IN THE CRIMINAL COURT OF TENNESSEE
FOR THE 30th JUDICIAL DISTIRCT, AT MEMPHIS
DIVISION I

PERVIS PAYNE,	)	
Petitioner	)	
	)	**No. P-09594**
v.	)	**Capital Case**
	)	**Post-Conviction**
STATE OF TENNESSEE,	)	
Respondent.	)	

ORDER GRANTING IN PART "PETITION FOR POST-CONVICTION DNA ANALYSIS"

I. Introduction

This matter came before the Court September 1, 2020, for a hearing on the above-referenced petition. The Petitioner, Pervis Payne, asserts he is entitled to testing of certain physical evidence under the Post-Conviction DNA Analysis Act of 2001, Tennessee Code Annotated sections 40-30-301 through -313, while the State argues the Petitioner has not established he is entitled to such testing. Having conducted a hearing and after reviewing the parties' filings and the relevant authorities, the Court concludes the Petitioner has established he is entitled to DNA testing. Accordingly, the petition is GRANTED, as detailed below.

II. Procedural History

A. Presiding Judges

The Hon. Bernie Weinman, former Judge of Criminal Court, Division I, presided over Mr. Payne's trial and initial post-conviction proceedings. Judge Weinman retired in

2004. The Hon. John P. Colton, former Judge of Criminal Court, Division III, presided over the Petitioner's prior post-conviction DNA proceedings in 2006 and 2007. Judge Colton's successor in Division III, Judge Robert Carter, presided over Mr. Payne's first motion to reopen his post-conviction proceedings. That motion was filed in 2012 and was later amended to include a petition for writ of error coram nobis. The undersigned Judge has presided over all matters involving Petitioner beginning with Mr. Payne's second motion to reopen his post-conviction proceedings, filed in May 2015.

B. Trial and Initial Post-Conviction Proceedings

A Shelby County jury convicted Petitioner of two counts of first degree murder for the 1987 stabbing deaths Charisse Christopher and her two-and-a-half-year-old daughter. The jury also found Petitioner guilty of assault with intent to commit first degree murder of Ms. Christopher's three-and-a-half-year-old son. The jury returned death sentences for each murder count. The convictions and sentences were affirmed on direct appeal. *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990) ("Payne direct appeal"); *aff'd sub nom. Payne v. Tennessee*, 501 U.S. 808 (1991).

In January 1992, Petitioner filed a timely petition for post-conviction relief. In June 1992, he filed a petition for writ of error coram nobis. After an August 1996 evidentiary hearing, the trial court denied relief in the post-conviction case. The trial court held a hearing on the coram nobis petition in January 1997, and the court denied the petition. On appeal, the Court of Criminal Appeals affirmed the trial court's rulings denying relief in both cases. *Pervis Tyrone Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670 (Tenn. Crim. App. Jan. 15, 1998). The Tennessee Supreme Court denied application for permission to appeal on June 8, 1998.

In September 2006, Mr. Payne filed a motion to compel testing of evidence under the Post-Conviction DNA Analysis Act of 2001. The petition proved unsuccessful. The litigation concerning Mr. Payne's earlier post-conviction DNA petition will be explored in greater detail below.

C. Other Collateral Proceedings

After the Petitioner was denied relief on his 2006 post-conviction DNA petition, Mr. Payne was involved in extensive litigation in an attempt to be declared intellectually disabled and ineligible for the death penalty. All attempts to prove Mr. Payne's intellectual disability proved unsuccessful. Because Mr. Payne's intellectual disability claim is not cognizable in a petition for post-conviction DNA testing, the specific procedural history associated with these causes of action will not be summarized here. Mr. Payne also sought a petition for writ of habeas corpus in federal court; this petition also proved unsuccessful. On February 24, 2020, the Tennessee Supreme Court filed an order setting Mr. Payne's execution date for December 3, 2020.

III. Summary of Evidence Linking Petitioner to Victim's Murder

The Tennessee Supreme Court summarized the evidence produced during the guilt-innocence phase of Petitioner's trial:

> Charisse Christopher was 28 years old, divorced, and lived in Hiwassee Apartments, in Millington, Tennessee, with her two children, three and one-half year old Nicholas and two and one-half year old Lacie. The building in which she lived contained four units, two downstairs and two upstairs. The resident manager, Nancy Wilson, lived in the downstairs unit immediately below the Christophers. Defendant's girlfriend, Bobbie Thomas, lived in the other upstairs unit. The inside entrance doors of the Christopher and Thomas apartments were separated by a narrow hallway. Each of the upstairs apartments had back doors in

the kitchen that led to an open porch overlooking the back yard. In the center of the porch was a metal stairway leading to the ground. There was also an inside stairway leading to the ground floor hallway and front entrance to the four-unit building.

Bobbie Thomas had spent the week visiting her mother in Arkansas but was expected to return on Saturday, 27 June 1987, and she and Defendant had planned to spend the weekend together. Prior to 3:00 p.m. on that date, Defendant had visited the Thomas apartment several times and found no one at home. On one visit he left his overnight bag, containing clothing, etc., for his weekend stay, in the hallway, near the entrance to the Thomas apartment. With the bag were three cans of Colt 45 malt liquor.

Nancy Wilson was resting in her apartment when she first heard screaming, yelling and running in the Christopher apartment above her. She heard a door banging open and shut and Charisse screaming, "get out, get out." She said it wasn't as though she was telling the intruder to get out, it was like "children, get out." The commotion began about 3:10 p.m., subsided momentarily, then began again and became "terribly loud, horribly loud." She went to the back door of her apartment, went outside and started to go to the Christopher apartment to investigate, but decided against that, and returned to her apartment and immediately called the police. She testified that she told the police she had heard blood curdling screams from the upstairs apartment and that she could not handle the situation. The dispatcher testified he received her disturbance call at 3:23 `p.m. and immediately dispatched a squad car to the Hiwassee Apartments. Mrs. Wilson went to her bathroom after calling the police. The shouting, screaming and running upstairs had stopped, but she heard footsteps go into the upstairs bath, the faucet turned on and the sound of someone washing up. Then she heard someone walk across the floor to the door of the Christopher apartment, slam the door shut and run down the steps, just as the police arrived.

Officer C.E. Owen, of the Millington Police Department, was the first officer to arrive at the Hiwassee Apartments. He was alone in a squad car when the disturbance call was assigned to Officers Beck and Brawell. Owen was only two minutes away from the Hiwassee Apartments so he decided to back them up. He parked and walked toward the front entrance. As he did so he saw through a large picture window that a black man was standing on the second floor landing of the stairwell. Owen saw him bend over and pick up an object and come down the stairs and out the front door of the building. He was carrying the overnight bag and a pair of tennis shoes. Owen testified that he was wearing a white shirt and dark colored pants and had "blood all over him. It looked like he was sweating blood." Owen assumed that a domestic fight had taken place and that the blood was that of the person he was confronting. Owen asked, "[H]ow are you doing?" Defendant responded, "I'm the complainant." Owen then asked, "What's going on up there?" At that point Defendant struck Owen with the overnight bag, dropped his tennis shoes and started running west on Biloxi Street. Owen pursued

him but Defendant outdistanced him and disappeared into another apartment complex.

Owen called for help on his walkie-talkie and Officer Boyd responded. By that time Owen had decided Defendant was not hurt and the blood was not his own—he was running too fast. Owen told Boyd that "there's something wrong at that apartment." They returned to 4516 Biloxi. Nancy Wilson had a master key and let them in the locked Christopher apartment. As soon as the door was opened they saw blood on the walls, floor—everywhere. The three bodies were on the floor of the kitchen. Boyd discovered that the boy was still breathing and called for an ambulance and reported their findings to the chief of police and the detective division. A Medic Ambulance arrived, quickly confirmed that Charisse and Lacie were dead, and departed with Nicholas. He was taken to Le Bonheur Children's Hospital in Memphis and was on the operating table there from 6:00 p.m. until 1:00 a.m., Sunday, 28 June. In addition to multiple lacerations, several stab wounds had gone completely through his body from front to back. One of those was in the middle of his abdomen. The surgeon, Dr. Sherman Hixson, testified that he had to repair and stop bleeding of the spleen, liver, large intestine, small intestine and the vena cava. During the surgery he was given 1700 cc's of blood by transfusion. Dr. Hixson estimated that his normal total blood volume should have been between 1200 and 1300 cc's. He was in intensive care for a period and had two other operations before he left the hospital, but he survived.

Charisse sustained forty-two (42) knife wounds and forty-two (42) defensive wounds on her arms and hands. The medical examiner testified that the forty-two (42) knife wounds represented forty-one (41) thrusts of the knife, "because there was one perforated wound to her left side that went through her—went through her side. In and out wounds produce two." He said no wound penetrated a very large vessel and the cause of death was bleeding from all of the wounds; there were thirteen (13) wounds "that were very serious and may have by themselves caused death. I can't be sure, but certainly the combination of all the wounds caused death." He testified that death probably occurred within, "maybe 30 minutes, that sort of time period," but that she would have been unconscious within a few minutes after the stabbing had finished.

