ATTACHMENT 2

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEDLEY ALLEY,	)	
	)	
Appellant,	)	
	)	
	)	SHELBY CRIMINAL
v.	)	NO. W2006-01179-CCA-R3-PD
	)	
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF
THE SHELBY COUNTY CRIMINAL COURT

BRIEF OF THE STATE OF TENNESSEE

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I. Does a petitioner seeking DNA analysis of biological evidence related to the investigation or prosecution that resulted in a judgment of conviction possess either a statutory or constitutional right to conduct a "DNA database comparison" or to present independent evidence of third-party guilt in Tennessee post-conviction DNA proceedings?

II. Sedley Alley confessed to the kidnapping, aggravated rape and murder of Suzanne Collins. After his arrest, he led law enforcement officials on a walk-through of the crime scene, identifying the place where Collins' body was found and the tree from which he obtained the branch used in his sadistic attack. Blood matching Collins' ABO type and hair visually matching hers were found on Alley's car. The shorts Alley was wearing on the night of the murder were stained with blood. Three witnesses identified Alley's car, both by sight and sound, as the one involved in Collins' abduction. Alley asserted an insanity defense at trial and, for twenty years thereafter, made no assertion of his factual innocence of the murder. Under these circumstances, did the trial court abuse its discretion in denying Alley's eleventh-hour petition for post-conviction DNA analysis?

STATEMENT OF THE CASE

1. Procedural History

The appellant, Sedley Alley, was convicted in 1987 for the kidnapping, aggravated rape and premeditated first-degree murder of Suzanne Collins and sentenced to death. The Tennessee Supreme Court affirmed his convictions and sentence on direct appeal, *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989), and the United States Supreme Court denied certiorari. *Alley v. Tennessee*, 439 U.S. 1036 (1990). Alley's convictions and sentence were upheld by the trial court on post-conviction and subsequently affirmed by this court. *Alley v. State*, 958 S.W.2d 138 (Tenn. Crim. App. 1997) (app. denied Sept. 29, 1997).

In 1998, Alley filed a petition for writ of habeas corpus in the United States District Court for the Western District of Tennessee challenging his convictions and death sentence. The district court summarily dismissed the petition, *Alley v. Bell*, 101 F. Supp. 2d 588 (W.D. Tenn. 2000), and the Sixth Circuit affirmed the district court's judgment. *Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002) (reh. denied Dec. 20, 2002). The United States Supreme Court denied a petition for writ of certiorari. *Alley v. Bell*, 540 U.S. 839 (2003) (reh. denied Dec. 8, 2003).

On December 9, 2003, the State of Tennessee filed a motion in the Tennessee Supreme Court requesting the setting of an execution date. The Tennessee Supreme Court granted the State's motion on January 16, 2004, setting Alley's execution for June

3, 2004.

On May 4, 2004, thirty days before his execution date, Alley filed a petition in the Shelby County Criminal Court for post-conviction DNA analysis, arguing for the first time in nearly 20 years of trial and post-conviction litigation that he is factually innocent of the murder. *See* Tenn. Code Ann. § 40-30-301 *et seq.* (also known as the "Post-Conviction DNA Analysis Act of 2001"). The trial court denied relief, and this court affirmed. *Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). Both courts concluded that, even if "potentially favorable" results were obtained through DNA analysis, it would not negate the remaining evidence, which "strongly identifies [Alley] as the perpetrator." *Id.*, slip op. at 11-14. In rendering its decision, this court summarized much of the evidence supporting Alley's conviction. *Id.* at 11. In addition, even then, the trial court noted "serious questions regarding [Alley's] motivation . . . for raising the issue at this time" and found that the timing of Alley's petition was "highly suspect." *Id.* at 14. The United States Supreme Court denied certiorari on March 28, 2005. *Alley v. Tennessee*, 544 U.S. 950 (2005).

In the meantime, however, Alley's execution was stayed by order of the federal district court on May 19, 2004, pending that court's "ruling on Petitioner's Rule 60(b) motion" in his habeas corpus case. The district court ultimately denied Alley's Rule 60(b) motion and, on March 22, 2006, denied his motion under Fed. R. Civ. P. 59(e)

to alter or amend the judgment. On March 29, 2006, the Tennessee Supreme Court re-set Alley's execution for May 17, 2006. One week later — forty-two days before his *rescheduled* execution date — Alley filed a complaint in the United States District Court for the Western District of Tennessee under 42 U.S.C. § 1983 requesting injunctive relief in the form of access to certain evidence introduced in his criminal trial for purposes of DNA testing.[1] The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), and, on April 20, 2006, the district court dismissed Alley's complaint for failure to state a claim upon which relief may be granted. Alley appealed the district court's judgment, and, on May 14, 2006, the Sixth Circuit affirmed, concluding that there exists no general constitutional right to post-judgment DNA testing. *Alley v. Key*, No. 06-5552, *slip op.* at 5.

Further, consistent with this court's finding in Alley's earlier state post-conviction DNA proceeding, the Sixth Circuit observed that "[t]he compelling evidence of Alley's guilt — including his confession, his description to law enforcement authorities of his acts, and the eyewitness testimony against him — strongly suggest that he could never accurately be considered actually innocent of the crime." The Sixth Circuit denied Alley's petition for rehearing on May 16, 2006.

While his appeal in the Sixth Circuit was still pending, on or about May 10,

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[1]Alley sued only William R. Key, Criminal Court Clerk for the Thirtieth Judicial District of Tennessee, the physical custodian of the evidence at issue. However, the district court subsequently permitted William L. Gibbons to intervene as a defendant in his official capacity as District Attorney General for the Thirtieth Judicial District.

2006, Alley's counsel submitted a letter to the governor of Tennessee, which was construed to be a request to grant a reprieve and to order that DNA testing be conducted on certain trial evidence. The governor referred the request to the Board of Probation and Parole, which held a hearing on May 15, 2006. At the conclusion of the hearing, the Board voted 4-3 to recommend a reprieve. On May 16, 2006, the governor granted a fifteen-day reprieve to "continue in effect until May 31, 2006." The stated purpose of the reprieve was to allow Alley "to return to state court and to seek permission to test those additional items that were not included in his 2004 [DNA] petition." (Executive Reprieve and accompanying statement attached) The statement accompanying the governor's reprieve correctly observed that the propriety of DNA testing is a matter that is "properly the province of our court system."

2. Proceedings Below

On May 19, 2006, Alley filed his second "Petition for Post-Conviction DNA Analysis Pursuant to Tenn. Code Ann. § 40-30-204 & 305." In his latest petition, Alley argued that DNA testing on four specific items of evidence would be "capable of determining with unmatched precision whether he is innocent or guilty of the 1985 rape and murder for which he was convicted and sentenced to death," namely: (1) underwear recovered from the crime scene; (2) the tree branch used to sexually mutilate Suzanne Collins; (3) "material from underneath the fingernails" of Suzanne Collins; and (4) blood and hair identified as being consistent with Suzanne Collins found on and in

Alley's car. (Petition, pp. 3-5) In addition, Alley argued that testing should be performed on virtually every item of physical evidence recovered at or near the crime scene "in the interest of a thorough post-conviction investigation . . . as they could contain additional evidence and create additional redundant results." (Petition, pp. 19-20)

Following a hearing on May 30, 2006, at which the trial court heard oral argument concerning the materiality of Alley's proposed DNA testing, the court dismissed the petition, concluding that, in light of the overwhelming evidence against him and despite any results that could be obtained from DNA analysis: (1) Alley still would have been prosecuted; and (2) the outcome of the trial would not have been affected. In addition, the court specifically found that the DNA petition was not filed with the intent to prove Alley's innocence but for the purpose of delaying his execution. Alley appealed.

STATEMENT OF FACTS

1. The Crime — Trial and Direct Appeal

The following facts summarize the evidence at Alley's state court trial and are taken from the opinion of the Tennessee Supreme Court on direct appeal.[2] *See State v. Alley*, 776 S.W.2d 506 (1989).

Nineteen-year-old Suzanne Marie Collins, a lance corporal in the United States Marine Corps, was stationed at the Millington, Tennessee, Naval Air Station. At approximately 10:00 p.m. on the night of July 11, 1985, she left her barracks to go jogging on the base. Shortly before 6:00 a.m. the following morning, her body was found in Orgill Park, which adjoins the Naval Air Station. She had multiple injuries to her skull consistent with blows from the rounded end of a screwdriver, bruises on her neck consistent with strangulation, and bruises and abrasions over her entire body front and back. She had also suffered severe internal injuries and bleeding as the result of the insertion of a 31-inch long, broken tree limb into her vagina, more than once and to a depth of 20 inches. While the cause of death was multiple injuries, the pathologist testified at trial that the victim was alive when the tree limb was inserted into her body.

Sedley Alley was a civilian married to a military person with whom he lived on the Navy base at Millington. Even before Collins' body was found, Alley was a suspect in

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[2]This court make take judicial notice of the appellate record of Alley's direct appeal and prior post-conviction actions. *See Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn.1987) (appellate court may take judicial notice of its records in prior proceedings).

her abduction. The night before her body was found, two male Marines jogging north on a road on the base passed Collins as she jogged south. Shortly after passing her, the two men heard a female voice screaming in distress, "Don't touch me," "Leave me alone." Although they immediately turned and ran in the direction of the scream, they saw only a station wagon drive off toward the main gate of the base. Suspecting a kidnapping, the two Marines continued to the gate and gave a full report of what they had witnessed. The gate guard remembered seeing a car that contained a man and a woman; he testified at trial that it appeared the man was holding the woman. The Naval Investigative Service put out a BOLO ("be on the look-out") for the vehicle described by the witnesses. A Shelby County Sheriff's Deputy, upon hearing the BOLO, suspected the car may be headed in the direction of Edmund Orgill Park near the Navy base. He arrived in the vicinity and stopped a car, driven by Alley, which matched the description in the BOLO, coming from the area of the park at 12:15 a.m. Alley reported that he had been on the Navy base earlier and had just been jogging in the park. He voluntarily accompanied NIS officers back to the base and was interviewed along with his wife. Their responses initially allayed any suspicion that he was connected with a kidnapping, and they were allowed to go home. In the meantime, however, the two Marine witnesses had returned to headquarters and identified Alley's vehicle by sight and by sound as the one they had seen on the base in the vicinity of the victim's screams.

