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

SEDLEY ALLEY	)	
Petitioner	)	**No. 85-05085-87**
	)	
v.	)	
	)	
STATE OF TENNESSEE	)	
Respondent	)	

ORDER
DENYING PETITION FOR POST-CONVICTION DNA ANALYSIS

This matter came to be heard upon the successive petition of defendant, Sedley Alley, for post-conviction DNA Analysis pursuant to the Tennessee Post-Conviction DNA Analysis Act of 2001, Tenn. Code Ann. §§ 40-30-301 to 313. The petition follows a fifteen day reprieve issued by the Governor to allow the defendant to seek DNA Analysis in this court. The Governor's reprieve was issued on May 16, 2006, hours before the petitioner's scheduled execution. It was not until late on May 19, 2006, that the Petitioner filed his Petition for Post-Conviction DNA Analysis in this court. This Court immediately set a hearing for May 30, 2006. Simultaneous to his motion for DNA Analysis, Petitioner filed a Motion for Admission of Counsel *Pro Hac* Vice, which this court subsequently granted. Thereafter, the State filed a response to the Petition. Additionally, on May 25, 2006, the petitioner filed a Motion for Depositions, which this court subsequently denied in a separate order. Finally, late on the afternoon of Friday

May 26, 2006, the petitioner filed a "Reply to the State's Response to Petition for DNA Testing."

In his "Reply", the petitioner requested additional items, which were not requested in the May 19th Petition, be made available for testing. Petitioner contends there are additional samples and evidence, in addition to those items sought in his original 2004 Petition for Post-Conviction DNA Analysis; which, if subjected to testing, may prove his innocence. Additionally, petitioner contends that his proposed "testing plan" is "capable of determining with unmatched precision whether he is innocent or guilty of the 1985 rape and murder for which he was convicted and sentenced to death." In particular, in his May 19th Petition, Alley seeks testing on the following items: (1) skin cells/sweat from the underwear that were found next to the victim's body and believed to have been worn by the assailant; (2) blood or skin cells located on the tree branch used to violate the victim; and, (3) material from underneath the fingernails of the victim; (4) swabs taken from the victim; (5) blood and hair found on and in defendant's car. Additionally, in their Reply to the State's Response, petitioner's counsel asks for testing to be done on the following items: (1) the victims' red t-shirt; (2) the paper that was wrapped around the tree branch; (3) fluid stained grass recovered from beneath the vaginal area of the victim; (4) the victim's underwear; (5) the victim's bra; (6) victim's jogging shorts; (7) red underwear; (8) the victim's shoes; (9) victim's sock; (10) exercise belt; (11) beer bottles; (12) three styrofoam cups.

In ruling on the petitioner's request, this court has reviewed the Petitioner's Petition for Post-Conviction DNA Analysis; the State's Response; the Petitioner's Reply to the State's Response; the original Petition for Post-Conviction DNA Analysis; all previous decisions of this court and the appellate courts, including decisions of the U.S. District Courts and the 6th Circuit Court of Appeals; the entire trial transcript; and arguments of counsel. After a thorough and exhaustive review of the Petitioner's current request, this court finds that the petitioner has failed to meet the statutory requirements which would mandate DNA Analysis as outlined in Tenn. Code Ann. §40-35-304 and has not convinced this court that discretionary analysis should be granted under the Tenn. Code Ann. §40-35-305. With regard to requirements of Tenn. Code Ann. §40-35-304, the court finds that petitioner has failed to demonstrate that a reasonable probability exists that the he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis of the requested samples; has failed to demonstrate that some of the samples sought are still in existence and/or are in a condition that is suitable for testing; and petitioner has failed to demonstrate that the purpose of the petition is to determine actual innocence and not merely to delay the execution of his sentence. *See* Tenn. Code Ann. § 40-30-304 (1), (2) and (4). Thus, testing is not mandated in this case.

Additionally, this court finds that the petitioner has failed to demonstrate that a reasonable probability exists that analysis of said 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. *See*

Tenn. Code Ann. § 40-30-305. Thus, this court is not inclined to order testing under the discretionary portion of the Act. Therefore, the petitioner's successive Petition for Post-Conviction DNA Analysis is, hereby, **DENIED** under both the mandatory and discretionary portions of the Post Conviction DNA Analysis Act.

BACKGROUND

The petitioner was convicted in 1985 of the kidnapping, aggravated rape and premeditated first degree murder of Suzanne Collins. Following his conviction, the defendant was sentenced to death. Thereafter, his sentence and conviction were affirmed on direct appeal. *See* State v. Sedley Alley, 776 S.W.2d 506 (Tenn. 1989). In addition the petitioner's sentence and conviction was twice subjected to state post-conviction review and federal habeas corpus review. Each time petitioner's conviction and sentence was upheld. Additionally petitioner has had the opportunity to file lengthy and extensive litigation on a variety of issues, including a 2004 petition in this court for Post-Conviction DNA Analysis. In his original petition, Alley sought the following items for testing: (1) the known hair and fluid samples taken from the victim; (2) the known hair and fluid samples taken from the petitioner; (3) hair found on the waistband of the victim; (4) hair found on the victim's shoe; (5) hair found on the victim's socks; (6) hair found on the stick which was used to rape the victim; (7) nasal, oral, rectal, and vaginal swabs taken from the victim; and (8) swabs taken from each of the victim's inner thighs. The petition which was subsequently dismissed for failure to meet the threshold criteria set forth under the Act; and this court's denial of testing was affirmed by the Court of

Criminal Appeals. *See* Alley v. State, W2004-01204-SC-R11-PD, (Tenn. Crim. App. filed May 26, 2004), 2004 Tenn. Crim. App. LEXIS 471, perm. to app. denied (Tenn. 2004). Subsequently, the petitioner field additional claims in federal court. However, all pending appeals have now been denied.

Recently, days before his execution, the petitioner sought clemency before the Board of Probation and Parole. After presentation of certain facts, this body, of non-lawyers, recommended to the Governor that the petitioner be allowed to seek DNA Analysis. Acting upon that recommendation, hours before the petitioner's scheduled execution, the Governor issued a fifteen day reprieve to allow petitioner time to pursue his claims.[1] In the issuance of the reprieve, the Governor gave a statement in which he specifically stated that he believed the petitioner was guilty of the crimes for which he had been convicted and sentenced to death, but acknowledged that the courts were the more appropriate arbiter of petitioner's request for DNA Analysis and gave petitioner a brief leave to make such a request in the appropriate court. Following, the Governor's reprieve, the State asked the Tennessee Supreme Court to set a new execution date.

[1] As the Governor's statement regarding petitioner's reprieve makes clear, the Governor recognizes the limits of his authority in this matter. This court would only further note that the Governor is without any legal, statutory or other authority to order this court to conduct DNA Analysis. It is wholly within the purview of this court to evaluate petitioner's second Petition for DNA Analysis according to the statutory guidelines and irrespective of any comments or actions of either the Governor of the Board of Probation and Parole. Moreover, while this court has immense respect for the work done by the Board of Probation and Parole, this court feels it important to note that this body has no legal training and only one of the current member of this body has substantial experience with the criminal system. These men and women, who are political appointees of the Governor, serve an important role in our system, but are without the requisite knowledge or skills to make the legal determinations necessary to evaluate petitioner's claims under Tenn. Code Ann. §40-30-304 and/or §40-30-305. Thus, while mindful of the Board's actions in this matter, this court gives their decisions no weight in evaluating the efficacy of the petitioner's claims.

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). Moreover, the statute is current silent on the issue of successive petitions for DNA Analysis.

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*).

In making its determination a trial court may 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. However, 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. 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). In upholding this court's denial of petitioner's initial request for DNA Analysis, 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). The Court then went on to hold that the Act "does not permit DNA analysis to be performed upon a third party. Rather the results of the DNA testing must stand alone. Id.

