**	)	**No. 87-04408** **87-00409** **87-00410**
v.	)	
STATE OF TENNESSEE **Respondent**	)	

ORDER
DENYING PETITION FOR POST-CONVICTION DNA ANALYSIS

This matter came to be heard upon the petition of defendant, Pervis Payne, for post-conviction DNA Analysis. Pursuant to the Tennessee Post-Conviction DNA Analysis Act of 2001, defendant now seeks DNA analysis of certain evidence introduced against him at trial. *See* Tenn. Code Ann. §§ 40-30-301 to 313. In 1990, the defendant was convicted of murder in the first degree for the stabbing death of Charisse Christopher and her daughter, Lacie. Petitioner received a sentence of death for each murder. Thereafter he appealed, and the Tennessee Supreme Court affirmed his sentence and conviction. *See* State v. Payne, 791 S.W.2d 10 (Tenn. 1990). Subsequently, petitioner sought state post-conviction review; federal habeas review and state *coram nobis* review of his conviction and sentence. Both petitioner's sentence and conviction were upheld. The petitioner is currently scheduled for execution on April 7, 2007.

On September 8, 2006, the petitioner filed a Petition for Post-Conviction DNA Analysis. Thereafter, on December 15, 2006, the State filed a response to petitioner's motion alleging the petition should be dismissed for failure to meet the requirements of the Act. On February 1, 2007, this court heard arguments of counsel on the Petition for DNA Analysis and the State's motion to dismiss.

EXHIBIT "A"

Having reviewed the written submissions and arguments of counsel, this court finds petitioner has failed to meet the criteria for DNA Analysis, under both the mandatory and discretionary portions of the Act, as outlined in Tenn. Code Ann. § 40-30-301 *et seq.* Therefore, the petitioner's Petition for Post-Conviction DNA Analysis is, hereby, **DENIED**

BACKGROUND

The petitioner was convicted in 1990 of the premeditated first degree murder of Charisse Christopher and her two and one-half year old daughter, Lacie. Additionally, petitioner was found guilty of assault with intent to commit murder in the first degree of Christopher's three and one-half year old son, Nicholas. Following his conviction, the defendant was sentenced to death for each of the murders and received a thirty year sentence for the assault. Although the petitioner's sentence and conviction have been subjected to extensive review through direct appeal; state post-conviction and coram nobis proceedings; and federal habeas corpus proceedings, petitioner has never sought DNA Analysis.

A brief recitation of the facts surrounding the death of the victim is relevant to the specific request now made by petitioner. Thus, this court has including the following from the Tennessee Supreme Court's direct review of petitioner's conviction and sentence:

> The building in which [the victim] lived contained four units, two downstairs and two upstairs. The resident manager, Nancy Wilson, lived in the downstairs unit immediately below the Christophers. Defendant's girlfriend, Bobbie Thomas, lived in the other upstairs unit. The inside entrance doors of the Christopher and Thomas apartment were separated by a narrow hallway. . . .
>
> Bobbie Thomas had spent the week visiting her mother in Arkansas but was expected to return on Saturday, 27 June 1987, and she and Defendant had planned to spend the weekend together. Prior to 3:00 p.m. on that date, Defendant had visited the Thomas apartment several times and found no one at home. On one visit he left his overnight bag and three cans of Colt 45 malt liquor in the hallway near the entrance to the Thomas apartment. . . .

Nancy Wilson was resting in her apartment when she first heard screaming, yelling and running in the Christopher apartment above her. She heard a door banging open and shut and Charisse screaming, "get out, get out." She said it wasn't as though she was telling the intruder to get out, it was like "children, get out." The commotion began about 3:10 p.m., subsided momentarily, then began again and became "terribly loud, horribly loud." She went to the back door of her apartment, went outside and started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police. She testified that she told the police she had heard blood curdling screams from the upstairs apartment and that she could not handle the situation. The dispatcher testified he received her disturbance call at 3:23 p.m. and immediately dispatched a squad car.

. . . Mrs. Wilson went to her bathroom after calling the police. The shouting, screaming and running upstairs had stopped, but she heard footsteps go into the upstairs bath, the faucet turned on and the sound of someone washing up. Then she heard someone walk across the floor to the door of the Christopher apartment, slam the door shut and run down the steps, just as the police arrived.