Collins' body was found shortly before 6:00 a.m. that morning, and Alley was

promptly arrested by military police at his home. At the time of his arrest, Alley was laundering a pair of blue jean shorts that he had been wearing; the shorts later tested positive for human blood in multiple areas. After his arrest, Alley gave a lengthy statement to investigators describing his activities the night before and admitting his role in the victim's murder. He accompanied officers over the route he had taken and to the location of the murder, identifying the tree from which the limb he used had been broken. Alley always insisted that he did not have sexual relations or attempt to have sexual relations with Collins at any time. Rather, he admitted taking off her clothes, dragging her by the feet to a tree, and penetrating her in the vagina with a tree limb he had broken off. A branch was protruding from Collins' vaginal area when her body was found. Blood stains on Alley's vehicle were consistent with the victim's blood type. Hair found on and in Alley's car were visibly consistent with the victim's hair.

On direct appeal, the Tennessee Supreme Court detailed the extensive proof presented at Alley's trial, including the details of Alley's confession, his actions after his arrest — "[Alley] voluntarily accompanied officers over the route he had taken the night before 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 "numerous witnesses who observed some of the movements" of Alley and Suzanne Collins on the night of the murder, and Alley's claimed insanity defense. *Alley*, 776 S.W.2d at 508-11.

2. The Defense — "Power" and/or "Billie" Did It.

At trial, Alley raised an insanity defense based upon a diagnosis by defense mental health experts of multiple personality disorder. Although he claimed to have no memory of the murder itself, Alley related information "leading up to it" in a series of interviews with Dr. Wyatt Nichols from November 1985 to January 1986. (Trial Tr. Vol. VII, pp. 954-55) Two other mental health experts, Dr. Willis Marshall and Dr. Allen Battle, testified that Alley had possibly two alternate personalities and that, if either of those personalities had been in control at the time of the offense, he could neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of the law. (Trial Tr. Vol. VIII, p. 1109-10, 1183; Vol. VIII, pp. 1194-96) Neither was able to say, however, that such an alternate personality was in fact in control at the time of the offense.[3]

Moreover, notwithstanding his subsequently-claimed amnesia, Alley never disavowed commission of the murder even to his own mental health experts and, in fact, gave statements clearly inculpating himself in it. For example, during his initial interview with Dr. Marshall in April 1986, Alley related that, on the night of the murder, he saw what he assumed to be a woman on a horse — "She was wearing a black gown

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[3]Dr. Marshall testified that interviews with Alley concerning the events leading up to the crime "lend some credence to the fact that maybe Power was in control at the time of the crime." (Trial Tr. Vol. VIII, p. 1109) He further opined that "Power" also suffered from his own mental disease or defect, namely, paranoid psychosis, and, if in control at the time of the offense, could neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of the law. (Trial Tr. Vol. VIII, pp. 1110-11)

and hood, coming at him, and he dodged, swerved his car to try to miss it, and that was at the time he allegedly hit the runner, according to what he told us." (Trial Tr. Vol. VII, p. 1087) Likewise, during sodium amytal sessions designed to identify his "other personalities," Alley was "able to remember back to the scene of the crime."

> [Alley] was able to place this female other personality, Billie, in the car with him, and he also indicated that this personality known as Power, which he called Death at the time because it looked like the Grim Reaper to him, was also in the car, allegedly, at the time he hit the girl. He said, in fact, that he — but he had told this part before, that Death, this Death personality, or whatever it was, dressed in a hood and a cape, riding on a horse, came through the windshield and into the car with him, and then later under the Amytal, he indicated that this personality was still with him at the time they arrived in the park.

(Trial Tr. Vol. VII, p. 1001)

In explaining how Sedley Alley was able to give a detailed confession the day after the murder, Dr. Marshall testified that, "[i]t's possible that Sedley may not have known these details, but this personality Power or Death . . . knows all the details, everything that's going on . . . [and] communicate[d] some of those details to the personality Sedley." (Trial Tr. Vol. VIII, p. 1139) Another expert, Dr. Allen Battle, testified that, during hypnosis sessions designed to discover the nature of Alley's subsequently-claimed amnesia of the night in question, Alley gave incriminating statements. (Trial Tr. Vol. IX, p. 1248)

The State presented "strong and impressive" evidence that Alley was neither insane nor suffering from a multiple personality disorder. *Alley*, 776 S.W.2d at 511.

Indeed, as the post-conviction court noted in its order denying DNA testing, Alley admitted his involvement to his wife and alluded in letters to her that he was creating an insanity defense in an attempt to "beat" the charges. (Order, p. 13) The court specifically found that "[Alley's] first contention that he did not commit the crimes in question was not brought before the courts until 2004, when he filed the first petition for Post-Conviction DNA analysis." (*Id.* at 13-14)

3. Alley's First Request for DNA Analysis — 30 Days from Execution 2004

On May 4, 2004, nearly twenty years after his conviction and exactly 30 days before his scheduled execution, Alley filed a petition in the Shelby County Criminal Court for post-conviction DNA analysis pursuant to Tenn. Code Ann. § 40-30-301 *et seq.* The petition alleged that DNA analysis of various items of biological evidence obtained in connection with the investigation of the case would "identify the person who assaulted and killed the victim" and demonstrate that "Sedley Alley was unjustly or inaccurately convicted and/or sentenced to death, and/or that his conviction and/or sentence suffer from . . . unconstitutionality, unfairness and/or illegality."

Alley's request for DNA analysis requested production of 11 biological samples:

(1) Vaginal swabs from the victim;
(2) Swab taken from the victim's right inner thigh;
(3) Swab taken from the victim's left inner thigh;
(4) Nasopharyngeal swabs from the victim;
(5) Oral swabs from the victim;
(6) Rectal swabs from the victim;
(7) Head hairs from an African-American individual found on the victim's socks;

(8) A Causasian body hair found on the victim's waistband;
(9) A Caucasian pubic hair found on the victim's left show;
(10) A hair found on a stick found in the victim; and
(11) Blood and hair samples of the victim.

He argued that, should testing of the samples yield results that fail to match either him or the victim, it would demonstrate that he did not rape and kill her or, at the very least, that the jury would not have imposed the death penalty. *Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). In that proceeding, as he does now, Alley also maintained that certain evidence at this trial was unreliable and should be disregarded, specifically (1) his confession, as it was coerced; (2) recently discovered documents revealing that the victim's time of death was later than originally thought; (3) the description of the perpetrator provided by Scott Lancaster is inconsistent with Alley's appearance; (4) the description of the vehicle provided by witnesses is inconsistent with Alley's vehicle; (5) tire tracks at the abduction scene do not match Alley's vehicle; (6) fingerprints on a beer bottle recovered near the crime scene do not match Alley's prints; and (7) shoe prints at the abduction scene do not match the shoes Alley was wearing on the night of the murder. In addition, as he does now, Alley asserted that "certain evidence tends to implicate one of the victim's romantic partners." *Id.*

Following a hearing at which the criminal court heard arguments of counsel, the court entered an order on May 17, 2004, denying Alley's petition. The court specifically found that Alley failed to demonstrate a reasonable probability that he would not have

been prosecuted or convicted if exculpatory results had been obtained through DNA analysis or that analysis of the evidence would produce results which would have rendered the jury's verdict or sentence more favorable. Tenn. Code Ann. §§ 40-30-304, -305. In a detailed opinion which outlined the facts and circumstances of the crime and the pertinent evidence at trial, the court made the following findings:

(1) Alley gave a lengthy and detailed confession, including accompanying law enforcement officials to the scene, where he identified the place where the body was found and the tree from which he obtained the limb used to penetrate her.

(2) A bloody head hair found on the front driver's side door of Alley's car belonged to Suzanne Collins.

(3) Blood on the driver's side door of Alley's car was of the same ABO blood type as Suzanne Collins.

(4) Three witnesses identified Alley's car, both by sight and sound, as the vehicle used in the abduction.

(5) Throughout his direct appeal and post-conviction review, Alley has never indicated that his statements to law enforcement were false or that someone else committed the rape and murder of Suzanne Collins.

(6) Alley's defense at trial was insanity, specifically that he suffered from Multiple Personality Disorder at the time of the offense. On appeal, he argued that the evidence was insufficient to establish his sanity beyond a reasonable doubt.

(7) At the time of her death, Suzanne Collins lived in a marine barracks on a Navy base, and her body was found in a public park.

(8) The jury at trial was informed that numerous hairs were found on Collins' clothing and at the crime scene, some belonging to Collins, some belonging to neither Collins nor Alley, and others that were insufficient to allow for microscopic comparison analysis.

(9) The presence of a third party's hair is not inconsistent with the state's theory at trial, nor would it preclude an act of violence by the petitioner.

(10) The State's theory at trial did not involve sexual intercourse, but rather, an act of sexual mutilation with a thirty-one-inch tree limb being inserted into Suzanne Collins' body. The State's theory regarding the aggravated rape was consistent with Alley's statement to law enforcement.

(11) In light of the facts of the crime, the State's theory at trial, and the overwhelming evidence against Alley, even if DNA testing revealed the presence of semen from another individual, it would not be reasonable to conclude that the State would not have sought prosecution or the jury would not have convicted Alley of the murder of Suzanne Collins.

In short, the post-conviction court concluded in 2004 that, even viewing the proposed DNA analysis in the light most favorable to the petitioner, the results would be in no way inconsistent with the State's theory, the totality of the evidence at trial,

Alley's statement to law enforcement and his defense at trial, or with any position he had taken in post-conviction proceedings in the 20 years since his conviction.

This court affirmed the judgment of the post-conviction court and, in so doing, made various findings directly pertinent to the disposition of Alley's present case:

> The purpose of the Post-Conviction DNA Analysis Act is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant. *Where the allegation is of recent origin and the evidence otherwise supports the identity of the petitioner as the perpetrator, a prior confession may be sufficient to deny DNA testing.*
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> [Further, t]he Act only permits "the performance of a DNA analysis which compares the petitioner's DNA samples to DNA samples taken from biological specimens gathered at the time of the offense." . . . Thus, *the Act does not permit DNA analysis to be performed upon a third party. Rather, the results of the DNA testing must stand alone.*
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> [W]e conclude that the record supports the post-conviction court's conclusions that [Alley] had failed to establish that (1) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis and (2) 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 proceedings leading to the judgment of conviction.