The medical examiner testified that the cause of death of Lacie Christopher was multiple stab wounds to the chest, abdomen, back and head, a total of nine. One of the wounds cut the aorta and would have been rapidly fatal.

Defendant was located and arrested at a townhouse where a former girlfriend, Sharon Nathaniel, lived with her sisters. Defendant had attempted to hide in the Nathaniel attic. When arrested he was wearing nothing but dark pants, no shirt, no shoes. As he descended the stairs from the attic he said to the officers, "Man, I ain't killed no woman." Officer Beck said that at the time of his arrest he had "a wild look about him. His pupils were contracted. He was foaming at the mouth, saliva. He appeared to be very nervous. He was breathing real rapid." A

search of his pockets revealed a "pony pack" with white residue in it. A toxicologist testified that the white residue tested positive for cocaine. They also found on his person a B & D syringe wrapper and an orange cap from a hypodermic syringe. There was blood on his pants and on his body and he had three or four scratches across his chest. He was wearing a gold Helbrose wristwatch that had bloodstains on it. The weekend bag that he struck Officer Owen with was found in a dumpster in the area. It contained the bloody white shirt he was wearing when Owen saw him at the Hiwassee Apartments, a blue shirt and other shirts.

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

Charisse's body was found on the kitchen floor on her back, her legs fully extended. The right side of her upper body was against the wall, and the outside of her right leg was almost against the back door that opened onto the back porch. Laura Picard was visiting her sister, Helen Truman, who lived in the downstairs apartment across from Nancy Wilson. She was sunbathing in the back yard and heard a noise like a person moaning coming from the Christopher apartment followed by the back door slamming three or four times, "but it didn't want to shut. And this hand, a dark-colored hand with a gold watch, kept trying to shut that back door." It was about that time that Nancy Wilson came out of her back door looking around. Mrs. Picard testified that she knew the manager was looking for the source of the noise and when Mrs. Wilson looked at her she pointed to the Christopher apartment. She said that it was just a few minutes later that the police arrived. She did not have a watch on at the time. She testified that the dark-colored hand she saw three or four times was at a level between the door knob and the bottom of the door.

The medical examiner testified that Charisse was menstruating and a specimen from her vagina tested positive for acid phosphatase. He said that result was consistent with the presence of semen, but not conclusive, absent sperm, and no sperm was found. A used tampon was found on the floor near her knee. The murder weapon, a bloody butcher knife, was found at the feet of Lacie, whose body was also on the kitchen floor near her mother. A kitchen drawer nearby was

partially open.

Defendant testified. His defense was that he did not harm any of the Christophers; that he saw a black man descend the inside stairs, race by him and disappear out the front door of the building, as he returned to pick up his bag and beer before proceeding to his friend Sharon Nathaniel's to await the arrival of Bobby Thomas. He said that as the unidentified intruder bounded down the stairs, attired in a white tropical shirt that was longer than his shorts, he dropped change and miscellaneous papers on the stairs which Defendant picked up and put in his pocket as he continued up the stairs to the second floor landing to retrieve his bag and beer. When he reached the landing he heard a baby crying and a faint call for help and saw the door was ajar. He said curiosity motivated him to enter the Christopher apartment and after saying he was "coming in" and "eased the door on back," he described what he saw and his first actions as follows:

> I saw the worst thing I ever saw in my life and like my breath just had—had tooken—just took out of me. You know, I didn't know what to do. And I put my hand over my mouth and walked up closer to it. And she was looking at me. She had the knife in her throat with her hand on the knife like she had been trying to get it out and her mouth was just moving but words had faded away. And I didn't know what to do. I was about ready to get sick, about ready to vomit. And so I ran closer—I saw a phone on the wall and I lift and got the phone on the wall. I said don't worry. I said don't worry. I'm going to get help. Don't worry. Don't worry. And I got ready to grab it—the phone but I didn't know no number to call. I didn't know nothing. I didn't know nothing about no number or—I just start trying to twist numbers. I didn't know nothing. And she was watching my movement in the kitchen, like she—I had saw her. It had been almost a year off and on in the back yard because her kids had played with Bobbie's kids. And I have seen her before. She looked at me like I know you, you know. And I didn't know what to do. I couldn't leave her. I couldn't leave her because she needed—she needed help. I was raised up to help and I had to help her.

He described how he pulled the knife out of her neck, almost vomited, then kneeled down by the baby girl, had the feeling she was already dead; said the little boy was on his knees crying, he told him not to cry he was going to get help. His explanation of the blood on his shirt, pants, tennis shoes, body, etc., was that when he pulled the knife out of her neck, "she reached up and grab me and hold me, like she was wanting me to help her ...", that in walking and kneeling on the bloody floor and touching the two babies he got blood all over his clothes. He said he went to the kitchen sink, probably twice, to get water to drink when he thought he was going to vomit, but he denied that he went into the bathroom at any time or used the bathroom lavatory to wash up, as Nancy Wilson testified she heard

someone do after the violence subsided.

He was then suddenly motivated to leave and seek help and he described his exit from the apartment as follows:

> And I left. My motivation was going and banging on some doors, just to knock on some doors and tell someone need help, somebody call somebody, call the ambulance, call somebody. And when I—as soon as I left out the door I saw a police car, and some other feeling just went all over me and just panicked, just like, oh, look at this. I'm coming out of here with blood on me and everything. It going to look like I done this crime.

The shoulder strap on the left shoulder of the blue shirt he was wearing while in the victim's apartment was torn, a fact he did not seem to realize and could not remember when it happened. He said he ran because the officer did not seem to believe him. He claimed that he had the Colt 45 beer with him as he ran; that the open can with beer in it spilled into the sack, as he ran from Owen, the bottom of the sack broke, the beer and tennis shoes were scattered along his route. He said that what witnesses had described as scratches were stretch marks from lifting weights.

Defendant presented five character witnesses who testified that Defendant's reputation for truth and veracity was good. Ruth Wakefield Bell testified that she had known Defendant all of his life. She was age 40 and lived in the same block on Biloxi as the Hiwassee Apartments, across the street. She said that on the Saturday afternoon of the murders, Defendant knocked on her door, identified himself and she looked out her bedroom window and saw him, but she did not let him in—she was upset with her boyfriend and did not want to see or "entertain" anyone. She denied that she was afraid to let him in—or that there was anything unusual about his appearance. She estimated that it was about twenty minutes after he knocked on her door that she saw police cars and an ambulance across the street. Defendant testified that he knocked on her door just before he decided to go to Sharon Nathaniels and went in the Hiwassee Apartments to pick up his bag and beer.

During the cross-examination of Defendant, he was asked and answered as follows:

> Q. Can you explain why there's bloodstains on your left leg?
>
> A. Left leg?
>
> Q. Yes, sir.
>
> A. Evidently it probably came—had to come from when she—

> when she hit the wall. When she reached up and grabbed me.
>
> Q. When she hit the wall?
>
> A. When she—when she hit—when she hit when I got ready to run up—when I got ready to vomit.
>
> Q. When she hit the wall she got blood on you?
>
> A. When she splashed. It was blood—a lot of blood on the floor.
>
> Q. She got blood on you when she hit the wall. Is that what you said?
>
> A. She hit against the wall when she fell back.
>
> Q. Is that what you said, sir, that she got blood on you when she hit the wall?
>
> A. I didn't say she got blood on me when she hit the wall.
>
> Q. Isn't that what you said just a moment ago, sir?
>
> A. That ain't—that's not what I said.

> Blood was smeared on the wall of the kitchen next to the back door and on the door itself, from doorknob height to the floor and laterally approximately six or seven feet.

Payne direct appeal, 791 S.W.2d at 11-15.

IV. 2006 Petition for Post-Conviction DNA Testing

In his earlier post-conviction DNA petition, Mr. Payne sought testing of (1) bloody clothing he wore at the time of his arrest; (2) a bloody shirt found in his discarded overnight bag; (3) bloody clothing worn by the victims; and (4) vaginal swabs taken from Ms. Christopher. The Court of Criminal Appeals summarized the parties' 2006 arguments as follows:

> Specifically, [Mr. Payne] argued that another individual preceded him in the Christophers' apartment. The Petitioner stated that DNA testing on these items

> has the potential to corroborate his claim of innocence. He further maintained that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis. Specifically, the Petitioner argued that exculpatory results could include (1) the presence of third party DNA on the various items of bloody clothing; (2) the absence of the Petitioner's DNA on the vaginal swabs of Charisse Christopher; (3) the presence of third party DNA on the vaginal swabs taken from Charisse Christopher; and (4) the presence of the same third party's DNA on both the various items of bloody clothing and the vaginal swabs from Charisse Christopher. The Petitioner also contends that the evidence sought to be tested was still in existence and was in such condition that DNA analysis may be conducted. Finally, the Petitioner asserted that the evidence had never been subjected to DNA analysis.
>
> On December 15, 2006, the State of Tennessee filed a response to the Petitioner's request for DNA testing. The State claimed that the Petitioner could not establish that a reasonable probability exists that the Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis. Specifically, the State asserted that the Petitioner was never charged with raping the victim, nor did the jury find that the Petitioner raped the victim. The State claimed that any DNA results would not have resulted in the Petitioner not being charged nor would it have changed the result of the trial. The State further asserted that the Petitioner's motive in filing the petition was merely an attempt to delay his execution.