Officer C.E. Owen, of the Millington Police Department, was the first officer to arrive. . . . He parked and walked toward the front entrance. As he did so he saw through a large picture window that a black man was standing on the second floor landing of the stairwell. Owen saw him bend over and pick up an object and come down the stairs and out the front door of the building. He was carrying an overnight bag and a pair of tennis shoes. Owen testified that he was wearing a white shirt and dark colored pants and had "blood all over him. It looked like he was sweating blood." Owen assumed that a domestic fight had taken place and that the blood was that of the person he was confronting. Owen asked, "[H]ow are you doing?" Defendant responded, "I'm the complainant" Owen then asked, "What's going on up there?" At that point Defendant struck Owen with the overnight bag, dropped his tennis shoes and started running. . . Owen pursued him but Defendant outdistanced him and disappeared into another apartment complex. Owen called for help on his walkie-talkie and Officer Boyd responded. . . . Owen told Boyd that "there's something wrong at that apartment." . . .

Nancy Wilson had a master key and let [the officers] in the locked Christopher apartment. As soon as the door was opened they saw blood on the walls, floor – everywhere. . . Charisse sustained forty-two (42) knife wounds and forty-two (42) defensive wounds on her arms and hands. The medical examiner testified . . . no wound penetrated a very large vessel and the cause of death was bleeding from all the wounds. . . . The medical examiner testified that the cause of death of Lacie Christopher

was multiple stab wounds to the chest, abdomen, back and head, a total of nine.

Boyd discovered that the boy was still breathing and called for an ambulance. . . . In addition to multiple lacerations, several stab wounds had gone completely through his body from front to back. One of those was in the middle of his abdomen. Dr. Sherman Hixson, testified that he had to repair and stop bleeding of the spleen, liver, large intestine, small intestine and the vena cava. During the surgery he was given 1700 cc's of blood by transfusion. Dr. Hixson estimated that his normal total blood volume should have been between 1200 and 1300 cc's. . . .

Defendant was located and arrested at the townhouse where a former girlfriend, Sharron Nathaniel, lived with her sisters. Defendant had attempted to hide in the Nathaniel attic. When arrested he was wearing nothing but dark pants, no shirt, no shoes. . . . There was blood on his pants and on his body and he had three or four scratches across his chest. He was wearing a gold Helbrose wristwatch that had bloodstains on it. The weekend bag that he struck Officer Owen with was found in a dumpster in the area. It contained the bloody white shirt he was wearing when Owen saw him.

It was stipulated that Charisse and Lacie had Type O blood and that Nicholas and Defendant had Type A. A forensic serologist testified that Type O blood was found on defendant's white shirt, blue shirt, tennis shoes and on the bag. Type A blood was found on the black pants Defendant was wearing when seen by Owen and when arrested. Defendant's baseball cap had a size adjustment strap in the back with a U-type opening to accommodate adjustments. That baseball cap was on Lacie's forearm- her hand and forearm sticking through the opening between the adjustment strap and the cap material. Three Colt 45 beer cans were found on a small table in the living room, two unopened, one opened but not empty, bearing Defendant's fingerprints, and a fourth empty beer can was on the landing outside the apartment door. Defendant was shown to have purchased Colt 45 earlier in the day. Defendant's fingerprints were also found on the telephone and counter in the kitchen.

Charisse's body was found on the kitchen floor on her back, her legs fully extended. The right side of her upper body was against the wall, and the outside of her right leg was almost against the back door that opened onto the back porch. Laura Picard was visiting her sister, Helen Truman, who lived in the downstairs apartment across from Nancy Wilson. She was sunbathing in the back yard and heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times, "but it didn't want to shut And this hand, a dark-colored hand with a gold watch, kept trying to shut the back door." It

> was about that time that Nancy Wilson came out of her back door looking around. Mrs. Picard testified that she knew the manager was looking for the source of the noise and when Mrs. Wilson looked at her she pointed to the Christopher apartment. She said that it was just a few minutes later that the police arrived and she did not have a watch on at the time. She testified that the dark-colored hand she saw three or four times was at a level between the door knob and the bottom of the door.
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> The medical examiner testified that . . . a specimen from [Charisse Christopher's] vagina tested positive for acid phosphatase. He said that result was consistent with the presence of semen, but not conclusive, absent sperm, and no sperm was found. . . .
>
> Defendant testified. His defense was that he did not harm any of the Christophers; that he saw a black man descend the stairs, race by him and disappear out the front door of the building, as he returned to pick up his bag and beer. . . . He said that as the unidentified intruder bounded down the stairs, attired in a white tropical shirt that was longer than his shorts, he dropped change and miscellaneous papers on the stairs which Defendant picked up and put in his pocket as he continued up the stairs to the second floor landing to retrieve his bag and beer. When he reached the landing he heard a baby crying and a faint call for help and saw the door was ajar. He said curiosity motivated him to enter the Christopher apartment.