Id. (emphasis added)

ARGUMENT

I. ALLEY POSSESSES NEITHER A STATUTORY NOR CONSTITUTIONAL RIGHT IN POST-CONVICTION DNA PROCEEDINGS TO CONDUCT A "DNA DATABASE COMPARISON" OR TO PRESENT INDEPENDENT EVIDENCE OF THIRD-PARTY GUILT.

Alley first faults the post-conviction court's refusal to consider the possibility that a DNA database hit could establish third-party guilt. He argues that the court's refusal to consider such a possibility in the face of the "routine practice in post-conviction testing around the nation," which presumably employs such procedures, "creates a serious and unwarranted constitutional problem" by depriving Alley of a "meaningful opportunity to be heard on his claim" in violation of his due process and confrontation clause rights under the United States and Tennessee Constitutions. (Brief of Appellant, pp. 18-19) However, this court's decisions make clear that Alley possesses no statutory right to present independent evidence of third-party guilt in the form of a nationwide database search or otherwise. Rather, the results of the proposed DNA analysis, standing alone, must exculpate him. Moreover, because Tennessee's Post-Conviction Procedure Act, including its DNA analysis procedure, is not a constitutionally-mandated procedure, any due process interest he possesses with respect to post-conviction DNA analysis is defined by the statute permitting it.

In Tennessee, a challenge to the validity of a criminal judgment under the Post-Conviction Procedure Act generally, or its DNA analysis component specifically, is a statutory remedy, and the nature and availability of relief lies within the discretion of

the legislature as defined by its terms. *Pike v. State*, 164 S.W.2d 257, 262 (Tenn. 2005). The DNA Act allows for "forensic DNA analysis" of evidence related to a judgment of conviction. Tenn. Code Ann. § 40-30-303. The Act defines "DNA analysis" for purposes of the Act 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.

This court has observed that the statute's reach is limited to the performance of a DNA analysis which compares the *petitioner*'s DNA to samples taken from biological specimens gathered at the time of the offense. *Crawford v. State*, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, *3 (Tenn. Crim. App. Aug. 4, 2003) (app. denied Dec. 22, 2003). "The statute does not authorize the trial court to order the victim to submit new DNA samples years after the offense *nor does the statute open the door to any other comparisons the petitioner may envision.*" *Id.* (Emphasis added) Thus, contrary to Alley's contention, the post-conviction court's denial of his request to perform a wholesale re-assessment of all of the physical evidence in this case and then engage in a nation-wide manhunt for Suzanne Collins' "real killer" through a national database of convicted offenders was neither "irrational" nor "arbitrary." It was in full accord with the law of this State that binds it.

As to his constitutional argument, Alley misplaces his reliance on *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006), since that case dealt only with the constitutional right

of a criminal defendant to present a complete defense at trial. The rule announced in *Holmes* regarding the admissibility of third-party guilt evidence is not implicated in post-conviction proceedings. Alley makes no claim that he was denied the opportunity to present third-party guilt evidence at his criminal trial, nor could he in this limited proceeding. *See also Wilson v. State*, No. E2003-02598-CCA-R3-PC, 2004 WL 1372832 (Tenn. Crim. App. June 18, 2004) (Because a petition for post-conviction DNA analysis is not a criminal prosecution, neither the United States nor Tennessee constitutional rights to confront and cross-examine witnesses are applicable.) (citing *Cravin v. State*, 95 S.W.3d 506 (Tex. App. 2002) ("[A]n applicant for a post-conviction DNA proceeding enjoys neither a presumption of innocence nor a constitutional right to be present at a hearing.")).

Nor does the DNA Analysis Act create any federal constitutional interest that would trigger a procedural due process analysis in this case.[4] The requirements of procedural due process are triggered only by government action that deprives an individual of "life, liberty, or property," *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); Tenn. Const. art. I, § 8 (". . . no man shall be . . . deprived of his life, liberty or property, but by judgment of his peers or the law of the land"). Although Alley claims that "Tennessee has created a liberty interest for convicted defendants to secure release

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[4]It is well established that neither Tennessee's Post-Conviction Act generally nor its DNA Analysis Act specifically are constitutionally mandated procedures. The State has no constitutional duty, as a matter of due process or otherwise, to provide post-conviction relief procedures to state prisoners. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

from prison by means of DNA testing," (Brief of Appellant, pp. 26-27), "a liberty interest created by state law is by definition circumscribed by the law creating it." *Montero v. Meyer*, 13 F.3d 1444, 1450 (10th Cir.), *cert. denied*, 513 U.S. 888 (1994). Thus, any "liberty" interest Alley may possess in DNA analysis under Tennessee law is defined by the statute that creates the right to obtain such analysis. In enacting the DNA Analysis Act in 2001, the General Assembly specifically confined the statutory right to testing to cases in which specific statutory criteria were met. Alley possesses no liberty interest in obtaining DNA analysis where, as in this case, he cannot establish those criteria.[5]

Moreover, Alley has already unsuccessfully pressed a constitutional claim for DNA testing in both the federal district court and Sixth Circuit Court of Appeals. On April 5, 2006, just over a month before his rescheduled 2006 execution date, Alley filed a complaint in the United States District Court for the Western District of Tennessee under 42 U.S.C. § 1983 and 28 U.S.C. § 1331, asserting a federal constitutional right to access to certain evidence introduced in his criminal trial for purposes of DNA testing. Relying on evidence virtually identical to that previously presented in state court, *i.e.*, the "unreliability" of his confession, inconsistent witness descriptions, tire track evidence, fingerprint evidence, time of death evidence, and a proposed alternate suspect (the victim's boyfriend), Alley asked to test various items of evidence in the custody of

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[5]The same analysis compels the conclusion that there is no "property interest" conferred by Tennessee law to obtain post-conviction DNA analysis without meeting the statutory criteria.

the Shelby County Criminal Court Clerk.

The district court summarily dismissed the complaint after concluding that there was no constitutional right to release of the evidence for purposes of DNA analysis under any of the theories presented, namely: (1) procedural due process; (2) substantive due process; (3) the due process right to the production of exculpatory evidence; (4) Eighth Amendment principles; and (5) the Ninth Amendment. (Copy attached) The Sixth Circuit affirmed, holding that "there exists no general constitutional right to post-judgment DNA testing." *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2005) (reh. denied). (Copy attached) The court further noted: "The compelling evidence of Alley's guilt — including his confession, his description to law enforcement authorities of his acts, and the eyewitness testimony against him — strongly suggest that he could never accurately be considered actually innocent of the crime, no matter the result of the analysis he now seeks." *Id.*

More importantly, however, the fact that someone else's DNA may appear on some or even all of the items some twenty years after the crime — even if that someone has previously been convicted of a crime — does not undermine confidence in the verdict in this case given the evidence establishing Alley as the perpetrator — evidence that courts at every stage of his appeal proceedings have characterized, *inter alia*, as "overwhelming," "compelling," and "strong and impressive." As the post-conviction court correctly observed, the evidence in this case could well contain DNA from

numerous individuals, either by virtue of the nature of the item, the location of the crime, the handling of the evidence by court, law enforcement and other personnel over the past two decades, or some combination of all of these factors. A test result confirming that fact does nothing to advance materially Alley's belated claim of innocence.

Moreover, even *if* redundant results could be obtained, and *if* those results could be run in a nationwide database, and *if* the results matched some as yet unknown individual whose profile is contained therein, the question still remains whether that individual came into contact with the items in question innocently, for example, either in the public park or the public courthouse. This type of wholesale re-investigation of a final criminal judgment is clearly not contemplated under the DNA Act, and no appellate court interpreting it has ever even remotely suggested otherwise.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ALLEY'S PETITION FOR POST-CONVICTION DNA ANALYSIS.

Although Alley complains that the post-conviction court lacked impartiality and appeared predisposed in this matter, it is clear that the court did not decide this case on a clean slate. This is the second time in as many years that the lower court was presented with an eleventh-hour appeal by Sedley Alley under the Post-Conviction DNA Analysis Act. In 2004, the court denied a previous petition after an exhaustive review of the record. The post-conviction court was thus familiar with the record and with Alley's recent claims of innocence. This court affirmed the post-conviction court's judgment. *Alley v. Tennessee*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). The post-conviction court's judgment in this case likewise merits affirmance. Not only is the court's well-reasoned and detailed opinion based upon a substantial body of evidence from Alley's trial and appellate proceedings, its decision was guided in large part by this court's instructions in its 2004 decision in this very case.

A post-conviction court possesses considerable latitude in deciding whether to grant relief in the form of access to evidence for DNA testing under the Post-Conviction DNA Analysis Act. *Shuttle v. State*, No. E2003-00131-CCA-R3-PC, 2004 WL 199826, at 4 (Tenn. Crim. App. Dec. 16, 2004) (app. denied). On appeal, this court should affirm the judgment of the post-conviction court unless its judgment is not supported by substantial evidence.

Statutory Criteria for DNA Testing

The Post-Conviction DNA Analysis Act, Tenn. Code Ann. §§ 40-30-301 *et seq.*, established a procedure by which a person convicted of certain enumerated offenses, including first degree murder, may petition the post-conviction court for DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory or court, that is related to the investigation and prosecution that resulted in the judgment of conviction and that may contain biological evidence. Tenn. Code Ann. § 40-30-303. The Act provides for both mandatory and discretionary testing depending upon the relative materiality of the evidence in relation to the prosecution and conviction of the petitioner. To qualify for mandatory testing, the petitioner must show:

> (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 (2003) (emphasis added).

DNA analysis is discretionary and may be ordered if the trial court finds that the petitioner has met parts (2), (3), and (4) above and shows: "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." Tenn. Code Ann. § 40-30-205(1) (emphasis added). Failure to meet any of the qualifying criteria is fatal to the action and justifies summary dismissal by the trial court. *See, e.g., Buford v. State*, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110, *6 (Tenn. Crim. App. Apr. 24, 2003).

The "reasonable probability" standard under sub-section (1) is a familiar one in the post-conviction context, applicable to ineffective assistance of counsel and *Brady* claims in post-conviction proceedings and evaluation of newly discovered evidence in error coram nobis proceedings. A "reasonable probability" of a different result exists when the evidence at issue, in this case potentially favorable DNA results, undermines confidence in the outcome of the prosecution. *See, e.g., State v. Workman,* 111 S.W.3d 10, 18 (Tenn. 2002); *State v. Burns,* 6 S.W.3d 453, 462 (Tenn. 1999); *Harris v. State,* 875 S.W.2d 662, 665 (Tenn. 1994). In short, DNA testing is appropriate only if favorable results are likely to have materially altered the outcome of the criminal proceedings. The scope of appellate review is limited, and trial courts are afforded considerable discretion in making the determination. *Ensley v. State,* M2002-01609-CCA-R3-PC, 2003 WL 1868647, *3 (Tenn. Crim. App. Apr. 11, 2003).

