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Docket No. _____

In the
SUPREME COURT of the UNITED STATES

SEDLEY ALLEY,	)
Petitioner	)
	)
v.	)
	)
STATE OF TENNESSEE	)
Respondent	)

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

BRIEF OF AMICI CURIAE JEANETTE POPP, KAREN POMER, AND JENNIFER THOMPSON-CANNINO IN SUPPORT OF THE PETITION

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This brief is filed with the consent of all parties, with written consent submitted simultaneously, pursuant to S. Ct. Rule 37.2.

The exigent circumstances of the associated petition necessitated the electronic submission of this brief. Amicae Curiae have arranged to print and thereafter submit this brief in booklet format, in full compliance with Supreme Court Rule 33.1.

INTEREST OF AMICUS CURIAE[1]

The Amicae are rape victims, family members of rape and murder victims, and/or experienced advocates for victims' rights. They are not family members of the victim in this case, and do not express any view regarding the correctness of the conviction of Petitioner Sedley Alley. Instead, the Amicae come before the Court for the sole purpose of offering their unique perspective on the value and wisdom of allowing DNA testing to occur in cases such as Petitioner's. In each of their cases, DNA was the only tool that identified the actual perpetrator. For one amicus-victim, Ms. Karen Pomer, DNA was able to identify her kidnapper-rapist where she could not. For the other two, Ms. Jennifer Thompson-Cannino and Ms. Jeanette Popp, DNA both exonerated innocent people who had been wrongfully convicted of the underlying crimes and led to the apprehension of the real perpetrators.

The Amicae therefore write to share their perspective—one that is not in the parties' briefs and, indeed, one that is seldom told. The Amicae submit that sharing it here will assist the Court in reaching a correct judgment. The Amicae themselves present the most compelling and eloquent argument for allowing DNA testing whenever possible. Here are their words:

Jeanette Popp: *I am the mother of a beautiful twenty-year-old daughter who was brutally murdered in 1988. For twelve years, I thought Chris Ochoa, who confessed and pled guilty to the vicious rape murder of my daughter, and Richard Danziger, who was implicated by Ochoa as the co-defendant, were the true perpetrators of the crime, and I wanted them to stay in prison forever. When I first heard that all the information in*

1 No counsel for either party authored the brief in whole or in part, and no one other than Amicae made a monetary contribution to its preparation or submission.

Chris1 Ochoa's confession had been made up by a detective who wanted to close my daughter's case, I did not believe it. In fact, Achim Marino, who is serving three life prison terms for other crimes, was the true perpetrator. DNA testing exonerated Ochoa and Danziger. I was greatly saddened to discover that I was wrong. I believe no one should be incarcerated for something they did not do.

I am the chair of the Texas Moratorium Network. I am a firm supporter of post-conviction DNA testing because I have seen firsthand how wrong the criminal justice system can be.

Jennifer Thompson-Cannino: *I am a rape survivor. I was raped in 1984. I identified Ronald Cotton as my assailant during my investigation, at the first trial in my case, and at the retrial. At one time during the case, another man named Bobby Poole was brought into court, and I indicated that I had never seen him before. Mr. Cotton was convicted and sentenced to two life sentences. In 1995, post-conviction DNA testing was done on evidence from the case. The DNA testing showed that it was not Mr. Cotton, but Bobby Poole, who raped me. If I can help people understand the human potential to make mistakes and the power of DNA in helping to avoid creating new victims as a result of such errors, then I will do whatever it takes. The cost is too great if we do not.*

Karen R. Pomer: *I am the survivor of a kidnapping and rape at gunpoint by a stranger in California in 1995. About four years ago, a suspect in my case was identified, and a man was charged with my rape and the rape of two other women. His DNA matched DNA obtained in one of the other attacks. Although I had spent six hours looking at the man's face during the assault, I could not identify him in court at a preliminary hearing. Nor*

could any of the other victims identify him in court. Without DNA testing, my assailant would never have been identified.