See State v. Payne, 791 S.W.2d 10, 14 (Tenn. 1990)

As the Supreme Court opinion indicates, the Defendant claimed at trial that he entered the apartment and saw Charisse "with a knife in her throat and with her hand on the knife like she had been trying to get it out." Id. at 14. He stated he went to the phone but could not think of the number to call. Defendant testified that he pulled the knife out of her neck, then kneeled down next to Lacie and discovered she was already dead. Id. He explained the blood on his shirt, pants, tennis shoes, body, etc as having come from the knife when he pulled it from Charisse's neck. He testified that he went to the kitchen sink a couple of times to get some water because he thought he was going to vomit. Id. He denied washing up in the bathroom as Nancy Wilson had testified. Defendant further testified that he left the apartment to "bang on doors" and get some help; but encountered Officer Owen and panicked. Id. However, he could not explain how the shoulder strap on the left shoulder of the blue shirt he was wearing had been torn and stated that what witnesses described as scratches on his chest were in fact stretch marks from lifting weights. Moreover, on cross-examination the following exchange occurred:

Q: Can you explain why there's blood stains on your left leg?

A: Left leg?

Q: Yes, sir.

A: Evidently it probably came – had to come from when she – when she hit the wall. When she reached up and grabbed me. . . .

Q: She got blood on you when she hit the wall. Is that what you said?

A: She hit against the wall when she fell back.

State v. Payne, 791 S.W.2d at 16. The Supreme Court noted that "blood was smeared on the wall of the kitchen next to the back door and on the door itself, from doorknob height to the floor and laterally approximately six or seven feet." Id. Considering the above proof, the Supreme Court made the following findings regarding the sufficiency of the evidence supporting petitioner's convictions:

> The testimony of Laura Picard and Nancy Wilson, the time of Mrs. Wilson's call to the police and Officer Owens' arrival virtually forecloses the possibility that an unidentified intruder committed these murders and disappeared out the front door before the Defendant entered the apartment. Defendant was the person that washed up in the upstairs bathroom, walked out of the apartment, locked the door, and encountered Officer Owen with his bag and beer. He was the person that Owen described as looking like "he was sweating blood." Also, the jury was justified in rejecting as unbelievable and contrary to human conduct and experience, his alleged efforts to render aid to the Christophers.

State v. Payne, 791 S.W.2d at 15. Similarly, upon reviewing petitioner's subsequent *coram nobis* petition, the Court of Criminal Appeals made the following findings:

> Based upon our review of the record and the facts of this case, the appellant's "newly discovered evidence" would not have resulted in a different judgment if the evidence had been admitted in the previous trial. The proof showed that the appellant, who was covered in blood, was seen by a police officer as he was leaving the apartment building following the murders. His fingerprints were throughout the apartment. Three cans of Colt 45 malt liquor were found on a small table in the Christopher apartment. There was proof that the appellant purchased this type of beer earlier in the day and the open can of beer had the appellant's fingerprints on it. Moreover, Type O blood, that of the victims, was found on the appellant's bag, shirts, and shoes, even though he had Type A blood.
>
> The appellant's own testimony was damning. Incredibly, he testified at trial that he went into the apartment and found the Christophers. In trying

> to explain how he had so much blood on him, the appellant testified that it happened when he pulled the knife out of Ms. Christopher's neck. As Ms. Christopher reached for him, she fell and hit the kitchen wall, splattering him with blood. This, of course, was after Ms. Christopher had been stabbed forty-one times. The appellant fled the scene, assaulting a police officer as he ran, and was later found hiding in a friend's attic. The appellant's baseball cap was found intertwined in Lacie's arm, although he did not recall his hat falling off. Moreover, we note that the time frame of the murders virtually precludes any person other than the appellant from committing these crimes. Witnesses at trial testified that, after they heard screaming from the upstairs apartment, they saw no one go up or down the stairs. The resident manager, Wilson, testified that, after the screaming stopped, she heard a person walk into the bathroom and heard water running. She then heard a person walk across the floor, slam the door shut and then run down the steps. The police were on the scene at that point in time for the first officer to observe the appellant as he ran down the stairs covered in blood. There is no question as to the confidence in the jury's verdict.

See Payne v. Tennessee, 1998 Tenn. Crim. App. LEXIS 68, *58. (Tenn. Crim. App. filed January 15, 1998).

POST-CONVICTION DNA ANALYSIS ACT OF 2001

Tenn. Code Ann. §§ 40-30-301 to 314 provides procedures by which a person convicted or sentenced for the commission of first-degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses or any lesser included offenses to these offenses may file a petition requesting DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the prosecution that resulted in the person's conviction, and that may contain biological evidence. *See* Tenn. Code Ann. § 40-30-303. Such petition may be filed at any time. The Act contains no explicit statute of limitations. *See* Shaun Lamont Herford v. State, No. E2002-01222-CCA-R3-PC, 2002 WL 31312370 (Tenn. Crim. App. November 13, 2002).

