

on the victim and the victim's clothing:

- (1) Vaginal swabs from the victim;²
- (2) Swab taken from the victim's right inner thigh;³
- (3) Swab taken from the victim's left inner thigh;⁴
- (4) Nasopharyngeal swabs from the victim;⁵
- (5) Oral swabs from the victim;⁶
- (6) Rectal swabs from the victim;⁷
- (7) Head hairs from an African-American individual found on the victim's socks, which do not match Sedley Alley, who is caucasian (Q7);⁸
- (8) A caucasian body hair found on the victim's waistband (Q6);⁹

² University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #1, Lab No. 85-1778, Case No. 85-1681, Item 11 (Attached as Exhibit 1 to this motion).

³ University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #1, Lab No. 85-1778, Case No. 85-1681, Item 12 (Exhibit 1).

⁴ University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #1, Lab No. 85-1778, Case No. 85-1681, Item 13 (Exhibit 1).

⁵ University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #2, Lab No. 85-1775, Case No. 85-1681, Item 3 (Exhibit 2).

⁶ University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #2, Lab No. 85-1775, Case No. 85-1681, Item 4 (Exhibit 2).

⁷ University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #2, Lab No. 85-1775, Case No. 85-1681, Item 5 (Exhibit 2).

⁸ Trial Transcript 883 (Craig Lahren: Item Q7 consists of 2 strands of hair from a black individual found on victim's sock)(Contained in attached Exhibit 3).

⁹ Trial Transcript 882 (Craig Lahren: Item Q6 collected from waistband of victim and identified as medium-brown caucasian body hair)(Exhibit 3).

- (9) A caucasian pubic hair found on the victim's left shoe (Q1);¹⁰
- (10) A hair found on a stick found in the victim;¹¹
- (11) Blood and hair samples of the victim.¹²

All of these samples contain biological evidence which will establish the identity of the person or persons who committed the sexual assault and murder of the victim in this case.

II.
SEDLEY ALLEY'S REQUEST IS APPROPRIATE, AND
IMMEDIATE PRODUCTION OF THE EVIDENCE
WILL ENABLE TESTING BEFORE THE JUNE 3 EXECUTION DATE

Sedley Alley is entitled under Tennessee law to ask for the DNA evidence "at any time." Tenn. Code Ann. §40-30-303. He couldn't have asked for it in earlier state proceedings, because the Post-Conviction DNA Act was only passed in 2001 – after he had completed state post-conviction review. The cellular DNA analysis (STR analysis) to be performed on the fluid samples also didn't exist until 2002. See Exhibit 6 (Declaration and Resume of Gary Harmor).

Importantly, Sedley Alley's unquestionably qualified expert can complete the DNA analysis of the fluid samples within 2 weeks of production of the evidence. See Exhibit 6 (Declaration of Gary Harmor). Mr. Harmor can complete the mitochondrial DNA analysis of the hair samples within 3 weeks. See Id. Therefore, this Court should immediately order the production of the evidence, so

¹⁰ Trial Transcript 879 (Craig Lahren: Item Q1 hair collected inside shoe of victim)(contained in attached Exhibit 3). See also Excerpt of Shelby County Sheriff's Report Concerning Evidence, AG File pp. 269, 271 (Attached as Exhibit 4).

¹¹ See Search Warrant Affidavit, July 17, 1985 ("hair was found on an instrument" used in sexual assault)(Attached as Exhibit 5).

¹² See e.g., University of Tennessee Toxicology And Chemical Pathology Laboratory, July 19, 1985 Report #1, Lab No. 85-1778, Case No. 85-1681, Items 1 & 2; Trial Transcript 872 (Exhibit 3).

that all the requested testing can be conducted and completed before June 3, 2004.¹³

III.

SEDLEY ALLEY IS ENTITLED TO PRODUCTION OF THE EVIDENCE UNDER TENNESSEE LAW, THE UNITED STATES CONSTITUTION, AND THE TENNESSEE CONSTITUTION

A.