I am the founder of the Rainbow Sisters Project, a national organization of rape survivors. Since I was assaulted, Jeri Elster (a rape survivor whose rapist was identified through DNA testing after the statute of limitations had expired), Herman Atkins (a man wrongly convicted of rape in California and freed by DNA testing after serving over eleven years in prison), and I worked together to persuade the California Legislature to pass two bills—one abolishing the statute of limitations for rape when DNA evidence is present, and the other insuring that inmates receive access to post-conviction DNA testing. I believe that all those convicted of crimes should have the right to have access to post-conviction DNA testing as long as the testing could provide evidence relevant to any issue in dispute regarding a person's guilt or innocence. Neither society nor victims benefit when innocent people remain in prison and those guilty of crimes go free.

SUMMARY OF THE ARGUMENT

Although DNA evidence is not available in most criminal cases, where it is available, the Amicae fervently believe that it should be tested. Unlike many other types of evidence, DNA is capable of getting to the heart of the matter—i.e., who the perpetrator is—or at least confirming or disproving the validity of the evidentiary case against an accused.

The Amicae are not insensitive to the concerns voiced by others, including the need for finality in convictions, the threat of seemingly endless appeals, and the creation of undue

administrative burdens. Yet they believe that those concerns are clearly outweighed by the States'—and the victims' and the family members of victims'—countervailing interests in producing correct results, in identifying and punishing only the guilty, in exonerating and freeing the innocent, and locating and prosecuting the real perpetrators of crimes.

Not testing available DNA also leaves open the real possibility that the actual perpetrators of the crimes remain at large. In many cases, this has led to the creation of new victims—not only the innocent, imprisoned person, who is often the overlooked victim, but also among the public at large, when the perpetrators are free to commit more crimes. Rapists rape more women. Murderers take more lives.

The Amicae also question the adherence to "finality" for finality's sake. They argue that when the validity of a conviction is drawn into question or when a conviction can be confirmed through available DNA testing but the State refuses to allow it, then for them, there is no "finality" and there is no "closure." If DNA testing confirms a conviction, then the victims can rest with true finality and closure—to a scientific certainty.

The Amicae therefore urge courts interpreting and applying statutes permitting post-conviction DNA testing, such as Tenn. Code. Ann. §§ 40-30-304 & 305, the statutory provisions in this case, to construe and apply the statutes in accordance with the express statutory language and in furtherance of the core value of the criminal justice system—and the interest of the victims' and victims' families: identifying and punishing the guilty party. Neither the States nor the victims and their families have a legitimate interest in prosecuting, convicting, imprisoning, and, most egregiously, executing an innocent person. DNA testing can

prevent that from occurring—and, with the aid of a databank in appropriate cases, can even identify and locate the real perpetrators.

Along with the State, victims of crime have perhaps the greatest interest in seeing that the States identify, prosecute, and convict the actual perpetrators in the crimes against them. Yet none of them wants to be involved in a case—as some of the Amicae here were—in which the wrong person is incarcerated for the crime. The anguish of the crime is compounded by that tragedy, and, in cases involving the death penalty, as in this case, that anguish would be unbearable.

The power of DNA is that it can provide scientific evidence of the "truth" in a case, the truth that provides the finality and closure that victims and families of victims need. Given that, the Amicae urge the Court to grant the Petition in this case to examine whether the request for DNA testing in this case was improvidently denied.

ARGUMENT

I. DNA TECHNOLOGY IS AN "AWESOME" TOOL FOR IDENTIFYING THE GUILTY AND EXONERATING THE INNOCENT

There is now no question that DNA technology, although solidly grounded in science, has had a nearly miraculous effect on the criminal justice system. DNA has worked to close cold cases after many years, identify unknown suspects in very quick order, and exonerate people after they served years for crimes they did not commit. The U.S. Department of Justice noted that as a result of its "awesome ability to convict a perpetrator or exonerate a

convicted offender, particularly in sexual assault and homicide cases, DNA evidence has become a powerful crime fighting tool." Understanding DNA Evidence: A Guide for Victim Service Providers, U.S. Dept. of Justice, Office for Victims of Crime, April 2001, at p. 1, available at http://www.ovc.gov/publications/bulletins/dna_4_2001/dna11_4_01.html (visited June 13, 2006). In committing more than $1 billion in 2003 to the advancement of the use of DNA technology in the states, the Bush Administration noted that "DNA technology allows us to exclude innocent people as suspects early on, allowing police to focus on finding the true perpetrator." Prepared Remarks of Attorney General John Ashcroft, on the DNA Initiative, March 11, 2003, reported at the DOJ Website, http://www/usdoj.gov/archive/ag/speeches/2003/031102dnaremarks.htm (visited June 12, 2006).

