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CAPITAL CASE
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No. 05-_____

IN THE
SUPREME COURT OF THE UNITED STATES

SEDLEY ALLEY,

Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
TENNESSEE COURT OF CRIMINAL APPEALS

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CAPITAL CASE

QUESTIONS PRESENTED

Tennessee has created a post-conviction remedy to provide access to critical evidence for DNA testing – unquestionably the most reliable “scientific means of establishing guilt, and hence innocence.” See Kansas v. Marsh, 548 U.S. ___, ___ (2006) (Scalia, J., concurring). Sedley Alley has been denied access to this remedy based on the Tennessee courts’ refusal, *inter alia*, to consider potential DNA scenarios that regularly lead to exoneration of the innocent and apprehension of the guilty. The questions presented are:

Consistent with due process under the Fourteenth Amendment, in a proceeding designed to ascertain whether DNA testing could raise a reasonable probability of a different result at trial, or no prosecution at all, may a state deny a petitioner DNA testing:

- (a) By refusing to acknowledge that redundant DNA test results tying a third party to the act of murder and the crime scene, or a DNA database “hit” identifying a third party, could be exculpatory evidence, and insisting instead that only DNA tests results showing “the absence” of petitioner’s DNA could be relevant exculpatory evidence?
- (b) By refusing to assume that DNA results would be favorable to the petitioner, as required by statute, but relying instead on the state’s speculation about what the DNA test results will be before the tests are performed?
- (c) Without allowing a petitioner, who has the burden of persuasion, the ability to present relevant, available evidence in support of his petition for DNA testing and thereby denying him a meaningful opportunity to be heard?
- (d) By only considering evidence indicating guilt, while refusing to consider reliable evidence which already shows actual innocence thereby confirming the need for DNA testing?

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Swedlow, Don't Believe Everything You Read: A Review Of Modern Post-Conviction DNA Testing Statutes, 38 Cal. W. L. Rev. 355 (2002) 17

DECISIONS BELOW

The Shelby County, Tennessee, Criminal Court's opinion denying relief (Appendix 1) is unreported. The Tennessee Court of Criminal Appeals' opinion affirming the judgment of the trial court (Appendix 2) is unreported. The Tennessee Supreme Court's opinion denying permission to appeal (Appendix 3) is unreported.

JURISDICTION

The Tennessee Supreme Court issued its opinion denying permission to appeal the Tennessee Court of Criminal Appeals' opinion on June 27, 2006. The Tennessee Court of Criminal Appeals issued its decision on June 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that "No state shall ... deprive any person of life, liberty, or property, without due process of law"

STATEMENT OF FACTS

I.

SEDLEY ALLEY'S PETITION FOR DNA ANALYSIS UNDER THE TENNESSEE POST-CONVICTION DNA ANALYSIS ACT AND THE ABILITY OF DNA TESTING TO ESTABLISH HIS INNOCENCE

Sedley Alley was convicted of the first-degree murder of Suzanne Collins. On May 15, 2006, a majority of the Tennessee Board of Probation and Parole recommended that the Governor of Tennessee issue a reprieve so that Sedley Alley could conduct DNA tests on significant items of evidence from the crime scene. Rather than ordering the testing, however, the Governor issued a 15-day reprieve, expecting that Alley would seek DNA testing through state court process.¹

Immediately after having a highly respected DNA expert fly to Memphis to examine available items of evidence from the crime scene, Sedley Alley filed a petition for DNA testing in the Criminal Court of the Thirtieth Judicial District at Memphis. In his petition, he requested DNA

¹ Alley has been trying to prove his innocence since 2004, when he first obtained proof establishing his innocence. The record is unrefuted that, until April 2005, the state unconstitutionally withheld time of death evidence establishing that Alley was innocent, because it established a clear alibi: Alley's whereabouts from 12:10 a.m. onward was known by authorities. There is also unrefuted proof that Alley first obtained improperly-withheld notes from pathologist Dr. James Bell in January 2004, which also confirmed his alibi. It is also undisputed that since 2004 and to this very day, Sedley Alley has sought relief in the federal courts for the state's malfeasance in withholding this evidence which, for the first time, provided proof of his actual innocence. Since then, Alley has also obtained additional proof that his statement to authorities is false, as evidenced by the affidavit of Dr. Richard Leo, an expert in false confessions who has provided testimony in the cases of various persons who have been exonerated through DNA testing after giving false confessions. See Brief of Arizona Attorneys For Criminal Justice *et al*, as *Amici Curiae*. In April 2006 in federal court, Alley sought DNA testing of the evidence requested in the state proceedings, and it is undisputed that testing could have been conducted and results returned before the then-pending execution May 17, 2006 execution date. The state, however, fought the testing, after which Alley went to the Board of Probation and Parole seeking DNA testing to prove his innocence, and the Board agreed that he should be entitled to such testing to prove his innocence. His petition, filed by the Innocence Project, whom the trial judge praised for establishing the innocence of so many, has unquestionably been brought to establish innocence. See Tenn. Code Ann. §40-30-304 (4). The mere fact that Alley has presented significant evidence of innocence in support of his petition confirms this as well.

testing of numerous critical items of forensic evidence, including, most notably:

- (1) *Red Underwear*: A pair of red underwear was found at the scene near the body. Petitioner's Reply, Exhibit K (crime scene photo), CCA Apx 92-93.² The prosecution maintained that such underwear was left by Sedley Alley. See Closing Arg. p. 39, 54-55 (linking red underwear to the killer, noting that it was "important" that such underwear was left at the scene). In particular, this underwear can be tested for skin cells to identify the person who wore the underwear. See Petitioner's Reply Exhibit L (red underwear), CCA Apx 94-95.
- (2) *The Victim's Red T-Shirt*: This shirt contains a large spot of biological material just below the Marine Corps insignia. This spot may contain saliva, semen, mucous, and/or other biological material which can be subjected to STR (Short Tandem Repeat) DNA testing. See Petitioner's Reply Exhibit B, CCA Apx. 67-69. The shirt also contains a possible bloodstain on the back, as well as perspiration. Petitioner's Reply Exhibit C, CCA Apx 70-71 All of these stains can likewise be subjected to DNA analysis.
- (3) *Victim's Bra*: On a portion of one cup of the bra, there is a biological stain. See Petitioner's Reply Exhibit I, CCA Apx 87-89. This is highly significant in identifying the perpetrator, as the victim sustained an injury to the top of the breast, which the prosecution asserted came from the perpetrator biting the victim. The stain on the bra may contain saliva or other bodily fluids associated with the injury to the breast. DNA testing can be conducted on the bra.³
- (4) *The Stick*: The stick contains much biological material. Visual inspection reveals the existence of blood and numerous hairs, which are attached to the stick in numerous places. See Petitioner's Reply Exhibit D (collective exhibit: hairs identified), CCA Apx 72-76. There may be semen on the stick, but the existence of semen can only be specifically determined under laboratory conditions.⁴

² Alley's reply in the trial court is cited as "Petitioner's Reply ____." The appendix filed with the Court of Criminal Appeals is cited as "CCA Apx. ____."

³Eight additional items from the crime scene also contain apparent items of biology, including possible perpetrator blood, hair and saliva that can be subjected to DNA testing which could exonerate Mr. Alley. These items were discussed in detail in the petition, the reply, at the evidentiary hearing, and are reflected in the exhibits to the reply and Exhibit PP. Because of page limitations, the evidence will not be recounted in detail here. See CCA Apx 49-51, & Petitioner's Reply Exs. H, J, M, N, O, P, Q, R, S, T, U: CCA Apx. 85-86, 90-91, 96-123.

⁴ The record establishes the state's contentions about contamination of the stick are of no
(continued...)

- (5) *Paper Wrapped Around Stick*: The stick was wrapped in paper. Petitioner's Reply Exhibit E, CCA Apx 77-78. There are various stains on the paper used to wrap the stick. In particular, there are two spots which are indicative of a mixture of blood and semen. See Petitioner's Reply Exhibit F (fluid mixture stains from inside paper), CCA Apx 79-80. These are critical pieces of biological evidence which can be subjected to STR DNA analysis to identify the actual perpetrator.
- (6) *Fluid-Stained Grass From Beneath The Vaginal Area*: Grass was recovered from beneath the victim's vaginal area, from which fluid dripped. The discoloration of the grass itself clearly establishes the existence of biological material, including blood and/or semen, and/or other material. See Petitioner's Reply Exhibit G (collective exhibit), CCA Apx 81-84. DNA testing of the grass samples can identify the donor of any of the biological samples contained on the grass.

The facts in the record establish that items of evidence in this case can be subjected to STR (short tandem repeat) DNA analysis. STR DNA testing can extract a male DNA profile from all these items which can exclude Alley, but most importantly, it could affirmatively identify a single male as having deposited DNA on multiple items, thereby tying a single individual – not Alley – to the murder itself and the crime scene.

In other words, a DNA profile obtained from various items of evidence can be used to exonerate Mr. Alley in numerous ways:

First, if the DNA on any particular item doesn't match Alley, that is proof that he is not the contributor of the DNA.

Second, since there are multiple items of evidence to be tested, there is the potential for redundant DNA test results. "Redundant test results" mean that a forensic scientist can generate an STR male DNA profile from, for example, the men's red underwear and saliva

⁴(...continued)

concern. One can hardly assert that blood and/or semen found on the stick was deposited on the stick by court or clerk's office personnel, members of the District Attorney's Office, or others. That was deposited when the victim was killed.

from the breast area of the victim's t-shirt. If the male DNA profiles match each other and don't match Mr. Alley, that would prove that Mr. Alley is not the perpetrator of the crime. Moreover, the DNA profile from the men's underwear and the saliva on the shirt could be compared to a male DNA profile developed from biology left on the stick/murder weapon. Again, if all three match each other and don't match Mr. Alley, that is proof that Mr. Alley is not the attacker. Even so, where the red underwear at the scene came from the killer, DNA results from that item alone would identify the killer. While it is possible that DNA unrelated to the true perpetrator is on any one of these items, it is inconceivable that the same male DNA profile could be on the murder weapon, the red underwear, and the victim's clothing. As was explained to the lower courts in the offer of proof, no single person who was not involved in the crime could have his DNA on all of these items.⁵

Third, the STR DNA profile from any one item, or a redundant profile from multiple items can be placed in the CODIS Databank and "hit" on a serial offender, as has happened in 63 of the 180 DNA exoneration cases.⁶

⁵ The state and the lower court have repeated the fallacy that concerns about contamination make it impossible to obtain an exculpatory DNA result in this case. Mr. Harmor, a scientist, was ready to testify, and experienced counsel, Mr. Scheck, made an offer of proof that is un rebutted, that contamination is not an issue. It was explained to the court in the extensive offer of proof that contamination can be accounted for in the analysis. This isn't speculation, it is un rebuttable science.