SEDLEY ALLEY IS ENTITLED TO PRODUCTION OF THE EVIDENCE UNDER *SHUTTLE v. STATE*, TENNESSEE LAW, THE TENNESSEE CONSTITUTION, AND THE UNITED STATES CONSTITUTION BECAUSE THE EVIDENCE IS RELEVANT TO HIS INNOCENCE AND THE FAIRNESS OF THE DEATH SENTENCE

To avoid miscarriages of justice, the Legislature passed §40-30-301 et seq. to prevent innocent people from either remaining incarcerated or being executed. As the Court of Criminal Appeals made clear in the case of Shuttle v. State, 2004 Tenn.Crim.App.Lexis 80 (Feb. 3, 2004)(Exhibit 7), when reviewing an application for DNA testing:

The Act requires the trial court to assume that the DNA analysis will reveal exculpatory results in the court's determination as to whether to order DNA testing . . . The Act was created because of the possibility that a person has been wrongfully convicted or sentenced. A person may be wrongly convicted based upon mistaken identity or false testimony.

Shuttle, slip op. at * 13. Thus, in Shuttle, where the petitioner "contend[ed] that he was wrongfully convicted at trial where he gave false incriminating testimony," (Id., slip op. at p. * 14), the Court held that he was entitled to production of the evidence because: "In summary, for purposes of the

¹³ Sedley Alley's request for DNA analysis was made because, after conducting further investigation into the case in the spring of 2004, Alley's defense team uncovered previously unknown exculpatory evidence which demonstrates innocence, including Dr. Bell's notes (Exhibit 8) and previously unknown information about a boyfriend – all of which indicates that Sedley Alley did not commit the crime. That investigation prompted further investigation, including analysis of the tire tracks at the abduction scene, and shed further light on the identity of the perpetrator, confirming the need and for the very type of DNA analysis permitted by the Legislature.

Act, we must assume that DNA testing will reveal exculpatory evidence.” *Id.*, slip op. p. *15.¹⁴

Here, we must assume that testing of the fluid samples and hairs will demonstrate that all the fluid samples and hairs left on the victim and her clothing were left by someone other than Sedley Alley. The hair found on the stick found inside the body, we must assume, came from someone other than Alley. Who other than the killer would leave a hair on a stick found only at the scene? The semen and fluids found on the body also must be assumed to have come from someone other than Sedley Alley. The fact that someone deposited semen or bodily fluids on the victim of a sexual assault also clearly confirms that the person who did so is the killer.¹⁵ Similarly, hairs found the victim’s clothing would also identify the killer.

That being said, all of this evidence would demonstrate that Sedley Alley did not rape and

¹⁴ The state argues that the *Saine* case is applicable. It is not. In *Saine*, as the Court of Criminal Appeals explained in *Shuttle*, the petitioner did not contest that he had assaulted the victim, and the evidence sought to be tested would not have identified the perpetrator. As the Court explained in granting the evidence to Shuttle, Shuttle denied having committed the offense, maintained that the evidence would show his statements to authorities were false, and analysis of the evidence would have shown the identity of the perpetrator. *Saine*, therefore, “is distinguishable from the case at bar.” *Shuttle*, slip op. p. *16 & 17. *Shuttle* controls here, and entitles Sedley Alley the evidence he has requested.

¹⁵ Courts have made clear that in a murder case, semen found on, in, or near a body is proof of the identity of the killer:

Evidence placing [a person] at the scene of the murder tends to prove that he participated in it. Semen is no different from fingerprints, hair follicles, or blood in its utility for this purpose. Such evidence connects him with the place, which in turn connects him to the crime that occurred there.

Commonwealth v. Sicari, 752 N.E.2d 684, 751 (Mass. 2001)(upholding murder conviction where defendant’s semen found at crime scene); See *Banks v. State*, 43 P.3d 390 (Okla.Cr.App. 2002)(where defendant’s DNA contained in sperm found on victim’s corpse and clothing, evidence established defendant’s guilt); See also “Two Months After Innocent Men Cleared in 1986 Chicago Murder, Two New Suspects Charged,” Associated Press, February 8, 2002 (victim was raped and murdered, but DNA from semen and hair samples did not match those convicted; defendants were later pardoned by the Governor).

kill the victim, but that someone else did. Given these circumstances, Sedley Alley is entitled to production of the evidence.