EXAMINATION OF EVIDENCE AT TRIAL AND REVIEW OF PROCEEDINGS ON APPEAL

In 1985, the petitioner was convicted of the kidnapping, rape and murder of the victim, Suzanne Collins, a nineteen year old Lance Corporal in the United States Marine Corps stationed at the Millington Naval Base. After finding the murder was especially heinous, atrocious and cruel and the murder was committed during the kidnapping and rape, the jury sentenced the petitioner to death for the murder. Petitioner was sentenced to forty years on each of the other offenses, all sentences consecutive. In it's opinion affirming the petitioner's convictions and sentence, the Tennessee Supreme Court outlined the following facts:

> At approximately 10:00 p.m. on 11 July 1985 she [Suzanne Collins] left her barracks dressed in physical training gear, a red Marine T-shirt, red Marine shorts, white socks and tennis shoes and went jogging on the Base, north of Navy Road. . . . Her body was found the next morning at Orgill Park, which adjoins the Naval Base, north of Navy Road.
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> Defendant was not in the military service but was married to a military person and they lived on the Naval Base. He was employed by a Millington heating and air conditioning company. He was almost 30 years old, had two children, born of an

earlier marriage, living in Kentucky, and had a history of alcohol and substance abuse. After appropriate *Miranda* warnings defendant waived the presence of an attorney and gave a lengthy statement of his activities that resulted in the death of Suzanne Collins to officers of the Naval Investigation Service on the morning of 12 July 1985. The statement was tape recorded with defendant's permission. A narrative account of the relevant events of that evening as he related them to the Naval Officers follows.

About 7:00 p.m. on 11 July 1985, his wife left with two women to go to a Tupperware party. Defendant had been drinking beer before they left and by approximately 9:00 p.m. he had consumed an additional six-pack and a fifth of wine. At the time he drove his 1972 Mercury station wagon, with a Kentucky license tag to the Mini Mart and purchased another six-pack. . . . He drove to the north side of the Base, parked on a lot near the golf course and started running toward Navy Lake. He ran past a girl jogging and before he got to the lake he stopped, she caught up with him and they had a brief conversation. He did not know her name and had never seen her before. They turned around and jogged back to his car. He stopped there out of breath, and she continued on toward the gate at Navy Road. He started driving down the road toward the gate in spite of his apparent recognition that he was drunk and weaving from side to side on the roadway. He heard a thump and realized he struck the girl jogger. Quoting from his statement "she rolled around and screamed a couple of times and I ran over and grabbed her and told her I was going to take her to the hospital. I helped her into the car and we started towards. . ."

On the way to the hospital defendant said that she called him names such as a drunken bastard and threatened to get him in trouble and he tried to calm her down without success. When he reached the traffic light on Navy Road near the 7/11 store he turned left and again went to the north part of the Base in the vicinity of the lake. He described in considerable detail the subsequent events that included hitting her a few times, holding her down on the ground, and sticking a screwdriver in the side of her head, under circumstances apparently calculated by the defendant to appear to be accidental. All of these actions were because she would not listen to his pleas not to turn him in.

He insisted that he did not have sex with her at any time, nor did he even try at any time. He insisted that he was scared of the trouble she was threatening him with and was drunk and could not think clearly. After sticking the screwdriver in her head and her collapse, he decided to make it appear that she had been raped. He took off her clothes, and dragged her by the feet over near a tree. There he broke off a tree limb, inserted it in her vagina and "pushed it in." He then ran to the car and drove away.

The state called numerous witnesses who observed some of the movements of the defendant and victim that night.

> An Naval officer driving north toward the lake on the Base passed two male Marines jogging north, and later saw a female Marine in red T-shirt and red shorts also jogging north. After passing the lone Marine he saw a white male near an old station wagon with wood paneling that was parked on an empty lot near the buffalo pens. The two Marines testified that as they jogged north a female Marine was jogging south and shortly thereafter they encountered a station wagon with wood grain paneling also going south that swerved over into the north lane towards them. The car continued on southward and when they were several hundred yards further north they heard a female voice screaming in distress, "Don't touch me," "Leave me alone." They immediately turned around and ran south in the direction of the scream. It was too dark to see any activity very far ahead and before they reached the scene they saw the station wagon drive off toward the main gate. At the time they were about 100 yards away and were able to observe that the station wagon was off the road in the grass, near the fence, on the left or wrong side for a vehicle going south. Suspecting a kidnapping they continued on to the gate and gave a full report of what they had witnessed. They accompanied military security personnel on a tour of the residential areas of the Base looking for the station wagon, without success. However, after they returned to their barracks, they were summoned to the security offices where they identified the station wagon. Defendant had been stopped and brought in for questioning as had his wife. Their responses had allayed any suspicion that the defendant had been connected with a kidnapping and they were allowed to go home. All of the events occurred before approximately 1:00 a.m., 12 July 1985. The victim's body was found shortly before 6:00 a.m. on that date and defendant was promptly arrested by the military police.
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> After completing the statement, defendant voluntarily accompanied officer over the route he had taken the night before and to the location of the murder and accurately identified various things, including the tree where he had left the body and where it was found by others and from which the limb he used had been broken.
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> The pathologist Dr. James Bell, testified that the cause of death was multiple injuries. He also identified several specific injuries, each of which could have been fatal. The victim had bruises and abrasions over her entire body, front and back. He testified that the injuries to the skull could have been inflicted by the rounded end of the defendant's screwdriver that was found near the scene, but not the pointed end. He identified the tree branch that was inserted into the victim's body. It measured 31 inches in length and had been inserted into the body more than once, to a depth of twenty inches, causing severe internal injuries and hemorrhaging. The pathologist was of the opinion that the victim was alive when the tree limb was inserted into her body. There were also bruises on the victim's neck consistent with strangulation.

State v. Sedley Alley, 776 S.W.2d 506, 508-510 (Tenn. 1989).

With regard to biological evidence, Paulette Sutton, an expert in forensic serology, and Craig Lahren, an expert in hair analysis testified at trial. Sutton testified that the presence of blood was detected on the driver's side door and near the driver side headlight of the defendant's car. She stated that typing of the blood found on the driver's side door reveled ABO type blood, the same type as the victim. She found that the stain was consistent with bloody hair having been swiped across the surface just above the door handle going downward towards the road. She also testified that a bloody napkin was found on the floorboard of the petitioner's car, but she could not determine the species origin for the sample. Sutton testified that a similar napkin with the same restaurant insignia was found at the crime scene, near the body. Likewise, there was blood on a screwdriver found at the scene, but Sims could not identify the source. There was no blood or seminal stains found on the victim's clothing. At least thirty seven points of blood were identified on the shorts worn by the petitioner, but a blood type could not be determined. Sutton testified that the defendant's clothing smelled like it might have been recently washed.

Lahren testified about various hairs found on the victim's person, in the petitioner's vehicle and on the stick which was inserted into the victim. A Caucasian pubic hair was found in the victim's shoe but it was too limited to do a comparison with either the petitioner's sample or the victim's sample. A Caucasian head hair found in the victim's tennis shoe was determined to belong to the victim. A bloody Caucasian head hair was found on the front driver's side of the petitioner's car. Analysis revealed the

hair belonged to the victim. Medium brown Caucasian body hair, either from the leg or arm, was found on the victim's waistband. However, Lahren testified that arm or leg hair does not have consistent microscopic characteristics and thus could not be compared to either the petitioner's or the victim's samples. Two strands of black head hair were found on one of the victim's socks. Lahren testified that this would be consistent with someone walking around in their sock feet. A light brown Caucasian head hair was found on the victim's shirt. It was determined that the hair belonged to the victim.

Petitioner's defense at trial revolved around an insanity defense, specifically, his contention that he was suffering from Multiple Personality Disorder. However, the State presented evidence to the contrary, including letters the petitioner wrote to his wife during his incarceration in which the petitioner again admitted involvement in the murders and alluded to his wife that he was creating an insanity defense in an attempt to "beat" the charges. The petitioner also admitted committing the crimes to some of the experts who were evaluating him and in one particular instance gave a vivid account of his actions. Additionally, several of the mental health experts testified that the petitioner was highly manipulative. On direct appeal, the primary issue raised by the petitioner was whether there was sufficient evidence presented at trial to establish his sanity beyond a reasonable doubt. Again, during post-conviction review the petitioner raised issues about trial counsel's performance, as it related to his defense of insanity.

