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

SEDLEY ALLEY	)	
Petitioner	)	**No. P-8040**
	)	
v.	)	
	)	
STATE OF TENNESEE	)	
Respondent	)	

ORDER
DENYING PETITION FOR POST-CONVICTION DNA ANALYSIS

This matter came to be heard upon the petition of defendant, Sedley Alley, for post-conviction DNA Analysis pursuant to the Tennessee Post-Conviction DNA Analysis Act of 2001,[1]. Tenn. Code Ann. §§ 40-30-301 to 313.[2] The petition was filed in this court on May 4, 2004. Petitioner "requests this court order the production of DNA samples so that he may conduct DNA analysis of those samples to establish any and all exculpatory evidence exonerating him, evidence which would establish a reasonable probability that [he] would not have been prosecuted or convicted and or a reasonable probability that the jury's verdict as to the guilt and/or sentence would have been more favorable had the jury learned the results of the requested DNA testing." *See* Tenn. Code Ann. § 40-30-304 and 305. The petitioner was convicted in 1985 of the kidnapping,

[1] Hereinafter referred to as the Act.
[2] This court recognizes that prior to 2003, the statutes known as the Post-Conviction DNA Analysis Act of 2001 were numbered §§ 40-30-401 to 413. The statutes were re-codified in the 2003 volume as §§ 40-30-301 to 313. For the sake of simplicity, when discussing these acts and the case law interpreting them, this court has used the current statutory numbers.

aggravated rape and premeditated first degree murder of Suzanne Collins. Following his conviction, the defendant was sentenced to death. Thereafter, his sentence and conviction were affirmed on direct appeal. *See* State v. Sedley Alley, 776 S.W.2d 506 (Tenn. 1989). In addition the petitioner's sentence and conviction were subjected to both state post-conviction review and federal habeas corpus review. The petitioner is currently set for execution on June 3, 2004.

On May 5th the State filed a written response requesting this court summarily dismiss the Petition. The State argued that the Petition failed to meet the threshold criteria set forth under the Act; and, therefore, petitioner was not entitled to a hearing on this matter. Subsequently, the petitioner filed a "Reply to Respondent's Response," setting forth further allegations and urging the court to conduct a full hearing on the matter. Not withstanding the State's contention, considering the gravity of the matter, this court set a date of May 12 in order to hear arguments of counsel. After the hearing, late on the afternoon of May 13, the Petitioner faxed additional pleadings, entitled "Supplement in Support of Petition for DNA Analysis," to this court.[3]

[3] This court notes that this document was faxed to the Judge's chambers on the afternoon of May 13, 2004. It appears this document has not been officially filed with the Clerk of this court. Shelby County does not have procedures by which pleadings may be filed by fax. Additionally, although a certificate of service indicating that a copy was faxed to John Campbell, the Assistant District Attorney assigned to the case, appears in the documents sent to this court, this court has not verified that these documents were received by Mr. Campbell, nor has Mr. Campbell been given an opportunity to respond to these documents. Following the hearing on May 12, 2004, the parties were informed that a written order with regard to the petitioner's request would be entered at 9:00a.m Monday, May 17, 2004. Consider the fact that petitioner's counsel failed to provide Mr. Campbell with a copy of their "Reply to the Respondent's Response" and accompanying booklet of exhibits until the morning of May 11, the original date for the hearing, causing the court to reset this matter until May 12 to give the State an opportunity to review the newly filed materials, this court can not simply rely on petitioner's assertion that Mr. Campbell has been provided a copy of the "Supplement." Given the fact that the "Supplement" has not been properly filed with this court, the uncertainty that the State has been provided a copy, the late nature of such filings and the fact that the petitioner had a full opportunity to argue these matters before this court at the hearing and made no request to later supplement their argument, this court is reluctant to consider this document. However, given the gravity of these proceedings and the fact that this court finds the "Supplement" contains no new information, this court will consider said document in its analysis of the "Petition for Post-Conviction DNA

Following the arguments of counsel, review of the pleadings filed in this matter, the appellate opinions filed with regard to petitioner's sentence and conviction and portions of the original trial transcript, this court finds that the petitioner has failed to demonstrate that a reasonable probability exists that the he would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis of the requested samples. *See* Tenn. Code Ann. § 40-30-304. Additionally, this court finds that the petitioner has failed to demonstrate that a reasonable probability exists that analysis of said evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction. *See* Tenn. Code Ann. § 40-30-305.