In conducting the materiality analysis, the Act thus requires the trial court to consider whether favorable DNA analysis, considered in light of the other evidence

adduced at trial, would give rise to a reasonable probability that the petitioner would not have been convicted or prosecuted. Because the DNA Act's focus is on the potential impact of DNA analysis on the criminal prosecution, the trial court's inquiry is limited to the "evidence and surrounding circumstances" of the prosecution. In making its determination, a trial court should 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. In addition, the opinions of this court on either the direct appeal of the conviction or the appeals in any previous post-conviction or habeas corpus actions may provide some assistance." *Mitchell v. State*, No. M2002-01500-CCA-R3-PC, 2003 WL 1868649, *5 (Tenn. Crim. App. Apr. 11, 2003) (app. denied Oct. 13, 2003); *Ensley, supra,* 2003 WL 1868647, at *4. Previous incriminating statements by the petitioner, as well as prior pleas and defenses, are relevant to the trial court's inquiry. *Turner v. State*, No. E2002-02895-CCA-R3-PC, 2004 WL 735036, *3 (Tenn. Crim. App. Apr. 1, 2004); *Tucker v. State*, M2002-02602-CCA-R3-CD, 2004 WL 115132, *2 (Tenn. Crim. App. Jan. 23, 2004).

Materiality of Alley's Proposed Testing

Here, for the second time, the post-conviction court engaged in a painstaking and detailed review of the evidence at trial, particularly with regard to the biological evidence, and the opinions of the appellate courts at the various stages of Alley's appeals. Against that backdrop, the court assessed the materiality of Alley's proposed testing.

Alley now faults the post-conviction court's analysis, arguing that the court failed to give sufficient credence to the possibility of redundant results and gave too much credence to the strength of the State's case at trial. Neither assertion is accurate. To the extent the post-conviction court had already addressed and rejected a request for testing of certain items of evidence, namely, the blood, hair and swabs obtained from the victim, the victim's clothing or from Alley (delineated A - C in the post-conviction court's order, pp. 25-27), the court was justified in summary dismissal of Alley's present request.[6] While the Post-Conviction DNA Act contains no express prohibition against successive petitions, a previous determination by the post-conviction court and this court as to specific items of evidence or specific legal questions would not be subject to relitigation under basic principles of res judicata. *See Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995) ("[A] final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to subsequent action involving the same claim, demand or cause of action.").

Further, in performing the materiality analysis under sub-section (1), nothing in the statute requires — or even permits — the post-conviction court to re-evaluate the credibility or validity of the evidence submitted at trial, or to consider new evidence, aside from the DNA test results, supporting a different theory than the one relied on by

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[6]The post-conviction court specifically addressed each category of evidence — delineated as sub-parts A - P — in its May 2006 order denying DNA testing. (Order, pp. 25-46)

the defendant at trial. *See Jones v. State*, No. E2003-00580-CCA-R3-PC, 2004 WL 2821300 (Tenn. Crim. App. Dec. 3, 2004) (app. denied) (denying request to test 22 trial exhibits in order to "show the identity of the real murderer and prove Petitioner's innocence;" even if testing "revealed the presence or absence of Petitioner's DNA on any, all or none of the items that Petitioner requests be submitted for testing," it would not have had a favorable effect on the prosecution or conviction of the Petitioner). Thus, the hundreds of pages of documents submitted by Alley as evidence that the proof against him at trial was flawed — largely identical to that submitted and rejected in 2004 — have no place in any materiality analysis under the DNA Analysis Act. It is also worth noting that the primary evidence on which Alley relies to defeat his confession — the affidavit of Dr. Richard Leo concerning the "falsity" of Alley's statement — would be inadmissible under Tennessee law even if other "extra-record" evidence could properly be considered. *See, e.g., State v. Coley*, 32 S.W.3d 831 (Tenn. 2000) (expert testimony concerning accuracy of eyewitness testimony inadmissible); *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993) (expert testimony that children exhibit symptoms of sexual abuse impermissibly invades the province of the jury). *See also Vent v. State*, 67 P.3d 661 (Alaska App. 2003) (testimony of Dr. Richard Leo concerning reliability of confession held inadmissible); *People v. Phillips*, 692 N.Y.S.2d 915 (N.Y. Sup. 1999) (same).

While the expedited briefing in this case does not permit an exhaustive discussion by the State of the remaining items (delineated as sub-parts D - P of the post-conviction

court's order, pp. 27-46) individually, it is clear, given the location of the crime and subsequent handling of the evidence, that a test result excluding Alley as the source of DNA on any single item would not undermine confidence in the District Attorney's decision to prosecute or the outcome of the trial, particularly given the overwhelming evidence against him. Even Alley seems to concede as much. Instead, Alley's argument hinges entirely on the possibility that testing of multiple items might reveal redundant results matching some individual other than Alley. But that possibility is not sufficient to meet his burden under sub-part (1) because it does not negate or in any way undermine Alley's confession, his insanity defense at trial, the eyewitness testimony describing his actions on the night of the murder, his actions after his arrest, and, perhaps most telling, the lateness of his claim of innocence. *See also Nixon v. State*, No. W2005-02158-CCA-R3-WM, 2006 WL 851764 (Tenn. Crim. App. Apr. 3, 2006) (dismissing petition requesting DNA testing on semen on a couch cushion where the petitioner was convicted of child rape based on the testimony of the victim and a witness, and petitioner also admitted his involvement).[7] While any one of these factors,

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[7]In *Campbell v. State*, No. M2004-00589-CCA-R3-PC, 2005 WL 467161 (Tenn. Crim. App. Feb. 22, 2005) (app. denied), this court affirmed the denial of DNA testing where the theory of exculpation was just as far-fetched as this one. Campbell sought to perform DNA testing of a bullet recovered from the crime scene and introduced at trial to determine whether it contained the victim's DNA. Although he confessed to police that he killed the victim and maintained an insanity defense at trial, Campbell argued that, with the new evidence, he "could have argued another defense" — "even though I confessed, the bullet would allow me to argue that someone else did the killing, if it had to get to that point. And, also, I could have been confessing to a crime that I never committed, even though that may not have been the direction I desired to take at the time." *Id.* The post-conviction court denied testing, and this court

standing alone, might not be sufficient to defeat Alley's petition, the combination in this case plainly defeats the last-minute, highly speculative, and surely futile exercise Alley proposes. Moreover, as stated above, *supra*, p. 22, even redundant results would not, in itself, undermine confidence in District Attorney's decision to prosecute or the outcome of the trial. The post-conviction court's materiality determinations as to Alley's proposed testing are fully supported by the record evidence, and the court's conclusions — consistent in all respects with this court's own previous decision in this matter — should be affirmed.

Motivation for Filing DNA Petition

Finally, the post-conviction court correctly found that Alley failed to meet the criteria under sub-section (4) of Tenn. Code Ann. §§ 40-30-304 and -305, specifically finding that "the petitioner seeks to delay his execution with this last minute successive petition for Post Conviction DNA Analysis." (Order, p. 49) The court's finding in this regard has ample support in the procedural history of this case; the court's conclusion is practically inescapable given the timing of Alley's two DNA petitions in the state trial court.[8]

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affirmed, concluding "especially in light of the fact that at no point has he denied killing the victim" that Campbell failed to show that DNA analysis would somehow have rendered a more favorable verdict.

[8]Indeed, Alley's needless delay in the pursuit of available judicial remedies and last-minute manipulation of court processes in an attempt to disrupt the timing of his execution is not limited to the DNA context. On June 14, 2006, the United States District Court for the Middle District of Tennessee dismissed his challenge to the constitutionality of Tennessee's

Alley's contention that the victim's time of death was "withheld for 20 years" is unsupportable. First, the report of the autopsy of Suzanne Collins as well as initial observations by the Medical Examiner concerning a potential time of death upon initial examination of the victim's body at the crime scene were either introduced at trial or available to counsel at any time thereafter through a public records request. Any remaining questions concerning the availability of alleged "time of death" evidence were surely laid to rest in recent federal proceedings in the United States District Court for the Middle District of Tennessee, *Alley v. F.B.I.*, No. 3:04-cv-00878 (M.D. Tenn.), in which Alley sought to obtain autopsy documents in the possession of the Federal Bureau of Investigation under the Freedom of Information Act, particularly as they related to Suzanne Collins' time of death. Following expedited review in advance of Alley's May 2006 execution date, the federal Magistrate Judge specifically found that the only autopsy materials that had not already been publicly disclosed or were already in Alley's possession had no relation to the victim's time of death or to any condition of her body that might relate to the time of death. *Alley v. F.B.I., supra* (M.D. Tenn. May 16, 2006). Further, aside from the bald allegations of prosecutorial misconduct asserted in this case, Alley has never pursued any legitimate judicial remedy to address the alleged misconduct by the state officials, *see, e.g., Sample v. State*, 82 S.W.3d 267 (Tenn. 2002); *Workman v. State*, 41 S.W.3d 100 (Tenn. 2001), another factor that undermines any claim that his

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lethal injection protocol on grounds that he had unduly delayed the filing of that action. *Alley v. Little*, No. 3:06-cv-00340 (M.D. Tenn. June 14, 2006).

present allegations are made for any purpose other than to delay his execution.[9]

On the basis of sub-section (4), Tenn. Code Ann. §§ 40-30-304, -305 alone, the judgment of the lower court could and should be affirmed.[10]

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[9]Moreover, the documents on which Alley relies to support of his "time of death" argument would not undermine the evidence at trial even if they could properly be considered in this proceeding. First, the Medical Examiner did not testify at Alley's trial concerning the victim's time of death. The jury was free to draw that inference based upon its review of the evidence presented. Second, given the totality of the evidence, Alley's claim of a 3:30 a.m. time of death fails in any event. The documents at issue reflect merely an initial observation by Dr. Bell, upon examination of the victim's body *at the crime scene* at 9:30 a.m., that the victim appeared to have been dead "6-8 hours *at least*." (Emphasis added)

[10]In a separate issue, Alley argues that the Tennessee Supreme Court's decision in *Griffin v. State*, 182 S.W.3d 795 (Tenn. 2006), requires a remand for an evidentiary hearing. However, because the post-conviction court's judgment is correct as a matter of law under sub-sections (1) and (4) of the DNA Act irrespective of any alleged factual disputes outside the existing record, additional evidentiary proceedings are unnecessary, and Alley's request should be denied.