Petitioner's first contention that he did not commit the crimes in question was not brought before the courts until 2004, when he filed the first petition for Post-Conviction

DNA Analysis. This court denied petitioner's request and that denial was affirmed by the appellate courts. Subsequently, the defendant litigated various issues in federal court, including recently claiming that the State of Tennessee had purposely destroyed or hidden evidence which now entitled the petitioner to DNA. All such claims have been denied. In denying petitioner's requests, the 6th Circuit Court of Appeals stated that "the compelling evidence of Alley's guilt – including his confessions, his description to law enforcement authorities of his acts, and the eyewitness testimony against him – strongly suggest that he could never accurately be considered actually innocent of the crime. Alley v. Key, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) at *5. Petitioner now seeks additional DNA analysis in this court.

PETITIONER'S ALLEGATIONS

Petitioner contends that, although there was no DNA evidence presented at trial, the State is in possession of numerous samples containing biological evidence, including hair specimens and fluid samples, which can now be subjected to DNA analysis. Although, defense counsel admits that Alley's current petition is a successive petition for DNA Analysis and that some of the items he is requesting where previously requested by counsel in his initial Petition for Post-Conviction DNA Analysis, they claim that previous counsel was inexperienced in the area of DNA Analysis and therefore petitioner should be allowed to pursue these claims with current counsel and obtain those items previously denied him in addition to other items now requested in the current Petition. Petitioner's

counsel further argues that the importance of any one item may arguably be minor but redundant DNA results could prove petitioner's innocence.

Specifically, the petitioner requests the state be ordered to turn over the following items for DNA analysis and comparison: (1) skin cells/sweat from the underwear that were found next to the victim's body and believed to have been worn by the assailant; (2) blood or skin cells located on the tree branch used to violate the victim; and, (3) material from underneath the fingernails of the victim; (4) swabs taken from the victim; (5) blood and hair found on and in defendant's car. Additionally, in their Reply to the State's Response, petitioner's counsel asks for testing to be done on the following items: (1) the victims' red t-shirt; (2) the paper that was wrapped around the tree branch; (3) fluid stained grass recovered from beneath the vaginal area of the victim; (4) the victim's underwear; (5) the victim's bra; (6) victim's jogging shorts; (7) red underwear; (8) the victim's shoes; (9) victim's sock; (10) exercise belt; (11) beer bottles; (12) three styrofoam cups.

The petitioner contends that there is a reasonable probability that he would not have been prosecuted or convicted if the analysis yields exculpatory results. *See* Tenn. Code Ann. § 40-30-304. In addition, or in the alternative, the petitioner contends that a reasonable probability exists that analysis of the requested evidence will produce DNA results which would have rendered a more favorable verdict or sentence, if the results had been available at the proceeding leading to the judgment of conviction. *See* Tenn. Code Ann. § 40-35-305. Petitioner argues that should the samples yield results which can not be linked to either the defendant or the victim then the evidence would demonstrate that

he did not rape and kill the victim, but that someone else did. Additionally, he claims that redundant result, meaning that the same male DNA profile, not linked to petitioner, is found on more than one item, would certainly prove exculpatory. Petitioner goes even further, and now contends that despite his confession to the kidnapping, rape and murder of the victim, he is not the perpetrator of said acts. As he did in the first Petition, Alley now maintains certain evidence tends to implicate one of the victim's romantic partners. Thus, petitioner contends that once a male DNA profile is identified it can be compared to the victim's ex-boyfriend, Borup and/or to certain offender databases.

Additionally, the petitioner contends that this court should disregard certain evidence at trial as unreliable.[2] Specifically, petitioner contends his confession, given the morning after the murder, was coerced, is the product of manipulation, and is not true. Petitioner's counsel claims an expert has examined the confession and found it to be false. At the very least, petitioner argues that had they been presented such evidence the jury would not have imposed the death penalty.

At the May 30 hearing on this matter, petitioner sought to introduce testimony from a DNA expert who they assert had examined the evidence in the custody of the State and whom they wished to call to testify regarding the results they thought testing of such evidence might reveal. Additionally, petitioner's sought leave to take depositions from certain individuals regarding the existence of certain pieces of evidence. This court

[2] Petitioner also contends Scott Lancaster, a witness to the abduction, gave a description of the perpetrator that does not match his physical build but does match one of the victim's romantic partners, John Borup; the car described by witnesses to the abduction matches that of Borup; tire tracks at the abduction scene do not match his car; and shoe prints at the abduction scene do not match the shoes he was wearing on the night in question.

denied both requests. *(See this court's separate "Order Denying Motion for Depositions")* field March 29, 2006. With regard to the testimony of the expert DNA witness, this court allowed counsel for petitioner to essentially relay the information that was provided by this witness. However, this court was of the opinion the based upon the allegations and requests in petitioner's petition that they had failed to meet all of the statutory criteria. While this court was more than willing to reserve ruling until hearing counsel's arguments and was more than willing to give counsel wide latitude in making those arguments, this court is not of the opinion that the statute requires allowing such testimony or that such testimony would have added anything additional to the allegations made in the petition and the arguments of counsel. Additionally, since the State was not given notice of this witness's appearance or an opportunity to respond with their own expert, this court found that allowing such testimony at this time was not appropriate.

Moreover, this court finds the Act does not require that it reevaluate the credibility or validity of the evidence submitted at trial nor review new evidence now asserting a different theory than the one relied on by the defendant at trial. Furthermore, the statute clearly limits its reach to permit only performance of a DNA analysis which compares the petitioner's DNA samples to DNA samples taken form biological specimens gathered at the time of the offense. *See* Earl David Crawford v. State, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328 (Tenn. Crim. App. August 4, 2003) *perm. to app. denied* (Tenn. 2004). The evidence requested to be tested must stand alone.

ANALYSIS[3]

Initially, this court notes that the post-conviction court is given considerable discretion in deciding whether the Petitioner is entitled to relief under the Post-Conviction DNA Analysis Act. *See* 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).

The Petitioner contends Jack Jay Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 WL 199826 (Tenn. Crim. App. February 2, 2004) applies to his case. He argues that, like Shuttle, his claim that a third party was involved in the murder now entitles him to DNA testing, irregardless of his pre-trial confession to the kidnapping, aggravated rape and murder of the victim. A confession he now claims was false. Additionally, petitioner's counsel argues that the Tennessee Court of Criminal Appeals decision in State v. Haddox, 2004 WL 2544668 (Tenn. Crim. App. November 10, 2004 at Jackson) is instructive in that the Court holds that under the statute, the term "exculpatory results" does not imply that the results of the requested analysis indicate with certainty that the petitioner is innocent of the crimes for which he was convicted. The petitioner argues

[3] This court notes that it finds Petitioner's successive Petition for Post Conviction DNA Analysis filed just days from execution to be akin to a petitioner's Motion to Re-Open Post-Conviction Relief under Tenn. Code Ann. § 40-30-117. Although, there is no statute of limitation on filing a Petition for Post-Conviction DNA Analysis, this court sees no reason to adopt a policy by which petitioner is not held accountable for unnecessary delay in bringing these matters before the appropriate court and essentially rewarded for failing to request certain evidence in an initial petition. If court's were to treat successive DNA petitions like Motions to Reopen Post Conviction, then petitioner would be held to the higher standard of proving that the new scientific evidence requested would demonstrate actual innocence. *See* Tenn. Code Ann. §40-30-117(a)(2). However, since there is no case law requiring such a standard or acknowledging the relationship between the statute addressing reopening Post Conviction and successive requests for Post Conviction DNA Analysis, such notation is merely that – a notion by this court. For the time being, this court will address petitioner's successive request strictly under the Post-Conviction DNA Analysis Act with no regard to any other statutory provision.

that Haddox contemplates the circumstance in which a petitioner's DNA is not found on a certain piece of evidence introduced at trial and holds that such results must be considered by the trial court in relation to the effect the potential "exculpatory result" would have on the jury. More particularly, the petitioner contends Haddox buttresses his position regarding redundant DNA.

