

Supreme Court, U.S.

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No. 05-10958

CAPITAL CASE
EXECUTION DATE: June 28, 2006, 1:00 a.m.

IN THE
SUPREME COURT OF THE UNITED STATES

SEDLEY ALLEY,

Petitioner,

v.

WILLIAM KEY,
Defendant-Respondent;

WILLIAM L. GIBBONS,
Intervenor-Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THIRD SUPPLEMENTAL BRIEF OF PETITIONER

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I. THE COURT OF CRIMINAL APPEALS' RECENT DENIAL OF DNA TESTING CONFIRMS THE NEED TO GRANT CERTIORARI

Petitioner Sedley Alley respectfully supplements his petition for writ of certiorari in light of the Tennessee Court of Criminal Appeals' June 22, 2006 denial of his application for DNA analysis. Quite simply, the Court of Criminal Appeals has acted arbitrarily and irrationally. The Court of Criminal Appeals opinion makes manifest that despite the potential to prove actual innocence by conducting DNA testing on items of evidence that could definitively tie a third party to the act of murder and the crime scene, Sedley Alley faces execution because the Tennessee courts will not secure his rights for DNA testing necessary to prove actual innocence. Sedley Alley's Sixth, Eighth and Fourteenth Amendment rights are not being protected under Tennessee law. This Court should grant certiorari.

* * *

Pursuant to Tennessee's Post-Conviction DNA statute, Sedley Alley has sought numerous items of evidence from the crime scene which, after being subjected to DNA analysis, can prove his actual innocence. As he has asserted, where the same male DNA profile from a third party is found on different items of evidence, i.e., where there are "redundant" DNA results, Alley establishes his actual innocence, because such results cannot be explained away as mere coincidence. In fact, numerous persons have been exonerated when the same male DNA profile was found on various items at the crime scene, and that profile did not match the person convicted.

In this case, the identity of the person who killed Suzanne Collins can be derived from STR DNA tests on a number of key pieces of evidence, including: men's underwear found near the victim that the prosecution argued were left by the assailant; apparent saliva stains found on the victim's t-shirt and bra; and deposits of blood and perhaps semen found on a stick that was inserted into the

victim by her murderer. If the same male STR DNA profile from a third party (not Alley) were found on these items, this would establish that someone else was the killer. And, were such DNA profiles entered into the national CODIS databank (which contains DNA profiles of convicted offenders and unsolved crimes)¹ the real perpetrator could be definitively identified,² as has occurred in numerous cases involving DNA exonerations.

In denying DNA testing, not only did the Court of Criminal Appeals completely mischaracterize Alley's arguments about "redundant DNA results," the court denied testing by using the very type of one-sided, bootstrapping "the petitioner is guilty" analysis which this Court recently condemned in Holmes v. South Carolina, 547 U.S. ____ (2006).

The court's error in judgment flows, first and foremost, from its mischaracterization of Alley's argument. The court claims that Alley's position is that he can prove his innocence through redundant results showing the *absence* of Alley's DNA from probative crime scene samples. On the contrary, as the court was well aware from Alley's powerpoint presentation and extensive offer of proof, Alley's claim is different: It is the potential *presence of a third party's DNA* on critical items

¹ The FBI Laboratory's Combined DNA Index System (CODIS) enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to each other and to convicted offenders. The Serological Research Institute (SERI) has been assisting Alley in this matter. As an accredited laboratory, STR DNA profiles obtained by SERI through testing of the evidence in this case could be entered into CODIS to find a convicted offender or match another unsolved crime in which the perpetrator used the same *modus operandi* as here.

² If the prosecution refused to run such a DNA profile in the CODIS databank, then, Alley argued, he would be entitled to an adverse inference. The state has never said that if the same male STR DNA profile was derived from the items of evidence Alley seeks to test, they *would not* run that profile in the CODIS database. Such a failure would literally be a scandalous deviation from standard practice. Rather, the state continues to baldly assert that the tests won't turn out that way, though the state, of course, doesn't know the results of such tests and Tennessee law ostensibly requires the court to assume that such results would be favorable to Alley, in that they would identify a person whose DNA profile is already on record.

of evidence that would prove his innocence. Such DNA results would tie that third party to the crime scene and the act of murder itself, thereby establishing Alley's innocence.