There is no doubt that the State of Tennessee also accepts the power of DNA technology in the investigation and prosecution of criminal cases. In Fiscal Years 2004 and 2005, the Tennessee Bureau of Investigation and the State of Tennessee itself received more than $1 million of these federal funds to advance the use of DNA technology in its own crime-fighting efforts. Advancing Justice through DNA Technology, U.S. Dept. of Justice, Forensics and Investigating Sciences, National Institute of Justice Awards, NIJ Awards in FY 2005, http://www.ojp.usdoj.gov/ nij/awards/2005_topic.htm#dna_research, and in FY 2004, http://www.ojp.usdoj.gov/nij/ awards/2004.htm#forensic_casework (sites last visited on June 12, 2006). The Amicae contend that the State of Tennessee should not be permitted to accept the federal funds and now deny one of the benefits the funds are intended to provide.

II. DNA TESTING HELPS CORRECT ERRORS PRODUCED BY THE CRIMINAL JUSTICE SYSTEM

The Amicae know better than most that the criminal justice system is not infallible. It can—and does—produce errors. Innocent people have been prosecuted and convicted, and guilty people have gone free, some never facing justice for their crimes. Ms. Jeanette Popp, one of the Amicae, along with the man wrongfully convicted in the rape and murder of her daughter in Texas, recently testified before the Sate of California's Commission on the Fair Administration of Justice about a subject with which they both have experience: "that innocent people sometimes really do confess to crimes they did not commit," just as Mr. Ochoa did in the rape and murder of her daughter. Henry Weinstein, "Freed Man Gives Lesson on False Confessions, LA Times.Com (June 21, 2006), available at http://www.latimes.com /news/local/la-me-confess21jun21,1,209 7212.story?coll=la-headlines-california&ctrack=1&cset=true (visited June 23, 2006).

Ms. Jennifer Thompson-Cannino, also one of the Amicae, has traveled extensively across the United States presenting her personal account of one type of error that can lead to a wrongful conviction, eyewitness testimony. The Amicae are working hard to make sure fewer mistakes happen and that when they do, they are corrected more quickly—through DNA testing, for example, whenever a case is fortunate to have that available.

In their efforts across the United States, the Amicae recognize the value of DNA to the justice system—in limiting future wrongful convictions and increasing the identification, prosecution, and conviction of the real perpetrators of crimes—but they all also speak to both the need to limit the number of victims

of crime by ensuring that the real perpetrators of crimes are identified, prosecuted, and incarcerated, and the real personal value of knowing the real perpetrator has been caught and is being punished.

A. DNA TECHNOLOGY HELPS IDENTIFY THE REAL PERPETRATORS OF CRIMES

The State has no legitimate interest in prosecuting and incarcerating innocent people. Yet it is now widely known that innocent people are prosecuted, convicted (or, in some cases, plead guilty), and, as in the present case, States sometimes fight to keep people imprisoned without testing the available DNA evidence to ensure they have the right person. And these States continue these fights even in the face of case after case where DNA served to exonerate inmates who had been convicted and were sincerely believed to be guilty, even some who allegedly confessed to guilt, as in the present case. Excerpts from "Convicted by Juries, Exonerated by Science" (Nat'l Institute of Justice Report cited above), FirstGov.Gov, The U.S. Government's Official Web Portal, http://www.dna.gov/case_studies/convicted_exonerated/ (visited June 12, 2006).