In contrast, the State asserts that Mr. Alley's case is more akin to the underlying facts presented in Carl E. Saine v. State, No. W2002-03006-CCA-R3-PC (Tenn. Crim. App. December 15, 2003). However, the State contends that under the rationale of either Shuttle or Saine petitioner has failed to meet the threshold requirements of the Act; and, thus, is not entitled to DNA testing of the requested items.

Applying the rationale behind Judge Tipton's concurring opinion in Ricky Flamingo Brown v. State, No. M2002-0247-CCA-R3-PC, 2003 WL 528 (Tenn. Crim. App. June 13, 2003) *perm. to app. denied* (Tenn. 2003), the Court in Shuttle held that "the Act requires that the court assume that the DNA analysis will reveal exculpatory results in the court's determination as to whether to order DNA testing." In Brown, the trial court based it's dismissal of the petition for analysis upon the victim's testimony that it was the petitioner who assaulted her. Judge Tipton argued that the Act "was created because of the possibility that a person has been wrongfully convicted or sentenced," and "a person may be wrongfully convicted based upon mistaken identity or false testimony." Thus, he concluded that dismissal of the petition should not be based solely upon the testimony of the victim. In Shuttle, the Court expanded Judge Tipton's rational to

include a petitioner who essentially contends he was wrongfully convicted at trial, where he gave false incriminating testimony. Shuttle, 2004 WL 199826, *4 (Tenn. Crim. App. February 2004).

The petitioner in Shuttle sought testing of blood and skin samples taken from under the victim's fingernails and blood found on the victim's jeans. The petitioner testified at the hearing on the petition for DNA analysis that, although he had falsely given incriminating evidence at trial, a third party was the actual perpetrator of the murder. The Court found particular significance in the fact that petitioner had initially informed his attorney that a third party committed the offense in a manner consistent with his testimony at the hearing. In addition, petitioner's trial counsel testified at the hearing, that the petitioner had indeed initially informed him that a third party had committed the murder, and only after counsel informed petitioner that he was unable to locate the named party, did the petitioner state that he had committed the murder. Thus, extrapolating from Judge Tipton's concurring opinion in Brown, the Court found that in reviewing the petitioner's request, it must assume that the DNA testing would reveal exculpatory evidence, namely, that the blood underneath the victim's fingernails and the blood on the victim's jeans was not the blood of either the victim or the petitioner. The Court found that

> in the event the DNA testing reveals such findings, the test results would be inconsistent with the state's theory at trial, inconsistent with the petitioner's trial testimony, consistent with the petitioner's first statement to his trial counsel, and consistent with the petitioner's latest testimony.

Id. Thus, the trial court concluded that the petitioner had a established a reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA evidence had been obtained. *Id.*

In a case which followed petitioner's original Petition for DNA Analysis, the Tennessee Court of Criminal Appeals ordered DNA testing on a baseball cap left by the alleged perpetrator. *See* State v. Haddox, 2004 WL 2544668 (Tenn. Crim. App. November 10, 2004 at Jackson). In *Haddox*, the Court found that, while exculpatory results from DNA Analysis of the red cap may not have resulted in a reasonable probability that the Petitioner would not have been *prosecuted*, such results would have resulted in a *reasonable probability* that the petitioner would not have been *convicted.* In so finding, the Court considered the effect on the jury of evidence showing the petitioner's DNA was not present on the cap that was worn by the perpetrator and recovered at the crime scene. Id. at *5-6. However, in Haddox, the remainder of the convicting evidence was not overwhelming. Moreover, in directly contrasting the case to the Court's holding with regard to petitioner's previous petition, the court found that, unlike Alley, in Haddox there was not a confession. The petitioner in Haddox had maintained his innocence since being charged with the crime and continued to do so, even after his release from prison on parole. Here, petitioner did not assert his innocence until one month before his execution date and did raise the current claims until hours before his execution. Additionally, unlike Haddox, the multiple courts have described the evidence against Alley as "overwhelming." Thus, this court does not find the appellate Court's holding in Haddox instructive.

Thus, the court's analysis of this issue really depends upon it's evaluation of the appellate Court's holdings in Shuttle and Saine. In contrast to Shuttle the Court in Saine found the petitioner's partial recantation, in light of other evidence to be unreliable, and; thus, held petitioner failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted had exculpatory DNA evidence been obtained. In Saine, the petitioner was convicted of assault and rape. Carl E. Saine v. State, No. W2002-03006-CCA-R3-PC, *6 (Tenn. Crim. App. December 15, 2003). He requested spermatozoa discovered on the victim's torn panties be submitted for DNA testing. *Id.* The petitioner admitted assaulting the victim, but stated he left the victim while she was still unconscious, and a third party could have then entered the room and committed the rape. *Id.* The trial court denied the petitioner's request and the Court of Criminal Appeals affirmed based upon the fact that the victim identified the petitioner as her rapist and other evidence corroborated her testimony regarding the rape. *Id.* at *10-11. The Court further noted that no evidence was presented at trial that the victim wore the panties containing the spermatozoa at any time during or after the rape, and, therefore, the evidence was not a primary factor in proving the petitioner's guilt. *Id.* at 11-12.

The State once again argues that the *Saine* case is analogous to Mr. Alley's petition. They argue that the petitioner is now incredulously claiming that although his confession to the murder, testimony from authorities that he participated in a walk-through of the crime scene, physical evidence placing the victim in his vehicle, and witness testimony identifying his car, with it's unique look *and* sound, as the one

involved in the abduction were introduced at trial, DNA analysis of certain evidence would now demonstrate that a third person could have raped the victim. The State argues that unlike Shuttle, where the prosecution and conviction of the petitioner was based upon the blood evidence, upon which petitioner requested testing be done, and his "false incriminating testimony;" the evidence against Mr. Alley, like that against the defendant in Saine, is far more overwhelming and testing of the requested items even if exculpatory would not have prevented his prosecution or conviction.

Additionally, the State argues that the Petition should be dismissed because certain evidence requested by the petitioner is either no longer in existence or has been severely contaminated to the point that the reliability of any testing would be highly suspect.

This court initially notes that the under prong three of the statute, the evidence sought by the petitioner for testing has never been subjected to DNA analysis. Thus, this court finds prong three of the statute is met. With regard to the second prong of the statute, the court finds certain items are not still in existence or are not suitable for testing; thus, petitioner fails to meet the statutory requirements with regard to those items. With regard to the remaining items, this court concludes that under either Shuttle or Saine the petitioner has failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA evidence had been obtained from any of the requested items. Moreover, with regard to the fourth prong of the statute, this court finds petitioner's current petition is designed solely to delay execution of judgment

in his case; and thus, he fails to meet this prong as well. Therefore, testing is not mandated. Finally, this court declines to exercise it's authority to allow discretionary testing under Tenn. Code Ann. §40-30-405.

Initially, this court finds, with regard to the criteria set forth in Tenn. Code Ann. §§ 40-30-304(2) and 40-30-305(2), certain of the requested samples are no longer in existence, or if said sample is in existence it is no longer in "such a condition that DNA Analysis may be conducted." The court will specifically address this prong of the statute with regard to those items. The court finds all other requested evidence is still in existence. While this court questions whether some of the remaining evidence outlined in the petition is in such a condition that DNA analysis may be conducted, for purposes of this court's review of the remaining items, the court finds petitioner has met prong two of the statutory requirements.

Moreover, as the appellate court made clear, when evaluating this court's denial of petitioner's 2004 request for DNA Analysis, the testing sought by the petitioner can only be used to compare with the petitioner's own DNA and the DNA of the victim and either identify the petitioner as the contributing source or exclude him as the source of biological materials found on certain pieces of evidence related to the crime. As the Court of Criminal Appeals previously made clear, the testing can not be used to identify some third party that petitioner now contends was involved in the crime or some "phantom" defendant found in a database. The statute and the case simply do not

contemplate such a result. The court will now separately address each of petitioner's requests.