⁶The case of Frank Lee Smith is one such case. Mr. Smith was the first death row DNA exoneration. Mr. Smith presented an insanity defense at trial. He was exonerated eleven months after his death. CODIS has aided over 34,000 investigations and has linked DNA profiles from crime scenes over 16000 times. In Tennessee, CODIS has aided over 115 investigations. In this case, Alley's expert (Gary Harmor) is from the Serological Research Institute (SERI) which is an accredited laboratory whose results are eligible to be put into CODIS to identify a serial offender. The state here has never said it wouldn't run a favorable DNA result from one or more items through CODIS; rather, the state argues that post-conviction DNA results should not, in principle, be used
(continued...)

II.
TENNESSEE'S POST-CONVICTION DNA ACT

Sedley Alley's petition has been considered by the Tennessee courts under the Tennessee Post-Conviction DNA Analysis Act of 2001. Under Tennessee law (Tenn. Code Ann. §40-30-304), DNA testing must be ordered if there is a reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory DNA results had been obtained through DNA analysis; if the evidence is still in existence and can be subjected to DNA analysis; if the evidence was not previously subjected to DNA testing; and the application is made for the purpose of demonstrating innocence and to unreasonably delay the execution of sentence. Similarly, DNA testing *may* be ordered if there is a reasonable probability that the verdict of sentence would have been more favorable with exculpatory DNA tests. Tenn.Code Ann. §40-30-305.

Several points about Tennessee law are also critical to note at this juncture. The reasonable probability standard is not an onerous standard, because the whole point of the DNA act is to initially allow access to evidence. Under that standard, a reviewing court must assume that test results are exculpatory and there is a reasonable probability of a different outcome if DNA testing would have caused **one juror** to have a reasonable doubt about guilt.⁷ In this regard, the burden carried by a DNA petitioner is much like that carried by a plaintiff facing summary judgment: He merely must establish a prima facie case, and, absent a hearing to resolve genuine disputes, all factual questions should be resolved in his favor.

⁶(...continued)
to show third party guilt, only the absence of a petitioner's DNA.

⁷ State v. Haddox, 2004 WL 2544668, *4-5 (Tenn. Crim. App. November 10, 2004); Jack Jay Shuttle v. State, 2004 WL 199826, *5 (Tenn. Crim. App. February 2, 2004).

In addition, when determining whether to grant or deny a post-conviction petition for DNA analysis, the trial court *must consider all the available evidence*.⁸ In addition, as the Tennessee Supreme Court explained when reversing a lower courts' failure to conduct an evidentiary hearing on a DNA petition: "[F]indings of fact upon which rights are granted or denied are best made following an evidentiary hearing." Griffin v. State, 182 S.W.3d 795, 800 (Tenn. 2006). Where, as here, the DNA petition establishes a *prima facie* case for DNA testing "to instigate a factual assessment" whether the statutory criteria are met (Ensley v. State, 2003 Tenn.Crim.App.Lexis 335, p.*11), the trial court must make a "factual finding about the existence of the statutory criteria." Id., p.*12. In other words, where the petition presents a *prima facie* case for DNA testing, *Griffin* and *Ensley* establish two related propositions: A factual inquiry must be undertaken, and that inquiry requires an evidentiary hearing – including on the question whether the petition has been filed to establish innocence.⁹

⁸ Jones v. State, 2004 Tenn.Crim.App.Lexis 1069, p.*15 (emphasis supplied); Ensley v. State, 2003 Tenn.Crim.App.Lexis 335. Also, there is no time limit for filing a petition under the Act. Tenn. Code Ann. §40-30-303 (petition may be filed "at any time.")

⁹ Sedley Alley is represented in this matter by the *Innocence Project* and Mr. Barry Scheck. In this very matter, the trial judge publicly praised Mr. Scheck for his "commitment toward . . . *establishing innocence of people across this country* (CCA Apx. 366), for having presented "fantastic" pleadings and having provided a "great" presentation explaining how he can establish Sedley Alley's innocence through DNA testing. Id. The judge offered to give Mr. Scheck a "key to the city" for his defense of innocence. Disregarding these critical facts, however, and without holding the very type of hearing on the issue as clearly demanded by *Griffin*, Tennessee has claimed that Alley should not be given DNA testing because his petition was *not* made to establish innocence, but made for the purpose of "delaying the execution of sentence." This is simply impossible to reconcile with Alley's ongoing attempts to prove his innocence, the trial court's finding of counsel's commitment to establishing innocence, and the Board of Probation and Parole's determination that testing should be allowed to permit a determination about innocence. Indeed, the petition at issue was filed *at the direction of the Governor of Tennessee* in response to the parole board's action.