Pervis Payne v. State, No. W2007-01096-CCA-R3-PD, 2007 WL 4258178, at *4 (Tenn. Crim. App. Dec. 5, 2007) ("Payne DNA opinion"), *perm. app. denied*, (Tenn. Apr. 14, 2008). On February 1, 2007, the post-conviction court[1] held a hearing at which counsel for the State made the following assertion:

> [t]he swabs that were tested and got a reaction for acid phosphatase would have been consumed by the test. If anything else, a rape kit or any similar type of evidence that was obtained by the Medical Examiner, would have been held at UT, and I found out through the last case I handled with Sedley Alley that that evidence was destroyed when the freezer that they were in broke in 1990, and it was a couple of days before people realized that it wasn't working, and by that time, the samples had spoiled and they were discarded, so anything before 1990 was lost when the freezer broke, and those items would not have been kept at the Clerk's Office, and had they

[1] As stated above, the Petitioner's trial and original post-conviction petition proceedings were held in Division I of Criminal Court. While the undersigned Judge had been appointed to the bench at the time the 2006 DNA petition was filed, the post-conviction DNA petition was assigned to Division III of Criminal Court.

> been, they probably would have not been able to have survived all those numbers of years just thrown in an unrefrigerated property room.

Payne DNA opinion, at *5. On March 29, 2007, the post-conviction court filed a written order denying the petition for DNA testing. The court's order stated, in relevant part:

> Petitioner contends that the clothing worn by both the defendant and the victims and vaginal swabs taken from the adult victim should now be subjected to DNA analysis. Petitioner contends that throughout his trial and many appeals he has maintained his innocence and put forth a "consistent and simple story" regarding his involvement in the events of June 27, 1987. He now argues that DNA testing has the potential to objectively prove or disprove his contentions. He argues that, should DNA testing indicate a third party's DNA was present at the crime, such results would corroborate his claims at trial; thereby, making his conviction and death sentence less likely. Specifically, petitioner contends testing could produce the following "range" of potentially exculpatory results: (1) the presence of a third party's DNA on various items of bloody clothing; (2) the absence of Mr. Payne's DNA on the vaginal swabs taken from the victim Charisse Christopher; (3) the presence of a third party's DNA in the vaginal swabs taken from the victim Charisse Christopher, and (4) the presence of the same third party's DNA on both the various items of blooding clothing and the vaginal swabs taken form the victim Charisse Christopher. He further contends each of these potential results, or any combination of the above, creates a reasonable probability that he would not have been prosecuted or convicted had such results been available at trial.
>
> <u>ANALYSIS</u>
>
> **I. Reasonable Probability of A Different Result**
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> The first and most crucial requirement under the Act mandates that petitioner demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis prior to trial. A reasonable probability of a different result "exists when the evidence at issue, in this case potentially favorable DNA results, undermines the confidence in the outcome of the prosecution." *Sedley Alley*. 2004 WL 1196095 at *9. Here, petitioner must demonstrate that a reasonable probability exists that, had evidence of a third party's DNA been found on the victims' clothing or on the vaginal swabs taken from Charisse Christopher, then he would not have been prosecuted; or, if prosecuted, the jury would not have convicted him of first degree murder. This court finds petitioner has failed to demonstrate such a probability exists.
>
> A. <u>Bloody Clothing</u>
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> In his petition, counsel for petitioner contends that the presence of an

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

Given the circumstances of the victims murder and the evidence presented at trial, this court can not agree with petitioner's contentions. Clearly, as petitioner's counsel seems to realize, the presence of skin, hair or some other substance containing DNA, other than blood, even if it were found to belong to an unknown third party would not prove exculpatory as such sample could have been left at the apartment at a time prior to the murders.

Certainly, if blood evidence found on the victims' clothing were tested and found not to belong either to the victims or the defendant, such proof arguably would present a stronger claim that, had the evidence been presented at trial, there is a reasonable probability it would have led to a different result. However, this court does not evaluate such claims in a vacuum. The convicted defendant requesting post-conviction DNA analysis is not provided a presumption of innocence, and this court need not ignore all the other proof supporting the conviction. *See Alley,* No. W2004-01204-CCA-R3-PD, 2004 WL I 196095, at *9. Here, both the Tennessee Supreme Court, on direct review, and the Court of Criminal Appeals, on *coram nobis* review, found that the proof against the defendant was overwhelming. Despite petitioner's continued claims that he did not attack the victims; but, rather found them after the brutal attack, each court found, based upon the proof presented at trial, that it was "virtually impossible" for anyone other than the petitioner to have committed the crime.

The Tennessee Supreme Court made the following findings on direct appeal:

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

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

> [W]e note that the time frame of the murders virtually precludes any person other than the appellant from committing these crimes. Witnesses at trial testified that, after they heard screaming from the upstairs apartment, they saw no one go up or down the stairs. The resident manager, Wilson, testified that, after the screaming stopped, she heard a person walk into the bathroom and heard water running. She then heard a person walk across the floor, slam the door shut and then run down the steps. The police were on the scene at that point in time for the first officer to observe the appellant as he ran down the stairs covered in blood. There is no question as to the confidence in the jury's verdict.

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

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

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

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

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

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

B. Vaginal Swabs

Next, petitioner contends that, if DNA taken from the vaginal swabs of Charisse Christopher excludes petitioner as the source of those samples and such proof had been presented to the jury, he would not have been prosecuted; or, if prosecuted, would not have been convicted. He contends sexual gratification was the state's theory regarding the motive for the killings. Thus, he argues that, if DNA testing indicating he was not the depositor of the biological material were introduced at trial, the jury would have found he was not the perpetrator. This court can not agree. At trial, the medical examiner testified that while the specimen from Ms. Christopher tested positive for acid phosphatase, no sperm was found. Thus, he testified that while such results

were consistent with semen, absent sperm, he could not conclusively say sexual intercourse had occurred; or, if it had occurred, at what precise time the specimens were deposited. Thus, the jury essentially heard inconclusive testimony regarding the State's ability to prove intercourse had occurred; and, even if it had occurred, when it had occurred.

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

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

In the alternative, should testing of the vaginal swabs reveal the presence of a third party's DNA, such results would also fail to exonerate petitioner. Even if the jury were to have heard such proof, they likely still would have convicted petitioner. Rather than conclude the petitioner did not kill the victims, given the inconclusive nature of the medical examiners testimony, the jury could have just as easily determined that either petitioner was unable to complete the attempted rape or that any biological specimen found on the Ms. Christopher was the result of previous consensual sexual contact. Again, the overall proof presented against the petitioner, overrides any potential exculpatory results or favorable inferences to be drawn from such exculpatory results. As the post-conviction court notes, the proof at trail demonstrated that: (w)hile waiting for Ms. Thomas to return, the appellant passed the morning and early afternoon injecting cocaine and drinking beer. Later, petitioner and a friend cruised around the area looking at a magazine

> containing sexual explicit material." *See Payne v. State*, 1998 Tenn. Crim. App. LEXIS 68, at *22 (Tenn. Crim. App. filed January 15, 1998) Thus, even if the jury were to learn that the biological material found on Ms. Christopher did not belong to the petitioner, they could still find that the petitioner entered the apartment with the intent of either raping or making sexual advances towards the victim and then brutally attacked her and her children. The fact that such proof was not presented, if it were to exist, does not undermine confidence in the jury's verdict.
>
> Thus, this court finds that with regard to both the bloody clothing and the vaginal swabs, even assuming the results of any testing would be favorable, petitioner has failed to meet the first prong of the statute. Therefore, this court need not address the remaining requirements. However, given the fact that petitioner's execution date is near at hand, this court is mindful that its decision will surely be appealed; and, thus, for the benefit of appellate review, has chosen to address the remaining requirement of the Act.
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> .

Pervis Payne v. State, Shelby Co. Crim. Ct. (Div. III) No. 87-04408, order denying petition for DNA testing, at 10-16 (Mar. 29, 2007). The post-conviction court, citing to the prosecuting attorney's assertions, concluded the vaginal swabs from Ms. Christopher were no longer available, but the other items were available for testing and had not been tested for DNA previously. *Id.* at 16-18. Finally, the post-conviction court concluded the petition was not designed to delay the petitioner's execution. *Id.* at 18.

On direct appeal, the Court of Criminal Appeals affirmed the post-conviction court's order. In examining whether exculpatory DNA results would have been sufficient to undermine the outcome of Petitioner's trial or sentencing, the Court of Criminal Appeals stated:

> **a. Presence of Unknown Party's DNA**
>
> The post-conviction court concluded that "[g]iven the circumstances of the victims' murder and the evidence presented at trial, this court can not agree with petitioner's contentions." The court concluded that "the presence of skin, hair or some other substance containing DNA, other than blood, even if it were found to belong to an unknown third party would not prove exculpatory as such sample could have been left at the apartment at a time prior to the murders." The court acknowledged that a stronger case would be presented if blood evidence

belonging to a third party was found on the victims' clothing. However, even in this event, this would not create a reasonable probability that the Petitioner would not have been prosecuted or convicted. The post-conviction court continued, noting that, as both the supreme court and this court have acknowledged, the evidence against the Petitioner rendered it virtually impossible for any person other than the Petitioner to have committed the crimes. The post-conviction court noted that it "can not say that the presence of some unknown quantity of some unknown person's blood deposited at some unknown time on either the victims' or the petitioner's clothing would have sufficiently corroborated petitioner's claims to the point that the jury would have accredited his version of events and rendered an acquittal." The post-conviction court added that "this court can not say that, even if exculpatory results were produced, the confidence in the outcome of the prosecution of petitioner's case would be undermined."