POST-CONVICTION DNA ANALYSIS ACT OF 2001

Tenn. Code Ann. §§ 40-30-301 to 314 provide procedures by which a person convicted or sentenced for the commission of first-degree murder, second degree murder, aggravated rape, rape, aggravated sexual battery or rape of a child, the attempted commission of any of these offenses or any lesser included offenses to these offenses may file a petition requesting DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the prosecution that resulted in the person's conviction, that may contain biological evidence. *See* Tenn. Code Ann. § 40-30-303. Such petition may be filed at any time. The Act contains no explicit statute of limitations. *See* Shaun Lamont Herford v. State, No. E2002-01222-CCA-R3-PC, 2002 WL 31312370 (Tenn. Crim. App. November 13, 2002).

Analysis."

After notice to the prosecution and an opportunity to respond, the court **shall** order DNA analysis if it finds:

> (1) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
> (2) the evidence is still in existence and in such a condition that DNA analysis may be conducted;
> (3) the evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
> (4) the application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-304. (*emphasis added)* Additionally, the court **may** order DNA analysis if it finds that:

> (1) a reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;
> (2) the evidence is still in existence and in such a condition that DNA analysis may be conducted;
> (3) the evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
> (4) the application for analysis is made for the purposes of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-305 (*emphasis added*) If the contents of the petition establish a prima facie case and the trial court determines all statutory prerequisites are present, a petitioner convicted of one of the statutorily enumerated crimes is entitled to DNA analysis. William D. Burford v. State , No. M2002-02180-CCA-R3-PC, 2003 Tenn. Crim. App., 2003 WL 1937110 (Tenn. Crim. App. April 24, 2003). A petitioner, under the Tennessee statute, is not required to plead with "specificity" and, unlike other states, is not required to demonstrate that identity was an issue at trial. Willie Tom Ensley v.

State, No. M2002-01609-CCA-R3-PC, 2003 WL 1868647 (Tenn. Crim. App. April 11, 2003). Conversely, if the state contests the presence of any qualifying criteria and it is apparent that each prerequisite cannot be established, the trial court, has the authority to dismiss the petition. Buford, 2003 WL 1937110, at * 3 The Act does not specifically provide for a hearing as to the qualifying criteria and, in fact, authorizes a hearing only after DNA analysis produces a favorable result. *Id.* Tenn. Code Ann. § 40-30-309 contemplates summary dismissal under appropriate circumstances, and failure to meet *any* of the qualifying criteria is fatal to the action. *Id*. (*emphasis added*).

In making its determination a trial court may consider all the evidence available, including the evidence at trial and/or any stipulations of fact by the petitioner or his counsel and the state; and the opinions of appellate courts on either direct appeal of the conviction, post-conviction proceedings, or habeas corpus actions. Ensley, 2003 WL 1868647, at * 3.

EXAMINATION OF EVIDENCE AT TRIAL
AND
REVIEW OF PROCEEDINGS ON APPEAL

In 1985, the petitioner was convicted of the kidnapping, rape and murder of the victim, Suzanne Collins, a nineteen year old lance corporal in the United States Marine Corps stationed at the Millington Naval Base. After finding the murder was especially heinous, atrocious and cruel and the murder was committed during the kidnapping and rape, the jury sentenced the petitioner to death for the murder. He was sentenced to forty years on each of the other offenses, all sentences consecutive. The petitioner is currently

set for execution on June 3, 2004. In it's opinion affirming the petitioner's convictions and sentence, the Tennessee Supreme Court outlined the following facts:

> At approximately 10:00 p.m. on 11 July 1985 she [Suzanne Collins] left her barracks dressed in physical training gear, a red Marine T-shirt, red Marine shorts, white socks and tennis shoes and went jogging on the Base, north of Navy Road. . . . Her body was found the next morning at Orgill Park, which adjoins the Naval Base, north of Navy Road.
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> Defendant was not in the military service but was married to a military person and they lived on the Naval Base. He was employed by a Millington heating and air conditioning company. He was almost 30 years old, had two children, born of an earlier marriage, living in Kentucky, and had a history of alcohol and substance abuse. After appropriate *Miranda* warnings defendant waived the presence of an attorney and gave a lengthy statement of his activities that resulted in the death of Suzanne Collins to officers of the Naval Investigation Service on the morning of 12 July 1985. The statement was tape recorded with defendant's permission. A narrative account of the relevant events of that evening as he related them to the Naval Officers follows.
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> About 7:00 p.m. on 11 July 1985, his wife left with two women to go to a Tupperware party. Defendant had been drinking beer before they left and by approximately 9:00 p.m. he had consumed an additional six-pack and a fifth of wine. At the time he drove his 1972 Mercury station wagon, with a Kentucky license tag to the Mini Mart and purchased another six-pack. . . . He drove to the north side of the Base, parked on a lot near the golf course and started running toward Navy Lake. He ran past a girl jogging and before he got to the lake he stopped, she caught up with him and they had a brief conversation. He did not know her name and had never seen her before. They turned around and jogged back to his car. He stopped there out of breath, and she continued on toward the gate at Navy Road. He started driving down the road toward the gate in spite of his apparent recognition that he was drunk and weaving from side to side on the roadway. He heard a thump and realized he struck the girl jogger. Quoting from his statement "she rolled around and screamed a couple of times and I ran over and grabbed her and told her I was going to take her to the hospital. I helped her into the car and we started towards. . ."
>
> On the way to the hospital defendant said that she called him names such as a drunken bastard and threatened to get him in trouble and he tried to calm her down without success. When he reached the traffic light on Navy Road near the 7/11 store he turned left and again went to the north part of the Base in the vicinity of the lake. He described in considerable detail the subsequent events, that included hitting her a few times, holding her down on the ground, and sticking a screwdriver in the side of her head, under circumstances apparently

calculated by the defendant to appear to be accidental. All of these actions were because she would not listen to his pleas not to turn him in.

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

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

An Naval officer driving north toward the lake on the Base passed two male Marines jogging north, and later saw a female Marine in red T-shirt and red shorts also jogging north. After passing the lone Marine he saw a white male near an old station wagon with wood paneling that was parked on an empty lot near the buffalo pens. The two Marines testified that as they jogged north a female Marine was jogging south and shortly thereafter they encountered a station wagon with wood grain paneling also going south that swerved over into the north lane towards them. The car continued on southward and when they were several hundred yards further north they heard a female voice screaming in distress, "Don't touch me," "Leave me alone." They immediately turned around and ran south in the direction of the scream. It was too dark to see any activity very far ahead and before they reached the scene they saw the station wagon drive off toward the main gate. At the time they were about 100 yards away and were able to observe that the station wagon was off the road in the grass, near the fence, on the left or wrong side for a vehicle going south. Suspecting a kidnapping they continued on to the gate and gave a full report of what they had witnessed. They accompanied military security personnel on a tour of the residential areas of the Base looking for the station wagon, without success. However, after they returned to their barracks, they were summoned to the security offices where they identified the station wagon. Defendant had been stopped and brought in for questioning as had his wife. Their responses had allayed any suspicion that the defendant had been connected with a kidnapping and they were allowed to go home. All of the events occurred before approximately 1:00 a.m., 12 July 1985. The victim's body was found shortly before 6:00 a.m. on that date and defendant was promptly arrested by the military police.

After completing the statement, defendant voluntarily accompanied officer over the route he had taken the night before and to the location of the murder and accurately identified various things, including the tree where he had left the body and where it was found by others and from which the limb he used had been broken.

> The pathologist Dr. James Bell, testified that the cause of death was multiple injuries. He also identified several specific injuries, each of which could have been fatal. The victim had bruises and abrasions over her entire body, front and back. He testified that the injuries to the skull could have been inflicted by the rounded end of the defendant's screwdriver that was found near the scene, but not the pointed end. He identified the tree branch that was inserted into the victim's body. It measured 31 inches in length and had been inserted into the body more than once, to a depth of twenty inches, causing severe internal injuries and hemorrhaging. The pathologist was of the opinion that the victim was alive when the tree limb was inserted into her body. There were also bruises on the victim's neck consistent with strangulation.

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

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

Lahren testified about various hairs found on the victim's person, in the petitioner's vehicle and on the stick which was inserted into the victim. A Caucasian

pubic hair was found in the victim's shoe but it was too limited to do a comparison with either the petitioner's sample or the victim's sample. A Caucasian head hair found in the victim's tennis shoe was determined to belong to the victim. A bloody Caucasian head hair was found on the front driver's side of the petitioner's car. Analysis revealed the hair belonged to the victim. Medium brown Caucasian body hair, either from the leg or arm, was found on the victim's waistband. However, Lahren testified that arm or leg hair does not have consistent microscopic characteristics and thus could not be compared to either the petitioner's or the victim's samples. Two strands of black head hair were found on one of the victim's socks. Lahren testified that this would be consistent with someone walking around in their sock feet. A light brown Caucasian head hair was found on the victim's shirt. It was determined that the hair belonged to the victim.

