**IN THE TENNESSEE SUPREME COURT**
**WESTERN DIVISION**
**AT JACKSON**

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| **SEDLEY ALLEY** | ) | |
| | ) | **No. ____________________** |
| **Petitioner-Appellant,** | ) | |
| | ) | **W2006-01179-CCA-R3-PD** |
| **v.** | ) | |
| | ) | **Death Penalty Case** |
| **STATE OF TENNESSEE** | ) | **EXECUTION DATE: June 28, 2006** |
| | ) | **1:00 A.M.** |
| **Respondent-Appelleee** | ) | |

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# APPLICATION FOR PERMISSION TO APPEAL

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## APPLICATION FOR PERMISSION TO APPEAL

Pursuant to Tenn.R.App.P. 11, Applicant Sedley Alley respectfully requests that this Court grant him permission to appeal the Court of Criminal Appeals's decision affirming the Shelby County Criminal Court's summary decision denying Mr. Alley access to biological material for DNA testing. (Appendix 1). The appeals court decision was entered June 22, 2006. No rehearing petition was filed.

## QUESTIONS PRESENTED

Our state legislature passed the Post-Conviction DNA Analysis Act to prevent the incarceration and execution of innocent people. The United States Supreme Court has spoken recently about the power of DNA to exonerate the wrongfully convicted in another Tennessee case. House v. Bell, 547 U.S. ___, 2006 U.S.Lexis 4675 (2006). The decision below ignores both the intent of the legislature and the lesson of the Supreme Court in the *House* case. The lower court fundamentally misunderstands the law and the power of DNA technology that is used in this country every day to solve crimes, exonerate innocent people and bring guilty people to justice. Ultimately, the Court of Criminal Appeals' analysis runs directly counter to Holmes v. South Carolina, 547 U.S. ___ (2006). Exactly as in *Holmes*, the Court of Criminal Appeals has improperly focused solely on the prosecution's case while ignoring the unreliability of its evidence. Holmes, 547 U.S. at ___, slip op. at 9. Exactly as in *Holmes*, the Court of Criminal Appeals has improperly refused to consider "defense challenges to the prosecution's evidence." Id.

Moreover, the opinion of the lower court misconstrues the factual and legal arguments made by Alley. Also, the opinion is directly contrary to this Court's January 2006 opinion in

Griffin v. State 182 S.W.3d 795, 800 (Tenn. 2006), as well as the Court of Criminal Appeals decisions in Shuttle v. State, (Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 Tenn.Crim.App. LEXIS 80), and Haddox v. State. Haddox, 2004 WL 2544668 5-6 (Tenn.Crim.App Nov. 10, 2004) .

If this decision is allowed to stand, no innocent person can gain access to DNA evidence in this State. Innocent people will remain in prison. Worse, innocent people will be executed. This Court must correct these grievous errors. The questions presented are:

1. Where The Trial Court Failed To Consider All Available Evidence In Support Of The Petition As Mandated By Tennessee Law, And Failed To Conduct An Evidentiary Hearing On Disputed Issues in Violation of This Court's Holding in Griffin v. State, While Ignoring Clear Proof That The Innocence Project Has Presented In The Petition To Establish Sedley Alley's Innocence, Should This Court Grant Permission to Appeal to Secure Uniformity of Decision, Settle an Important Question, and to Secure Settlement of a Question of Public Importance.

2. Where the Court Of Criminal Appeals Decision Conflicts with Other Decisions from the Court of Criminal Appeals in Shuttle v. State and Haddox v. State, and the United States Supreme Court Decision in House v. Bell, Should this Court Grant Permission to Appeal to Secure Uniformity of Decision, Settle an Important Question, and to Secure Settlement of a Question of Public Importance?

3. Does the Trial Court's Arbitrary Refusal to Recognize the Power of DNA Testing to Prove Third-Party Guilt As Well As The Exculpatory Impact of a DNA Database Identification Violate Sedley Alley's Due Process and Confrontation Rights Under the Sixth And Fourteenth Amendments And The Tennessee Constitution?

4. Does The Post-Conviction DNA Analysis Act of 2001 Prohibit Comparison Of DNA Test Results With Databases Of Convicted Offenders To Identify The Actual Perpetrator Of An Offense?

## STATEMENT OF THE FACTS

### A.
### SCIENTIFIC FACTS WHICH ESTABLISH THAT DNA EVIDENCE CAN PROVE ALLEY'S INNOCENCE

Pursuant to Tennessee's Post-Conviction DNA statute, Sedley Alley has sought numerous items of evidence from the crime scene which, after being subjected to DNA analysis, can prove his actual innocence. See Petition for Post-Conviction DNA Analysis, Court of Criminal Appeals Apx. at pp. . (hereinafter CCA Apx at [page number]) It is undisputed that numerous items of evidence taken from the crime scene exist and can be subjected to DNA testing.

In this case, the identity of the person who killed Suzanne Collins can be derived from STR DNA tests on a number of key pieces of evidence, including: men's underwear found near the victim that the prosecution argued were left by the assailant; apparent saliva stains found on the victim's t-shirt and bra; and deposits of blood and semen found on a stick that was inserted into the victim by her murderer.[1] If the same male STR DNA profile from a third party (not Alley) were found on these items, this would establish that someone else was the killer. And, were such DNA profiles entered into the national CODIS databank (which contains DNA profiles of convicted offenders and unsolved crimes),[2] the real perpetrator could be definitively

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[1]The court below makes the scientifically unsupportable assertion that, had evidence been handled by innocent parties, Alley's innocence could not be established. This is not true. The uncontroverted scientific proof in the record is that if one male's STR DNA profile is found on differing items of evidence such as the underwear, saliva stains, etc., it doesn't matter how many other persons may have incidentally touched such items: the redundancy of one male's DNA on all such items could not be mere coincidence. And if there is a databank "hit," or a match to the victim's boyfriend – potential perpetrators who would not have innocently touched those items – those favorable results cannot be explained away.

[2] The FBI Laboratory's Combined DNA Index System (CODIS) enables federal, state, and local crime labs to exchange and compare DNA profiles electronically, thereby linking crimes to

identified,[3] as has occurred in numerous cases involving DNA exonerations.[4]

In denying DNA testing, not only did the Court of Criminal Appeals completely mischaracterize Alley's arguments about "redundant DNA results," the court denied testing by using the very type of one-sided, bootstrapping "the petitioner is guilty" analysis which the U.S. Supreme Court recently condemned in Holmes v. South Carolina, 547 U.S. ___ (2006).

## B.
## FACTS WHICH PROVE ALLEY COULD NOT BE THE KILLER AND THUS A THIRD PARTY, WHO REMAINS AT LARGE, IS GUILTY

Numerous solid facts, which the lower court refuses to consider, support Alley's claims of innocence. They include:

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each other and to convicted offenders. The Serological Research Institute (SERI) has been assisting Alley in this matter. As an accredited laboratory, STR DNA profiles obtained by SERI through testing of the evidence in this case could be entered into CODIS to find a convicted offender or match another unsolved crime in which the perpetrator used the same *modus operandi* as here.

[3] If the prosecution refused to run such a DNA profile in the CODIS databank, then, Alley argued, he would be entitled to an adverse inference. The prosecution has never said that if the same male STR DNA profile was derived from the items of evidence Alley seeks to test they *would not* run that profile in the CODIS database (such an admission would literally be a scandalous deviation from standard practice. Rather, the prosecution continues to baldly assert the tests won't turn out that way, notwithstanding the undisputed mandate of the post conviction DNA statute in Tennessee that "favorable results" must be assumed for purposes of determining whether testing should be permitted because it could raise a reasonable probability of a different outcome. See Appendix 4, Letter to CCA regarding supplemental authority of State v. Moffitt.

[4]A chart graphically depicting the power of redundant DNA testing to exonerate Mr. Alley was provided to the lower court in exhibit PP. See CCA Apx. 252-256, reproduced in Appendix 5. The State has never offered a credible alternate explanation for how redundant DNA results which match each other, but, do not match Mr. Alley, could come from anyone other than the true perpetrator.