The Act addresses two categories of cases in which DNA analysis might be appropriate. State v. Griffin, 182 S.W.3d 795 (Tenn. 2006). In the first category, DNA Analysis is mandatory and must be ordered. After notice to the prosecution and an opportunity to respond, the court **shall** order DNA analysis if it finds:

(1) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
(2) the evidence is still in existence and in such a condition that DNA analysis may be conducted;
(3) the evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
(4) the application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-304. *(emphasis added)* Additionally, under section 305, DNA is discretionary. The court **may** order DNA analysis if it finds that:

(1) a reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
(2) the evidence is still in existence and in such a condition that DNA analysis may be conducted;
(3) the evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
(4) the application for analysis is made for the purposes of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-305 (*emphasis added*)

Under Tenn. Code Ann. § 40-30-204, if the contents of the petition establish a prima facie case and the trial court determines all statutory prerequisites are present, a petitioner convicted of one of the statutorily enumerated crimes is entitled to DNA analysis. William D. Burford v. State , No. M2002-02180-CCA-R3-PC, 2003 Tenn. Crim. App., 2003 WL 1937110 (Tenn. Crim. App. April 24, 2003). A petitioner, under

the Tennessee statute, is not required to plead with "specificity" and, unlike other states, is not required to demonstrate that identity was an issue at trial. Willie Tom Ensley v. State, No. M2002-01609-CCA-R3-PC, 2003 WL 1868647 (Tenn. Crim. App. April 11, 2003). Conversely, if the state contests the presence of any qualifying criteria and it is apparent that each prerequisite cannot be established, the trial court, has the authority to dismiss the petition. Buford, 2003 WL 1937110, at * 3 The Act does not specifically provide for a hearing as to the qualifying criteria and, in fact, authorizes a hearing only after DNA analysis produces a favorable result. *Id.* Tenn. Code Ann. § 40-30-309 The Act specifically contemplates summary dismissal under appropriate circumstances, and failure to meet *any* of the qualifying criteria is fatal to the action. *Id.* (*emphasis added*).

The Post Conviction DNA Analysis Act was created to address the possibility that a person may have been wrongfully convicted or sentenced. *See* Jack Jay Shuttle v. State, 2004 Tenn. Crim. App. LEXIS 80, No. E2003-00131-CCA-R3-PC, 2004 WL 199826, at *4 (Tenn. Crim. App., at Knoxville, Dec. 16, 2004), perm. to app. denied (Tenn. Apr. 2, 2004). When considering such claims, the post-conviction court is to assume that the requested analysis will produce exculpatory results. Id. (quoting Ricky Flamingo Brown v. State, No. M2002-02427-CCA-R3-PC, Tenn. Crim. App., at Nashville, June 13, 2003) perm. to app. denied (Tenn. 2003). However, "the convicted defendant requesting post-conviction DNA analysis is not provided a presumption of innocence, and the reviewing court need not ignore the proof supporting the conviction." Sedley Alley v. State, No. W2006-01179-CCA-R3-CD (Tenn. Crim. App. filed June 22, 2006), 2006 Tenn. Crim. App. LEXIS 470 at *27. Thus, in making its determination, a trial court may also consider all the evidence available, including the evidence at trial and/or any stipulations of fact by the petitioner or his counsel and the state; and the opinions of appellate courts on either direct appeal of the conviction, post-conviction proceedings, or habeas corpus actions. Ensley, 2003 WL 1868647, at * 3. Additionally, previous incriminating statements by the petitioner, as well as pleas and defenses employed by petitioner are relevant to the trial court's inquiry. Clayton Turner v. State, No. E2002-02895-CCA-R3-PC, (Tenn. Crim. App. filed April 1, 2004 at Knoxville), 2004 WL 735036, *3; David I. Tucker v. State, M2002-02602-CCA-R3-CD (Tenn. Crim. App. filed January 23, 2004 at Nashville), 2004 WL 115132, *2.

The post-conviction court's review is limited to the facts and theories presented at trial. Nothing in the case law either suggests or requires the court to accept or even entertain extraneous information or newly propounded theories by either side. Moreover, the statue does not authorize the trial court to order additional samples taken from the victim, nor does the statute allow for any other third party comparisons the petitioner may envision. *See* Earl David Crawford v. State, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, *3 (Tenn. Crim. App. August 4, 2003 at Knoxville). The Act's reach is limited to the performing of DNA Analysis which compares the petitioner's DNA to samples taken from biological specimens gathered at the time of the offense. Sedley Alley v. State, No. W2006-01179-CCA-R3-CD (Tenn. Crim. App. filed June 22, 2006), 2006 Tenn. Crim. App. LEXIS 470 at *27. In *Alley I*, the Tennessee Court of Criminal Appeals specifically held that "the purpose of the Post Conviction DNA Analysis Act is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possible been perpetrated by a 'phantom defendant.'" Sedley Alley v. State, W2004-01204-CCA-R3-PD, at *9-10. (Tenn. Crim. App. May 26, 2004 at Jackson), application for permission to appeal denied (Tenn. October 4, 2004).