With consideration of the proof introduced at trial, this court, as found by the post-conviction court, cannot conclude that the presence of an unknown person's DNA on the victims' or Petitioner's clothing would have resulted in the State foregoing prosecution and/or resulting in the Petitioner not being convicted. Moreover, this court, as found by the post-conviction court, cannot conclude that the presence of an unknown party's DNA on the victims' clothing or the Petitioner's clothing would have rendered the Petitioner's verdict or sentence more favorable. Considering the severity and number of wounds inflicted upon the victims, it is more likely than not, that the blood belonged to Ms. Christopher, Lacie, or Nicholas. Additionally, even should the samples contain DNA evidence belonging neither to the Petitioner nor any of the victims, we cannot conclude that such evidence, in light of the totality of all evidence, would have precluded prosecution or conviction. Accordingly, this court concludes that the post-conviction court has not abused its discretion in denying post-conviction DNA analysis on the victims' clothing and the Petitioner's clothing.

b. Lack of Presence of the Petitioner's DNA

The Petitioner additionally argues that, if testing revealed the absence of his blood DNA on the victims' clothing, then such fact would lead to a reasonable probability that he would not have been convicted. The post-conviction court disagreed, noting that although there was evidence presented that the Petitioner had scratches on his chest, there was no proof that the Petitioner's injuries were so severe that they would have necessarily left blood evidence on the victims' clothing. The post-conviction court concluded that "even if DNA testing indicated petitioner did not leave blood on the victims' clothing, there is not a reasonable probability that the State would have forgone prosecution." The court continued, saying that "[g]iven the strength of the proof against petitioner, it is almost certain they would have continued to prosecute petitioner for the murders." The post-conviction court added that the absence of the Petitioner's blood from the victims' clothing does not corroborate his claim of innocence; rather, it just leads to the

> conclusion that the Petitioner did not leave any blood deposits on the victims' clothing during the altercation.
>
> We agree with the conclusions reached by the post-conviction court. We cannot conclude that the absence of the Petitioner's blood on the victims' clothing would have resulted in the State foregoing prosecution and/or resulting in the Petitioner not being convicted. Moreover, this court, as found by the post-conviction court, cannot conclude that the absence of the Petitioner's blood on the victims' clothing would have rendered the Petitioner's verdict or sentence more favorable. Accordingly, this court concludes that the post-conviction court has not abused its discretion in denying post-conviction DNA analysis on the victims' clothing and the Petitioner's clothing.

Payne DNA opinion, at **11-12.

V. Parties' Arguments

A. Mr. Payne's Petition for DNA Testing, Filed July 22, 2020[2]

Initially, this Court notes that in the July 22 petition, counsel for Mr. Payne asserted that during a December 20, 2019 examination of the evidence in this case held in the Shelby County Criminal Court Clerk's property room, "counsel, for the first time, was discovered with new, material, and potentially exculpatory evidence that had been in the State's possession the whole time[.]"[3] In its response, the State asserted these items, kept in an evidence bag labelled "bedroom" and located atop the two boxes of evidence from Mr. Payne's case, were from another case. At the September 1 hearing, counsel for the Petitioner stated that after reviewing the crime scene video, the Petitioner acknowledged the bedroom items were not related to the Payne case. Therefore, the Petitioner withdrew his request to conduct DNA testing on those items, and the parties' arguments regarding these items will not be referenced in this order.

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[2] Although a post-conviction petitioner may seek DNA testing under both Tennessee Code Annotated sections 40-30-304 and 40-30-305, Mr. Payne seeks testing solely under section 40-30-304.

[3] Petitioner's July 22, 2020 petition for DNA testing, at 11.

In the petition for post-conviction DNA testing, Mr. Payne seeks testing of these previously-identified items from the crime scene:

1. The knife used in these offenses;
2. A tampon discovered at the crime scene, purportedly removed from Ms. Christopher's body during the offense;
3. Bloodstained curtains from the victim's kitchen;
4. A bloodstained tablecloth from the kitchen;
5. Bloodstained women's glasses found in the kitchen;
6. A bloodstained stuffed animal found in the kitchen;
7. A bloodstained rug found in the kitchen;
8. A bloodstained paper bag taken from the kitchen;
9. A bloodstained washcloth found in the victim's living room;
10. The Petitioner's bloodstained clothing;
11. The victims' bloodstained clothing;
12. Vaginal swabs taken from Ms. Christopher; and
13. Fingernail scrapings taken from the three victims.

As stated in greater detail below, the proof from the September 1 hearing established the vaginal swabs and fingernail scrapings had not been located as of the hearing date. Furthermore, Petitioner's counsel conceded that the clothing worn by Ms. Christopher and her daughter at the time of their deaths had not been located as of the hearing date.

Mr. Payne asserts that if the items which are available for testing do not indicate the presence of Mr. Payne's DNA and/or indicate the presence of DNA belonging to another person, such evidence would support Mr. Payne's assertion that he did not commit these offenses. The Petitioner asserts that given the presence of Ms.

Christopher's defensive wounds, she and the assailant were likely involved in "an intense, prolonged, close-range struggle," [4] making the presence of the assailant's DNA on these items likely. Mr. Payne argues evidentiary photographs taken of him shortly after the offense show only "two minor cuts/abrasions to his hand which he maintained resulted from when he attempted to aid Ms. Christopher and dislodged the knife from her neck." *Id.* These relatively minor wounds, the Petitioner asserts, are not consistent with the Petitioner having committed the offenses, thus making the presence of his DNA on most of the items unlikely. Mr. Payne also claims the presence of DNA from another individual would identify the true perpetrator of these offenses.

Furthermore, the Petitioner argues that should the discarded tampon be tested for DNA and the Petitioner's DNA not found, such proof would damage the State's asserted motive for the crime; i.e., that Mr. Payne committed the offenses for sexual gratification.

In light of the above assertions, Mr. Payne argues any form of exculpatory DNA test results—results excluding Petitioner as the contributor of the DNA results, results establishing the same DNA profile (other than Petitioner) on multiple evidentiary items, or results indicating the DNA profile belongs to known alternative suspects or some other profile maintained in the CODIS database—would establish a "reasonable probability" the Petitioner would not have been prosecuted or convicted had such evidence been available at the time of trial. The Petitioner asserts the evidence identified in the motion still exists in a condition capable of testing and has not been tested in the 33 years since these offenses were committed. Regarding the final prong of the statutory test, Mr. Payne asserts his petition for testing is a reasonable one intending to establish his innocence rather than delay the execution of his sentence. Mr. Payne asserts DNA testing of these

[4] *Id.* at 14.

items, if approved by the Court, can be accomplished within 60 days.

Finally, the Petitioner argues the denial of Mr. Payne's prior petition for DNA testing should not prevent testing here, in light of (1) advancements in DNA testing over the past fourteen years and (2) the Tennessee Supreme Court's opinion in *Powers v. State*, 343 S.W.3d 36 (Tenn. 2011), which establishes a standard of review which the Petitioner asserts is more favorable to him than the prevailing standard in 2006. Mr. Payne also notes the *Powers* opinion concluded DNA testing may be used to match a crime scene profile to a third-party profile in a DNA database—an option which was not available in 2006.

B. State's Response, Filed July 30, 2020

In its response, the State asserts that regarding the items the Petitioner sought to have tested in his 2006 petition, any subsequent petition seeking to have these items tested should be dismissed on res judicata, collateral estoppel, and "law of the case" grounds.

As to all items, the State raises several arguments why Mr. Payne's July 22 petition should be dismissed:

- Because the petition was filed four-and-a-half months before Mr. Payne's scheduled December 3 execution, the petition is designed to delay the Petitioner's scheduled execution. The State emphasizes the Petitioner knew about the crime scene evidence at the time of the 2006 petition, the filing of the *Powers* opinion in 2011, and at the time the Petitioner's counsel discovered the items they initially believed were connected to this case in December 2019. Thus, the State argues, motions seeking to have the crime

scene evidence tested should have been filed earlier.

- Viable alternative suspects were known about and identified at the time of the 2006 petition; one of those suspects, Ms. Christopher's ex-husband, is white, so Mr. Christopher cannot be a suspect because the Petitioner claimed to have seen a black man fleeing the victims' apartment before Mr. Payne entered.