Petitioner's defense at trial revolved around an insanity defense, specifically, his contention that he was suffering from Multiple Personality Disorder. On direct appeal, the primary issue raised by the petitioner was whether there was sufficient evidence presented at trial to establish his sanity beyond a reasonable doubt. Again, during post-conviction review the petitioner raised issues about trial counsel's performance, as it related to his defense of insanity.

PETITIONER'S ALLEGATIONS

Petitioner contends that, although there was no DNA evidence presented at trial, the State is in possession of numerous samples containing biological evidence, including hair specimens and fluid samples, which can now be subjected to DNA analysis.

Specifically, the petitioner requests the state be ordered to turn over the following items for DNA analysis:

1. the known hair and fluid samples taken from the victim;
2. the known hair and fluid samples taken from the petitioner;
3. hair found on the waistband of the victim;
4. hair found on the victim's shoe;
5. hair found on the victim's socks
6. hair found on the stick which was used to rape the victim;
7. nasal, oral, rectal, and vaginal swabs taken from the victim; and
8. swabs taken from each of the victim's inner thighs.

The petitioner contends that there is a reasonable probability that he would not have been prosecuted or convicted if the analysis yields exculpatory results. *See* Tenn. Code Ann. § 40-30-304. In addition, or in the alternative, the petitioner contends that a reasonable probability exists that analysis of the requested evidence will produce DNA results which would have rendered a more favorable verdict or sentence, if the results had been available at the proceeding leading to the judgment of conviction. *See* Tenn. Code Ann. § 40-35-305. Petitioner argues that should the samples yield results which can not be linked to either the defendant or the victim then the evidence would demonstrate that he did not rape and kill the victim, but that someone else did. At the very least, he argues the jury would not have imposed the death penalty. In his "Reply to the Respondent's Response" petitioner goes further, and now contends that despite his confession to the kidnapping, rape and murder of the victim, he is not the perpetrator of said acts. Petitioner now maintains certain evidence tends to implicate one of the victim's romantic partners. Additionally, the petitioner contends that this court should disregard certain

evidence at trial as unreliable.[4] Thus, defendant contends he is entitled to DNA analysis of the requested samples. Moreover, the petitioner contends such testing could be completed prior to the June 3 execution date.[5]

ANALYSIS

The Petitioner contends Jack Jay Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 WL 199826 (Tenn. Crim. App. February 2, 2004)[6] applies to his case. He argues that, like Shuttle, his claim that a third party was involved in the murder now entitles him to DNA testing, irregardless of his pre-trial confession to the kidnapping, aggravated rape and murder of the victim. In contrast the State asserts that Mr. Alley's case is more akin to the underlying facts presented in Carl E. Saine v. State, No. W2002-03006-CCA-R3-PC (Tenn. Crim. App. December 15, 2003). However, the State contends that under the rationale of either Shuttle or Saine petitioner has failed to meet the threshold requirements of the Act; and, thus, is not entitled to DNA testing of the requested items.

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[4] Specifically, petitioner contends his confession, given the morning after the murder, was coerced, is the product of manipulation, and is not true; recently discovered documents from Dr. Bell, who conducted the autopsy of the victim, reveal that the victim's time of death was later than originally thought, and he has an alibi for the window of time in which he now contends the murder was committed; Scott Lancaster, a witness to the abduction, gave a description of the perpetrator that does not match his physical build but does match one of the victim's romantic partners, John Borup; the car described by witnesses to the abduction matches that of Borup; tire tracks at the abduction scene do not match his car; fingerprints on a beer bottle recovered near the body of the victim are not identical to his; and shoe prints at the abduction scene do not match the shoes he was wearing on the night in question.

[5] Petitioner included as exhibit 20 to its "Reply to the Respondent's Response" the "Declaration of Gary C. Hammer." Hammer is a Senior Forensic Serologist at the Serological Research Institute in Richmond, CA. From this document, it appears Mr. Hammer avers that DNA analysis of the requested hair and fluid samples could be completed within ten working days.

[6] The State has a pending Rule 11 in this case filed in March of 2004.