**1. It is now clear that the victim died later than initially believed, and Alley has a solid alibi during the time the murder took place.[5]**

Evidence from the Medical Examiner's files indicates that the crime actually occurred between 1:30 a.m. and 3:30 a.m., hours later than 11:00 p.m., which the DA claimed at trial. Alley has an alibi during the actual time of death, as he was either in custody or under intermittent surveillance by law enforcement starting at 12:10 a.m. and continuing through the morning. No gate guard ever reported Alley passing through any gates after he arrived home around 1:15 a.m., which means he never left home. Indeed, Alley was seen by police sitting on his front porch talking to his wife at 1:27 a.m..

**2. Alley does not match the eyewitness description from the crime scene.**

The main eyewitness in the case saw the victim, Suzanne Collins, shortly before she was abducted. She was being approached by a man the witness described as 5'8", short dark hair, medium build, tan and wearing black shorts. Alley is 6'4", and at the time of the crime had a full beard, glasses, long reddish-blonde hair and wearing blue jean shorts.

**3. The eyewitness could not identify Alley in a lineup.**

After Alley was brought in for questioning, the same eyewitness did not identify him as the man he saw across the street from Collins. Only later at trial did the eyewitness identify Mr. Alley as the man he saw that night (Mr. Alley was clean-shaven and seated at trial).

**4. Evidence indicates that Collins knew her attacker, but Alley did not know her.**

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[5] See Petitioner's Supplemental Brief, Alley v. State, No. W2006-01179-CCA-R3-PD, Appendix 3.

Eyewitness accounts suggest that Collins had some interaction with her assailant, for as long as half an hour, before she cried out for him to leave her alone, which indicates that she knew her attacker. There is no evidence that Collins and Alley ever met.

**5. Alley's "confession" to the crime is not credible.**

Experts say Alley's confession is a textbook false confession. He confessed to the murder only after several hours of interrogation without an attorney present; he gave many inaccurate details about the crime and the crime scene; he was mentally ill at the time he confessed, which made him more vulnerable to pressure from police. Even the Shelby County Sheriff in charge at the time of the crime has stated publicly that Mr. Alley's confession did not add up.

**6. Other suspects and leads – which may well have indicated that another individual committed the crime – were not pursued once Alley's "confession" was secured.**

The Shelby County Sheriff's Office admits that it failed to pursue further investigation of the case once Alley confessed. Evidence and, importantly, other potential suspects that were known to law enforcement authorities and have long been thought to have motive and opportunity to commit the crime, were completely ignored after Alley's confession.

**7. Supposed blood evidence from Alley's car is entirely unreliable.**

None of the officers who inspected Alley's car the night of the murder noticed any blood on his car. Only in the morning, after Alley's wife drove the car to her job, was blood noticed on the car. The minute amounts of blood found on Mr. Alley's car were either not conclusively

determined to be human blood, were a type foreign to Mr. Alley and Ms. Collins, and only one spot of blood was consistent with both Mr. Alley and Ms. Collins.[6]

**8. Contrary to trial testimony, Alley did not lead officers to the crime scene.** Although the DA at trial stated that Alley took officers to the crime scene, a Naval Security officer is on record stating that Mr. Alley was, in fact, "to be taken to the scene" by officers.

**9. None of the victim's personal items were ever linked to Alley.**

Law enforcement believed that Collins had several items in her possession on the night she was killed, including her bandana, her watch, her marine ID, and a tube sock she was wearing. Police conducted multiple searches of Alley's car and home, believing that the items would have to be in one of those two locations if he committed the crime, but they never found them.

**10. Alley had no physical injuries when he was arrested.**

Evidence indicates that Collins had at least 100 injuries to her body and that she struggled with her attacker. Such a struggle would leave significant injuries (such as cuts and scratches from Collin's nails) on the perpetrator. When he was arrested shortly after the crime, Alley did not have one scratch, cut or bruise on his body.

**11. Evidence establishes that a third party, John Borup, had motive and opportunity to commit the murder and Borup closely matches the description of the killer.**

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[6]Contrary to the lore of this case, the single head hair recovered from the outside of the car was not "matched" to Ms. Collins. The technology that existed at the time did not permit such "matches."

Alley has substantial evidence not only of John Borup's "opportunity" to kill Suzanne Collins (he admits being with her in his car on the base the night she died and that he had jogged with her in the past, and knew her route and how to get on base), but also of Borup's motive to kill: jealousy. Suzanne Collins was leaving Millington the next day to be with her fiancé in California. Thus, she was leaving Borup, whose ex-wife had just recently divorced him, for another man. Morevover, Alley has clear proof that *Borup matches the description of the abductor* (while Alley does not) and drove the same type of car driven by the abductor (brown-over-brown station wagon which Borup "suped up" to make loud).

## REASONS FOR GRANTING THE APPLICATION

The Court of Criminal Appeals has denied DNA testing through an analysis which fails to make any meaningful search for the truth: (1) It ignores Alley's reliable evidence establishing his innocence; (2) It relies on the prosecution's theory of guilt without regard to its unreliability; and (3) It relies on newly invented "evidence" which is simply false, all the while denying Alley the opportunity to present evidence in support of his claims. Despite the potential to prove actual innocence by conducting DNA testing on items of evidence that could definitively tie a third party to the act of murder and the crime scene, Sedley Alley faces execution.

### A.
### THE LOWER COURT'S OPINION AFFIRMING THE TRIAL COURT'S SUMMARY DISPOSITION OF ALLEY'S PETITION CONFLICTS WITH THIS COURT'S DECISION IN GRIFFIN AND VIOLATES ALLEY'S RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

The lower courts in this case engaged in fact-finding while at the same time denying Alley an evidentiary hearing. In so doing, the lower court held, contrary to this Court's opinion in Griffin, that "the Post-Conviction DNA Analysis Act does not contemplate an evidentiary hearing until after DNA testing produces results favorable to the Petitioner." Alley v. State, No. W2006-01179-CCA-R3-PD, June 22, 2006, Slip Op. at 8. Appendix 1.

Sedley Alley was denied fundamental procedural rights through the trial court's dismissal of his petition without an evidentiary hearing. He was: (1) denied his right to an evidentiary hearing on his petition; (2) denied that right by a judge who was not completely impartial; and (3) denied fair process on his request to determine the existence of additional items of evidence suitable for DNA testing. See Appellant's Opening Brief, *Alley v. State*, No. W2006-01179-

CCA-R3-PD, Appendix 2, pp. 49-58. This Court should reverse the judgment below and remand for a full evidentiary hearing before an impartial adjudicator.

The trial court scheduled an evidentiary hearing for May 30, 2006. In anticipation of the hearing, and in reply to the States's Response, Alley filed a comprehensive reply to the State's response and provided an extensive appendix of documents establishing the various items of evidence that existed which were capable of producing exculpatory DNA results. Alley also provided the Court with numerous real world examples of how just such evidence had produced exonerations in other similar cases. Alley's reply made clear that Alley anticipated that the Court would hear testimony at the May 30, 2006 evidentiary hearing; indeed, a DNA expert had flown in from California a week earlier to examine each item of evidence kept in the courthouse, and flew back again to testify at the hearing.