III.
THE TENNESSEE COURTS HAVE ARBITRARILY AND UNFAIRLY
DENIED DNA TESTING

Having created a post-conviction DNA remedy, Tennessee's remedy must comport with due process under the Fourteenth Amendment. Little v. Streater, 452 U.S. 1, 12 (1981). The Tennessee courts, however, have denied Sedley Alley DNA testing, but their analysis is fatally flawed and does not comport with due process: (1) Tennessee has refused to consider DNA's ability to establish third-party guilt; (2) Tennessee has relied on invented facts and explained away the guilt of third parties contrary to scientific principles; (3) Tennessee has denied Alley his fundamental due process right to present evidence in support of his petition; and (4) Tennessee has arbitrarily chosen to consider only evidence of guilt, while refusing to consider relevant, probative evidence of Alley's innocence.

A.
TENNESSEE HAS REFUSED TO CONSIDER DNA'S ABILITY
TO ESTABLISH THIRD-PARTY GUILT:
TENNESSEE REFUSES TO ACKNOWLEDGE THAT REDUNDANT DNA RESULTS
TYING A THIRD PARTY TO THE ACT OF MURDER AND THE CRIME SCENE,
OR A DNA DATABASE "HIT" IDENTIFYING A THIRD PARTY COULD BE
EXCULPATORY EVIDENCE, AND INSISTS INSTEAD THAT ONLY DNA TESTS
RESULTS SHOWING "THE ABSENCE" OF PETITIONER'S DNA
CAN BE RELEVANT EXCULPATORY EVIDENCE

The most stunning, surprising, and definitive post-conviction DNA exonerations, obtained through post-conviction statutes across the country that are virtually identical to the Tennessee statute, are cases in which the convicted offender has not only been excluded as the source of DNA, but the real assailant identified. Yet the Tennessee courts, by irrationally and unscientifically eliminating a whole category of evidence – cases in which petitioners can prove their innocence only by demonstrating the guilt of a third party, not just the absence of their DNA – have eviscerated the powerful aspect of the post-conviction DNA remedy.

In the Tennessee courts, Sedley Alley expressly argued that he was entitled to DNA testing because, *inter alia*, DNA tests – including tests indicating identical male DNA profiles on different items of evidence – would establish the guilt of a third party. In this case, while Alley has identified John Borup (the victim’s boyfriend) as the person who may have committed the murder, Alley has also maintained that male DNA profiles can be run through the CODIS databank to identify a person who is a serial offender.

The Court of Criminal Appeals, however, has fundamentally refused to consider the guilt of third parties when considering Alley’s request for DNA testing. It did so in at least two significant ways:

First, the Court of Criminal Appeals fundamentally misunderstood Alley’s argument. claiming 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: DNA technology makes clear that it is the potential *presence of a third party’s DNA* on critical items 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.¹⁰

Second, the Court of Criminal Appeals held that Alley would not be allowed to compare DNA tests results either to a known third party, or to compare such results to

¹⁰ Incredibly, before the Tennessee Supreme Court, the state has maintained that a reviewing court should consider every item of evidence in isolation and without consideration of cumulative results. Of course, this Court has rejected the use of such piecemeal analysis in any “reasonable probability” determination, because such a factfinder is required to look at all evidence cumulative, not individually. See Kyles v. Whitley, 514 U.S. 419 (1995).

individuals contained in the CODIS database. The court has indicated that Alley simply cannot use DNA test results in this way to try to identify who actually left the DNA and is therefore the killer. But this flies in the face of the real-world of DNA testing and law enforcement. Real killers are routinely identified through the use of DNA databank hits. See e.g., Brief of Arizona Attorneys For Criminal Justice *et al*, as *Amici Curiae*; Brief of Douglas Warney *et al*, as *Amici Curiae* (discussing case of Chris Ochoa).

The position of the Tennessee courts that Alley can exculpate himself only with DNA testing results that show the “absence” of his DNA on probative biological evidence, not the presence of a third party’s DNA, makes no legal or scientific sense. The plain wording of the statute itself makes no such distinction. It refers simply to “DNA analysis,” not DNA analysis that shows the “absence” of a petitioner’s DNA. Most importantly, Alley has shown that DNA test results identifying the presence of a third party’s DNA could permit him to reach easily the “reasonable probability” standard of the Tennessee statute.

Below, Alley demonstrated that redundant results showing the same male STR DNA profile on items of evidence – men’s underwear left next to the body, apparent saliva stains on the t-shirt and bra, the stick, the wrapping of the stick, the grass – could not be a coincidence, and would be strong proof of his innocence. Alley also demonstrated that a DNA database hit through the CODIS system could identify a third party as the real assailant, and provided the courts with uncontroverted evidence of many cases where that had occurred, counter intuitive matters involving detailed confessions, guilty pleas, and other forms of “overwhelming” proof. See Riter, *It’s The Prosecution’s Story, But They’re Not Sticking To It: Applying Harmless Error And Judicial Estoppel To Exculpatory Post-Conviction DNA Testing Cases*, 74 Fordham L.Rev. 825 (2005).

The refusal of Tennessee courts to consider how the every day use of DNA technology to exculpate innocent suspects and defendants by proving third party guilt, either by redundant results or databank hits, could be used by Alley in the post conviction setting, ignores reality and is fundamentally unfair.

B.
IN DENYING DNA TESTING, TENNESSEE HAS RELIED ON FALSE FACTS
AND *A PRIORI* EXPLAINED AWAY THE GUILT OF THIRD PARTIES,
CONTRARY TO KNOWN SCIENTIFIC PRINCIPLES

Tennessee has also denied DNA testing by either fabricating false facts to explain away otherwise exculpatory evidence identifying someone other than Alley as the killer or to rely upon claims about DNA evidence which are otherwise scientifically unsupportable.