The Court of Criminal Appeals, however, explicitly refused to acknowledge or assume that DNA tests could exculpate Alley by showing the guilt of a third party, which is what DNA tests have done for those who have been exonerated. In doing so, the court consciously avoided this inherent power of DNA testing, while fallaciously concluding that "favorable" DNA results could not prove his innocence – nor even raise a reasonable probability that he would not have been convicted.

Perhaps even worse than this patently arbitrary, circular, and irrational line of reasoning, the court distorted record facts, ignored Alley's uncontroverted showing of other cases where redundant DNA results and/or DNA databank "hits" proved actual innocence, and invented scenarios without any factual support to avoid the potential exculpatory value of DNA testing in this case. The court did all of this while simultaneously ignoring clear evidence of innocence which already exists – including previously-withheld time-of-death evidence which conclusively establishes alibi.

One of the most egregious examples of the court's distortion of the facts involves its assertions about the men's red underwear found at the scene. Despite the fact that the prosecution clearly maintained that men's underwear found at the crime scene came from the killer (Arg. Tr. 39, 54-55), the court twists the record to now claim that DNA from the habitual wearer of that underwear likely "will not belong to the perpetrator." As support for this conclusion (by which the court arrogates to itself foreknowledge of the results of as-yet-performed DNA tests), the court incredibly claims that DNA tests on the underwear cannot exonerate Alley because Alley's statement to authorities (which he asserts is false) did not mention him leaving his underwear. This is irrational: The court is saying that Alley cannot prove his innocence through the DNA testing of someone else's

underwear, because Alley should have earlier declared to authorities that he left his own underwear at the scene. This makes no sense whatsoever.

Alley's whole point, like the prosecution's, is that the killer left his underwear at the scene. Testing of that underwear will identify the killer. In fact, in Louisiana, Calvin Willis was exonerated after male DNA in men's underwear at the crime scene matched male DNA found under the victim's fingernails.³ Because of the court's confused logic, however, Alley has been denied the opportunity to identify the actual killer by testing this item.

Additionally, to deny DNA testing, the court has made factual assertions that are patently false and/or border on the ludicrous:

For example, where Alley asserts that DNA samples from known saliva on the victim's shirt (consistent with bruising to the breast) can prove his innocence (like similar evidence did for Ray Krone in Arizona), the court explains away this evidence by claiming that "contusions on the victim's breast were the result of a consensual sexual encounter." This is simply not true. The proof, in fact, shows that the victim had no such encounter before her murder, but the Tennessee courts have refused to consider such evidence. This posthumous attack on the victim's character is factually and legally wrong, and morally offensive as well.

The court also claims that DNA from apparent semen and blood on the stick and its wrapper come from contamination by the prosecutor or court personnel. The court does not

³ The court also claims that known fluid which drained from the victim's vagina does not contain semen, because Alley's unreliable confession does not contain any statement of a rape involving semen. But this is not a reason to deny DNA testing, it is a reason to *grant* DNA testing: It shows that Alley's statement to the police is false and that the real killer did rape the victim and leave semen which can be identified through DNA testing.

explain, however, how court personnel transferred their semen and blood to the murder weapon and the paper wrapper.⁴

In addition, when determining whether to grant DNA testing, the Court of Criminal Appeals has categorically refused to consider critical, exculpatory evidence showing that Alley is actually innocent, and which fully establishes the need for DNA testing. The court has not only refused to consider Alley's unrefuted *alibi* (authorities knew Alley was home when the victim was killed elsewhere), it has likewise refused to consider "troubling evidence" that John Borup "could have been the murderer." House v. Bell, 547 U.S. ___, ___, slip op. at 28. Indeed, "When identity is in question, motive is key," Id., slip op. at 21, and Borup not only had motive to kill (jealousy), he (unlike Alley) fits the description of the abductor. This critical evidence showing Alley's innocence and Borup's guilt has been disregarded as irrelevant to the determination whether DNA testing is appropriate.⁵

So, too, the Tennessee courts have refused to consider Alley's unrefuted offer of proof

⁴ The court also makes the scientifically unsupportable assertion that, had evidence been handled by innocent parties, Alley's innocence could not be established. This is not true. The uncontroverted scientific proof in the record is that if one male's STR DNA profile is found on differing items of evidence such as the underwear, saliva stains, etc., it doesn't matter how many other persons may have incidentally touched such items: the redundancy of one male's DNA on all such items could not be mere coincidence. And if there is a databank "hit," or a match to the victim's boyfriend – potential perpetrators who would not have innocently touched those items – those favorable results cannot be explained away.