Yet when the hearing began, the Court expressed surprise that Mr. Alley sought to present witnesses. The Court stated, "Excuse me? You wish to call a witness?" May 30, 2006 Transcript, p. 9, CCA Apx. 310. An extensive discussion then ensued after which the Court ruled, "All right, I am going to deny that request to call witnesses. You can argue your motion for DNA testing, but I don't want to hear from any witnesses." Id, pp. 17-18, Apx. 318-319. Alley then requested to make an offer of proof with the witness. That motion was also denied. Id. p. 19, Apx. 320. Counsel, Mr. Scheck, then requested that the witness be allowed to enter the courtroom so that Mr. Scheck could make sure that in his oral offer of proof he did not misstate any facts. The following colloquy took place:

MR. SCHECK: [C]ould I bring Mr. Harmor in so that I could just ask him. He's actually outside, because we figured he was a sequestered witness. I just wanted to –

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| THE COURT: | You want him to sit in the courtroom? |
| MR. SCHECK: | Yes, if he could just sit and I would ask him questions to make sure I've got his observations correct. Could we bring him in? |
| THE COURT: | I've already ruled and I don't want to hear from the gentleman. |
| MR. SCHECK: | I understand. Would you permit him to come into the courtroom so I can ask him a question, as I make my offer to you. |
| THE COURT: | What is the methodology of asking questions of a person that I don't want to hear from as a witness? |
| MR. SCHECK: | No, he's the one that examined the – those photographs are pictures and observations that he made and I am giving – I am telling you – |
| THE COURT: | Well, you just give it your best shot. |

P. 30. Mr. Scheck then presented a 42 page oral offer of proof supported by reply exhibits A-00, exhibits PP, RR 1-6, SS, and TT. Apx. 331 *et seq.*

The Court also refused to allow Mr. Alley to call as a witness defense investigator Ms. April Higuera who was present to offer testimony regarding evidence she had uncovered which established the guilt of a third party, Mr. Borup. In addition to refusing to consider this testimony at the hearing, the trial judge also struck from the appellate record Mr. Alley's offer of proof as to Ms. Higuera's affidavit after an apparent *ex parte* communication with counsel for the state. As the affidavit of counsel Kelley Henry makes clear, Mr. Alley only learned of the Court's order striking Ms. Higuera's affidavit in a phone call to the clerk's office on another matter. CCA Apx. 460.

At the end of the May 30, 2006 hearing the trial judge announced his decision denying Mr. Alley's petition. A comparison of the transcript with the Court's written order, indicates that

the Court was reading from a prepared order in announcing his ruling. Compare CCA Apx. 378 with CCA Apx. 387-389. In rejecting Mr. Alley's Petition, the Court refused to credit any of Mr. Alley's evidence or representations made by his counsel, who are officers of the court. All of this was in a summary proceeding.

### 1. The Trial Court Improperly Denied Sedley Alley An Evidentiary Hearing To Enable Him To Establish His Entitlement To DNA Testing Under Tennessee Law And the Fourteenth Amendment of the United States Constitution

"In determining whether to grant or deny a post-conviction petition for DNA analysis, the trial court *must consider all the available evidence* . . . ." Jones v. State, 2004 Tenn.Crim.App.Lexis 1069, p.*15 (emphasis supplied); Ensley v. State, 2003 Tenn.Crim.App.Lexis 335. Because the trial court not only failed to conduct an evidentiary hearing but even refused to allow a complete offer of proof, Sedley Alley's case must be remanded for further proceedings.

#### a. In A DNA Case, An Evidentiary Hearing Is Required Where The Alley Has Made A *Prima Facie* Showing Of Entitlement To Testing In His Petition

As this Court explained when reversing a lower courts' failure to conduct an evidentiary hearing on a DNA petition: "[F]indings of fact upon which rights are granted or denied are best made following an evidentiary hearing." Griffin v. State, 182 S.W.3d 795, 800 (Tenn. 2006). Where, as here, the DNA petition establishes a *prima facie* case for DNA testing "to instigate a factual assessment" whether the statutory criteria are met (Ensley v. State, 2003 Tenn.Crim.App.Lexis 335, p.*11), the trial court must make a "factual finding about the existence of the statutory criteria." Id., p.*12. In other words, where the petition presents a *prima*

*facie* case for DNA testing, *Griffin* and *Ensley* establish two related propositions: A factual inquiry must be undertaken, and that inquiry requires an evidentiary hearing.

In fact, the lower courts have repeatedly acknowledged that a petition may be dismissed summarily (i.e., without any factual inquiry) ***only*** if "it is apparent that each prerequisite [under the statute] cannot be established." See Buford v. State, 2003 Tenn.Crim.App.Lexis 370. It is "[o]nly when the trial judge may *conclusively* find from the contents of the petition that the Alley is not entitled to relief" that a summary dismissal without a hearing is appropriate. Ensley v. State, *supra*, p.*12 (emphasis supplied).

**b. Sedley Alley Is Entitled To A Remand For An Evidentiary Hearing On His Entitlement To DNA Testing**

Sedley Alley is entitled to an evidentiary hearing under *Griffin*. In *Griffin*, the trial court dismissed the petitioner's request for DNA analysis without conducting an evidentiary hearing to allow Griffin to establish that he was entitled to DNA testing under the four-prong test of Tenn. Code Ann. §40-30-304(1)-(4) or §40-30-305(1)-(4). Griffin, 182 S.W.3d at 797. As noted *supra*, the Tennessee Supreme Court held that "findings of fact upon which rights are granted or denied are best made following an evidentiary hearing." Id. at 800. Thus, where it was not apparent from the face of the record that Griffin could not obtain DNA analysis under the Act (including whether the petition was presented for the purpose of unreasonably delaying the execution of sentence), the Tennessee Supreme Court "remanded to the trial court for the purpose of conducting an evidentiary hearing to make findings of fact and conclusions of law in accordance with the Post-Conviction DNA Analysis Act of 2001." Griffin, 182 S.W.3d at 800.

Here, the trial court made the exact same error condemned by the Tennessee Supreme Court in *Griffin*: It denied DNA analysis but did so without conducting an evidentiary hearing to illuminate the operative facts upon which application of the Act depends. The trial court's actions in this regard were particularly egregious here where: (1) the trial court set the case for an evidentiary hearing; (2) Alley had witnesses in the courtroom available to testify as to matters relevant to the application of the DNA Act; (3) the trial court prohibited Sedley Alley from presenting such witnesses at the hearing; and then (4) prohibited an offer of proof. This is wholly unacceptable under *Griffin* or under any meaningful understanding of fair process.

Indeed, as the lower courts have explained in *Jones* and *Ensley*, a trial court considering a petition for DNA analysis "*must consider all the available evidence* . . . ." Jones v. State, 2004 Tenn.Crim.App.Lexis 1069, p.*15. That command was manifestly ignored by the trial court. Gary Harmor was available to testify about the existence of evidence (Tenn. Code Ann. §40-30-304(2), 305(2)) and to explain how, through testing of the evidence, Sedley Alley could be exonerated under Tenn. Code Ann. §40-30-304(1), & -305(2).[7]

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[7]The State and the lower court have repeated the fallacy that concerns about contamination make it impossible to obtain an exculpatory DNA result in this case. Mr. Harmor, a scientist, was ready to testify, and experienced counsel, Mr. Scheck, made an offer of proof that is unrebutted, that contamination is not an issue. It was explained to the court in the extensive offer of proof that contamination can be accounted for in the analysis. This isn't speculation, it is unrebuttable science. The state merely speculates that contamination could be a problem. The court then goes on to conclude that it can divine the results of the analysis - that the DNA would all come back to the victim, be the result of consensual sex, or the result of contamination. That is speculation. What the real world examples, which were categorically ignored in the lower court, prove is that no one can know the results until you test. Moreover, if you do the testing and you get redundant results and those results match an offender in the databank or the boyfriend, that's not contamination. Yet, the lower court refuses to acknowledge that if the DNA did not come from Alley, then, it came from a third party. If that third party's DNA is on multiple items of evidence, the only explanation is that this third party is the killer. The Court of Criminal Appeals simply assumed away this scientific fact by its own conclusion that the DNA from a

He was prohibited from doing so.

April Higuera also had highly significant evidence – which is embraced by the *Jones* "all the evidence" standard – informing the court's decision about whether DNA testing would reasonably produce the lack of indictment, conviction, or death sentence. See Tenn. Code Ann. §40-30-304(1), -305(1). To add insult to injury, after precluding the presentation of evidence which was necessary for any determination of the statutory factors of Tennessee law, the trial court even prohibited an offer of proof from available witnesses.

Then, without taking any proof (exactly as in *Griffin*), the trial court made a factual determination under Tenn. Code Ann. §40-30-304(4) & 305(4) that Sedley Alley's petition was not presented for the purpose of establishing innocence. This was a clear abuse of discretion. First, the trial court's conclusion simply ignores Sedley Alley's petition and supporting contentions: As Alley has made clear, he first learned of withheld exculpatory evidence in 2004 and 2005 concerning the time of death (the victim was killed at 3:30 a.m. when Alley was known by authorities to be at home) and he has been trying (and continues to try) to receive a new trial on the basis of his innocence of the offense. See e.g., Alley's Reply, p. 19.