A. Blood and Hair found on Defendant's Car

Assistant District Attorney General, John Campbell informed this court on May 23, 2006 that, due to a malfunction in the evidence storage freezer at the University of Tennessee in 1990, the blood and hair recovered from the defendant's car were destroyed and no longer exist for testing. This court finds no reason to doubt the validity of these claims. As an officer of this court, Assistant District Attorney General Campbell credibility on this issue is accepted by the court. Moreover, Shelby County District Attorney Bill Gibbons and the attorney who tried this case, Assistant District Attorney General Carter, were present at the hearing and similarly asserted that to their knowledge the evidence has been destroyed. Certainly, these individuals are in a unique position to know whether or not certain evidence still exists and can corroborate those assertions with the appropriate authorities.

B. Piece of Victim's Fingernail

Assistant District Attorney General Campbell also informed this court that the broken fingernail of the victim requested by Alley was never recovered and thus does not exist for testing. Campbell also stated that had there ever been such a piece of evidence,

it too would have been stored in the evidence freezer at UT; and, thus, would have been destroyed in 1990 along with the other evidence.

C. Previous Samples Taken From Victim and Defendant for Comparison and Swabs Taken From the Victim's Body

Likewise, it appears that the samples taken from the victim and from the defendant at the time of the investigation in this case were lost during the 1990 freezer malfunction as were the swabs taken from the victim's body.

Nevertheless, this court previously reviewed a request by petitioner for DNA Analysis of certain swabs of bodily fluid taken from the victim and found:

> this court notes that it is unclear whether any material for testing exists in the swabs. Documents submitted from the chemical and pathology laboratory utilized by the State in analyzing these materials for trial indicates that on some samples there was a "weak positive" indicating the presence of "acid phosphates" or "H substance." The petitioner contends this indicates the presence of semen. However, the State indicates that these substances could be fluids from the victim and do not indicate the presence of semen. Specifically, the State argues that women often have "weak positives" for acid phosphotate and further argues that the term "H substance" refers to the blood type O, the same blood type as the victim. Regardless, we find that even if the sample is sufficient for DNA testing, the petitioner has still failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted if testing reveals the presence of another person's bodily fluid on the nasal, oral, rectal or vaginal areas of the victim or on the victim's inner thighs.
>
> As the State argues, evidence of another person's semen could merely have been evidence of a prior consensual sexual encounter. Again, this court reiterates that the State's theory at trial was not that the victim was raped by penile penetration. Rather, the theory was that the victim was essentially sexually mutilated through the insertion of the tree branch into her vagina. Thus, in light of the fact that the petitioner gave a detailed confession to the crime; drove officers, who were unfamiliar with the crime scene, to the location where the body was found and to

> the place, which was some distance away, where he had broken off the tree limb; the insanity defense asserted by the petitioner at trial and on appeal; the testimony from the three individuals who identified the petitioner's car as the vehicle used in the abduction, both by sight and sound; the fact that victim's bloody hair was found in the victim's vehicle and her blood; matching her type found on the victim's door and the medical testimony regarding the insertion of the tree limb into the victim, it simple is not "reasonable" to conclude that, even if the DNA of the samples revealed semen from another individual present on the victim, the State would not have sought prosecution or the jury would not have convicted the petitioner.

It seems clear the swabs are no longer in existence. However, even if they were, the Court sees no reason to reach a different conclusion at this time.

D. Hair, Blood, Body Fluids found on Tree Limb

Next, Mr. Campbell explains that the tree limb used to rape, brutalize and kill the victim was stored in an evidence "bin" in custody of the Criminal Court Clerk. Mr. Campbell stated that the tree limb has been in this been, unsealed, open to the public and the elements for twenty years. The branch apparently is stored along with other evidence in this case. Despite defense counsel's arguments that such contamination has no effect on the potential DNA that may be recovered from the limb, this court finds that any such results would be highly suspect given the conditions that evidence has been in for twenty years. Moreover, this court previously ruled on this request in 2004 and found:

> Again, this court notes that victim was found in a public park and the tree limb which was utilized to rape and mutilate the victim was also taken from a public place. There was no testimony at trial regarding the hair found on the tree limb. Therefore, it was not a primary factor in proving the petitioner's guilt. Thus, given the testimony and evidence introduced at trial regarding the petitioner's culpability and medical testimony about the victim's death, this court finds that even if DNA analysis established that the hair on the limb did not belong to the petitioner or the victim, petitioner has failed to demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted.

This court notes that petitioner is now requested testing for blood and fluids found on the branch, not just the hairs that are allegedly there. However, this court notes that the only testimony regarding fluids found on the tree limb came from the medical examiner who testified that their was blood on the portion of the tree limb that was protruding from between the victim's legs. He stated that the blood and other fluids had come from the victim. He explained that the tree limb had been inserted, withdrawn and reinserted at least twice and as many as five or six times. He also explained that due to the wound track the limb left he could tell that at one point a portion of the limb that he could visibly see had once been inserted into the victim. Thus, the blood on the stick most likely came from the victim. This court finds petitioner's argument that the blood can now be tested after twenty years of exposure to the elements and the proposition that even if it were suitable for testing, the blood might belong to someone other than the victim preposterous. With regard to the stain the petitioner contends "might" be semen, as the State explained the limb has been loose and exposed for nearly twenty years; thus, it is just as likely the purported semen stain is actually some other substance. Finally, certainly, the contamination of the evidence would affect an examiner's ability to get an accurate profile from skin cells taken from the limb, if any such material even still exists on the limb.

As to the proposition that a reasonable probability exists that such evidence, if it excluded the defendant, would have resulted in either the State not seeking prosecution or petitioner not being convicted, this court finds that, with regard to the skin cells and hair,

given the fact that the limb was taken from a public park, this argument is without merit. Moreover, given the medical examiner's testimony regarding the blood evidence on the limb, this court finds it unlikely the State would have forgone prosecution or the jury not convicted had DNA testing excluded defendant as the blood source. Finally, arguably had semen not belonging to the defendant been found on the limb, the question becomes a more difficult one. However, since the State's theory was not one of penile penetration and since the defendant claims he did not penetrate the victim with his penis such a result would not necessarily have precluded prosecution nor resulted in acquittal. It is likely that had the victim had consensual sex that some semen from the consensual act might have been transferred to the limb upon insertion. Thus, this court finds that given the breadth of incriminating proof at trial, even this result would not meet the first prong of the statute.

Nevertheless, even if such evidence were suitable for testing and there was a reasonable probability that the petitioner would not have been convicted if the results demonstrated the limb had blood containing a DNA profile that excluded both he and the victim, this court finds that the application for analysis of this evidence is not made for the purpose of demonstrating innocence but to unreasonably delay the execution of petitioner's sentence. Thus, the petitioner fails to meet the statutory prerequisites for testing with regard to the tree limb.

E. Blood on Victim's Shoes

Paulette Sutton, an expert in serology testified at trial and stated that she tested the shoes of the victim for the presence of blood and found no blood on either shoe. (*See* Trial Transcript, page 845). Ms. Sutton stated that when tested for blood the shoes showed a presumptive negative. Petitioner has given this court no reason to doubt Ms. Sutton's testimony. Although, the petitioner now contends their expert identified what "may" be blood on the shoe, this court is unconvinced. Thus, this court finds petitioner has failed to demonstrate such evidence exists for testing. Nevertheless this court will also evaluate the evidence under with regard to its potential exculpatory results. Even if the petitioner could demonstrate through testing that there is blood on the shoe and the blood does not belong to him, there is no reasonable probability that such a result would have precluded prosecution or conviction. The blood is likely from the victim. Even if the petitioner, were to find the blood was from an unknown male source, this information is of little use. As previously discussed the Tennessee Statute and the case law interpreting and applying it do not allow for independent third party comparisons. Furthermore, as this court has noted, the victim lived and worked in a public place. The blood on her shoe could have come from anyone that she routinely came in contact with or from the roadside where she frequently ran. Thus, petitioner also fails to meet the first prong of the statute.