⁵ While the court has failed to consider all evidence showing Alley's innocence, it has instead taken a lopsided view of the facts, focusing solely on the evidence of guilt presented at trial, while simultaneously ignoring evidence of innocence presented at trial. For example, the court nowhere mentions Scott Lancaster's description of the abductor at trial – which describes Borup, not Alley. Trial Tr. 150. And when relying on evidence of guilt from trial, the court has refused to consider the unreliability and inconclusiveness of such evidence. In particular, the court has refused to consider not only Professor Richard Leo's expert opinion that Alley's statement to authorities is false, but also the Tennessee Supreme Court's acknowledgment that the statement is false in material respects.

(contained in his powerpoint presentation) showing exactly how others have been exonerated through the very type of testing which Alley now requests. As noted *supra*, Calvin Willis was exonerated through redundant DNA results on underwear and the victim's fingernails. Douglas Warney was exonerated through a database "hit," after he was convicted based on a false confession. Chris Ochoa was exonerated after pleading guilty and giving a false confession. Frank Lee Smith was exonerated by DNA after pleading insanity at trial. In denying DNA testing, the Tennessee courts have myopically refused to consider the real-world experience of DNA testing and DNA exonerations.

Suffice it to say, the Court of Criminal Appeals' denial of DNA testing is fraught with error. The court has failed to make any meaningful search for the truth: It has distorted Alley's argument, distorted the facts and fabricated false ones, and it has ignored clear, unrefuted evidence of Alley's innocence which makes manifest precisely why DNA testing is warranted here. Where the state court has taken such a biased view of the evidence and ignored critical evidence of innocence, it is no surprise that Sedley Alley cannot obtain the DNA evidence under state law – even though he has a clear alibi and, like Paul House, he has compelling proof that someone else actually killed the victim.

Ultimately, the Court of Criminal Appeals' analysis runs directly counter to Holmes v. South Carolina, 547 U.S. ____ (2006). Exactly as in *Holmes*, the Court of Criminal Appeals has improperly focused solely on the prosecution's case while ignoring the unreliability of its evidence. Holmes, 547 U.S. at ____, slip op. at 9. Exactly as in *Holmes*, the Court of Criminal Appeals has improperly refused to consider "defense challenges to the prosecution's evidence." *Id.*

"[T]he purpose of the Post-Conviction DNA Analysis Act," however, "is to establish the innocence of the petitioner" Alley v. State, 2004 WL 1196095, *9. A petitioner cannot establish

innocence when the courts employ the type of skewed analysis condemned in *Holmes*. By denying DNA testing by only considering the state's case for guilt, while excluding Alley's compelling showing of innocence (while also adding additional false evidence into the mix), Tennessee has acted arbitrarily, just like South Carolina did in *Holmes*. In a proceeding designed to establish innocence, it is arbitrary to consider only evidence of guilt while ignoring compelling evidence of innocence. That, however, is the very type of arbitrariness to which Alley has been subjected.

The Court of Criminal Appeals' denial of testing confirms exactly what Sedley Alley has said all along: Where Alley already has a compelling case for innocence (even stronger than Paul House's (because "alibi is key," House, slip op. at 17 (Roberts, C.J., concurring and dissenting));⁶ where Alley requires DNA testing to prove his actual innocence; but where the Governor and the state courts have refused to provide that testing (especially by acting arbitrarily and unfairly as described *supra*) the Eighth and Fourteenth Amendments demand disclosure of evidence for DNA testing under *Herrera*, as well as the guarantees of procedural and substantive due process. Harvey v. Horan, 285 F.3d 298, 304-325 (4th Cir. 2002)(Luttig, J.).

Where "guilt can be quickly and definitively determined by means of a simple test, there is no reason not to have it performed."Cooper v. Woodford, 358 F.3d 1117, 1125 (9th Cir. 2004) (Silverman, J., concurring). The petition for writ of certiorari should be granted.

⁶ See e.g., Petitioner's Second Supplemental Brief.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via email to Lenard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 25th day of June, 2006.