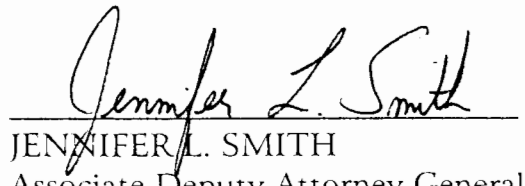
CONCLUSION

For these reasons, the judgment of the post-conviction court should be affirmed.

Respectfully submitted,

PAUL G. SUMMERS
Attorney General & Reporter

MICHAEL E. MOORE
Solicitor General



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been hand delivered to:

Kelley J. Henry
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Further, a copy was delivered by electronic mail to:

Barry C. Scheck
The Innocence Project
100 5th Ave., 3rd Floor
New York, NY 10011

on the 16th day of June, 2006.

Jennifer L Smith

JENNIFER L. SMITH
Associate Deputy Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SEDLEY ALLEY, Plaintiff, V. WILLIAM R. KEY, Criminal Court Clerk for the Thirtieth Judicial District, Defendant, and WILLIAM L. GIBBONS, District Attorney General for the Thirtieth Judicial District, Intervenor.	No. 2:06-CV-2201

ORDER OF DISMISSAL

Plaintiff Sedley Alley ("Alley"), who is incarcerated under a sentence of death, brings this action pursuant to 42 U.S.C. § 1983 alleging that Defendant William R. Key ("Key"), in his capacity as Criminal Court Clerk for the Thirtieth Judicial District of Tennessee, has violated Plaintiff's rights under the Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States by refusing to produce evidence in Key's physical custody so that

Plaintiff may conduct D.N.A. testing that he believes may tend to exonerate him.

By order of April 11, 2006, the Court permitted William L. Gibbons ("Gibbons") to intervene in his capacity as Attorney General of the Thirtieth Judicial District. The Court did so on the representation of Gibbons' counsel, the Attorney General of Tennessee, that Key was "merely a custodian" and that Gibbons "has a far more direct interest in defending and pursuing the State's interests in its criminal procedures and the finality of the decisions of its criminal justice system."[1]

On April 13, 2006, Gibbons filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) alleging lack of subject matter jurisdiction and failure to state a claim. On April 17, 2006, Key filed a Motion to Dismiss adopting Gibbons' Motion.

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[1] At the hearing of this matter on April 18, 2006, Gibbons' counsel asserted that neither Gibbons nor Key has authority to release the evidence in question and that it is, in fact, under the control of the judicial branch in Tennessee. Counsel did, however, concede that Gibbons would comply with the orders of the federal judiciary in this proceeding. Key's counsel has also expressed his client's willingness to produce the evidence, if ordered to do so. The participation of Gibbons and Key in this proceeding appears to guarantee, at least, that the Court has before it parties who have the evidence in their physical control, can release it if ordered, and will act vigorously to protect whatever interest the "State" may have.

On April 18, 2006, the Court held a hearing which the parties attended and at which they had the opportunity to present proof, but did not. All parties agree that this case should be decided as a matter of law.

For the reasons set forth in this order, the Court grants Key's and Gibbons' Motions to Dismiss.

I. BACKGROUND

Plaintiff is an inmate under sentence of death currently incarcerated at Riverbend Maximum Security Institution, in Nashville, Tennessee. A Shelby County jury convicted Plaintiff of the July, 1985 murder of Suzanne Marie Collins and sentenced him to death. State v. Alley, 776 S.W.2d 506 (Tenn. 1989). Plaintiff's convictions and sentence were affirmed on appeal. See id., cert. denied, 493 U.S. 1036 (1990). Plaintiff's initial attempt to obtain post-conviction relief was ultimately denied. Alley v. State, 958 S.W.2d 138 (Tenn. Crim. App. 1997). Plaintiff was denied habeas corpus relief in the federal courts. Alley v. Bell, 101 F.Supp.2d 588 (W.D. Tenn. 2000), aff'd, 307 F.3d 380 (6th Cir. 2002), cert. denied, 540 U.S. 839 (2003).

Plaintiff thereafter sought, and was denied, post-conviction relief in state court in the form of access to biological evidence

for D.N.A. testing, pursuant to Tenn. Code. Ann. § 40-30-301 (et seq.). See Alley v. State, 2004 WL 1196095 (Tenn. Crim. App. 2004), cert. denied, 544 U.S. 950 (2005).

Plaintiff's motion for equitable relief from the judgment of the District Court denying him habeas relief has been denied, Alley v. Bell, no. 97-3159, doc nos. 169 and 176, and Plaintiff is currently appealing those judgments to the Sixth Circuit. See Alley v. Bell, no. 05-6876. In light of the District Court's ruling on Plaintiff's motion for equitable relief, and despite the pendency of his appeal in that matter, the Tennessee Supreme Court has scheduled the execution of Plaintiff's death sentence for May 17, 2006. State v. Alley, M1991-00019-SC-DPE-DD (Tenn. March 29, 2006).

II. THE INSTANT COMPLAINT AND MOTION

Plaintiff has filed suit under 42 U.S.C. § 1983, seeking access to evidence introduced at his trial so that he may subject it to D.N.A. testing to "exclude Plaintiff as having committed the homicide and/or provide information to identify the person(s) involved in Suzanne Collins' death." Amended Complaint at 6, ¶ 8. Thus, he seeks access to the evidence to demonstrate his actual innocence. Plaintiff avers that, despite the restrictions on a district court's exercise of its habeas jurisdiction, this Court is not barred from

exercising jurisdiction because the instant action does not question the validity of his conviction or sentence and does not seek his release from confinement. See generally Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff grounds his entitlement to the relief requested on numerous bases in the Eighth, Ninth, and Fourteenth Amendments to the Constitution.

Gibbons contends that the Court is barred from exercising jurisdiction because the action is the "functional equivalent of an application for a writ of habeas corpus brought without leave of the United States Court of Appeals for the Sixth Circuit." Memorandum In Support Of Motion To Dismiss and/or Opposition To Motion For Immediate Release Of Evidence ("Intervenor's Memorandum"), doc. no. 12 at 3. He also contends that Plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted, because Plaintiff cannot demonstrate that Key's refusal to allow D.N.A. testing of the requested items deprives Plaintiff of a constitutionally protected right. Id. at 9-12. Gibbons further argues that Plaintiff's prior unsuccessful post-conviction pursuit of D.N.A. testing precludes the granting of relief in this matter based on collateral estoppel, *res judicata*, and the Rooker-Feldman doctrine. Finally, Gibbons contends

that the statute of limitations applicable to this action bars Plaintiff's request for relief.

III. ANALYSIS

A. Jurisdiction

This action is not the functional equivalent of a second or successive habeas corpus petition.

Gibbons asserts that this Court lacks subject matter jurisdiction over Plaintiff's suit because it is the functional equivalent of a second or successive application for habeas relief and is, therefore, subject to the pre-clearance requirements of 28 U.S.C. § 2244(b)(3)(A). Gibbons argues that the "injunctive relief [Plaintiff] seeks is designed solely and necessarily to undermine his state court conviction and/or sentence." Intervenor's Memorandum at 4. Because Plaintiff seeks access to evidence he believes will allow him to demonstrate his innocence, Gibbons concludes that granting Plaintiff the relief requested will "'necessarily imply the invalidity of his conviction or sentence'" because "he seeks federal judicial relief for the sole purpose of undermining the state court judgment under which he is confined." Id. at 5 (quoting Heck, 512 U.S. at 480)). See also, Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002)("Harvey I"); Harvey v. Horan, 285 F.3d 298 (4th Cir.

2002)(denying petition for rehearing and rehearing en banc)("Harvey II"); and Kutzner v. Montgomery County, 303 F.3d 339 (5th Cir. 2002).

Plaintiff maintains that his suit is not, and should not be construed as, an action in habeas corpus. This is evident, he asserts, because "[s]hould [Plaintiff] receive the relief he is requesting, he will not be released immediately, nor will his conviction be overturned, nor his sentence reduced." Memorandum Of Law In Support Of Plaintiff's Complaint And Response To Intervenor's Motion To Dismiss ("Plaintiff's Memorandum"), doc. no. 13 at 5. Accordingly, Plaintiff argues, success on the instant motion "will not necessarily imply the invalidity of [Plaintiff's] convictions or sentences." Id. at 6 (quoting Wilkinson v. Dotson, 125 S.Ct. 1242, 1248 (2005)). See also Osborne v. District Attorney's Office, 423 F.3d 1050 (9th Cir. 2005); Bradley v. Pryor, 305 F.3d 1287 (11th Cir. 2002).

The issue appears to be one of first impression in this Circuit. There can be no doubt but that, with the instant action, Plaintiff hopes to set in motion legally significant events that will provide some relief from his present conviction and sentence. However, the standards governing this Court's determination about whether a § 1983 action is more properly construed as an action in habeas corpus are

objective standards concerned with the nature of the immediate relief requested, not subjective inquiries into the Plaintiff's motive for seeking redress for alleged constitutional violations. Harvey, 278 F.3d at 383 (King, J., concurring). Where a judgment in favor of Plaintiff will not "necessarily imply the invalidity of his conviction or sentence," Plaintiff's cause of action is not one for habeas corpus relief. Wilkinson v. Dotson, 125 S.Ct. 1242, 1247-48; Heck, 512 U.S. at 487. Were the Court to grant Plaintiff the relief requested, his underlying conviction and sentence would remain intact. Thus, success in this suit cannot call into question the validity of Plaintiff's conviction and sentence. If Plaintiff wishes to challenge his sentence and conviction on the basis of any subsequent D.N.A. testing of the specified pieces of evidence, he will, at least as far as the federal courts are concerned, be required to seek habeas corpus relief in an action wholly separate from the instant matter. Therefore, Plaintiff's § 1983 action is not the functional equivalent of an application for habeas corpus relief, and this Court may properly exercise jurisdiction under 28 U.S.C. § 1331.