PETITIONER'S ALLEGATIONS

Petitioner contends that the clothing worn by both the defendant and the victims and vaginal swabs taken from the adult victim should now be subjected to DNA analysis. Petitioner contends that throughout his trial and many appeals he has maintained his innocence and put forth a "consistent and simple story" regarding his involvement in the events of June 27, 1987. He now argues that DNA testing has the potential to objectively prove or disprove his contentions. He argues that, should DNA testing indicate a third party's DNA was present at the crime, such results would corroborate his claims at trial; thereby, making his conviction and death sentence less likely. Specifically, petitioner contends testing could produce the following "range" of potentially exculpatory results: (1) the presence of a third party's DNA on various items of bloody clothing; (2) the absence of Mr. Payne's DNA on the vaginal swabs taken from the victim Charisse Christopher; (3) the presence of a third party's DNA in the vaginal swabs taken from the victim Charisse Christopher, and (4) the presence of the same third party's DNA on both the various items of blooding clothing and the vaginal swabs taken form the victim

Charisse Christopher. He further contends each of these potential results, or any combination of the above, creates a reasonable probability that he would not have been prosecuted or convicted had such results been available at trial.

ANALYSIS

I. Reasonable Probability of A Different Result

The first and most crucial requirement under the Act mandates that petitioner demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis prior to trial. A reasonable probability of a different result "exists when the evidence at issue, in this case potentially favorable DNA results, undermines the confidence in the outcome of the prosecution." Sedley Alley, 2004 WL 1196095 at *9. Here, petitioner must demonstrate that a reasonable probability exists that, had evidence of a third party's DNA been found on the victims' clothing or on the vaginal swabs taken from Charisse Christopher, then he would not have been prosecuted; or, if prosecuted, the jury would not have convicted him of first degree murder. This court finds petitioner has failed to demonstrate such a probability exists.

A. Bloody Clothing

In his petition, counsel for petitioner contends that the presence of an unknown third party's DNA on the bloody clothing taken from the victims or on petitioner's bloody clothing would create a reasonable probability that he would either not have been prosecuted or would not have been convicted of the murders. At the hearing on this matter, counsel clarified that they were not maintaining that the presence of any type of third party DNA evidence would lead to exculpatory results. Rather, counsel indicated that they were relying solely on the presence of blood which, if subjected to DNA testing, may indicate that a third party perpetrated the murder and deposited their own blood at the scene during the violent struggle. He claims such evidence would be exculpatory and would have corroborated his testimony at trial. Moreover, petitioner argues that the absence of his own blood from those items would also be exculpatory.

Given the circumstances of the victims murder and the evidence presented at trial, this court can not agree with petitioner's contentions. Clearly, as petitioner's counsel seems to realize, the presence of skin, hair or some other substance containing DNA,

other than blood, even if it were found to belong to an unknown third party would not prove exculpatory as such sample could have been left at the apartment at a time prior to the murders.

Certainly, if blood evidence found on the victims' clothing were tested and found not to belong either to the victims or the defendant, such proof arguably would present a stronger claim that, had the evidence been presented at trial, there is a reasonable probability it would have led to a different result. However, this court does not evaluate such claims in a vacuum. The convicted defendant requesting post-conviction DNA analysis is not provided a presumption of innocence, and this court need not ignore all the other proof supporting the conviction. *See Alley*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095, at *9. Here, both the Tennessee Supreme Court, on direct review, and the Court of Criminal Appeals, on *coram nobis* review, found that the proof against the defendant was overwhelming. Despite petitioner's continued claims that he did not attack the victims; but, rather found them after the brutal attack, each court found, based upon the proof presented at trial, that it was "virtually impossible" for anyone other than the petitioner to have committed the crime.

> The Tennessee Supreme Court made the following findings on direct appeal: The testimony of Laura Picard and Nancy Wilson, the time of Mrs. Wilson's call to the police and Officer Owens' arrival virtually forecloses the possibility that an unidentified intruder committed these murders and disappeared out the front door before the Defendant entered the apartment. Defendant was the person that washed up in the upstairs bathroom, walked out of the apartment, locked the door, and encountered Officer Owen . . . looking like he was "sweating blood."