There is no doubt that the crime-solving power of DNA extends to a wide range of cases. It of course solves rape cases in which the known-suspect deposits seminal fluid revealing his identity, but it also works to solve more complicated cases, where the biological evidence is of varied types (like Alley's case, with possible saliva stains, blood drops, skin cells, etc.), on a number of different objects (again, like Alley's case), and even where the weight of evidence may suggest a different perpetrator (e.g., when "confessions" are involved, also as in the present case). In these

cases, testing can reveal that the DNA evidence common to all of the objects belongs to an unknown person, someone other than the suspect or the person who has already been convicted. And the DNA results can also be run through the DNA databanks, getting a "cold hit" and identifying the real perpetrator.

Yet, despite these real possibilities, the courts below in this case have declared that DNA testing is inappropriate for Alley because (1) the evidence of his guilt is overwhelming and (2) Tennessee's DNA testing statute allows testing only to exclude Alley as the person who left biological evidence at the crime scene, not to match the available DNA to a third party. *See* Order Denying Post-Conviction DNA Analysis, State of Tennessee v. Sedley Alley, No. 85-05085-87 (Higgs, J., May 31, 2006); Sedley Alley v. State of Tennessee, No. W2006-01179-CCA-R3-PD (Tennessee Court of Criminal Appeals, June 22, 2006). Both courts concluded that a significant part of the "overwhelming evidence of guilt" is Alley's "confession," but in at least 30 of the first 181 post-conviction DNA exonerations, the person wrongfully convicted – the innocent person – confessed to the crime. Case Profiles, Website of The Innocence Project, available at http://www.innocenceproject.org/case/ display_cases.php? sort=year_ exoneration (visited on June 23, 2006) (hereinafter "DNA Exonerations Database"); see also The Role of False Confessions in Illinois Wrongful Murder Convictions since 1970, available at http://www.law.northwestern.edu/depts/clinic/ wrongful/FalseConfessions2.htm (visited June 23, 2006)(noting that of the 42 wrongful murder convictions documented since 1970, 14 involved the defendant's own confession). And, in 66 of these post-conviction exoneration cases, DNA testing matched a known alternate suspect or got a "cold hit" in the national

databank. Case Profiles, *supra.*

Yet the courts of Tennessee know the power of DNA only too well. In 2002, a Tennessee state court judge ordered the release of Clark McMillan, a man who had served 22 years of a 119-year sentence for rape and robbery–at the time, the longest term ever served by someone later cleared by DNA evidence. David Boyd, the real perpetrator, was identified through a "cold hit" when the DNA evidence was finally located, tested, and run through the national databank. Boyd, a former Memphis resident, was in the databank because he had committed more crimes while McMillan was incarcerated, and was then serving time in Texas for rape. Jay Hamburg, "He's Innocent, parole board tells governor," Tennesseean.com (August 26, 2004), available at http://www.tennessean.com/local/ archives/04/08/56433380 .shtml?Element_ ID= 56433380 (visited June 23, 2006).

Chris Ochoa, who, along with a co-defendant he had implicated, was exonerated of a violent rape and murder in Texas after serving 12 years, knows only too well that "overwhelming evidence of guilt" can be wrong—even when part of that evidence is a detailed confession from the defendant, himself. When Mr. Ochoa told the Texas jury what happened, he provided such graphic detail that the victim's mother, Ms. Jeanette Popp (one of the Amicae here), fled the courtroom to vomit in a courthouse bathroom. Weinstein, *supra.* Yet everything Mr. Ochoa said was untrue. A police detective had threatened him with the death penalty during the investigation of the case, and Mr. Ochoa lied to stay alive. *Id.* DNA finally identified the real perpetrator, someone who had confessed four years earlier but was not believed. *Id.* To compound the tragedy, the actual perpetrator in the case committed other serious and violent crimes while Mr.

Ochoa and his co-defendant were locked away. *Id.*

To avoid committing such compound errors, with such heart-rending and catastrophic results, the Amicae contend that if DNA testing can be done in a case, it must be done—especially when the sentence imposed is the death penalty. Simply put, DNA technology is currently the most powerful tool for "getting it right," and the Amicae implore this Court to grant Mr. Alley's Petition to examine whether the Tennessee courts improperly denied his request for DNA testing. Denying the testing is a serious insult to victims and victim's families. When a State has the power and ability to determine the real perpetrator of a crime, whether through DNA testing or any other crime-fighting tool, that is what victims want—and not only for themselves, but also to limit the creation of new victims.