B. Preclusion and Statute of Limitations

Plaintiff is not precluded from seeking the relief requested.

Gibbons contends that the Court should not exercise jurisdiction because: 1) the Plaintiff is collaterally estopped from bringing this suit in the federal courts on the basis of his unsuccessful state court post-conviction action seeking access to certain items of evidence; 2) *res judicata* and the Rooker - Feldman doctrine bar Plaintiff from seeking the requested relief; and 3) the applicable statute of limitations has expired.

1. Collateral Estoppel

Collateral estoppel applies to preclude litigation of issues that have already been decided. Hutcherson v. Lauderdale County, Tennessee, 326 F.3d 747, 758 n. 3 (6th Cir. 2003). The federal courts are required to give the same preclusive effect to a state court judgment as would any state court considering the same action. Id. at 758. Gibbons contends that Plaintiff is collaterally estopped from seeking access to the evidence requested. Gibbons premises his objection on his assertion that the issue posed, the Plaintiff's entitlement to specifically requested items of evidence, was previously decided by the state courts. Because Plaintiff was

unsuccessful in his previous attempt to obtain certain items for D.N.A. testing, Gibbons now contends that issue preclusion bars Plaintiff from seeking to re-litigate the matter in the federal courts. He concludes: "Because the state criminal courts necessarily determined that there was NO reasonable probability of a finding of innocence or a more favorable sentence, the plaintiff is collaterally estopped from re-litigating the issue." Intervenor's Memorandum at 16.

Plaintiff responds that the issue he seeks to adjudicate is not whether a reasonable probability exists that he would have been found innocent or received a more favorable sentence if D.N.A. testing revealed exculpatory evidence, but, rather, whether he is deprived of his constitutional rights when the State denies him access to evidence for D.N.A. testing. He maintains that this narrow issue has never been decided, much less discussed, in the state courts. Moreover, he asserts that the items of evidence requested in the instant suit are wholly separate from those at issue in his state court litigation and have, therefore, never been the subject matter of any prior suit.

Gibbons' reliance on collateral estoppel is misplaced. Only in the broadest sense are the issues between the previous state action

and the present similar: Plaintiff here seeks access to evidence for D.N.A. testing. However, the real issue before the Court, Plaintiff's various theories of constitutional entitlement to the evidence, has not been litigated previously. A fair reading of the state court opinions indicates that Plaintiff's constitutional claims were not addressed by the state courts and were not relevant to the disposition of the post-conviction action. Rather, it appears that the state courts merely determined that Petitioner was not entitled to D.N.A. testing of the evidence pursuant to state statutory and case law. See Alley, 2004 WL 1196095 at *7-13. Thus, no state court has ruled on the constitutional issues before the Court. Therefore, Plaintiff's suit is not barred by collateral estoppel.

2. *Res Judicata* and Rooker-Feldman

Res Judicata applies to bar subsequent re-litigation of "'all claims that were actually litigated or could have been litigated in the first suit between the same parties.' Four elements must be established before res judicata can be asserted as a defense: (1) the underlying judgment must have been rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; and (4) the underlying judgment was on the merits." Hutcherson, 326 F.3d at 758 (citations omitted).

In arguing that the instant suit should be barred by *res judicata*, Gibbons again asserts that Plaintiff is merely seeking to replicate the previous state court action. He contends that Plaintiff seeks identical relief, against identical parties, that the subject matter is identical, and that the causes of action are identical to those previously raised. Thus, he concludes, the claims in this suit "were actually litigated or could have been litigated in the first suit." Id.

Plaintiff responds that the evidence identified in his Amended Complaint has never been the subject of any state-court claims. Furthermore, Plaintiff argues that the state courts refused to adjudicate the constitutional claims he now raises when they considered the other evidence.

Applying the elements of *res judicata* set forth above, the Court is satisfied that Plaintiff's claims are not precluded. The parties are not the same. The subject matter of the post-conviction proceedings is distinct from the subject matter of the instant suit, that is, the evidence sought is not the same. Compare Amended Complaint at 7 (identifying various pieces of physical evidence), with Petition For Post-Conviction DNA Analysis Pursuant To Tenn. Code

Ann. § 40-30-301 Et Seq., exhibit 2 to Intervenor's Memorandum (seeking access for D.N.A. testing to numerous biological samples including hairs and swabs taken from the victim's body). The specific causes of action are not identical where Plaintiff had no explicit basis for pleading any constitutional claims in the statutory action alleged to be preclusive. There is, therefore, no indication that Plaintiff's constitutional claims about the evidence then requested "could have been litigated." It was apparently discretionary whether the Tennessee courts would consider Plaintiff's constitutional claims in the state courts, and, exercising that discretion, the state courts chose not to adjudicate them. It would be inequitable to deny Plaintiff a federal forum for his constitutional claims because he was denied the previous opportunity to litigate those claims, through no fault of his own, when the state courts apparently refused to consider his invocation of

constitutional protections.[2] Accordingly, *res judicata* does not preclude Plaintiff's action.

Plaintiff is not barred from seeking relief based on the Rooker-Feldman doctrine. The Rooker-Feldman bar is confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S.Ct. 1517, 1521-22 (2005). Petitioner does not contend that the harm he suffers resulted from the previous state court judgment. He does not seek to have that judgment rejected. He merely seeks to have constitutional claims, which the state courts did not address, adjudicated insofar as those claims apply to evidence which was not before the state courts and which was not relevant to the previous state court proceedings. The Court's decision on Plaintiff's constitutional claims cannot call into

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[2] The Court notes that there is passing authority suggesting that the failure of the state courts to address Plaintiff's constitutional claims may not be alone sufficient to defeat the assertion of *res judicata*. In Pittman v. Michigan Corrs. Organization, 123 Fed.Appx. 637, 640 (6th Cir. 2005), the federal plaintiff conceded that he raised constitutional claims in his previous state court litigation, as has Plaintiff, but he argued that *res judicata* was inapplicable because the state courts "did not specifically address them." The Sixth Circuit was not persuaded: "[The Plaintiff] cites no authority, and we have found none, for his assertion that the state court's failure to address individually each of his issues means that they were 'not decided' for purposes of *res judicata*."

question the state law grounds forming the basis of the Tennessee courts' decision not to grant Plaintiff access to the evidence he previously requested. That evidence is not even the subject matter of this action. Therefore, the present action is not an "appeal" of the state court proceedings. Plaintiff's suit is not the "'paradigm situation in which Rooker-Feldman precludes a federal district court proceeding.'" Id. at 1527 (citations omitted). Plaintiff's action is not barred by Rooker-Feldman.

3. It is unclear on this record whether Plaintiff's action is barred by the applicable statute of limitations.

Gibbons contends that, if Plaintiff's action is proper under § 1983 and is not subject to preclusion, it is barred by the applicable statute of limitations. In § 1983 actions, federal courts apply the relevant state statute of limitations, although "federal standards govern when the statute begins to run." Sharpe v. Cureton, 319 F.3d 259, 266 (6th Cir. 2003)(citing Wilson v. Garcia, 471 U.S. 261, 267 (1985)). Gibbons asserts that the applicable Tennessee statute of limitations is Tenn. Code Ann. § 28-3-104(a)(3), which imposes a one-year limitation on relief under federal civil rights statutes. See Roberson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005); Sharpe, 319 F.3d at 266. Plaintiff asserts that his action cannot be subject to § 28-3-104(a)(3) because he seeks access to D.N.A. testing and Tennessee does not impose a limitations period on post-conviction actions to obtain evidence for D.N.A. testing. See Tenn. Code Ann.

§ 40-30-303. Therefore, Plaintiff contends, there is no limitations period for his suit.

Plaintiff may not claim that his suit concerns only the constitutional violations he suffers at the hands of Key and then attempt to incorporate into his action the lack of limitations period for a state court action that he believes has not provided a forum for the constitutional claims he presently alleges. See Plaintiff's Memorandum at 28 n. 11 ("The message from the state courts in this case was clear: The PostConviction DNA Act does not permit the litigation of federal constitutional claims, and only permits the application of state law."). Plaintiff's theory, which this Court has accepted, is that this is a civil rights action under 42 U.S.C. § 1983. Plaintiff is bound by the Tennessee statute of limitations governing such actions in the state courts. Roberson, 399 F.3d at 794.

The question, therefore, is when the statute of limitations began to run. "The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." Sevier v. Turner, 742 F.2d 262, 273 (6th Cir. 1984)(citations omitted). In applying this test, courts seek to determine "'what event should have alerted the typical lay person to protect his or her rights.'" Roberson, 399 F.3d at 794 (quoting Hughes v. Vanderbilt Univ., 215 F.3d 543, 548 (6th Cir. 2000)).

The Court's inquiry in this case is fundamentally complicated by the fact that the constitutional right of which Plaintiff asserts he has been deprived has never been recognized or defined by a court of binding authority.[3] The Court is left to consider the following question: Where the existence and contours of a constitutional right are speculative, how is a court to discern precisely when that right has been denied such that the plaintiff should know that the right he asserts needs protection?

Gibbons reasons that, at the latest, Plaintiff knew or should have known of any alleged injury based on his access to evidence by May 5, 2004, when the State of Tennessee moved to dismiss his state court petition seeking such access. Intervenor's Memorandum at 19. Thus, Gibbons contends, the statute of limitations for the instant action expired on May 5, 2005. Plaintiff asserts that the one-year limitations period was not commenced upon the filing of the State's motion in opposition to his state court petition because the evidence he now requests is separate and distinct from that requested in state court, and, further, that Key has only recently denied him

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[3] The only federal case recognizing and applying a constitutional right similar to any of those claimed in this suit appears to be Godschalk v. Montgomery County District Attorney's Office, 177 F.Supp.2d 366 (E.D. Penn. 2001). The District Court in Godschalk concluded that the due process protections recognized by Brady v. Maryland, 373 U.S. 83 (1963) entitled an inmate to evidence for D.N.A. testing in order to seek exculpatory evidence post-conviction. Godschalk, 177 F.Supp.2d at 370. Judge Luttig, expressing his "views" on the subject, has also speculated that there exists some post-conviction right of access to D.N.A. testing of evidence. HarveyII, 285 F.3d at 310-20.

access to the requested evidence, thus ripening his constitutional claims about the denial of access.