State v. Payne, 791 S.W.2d 10, 15 (Tenn. 1990). Similarly, the Tennessee Court of Criminal Appeals made the following observations when reviewing petitioner's claims under his *coram nobis* petition:

> [W]e note that the time frame of the murders virtually precludes any person other than the appellant from committing these crimes. Witnesses at trial testified that, after they heard screaming from the upstairs apartment, they saw no one go up or down the stairs. The resident manager, Wilson, testified that, after the screaming stopped, she heard a person walk into the bathroom and heard water running. She then heard a person walk across the floor, slam the door shut and then run down the

> steps. The police were on the scene at that point in time for the first officer to observe the appellant as he ran down the stairs covered in blood. There is no question as to the confidence in the jury's verdict.

Payne v. Tennessee, 1998 Tenn. Crim. App. LEXIS 68, *58 (Tenn. Crim. App. filed January 15, 1998).

Thus, the question before this court is whether DNA evidence, tending to show another third party may have at some time deposited blood on either the defendant or the victims' clothing, would have so altered the strength of the prosecutions case to the point that there is a reasonable probability that had such evidence been available at the time of trail the petitioner would not have been prosecuted; or, if prosecuted, would not have been convicted. Essentially, using the language of the appellate courts as stated in *Alley I* and *II*, would proof that another person, at some point, bled on the victims' clothing or the petitioner's clothing, undermine the confidence in the outcome of the prosecution. The petitioner contends it would because such proof would corroborate his claims that he did not commit the murder and his assertion that he passed the real perpetrator on the steps on his way to the apartment. This court disagrees.

Given the strength of the proof against petitioner, merely exculpatory results without comparison would not establish a reasonable probability that prosecutor's would forego their prosecution of petitioner. Moreover, given the statements by the appellate courts regarding the timeline of events, the strength of the proof against petitioner, and the credibility of petitioner's testimony at trial, this court can not find that such results, even if somehow corroborative of petitioner's testimony, would result in a different verdict either at the guilt or the sentencing phase of the trial. The Tennessee Supreme Court noted on direct review of petitioner's conviction, that, at trial, petitioner's explanation of his involvement in the events in question was "unbelievable and contrary to human experience," *See* State v. Payne, 791 S.W.2d at 16, and upon review of his *coram nobis* petition, the Court of Criminal Appeals similarly found petitioner's trial testimony was "incredible." *See* Payne v. Tennessee, 1998 Tenn. Crim. App. LEXIS 68, at *58. Thus, this court can not say that the presence of some unknown quantity of some unknown person's blood deposited at some unknown time on either the victims or the

petitioner's clothing would have sufficiently corroborated petitioner's claims to the point that the jury would have accredited his version of events and rendered an acquittal.

Petitioner also contends that, if testing revealed the absence of his blood on the victims' clothing, then such fact would lead to a reasonable probability that he would not have been convicted. Again, he claims that such a result would corroborate his claim that he did not commit the murders. This court disagrees.

Although proof was presented at trial regarding scratches observed on the petitioner's chest, there was not proof that such injuries were so severe that they would have necessarily left blood evidence on the victims' clothing. In fact, Officer Owen noted that, once the victim had fled, he realized that the petitioner was not hurt and the blood he witnessed was not his own. However, the fact that the petitioner did not leave his own blood at the scene does not exonerate him and does not necessarily corroborate his testimony as it is just as likely the jury would have found he committed the murders and simply avoided bleeding on the victims' clothing. Again, this court must consider the potentially favorable DNA results in the context of the entire proof. Here, the jury heard proof that the petitioner was seen leaving the victims' apartment covered in blood and, when confronted by the police, fled the scene. Additionally, several pieces of evidence, tending to place the petitioner in the victims' apartment during the altercation, were introduced at trial. Thus, even if DNA testing indicated petitioner did not leave blood on the victims' clothing, there is not a reasonable probability that the State would have forgone prosecution. Given the strength of the proof against petitioner, it is almost certain they would have continued to prosecute petitioner for the murders. Moreover, this court does not find that DNA analysis indicating the absence of the petitioner's blood on the victims' clothing, would result in a reasonable probability that petitioner would not have been convicted. As stated, rather than corroborate petitioner's claims, it is just as likely the jury would have concluded that the petitioner simply avoided depositing blood on the victims' clothing during the altercation.

B. Vaginal Swabs

Next, petitioner contends that, if DNA taken from the vaginal swabs of Charisse Christopher excludes petitioner as the source of those samples and such proof had been presented to the jury, he would not have been prosecuted; or, if prosecuted, would not

have been convicted. He contends sexual gratification was the state's theory regarding the motive for the killings. Thus, he argues that, if DNA testing indicating he was not the depositor of the biological material were introduced at trial, the jury would have found he was not the perpetrator. This court can not agree. At trial, the medical examiner testified that while the specimen from Ms. Christopher tested positive for acid phosphatase, no sperm was found. Thus, he testified that while such results were consistent with semen, absent sperm, he could not conclusively say sexual intercourse had occurred; or, if it had occurred, at what precise time the specimens were deposited. Thus, the jury essentially heard inconclusive testimony regarding the State's ability to prove intercourse had occurred; and, even if it had occurred, when it had occurred.