- *Powers* did not change the analysis and conclusion of the Court of Criminal Appeals regarding Mr. Payne's 2006 DNA testing petition. And while *Powers* did change Tennessee law in that the opinion permitted crime scene DNA to be compared to third-party DNA in a criminal database, the post-conviction and appellate courts in Mr. Payne's earlier DNA testing petition examined the crime scene DNA in a post-*Powers* manner. The State argues the courts addressing the 2006 petition presumed that the crime scene evidence would be exculpatory, as the prevailing standard now requires, and concluded the evidence, even if exculpatory, would not have created a reasonable probability Mr. Payne would not have been prosecuted or convicted.

- The vaginal swabs collected during Ms. Christopher's autopsy are no longer in existence, so the motion for testing must be denied as to that item. Regarding the other items, the State asserted it "believes DNA testing may be conducted on all [available] items except for the vaginal swabs, even though it does not believe the results will be unaffected by

contamination."[5]

- The State acknowledges that in *Griffin v. State*, 182 S.W.3d 795 (Tenn. 2006), the Tennessee Supreme Court concluded that in a case in which a petitioner did not seek DNA testing in an initial post-conviction proceeding, a petition for DNA testing filed after the conclusion of the initial post-conviction proceeding cannot be considered waived. However, in this case the State argues waiver should apply because the petitioner should not be permitted to file a second DNA petition for evidence which is not newly discovered.

- Finally, the State argues the petition should be dismissed based on the constitutional rights afforded crime victims in this state.

C. Petitioner's Reply to State's Response, Filed August 7, 2020

In addition to reiterating his earlier arguments, the Petitioner's August 7 reply asserts the following:

- The State's waiver argument is ineffective based on the *Griffin* opinion and the lack of language in the post-conviction DNA statutes establishing a waiver defense. The Petitioner also points to the language of Tennessee Code Annotated section 40-30-303, which provides that a petition for testing may be filed "at any time." At the very least, the waiver argument cannot apply to those items which were not addressed in the 2006 petition.

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[5] State's response to Payne 2020 DNA petition, at 14 (alteration added).

- The State's argument that this petition is designed to delay Petitioner's execution is also inaccurate. The Petitioner asserts many of the advancements in DNA testing technology and the expansion of the CODIS database to allow more samples in that database have come about only in recent years—long after the Tennessee Supreme Court's opinion in *Powers* and certainly after the 2006 DNA testing petition was filed.
- The State misapprehends *Powers*; the State asserts the evidence in the record weighs against DNA testing, but *Powers* requires a court considering a post-conviction DNA testing motion to consider the evidence presuming it would be exculpatory, thus allowing a court to grant the motion even in the light of what appears to be "overwhelming" evidence of guilt.
- The doctrines of collateral estoppel, res judicata, and law of the case do not apply because
    - (1) "the factual issue in dispute—whether modern testing methods can identify DNA evidence that would undermine the decisions to convict or prosecute" differs from the issue presented to the post-conviction court in 2006-07;
    - (2) The changes to prevailing Tennessee law regarding post-conviction DNA testing, as set forth in *Powers*, creates an exception to the doctrines of collateral estoppel and res judicata;
    - (3) Issues of claim preclusion and issue preclusion are based on considerations of efficiency and fundamental fairness, and applying

res judicata and collateral estoppel to prevent testing would undermine these fairness and efficiency considerations; and

- (4) The law of the case doctrine does not bar a second request for DNA testing. Furthermore, the law of the case doctrine, which is discretionary, may be overcome if there is a controlling change in the law, and *Powers* created such a change in this case.

Finally, the Petitioner's reply asserts this Court should permit testing of fingerprint evidence taken from the crime scene in light of more advanced testing techniques and updated fingerprint databases. The Petitioner also raised this argument in his initial petition for testing. The Petitioner argues that because the State's response did not address the Petitioner's request for fingerprint testing, the State has waived any objection to this Court's ordering fingerprint testing.

VI. Evidence Presented

A. Testifying Witnesses

At the September 1 hearing, the following witnesses testified for the Petitioner:

- Ben Leonard, Coordinating Investigator with the Federal Defender's Office for Middle Tennessee;
- Lt. Christopher Stokes, Millington Police Department; and
- Alan Keel, forensic biology and DNA examiner.

The following persons testified for the State:

- Benjamin Figura, Director of the West Tennessee Forensic Center; and
- Carl Townsend, Supervisor with the Shelby County Criminal Court Clerk property room.

Having found all witnesses credible, the Court makes the following findings of fact:

B. Evidence in Criminal Court Clerk's Property Room and DA's File

In December 2019, Mr. Leonard and Kelley Henry, the Petitioner's local counsel, went to the Criminal Court Clerk's Property Room at 201 Poplar. They obtained an order from Division VIII of Criminal Court[6] to enter the property room and review the evidence held by the Clerk in Mr. Payne's case. Mr. Townsend and three other Clerk's employees were present while Mr. Leonard, Ms. Henry, and another employee of the Federal Defender's Office reviewed the two boxes of exhibits. One larger box contained the physical exhibits introduced into evidence at Mr. Payne's 1988 trial, while another box contained the "residue" evidence, or the other evidence held by the Clerk which was not introduced at trial.

Mr. Leonard was the only person from the Federal Defender's Office to touch the boxes and the evidence contained therein. Both he and the Clerk's Office provided plastic gloves which Mr. Leonard put on and replaced throughout his time there, and the Clerk placed brown paper atop the table on which Mr. Leonard reviewed the evidence. Mr. Leonard and Mr. Townsend both testified the gloves and paper were routinely used to prevent contamination, though Mr. Townsend was unable to remember whether the gloves and paper had been used at all times during his nearly three decades of employment with the Clerk's Office.

Mr. Leonard detailed certain items which he examined and had photographed during his review of both the Clerk's files and the District Attorney General's file ("DA's file"). He described a photograph from the DA's file, previously unseen by the petitioner's attorneys, depicting one of Ms. Christopher's hands. Defensive wounds and a

[6] The undersigned Judge was not available to sign the order at the time.

broken fingernail can be seen in the photograph. This photograph was introduced into evidence at this hearing along with an autopsy diagram depicting the wounds in Ms. Christopher's hand.

Photographs of a brown paper package containing the murder weapon, a knife, were introduced into evidence. Mr. Leonard did not remove the knife from the package at the time of his December 2019 visit, but a photograph was taken of the knife positioned inside the opened paper package. Similar brown paper packaging was used to store other items introduced into evidence, including a tampon found at the crime scene and a bloody washcloth from the victims' kitchen. The washcloth had some areas cut away from it, presumably for prior testing, although the washcloth still appeared to have some blood stains. A pair of eyeglasses found near—but not on—Ms. Christopher's head at the crime scene were also contained in the box of evidence.

On cross-examination, Mr. Leonard testified that he had no way of knowing who had touched or otherwise handled the evidence over the years and no way to know whether everyone who had ever touched the exhibits had worn gloves while doing so. Mr. Leonard also said he was unaware that one of the trial jackets contained an "additional memorandum of discovery" which asserted that Mr. Payne's trial counsel had reviewed certain evidence.

Ms. Christopher's fingernail scrapings, the clothing worn by the decedents at the time of the offense, and the vaginal swabs from Ms. Christopher's rape kit were not among the items contained in the Clerk's property room.

C. Attempts to Locate Evidence in this Case

Counsel for the Petitioner—and in some instances, counsel for the State as well—

served subpoenas upon several entities in an attempt to locate physical evidence related to this case. Based on the stipulation of the parties, the State introduced a copy of the Tennessee Bureau of Investigation (TBI) file in this case. An affidavit introduced into evidence stated that no physical evidence related to this case could be found at TBI.

Dr. Benjamin Figura, the director of the West Tennessee Regional Forensic Center (WTRFC), the agency which includes the Shelby County Medical Examiner, testified regarding his search for evidence and the various ways in which evidence which had been collected by WTRFC[7] had been moved from place to place over time. Ultimately, Dr. Figura reviewed the records associated with the two WTRFC file numbers related to this case. In reviewing the log sheets associated with these file numbers, Dr. Figura discovered WTRFC was in possession of no physical evidence related to this case. Dr. Figura also reviewed two plastic bins containing evidence from various cases which had not been moved elsewhere; these two plastic bins contained no evidence related to this case. Finally, Dr. Figura reviewed histology slides kept at the University of Tennessee Health Sciences Center. These slides contained no evidence related to this case.

On cross-examination, Dr. Figura acknowledged that the University of Tennessee Health Sciences Center's pathology department had maintained some evidence from cases dating to the 1970s and 1980s, but his review of pathology department records indicated no physical evidence was available related to this case. In reviewing records related to pretrial testing of Ms. Christopher's fingernails, Dr. Figura acknowledged that a notation contained within his agency's records suggested that the fingernails may have

[7] At the time of Petitioner's trial, WTRFC (and, therefore, the Shelby County Medical Examiner) was administered by the University of Tennessee Health Science Center's Pathology Department. UTHSC ended its administration of WTRFC in 2006, but UTHSC resumed its administration of the Forensic Center in 2014.

been discarded 90 days after they were submitted for testing.

On September 8, Dr. Figura filed an affidavit with this Court detailing his further search for evidence in this case after the September 1 hearing. In the affidavit, Dr. Figura stated copies of the two case files (for the two murder victims) had been copied from the Shelby County Archives and provided to the parties. He also stated he personally reviewed the files related to Mr. Payne's case held at the Shelby County Archives. Dr. Figura found no physical evidence there, but he did locate autopsy photographs, copies of which were attached to his affidavit.