F. Paper From Tree Branch

Petitioner contends the tree branch used to rape and kill the victim was at some point wrapped in paper and the paper has stains on it that appear to be a mixture of blood and semen. It is unclear to the court whether the paper is even still in existence. However, even if the paper exists, it is certainly not clear that the stains are a mixture of blood and semen. Again, even if the semen on the paper was tested and found not to belong to the petitioner, as this court noted in it's evaluation of claims regarding the tree limb itself, it is possible semen from a consensual sexual act was transferred to the stick and then to the paper. Given the State's theory of the case and the description of events by petitioner in his confession, this court can not say that the presence of semen not belonging to petitioner would meet the first prong of the statute, in that there is not a reasonable probability that such result would have led the State to forgo prosecution or the jury to acquit petitioner of the kidnapping, rape and murder.

It appears the remaining items, requested by petitioner, exist for testing and have not previously been tested. While it appears Paulette Sutton, a serology expert, tested certain items for the presence of blood or seminal fluids, it does not appear any DNA analysis was conducted. The same is true for Lahren. Initially, Lahren explained that hair analysis does not allow an examiner to say that two "matching" samples are exactly the same; rather, the examiner determines that the two samples share the same microscopic characteristics. Obviously, this is not a sophisticated a technique as DNA analysis. However, with regard to both Lahren and Sutton's statements that certain

samples were insufficient to allow meaningful comparison, it calls into question whether or not such samples would be sufficient for DNA analysis. Nevertheless, since there has not been sufficient proof to contradict the assertion that the samples are sufficient for DNA testing, for purposes of evaluating the statutory criteria, this court will assume said samples are of a sufficient quantity and condition to be tested.

Thus, this court will evaluate each item using under the first prong of the statute. First the court will examine each item separately to determine if a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis. Next, the court will consider petitioner's argument that redundant DNA would result in overwhelming exculpatory evidence to the point that petitioner would not have been prosecuted or convicted.

G. Red Underwear

Petitioner contends that testing should be conducted on a pair of red underwear found at the scene. He contends that although trial testimony indicated there was no semen or blood found on the underwear, the underwear can be tested for skin cells or other habitual wearer DNA to identify the person who wore the underwear.

This court initially notes that both the petitioner and the state misstate the significance of the red underwear found at the scene. Contrary to the State's assertion, the red underwear was found in relatively close proximately to the scene where the

victim's body was found and was referenced by the prosecutor in closing arguments. However, also contrary to the petitioner's assertions, the underwear was not conclusively linked to petitioner at trial. There were suggestions that the underwear did not belong to the victim due to the size differential of the two pairs of underwear, the one known to belong to the victim and the red pair, whose owner was unknown. Many witnesses compared the two by size for the first time in court. However, some witnesses described the underwear as women's underwear, some stated they were unsure whether the underwear was mail or female underwear. While it did become clear that the State did not believe the underwear belonged to the victim, their ability to associate the underwear to the petitioner was not as strong as petitioner's counsel suggests.

Perhaps more important is the fact that Paulette Sutton, the serology expert, testified that she examined the underwear and did not find the presence of blood or semen. *See* Trial Transcript, page 845-46. Additionally, there was considerable evidence presented that there were other trash items found in an around the crime scene. While the petitioner, contends the State's argument that the underwear was unrelated to the crime scene is disingenuous, this court must consider the proof from the whole trial and how this piece of evidence fits before determining whether testing should be allowed. This court gives considerable weight to the potential effect on the jury that exculpatory results might have with regard to this particular piece of evidence. However, given the overwhelming evidence against the defendant and the fact that the State never specifically tied the underwear to the defendant at trial, this court finds petitioner has

failed to show there is a reasonable probability that exculpatory results would have led the State to forego prosecution and/or resulted in petitioner not being convicted.

This is court is particularly convinced of the limited effect of this evidence given what appears to be an acknowledgement on the part of petitioner's counsel that this evidence only really has significance if testing not only excludes petitioner, but is allowed to be compared either with the victim's ex-boyfriend or some third party database defendant. As this court has previously noted, such comparison is not allowed under the Tennessee statute.

Moreover, even if the petitioner has met the first, second and third prongs of the statute with regard to this piece of evidence, this court still finds that petitioner fails to meet the fourth prong of the statute. This evidence was available from the beginning of trial and more importantly was available in 2004 at the time of petitioner's first petition for DNA Analysis. This court finds that the sole purpose for now seeking examination of this evidence is to delay petitioner's execution. Thus, the request fails to meet the fourth prong of the statute.

H. Victim's Red T-Shirt

Petitioner contends he should be allowed to test the victim's red t-shirt for DNA. He contends the 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. Additionally, he contends the shirt has a "possible" bloodstain on the back as well as perspiration.

Initially, this court notes that Paulette Sutton, performed tests on the victim's clothing to determine if there was the presence of blood, semen or other bodily fluids and found no such substances on any of the victim's clothing. *See* Trial Transcript, page 839. Thus, this court finds petitioner's assertion that stains are present on victim's shirt with biological worth highly suspect, especially in light of the fact that the shirt has been in the evidence room with other items for nearly twenty years. Nonetheless, this court will evaluate petitioner's claims under the first prong of the statute.

Initially, this court notes that there is no way to demonstrate that the purported stain is associated with the crime. It could have just as easily predated the crime; and could also be of some nature other than biological material. However, for purposes of petitioner's request, this court will assume that there are biological materials on the victim's shirt that do not belong to the defendant. It appears from petitioner's argument that he claims the stains are saliva from the perpetrator biting the victim's breast. However, assuming even that the stains are of the most exculpatory nature – i.e. saliva not belonging to the petitioner, given the proof in this case, this court finds there is not a reasonable probability that the defendant would not have been prosecuted or convicted. The petitioner has continued to try to implicate the victim's boyfriend; however, any such stain could have been left during a consensual sexual encounter. Moreover, given the fact that the defendant gave a lengthy confession, a detailed walk through of the crime

scene, and continued to admit his guilt to his wife even after he was in jail, it is not likely that this information would have prevented petitioner's prosecution or conviction.

I. Fluid Stained Grass recovered from beneath the vaginal area of the victim

Petitioner contends he should be allowed to test grass that was recovered from beneath the victim's vaginal area which might contain bodily fluids. Testimony at trial indicates that some of the samples taken were discarded due to mold. *See* Trial Transcript, page 850. Whether or not other samples remain in a sufficient state to allow testing is unclear. This court notes its concern that this type of sample might break down over time and been unsuitable for testing. However, this court finds, for purposes of this evaluation, that petitioner has satisfied the second prong of the statute. Nevertheless, this court finds that, even if the specimens found on the grass do not belong to the victim or the defendant, there still is not a reasonable probability that this evidence would have precluded petitioner's prosecution or conviction. As this court has stated many time, the proof of petitioner's guilt was extensive and the area where the body found was a very public place. Thus, given these unique circumstances and the proof of petitioner's guilt, this court can not say that a blade of grass with someone else's DNA being found at the scene would preclude petitioner's prosecution or conviction. As stated many times by this court, petitioner is not allowed to compare any recovered DNA to any source other than himself and the victim.

J. Victim's underwear and Victim's bra

1. Victim's underwear

Petitioner contends the crotch of the victim's underwear is stained with biological material that can be tested for DNA. This court initially notes that Paulette Sutton, the State expert on serology, found no presence of semen on the victim's underwear and also found no blood on the underwear. However, this court finds that even if her conclusions were incorrect and even if subsequent testing revealed the petitioner was not the source of any biological material, there is not a reasonable probability that such results would have precluded his prosecution or conviction.