Additional testimony presented on post-conviction further highlighted the fact that it was simply unclear from the proof available at the time of trial whether sexual contact had occurred at the time of the murders. Tom Henderson, the Assistant District Attorney who prosecuted the case, testified at the post-conviction hearing. He admitted that the prosecution attempted to show that petitioner had attempted to rape Ms. Christopher; however, he stated that he felt the jury rejected this theory because it did not find the felony murder aggravating circumstance. Moreover, at the post-conviction hearing, evidence was introduced regarding sexual relations Ms. Christopher might have had a few days prior with her boyfriend. While the boyfriend gave conflicting statements, such consensual sexual relations would be consistent with the medical examiners testimony.

Regardless, given the proof that was before the jury, even if they heard that the biological specimen found on Ms. Christopher did not match the DNA profile of the petitioner, they could still find petitioner was the killer. Contrary to petitioner's contention that such proof negated the State's theory at to motive, this court finds that, even if the jury found there was no rape, they still could have found the murders were motivated by Ms. Christopher's thwarting petitioner's sexual advances. In fact, this court agrees with the State's contention that since the jury failed to find the felony aggravating circumstance, they likely did not find petitioner sexually assaulted the victim. However, the jury need not find that a rape actually occurred to find the killing was sexually motivated and that the petitioner was in fact the perpetrator.

In the alternative, should testing of the vaginal swabs reveal the presence of a third party's DNA, such results would also fail to exonerate petitioner. Even if the jury were to have heard such proof, they likely still would have convicted petitioner. Rather than conclude the petitioner did not kill the victims, given the inconclusive nature of the medical examiners testimony, the jury could have just as easily determined that either petitioner was unable to complete the attempted rape or that any biological specimen found on the Ms. Christopher was the result of previous consensual sexual contact. Again, the overall proof presented against the petitioner, overrides any potential exculpatory results or favorable inferences to be drawn from such exculpatory results. As the post-conviction court notes, the proof at trail demonstrated that: [w]hile waiting for Ms. Thomas to return, the appellant passed the morning and early afternoon injecting cocaine and drinking beer. Later, petitioner and a friend cruised around the area looking at a magazine containing sexual explicit material." *See* Payne v. State, 1998 Tenn. Crim. App. LEXIS 68, at *22 (Tenn. Crim. App. filed January 15, 1998) Thus, even if the jury were to learn that the biological material found on Ms. Christopher did not belong to the petitioner, they could still find that the petitioner entered the apartment with the intent of either raping or making sexual advances towards the victim and then brutally attacked her and her children. The fact that such proof was not presented, if it were to exist, does not undermine confidence in the jury's verdict.

Thus, this court finds that with regard to both the bloody clothing and the vaginal swabs, even assuming the results of any testing would be favorable, petitioner has failed to meet the first prong of the statute. Therefore, this court need not address the remaining requirements. However, given the fact that petitioner's execution date is near at hand, this court is mindful that its decision will surely be appealed; and, thus, for the benefit of appellate review, has chosen to address the remaining requirement of the Act.

II. Current Condition of Evidence and Previous Testing

The second and third requirements under the statute are that the item for which testing is sought still be in existence and in such a condition that testing is possible, and that the item not be the subject of previous DNA Analysis.

According to statements presented at the hearing on this matter by Assistant District Attorney General John Campbell, it appears at least a portion of the evidence in

question is currently not in the possession of the State, and, although it has not previously been subjected to DNA analysis, likely does not still exist due to a malfunction of a storage facility at the Tennessee Bureau of Investigation (T.B.I.) Lab. According to Mr. Campbell, certain biological samples taken during the course of the investigation and submitted for testing by the State were stored at the T.B.I. lab prior to 1990. In 1990, a freezer at the facility, containing those materials, malfunctioned and the samples therein spoiled prior to the discovery of the malfunction. After the malfunction, the samples were discarded. Thus, the vaginal swabs taken from Ms. Christopher in this case are no longer available for testing. The petitioner does not seem to dispute the veracity of these facts. Thus, with regard to those samples, while petitioner is able to meet the third prong of the statute, he fails to meet the second prong in that the samples are no longer in existence.