Indeed, a reasonable jury which hears that hairs and fluids found on, in, or near the victim did not come from Sedley Alley would reasonably conclude that Sedley Alley did not rape and kill the victim. A jury would acquit him under the reasonable doubt standard, and certainly would never impose the death sentence. Thus, Sedley Alley is therefore entitled to the evidence under Tenn. Code Ann. §40-30-304, because he would not have been convicted. He is also entitled to the evidence under Tenn. Code Ann. §40-30-305, because there is a reasonable probability that the jury would have rendered a "sentence more favorable," i.e., a life sentence, had they known that Sedley Alley did not abduct, rape and kill the victim. See Tenn. Code Ann. §40-30-305(1). This is especially true because residual doubt is a mitigating factor which jurors must consider when deciding whether to impose the death sentence. See State v. Hartman, 42 S.W.3d 44 (Tenn. 2001).¹⁶

Though Alley gave a statement to police, such statement was coerced and not true. See infra. It is his contention – as in Shuttle – that the DNA evidence will prove that the statement is, in fact, false. Under Shuttle, therefore, and as a matter of due process under the Tennessee Constitution and the Fourteenth Amendment, Sedley Alley must be provided the evidence he has requested. Under the Tennessee statutes, the due process provisions of the Tennessee Constitution, Article I §16 of the Tennessee Constitution, the Fourteenth Amendment's due process and equal protection clauses, and the Eighth Amendment (which prohibits cruel and unusual punishment and the execution of the

¹⁶ Moreover, as an individual convicted of a capital offense, Sedley Alley has the right to testing. He has specifically requested it. The fact that his trial attorney did not pursue such a course is irrelevant. Sedley Alley has the right to testing, and he is not bound by the decisions of trial counsel, which have influenced the ongoing litigation in this case.

innocent), the evidence must be produced. See State v. Thomas, 586 A.2d 250 (N.J. 1991)(due process requires DNA testing: no greater injustice than to prohibit testing of evidence to show innocence); Commonwealth v. Brison, 618 A.2d 420 (Pa. 1992); Dabbs v. Vegari, 570 N.Y.S.2d 765 (1990). See Herrera v. Collins, 506 U.S. 390 (1993).

As Judge Luttig (whose father was murdered) has properly recognized, where DNA can identify the perpetrator of a murder, access to DNA evidence should "be unbegrudging," and there is both a substantive and procedural due process right under the Fourteenth Amendments to have such evidence produced and tested. Harvey v. Horan, 285 F.3d 298, 306, 312-321 (4th Cir. 2002)(Luttig, J., concurring in denial of rehearing). See also Kreimer & Rudovsky, Double Helix, Double Bind: Factual Innocence And PostConviction DNA Testing, 151 U.Pa.L.Rev. 547 (2002).

Because the Legislature passed the DNA Act to enable persons to establish their innocence through DNA testing, because the DNA evidence in this case will enable Sedley Alley to make such a showing, and because it would be unconstitutional under Eighth Amendment principles and principles of procedural & substantive due process to deny him access to this vital evidence, Sedley Alley is entitled to production of the evidence. The Criminal Court should be immediately reversed.

B.

EVEN WERE SEDLEY ALLEY REQUIRED TO MAKE SOME SHOWING
THAT SOMEONE ELSE COMMITTED THE KILLING,
HE HAS DONE SO

Sedley Alley is entitled to the evidence under Shuttle, *supra*, the Tennessee Constitution and the United States Constitution. Even were he required to make some sort of showing of innocenceto get the evidence (which he is not), Sedley Alley can show definitive evidence demonstrating that he did not kill the victim. That evidence includes, but is not limited to, the following:

(1) Recently discovered notes from Dr. James Bell, who examined the body at the scene and performed the autopsy, establish that the victim was killed as late as 1:30 a.m. to 3:30 a.m. on July 12, 1985. See Exhibit 8 (Bell Notes). We know, however, that Sedley Alley was arrested at 12:10 a.m. and under surveillance until 1:27 a.m. at his home, and that he remained at his house afterwards. See Exhibit 9 (Radio Log). Dr. Bell's newly discovered notes, in conjunction with clear evidence of Sedley Alley's whereabouts the morning of July 12, 1985, establishes alibi, and confirms that someone other than Sedley Alley committed the murder;

(2) The abductor was described by Scott Lancaster as caucasian, about 5'8," with short, dark brown hair, a dark complexion, and black shorts. See Exhibit 10 (Statement of Scott Lancaster). This clearly does not describe Sedley Alley. Sedley Alley was 6'4", 200 pounds, slender build, with medium to long light brown-reddish hair, a mustache and beard, medium complexion, and wearing blue jean shorts. See e.g., Exhibit 11 (Alley's booking photograph); Exhibit 12 (police description of Alley). Alley was not the person identified by Lancaster:

	Abductor	Sedley Alley
Height & Build	5'8", Medium Build	6'4"; Slender Build
Hair Color	Dark Brown	Light Reddish-Brown
Hair Length	Short	Medium to Long
Complexion	Dark Complexion	Medium Complexion
Facial Hair	None Noted	Mustache & Beard
Clothing	Black Shorts	Blue Jean Shorts