Applying the rationale behind Judge Tipton's concurring opinion in Ricky Flamingo Brown v. State, No. M2002-0247-CCA-R3-PC, 2003 WL 528 (Tenn. Crim. App. June 13, 2003) *perm. to app. denied* (Tenn. 2003), the Court in Shuttle held that "the Act requires that the court assume that the DNA analysis will reveal exculpatory results in the court's determination as to whether to order DNA testing." In Brown, the trial court based it's dismissal of the petition for analysis upon the victim's testimony that it was the petitioner who assaulted her. Judge Tipton argued that the Act "was created because of the possibility that a person has been wrongfully convicted or sentenced," and "a person may be wrongfully convicted based upon mistaken identity or false testimony." Thus, he concluded that dismissal of the petition should not be based solely upon the testimony of the victim. In Shuttle, the Court expanded Judge Tipton's rational to include a petitioner who essentially contends he was wrongfully convicted at trial, where he gave false incriminating testimony. Shuttle, 2004 WL 199826, *4 (Tenn. Crim. App. February 2004).

The petitioner in Shuttle sought testing of blood and skin samples taken from under the victim's fingernails and blood found on the victim's jeans. The petitioner testified at the hearing on the petition for DNA analysis that, although he had falsely given incriminating evidence at trial, a third party was the actual perpetrator of the murder. The Court found particular significance in the fact that petitioner had initially informed his attorney that a third party committed the offense in a manner consistent with his testimony at the hearing. In addition, petitioner's trial counsel testified at the hearing, that the petitioner had indeed initially informed him that a third party had

committed the murder, and only after counsel informed petitioner that he was unable to locate the named party, did the petitioner state that he had committed the murder. Thus, extrapolating from Judge Tipton's concurring opinion in Brown, the Court found that in reviewing the petitioner's request, it must assume that the DNA testing would reveal exculpatory evidence, namely, that the blood underneath the victim's fingernails and the blood on the victim's jeans was not the blood of either the victim or the petitioner. The Court found that

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

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

In contrast to Shuttle, the Court in Saine found the petitioner's partial recantation, in light of other evidence to be unreliable, and; thus, held petitioner failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted had exculpatory DNA evidence been obtained. In Saine, the petitioner was convicted of assault and rape. Carl E. Saine v. State, No. W2002-03006-CCA-R3-PC, *6 (Tenn. Crim. App. December 15, 2003). He requested spermatozoa discovered on the victim's torn panties be submitted for DNA testing. *Id.* The petitioner admitted assaulting the victim, but stated he left the victim while she was still unconscious, and a third party could have then entered the room and committed the rape. *Id.* The trial court denied the petitioner's request and the Court of Criminal Appeals affirmed based upon the fact that

the victim identified the petitioner as her rapist and other evidence corroborated her testimony regarding the rape. *Id.* at *10-11. The Court further noted that no evidence was presented at trial that the victim wore the panties containing the spermatozoa at any time during or after the rape, and, therefore, the evidence was not a primary factor in proving the petitioner's guilt. *Id.* at 11-12. The State argues that this case is analogous to Mr. Alley's petition. They argue that the petitioner is now incredulously claiming that although his confession to the murder, testimony from authorities that he participated in a walk-through of the crime scene, physical evidence placing the victim in his vehicle, and witness testimony identifying his car as the one involved in the abduction were introduced at trial, DNA analysis of certain evidence would now demonstrate that a third person could have raped the victim. The State argues that unlike Shuttle, where the prosecution and conviction of the petitioner was based upon the blood evidence, upon which petitioner requested testing be done, and his "false incriminating testimony;" the evidence against Mr. Alley, like that against the defendant in Saine, is far more overwhelming and testing of the requested items even if exculpatory would not have prevented his prosecution or conviction.

This court concludes that under either Shuttle or Saine the petitioner has failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA evidence had been obtained from any of the requested items. Initially, this court finds, with regard to the criteria set forth in Tenn. Code Ann. §§ 40-30-304(2) and 40-30-305(2), that the requested samples are still in existence and have never been subjected to DNA testing. While it appears Sims tested certain items for

the presence of blood or seminal fluids, it does not appear any DNA analysis was conducted. The same is true for Lahren. Initially, Lahren explained that hair analysis does not allow an examiner to say that two "matching" samples are exactly the same; rather, the examiner determines that the two samples share the same microscopic characteristics. Obviously, this does not appear to be as sophisticated a technique as DNA analysis. However, with regard to both Lahren and Sims statements that certain samples were insufficient to allow meaningful comparison, it calls into question whether or not such samples would be sufficient for DNA analysis. Neither the State nor the petitioner can conclusively say that each of the items is in a sufficient condition for DNA testing. Nevertheless, since there has not been sufficient proof to contradict the assertion that the samples are sufficient for DNA testing, for purposes of evaluating the statutory criteria, this court will assume said samples are of a sufficient quantity and condition to be tested.