The trial court, however, never took evidence on the matter and thus ignored these dispositive facts, but then crafted its own factual theory about the purpose of Sedley Alley's DNA petition and devised its own conclusion that the "sole purpose" for the petition was for

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third party would have come from some other person touching the evidence. Gary Harmor was at the hearing, and prepared to testify, to the uncontroverted scientific fact that if a third party's DNA is there, you can find it, and you can separate out other irrelevant parties DNA. That is the power of the technology. This basic fact was not understood by the lower courts. But it is in the record and there is no scientific evidence to the contrary.

unreasonable delay. As *Griffin* made manifest under similar circumstances, the trial court's complete lack of evidentiary process for determining the statutory question of "unreasonable delay" and its crafting its own theory without taking evidence on the question is unacceptable. *Griffin* is directly on point, it controls, and requires a remand on the question of unreasonable delay. The Court of Criminal Appeals never dealt with this issue head on.

Moreover, it is already clear beyond peradventure that the petition was filed for the purpose of establishing innocence under §40-30-304(4) & 305(4). Sedley Alley is represented in this matter by the *Innocence Project* and Mr. Barry Scheck. In this very matter, the judge publicly praised Mr. Scheck for his "commitment toward . . . *establishing innocence of people across this country* (Id., p. 65, Apx. 366), for having presented "fantastic" pleadings (Id.) and for providing a "great" presentation explaining how he can establish Sedley Alley's innocence through DNA testing. Id. It simply flies in the face of reality for the trial court to then claim that counsel – whom the judge would have given the "key to the city" for his dedication to innocence (Id., Apx. 366) – did not file the petition to establish innocence.[8]

It is impossible for a court to come to any fair resolution of the petition where it categorically prohibited the presentation and consideration of evidence on which application of the DNA Act depends. *Griffin* prohibits such a result. The case must be remanded for further

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[8] Moreover, the record at an evidentiary hearing (as was established before the Board of Probation and Parole) would show that the DNA testing can be accomplished in a matter of 30-60 days. This cannot be seen as involving any "unreasonable" delay of execution of sentence. Indeed, the term "unreasonable delay" in §40-30-304(4) & 305(4) clearly indicates that requests for DNA testing will require some time, which can cause some delay. It is only when a petition would result in "unreasonable" delay that it is not permitted. Where the Board of Probation and Parole acknowledged that testing should occur and that a reprieve of 30-60 days would be appropriate, one cannot say that this case involves any potential delay which is not reasonable.

proceedings. See also Collins v. State, 869 So.2d 723 (Fla. App. 2004)(remanding for evidentiary hearing on post-conviction DNA petition); Schofield v. State, 861 So.2d 1244 (Fla. App. 2003)(requiring evidentiary hearing to determine whether DNA testing could exonerate petitioner).

## B.
## REASONABLE PROBABILITY ANALYSIS: FAVORABLE RESULTS, THIRD PARTY GUILT, AND REFUSAL TO CONSIDER ALL OF THE EVIDENCE

### 1. The Lower Court's Analysis Under § 40-30-304(1) Is Wrong As A Matter Of Law Since It Improperly Failed To Consider The Probative Value Of Redundant Results Which Identify DNA From The Same Man (Someone Other Than Sedley Alley) On Numerous Crime Scene Items

The statute requires that the Court is to presume favorable results. But, the Court of Criminal Appeals misunderstands what favorable results mean. The "reasonable probability" standard does not require an applicant for testing to show that favorable test results will wholly exonerate him or prove his "actual innocence," or even that the tests are likely to come back in his favor. Haddox v. State, 2004 WL 2544668 5-6 (Tenn. Crim. App Nov. 10, 2004) ("the term 'exculpatory results' does not imply that the results of the contemplated DNA analysis must indicate with certainty that the petitioner is innocent of the crime in question."); See, e.g., *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1573 (1995) ("Notably, the [reasonable probability] test does not require a court to determine that it is likely that tests would exonerate the defendant"). In other cases the Court of Criminal Appeals has used the standard set out in Brady v. Maryland, 373 U.S. 83 (1963) to evaluate a convicted defendant's right to access biological evidence for DNA testing under the Act, defining "reasonable probability" for purposes of its analysis as follows: "[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." Haddox, 2004 WL 2544668 * 4 *citing Alley I* at *9. The Court of Criminal Appeals has also framed the "reasonable probability" inquiry as whether favorable results "would have created a reasonable doubt in the mind of one

or more jurors" since "[b]y law, a reasonable doubt in the mind of one or more jurors would have precluded a conviction." Haddox v. State, 2004 WL 2544668 *5. While reciting the reasonable probability language of T.C.A. § 40-30-304(1), the court below, in fact, erroneously imposed a higher, actual innocence burden on Alley's request for testing.

The lower court also failed to consider the full range of potential favorable results in Alley's case, despite the fact that it is well established that in determining whether DNA test results would create a reasonable probability under § 40-30-304(1), the court must presume exculpatory or favorable DNA results. Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 80, at *14.

In this case, the identity of the person who killed Suzanne Collins can be derived from STR DNA tests on a number of key pieces of evidence, including: men's underwear found near the victim that the prosecution argued were left by the assailant; apparent saliva stains found on the victim's t-shirt and bra; and deposits of blood and perhaps semen found on a stick that was inserted into the victim by her murderer. If the same male STR DNA profile from a third party (not Alley) were found on these items, this would establish that someone else was the killer. And, were such DNA profiles entered into the national CODIS databank (which contains DNA profiles of convicted offenders and unsolved crimes) the real perpetrator could be definitively identified, as has occurred in numerous cases involving DNA exonerations.

In denying DNA testing, not only did the Court of Criminal Appeals completely mischaracterize Alley's arguments about "redundant DNA results," the court denied testing by using the very type of one-sided, bootstrapping "the petitioner is guilty" analysis which this Court recently condemned in Holmes v. South Carolina, 547 U.S. ___ (2006).

The court's error in judgment flows, first and foremost, from its mischaracterization of Alley's argument. The court claims that Alley's position is that he can prove his innocence through redundant results showing the *absence* of Alley's DNA from probative crime scene samples. On the contrary, as the court was well aware from Alley's powerpoint presentation and extensive offer of proof, Alley's claim is different: It is the potential *presence of a third party's DNA* on critical items of evidence that would prove his innocence. Such DNA results would tie that third party to the crime scene and the act of murder itself, thereby establishing Alley's innocence.

The Court of Criminal Appeals, however, explicitly refused to acknowledge or assume that DNA tests could exculpate Alley by showing the guilt of a third party, which is what DNA tests have done for those who have been exonerated. In doing so, the court consciously avoided this inherent power of DNA testing, while fallaciously concluding that "favorable" DNA results could not prove his innocence – nor even raise a reasonable probability that he would not have been convicted.

Perhaps even worse than this patently arbitrary, circular, and irrational line of reasoning, the court distorted record facts, ignored Alley's uncontroverted showing of other cases where redundant DNA results and/or DNA databank "hits" proved actual innocence, and invented scenarios without any factual support to avoid the potential exculpatory value of DNA testing in this case. The court did all of this while simultaneously ignoring clear evidence of innocence which already exists – including previously-withheld time-of-death evidence which conclusively establishes alibi.

One of the most egregious examples of the court's distortion of the facts involves its assertions about the men's red underwear found at the scene. Despite the fact that the prosecution clearly maintained that men's underwear found at the crime scene came from the killer (Arg. Tr. 39, 54-55), the court twists the record to now claim that DNA from the habitual wearer of that underwear likely "will not belong to the perpetrator." As support for this conclusion (by which the court arrogates to itself foreknowledge of the results of as-yet-performed DNA tests), the court incredibly claims that DNA tests on the underwear cannot exonerate Alley because Alley's statement to authorities (which he asserts is false) did not mention him leaving his underwear. This is irrational: The court is saying that Alley cannot prove his innocence through the DNA testing of someone else's underwear, because Alley should have earlier declared to authorities that he left his own underwear at the scene. This makes no sense whatsoever.