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.¹¹ 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 explain, however, how court personnel transferred their semen and blood to the murder weapon and the paper wrapper.

Significantly, 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

¹¹ 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.

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.¹²

C.

THE TENNESSEE COURT HAS DENIED DNA TESTING BY DENYING
SEDLEY ALLEY HIS FUNDAMENTAL DUE PROCESS RIGHT
TO PRESENT RELEVANT EVIDENCE IN SUPPORT OF HIS PETITION,
PREJUDGING THE CASE, AND ENGAGING IN *EX PARTE* CONTACT
WITH THE PROSECUTOR

Equally troubling has been the Tennessee courts adamant refusal to allow Sedley Alley to even present evidence in support of his right to testing under state law (when he bears the burden of persuasion), and the trial judge's otherwise improper dismissal of the petition.

Indeed, the trial court set the case for an evidentiary hearing. Alley then sought to present evidence at the hearing to establish his entitlement to relief under Tennessee's statutory criteria, including, most notably, clear proof from DNA expert Gary Harmor about the evidence in this case and how testing of that evidence could exonerate Alley, as well as clear proof already in existence (from investigator April Higuera) establishing that Alley is not the person who killed the victim in this case. Moreover, April Higuera would have established the patent untruth – relied upon by the trial court – that the victim had consensual relations with someone before her death.

After refusing to hear any evidence in support of the petition, the trial court then read its decision, which had obviously been prepared before the "hearing" ever commenced. Afterwards, when Alley filed an affidavit of April Higuera as an offer of proof, the judge and the assistant district

¹² Expert Gary Harmor was prepared to testify to this matter, but was prohibited from doing so.

attorney colluded *ex parte*, after which the judge (unbeknownst to Alley) signed the assistant district attorney's prepared order striking the affidavit. The Court of Criminal Appeals allowed this improper conduct to taint the proceedings, concluding that Alley had only made "allegations" of improper conduct. His allegations, however, were supported by affidavit and contained information provided directly by court personnel. Even so, the Tennessee courts have refused to give Alley a hearing at which he can prove that the judge indeed acted improperly.

D.
THOUGH DNA PROCEEDINGS ARE DESIGNED TO ESTABLISH INNOCENCE,
TENNESSEE HAS ENGAGED IN A ONE-SIDED VIEW OF THE EVIDENCE:
TENNESSEE HAS ARBITRARILY REFUSED TO CONSIDER EVIDENCE
SHOWING ALLEY'S ACTUAL INNOCENCE,
AND HAS ONLY CONSIDERED EVIDENCE THAT HE IS GUILTY

As noted *supra*, in a Post-Conviction DNA proceeding, Tennessee law requires consideration of "all the evidence" before a court makes a determination whether DNA analysis should be conducted. Jones v. State, 2004 Tenn.Crim.App.Lexis 1069, p.*15. Here, however, the Tennessee courts have denied disclosure of evidence for DNA testing by taking a decidedly one-sided view of the evidence. Indeed, Tennessee has refused to consider any theory of the case other than the theory of guilt at trial,¹³ and even then, Tennessee refuses to consider the unreliability of such evidence – including Alley's statement to authorities which is demonstrably false in material respects. See State v. Alley, 776 S.W.2d 506, 509 n. 1 (Tenn. 1989)(statement introduced against Alley did not comport with the facts).

In fact, here, Alley has presented the uncontested affidavit of Dr. Richard Leo, Ph.D., who has confirmed that Alley's statement appears to be a false confession – much the same way Dr. Leo

¹³ *Alley v. State*, slip op. at 9.

has correctly concluded in numerous other cases that actually innocent individuals were convicted based on false confessions: Douglas Warney in New York, Earl Washington in Virginia, Bruce Godschalk in Pennsylvania. Rather than considering Dr. Leo's reliable expert conclusions (confirmed by his track record in identifying false confessions), the Tennessee courts have instead refused to consider such evidence in favor of adopting the theory that Alley is guilty.

Tennessee has also categorically refused to consider otherwise reliable evidence that Alley is innocent which also supports the need for DNA testing to establish actual innocence. There is unrefuted proof – first obtained in 2004-2005 – that Alley could not have killed the victim, because she was killed at 3:30 a.m., when Alley's whereabouts were clearly known by authorities. There is also reliable evidence that John Borup (not Alley) is the guilty party: Unlike Alley, he fits the description of the abductor; Borup admits to being with the victim before she was killed; He drove the type of car described by witnesses; and he had motive to kill.¹⁴ To deny DNA testing, however, Tennessee has categorically refused to consider the clear alibi and Borup's apparent involvement – even while it professes that the purpose of the DNA act is “to establish the innocence of the petitioner.” *Alley v. State*, slip op. at 11. In other words, Alley's evidence of innocence is not relevant to making an assessment of whether he is entitled to DNA evidence to establish his innocence.