Lieutenant Christopher Stokes of the Millington Police Department produced his department's file on the Payne case pursuant to subpoena. Among the items contained in the case file was an empty evidence envelope with no notations indicating what may have been held in the envelope previously. Other than the items contained in the file, Lt. Stokes testified his search of the Millington Police Department's files and property room revealed no physical evidence related to this case. Lieutenant Stokes, who began working with the Millington police after the Petitioner's trial, testified some evidence in this case may have been brought previously to the Criminal Court Clerk's property room at 201 Poplar.

Finally, in her opening statement, Ms. Henry asserted she served a subpoena on LeBonheur Hospital's EMS department. This subpoena, she stated, proved unsuccessful. Accordingly, the Court finds three of the items sought to be tested by the Petitioner—vaginal swabs from Ms. Christopher's rape kit, clothing worn by the two murder victims at their deaths, and fingernail clippings from Ms. Christopher—are not available to be tested.

D. Testimony of C. Alan Keel

Mr. Keel, accredited by the Court as an expert in the fields of forensic biology and DNA examination and testing, is the Forensic Biology/DNA Analysis Unit Supervisor and DNA Technical Lead Analyst at Forensic Analytical Crime Laboratory, a private forensic testing laboratory in Hayward, California. The private laboratory conducts testing for both prosecution and defense; he testified that roughly 40% of his agency's work is for law enforcement in the pretrial investigation. At the hearing, Mr. Keel stated 20 to 30% of his present workload is "at-the-bench" testing, with Mr. Keel spending the rest of his time on administrative duties.

Mr. Keel has conducted examination and testing in the field of forensic biology since 1982 and in the field of DNA in the late 1980s or early 1990s. Mr. Keel worked for state crime laboratories in Louisiana, California, and Oklahoma before becoming employed in private practice in 1999. Mr. Keel explained that early in his career, he focused on the identification and examination of biological specimens. Between 1989 and 1999, he established PCR-based DNA testing programs at crime laboratories in Oakland, California; Tulsa, Oklahoma; and San Francisco, California. He said he was the primary examiner at those three crime labs during his time there.

Mr. Keel is presently licensed in Texas to perform DNA testing, as that state requires licensure to conduct such tests. He is also certified by the American Board of Criminalistics, which he described as the primary professional organization providing certification for DNA examiners. He also testified that for his lab to remain accredited, they must maintain ISO-1725 accreditation, which is the international quality management standard for testing and calibration laboratories. The lab must also comply with the quality assurances standards set forth by the FBI crime lab. His agency is audited

by an external agency every other year, with an audit lasting two to three days. All examiners working in the lab must maintain their individual certifications as well, with examiners undergoing two proficiency tests per year. The lab also undergoes a yearly internal audit.

Mr. Keel stated that his laboratory examines and tests both newly-collected evidence and older evidence from post-conviction cases. Mr. Keel said he has worked on about 150 post-conviction cases personally in various jurisdictions, while his current agency has worked on about 165 cases. Mr. Keel said he is usually retained by criminal defendants and petitioners when investigating older evidence from post-conviction cases. Mr. Keel testified he has been able to identify biological materials in well over 1,000 cases and has testified approximately seventy-five times in twenty-three different jurisdictions. Mr. Keel stated his DNA testing in post-conviction cases resulted in about half the cases leading to exonerations and half the cases confirming the defendant/petitioner committed the offense for which he was convicted. Mr. Keel stated he was involved in "very few" examinations in which no biological material could be identified.

Mr. Keel testified that after reviewing certain records in this case—including crime scene photographs, transcripts of trial testimony from Dr. Richard Haruff and Paulette Sutton, TBI's January 1988 serology report, the list of physical evidence contained in the Clerk of Court's files, and a list of other evidence which may still exist—Mr. Keel stated some basic serological testing was conducted but no DNA testing had ever been done on any evidence in this case. Mr. Keel stated the serological testing techniques in use at the time of trial were "state of the art," and he also acknowledged early DNA testing was state of the art as well, but current DNA testing techniques are far

more sensitive and discriminating in their ability to identify DNA profiles from biological material left at a crime scene. Current DNA testing techniques, Mr. Keel opined, would be able to identify DNA profiles which may not have been identified in the past.

Specifically, Mr. Keel testified that "touch" or "contact" DNA testing could be used to identify DNA profiles based on the transfer of skin cells, even if a potential assailant handled the knife or touched fabric at the crime scene for a short period of time. He also testified that advances had been made in Y-STR DNA testing, a type of STR [short tandem repeat] DNA testing which focuses exclusively on the Y-chromosome, which exists only in males. Mr. Keel testified such testing would be particularly useful in cases such as this one, in which the homicide victims were female and would have left a large amount of blood. Mr. Keel testified that in this case, Y-STR testing could be used to identify the profile of a male (potential) assailant even when mixed in with a considerable amount of female DNA. He also testified that current PCR [polymerase chain reaction]-based STR DNA testing, in addition to being far more exact than earlier DNA testing methods, requires the use of far less biological material to identify a sample than did earlier DNA testing methods. In a declaration attached to Mr. Payne's July 2020 petition, Mr. Keel asserted that RFLP DNA analysis, the type of DNA testing available (albeit in very few laboratories) at the time of Mr. Payne's trial, "required approximately 50 to 200 times as much DNA as PCR-based methods[.]"

Mr. Keel testified the ability to identify a potential assailant from a DNA profile was far more likely now than in the past based on advancements in CODIS, the FBI-maintained databank of DNA profiles. Mr. Keel testified CODIS contained known DNA profiles from approximately 14 million convicted offenders, known DNA profiles from four million arrestees, and one million DNA profiles which could not be matched to a

particular person. He stated that at the time of Mr. Payne's 2006 DNA testing petition, only about four million DNA profiles were contained in CODIS. In addition to the DNA profiles added over the past fourteen years, Mr. Keel also testified that the pool of DNA profiles in CODIS has been expanded because the FBI now allows DNA profiles to be maintained in CODIS even if fewer than the full number of genetic markers can be identified.[8] With the expanded pool of DNA profiles in CODIS and somewhat relaxed standards for maintaining a DNA profile in the database, Mr. Keel said that even partial profiles obtained from the evidence in this case would be helpful. He also testified that smaller STR "chains" and even degraded samples were now more likely to generate CODIS matches than in the past.

Furthermore, Mr. Keel also said that "genetic genealogy" could be used to identify a potential assailant. In genetic genealogy, a DNA profile taken from a biological sample is matched to potential familial matches in a commercial DNA database. Based on the strength of the match, an examiner can research familial records to identify a potential assailant.

Turning to the evidence from this particular case, Mr. Keel testified that if Ms. Christopher's fingernail clippings or scrapings from under her nails could be located, the fingernails could be a potential source for an assailant's DNA. In this particular case, the presence of defensive wounds on Ms. Christopher's arms and hands suggest she tried to stave off the assailant's attack, and in doing so she may have collected the assailant's DNA under her fingernails. TBI testing in this case indicated a foreign blood type (i.e.,

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[8] Mr. Keel explained that originally, CODIS required a DNA profile to exhibit all thirteen "core loci" to be included in CODIS. A locus (plural, loci) is a fixed position on a chromosome where a particular gene or genetic marker is located. The number of core loci identified in CODIS was expanded to twenty in January 2017. Dr. Keel explained that while a DNA examiner must test for all twenty loci, a profile may now qualify for inclusion in CODIS if at least eight of the core loci are present.

not that of Ms. Christopher) under her nails, further strengthening the possibility DNA of an assailant could be located. Mr. Keel said that in his experience—he had tested fingernail scrapings from at least fifty cases throughout his career—DNA from blood, tissue, and even semen could be collected under the nails, and such biological material was likely to come from an assailant and not collected at random or as the result of contamination. Mr. Keel also testified DNA profiles could be obtained from such evidence even if many years had passed.

Focusing on the evidence that was known to exist, Mr. Keel first addressed the knife generally believed to be the murder weapon, the tampon, and a washcloth. Mr. Keel stated these three items were kept inside brown paper packaging inside a cardboard box in the Criminal Court Clerk's Office. He said that in the course of his work, evidentiary items were usually packaged similarly. Some of the paper packaging he encountered was sealed, while other packages were not. Regardless of whether the packaging was sealed, Mr. Keel stated he was often still able to obtain DNA profiles from biological material found on items packaged in paper bags. Mr. Keel said this conclusion proved accurate even if the material had been stored for "decades," as is the case with the knife, washcloth, tampon, and other evidence in Mr. Payne's case.

Regarding the knife, Mr. Keel testified given the multiple stab wounds inflicted upon the three victims, there is a possibility the assailant injured himself with the knife during the attacks. Additionally, the assailant may have left skin cells on the knife while handling it. Mr. Keel stated DNA from blood could be obtained using Y-STR testing to isolate the (presumably) male assailant's DNA from that of the two murder victims. Mr. Keel said he would swab areas of the knife not containing blood in an attempt to obtain "touch DNA" which would not be intermingled with blood DNA. This testing pattern

(attempting to obtain touch DNA from areas not containing blood stains) would be repeated for all items tested.