As discussed above, this Court must determine what event should have alerted Plaintiff, as a "typical lay person," that action was required to protect any constitutional right of access to evidence. Roberson, 399 F.3d at 794. It should have been clear to Plaintiff, in May of 2004, that the State of Tennessee would not observe any constitutional right of access to evidence when the State refused to convey evidence upon his request in the state courts.[4] Moreover, that alleged constitutional deprivation was again apparent on May 17, 2004, when the Shelby County Criminal Court denied Plaintiff access to the evidence while refusing to consider his assertion of a constitutional right of access. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court later that month, and, on October 4, 2004, the Tennessee Supreme Court denied permission to appeal. Finally, on March 28, 2005, the U.S. Supreme

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[4] Plaintiff suggests in his memorandum, p. 23 n. 10, that the limitations period could not have commenced during the state-court proceedings because the specific evidence at issue there differs from the evidence at issue in this suit. A denial of access to the evidence requested in 2004 would constitute a constructive denial of the general right Plaintiff asserts. See Harvey, 278 F.3d at 384 (King, J. concurring). The operative inquiry is when Plaintiff should have known that action was required to protect his alleged constitutional right. Thus, because it is not likely that the State's position about the alleged right would have differed as to any evidence requested by Plaintiff, Plaintiff should have known that his purported constitutional right to access evidence was in jeopardy when the State first failed to grant his request for evidence.

Court denied certiorari. At no point during this chain of events did Plaintiff seek to protect the claimed right.

The effect of the State's action on Defendant Key is more problematic. As Gibbons asserts in his Motion To Intervene, Key is a Shelby County employee and custodian of the evidence. He acknowledges physical possession. Demand was made on Key for the first time within one year of the filing of this complaint.

To the extent that mere denial of access to evidence is the constitutional harm of which Plaintiff complains, his action may be barred by the one-year statute of limitations applicable to actions under federal civil rights statutes. Plaintiff has had at least constructive knowledge of the constitutional violation he alleges here since May, 2004, at the latest. His suit was filed on April 5, 2006. Tenn. Code Ann. § 28-3-104(a)(3).[5]

However, Plaintiff also argues that the limitations period has only recently been triggered by the ripening of his constitutional claims about clemency. See Plaintiff's Memorandum at 23 n. 10. Any supposition that the action is barred based on when Plaintiff knew that he would not be granted the evidence as a matter of right necessarily overlooks the amorphous nature of the right asserted by Plaintiff. See generally Harvey, 285 F.3d at 310-11 (Luttig, J., respecting the denial of rehearing en banc)(asserting that the post-

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[5] Neither Alley nor Gibbons addresses whether equitable tolling of the statute of limitations is appropriate in this case, and, if so, how the Court should approach that analysis. Because this issue is not before the Court, the Court makes no ruling on it.

conviction due process right to testing of D.N.A. evidence "*legitimately* draws upon the principles that underlay" a number of recognized procedural and substantive due process rights)(emphasis in original). Thus, to the extent that Plaintiff alleges constitutional harm independent of the mere denial of access - for instance, that he would be effectively denied the opportunity to present his case for clemency - the Court must determine whether there is any constitutional basis for the right of access to evidence that he asserts before determining whether all claims based on that right are time-barred. Therefore, the Court will consider whether Plaintiff states a cause of action for the violation of any constitutional right.

C. Plaintiff's Constitutional Entitlement to the Release of Evidence

Plaintiff asserts that he is entitled to the release of the evidence requested pursuant to: 1) procedural due process; 2) substantive due process; 3) the due process right to the production of exculpatory evidence; 4) Eighth Amendment principles; and 5) the Ninth Amendment. Plaintiff's Memorandum at 11. Respondent maintains that no such constitutional right exists under any provision of the Constitution.

1. Procedural Due Process

Plaintiff first contends that his right to procedural due process under the Fourteenth Amendment requires release of the requested evidence. Plaintiff asserts that, because he possesses a fundamental interest in his life, due process requires that he be allowed access to evidence which may allow him to preserve that life interest by demonstrating his innocence of the crime for which he is sentenced. Plaintiff maintains that the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), establishes the analytical framework for his procedural due process claim. In Mathews, the Supreme Court held as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.[6] Applying that test, Plaintiff concludes that the process to which he is entitled to protect his life interest is release of the evidence because "[h]is right to life is paramount, the release of evidence for DNA testing is of exceptional value because it will provide the most accurate determination of Plaintiff's innocence, and there is no burden on the government." Plaintiff's Memorandum at 15.

The Mathews test is relevant only to the extent that Petitioner is able to show that he has some legally recognized liberty or property interest in the evidence he requests. Plaintiff's argument fails because he cannot demonstrate that the life interest which he asserts bestows upon him "the post-conviction legal right to access or discover the evidence relating" to his conviction. Harvey, 278 F.3d at 388 (King, J., concurring). Plaintiff has no state law right to the evidence. As noted above, no court of binding or persuasive authority has concluded that federal law encompasses such a right. Thus, because Plaintiff can articulate no established legal right to

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[6] Plaintiff's reliance on the Mathews test presupposes that the life interest he asserts is subsumed within the sphere of the liberty interests the test normally serves to protect. The Court assumes that Plaintiff is correct. However, there were divisions on the Supreme Court when it last spoke about whether and to what extent a death sentenced inmate retains a life interest protected by due process. Compare Ohio Adult Parole Authority, 523 U.S. at 281 (Rehnquist, C.J., joined by three justices)(concluding that whatever residual life interest remains after a death sentence is limited to protection from summary execution), with id. at 288-89 (O'Connor, J., joined by three justices)(recognizing a broader life interest after a death sentence).

the evidence, he is not entitled to process before being deprived of the evidence. Were the Court to recognize, without the aid of precedent or more clearly articulated reasoning, some post-conviction constitutional right to D.N.A. testing of evidence, the Court would lack a clearly defined right and a clear standard for its enforcement, leaving the development of the substance, form, and operation of the right to nothing more than the Court's prerogative. Although it is questionable whether any Court is capable of satisfactorily formulating such a right given the infinite possibilities of science and the idiosyncracies of each case, this Court is particularly ill-suited to do so. Plaintiff cannot establish a legally recognized right to the evidence he requests. Therefore, the Court concludes that he has no procedural due process right to the release of the evidence.

2. Substantive Due Process

Plaintiff claims that he is entitled to the evidence under the substantive due process protections of the Fourteenth Amendment. Plaintiff grounds his substantive due process argument on two principles: 1) it "shocks the conscience" to withhold the evidence arbitrarily in this matter; and 2) Plaintiff's life interest must include the right to obtain evidence of his innocence for presentation in clemency proceedings. Plaintiff's Memorandum at 16.

In arguing that denying him access to the requested evidence "shocks the conscience," Plaintiff posits a number of essentially

inapposite constitutional absolutes. See Plaintiff's Memorandum at 16-17. The operative inquiry confronting a court considering a substantive due process claim premised on the alleged "conscience shocking" behavior of some state official is whether her power is wielded egregiously or as an "instrument of oppression." County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998)(citations omitted). Key's conduct in this matter does not "shock the conscience" where he simply retains the evidence for safekeeping and releases it only in accordance with state or federal law. Defendant does not appear to have any power over the evidence which he could wield arbitrarily or oppressively. Because there is no demonstrable state or federal entitlement to post-conviction release of the evidence on demand, Key's refusal to do so cannot "shock the conscience." In effect, Plaintiff here seeks to have the Court construe a constitutionally protected right to access the evidence post-conviction, so that the Court may then conclude that a state actor who fails to acknowledge that right violates due process. For the reasons stated above, such an exercise of constitutional divination would be imprudently undertaken by this Court.

Plaintiff also contends that he has a substantive due process right of access to the evidence to establish his actual innocence during clemency proceedings. This argument is unavailing because, given that there is "no constitutional right to clemency proceedings," Workman v. Summers, 111 Fed.Appx. 369, 371 (6th Cir. 2004), it cannot be argued persuasively that a potential clemency

applicant is constitutionally entitled to what amounts to discovery for the preparation of a clemency application.

Plaintiff premises his argument on language from the Supreme Court's decision in Herrera v. Collins, 506 U.S. 390, 415 (1993), opining that clemency is the "fail-safe" mechanism in our criminal justice system for allowing the convicted to present judicially barred or frustrated claims of actual innocence. See Plaintiff's Memorandum at 18-19. Thus, Plaintiff reasons, due process requires that he have the "ability to establish his innocence to the Executive through the testing of the evidence at issue here." Id. See also Harvey II, 285 F.3d at 314 (Luttig, J., respecting the denial of rehearing). Although Herrera does recognize the historical role of clemency in the Anglo-American criminal justice system, Chief Justice Rehnquist explains that clemency's role is not one of constitutional dimension, but, rather, of grace. 506 U.S. at 413-14. See also Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998). Thus, the Constitution does not "require [a] prisoner to show actual innocence through proceedings for executive clemency, but on the other hand not guarantee the ability to show actual innocence at such proceedings." Plaintiff's Memorandum at 19. The Constitution simply does not require clemency. To the extent that the Constitution requires judicial oversight of clemency proceedings, it requires no more than "*minimal* procedural safeguards," Ohio Adult Parole Authority, 523 U.S. at 290 (O'Connor, J., concurring)(emphasis in original), to protect against arbitrariness in denying access to the process itself and ensuring that the executive's exercise of her

clemency power is not grossly arbitrary, as in, for example, "flipping a coin" to determine the fate of the applicant. Id. The Court has never extended whatever "*minimal* procedural safeguards" are implicated in a state executive's exercise of her clemency power to include judicially mandated discovery of evidence. Therefore, because there is no substantive due process right of access to evidence to present claims in executive clemency proceedings or otherwise, such a right cannot be the basis for an action under § 1983.

3. The Due Process Right to Exculpatory Evidence

Plaintiff also contends that due process requires that the requested evidence be released to him because of his right to the disclosure of exculpatory evidence. See Brady v. Maryland, 373 U.S. 83 (1963). Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. The due process concerns of Brady are implicated where the prosecution's withholding of evidence denies the defendant a fair trial. U.S. v. Bagley, 473 U.S. 667, 675 (1985).