With regard to the criteria set for in subsection (1) of the above referenced statutes this court will analyze each of the petitioner's request independently, utilizing the standard set forth by Shuttle, i.e. assuming the DNA testing of each will reveal exculpatory evidence.[7]

First, the petitioner seeks testing of the medium brown body hair found on the victim's waistband. Petitioner contends that if tests revealed the hairs belonged to someone other than himself or the victim, then he would not have been prosecuted or

[7] The court is mindful of the State's notice that Shuttle has a pending Rule 11 application. However, this court is bound by the authority it presently has before it. Moreover, even under this broad standard, this court finds petitioner is unable to meet the prerequisites to testing as required under the Act.

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

Initially, this court find the Act does not require that it reevaluate the credibility or validity of the evidence submitted at trial nor review new evidence now asserting a different theory than the one relied on by the defendant at trial. Furthermore, the statute clearly limits its reach to permit only performance of a DNA analysis which compares the petitioner's DNA samples to DNA samples taken form biological specimens gathered at the time of the offense. *See* Earl David Crawford v. State, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328 (Tenn. Crim. App. August 4, 2003) *perm. to app. denied* (Tenn. 2004). The evidence requested to be tested must stand alone. Simply put, would evidence that the hair found on the victim's waistband belonged to someone other than the petitioner or the victim precluded the State from seeking prosecution of the petitioner or the jury from convicting petitioner. This court finds it would not have. The key inquiry is whether petitioner has established a "**reasonable** probability" that a different outcome would have resulted. What petitioner now suggests is far from **"reasonable."** , then he would not have been prosecuted and/or convicted. Like, the evidence sought to be tested in Saine, the hairs found on petitioner's waistband were not a primary factor in proving petitioner's guilt. Moreover, unlike Shuttle, such results would not be inconsistent with the State's proof at trial, given the fact that the victim resided in a public place and was found in a public park. Hair is different than blood as it relates to the evidence of criminal action, and the presence of a third party's hair does not preclude an act of violence by the petitioner, in the same way that presence of another's blood would.

Next the petitioner seeks DNA testing for a pubic hair found on the victim's left shoe. Again, for purposes of evaluating this request, the court assumes DNA testing would reveal that the hair belonged to someone other than the victim and someone other than the petitioner, and this court again finds the petitioner has failed to establish a reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA evidence was obtained from this sample.

The State's theory at trial, with regard to the rape of the victim, did not involve a traditional sex act; but, rather, involved an act of sexual mutilation. Never did the State contend that the petitioner had sexual intercourse, or attempted to have sexual intercourse with the victim. In addition, in his statement to police, the petitioner contends he did not have or attempt to have sexual intercourse with the victim. Rather, the evidence at trial revealed that the victim was raped by a thirty-one inch tree limb being forcibly inserted into her body. In addition, the jury heard testimony from Lahern that a Caucasian pubic hair was found in the victim's shoe, but that he was unable to determine if it originated from the victim or the petitioner because the sample was too limited for comparison to the known samples taken from the petitioner and victim. In light of this testimony, the circumstances of the offense, and the petitioner's confession, this court finds that the petitioner has failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted should testing of this sample provide exculpatory DNA evidence. Again, this evidence was not a primary factor in proving petitioner's guilt, and exculpatory results, while consistent with petitioner's current assertions that a third party was involved, are not consistent with the overwhelming proof presented at trial.

Petitioner, simply has not demonstrated a reasonable probability that exculpatory results would affect his conviction.

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

Next the petitioner requests DNA analysis of the hair found on the tree limb which was used to rape and kill the victim. Again, this court notes that victim was found in a public park and the tree limb which was utilized to rape and mutilate the victim was also taken from a public place. There was no testimony at trial regarding the hair found on the tree limb. Therefore, it was not a primary factor in proving the petitioner's guilt.