Regarding the washcloth, Mr. Keel acknowledged that while two separate portions of the washcloth which appeared to be blood-soaked were cut out for prior testing, Mr. Keel said he was confident he would still be able to obtain a DNA profile from other bloody sections of the cloth. He also said he would test non-bloody sections of the cloth for touch DNA.

Regarding the tampon, Mr. Keel testified he would look for sperm potentially contained in the tampon. With the eyeglasses, he would test the blood found on the glasses and hoped to obtain DNA from other areas routinely handled by the wearer (presumably, such as the nose pieces and the legs).

Mr. Keel refuted the State's assertion that the possibility of "contamination" of the evidence in this case—be it by handling by attorneys, jurors, or court staff, or by less-than-ideal storage conditions—would make it somewhat doubtful that DNA profiles could be obtained. Mr. Keel stated throughout his testimony that he has, in the course of his career, obtained DNA profiles from a variety of items stored in a variety of ways. He had not encountered "contamination" in the manner suggested by the State in the course of his work. By way of example, he recalled that he was once able to obtain a DNA profile from a knife which had, before Mr. Keel's examination, been placed a trash can and dusted for fingerprints. He added that modern DNA testing techniques now made it likely that DNA profiles could be obtained from biological material that would have once been considered too degraded for testing. While the possibility of contamination could never be discounted completely, and while Mr. Keel acknowledged the DNA of jurors or attorneys could possibly be found on the items to be tested, the advanced sensitivity of

the DNA testing, his professional experience, and focus on the "robustness" of the DNA contained in a particular sample would all contribute to the analyst's being able to obtain profiles from a potential assailant rather than from someone who had touched an item only briefly. He expected that in all likelihood, any DNA profiles generated from touch DNA would also be contained in blood or other fluids found on the items. The only contamination concerning Mr. Keel was that which could occur at the lab, and with the lab's testing protocols and the knowledge and expertise of those working at the lab, he was not worried about that sort of contamination.

On cross-examination Mr. Keel acknowledged an examiner could never know for certain whether a person who left a DNA profile at a crime scene was the actual assailant. And with the tampon, he acknowledged the possibility that male DNA, if found, could come from an unknown sexual partner of Ms. Christopher's who left his DNA before the offenses happened.

VII. Applicable Legal Standards

The Post-Conviction DNA Analysis Act allows, under certain circumstances, individuals convicted of certain crimes, including first degree murder, to obtain DNA testing of certain evidence at any time. *See* Tenn. Code Ann. §§ 40-30-301 through -313. Specifically, 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).

A "reasonable probability" of a different result exists when potentially favorable DNA testing results "undermine the confidence in the outcome of the prosecution." *Sedley Alley v. State*, No. W2006-01179-CCA-R3-PD, 2006 WL 1703820, at *14 (Tenn. Crim. App. June 22, 2006). "Under section 40-30-304(1), therefore, prior to a mandatory order of testing, a petitioner's argument must merely establish 'a probability sufficient to undermine confidence' in the decision to prosecute or in the conviction had the State or the jury known of exculpatory DNA testing results." *State v. Powers*, 343 S.W.3d 46, 55 (Tenn. 2011).

"In making its decision [on the DNA petition], the post-conviction court must consider all the available evidence, including the evidence presented at trial and any stipulations of fact made by either party." *Powers*, 343 S.W.3d at 56. When reviewing a DNA petition, the court assumes the DNA testing will reveal exculpatory evidence, and "the evidence must be viewed in light of the effect that exculpatory DNA evidence would have had on the fact-finder or the State." *Id.* at 55. However, "there is no presumption of innocence afforded to a petitioner" who files a DNA post-conviction petition. *Charles Elsea v. State*, No. E2017-01676-CCA-R3-PC, 2018 WL 2363589, at *4 (Tenn. Crim. App. May 24, 2018), *no perm. app. filed*. The petitioner bears the burden of establishing all four criteria under T.C.A. section 40-30-304, and "[t]he court must dismiss the

petition if the petitioner fails to establish each of the four criteria required" in the statute. *Powers*, 343 S.W.3d at 48.

Post-conviction testing under the act is explicitly limited to "DNA analysis," which the statute defines as "the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes." Tenn. Code Ann. § 40-30-302. Put another way, "The Act, by all accounts, provides for DNA testing and analysis but does not provide for additional scientific testing not encompassed within the clearly defined term 'DNA analysis.'" *Bondurant v. State,* 208 S.W.3d 424, 430 (Tenn. Crim. App. 2006).

The Tennessee Supreme Court has concluded DNA testing available under the post-conviction DNA act may include a comparison between the evidence at issue and other profiles contained in a DNA database—in other words, the comparison is not limited merely to the petitioner's DNA profile. *See Powers*, 343 S.W.3d at 49-50.

VIII. Application to Present Case

Before addressing the specific issue of whether the Petitioner has established he is entitled to testing under Tennessee Code Annotated section 40-30-304, the Court makes some initial observations.

First, as noted elsewhere in this order, Mr. Payne's trial and initial post-conviction proceedings took place in Division I of Criminal Court. The undersigned Judge became Presiding Judge of Division I in 2004, following the retirement of Judge Weinman. However, Mr. Payne's 2006 petition for post-conviction DNA testing was disposed of in Division III of Criminal Court. Thus, while the undersigned Judge is familiar with this

case and has ruled in numerous matters in Mr. Payne's case following the 2006 petition, the current post-conviction DNA petition represents the first time the undersigned Judge has reviewed the matter of DNA testing.

Second, this Court concludes the State's defenses of waiver, claim preclusion, issue preclusion, and law of the case are unavailing. In the 2006 petition, Mr. Payne sought testing only of clothing belonging to himself and the victims and of vaginal swabs taken from Ms. Christopher after her death. In this petition, Mr. Payne seeks, for the first time, testing of numerous other items. The post-conviction DNA testing statutes make clear a petition for DNA testing may be brought "at any time," Tenn. Code Ann. § 40-30-303, "and no provision in the Act provides for waiver by failing to request analysis at a prior proceeding." *Griffin v. State*, 182 S.W.3d 795, 799 (Tenn. 2006). *Griffin* dealt with a petitioner who did not seek DNA testing during his initial trial and post-conviction proceedings and later sought testing under the post-conviction DNA testing act. While the factual scenario in *Griffin* differs from that in Mr. Payne's case, this Court sees no reason why the *Griffin* holding cannot be extended to a petitioner who files successive post-conviction DNA petitions in which the successive petitions seek testing of items not sought in the earlier petitions. Furthermore, unlike Tennessee Code Annotated section 40-30-102(c), which explicitly limits a post-conviction petitioner to a single petition for relief, there is nothing in the post-conviction DNA testing statutes limiting a petitioner to a single petition for DNA testing.

Regarding Mr. Payne's second attempt to have the items from the 2006 petition subject to DNA testing, the issue is a closer one. The State's issue preclusion, claim preclusion, and law of the case arguments are reasonable ones. However, changes in Tennessee case law regarding post-conviction DNA testing (specifically, the *Powers*

opinion enabling a DNA sample to be tested against an unknown sample in a database rather than limiting testing to a comparison of the petitioner's DNA), improvements in DNA testing techniques detailed in Mr. Keel's testimony, and the expansion of available samples in the CODIS database all make the likelihood of a positive DNA match far greater in 2020 than at the time of Mr. Payne's initial DNA testing petition. These factors all weigh in support of disregarding, on fundamental fairness grounds, any potential bars of claim preclusion, issue preclusion, and law of the case and considering the petition on the merits as it relates to all items identified by Mr. Payne—even the ones he sought to have tested previously.

A. Tenn. Code Ann. § 40-30-304(2) through (4)

The Court must first examine whether the Petitioner has established the items he seeks to have tested are still in existence and capable of testing.[9] In its July 30 response, the State asserted that other than the vaginal swabs from Ms. Christopher's rape kit, the State did not argue any of the other items are missing. However, the day before the September 1 hearing, the State filed a pleading disavowing this statement. In both its initial response and at the hearing, the State argued any available items could be contaminated and, potentially, testing them would not produce reliable results. The September 1 hearing also established certain items the Petitioner sought to have tested had not been located (or had been discarded) as of the hearing date.

1. Unavailable Items

The State asserted in 2007 that the vaginal swabs taken from Ms. Christopher

[9] *See* Tenn. Code Ann. § 40-30-304(2).

became unusable once the refrigerator in which they were stored malfunctioned. In his current petition Mr. Payne asserted these swabs may still be available, but the proof produced at the September 1 hearing establishes the vaginal swabs have not been located. Furthermore, the bloody clothing worn by the murder victims has not been located, and Ms. Christopher's fingernail clippings, which at the very least have not been located as of this writing, may have been discarded shortly after testing was conducted on them after the offense. Were these items still available for testing, this Court would have been inclined to permit their testing. The Court places particular emphasis on Mr. Keel's testimony regarding the ability to find assailant DNA under a victim's fingernails and, regarding the vaginal swabs, Mr. Keel's testimony about the ability to develop a DNA profile from biological material once considered too "degraded" to obtain a DNA profile. However, if the swabs, clothes, and fingernail clippings no longer exist, they cannot be tested. Thus, as to these items, this Court concludes the Petitioner has not established this evidence exists and is in a condition to be tested. Therefore, the motion for DNA testing relative to the vaginal swabs, female victims' clothing, and fingernail clippings is DENIED.