(3) Lancaster's description of the abductor closely matches the description of the

victim's boyfriend, John Borup. See Exhibit 13, ¶5 (Affidavit of April Higuera);

(4) The car involved in the abduction was initially described as a "brown over brown station wagon." See Exhibit 14 (July 12, 1985 Statement of Richard Wayne Rogers). Borup drove a brown Dodge Aspen, which fits that description. See Exhibit 13, ¶6 (Affidavit of April Higuera); Exhibit 15 (Picture of Dodge Aspen);

(5) The tire tracks at the abduction scene *do not* match Sedley Alley's car. See Exhibit 16 (picture of tire tracks at abduction scene); Exhibit 17 (photographs of Sedley Alley's car); Exhibit 18 (Report of Peter McDonald: Sedley Alley's car did not make tire tracks found at abduction scene);

(6) Hairs on the victim's socks at the site where the body was found *do not match* Sedley Alley. See Trial Transcript p. Tr. 883 (Attached as Exhibit 3);

(7) Fingerprints on a beer bottle recovered near the body "are definitely not identical to Sedley Alley's fingerprints." See Exhibit 19 (Excerpt of Report of Sgt. G.B. Dunlap);

(8) Markings identified as shoe prints at the abduction scene have not been shown to match Sedley Alley's shoes, even though the authorities had his shoes from that night. See Exhibit 20: Report concerning shoe prints; Exhibit 21 (picture of Sedley Alley's shoes);

(9) Alley's statement to the police was coerced and not true and the product of manipulation.¹⁷ It contains patently false statements which are not born out by the physical evidence, including statements that the victim was hit by a car and stabbed in the head with

¹⁷ In the lower court, Sedley Alley verified that the foregoing statements concerning the nature of the interrogation are true and correct.

a screwdriver. Even Dr. Bell made clear that such statements were not true. See e.g. State v. Alley, 776 S.W.2d 506, 509 n.1 (Tenn. 1989). Further, prior to the interrogation, Sedley Alley requested and was denied an attorney upon request, and he was threatened by authorities. Detective Sergeant Gordon Neighbours said the next time Alley went to the bathroom he could just shoot him in the back of the head, making the "case closed." They told Alley that his wife would be charged if he didn't make the statement, and that she would get life at Leavenworth. Anthony Belovich lied by telling Alley that they had found the victim's identification card in the front seat of his car. Alley told them he didn't know what they were talking about. These threats, lies, and manipulations led to a false confession by Alley. See Drizin & Leo, The Problem Of False Confessions In The Post-DNA World, 82 N.C.L.Rev. 891 (2004)(identifying 125 persons who gave false confessions to crimes they did not commit, including 9 who were sentenced to death based on confessions proven to be false). Moreover, even once the tape recorder was turned on to record the statement, the authorities turned off the recorder at times and provided information to Alley before continuing the statement. In fact, the tape is significantly shorter in length than the claimed time of the interrogation. See Exhibit 22 (Affidavit of Janet Santana concerning length of tape being under one hour); Exhibit 23 (reports stating that taped interrogation began at 13:47 and concluded at 15:42, indicating that statement was actually nearly two hours in length. This makes clear that the statement is simply not trustworthy.

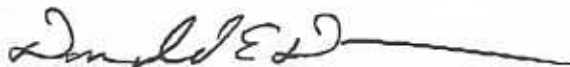
Given all the circumstances, Sedley Alley has demonstrated substantial doubt about his guilt. He doesn't fit the description of the abductor and killer. Tire tracks from someone else's car were at the abduction scene. Someone else's hair and fingerprints were at the scene where the body was

found. The murder would have occurred at a time where Sedley Alley's whereabouts were known. Under all the circumstances, Sedley Alley is entitled to production of the biological materials to finally prove his innocence – a result which the law requires.

CONCLUSION

Pursuant to Tenn. Code Ann. §40-30-301 et seq., the Tennessee Constitution (Article I §§ 8 & 16) and the Eighth and Fourteenth Amendments, this Court should enter an emergency order requiring immediate production of the requested biological samples from the University of Tennessee Toxicology and Chemical Pathology Laboratory in Memphis and Medical Examiner's Office, so that all such samples may be sent to Petitioner's expert for immediate analysis. This Court should also conduct further proceedings as necessary on this appeal.

Respectfully Submitted,



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