Thus, given the testimony and evidence introduced at trial regarding the petitioner's culpability and medical testimony about the victim's death, this court finds that even if DNA analysis established that the hair on the limb did not belong to the petitioner or the victim, petitioner has failed to demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted.

Finally, the petitioner requests DNA analysis be performed on the nasal, oral rectal and vaginal swabs taken from the victim and on swabs taken from the victim's inner thighs. Initially, this court notes that it is unclear whether any material for testing exists in the swabs. Documents submitted from the chemical and pathology laboratory utilized by the State in analyzing these materials for trial indicates that on some samples there was a "weak positive" indicating the presence of "acid phosphates" or "H substance." The petitioner contends this indicates the presence of semen. However, the State indicates that these substances could be fluids from the victim and do not indicate the presence of semen. Specifically, the State argues that women often have "weak positives" for acid phosphotate and further argues that the term "H substance" refers to the blood type O, the same blood type as the victim. Regardless, we find that even if the sample is sufficient for DNA testing, the petitioner has still failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted if testing reveals the presence of another person's bodily fluid on the nasal, oral, rectal or vaginal areas of the victim or on the victim's inner thighs.

As the State argues, evidence of another person's semen could merely have been evidence of a prior consensual sexual encounter. Again, this court reiterates that the State's theory at trial was not that the victim was raped by penile penetration. Rather, the theory was that the victim was essentially sexually mutilated through the insertion of the tree branch into her vagina. Thus, in light of the fact that the petitioner gave a detailed confession to the crime; drove officers, who were unfamiliar with the crime scene, to the location where the body was found and to the place, which was some distance away, where he had broken off the tree limb; the insanity defense asserted by the petitioner at trial and on appeal; the testimony from the three individuals who identified the petitioner's car as the vehicle used in the abduction, both by sight and sound; the fact that victim's bloody hair was found in the victim's vehicle and her blood; matching her type found on the victim's door and the medical testimony regarding the insertion of the tree limb into the victim, it simple is not "reasonable" to conclude that, even if the DNA of the samples revealed semen from another individual present on the victim, the State would not have sought prosecution or the jury would not have convicted the petitioner.

Moreover, this court does not find that DNA testing is warranted under Tenn. Code Ann. § 40-30-305. It is this court's understanding that a request for DNA testing, unlike a request for testing under Tenn. Code Ann. § 40-30-304, is discretionary. Even if the court finds the criteria is met, it may in it's discretion deny the request. Regardless, this court also finds that, with regard to each request, petitioner has failed to demonstrate that a reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if

the results had been available at the proceeding leading to his judgments of conviction. Given the petitioner's statement regarding the circumstances of the murder, and the corroborative witness testimony and medical testimony, it is unlikely that the jury would have returned a verdict finding the petitioner guilty of an offense lesser than those for which he was convicted, even if DNA analysis, of any of the requested items, had produced results excluding the petitioner and the victim. Nor as previously indicated, is it likely the jury would have acquitted the petitioner on any of the charged offenses. Finally, despite the petitioner's argument to the contrary, given the brutal nature of the offense and extensive injuries to the victim, it is not likely that the jury would have rendered a sentence less than death, even if they had heard evidence that DNA analysis excluded petitioner and the victim as the source for the requested samples.

Finally with regard to subsection (4) of Tenn. Code Ann. §40-30-304 and 305, this court has serious questions regarding the motivations of the petitioner for raising this issue at this time. As previously noted, throughout this order, the petitioner is currently set for execution on June3, 2004. While it is clear from the statutes and the case law analyzing the Act that a petition for post-conviction DNA analysis may be brought at any time, the samples sought for testing by this petitioner have been available since before the trial. Much of the documentation supporting their request was available at trial. Throughout the direct appeal and the post-conviction of this case, petitioner has asserted that he committed the alleged acts, but was not sane at the time of their commission. Thus, the timing of petitioner's allegations is highly suspect. However, having found the petitioner has failed to meet criteria (2) under both sections 304 and 305 of the Act, this

court need not reach the issue of whether the petition was filed for the purpose of demonstrating actual innocence or merely to unreasonably delay the execution of the petitioner's sentence.

Having found petitioner has failed to demonstrate that a reasonable probability exists that he would not have been prosecuted or convicted; or that he would have received a more favorable verdict or sentence, if exculpatory DNA evidence had been obtained, the Petition for Post-Conviction DNA Analysis is, hereby, DENIED.

_____ _____

Date Judge W. Otis Higgs, Division II.