First, this court notes that the stains could be bodily fluids from the victim or they could be fluids from a previous consensual sexual act. Since the State's theory was not one of penile penetration and the petitioner contends he did not personally penetrate the victim, this court finds it is unlikely that the fact that testing excluding the petitioner as the source of any biological material on the victim's underwear, would have a significant impact on the jury. Especially in light of the other blood evidence, eyewitness evidence, and confession linking petitioner to the crimes.

2. Victim's Bra

Petitioner contends the victim's bra contains a biological specimen on one of the cups. He contends this is very significant given the medical examiners testimony that the victim may have been bitten on her breast in the area where the stain in located. Again, this court would note Paulette Sutton found not semen or blood on the bra. However, here it appears, like with the victim's shirt, the petitioner is more concerned with potential saliva that remains on the bra. This court does not diminish the significance of such evidence; however, the court again notes that such evidence could have been left through a consensual sexual act. Given this fact and, given the evidence against the defendant; the court again finds that even if the specimen were sufficient for testing and still in good enough condition to test and such tests excluded petitioner as the source of the specimen, a reasonable probability would not exist that such a result would have precluded prosecution and/or conviction.

K. Victim's jogging Shorts

Petitioner contends the jogging shorts contain a possible blood stain. However, at trial Paulette Sutton found no such stain. *See* Trial Transcript, page 839. It is obvious to the court that the stain could belong to the victim; but even excluding the victim, this court finds the defendant does not meet the statutory requirements. Like the alleged stain on the shirt, this court finds the stain on the shorts could have predated the crimes and could be the result of consensual sexual activity. Thus, even if there is such a specimen

and testing reveals it is consistent with a source other than the defendant, this court finds there is not a reasonable probability that prosecution and/or conviction would have occurred in this case.

L. Victim's Shoes

1. Left Shoe

Next the petitioner seeks DNA testing for a pubic hair found on the sole of the victim's left shoe and a potential blood stain found on the front right portion of the shoe. This court initially notes that Craig Lahern an expert in the field of hair examination and comparison stated that the hair on the bottom of the victim's shoe belonged to the victim. Thus, this court finds the petitioner has failed to establish a reasonable probability that he would not have been prosecuted or convicted if this evidence were tested. Even if Analysis produced exculpatory results, a prospect that is very unlikely given Lahern's findings, petitioner would not succeed in meeting the statutory requirements for testing.

In light of this testimony, the circumstances of the offense, and the petitioner's confession, this court finds that the petitioner has failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted should testing of this sample provide exculpatory DNA evidence. Again, this evidence was not a primary factor in proving petitioner's guilt, and exculpatory results, while consistent with

petitioner's current assertions that a third party was involved, are not consistent with the overwhelming proof presented at trial.

This court notes that the victim lived in public barracks on a Marine Base, was abducted while running along a semi-public roadway and was raped and killed in a public park, it is not inconceivable that she may have picked up a stray hair from the barracks or the road or the grassy area where her body was found. Thus, the value of analysis that excludes defendant as the source is minimal given the circumstances of the crime and the living arrangements and habits of the victim. Thus, petitioner simply has not demonstrated a reasonable probability that exculpatory results would affect his conviction.

[With regard to the alleged blood evidence present on the shoe, see the court's discussion above]

2. Right Shoe

Petitioner contends there are three "apparent stains" on the sole of the victim's right shoe from dried fluid as well as possible hair stuck to the shoelace. This court initially notes that there is no mention by either Lahern or Sutton at trial regarding hairs found in the victim's shoelaces; thus, this court is unclear as to whether any such hairs exist. The State argued at the hearing that, if such hairs exist they must have been deposited after the crime, because they were not found by the persons her tested and

examined the evidence prior to trial. This court founds the State's proposition reasonable.

However, again even assuming such hairs exist and assuming that they do not belong to the defendant but a third person, this court reiterates its position that such evidence would not create a reasonable probability that the petitioner would not have been prosecuted or convicted.

The victim lived in a public place; often wore the shoes in question for running all over the military base and her body was found in a public park. She could have picked the hairs up anywhere. Given the wealth of evidence against the defendant such information would have likely had a minimal effect on the jury. The same can be said for the alleged fluids found on the soles of the shoes. Petitioner can not say what the substance is or if it is even appropriate for testing. It is just as probable that the substance is something other than semen. Again, the victim had been jogging along the roadway; she could have come in contact with any number of substances. Moreover, there is no mention by Paulette Sutton regarding any such stains on the victim's shoes.

M. Victim's Sock

Petitioner contends there are hairs on one of the victim's socks as well as blood. Initially, this court notes that Paulette Sutton tested the sock for the presence of blood and testified at trial that no blood was found. *(See* Trial Transcript, page 844). Thus, this

court is not inclined to grant testing based on the alleged blood evidence. And for reasons previously stated this court finds that due to the public nature of the victim's living arrangement even assuming results excluding the defendant were found, they would not meet the statutory requirements for testing.

Petitioner also seeks DNA testing for black hairs found on the bottom of the victim's socks. This court previously ruled on this request and finds no reason to reach a different conclusion based on petitioner's current petition. In ruling on this issue in 2004 the court found:

> The State concedes that DNA analysis of the hairs would indicate that the hairs do not belong to the petitioner. However, the State argues that the victim, who lived in a Marine barracks on a Naval Base could have come in contact with the hairs long before the murder. Additionally, Lahern testified at trial that black hairs were found on the bottom of the victim's socks and that this was consistent with someone walking around in their "sock feet." Since, the petitioner is excluded from comparing the samples gathered during the investigation with those of a third party, this court fails to see what other evidence could be gathered from DNA analysis that has not previously been placed before the jury. *See* State v. Crawford, 2003 WL 21782328 (Tenn. Crim. App. August 4, 2003). Thus, considering the prosecution was aware of the exculpatory evidence and the jury was informed that the hairs came from someone other than the defendant, there is no reasonably probability that even, if DNA analysis produced exculpatory results, the petitioner would not have been prosecuted or convicted.

Moreover, once again this court agree with the State's proposition that if there are new hairs on the socks that were not found by Sutton or Lahern, it is just as likely they were deposited there by court personnel sometime over the last twenty years.

N. Exercise Belt

Petitioner contends that the victim's exercise belt contains biological specimens and hairs that are suitable for DNA testing. This court initially notes that Paula Sutton, the State's expert serology witness, testified at trial that the belt contained no blood. However, she did not specify whether the belt contain other substances. Nor does the petitioner specify what "biological" substances he believes the belt contains. Thus, it is unclear what potential results might be elicited from testing these materials. However, the court will review this evidence under the first prong of the statute. For purposes of ruling on this point, the court must assume such specimens would reveal genetic material that excludes the defendant. This court does note that is quite likely that the material on the belt is sweat, or nasal secretions or some other biological specimen belonging to the victim. Nevertheless, in evaluating petitioner's claim, this court will assume they are not from either the defendant or the victim. However, since this court is unclear what exact "biological" material the petitioner portends is on the belt, the court finds a reasonable probability does not exist that the exclusion of both defendant and victim as depositors of the substances would preclude the petitioner's prosecution or conviction. If the material is sweat or even nasal secretions it is possible the victim loaned the belt to others to use for exercise and any number of people could have deposited biological material on the belt. Additionally, as previously mentioned the victim was the resident of a public barracks and could have contacted the materials there.