B. DNA TECHNOLOGY LIMITS THE CREATION OF NEW VICTIMS

For every innocent person in prison, a guilty person remains at large to continue committing crimes. This pattern has played out in tragic consequences in case after case. One such case involved two innocent men incarcerated in Florida: Frank Lee Smith and Jerry Frank Townsend. While they languished in prison for crimes they did not commit, the real perpetrator, Eddie Lee Moseley, a man called a "one-man crime wave," *see* "Did Frank Lee Smith Die in Vain?," Frontline, Public Broadcasting Service, available at http://www.pbs.org/wgbh/pages /frontline/shows/smith/ofra/scheck.html (visited June 23, 2006), continued his horrific criminal actions unimpeded. In fact, Mr. Moseley is believed to have committed "60 rapes and 12 homicides in the Fort Lauderdale-Broward County area, including

the homicide which put Smith on death row and eight other rape/murders that were pinned on . . . Townsend." *Id.* DNA evidence ultimately exonerated Mr. Smith (but only after serving 14 years of his sentence and 11 months after his death in prison) and Mr. Townsend (after 22 years in prison). Case Profiles, *supra*, at http://innocenceproject.org/case/display_profile.php?id=88 (Townsend) and http://www.innocenceproject.org/case/display_profile.php?id=65 (Smith).

Because of these types of cases, it is essential to allow DNA testing—even in cases involving "overwhelming evidence of guilt": Mr. Smith's case included multiple eyewitness identifications and Mr. Townsend's included his own confession. *Id.* Testing the available DNA evidence is currently the only "sure-bet" way to halt the creation of new victims. Incarcerating the innocent certainly does not work.

C. DNA TECHNOLOGY HELPS PROVIDE THE "FINALITY" AND "CLOSURE" CRIME VICTIMS AND THEIR FAMILIES NEED

In the U.S. Department of Justice's guide for victim service providers, the Department notes that "[n]othing illustrates the power of DNA evidence more effectively than the case studies—or real-life experiences—of those whose lives have been changed by such evidence. Whereas some case studies demonstrate DNA's ability to exonerate inmates wrongfully convicted of crimes, others show the powerful sense of closure and relief that a DNA match can bring to victims of violent crime." Understanding DNA Evidence, *supra*. When the wrong person is held responsible for a crime, this "powerful sense of closure and relief" is turned upside down.

In recounting her reaction when she heard on television that Mr. Ochoa and his co-defendant might have been wrongfully convicted, Ms. Popp said, "My knees began to shake. My first reaction was anger — why were they trying to get these boys off; the evidence I heard in the courtroom was extremely strong." Weinstein, *supra*. But after looking at the documents in the case, she said she "knew we had done a horrible thing. I say 'we' even though I was not involved in sending them to prison. I somehow felt responsible." She sent Mr. Ochoa and his co-defendant letters saying how sorry she was and soon told a newspaper during an interview that they should be freed. *Id.* Ms. Popp later met with the man who actually killed her daughter and learned that the facts, though still terrible to hear, were not as horrific as concocted by the investigating detective and as testified to by Mr. Ochoa at trial. Instead of being repeatedly sodomized and raped (8 times), she was raped only once. Ms. Popp said the truth ended her 12 years of nightmares. *Id.*

Ms. Thompson-Cannino describes the moment she was told the wrong man was in prison for raping her as "a snow globe" moment, as if someone took her life and shook it all around—"Worse," she says, than the day she was raped. She wanted no part in incarcerating the wrong person, but she even more fervently wanted to right the tragic consequences of the misidentification of Ronald Cotton.

In both Ms. Popp's and Ms. Thompson-Cannino's cases, DNA was the victim's real ally, helping to find the truth, identifying the real perpetrator, and, in Ms. Thompson-Cannino's case, relieving the victim of the full burden of the identification. Disallowing DNA testing when it is available therefore denies victims this powerful aid and relief.