This claim is unavailing. Plaintiff does not allege that the State failed to satisfy its Brady obligations regarding this evidence during his prosecution or that he has been denied a fair trial based on the refusal to grant access to the evidence. Plaintiff cannot

show that the evidence would have been favorable to his defense at trial because it remains purely a matter of speculation whether the evidence Plaintiff requests will tend to exculpate or otherwise prove favorable to him. Thus, Brady and the due process principle it vindicates are not implicated and do not provide Plaintiff with a due process right to the post-conviction release of evidence related to his conviction. Therefore, Brady and its progeny cannot be the basis for this § 1983 action.

4. Eighth Amendment Principles

Plaintiff argues that he is entitled to release of the evidence pursuant to fundamental Eighth Amendment principles. He first contends that, accepting Justice O'Connor's premise that it is "constitutionally intolerable" to execute an innocent person, see Herrera, 506 U.S. at 419, the Eighth Amendment requires that he be allowed to access evidence to demonstrate his innocence during clemency. However, as Justice O'Connor subsequently made clear in Herrera, persons, like Plaintiff, convicted and sentenced to death are not entitled to any presumption that they are innocent. Id. at 420. Simply put, upon a constitutionally sufficient adjudication of guilt, the convict may no longer invoke the protections afforded the presumptively innocent. Id. 419-20 ("Petitioner therefore does not

appear before us as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again. Consequently, the issue before us is not whether a State can execute the innocent."). Despite Plaintiff's impassioned assertions of factual innocence, he remains, before this Court, legally guilty. Therefore, the question raised by Plaintiff's Eighth Amendment claim is not whether he will be executed despite his innocence, but, rather, whether the Eighth Amendment requires this Court to order that he be allowed access to evidence to present his claim of innocence more effectively in clemency proceedings. As discussed *supra*, whatever Constitutional protections are implicated when a state inmate petitions for executive clemency, they do not include the judicially mandated discovery of evidence. Accordingly, the Eighth Amendment does not require release of the evidence to bring claims of innocence in clemency.

Plaintiff also asserts that the Eighth Amendment requires release of the evidence because the failure to do so exhibits a "deliberate indifference" to the potential for harm to Plaintiff. Plaintiff's Memorandum at 21. He contends that "[w]hen a state actor clearly knows that evidence in his or her possession could establish

an inmate's innocence, the person who fails to release that evidence is acting with deliberate indifference to the clearly foreseeable harm that the inmate will remain unjustly incarcerated and/or physically harmed by being executed - notwithstanding the inmate's actual innocence." Id. The "deliberate indifference" thread of Eighth Amendment jurisprudence has developed to formulate a test for evaluating a prison inmate's claim that prison conditions violate the Eighth Amendment. The inquiry is whether prison officials have demonstrated a "'deliberate indifference' to the inmates' health or safety." Hope v. Pelzer, 536 U.S. 730, 737-38 (2002)(citations omitted). The test has never been applied in the context which Plaintiff here asserts, that is, that a criminal court clerk acts with "deliberate indifference" in refusing to release evidence that state law forbids him from summarily releasing at his pleasure. Plaintiff's pursuit of the requested evidence has nothing to do with the conditions of his confinement or with the state officers charged with overseeing his confinement. Thus, his "deliberate indifference" argument is unavailing. Plaintiff's Eighth Amendment claims do not establish a constitutional right to the evidence.

5. Ninth Amendment

Plaintiff briefly proposes that the Ninth Amendment "provides him additional protections which entitle him to release of the evidence under the circumstances." Plaintiff's Memorandum at 22. Plaintiff cites no authority, nor is the Court aware of any authority, supporting his proposition about the sudden and sweeping reach he imputes to the Ninth Amendment. Therefore, this claim does not merit further consideration. Plaintiff's proposed Ninth Amendment right is unavailing.

IV. THE ALLEGED IMPROPRIETY OF PLAINTIFF'S COUNSEL BRINGING SUIT

Gibbons contends that Plaintiff's counsel, an employee of the Federal Public Defender's Office, has engaged in the unauthorized private practice of law by filing this suit. Plaintiff's counsel was authorized to bring this action pursuant to the mandate of the federal statute under which he was appointed to represent Plaintiff during his federal habeas corpus proceedings. See 21 U.S.C. § 848(q)(8)(repealed and re-codified at 18 U.S.C. § 3599). There has been no unauthorized practice of law.

V. CONCLUSION

Plaintiff's action is properly before this Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331. However, Plaintiff's action fails to state a claim upon which relief can be granted. Accordingly, Key's and Gibbons' Motions To Dismiss are GRANTED.

IT IS SO ORDERED, this 20th day of April, 2006.

S/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 06-5552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY,

Plaintiff-Appellant,

v.

WILLIAM R. KEY,

Defendant-Appellee;

WILLIAM L. GIBBONS,

Intervenor-Appellee.

On Appeal from the United States District Court for the Western District of Tennessee

Before: **BOGGS, Chief Judge; RYAN and BATCHELDER, Circuit Judges.**

BOGGS, Chief Judge. Sedley Alley, a death row inmate convicted in 1987 by a Shelby County, Tennessee jury of kidnaping, rape, and first-degree murder, appeals the district court's dismissal of his action brought pursuant to 42 U.S.C. § 1983 seeking injunctive relief in the form of access to certain physical evidence, now in the custody of the state court, for the purpose of DNA testing. William R. Key is the Clerk of the Criminal Court of the Thirtieth Judicial District

of Tennessee. William L. Gibbons is the District Attorney General of the same state judicial district.

We **AFFIRM** the decision of the court below.

I

Alley seeks access to test for DNA evidence, at his own cost, a stick found inside the victim's body, the victim's underwear found at the scene, another set of purportedly men's underwear also found at the scene, the victim's shorts, bra, shirt, shoes, and a sock. These items were introduced as evidence at his trial. He claims to expect to identify "semen, urine, skin cells, or other biological samples from the perpetrator . . . ." (Appellant's Brief, 12)

Alley confessed to most features of the brutal attack on 19 year-old Marine Suzanne Marie Collins only hours after it occurred, and he walked law enforcement authorities through the crime scene shortly after his arrest. He never asserted his innocence either at trial or until very lately in the nineteen years since his conviction. *See, e.g.*, *State v. Alley*, 776 S.W.2d 506, 508-10 (Tenn. 1989). However, he now requests access to physical evidence as part of a last-minute claim of actual innocence.

Alley first sought post-conviction DNA analysis in a petition to the Shelby County Criminal Court, pursuant to Tenn. Code Ann. §§ 40-30-403 and 304, filing his request on May 4, 2004, following the federal district court's denial of his habeas petition and affirmance of that decision by our court. *Alley v. Bell*, 101 F. Supp. 2d 588 (W.D. Tenn. 2000), *aff'd*, 307 F.3d 380 (6th Cir. 2002), *cert. denied*, 540 U.S. 839 (2003). The state trial court denied Alley's DNA analysis petition, finding that Alley had not demonstrated that he was entitled to DNA analysis pursuant to § 40-30-303 or that he satisfied the requirements for a discretionary order for DNA testing pursuant to § 40-

30-304. The Tennessee Court of Appeals affirmed. *Alley v. State*, No. W2004-0124-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). The United States Supreme Court denied certiorari. *Alley v. Tennessee*, 544 U.S. 950 (2005). Alley then initiated this action, which was dismissed by the district court on April 20, 2006, for failure to state a claim on which relief may be granted. We granted Alley's motion for expedited briefing of the appeal from this dismissal. (Order, May 9, 2006)

II

A successful claim brought pursuant to 42 U.S.C. § 1983 must identify both a right guaranteed by the United States Constitution and a deprivation of that right by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Though this case and its expedited briefing schedule do not encourage a definitive ruling on all aspects of the matter, we agree for purposes of the dispute now before us, with the district court's ruling that there exists no general constitutional right to post-judgment DNA testing.

Specifically, we concur with the district court's finding that Alley enjoys no procedural due process right to post-conviction DNA testing. Nor does Tennessee's Post-Conviction DNA Analysis Act create such a right. Tenn. Code Ann. § 40-30-301 *et seq*. The state-imposed requirements for securing DNA analysis under the Act do not themselves create any unconstitutional deprivation. Finally, Alley was not deprived of his right under state law to petition for DNA analysis. His petition was simply denied under state law.

Similarly, we find that Alley has no substantive due process right that supports the relief he seeks. We find that the defendant's denial of Alley's request for access to the evidence does not

"shock the conscience." *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). Key, a clerk, may grant access only in accordance with state law. In this dispute, he has thus far operated consistently with state law. The conduct of Gibbons, the local District Attorney General, in opposing access likewise does not rise to the level of constitutional error here. It is neither arbitrary nor capricious for him to defend legally what has to date been viewed as valid state practice in the handling of extremely belated requests for examination of alleged DNA evidence. We note also that, though Alley seeks access to DNA testing as part of his campaign for executive clemency, he does not have a substantive due process right to clemency proceedings. *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Therefore, no substantive due process right can attach to procedures, such as the access and testing desired here, that he seeks collaterally to his petition for clemency.

Nor does *Brady v. Maryland*, 373 U.S. 83 (1963) demand the relief Alley seeks. Alley's suit does not claim that he was denied access to this physical evidence during his trial, or even that he was denied a fair trial. *Brady* cannot be said to reach post-conviction access for DNA testing in the circumstances presented by the case before us. The district court correctly noted that *Brady* requires no relief in this matter because, *inter alia*, "it remains purely a matter of speculation whether the evidence Plaintiff requests will tend to exculpate or otherwise prove favorable to him." (District Court Opinion of May 4, 2004, at 19)

Neither the Eighth nor Ninth Amendments commands William R. Key to grant access to the physical evidence in this case for the purposes of DNA testing. It is true that a majority of the Supreme Court has said that the Eighth Amendment prohibits execution of innocents. See, e.g., *Herrera*, 506 U.S. 419 (O'Connor, J., concurring); *id.* at 431-32 (Blackmun, J., dissenting).

However, it is also true that Alley files his § 1983 action as a "legally guilty" man. *Id.* at 419 (O'Connor, J., concurring). The compelling evidence of Alley's guilt–including his confession, his description to law enforcement authorities of his acts, and the eyewitness testimony against him–strongly suggest that he could never accurately be considered actually innocent of the crime, no matter the result of the analysis he now seeks. Moreover, the Ninth Amendment has never yet been understood, by any federal court, to require post-conviction DNA testing.

III

For the forgeoing reasons, we **AFFIRM** the ruling of the court below.