Alley's whole point, like the prosecution's, is that the killer left his underwear at the scene. Testing of that underwear will identify the killer. In fact, in Louisiana, Calvin Willis was exonerated after male DNA in men's underwear at the crime scene matched male DNA found under the victim's fingernails.[9] Because of the court's confused logic, however, Alley has been denied the opportunity to identify the actual killer by testing this item.

Additionally, to deny DNA testing, the court has made factual assertions that are patently false and/or border on the ludicrous:

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[9] The court also claims that known fluid which drained from the victim's vagina does not contain semen, because Alley's unreliable confession does not contain any statement of a rape involving semen. But this is not a reason to deny DNA testing, it is a reason to *grant* DNA testing: It shows that Alley's statement to the police is false and that the real killer did rape the victim and leave semen which can be identified through DNA testing.

For example, where Alley asserts that DNA samples from known saliva on the victim's shirt (consistent with bruising to the breast) can prove his innocence (like similar evidence did for Ray Krone in Arizona), the court explains away this evidence by claiming that "contusions on the victim's breast were the result of a consensual sexual encounter." This is simply not true. The proof, in fact, shows that the victim had no such encounter before her murder, but the Tennessee courts have refused to consider such evidence. This posthumous attack on the victim's character is factually and legally wrong, and morally offensive as well.

The court also claims that DNA from apparent semen and blood on the stick and its wrapper come from contamination by the prosecutor or court personnel. The court does not explain, however, how court personnel transferred their semen and blood to the murder weapon and the paper wrapper.[10]

In addition, when determining whether to grant DNA testing, the Court of Criminal Appeals has categorically refused to consider critical, exculpatory evidence showing that Alley is actually innocent, and which fully establishes the need for DNA testing. The court has not only refused to consider Alley's unrefuted *alibi* (authorities knew Alley was home when the victim was killed elsewhere), it has likewise refused to consider "troubling evidence" that John Borup

[10] The court also makes the scientifically unsupportable assertion that, had evidence been handled by innocent parties, Alley's innocence could not be established. This is not true. The uncontroverted scientific proof in the record is that if one male's STR DNA profile is found on differing items of evidence such as the underwear, saliva stains, etc., it doesn't matter how many other persons may have incidentally touched such items: the redundancy of one male's DNA on all such items could not be mere coincidence. And if there is a databank "hit," or a match to the victim's boyfriend – potential perpetrators who would not have innocently touched those items – those favorable results cannot be explained away.

"could have been the murderer." House v. Bell, 547 U.S. ___, ___, slip op. at 28. Indeed, "When identity is in question, motive is key," Id., slip op. at 21, and Borup not only had motive to kill (jealousy), he (unlike Alley) fits the description of the abductor. This critical evidence showing Alley's innocence and Borup's guilt has been disregarded as irrelevant to the determination whether DNA testing is appropriate.[11]

So, too, the Tennessee courts have refused to consider Alley's unrefuted offer of proof (contained in his powerpoint presentation) showing exactly how others have been exonerated through the very type of testing which Alley now requests. As noted *supra*, Calvin Willis was exonerated through redundant DNA results on underwear and the victim's fingernails. Douglas Warney was exonerated through a database "hit," after he was convicted based on a false confession. Chris Ochoa was exonerated after pleading guilty and giving a false confession. Frank Lee Smith was exonerated by DNA after pleading insanity at trial. In denying DNA testing, the Tennessee courts have myopically refused to consider the real-world experience of DNA testing and DNA exonerations.

Suffice it to say, the Court of Criminal Appeals' denial of DNA testing is fraught with error. The court has failed to make any meaningful search for the truth: It has distorted Alley's

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[11] While the court has failed to consider all evidence showing Alley's innocence, it has instead taken a lopsided view of the facts, focusing solely on the evidence of guilt presented at trial, while simultaneously ignoring evidence of innocence presented at trial. For example, the court nowhere mentions Scott Lancaster's description of the abductor at trial – which describes Borup, not Alley. Trial Tr. 150. And when relying on evidence of guilt from trial, the court has refused to consider the unreliability and inconclusiveness of such evidence. In particular, the court has refused to consider not only Professor Richard Leo's expert opinion that Alley's statement to authorities is false, but also the Tennessee Supreme Court's acknowledgment that the statement is false in material respects.

argument, distorted the facts and fabricated false ones, and it has ignored clear, unrefuted evidence of Alley's innocence.

Indeed, the reasoning and analysis in *House* make clear that, under the "reasonable probability" standard applicable to Sedley Alley's DNA petition, Sedley Alley is entitled to release of the requested evidence because: (1) his showing of actual innocence through DNA and other evidence is even stronger than House's; and (2) House was found to satisfy an evidentiary standard much higher than the "reasonable probability" standard which governs this appeal. *A fortiori*, where House wins, Sedley Alley must win as well – especially where *Alley, unlike House, has uncontroverted evidence establishing alibi*, and like House, has identified the person who DNA would show to be the likely killer. While House's case "is not a case of conclusive exoneration" (Id., 547 U.S. at ___, 2006 U.S.Lexis 4675, p.*62-63), Sedley Alley's would be such a case for "conclusive exoneration" given exculpatory DNA results. See Appendix 3, Alley's Supplemental Brief in the CCA.

As stated previously, in evaluating whether an applicant for testing has met the "reasonable probability" requirement, the post-conviction court is required to "assume that DNA testing will reveal exculpatory evidence." Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 80, at *14. In cases, such as Mr. Alley's, where there are a number of items of relevant evidence, as a matter of law and scientific fact, favorable results necessarily include redundant results, meaning results which show the same genetic profile on a number of items of crime scene evidence. Kyles v. Whitley, 514 U.S. 419 (1995) (holding for purposes of *Brady* materiality, the "cumulative effect" of all evidence must be considered rather than considering each item of evidence individually); See also State v. Peterson, 364 N.J. Super. 387

(App. Div. 2003) (reasoning under New Jersey's post-conviction DNA testing statute, which is similar to § 40-30-304, that "because it is difficult to anticipate what results DNA testing may produce in advance of actual testing, the trial court should postulate whatever realistically possible test results would be most favorable to defendant in determining whether he has established that 'favorable' DNA testing 'would raise a reasonable probability a motion for new trial based upon newly discovered evidence would be granted'" and finding that "DNA testing could show that all of this evidence, including the hairs on the sticks found at the crime scene [semen on the victim's pants, and DNA from under her nails], had a common identifiable source other than defendant who could have had access to the victim around the time of the murder"). It is both contrary to real life experience and legal error for the lower court to have ignored the probative value of redundant DNA results. See Alley Brief Appendix 2 at pp. ; Petition, Appendix 3 at pp. ___.

**2. The Lower Court's Reasonable Probability Analysis Is Flawed -- Not Only Because The Court Analyzed The Items Of Evidence Primarily In Isolation And Failed To Consider Redundant Results -- But Also Because It Improperly Bases The Reasonable Probability Requirement On The Strength Of The State's Case And Turns A Blind Eye To The Probative Value Of The Evidence Sought To Be Tested, Refusing to Consider *All* of the Evidence**

The determination of whether a particular case meets the reasonable probability standard is not based on the type of evidence that was used to obtain the conviction, nor on the strength of the state's case. What is decisive under the reasonable probability test is the probative value of the evidence sought to be tested or, in other words, the significance that exculpatory DNA test results would have in the case. Shuttle v. State, 2004 Tenn. Crim. App. LEXIS 80; State v. Brown, 2003 Tenn. Crim. App. LEXIS 528; Saine v. State, No. W2002-03006-CCA-R3-PC,

2003 Tenn. Crim. App. LEXIS 1135 (Tenn. Crim. App. Dec. 15, 2003); Haddox v. State, 2004 WL 2544668.

In *Haddox,* the Court of Criminal Appeals reversed a lower court's denial of a defendant's request for DNA testing of a baseball cap that the perpetrator of the murder for which he was convicted left at the crime scene and which, like the underwear in Alley's case, was found near the murder victim's body. In granting testing of the baseball cap, the Court of Criminal Appeals rejected the State's arguments that Haddox should be denied testing because the absence of his DNA on the baseball cap would not exclude him as the perpetrator since "he could have worn the cap without leaving traces of his DNA" and the presence of someone else's DNA on the baseball cap would merely indicate that some other person, "at some time, had come in contact with the cap." The court ruled:

> While the lack of the Petitioner's DNA on the cap would not conclusively exclude him from being present and committing the crime, and the presence of another person's DNA would not necessarily mean that another person wore the cap during the commission of the crime, the statute specifically requires that DNA analysis be conducted if a *reasonable probability* exists that the petitioner would not have been prosecuted *or* convicted if exculpatory results had been obtained through DNA analysis. *See* Tenn.Code Ann. § 40-30-304(1). While exculpatory results from DNA analysis of the red cap may not have resulted in a reasonable probability that the Petitioner would not have been *prosecuted,* we conclude that such results would have resulted in a reasonable probability that the Petitioner would not have been *convicted.* The proper analysis for the trial court under the DNA Analysis Act necessarily includes a consideration of the effect on the jury of evidence showing that Petitioner's DNA was not present on the baseball cap that was worn by the perpetrator and recovered at the crime scene. In this regard, there is at least a reasonable probability that the Petitioner would not have been convicted if the jury was presented evidence that a DNA analysis if the red baseball cap worn by the perpetrator indicated that no DNA from Petitioner is present in or on the red baseball cap.

*Id.* at 5. The underwear in Alley's case are of equal probative value as the baseball cap in *Haddox*, both are items of clothing alleged to have been used by the perpetrator and left at the crime scene, recovered nearby the murder victim's body. The probative value of the evidence -- underwear that the state argued at trial the perpetrator wore to the scene and left by the murder victim's body - and the ability of DNA to identify the person who used the clothing -- is no less because the evidence of guilt consists of a confession or is overwhelming.The lower court never even addressed the *Haddox* argument.

In fact, *Shuttle* makes clear that DNA testing is warranted even where the proof of guilt is strong, such as where the defendant testified under oath as to his involvement in the crime. Shuttle, who was convicted of murder, filed a petition under the Act, requesting DNA testing of blood from underneath the murder victim's fingernails and blood that was found on his jeans. The post-conviction court denied Shuttle's petition for testing because he had testified at trial that he killed the victim. The court reasoned that, because of his trial testimony, the results of DNA testing would not be dispositive and thus the defendant failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted had exculpatory DNA evidence been obtained. *Id.* at *9. However, the Court of Criminal Appeals reversed, "conclud[ing] Judge Tipton's analysis applies to the case at bar, which involves a petitioner who essentially contends he was wrongly convicted at trial where he gave false incriminating testimony." Id. at *14. Noting that for purposes of the Act, the court "must assume that DNA testing will reveal exculpatory evidence," Id. at *14, the Court of Criminal Appeals ruled that T.C.A, § 40-30-304(1) (2003) was met. The court explained that if DNA testing showed that the source of the blood samples was neither the victim nor the Petitioner, then:

> the test results would be inconsistent with the state's theory at trial, inconsistent with the petitioner's trial testimony [where he admitted to killing the victim], consistent with the petitioner's first statement to his trial counsel [where he asserted his innocence], and consistent with the petitioner's latest testimony [at the evidentiary hearing for the post-conviction motion under the Act]. Thus, we conclude the petitioner has established a reasonable probability that he would not have been prosecuted or convicted if exculpatory DNA evidence had been obtained.

Shuttle, 2004 Tenn. Crim. App. LEXIS 80, at *15; A. 270 (Citations Omitted).

Under the court's ruling in *Shuttle*, there can be no question that testing is required in Alley's case. Where there are probative items of evidence to test, the reasonable probability requirement test can be met regardless of whether the evidence at guilt at trial included an admission of guilt by the defendant. For good reason, many of the DNA exonerations have involved evidence of guilt against the innocent that prior to DNA testing was correctly described as "overwhelming." See e.g., Godschalk v. Montgomery County District Attorney's Office, 177 F. Supp. 2d 366, 368-70 (E.D. Pa. 2001)(in case where defendant gave detailed confessions to two rapes, which included over a dozen non-public details of the crime, court employed the standards set out by the Supreme Court in *Brady* and *Bagley* to evaluate whether a prosecutor's refusal to release biological evidence for post-conviction DNA testing violated federal due process, finding "if by some chance no matter how remote, DNA testing on the biological evidence excludes plaintiff . . . a jury would have to weigh this result against plaintiff's uncoerced detailed confessions to the rapes. While plaintiff's detailed confessions to the rapes are powerful inculpatory evidence, so too any DNA testing that would exclude plaintiff as the source of the genetic material taken from the victims would be powerful exculpatory evidence. Such contradictive results could well raise reasonable doubts in the minds of jurors as to

plaintiff's guilt. Given the well-known powerful exculpatory effect of DNA testing, confidence in the jury's finding of guilt at his trial, where such evidence was not considered, would be undermined.").

While reversal is required because the trial court misapplied the "reasonable probability" standard, reversal is also required, because when rejecting Alley's motion for DNA testing, the trial court speculated – with absolutely no proof in the record – that DNA from the victim's boyfriend came from a consensual encounter. The clear problem with this conclusion is that *there is no proof to support such a factual assertion.* No one can contend otherwise, and in fact, evidence which would have been presented at a hearing would have shown the exact opposite: The victim was not sexually active, as the lower court now claims. See Notice Of Filing, Affidavit of April Higuera (victim was not unchaste), Apx. 447-448. Moreover, the trial court never explains how the boyfriend's or someone else's DNA on the red underwear at the scene – argued by the state as being the assailant's underwear – wouldn't exonerate Alley. Of course it would: The DNA in the underwear comes from the killer.

Ultimately, the trial court's reliance on unsupported speculation to deny DNA testing was manifestly in error: It runs afoul of the Tennessee Supreme Court's ruling in Griffin v. State, 182 S.W.3d 795 (Tenn. 2006), which holds that DNA testing may not be denied under Tennessee's Post-Conviction DNA Analysis Act based on alleged "facts" when there is "no . . . evidence in the record to support" such "facts." Id. at 800 (reversing denial of DNA testing where trial court findings had no support in the record).

To reiterate: There is no evidence that the victim had a consensual sexual encounter with her boyfriend before she was killed, and evidence presented at a hearing would have shown the

exact opposite. The Court of Criminal Appeals therefore made a manifest error in denying DNA testing based upon nothing more than pure speculation. There is also no explanation in the record how a third party's DNA all over the crime scene fails to exonerate Alley. Under *Griffin*, the trial court's denial of testing based on nothing more than speculation cannot stand. See also Carter v. State, 913 So.2d 701 (Fla.App. 2005)(trial court erroneously denied DNA petition by adopting state's theory, unsupported by any proof in the record, that blood which petitioner claimed was testable and from assailant, supposedly came from the victim herself); Borland v. State, 848 So.2d 1288, 1289 (Fla. App. 2003)(error for court reviewing DNA petition to deny testing based on anything less than sworn evidence).

C.

## THE LOWER COURT'S IRRATIONAL REFUSAL TO RECOGNIZE THE POWER OF DNA TESTING TO PROVE THIRD PARTY GUILT AND THE EXCULPATORY IMPACT OF A DNA DATABASE IDENTIFICATION VIOLATES THE DUE PROCESS NAD CONFRONTATION CLAUSES OF THE TENNESSEE AND UNITED STATES CONSTITUTIONS

The Post-Conviction DNA Analysis Act is a legislative mechanism designed to give access to results which can prove an inmate's actual innocence. The statute cannot serve its purpose if the lower courts are allowed to misinterpret what favorable results mean and if they fail to consider all of the evidence, including evidence of third party guilt, in conducting the reasonable probabilty analysis.