Next, with regard to the bloody clothing, it appears from the statements of Mr. Campbell, that the items are still in the State's possession and such items have not previously been subjected to testing. However, Mr. Campbell expressed concerns about the viability of testing on these items. This court shares his concerns. On direct appeal, the Supreme Court noted that the crime scene video and testimony of witnesses indicated that the crime scene was covered in pools of blood. One witness indicated there was blood on the floor and wall – on "everything." Given that Ms. Christopher was stabbed forty-two (42) times; Lacie was stabbed nine times with several wounds going through her entire body and one wound piercing the cavity around her heart; and Nicolas, although he survived, essentially, lost nearly the full volume of his body's blood before being transported from the scene, it seems logical to assume that each of the victims' items of clothing were soaked in blood. In fact, Mr. Campbell, who has viewed the crime scene photos and video indicated that the clothes were in fact saturated with the victims' blood and the scene was a "bloody mess." Thus, given the level of blood saturation, it is not clear to this court that, after twenty years, any meaningful testing could be done to determine if blood other than the victims', either individually or collectively, is contained on any one article of clothing and the petitioner has failed to present any scientific testimony or proof that such testing could be accomplished. Thus, although this court need not address this issue, having already found petitioner failed to meet the first prong

of the statute, with regard to the victims' clothing, this court also finds petitioner has failed to meet the second prong of the statute.

However, it may be more likely that blood samples could be sufficiently isolated on the petitioner's bloody clothing to allow for meaningful testing. Although, Officer Owen testified that it appeared petitioner was "sweating blood," since petitioner did not himself suffer actual puncture wounds, one would assume the level of saturation was considerably less. Moreover, it appears these items have never been subjected to DNA testing. Therefore, with regard to the bloody clothing worn by petitioner on the date in question, this court finds petitioner has satisfied both the second and third prongs of the statute.

III. Unreasonable delay

The final prong of the statute requires that the petition be brought for the purposes of establishing innocence and not merely to delay the execution of sentence or administration of justice.

This court must question petitioner's motivations in raising these matters at this time. While it is clear from the statutes constituting the Act and the case law analyzing the Act that a petition for post-conviction DNA analysis may be brought at any time, the items which petitioner now seeks to have tested has been available since before the petitioner's trial. Since the passage of the Post-Conviction DNA Analysis Act in 2001, petitioner has made no attempt to have these items tested. Petitioner's counsel contends the delay in bringing these claims was not merely to delay the execution of petitioner's sentence, currently set for April 7, 2007. He candidly admits that he was not aware of the statue granting petitioner the right to seek DNA analysis until just before the petition was initiated and contends he was focused on the petitioner's federal claims. This court accepts counsel's assertions and finds petitioner has met the requirements established under the fourth prong of the statute.

TESTING UNDER TENN. CODE ANN. § 40-30-305

Finally, this court does not find that DNA testing is warranted under Tenn. Code Ann. § 40-30-305. It is this court's understanding that a request for DNA testing under this section, unlike a request for testing under Tenn. Code Ann. § 40-30-304, is discretionary. Even if the court finds the criteria are met, it may in its discretion deny the

request. Regardless, this court also finds that, petitioner has failed to demonstrate that a reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to his judgment of conviction. Given the strength of the State's proof at trial and the damning nature of petitioner's own trial testimony, this court finds it is unlikely the jury would have returned a verdict finding the petitioner guilty of an offense lesser than that for which he was convicted, even if DNA analysis of the bloody clothing or vaginal swabs had produced favorable results. Finally, despite the petitioner's argument to the contrary, given the brutal nature of the offense, it is not likely that the jury would have rendered a sentence less than death, even if they had heard evidence of DNA analysis favorable to petitioner. This is particularly true with regard to the vaginal swabs, since the jury specifically rejected the aggravating circumstances premised upon this proof.

CONCLUSION

This court finds petitioner failed to demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted or that he would have received a more favorable verdict or sentence, if exculpatory DNA evidence had been obtained through the requested testing. Moreover, with regard to the vaginal swabs and bloody clothing of the victims, petitioner failed to demonstrate such items are either still in existence; or, if still in existence, are in a condition suitable for testing. Thus, the Petition for Post-Conviction DNA Analysis is, hereby, **DENIED.**

3-29-07
Date

Judge, John P Colton, Jr.
Division III.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

PERVIS T. PAYNE,	)	
	)	
Petitioner,	)	
	)	
V.	)	**No. 98-2963-D**
	)	
RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION,	)	
	)	
Respondent.	)	

ORDER REOPENING ADMINISTRATIVELY CLOSED CASE
AND
ORDER DIRECTING RESPONDENT TO RESPOND

On December 27, 2006, the Court entered an order administratively closing this habeas corpus case. On April 30, 2007, Petitioner filed a Motion for Equitable Relief From Judgment and an accompanying Motion for Discovery. Accordingly, it is hereby ORDERED that the Clerk reopen this case. Respondent is ORDERED to respond to Petitioner's motions on or before May 29, 2007.

IT IS SO ORDERED this 14th day of May, 2007.

s/Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT COURT JUDGE

EXHIBIT "B"