2. Other Items

Regarding the items which are available for testing, the State asserts there are no guarantees these items have not been contaminated and would not yield a DNA profile or profiles which would be of value. While this Court disagrees with the Petitioner that these concerns are not valid, concerns over contamination will not prevent the Court from concluding the items exist and are in a condition in which they can be tested. The Court accredits Mr. Keel's assertion that modern DNA testing techniques may allow an

examiner to derive a DNA profile from a sample that in the past would have been considered too "degraded" or "incomplete" to provide a sample. The Court finds particularly persuasive Mr. Keel's past successes in obtaining DNA profiles from items stored similarly to the evidence in this case, as well as Mr. Keel's testimony regarding his successfully obtaining a DNA profile from a knife which had been found in a trash can and dusted for fingerprints before Mr. Keel's examination. In light of Mr. Keel's testimony, the Court concludes the Petitioner has established that with the exception of the vaginal swabs, female victims' clothing, and fingernail clippings, the evidence which Mr. Payne seeks to have tested still exists in a condition in which the evidence can be tested.

The record also establishes the items the Petitioner seeks to have tested have not been subjected to DNA testing[10] at any point in the thirty-three-year life of this case. Thus, the Court concludes the Petitioner has established this prong of the statutory test.

Finally, regarding the fourth prong, "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,"[11] the Court recognizes the Petitioner's execution date is set for December 3, 2020. However, the Court accredits the Petitioner's assertion that any DNA testing can be completed between forty-five to sixty days after the evidence is submitted for testing. If Petitioner had filed this motion within sixty days of the scheduled execution date, this factor may have weighed in the State's favor. While it would have been preferable for the Petitioner to have filed a petition for DNA testing before July 2020, the Court acknowledges the high number of cases handled by the

[10] *See* Tenn. Code Ann. § 40-30-304(3).
[11] *See* Tenn. Code Ann. § 40-30-304(4).

Innocence Project and issues caused by the COVID-19 pandemic may have caused some reasonable delay in Mr. Payne's filing this petition. Ultimately, because this petition was not filed at the absolute last minute, this Court concludes Mr. Payne's petition for DNA testing is not "designed to unreasonably delay the execution of sentence or administration of justice."

B. Tenn. Code Ann. § 40-30-304(1)

The resolution of Petitioner's motion will therefore turn on whether, in light of exculpatory DNA evidence, there is a reasonable probability the Petitioner would not have been prosecuted or convicted of the offenses in this case.[12]

The Court agrees with the State there is not a reasonable probability exculpatory evidence would have led the State not to prosecute the Petitioner. As the post-conviction court and Court of Criminal Appeals stated in denying the Petitioner's original motion for DNA testing, there was significant evidence presented at the Petitioner's trial implicating the Petitioner in these offenses. Thus, even if this Court were to assume the DNA tests on all items were to yield exculpatory results—i.e., the absence of the Petitioner's DNA, the presence of a DNA profiled not belonging to the victims, or both—there is still a reasonable probability the State would have prosecuted Mr. Payne for these offenses.

However, in the Court's view the Petitioner has established a reasonable probability he would not have been *convicted* of first degree murder had exculpatory evidence been presented to the jury. This Court draws a firm distinction between the current petition and the 2006 petition. In the 2006 petition, the Petitioner only sought to have his clothes, clothing worn by the victims, clothing in his bag, and the victim's rape

[12] *See* Tenn. Code Ann. § 40-30-304(1).

kit swabs tested. The court in the 2006-07 case concluded the vaginal swabs were no longer available for testing, leaving the bloody clothes as the only items available to be tested. The Petitioner, in his own trial testimony, admitted to removing the knife from Charisse Christopher's body and touching the "two babies," so it would have been reasonable to find the Petitioner had the blood of at least one victim, if not all three, on his clothing. Given the Petitioner's admission he cut himself removing the knife, it also would have been reasonable to find the Petitioner's blood on, at the very least, Ms. Christopher's clothes, and possibly on those of the children. Even if the Petitioner did not have the victims' blood on his clothing and the victims had either no blood of the Petitioner or the blood of another person on their clothing, those facts, standing alone, would not have been sufficient to undermine confidence in the jury's verdict in light of the other evidence presented at trial.

The same cannot be said in the current DNA petition, in which Mr. Payne is seeking to have a multitude of items tested. The Court places particular emphasis on the testing of the murder weapon. Although, if the Petitioner's version of events is true, one may expect to find at least some of the Petitioner's DNA on the murder weapon, one may reasonably expect that in a case involving numerous stabbing injuries and featuring many defensive wounds the assailant would have deposited more than a trace amount of DNA on the murder weapon.

Furthermore, in seeking to test several other items, including a tampon and other bloody items found in the victims' kitchen, the Petitioner increases his chances of locating exculpatory evidence which would undermine confidence in the outcome of the jury verdict. Assuming a third person's DNA is found on several of the items the Petitioner seeks to have tested, this conclusion would serve to undermine confidence in

the jury's verdict. The more items containing a third party's DNA, the more likely it would appear Mr. Payne did not commit these offenses. Additionally, if the Petitioner's DNA is not found on the tampon and the DNA of someone else (perhaps other than that of Ms. Christopher's boyfriend, who at times has stated he had sex with Ms. Christopher the night before her death) is so found, it would undermine the State's theory that Mr. Payne raped Ms. Christopher. Conversely, if Mr. Payne's DNA is found on several of the items, confidence in the jury's verdict would be bolstered. The possibility of finding DNA, regardless of whether it belongs to Mr. Payne, a third party, or both, is far greater now than it was in 2006 and 2007, given advances in DNA technology and the expanded pool of DNA profiles in CODIS.

Although several appellate opinions have emphasized the strength of the evidence upon which the Petitioner's conviction was based, if DNA testing in this case produces results favorable to the Petitioner—and in resolving a post-conviction DNA petition, the reviewing Court must presume testing results would be exculpatory—the strength of the convicting evidence would be compromised. The more items containing the DNA of another or excluding the DNA of Mr. Payne, the more that confidence in the jury's verdict would be compromised. The Court notes DNA testing now available by statute gives Mr. Payne the ability to identify potential alternate suspects through a match to a known profile in CODIS; this option was not available to Mr. Payne in 2006-07.

This Court concludes exculpatory DNA results in this case, had they been presented to the jury, would have created a reasonable probability Mr. Payne would not have been convicted of first degree murder. Thus, the Petitioner has met his burden of establishing all four prongs of Tennessee Code Annotated section 40-30-304, and therefore this Court is obligated to GRANT Mr. Payne's petition for post-conviction

DNA testing of the items identified in the petition which are available to be tested.

IX. Fingerprint Testing

As stated earlier in this Order, the Petitioner seeks to have crime scene fingerprints in this case tested in light of advances in fingerprint testing technology. However, testing available under the post-conviction DNA testing statues is explicitly limited to "DNA analysis," which the statute defines as "the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes." Tenn. Code Ann. § 40-30-302. Other forms of scientific testing may not be granted under these statutes. *See Bondurant,* 208 S.W.3d at 430. Mr. Payne's motion for fingerprint testing is therefore DENIED.

X. Conclusion

For the reasons stated above, the Court concludes the Petitioner has established he is entitled to DNA testing under Tennessee Code Annotated section 40-30-304. Mr. Payne's petition for post-conviction DNA testing of the items specifically identified in this Order (items 1-10 in section V(A) above) is therefore GRANTED.

Because the Post-Conviction DNA Analysis Act does not allow for testing of fingerprints, the portion of Mr. Payne's petition seeking testing of fingerprints is DENIED.

The Court also ORDERS the following:

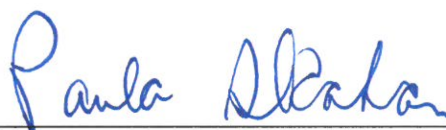
1. Within ten (10) days of the entry of this order Petitioner's counsel shall notify the Court of the laboratory which shall conduct DNA testing of the evidence.

2. Per T.C.A. section 40-30-309, all evidence identified by the Petitioner shall be preserved during the pendency of any potential appeal. If this Court's order withstands any such appeal (or if the State does not appeal this Order), any evidence not consumed in the testing process shall be preserved in case additional testing is warranted.

3. When the ruling of this Court becomes final (after appeal or after the State declines to pursue an appeal), the Court shall file an order transferring the evidence to the testing laboratory.

4. To ensure compliance with T.C.A. section 40-30-312, counsel for the Petitioner shall provide this Court and the State with testing results as soon as such results are available.

IT IS SO ORDERED this the 16 day of September, 2020.



Paula Skahan, Judge
Criminal Court, Division I
30th Judicial District, at Memphis