The reasonable probability analysis adopted by the lower courts is myopic. The Court has held that the analysis is limited to a simple evaluation of the trial court record with the additional consideration of DNA results which show that the defendant's DNA was not found on items taken from the crime scene and no more. This approach defies logic and perverts the purpose of the act. In this case, we are not just talking about the absence of Mr. Alley's DNA on items from the crime scene, we are talking about the presence of a third party's DNA on items from the crime scene. And, while the State may not be required by the Act to run the DNA through CODIS, the reality is that good law enforcement practice requires that they do. If they fail to do so, then we would be entitled to the adverse inference. This is true because there is no reason not to run the profile of a third party whose DNA is at the crime scene through the databank. It is an easy thing to do. And, it has resulted in the apprehension of 66 criminals who remained at large while innocent men were incarcerated. So, if the State refuses to run the profile in CODIS, and they have not said that they would not, the only reason they would refuse is because they know it

will "hit" on someone else. Under State v. Moffitt, 2002 Tenn. Crim.App. LEXIS 362 (Tenn.Crim.App. at Jackson, April 19, 2002) and the laws of this State, this Court should consider that fact in the context of the reasonable probability analysis.

The lower court says that Alley's case hinges on speculation. This is not true. Several real world examples demonstrate exactly how DNA technology has worked to exonerate men whose convictions were supported by ovewhelming evidence of guilt before the tests were run.[12] The lower courts simply ignore the real world examples which show once the DNA is tested, cases of overwhelming guilt fall apart.

What the lower court refuses to acknowledge is that if the DNA isn't Alley's, it is somebody elses. This is the same backwards thinking that led the Court in the Warney case to refuse to grant DNA testing. In the meantime, the prosecutor in the Warney case went ahead and tested the DNA. Mr. Warney was released from prison on May 16, 2006. The same day the Governor granted Mr. Alley a reprieve because the Board of Probation and Parole recognized that DNA in this case could establish Mr. Alley's actual innocence.

The court said Alley argued that redundant results showing the *absence* of Alley's DNA from probative crime scene samples proves his innocence. On the contrary, as the court had to know from the powerpoint slides in Alley's offer of proof (exhibit PP) and extensive oral argument, Alley's claim is different: it is the *presence of a third party's DNA* on critical items of evidence that would tie that third party to the act of murder and crime scene that would establish

[12]Calvin Willis (DNA from assailant's underwear matched DNA under the victim's fingernails); Dougla Warney (database hit and false confession); Frank Lee Smith for insanity defense and Frank Townsend (guilty plea); Chris Ochoa,(false confession, guilty plea, and late assertion of innocence).

his innocence. The Court of Criminal Appeals explicitly refused to acknowledge or assume that DNA tests could exculpate Alley by showing the guilt of third party, and by consciously avoiding this undeniable property of DNA testing, the court fallaciously concludes "favorable" DNA results could not prove his innocence or even raise a reasonable probability he would not have been convicted. Perhaps even worse than this patently arbitrary, circular, and irrational line of reasoning, the court distorted record facts, ignored Alley's uncontroverted showing of other cases where redundant DNA test results and/or databank "hits" proved actual innocence, and invented scenarios without any factual basis to avoid the potential exculpatory value of DNA testing while dismissing out of hand suppressed exculpatory evidence concerning time of death that establishes an irrefutable alibi for Alley.

The lower courts' adamant refusal to consider the possibility of third-party guilt or database comparisons creates a serious and unwarranted constitutional problem. It deprives Mr. Alley of a meaningful opportunity to be heard on the substance of his claim, is wholly arbitrary restriction on the presentation of third-party guilt, and contradicts the real-world experience of exonerations and law enforcement practice. As such, the lower courts have construed the statute in a way that violates Alley's Due Process and confrontation clause rights under the United States and Tennessee constitutions.

There is no dispute that in reviewing an application under Tennessee's post-conviction DNA statute, the courts must assume that the proposed DNA testing results will be favorable to the applicant. See Tenn. Code. Ann. § 40-30-304(1) ("reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis"); See also State v. Haddox, 2004 WL 2544668, *4-5 (Tenn. Crim. App.

November 10, 2004); Jack Jay Shuttle v. State, 2004 WL 199826, *5 (Tenn. Crim. App. February 2, 2004)( "for purposes of the Act, we must assume that DNA testing will reveal exculpatory evidence"). Favorable results in this case, and in any other post-conviction DNA application, necessarily include the possibility that DNA profiles derived from probative crime-scene evidence will not only exclude the applicant but inculpate a third party, either a known suspect or an unknown convicted offender whose DNA profile is contained in a national DNA databank.

This term in Holmes v. South Carolina, 547 U.S. ____ (2006), the United States Supreme Court affirmed a long line of cases holding that neither state statutes or state evidentiary rules can irrationally restrict a defendant from exculpating himself through proof that a third party is guilty. *Holmes*, Slip Op. at 4-6 (*citing*, *inter alia*, Washington v. Texas, 388 U.S. 14 (1967) (Texas statute barring person who had been charged as a participant in crime from testifying in defense of another participant unconstitutional); Chambers v. Mississippi, 410 U.S. 284 (1973) (Mississippi's "voucher rule" which prevented defendant from cross-examining third-party who had confessed to murder unconstitutional); and Crane v. Kentucky, 476 U.S. 683 (1986) (Kentucky evidentiary rule arbitrarily prevented defendant from showing circumstances under which he gave confession were unreliable)).

It is a well-established due-process principle that once the state has created a statutory scheme affecting a litigant's rights and interests, it must provide "'a meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." Tennessee v. Lane, 541 U.S. 509, 523 (2004) (*citing* Boddie v. Connecticut, 401 U.S. 371, 379 (1971); M.L.B. v. S.L.J., 519 U.S. 102 (1996)). Here, the lower court has in fact created obstacles to full

participation by artificially limiting the scope of its enquiry to not include the real-world possibility of an outcome-changing third-party match. This arbitrary rule "in effect forecloses what is potentially a conclusive means for an indigent defendant to … exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." Little v. Streater, 452 U.S. 1, 12 (1981). *See* Appellant's Opening Brief, Appendix 2 at pp. ___.

While *Holmes* concerned a trial right to present third-party evidence and the DNA Act concerns a post-conviction right, there is no reason to believe that the judiciary's duty to rationally apply rules of evidence to effectuate the purpose of a statute ends after trial. Indeed, it is well established principle of due process that once a state creates a scheme that affects a litigant's rights, it must provide a meaningful opportunity to be heard in that forum. Tennessee v. Lane, 541 U.S. at 523. An arbitrary rule preventing the court from considering the possibility of third-party guilt or a database match renders the opportunity to be heard on the critical "reasonable probability" question far less than meaningful.

When the state has created a procedure such as the one at issue here, three factors normally determine whether an individual has received the "process" that the Constitution finds "due": 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. City of Los Angeles v. David, 538 U.S. 715, 716 (2003) (*citing* Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). "By weighing these concerns, courts can determine whether a State has met the 'fundamental requirement of due process'-'the

opportunity to be heard at a meaningful time and in a meaningful manner.'" City of Los Angeles, 538 U.S. at 717 (*quoting* Mathews, 424 U.S. at 333).

Here, the private interest affected by the official action could not be greater. Sedley Alley has been sentenced to die, and DNA testing that could potentially prove his innocence and save his life has not been ordered because of the official action. If the lower courts had considered the possibility of third-party guilt or a database match, he may well have ordered testing. The first factor is thus easily met.

Second, the risk of an erroneous deprivation of Mr. Alley's right to DNA testing is great under the lower courts' "no third party guilt" rule. Real-world experience has shown that time and time again, cases that appeared to be overwhelming evaporated in an instant through the power of a DNA match to the database. (*See*, *e.g*, Petition for Post-Conviction DNA Analysis at 22-24 & n. 13 (citing individual cases involving database matches and Chicago Tribune study on database matches)). By refusing to consider the possibility of a database hit, the lower courts also ignored the reality of how exonerations work. They have artificially limited the inquiry into how Sedley Alley's testing plan could or could not prove innocence, and on the basis of this less-than-meaningful record, denied testing. The risk of erroneous deprivation for Mr. Alley, and future DNA petitioners, is therefore great.

Finally, the government's interest in the lower courts' rule is non-existent. Law enforcement routinely uses DNA databases to solve crimes, and it is in their interest to have the true power of this tool understood and considered in judicial hearings. Moreover, there is absolutely no financial or administrative burden to having the trial court consider the possibility

of a database match when it weighs whether testing should be granted. This factor also weighs entirely in Mr. Alley's favor.