III. POST-CONVICTION DNA TESTING SHOULD BE PERMITTED IN THIS CASE

Given the "awesome" power of DNA technology in identifying the guilty and exonerating the innocent, and given the inevitable errors produced by the criminal justice system, the Amicae contend that courts should allow DNA testing whenever DNA is available and relevant. In the present case, untested DNA is abundant and, if tested, could finally help to provide the unquestioned finality and closure needed in such cases.

The Amicae are fully mindful of the fact that they are not parties to this action, that the principal Briefs in the case more appropriately wrestle with the precise legal issues present, and that there are important social policies and benefits related to the finality of criminal convictions. Amicae are also fully mindful of the pain, frustration, and anguish that crime victims and family members often feel when cases are reopened on the issue of possible innocence. The resumption of litigation in this case has almost certainly caused the family and friends of Suzanne Collins significant pain.

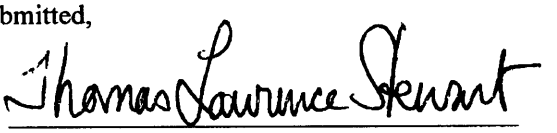
Being mindful of all of this, however, does not persuade the Amicae that following any path other than the pursuit of truth in a criminal case is acceptable. The Amicae submit that the American judicial system must be driven by a search for truth, justice, and finality. When DNA is available in a case but untested, one prong of that search—finality—has over-ridden the other two. Yet the best way to achieve true finality in the criminal justice process is not to deny DNA testing, but to grant it in appropriate cases to learn what evidence the new technology can reveal. Denying the testing does not promote finality; it promotes

ignorance. The Amicae therefore respectfully request that this Court reject ignorance in this case and instead grant the Petition for a Writ of Certiorari.

CONCLUSION

If Sedley Alley is actually innocent as he contends or guilty as the State of Tennessee asserts, the requested DNA testing should still be allowed. To deny it defies the justice system's truth-seeking function, the legitimate interests of the State and the public in identifying and punishing the real perpetrators in criminal cases, and the victims' and victims' families in knowing the people who committed the crime—and no innocent people—are behind bars. To deny the testing on the grounds articulated by the Tennessee courts also defies logic: If the DNA on the available evidence reveals a common donor, and that donor is not Sedley Alley, then the State of Tennessee should want to know who it is—and he might be easily identified by running the DNA profile through the national databank. Indeed, the State should want to test the evidence in pursuit of the truth—no matter how late the requests for testing were made, no matter how long the evidence has been around, and no matter how "overwhelming" the evidence of guilt may appear to be. The 181 cases of DNA exonerations to date loudly warn of the grave dangers of resistance to such testing. For all the reasons stated herein, the Amicae fervently hope that this Court grants the Petition for a Writ of Certiorari. Untested evidence insults the justice system's truth- and justice-seeking function, the public's confidence in the administration of justice, and victims' need for true finality and closure.

Respectfully submitted,



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I hereby certify that a true and exact copy of this Motion has been served upon the following:

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on this 27th day of June, 2006.

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No. ____

In the
SUPREME COURT of the UNITED STATES

SEDLEY ALLEY,
Petitioner,

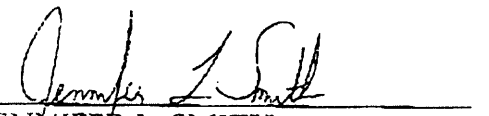
v.

STATE OF TENNESSEE,
Respondent.

CONSENT TO THE FILING OF BRIEF *AMICUS CURIAE*

The undersigned counsel for respondent, State of Tennessee, consents to the filing of a brief *amicus curiae* in support of the petitioner by Karen Pomer, Jennifer Thompson-Cannino, and Jeanette Popp in the above referenced case.

Respectfully submitted,



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June 26, 2006

Re: *Sedley Alley v. Tennessee*
Petition for Certiorari, United States Supreme Court

Dear Ms. Newman:

Please be advised, pursuant to Rule 37.2(a) of the Rules of Supreme Court of the United States, that the above-named petitioner has no objection to your filing an *amicus* brief in support of the petitioner in the United States Supreme Court.

Sincerely,

Barry C. Scheck

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Counsel for Mr. Alley