Next, the petitioner asks to examine the hairs found on the belt. This court previously ruled on this request and found:

> [t]he petitioner seeks testing of the medium brown body hair found on the victim's waistband. Petitioner contends that if tests revealed the hairs belonged to someone other than himself or the victim, then he would not have been prosecuted or convicted. This court disagrees. The victim lived in a marine barracks on a Navy Base. Her body was found in a public park near the Base. At trial, the jury was informed, through the testimony of Craig Lahern, that hairs were discovered on the victim's waistband. They were informed that the hairs belonged to a Caucasian person and were medium-brown in color. However, because arm and leg hairs do not contain microscopic tendencies allowing for comparison Lahern could not determine whether the hairs belonged to the victim, the defendant or some unknown party. While it is true, DNA analysis may now be able to exclude the defendant and the victim as the source of these hairs, such an outcome would not change the results of the trial, especially in light of the fact that the defendant gave a lengthy and detailed confession, including accompanying law enforcement to the scene where he identified the place where the body was found and the tree in which he extracted the limb used to penetrate the victim. Unlike Shuttle, throughout the direct appeal and post-conviction review of his convictions and sentence the defendant has never indicated that his statements were false or that someone other than himself committed the rape and murder. Nor does this court now have either a written assertion or verbal testimony from the petitioner asserting he was not the perpetrator. However, petitioner's counsel has now asserted a theory that someone acquainted with the victim was the actual perpetrator based on extraneous proof alleging newly discovered statements and evidence which tend to implicate the alleged perpetrator. Thus, the petitioner asserts that, if the hairs on the victim's waistband are not that of the victim or the defendant, then that fact taken together with the evidence it now submits inculpates the alleged third party, would establish the petitioner did not commit the rape and murder.

This court finds nothing in petitioner's current argument to warrant a different conclusion.

O. Beer Bottles

Defendant contends numerous beer bottles were found near the body; and thus he should be allowed to test them for traces of DNA. This request completely fails to meet the first prong of the statute. In reality the beer bottles were not found close to the body. This court realizes that "near" is a relative term; but the trial transcript reveals that the beer bottles were actually "not in the particular area of the scene." *See* Trial Transcript, page 464-65. The bottles were found in an area resembling a picnic area and were located both in and out of the trashcan. Id. Further testimony revealed that the bottles were found approximately 1/2 to 3/4 of a mile away from the body. Id. at 468.

The bottles and the body were found in a public area. Clearly, even if the bottles showed the presence of DNA from someone other than the defendant or victim, given the overwhelming proof of the defendant's guilt, as outlined in this order, this fact would not lead to a reasonable probability that the defendant would not have been prosecuted or convicted.

At the hearing on this matter, the petitioner's counsel seemed to indicate that they were also seeking testing on unopened bee bottles that had previously been examined for fingerprints. Petitioner contends the prints did not match his own and that he should now be allowed to use those prints to run through certain databases to see if he could get a match; a match that he would then presumable try to link to the requested DNA testing.

The court finds such a request is not appropriate under the Post Conviction DNA Analysis Act.

P. Three Styrofoam cups

Petitioner contends he should be allowed to test three Styrofoam cups found near the body. Initially, this court notes that testimony from the trial court indicated that the cups were sent to a lab to be tested for the presence of bodily fluids and none were found. *See* Trial Transcript, page 466. Petitioner has given the court no reason to doubt that the cups either contain biological material or any such samples are insufficient for testing. Nevertheless, even if tests could be performed and such tests excluded the defendant as the source of the specimen, given the overwhelming proof in this case, the court finds there is not a reasonable probability that the petitioner would not have been prosecuted or convicted. In addition to the incriminating evidence already mentioned by this court, of additional significance is the fact that the victim's blood and hair were found on the defendant's car, blood was found on his clothing, and a napkin found at the scene resembled one found in the defendant's car.

REDUNDANT DNA

Finally, petitioner argues that, while one single piece of exculpatory evidence, alone may not have been enough to meet the statutory requirements, if testing showed many pieces of evidence shared common DNA that did not belong to the defendant or the

victim, then there is a reasonable probability that he would not have been prosecuted and/or convicted. Moreover, the petitioner contends he could then take that DNA profile and compare it to (1) the victim's ex-boyfriend; or (2) any number of DNA databases.

As this court has previously stated, 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. 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). In upholding this court's denial of petitioner's initial request for DNA Analysis, 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). The Court then went on to hold that the Act "does not permit DNA analysis to be performed upon a third party. Rather the results of the DNA testing must stand alone. Id.

Additionally, this court does not find that is appropriate under the statute to examine the extraneous information and evidence sought to be presented by the petitioner. In particular, this court is not inclined to accept evidence that petitioner

contends inculpates another individual. This court ruled on similar information during the Petitioner's 2004 hearing and again finds nothing in the statute or case law which allows this type of presentation.

Moreover, because of the unique circumstances of this case, this court finds petitioner's argument unpersuasive. In particular, this court once again notes that the victim lived in a marine barracks and had a very regimented schedule. She likely came in contact with the same people on a daily basis; thus, multiple deposits of biological material like hairs would not be uncommon

UNREAONABLE DELAY OF EXUECTION OF SENTENCE

Although, with regard to certain pieces of evidence, this court has commented throughout this order about petitioner's ability to meet the fourth requirement of the statute, the court feels the need in this case to make further definitive comments about it's holding with regard to subsection (4) of Tenn. Code Ann. §40-30-304 and 305. This court has serious questions regarding the motivations of the petitioner for raising this issue at this time. The petitioner sought to present much of these claims hours before his execution and has previously had the opportunity to litigate a portion of his request before this court, in a 2004 Petition for Post Conviction DNA Analysis. A Petition which was also filed close to the time of his pending execution. 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 samples sought for testing by

this petitioner have been available since before the trial. Much of the documentation supporting their request was available at trial. Throughout the direct appeal and the post-conviction of this case, petitioner has asserted that he committed the alleged acts, but was not sane at the time of their commission. Thus, the timing of petitioner's allegations is highly suspect.

Thus, unlike this court's previous order where the court declined to reach this issue because it found petitioner failed to meet other prongs of the statute, this court specifically finds the Petition fails under the fourth prong of the statute. This court does not believe petitioner seeks relief under the Act for the purpose of demonstrating actual innocence. Rather this court if firmly convinced that the motivations of petitioner are quite different. It is clear to this court that petitioner seeks to delay his execution with this last minute successive petition for Post Conviction DNA Analysis. Despite counsel's chastisement of the Assistant District Attorney General and this court for not being as enlightened as the non-legal Board of Probation and Parole, this court finds petitioner's admonitions ring false.[4] In addition to the evidence against defendant at trial, his failure to ever assert his innocence until the first petition for DNA Analysis, in 2004, which was also filed very close to the execution date, many of the treating psychologist and psychiatrists who testified at the petitioner's trial described him as very manipulative. A fact that was evidenced by the letters petitioner wrote his wife while incarcerated which discussed how he would "try for insanity" and "pray" for the jury to "buy" that defense. This court finds Mr. Alley's current petition is just another in a long line of manipulative

[4] *See* Petitioner's Reply to State's Response to Petition for DNA Testing, pages 1-2. Petitioner contends the State "fails to deal with the fundamental reality that the Board of Probation and Parole *clearly understood* when it recommended testing." (emphasis added)

actions designed to spare his life. Thus, regardless of the petitioner's ability to meet any of the other listed statutory criteria, this court finds he clearly does not meet the Tenn. Code Ann. § 40-30-304 subsection 4.

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, 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, with regard to each request, 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 judgments of conviction. Given the petitioner's statement regarding the circumstances of the murder, and the corroborative witness testimony and medical testimony, it is unlikely that the jury would have returned a verdict finding the petitioner guilty of an offense lesser than those for which he was convicted, even if DNA analysis, of any of the requested items, had produced results excluding the petitioner and the victim. Nor as previously indicated, is it likely the jury would have acquitted the petitioner on any of the charged offenses. Finally, despite the petitioner's argument to the contrary, given the brutal nature of the

offense and extensive injuries to the victim, it is not likely that the jury would have rendered a sentence less than death, even if they had heard evidence that DNA analysis excluded petitioner and the victim as the source for the requested samples.

CONCLUSION

Having found in part that petitioner failed to demonstrate certain pieces of evidence still exist and are in such a condition that DNA analysis may be conducted; and having further found petitioner has 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; and having found the petition was not filed for the purpose of establishing innocence, but rather was filed for the sole purpose of postponing petitioner's execution, the Petition for Post-Conviction DNA Analysis is, hereby, **DENIED.**

_____ _____

Date Judge W. Otis Higgs, Division II.