In sum, it is clear that the lower courts' rule serves no rational purpose, and in fact creates a barrier to meaningful review under state procedures. This arbitrary rule therefore violates the constitution as it "forecloses what is potentially a conclusive means for an indigent defendant to … exonerate himself." Little v. Streater, 452 U.S. 1, 12 (1981).

The lower court's actions can also be understood as depriving Mr. Alley of a statutorily created liberty interest. The principle that the state may create a liberty interest by statute that is entitled to due process protection is well-established. See Wilkinson v. Austin, 545 US 209, 125 S.Ct. 2384, 2393(2005)(liberty interest protected by the Fourteenth Amendment's Due Process Clause may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies.); Vitek v. Jones, 445 US 480, 488 (1980) (State statutes may create liberty interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment); Wolff v. McDonnell, 418 US 539, 558 (1974) (Some kind of hearing is required at some time before a person is finally deprived of his liberty, even when the liberty itself is a statutory creation of the state).

Here, Tennessee has created a liberty interest for convicted defendants to secure release from prison by means of DNA testing. For those on death row like Alley, that liberty interest is also a life interest. Indeed the Tennessee Court's have recognized that the purpose of the Act is to provide an avenue for the discovery of proof of innocence. Once the legislature creates such a liberty and life interest in its post-conviction DNA statute, the courts cannot restrict an inmate's

statutory right to vacate his conviction, much less prove his actual innocence, by irrationally and unfairly preventing him from using DNA testing to prove third party guilt. See e.g. Wilkinson v. Austin, 545 U.S. 209 (2005) (process must be appropriate when judged against liberty interest involved).

## D.
## CONTRARY TO THE TRIAL COURT'S CONCLUSION, STATE LAW DOES NOT PROHIBIT MERE CONSIDERATION OF THE IMPACT OF A DATABASE MATCH

Of course, it is not necessary to find that Tennessee's statute, as interpreted by the lower courts, falls afoul of the Constitution. Indeed, it is apparent that the lower courts erred as a matter of state law.

*Crawford* and *Alley I* do stand for the proposition that the DNA statute does not create a mechanism for the trial court to order the victim or any third party to submit new DNA samples. *See Crawford*, 2003 WL 21782328 at *3 ("[t]he statute does not authorize the trial court to order the victim to submit new DNA samples..."); *Alley I*, 2004 WL 1196095 at *10 ("the Act does not permit DNA analysis to be performed upon a third party."). However, Alley is not requesting that DNA testing be performed on any third party. Indeed, he seeks only to test crime-scene evidence that may contain the DNA of the perpetrator of the horrible crime at issue.

The lower courts incorrectly extends a simple prohibition on the *performance* of third-party testing under the Act into a ban on the *mere consideration* of the impact of identifying a third-party on exculpatory results when analyzing the "reasonable probability" prong. This radical and artificial limitation on the analytic process of weighing a petitioner's request is entirely unjustified.

Neither *Crawford* nor *Alley I* even mentions database comparisons. In *Crawford*, the petitioner sought to have the victim and victim's husband provide new DNA samples, and the court's pronouncements of improper comparisons are entirely limited to the impropriety of that request. In *Alley I*, this Court found that Mr. Alley's confession was distinguishable from the

inculpatory statements made by the petitioner in *Jack Jay Shuttle*, and that Mr. Alley's suggestion that one of the victim's romantic partners may have been involved in the crime was not enough to overcome his confession. It was in this context that this Court held that the "purpose of the Post Conviction DNA Analysis Act is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant." *Alley I*, 2004 WL 1196095 at *9. Of course, with the help of new counsel greatly experienced in the nuances of DNA testing, Mr. Alley has now requested examination on the particular crime-scene items that could indeed definitively identify the perpetrator and overcome Mr. Alley's confession.

The Court of Criminal Appeals previous reference to "conjecture" concerning a "phantom defendant" was clearly not a limit on the *process* of analyzing assumed exculpatory results. Rather, it was judgment on the limited potential of the testing requested by Mr. Alley in his flawed first petition. Now that those flaws have been corrected, there is no reason to artificially ignore the possibility of a database match changing the picture of guilt.

The first reason why consideration of a match is appropriate is purely logical. In considering an application of DNA testing, it is uncontested that the reviewing court must assume "exculpatory results." *See* Tenn. Code. Ann. § 40-30-304(1) ("reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis"); See also State v. Haddox, 2004 WL 2544668, *4-5 (Tenn. Crim. App. November 10, 2004); Jack Jay Shuttle v. State, 2004 WL 199826, *5 (Tenn. Crim. App. February 2, 2004)("for purposes of the Act, we must assume that DNA testing will reveal exculpatory evidence"). By definition, "exculpatory results" means that the DNA from

someone *other than the victim or defendant* is found on the evidence tested. In other words, under well-settled law, this Court must assume that the DNA of a third party is found on the evidence upon which DNA testing is requested. Although the lower courts recoil at the mention of a third party, there can be no "exculpatory results" without implicating one.

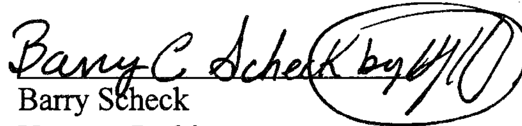
Analytically, the question then becomes whether a court can consider that a DNA database could link a specific person to the assumed exculpatory result. The answer must surely be "yes." There is absolutely no language in the statute prohibiting such an analysis. Although the lower courts never acknowledged it, the uncontested record establishes that database comparisons are routinely performed by law enforcement, and that such comparisons have led to dramatic exonerations. (*See*, *e.g*, Petition for Post-Conviction DNA Analysis at 22-24 & note 13 (citing individual cases involving database matches and Chicago Tribune study on database matches). Critically, running an exculpatory profile through a DNA database does not require a trial court to order any new samples to be submitted by anyone. Rather, it is simply a matter of typing numbers into a computer.

It is axiomatic that laws should not be read in a manner that defies logic or creates constitutional problems. No case law directly suggests that a reviewing court need ignore the reality of DNA databases when considering an application for DNA testing. Given the very nature of DNA, unknown third parties are necessarily implicated when assuming exculpatory results. It would be folly to pretend that DNA databases did not exist, and that databases could not be used to identify the unknown third parties implicated in these assumed exculpatory results. The lower courts' attempt to avoid this analysis by reference to inapplicable precedent is reversible error.

## CONCLUSION

Mistakes do happen. Innocent men do confess, raise insanity defenses, even plead guilty. In the past three days, the Chicago Tribune has reported new evidence which establishes that Texas executed an innocent man, Carlos DeLuna, in 1989. The "phantom" suspect in the DeLuna case, Carlos Hernandez, has now been established to be the true killer. *New Evidence Suggests a 1989 Execution in Texas Was a Case of Mistaken Identity.* Chicago Tribune, June 24, 2006. Does Tennessee want to be like Texas? Where "guilt can be quickly and definitively determined by means of a simple test, there is no reason not to have it performed."Cooper v. Woodford, 358 F.3d 1117, 1125 ($9^{th}$ Cir. 2004) (Silverman, J., concurring).

Respectfully Submitted,



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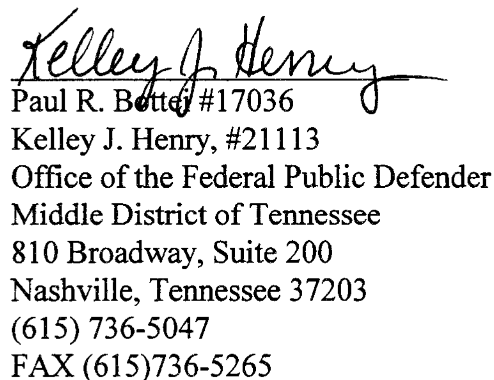

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing has been served via hand delivery to the Office of the Attorney General, 425 Fifth Avenue North, Nashville, TN 37243 on this 26th day of June, 2006.

Kelley J. Henry