In addition, though, in his offer of proof, Alley presented significant evidence establishing how DNA testing could establish his actual innocence – as has occurred in numerous other cases of

¹⁴ This fact makes Alley's case quite similar to *House v. Bell*, 547 U.S. ____ (2006), in which House established the likely guilt of a third party, the victim's husband. As Alley has noted elsewhere, while DNA was unable to provide a conclusive case of exoneration for House, it could do so here, given the numerous items of evidence which can be tested and which, if linked to a third party, would conclusively demonstrate the guilt of someone other than Alley, including Borup. See Appellant's Supplemental Brief, *Alley v. State*, No. W2006-01179-CCA-R3-PD (filed June 14, 2006)(comparing *Alley* and *House*).

DNA exonerations (See CCA Apx. 252-270), the Tennessee courts refused to consider such evidence in determining whether to grant DNA testing.

E.

TENNESSEE’S FAILURE TO SECURE ALLEY ACCESS TO RELEVANT DNA EVIDENCE

As a result, though purportedly available to enable Sedley Alley to establish his innocence through DNA testing, Tennessee’s Post-Conviction DNA Act has been interpreted in such a manner to leave Sedley Alley without any meaningful opportunity to obtain DNA evidence needed to prove his innocence. The Tennessee courts have misunderstood the power of DNA technology to identifying actual perpetrators, including through database hits. The Tennessee courts have misapprehended the significance of redundant results when identical DNA is found on differing items of evidence. The Tennessee courts have fabricated scientifically unsound and factually unsupported assertions to preclude DNA testing. They have excluded highly relevant evidence and refused to consider any theory other than the theory of Alley’s guilt, following a hearing which fails to comport with fundamental notions of fairness.

REASONS FOR GRANTING THE WRIT

I. THE TENNESSEE COURT’S DENIAL OF DNA TESTING RISKS THE CONTINUED INCARCERATION AND EXECUTION OF THE INNOCENT IN TENNESSEE AND ELSEWHERE

While there is an ongoing debate whether the innocent are being executed in this nation,¹⁵ there is no debate that DNA testing can – and does – avoid the incarceration and execution of the innocent. As Justice Scalia has emphasized, it is the “success” of the justice system that has brought about exonerations of those unjustly convicted. Kansas v. Marsh, 548 U.S. at ____, slip op. at 12

¹⁵ Compare Kansas v. Marsh, 548 U.S. ____ (2006)(Scalia, J.,) with Id. (Souter, J., dissenting).

(Scalia, J., concurring). But manifestly, the system cannot work if DNA testing is refused when it can otherwise objectively identify the guilty and prevent the incarceration of the innocent in a case already raising troubling issues of innocence. See www.innocenceproject.org

That is the effect of the regime employed here by Tennessee. Tennessee's regime is certainly huge step backward in our nation's quest to incarcerate the guilty while protecting the innocent. And where other states have similar DNA testing regimes, Tennessee's lead portends a future where more – not fewer – persons are unjustly convicted or condemned, when a simple test could easily resolve the issue of guilt or innocence. Where Tennessee employs a “reasonable probability” standard akin to that applied in various other states (Compare Swedlow, *Don't Believe Everything You Read: A Review Of Modern Post-Conviction DNA Testing Statutes*, 38 Cal.W.L.Rev. 355 (2002)), review here is particularly appropriate.¹⁶

¹⁶*Arizona, Ariz. Rev. Stat. § 13-4240* (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing.”); *Arkansas, Ark. Code Ann. 16-112-202* (“The proposed testing of the specific evidence may produce new material evidence that would: Raise a reasonable probability that the person making a motion under this section did not commit the offense.”); *California, Cal. Penal Code 1405* (“Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.”); *Connecticut, Ct. Statute 54-102J(7)* (“A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction.”); *Fl. Stat. Ann. 925.11* (“Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.”); *Georgia, Ga. Code Ann 5-5-41* (“The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case.”); *Hawaii, Haw. Rev. Stat. 844D-123* (“A reasonable probability exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis, even if the defendant later pled guilty or no contest.”); *Ind. Code Ann. 35-38-7-7* (“A reasonable probability exists that the petitioner would not have been prosecuted for, or convicted of the offense.”); *Iowa Code §81.10(7)(a)* (“A reasonable
(continued...)”)

Here, the reasoning of the Tennessee courts can be described as nothing less than irrational. The courts are supposed to assume exculpatory results. Instead, the courts have assumed away exculpatory results by inventing “facts” which simply don’t exist, refusing to consider the guilt of third parties, and, in fact, explaining away the guilt of the person(s) who may be the actual killers. Especially where the identification of guilty parties is the very basis for using DNA technology, a regime which categorically refuses to use DNA to identify actual guilty parties provides no reasonable method for convicting the guilty or freeing the innocent.

Here, Alley already has conclusive proof of alibi, and he can already identify John Borup as the person with motive and opportunity to kill. But *before the evidence has ever been tested*, the

¹⁶(...continued)

probability that the defendant would not have been convicted”); *Ky rev. stat. ann. §422.285(2)(a)* (“A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing and analysis”); *Maryland, Md. Code Ann., Crim. Proc., § 8-201(c)(1)* (“a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence”); *Mo. Rev. Stat. §547.035 (2)(c)(5)* (“A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing”); *N.J. Stat. Ann. §2A:84A-32a* (“[t]he requested DNA testing result would raise a reasonable probability that if the results were favorable to the defendant, a motion for a new trial based upon newly discovered evidence would be granted.”); *N.Y. Crim. Proc. Law § 440.30* (“...if a DNA test had been conducted on such evidence, and if the results had been admitted in the trial resulting in the judgment, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”); *N.C. Gen. Stat. Ann. § 15A-269* (“If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant.”); *R.I. Gen. Laws § 10-9.1-12 (2006)* (“A reasonable probability exists that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.”); *W. Va. Code § 15-2B-14 (2006)* (“...the requested DNA testing would raise a reasonable probability the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.”); *Wis. Stat. § 974.07 (2006)* (“It is reasonably probable that the movant would not have been prosecuted, convicted, found not guilty by reason of mental disease or defect, or adjudicated delinquent for the offense... if exculpatory deoxyribonucleic acid testing results had been available before the prosecution, conviction, finding of not guilty, or adjudication for the offense.”)

Tennessee courts have ignored Alley's alibi and created a story (which would have been shown to be false had the Tennessee courts taken any evidence on the matter) to exculpate Borup – Alley is still guilty because Borup had consensual sex with the victim, bit her breast, and left saliva on her shirt *after* which Alley (supposedly) then killed her. There is absolutely no proof of this, and the story makes little sense, but this is good enough to deny Alley DNA testing. Even then, the Tennessee courts do not explain how this theory explains away the guilt of a *stranger* who had sex with the victim, bit her breast, left saliva on her clothes, and semen at the scene (after which Alley then supposedly killed her). Nonetheless, Alley still gets no DNA testing – despite the undisputed fact that he was somewhere else when the victim was killed.

If this is the law of Tennessee, it can be adopted as the law anywhere: One doesn't get DNA if the state court can create a theory out of whole cloth and without regard to the truth, thereby explaining away truly exculpatory results from tests which have yet to be conducted. Under such a regime, no one can reasonably get DNA testing – especially where, as here, the courts refuse to consider evidence of innocence, will assume that the petitioner is guilty, and refuse to allow a petitioner to present evidence in support of a request for testing.

The implications of the Tennessee courts' decision are not simply limited to the nearly 20,000 people incarcerated in Tennessee. It has ramifications for those who are committing crimes and getting away with them. Tennessee will allow those people to go free. It has ramifications for victims as well: Though real perpetrators can be identified and punished, so long as there is evidence that a person convicted might be guilty, actual perpetrators will not be brought to justice.

This Court has yet to apply general due process principles to a post-conviction DNA case, and this case provides an opportunity to set forth the basic federal principles which must be applied

in all states considering post-conviction DNA requests. Should other states adopt the same type of stingy, and manipulative approach to DNA testing now adopted by Tennessee, the implications are even more far-reaching. For this reason, this Court should grant certiorari to establish that states are not free to deny DNA testing in situations which suffer the numerous procedural infirmities present here.

Ultimately, if allowed to stand, the Tennessee courts' decision will be a huge setback for our system of justice. Since the Innocence Project began in 1992, this case has perhaps the most important implications for the ability of Innocence Projects to serve their role in the justice system: If a state can deny DNA testing based on nothing more than speculation – when there is already compelling proof of innocence – innocence will suffer and justice will not be served, as is occurring here. This Court should grant certiorari to avoid such a result.

II. THE DENIAL OF DNA TESTING CONFLICTS WITH FUNDAMENTAL PRINCIPLES ENUNCIATED IN *HOLMES v. SOUTH CAROLINA*, 547 U.S. ____ (2006)

Just as in a criminal trial, “[T]he purpose of the Post-Conviction DNA Analysis Act is to establish the innocence of the petitioner” *Alley*, slip op. at 11. As this Court has recently recognized in *Holmes v. South Carolina*, 547 U.S. ____ (2006), in a proceeding designed to reach an ultimate factfinding on guilt or innocence, a state may not apply procedural rules which arbitrarily prevent an accurate determination of guilt or innocence.

In *Holmes*, therefore, this Court struck down a procedural rule by which South Carolina refused to consider evidence of third-party guilt if the state court believed that the evidence of the defendant's guilt was strong, and thus evidence of third-party guilt supposedly could not establish innocence. As this Court explained the South Carolina rule in *Holmes*:

If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice or confusion of the issues.

Holmes, 547 U.S. at ____, slip op. at 9. This Court made clear that such a lopsided view of the evidence was arbitrary. As this Court explained: “[B]y evaluating the strength of only one part’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.” Id., slip op at 10-11. See generally Brief of Arizona Attorneys For Criminal Justice *et al*, as *Amici Curiae*.

Tennessee has made the very same mistake South Carolina did in *Holmes*. In trying to resolve the DNA question, Tennessee has assumed Alley’s guilt, *only* considered evidence showing his guilt, and refused to consider significant evidence calling into question the prosecution’s case – including proof that Alley’s statement to the authorities is false, and proof that Alley *manifestly was not* the person identified by Scott Lancaster, the only person to actually see the abductor. Trial Tr. 150. Moreover, the Tennessee courts have simply excluded from their consideration all additional evidence indicating the clear need for DNA testing, including unrefuted proof that Alley was elsewhere when the murder occurred.

In a proceeding designed to “establish the innocence of the petitioner,” however, Tennessee’s actions can be seen as nothing less than arbitrary. As in *Holmes*, a proceeding cannot serve its intended purpose of establishing innocence if the factfinder only considers evidence of guilt, and refuses to consider evidence of innocence which establishes the need for DNA testing. Here, the Court of Criminal Appeals’ analysis runs directly counter to *Holmes*. 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. Here, the Court of Criminal Appeals has essentially denied DNA testing because – in the absence of DNA testing – the court already considers Alley to be guilty and third parties to be innocent. This is circular: The point of DNA proceedings is to determine guilt.

Ultimately, the Tennessee courts have made no attempt to provide a substantive rationale behind this blanket prohibition on using DNA evidence to identify third parties, and their failure to do so is itself suspect. See e.g., Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (state failed to explain underlying rationale of voucher rule, rule rejected as not “in accord with traditional and fundamental standards of due process.”). Instead, the Tennessee courts have attempted to avoid this entire debate by suggesting that *Holmes*’ logic is strictly limited to trial-based evidentiary rules.

This distinction falls short of the mark, however, because it misreads the fundamental import of the unanimous decision. The real problem with the South Carolina rule was simply that it did not make sense; it was not logical or in any way connected to the ends that third-party guilt rules are designed to serve -- ensuring that evidence that is “remote” or “lack[s] connection with the crime” is properly excluded. Holmes, 547 U.S. at ____, slip op. at 7 (*citing* 40 A. Am. Jur. 2d. Homicide §286, pp. 136-138 (1999)). Here, the Tennessee courts have displayed a similar lack of concern for the probative value of Alley’s third-party considerations. The courts do not maintain that a single male could coincidentally have all of his DNA on the murder weapon and victim’s clothes. And they cannot avoid dealing with this simple and undeniable logic on the sole basis that Mr. Alley’s trial and appeals have concluded. The Constitution demands that rational rules dictate procedures literally affecting life and death both before and after trial.

III. TENNESSEE HAS DENIED DNA TESTING BY VIOLATING FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS

In addition, in denying DNA testing, Tennessee has also violated fundamental precepts of due process. Sedley Alley has been denied the opportunity to present relevant evidence in support of his claim for DNA testing, and he has been denied relief based on findings which were made without any factual support and without his opportunity to present contrary evidence. See Jones v. Flowers, 547 U.S. ____ (2006)(due process requires notice and opportunity to be heard). He has been denied relief by a judge who was not completely impartial. See Gomez v. United States, 490 U.S. 858, 876 (1989)(acknowledging due process right to impartial adjudicator)

Of special significance is the due process violation resulting from the Tennessee court's failure to allow consideration of evidence of third party guilt or a database "hit." Indeed, it is well established principle of due process that once a state creates a scheme that affects a litigant's rights, it must provide a meaningful opportunity to be heard in that forum. Tennessee v. Lane, 541 U.S. 509, 523 (2004). An arbitrary rule preventing the court from considering the possibility of third-party guilt or a database match renders the opportunity to be heard on the critical "reasonable probability" question far less than meaningful.

When the state has created a procedure such as the one at issue here, three factors normally determine whether an individual has received the "process" that the Constitution finds "due:" First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural

requirement would entail. City of Los Angeles v. David, 538 U.S. 715, 716 (2003) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). "By weighing these concerns, courts can determine whether a State has met the 'fundamental requirement of due process' – 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" City of Los Angeles, 538 U.S. at 717 (quoting Mathews, 424 U.S. at 333).

Here, the private interest affected by the official action could not be greater. Sedley Alley has been sentenced to die, and DNA testing that could potentially prove his innocence. Second, the risk of an erroneous deprivation of Mr. Alley's right to DNA testing is significant under the "no third party guilt" rule. Indeed, real-world experience has shown that time and time again, cases that appeared to be overwhelming evaporated in an instant through the power of a DNA match to the database. See e.g., Petition for Post-Conviction DNA Analysis at 22-24 & n. 13 (citing individual cases involving database matches and Chicago Tribune study on database matches). Finally, there is no valid state interest served by prohibiting careful and probing analysis of third-party guilt: Indeed, determining the guilt of parties through DNA databases is a method routinely used by law enforcement throughout the nation, and it takes virtually no effort once a DNA profile is determined. By precluding Sedley Alley from proving third-party guilt – including through a database search, Tennessee has violated due process by establishing a procedure which "forecloses what is potentially a conclusive means for an indigent defendant to ... exonerate himself." Little v. Streater, 452 U.S. 1, 12 (1981).¹⁷

¹⁷ It can also be understood as depriving Mr. Alley of a statutorily created liberty interest. See Wilkinson v. Austin, 545 U.S. 209 (2005)(liberty interest protected by the Fourteenth Amendment's Due Process Clause may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies). Here, (continued...)

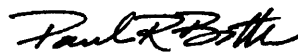
CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,



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¹⁷(...continued)

Tennessee has created a liberty interest for convicted defendants to secure release from prison by means of DNA testing. For those on death row like Alley, that liberty interest is also a life interest. Once the legislature creates such a liberty and life interest in its post-conviction DNA statute, the courts cannot restrict an inmate's statutory right to vacate his conviction, much less prove his actual innocence, by irrationally and unfairly preventing him from using DNA testing to prove third party guilt. See e.g. Wilkinson v. Austin, *supra*.

CERTIFICATE OF SERVICE

I certify that a copy of this Petition was served by hand on Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243 this 27th day of June 2006.

Paul R. Bette