Appendix 2
Appellant's Brief
Alley v. State, No. W 2006-01179-CCA-R3-PD

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
WESTERN DIVISION
AT JACKSON

SEDLEY ALLEY,	)	
	)	
Petitioner-Appellant,	)	No. W2006-01179-CCA-R3-PD
	)	Capital Case
v.	)	
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent-Appellee	)	

BRIEF OF APPELLANT
SEDLEY ALLEY

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1. Did 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?

2. 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?

3. Is There A Reasonable Probability That Exculpatory, Redundant DNA Test Results From Numerous Items Of Evidence (Including Saliva And Blood From The Victim's Shirt; Blood Semen, And Hair On The Stick; Semen And/Or Blood Found On Grass Beneath The Vaginal Area) Would Result In Sedley Alley Not Having Been Prosecuted, Convicted, Or Sentenced To Death?

4. a. Should The Matter Be Reversed And/Or Reversed And Remanded 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, While Ignoring Clear Proof That The Innocence Project Has Presented In The Petition To Establish Sedley Alley's Innocence?

   b. In Violation Of Due Process Under The Fourteenth Amendment, As Well As The Tennessee Constitution And Tennessee Law, Was Sedley Alley Denied An Impartial Adjudicator, And One Who Appeared Completely Impartial?

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STATEMENT OF THE CASE

On May 15, 2006, the Tennessee Board of Probation And Parole recommended (4-3) that Sedley Alley be granted an executive reprieve to allow DNA testing of numerous forensic samples in this case. On May 16, the Governor granted a 15-day reprieve to allow Sedley Alley to seek DNA testing in the Tennessee courts. On May 19, pursuant to Tenn. Code Ann. §40-30-301 *et seq.*, Sedley Alley filed a petition for DNA analysis in the Criminal Court for the Thirtieth Judicial District at Memphis. After the state responded, Sedley Alley filed a reply. The Court set the case for an evidentiary hearing on May 30, 2006. After categorically prohibiting the presentation of any evidence at the evidentiary hearing, the trial court ruled from the bench on May 30 denying testing, and issued a written order on May 31, 2006. Sedley Alley filed a supplemental notice containing evidence which had been excluded at the hearing, and he filed a timely notice of appeal.

INTRODUCTION

DNA is the single most powerful law enforcement tool of the 21st Century. DNA testing has the ability to identify with absolute certainty persons who are guilty of crimes and those who have been wrongfully convicted. Because of the incredible scientific advances in DNA testing, law enforcement agencies across this country have been able to solve "cold cases" thus ensuring that dangerous offenders are held accountable for their actions. Similarly, DNA testing has proven a powerful tool in identifying 180 wrongfully convicted men, fourteen from death row. These individuals were convicted after a jury of twelve found that the evidence supported their guilt beyond a reasonable doubt. These cases involve situations were the wrongfully convicted men were identified by eyewitnesses, gave false confessions, pled insanity, or even pled guilty. And yet, they were all innocent. In sixty six of these cases, the same DNA which led to exoneration, also identified

the true perpetrator, simply by typing some numbers into a computer database called CODIS.[1]

After a five hour hearing, on May 15, 2006, the Tennessee Board of Probation and Parole voted to recommend to the Governor that crime scene evidence in this case be subjected to DNA testing. In its ruling, the Board recognized the power of DNA evidence to prove Mr. Alley's innocence in this case. In response to the Board's action, on May 16, 2006, Governor Bredesen issued a fifteen day reprieve of Mr. Alley's scheduled execution. The Governor recognized the power of DNA testing in a case such as this, but, expressed his belief that he lacked the authority to order testing. The Governor expressed his intent that Mr. Alley petition the State Court for access to the evidence, making the arguments that Mr. Alley's previous, inexperienced counsel failed to make in Mr. Alley's first request for DNA testing.

Mr. Alley promptly filed a thirty-five page Petition for Post-Conviction DNA Analysis Pursuant to Tenn. Code Ann.§§ 40-30-304 and 40-30-305. In his Petition, Mr. Alley requested access to fourteen separate items of crime scene evidence. Petition pp. 19-20.[2]

In this case, the trial court not only summarily rejected Mr. Alley's Petition, it also summarily rejected the power of DNA testing to establish the truth.[3] The trial court's decision not only risks

[1]"The FBI Laboratory's Combined DNA Index System (CODIS) blends forensic science and computer technology into an effective tool for solving violent crimes. CODIS enables federal, state, and local crime labs to exchange DNA profiles electronically, thereby linking crimes to each other and to convicted offenders." CODIS Mission Statement, available at www.fbi.gov/hq/lab/codis/program.htm (last visited June 10, 2006).

[2]At the May 30, 2006, "hearing" and in his written order, in recounting the history of the case, the Judge indicates that Mr. Alley requested access to only four items of evidence in his Petition. May 30, 2006, Hearing Transcript, pp. 79-80, Apx []; May 31, 2006 Order, p. 2, Apx 388. This inaccuracy likely comes from the misstatements of the prosecutor in his reply.

[3]The trial court observed, "Well there's another great truth. And that great truth is that the Governor of this state has no authority over this Court. The second great truth is that the probation (continued...)

the execution of an innocent man, but, also strikes a blow to law enforcement and victim's rights. The trial court reached this conclusion by ignoring evidence of third party guilt, just weeks after the United States Supreme Court unanimously held that due process requires the consideration of such evidence. Moreover, the trial court simply refused to accept the science and instead credited the assertions of the Assistant District Attorney General,[4] who is not a scientist, and who presented no scientific data, research, or evidence. In crediting the District Attorney General over the evidence and argument presented by Petitioner's counsel, who has worked with DNA evidence and law enforcement for more than fifteen years, the trial court also refused to even consider the real world examples which illustrate how, time and again, DNA evidence can lead to the exoneration of individuals convicted by "overwhelming" evidence. See, Exhibit PP to May 30, 2006 hearing (Apx. 233-270).[5]

The trial court's arbitrary and summary ruling here poses a threat to the fair application of the Post-Conviction DNA Analysis Act and threatens law enforcement efforts to solve old cases, which in turn, is an affront to the victims of those crimes. It must be reversed.

STATEMENT OF FACTS

This section is divided into three parts. In the first part, we will outline the record facts which

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[3](...continued)
and parole board has no authority over this Court." May 30, 2006, Hearing Transcript, p. 64, Apx. 365.

[4]"This Court knows Assistant District Attorney General Campbell and trusts the assertions he made to this Court[.]" May 30, 2006 Order denying Motion for Depositions. Apx 476.

[5]Exhibit PP is a powerpoint presentation utilized by Petitioner in his offer of proof and argument to the trial court on May 30, 2006. The presentation is provided to this Court both electronically on a CD, and, a color printout has also been included in the Appendix at pp. 233-270.

establish how DNA in this case can identify the perpetrator of this crime and thus, exonerate Mr. Alley. Second, we will outline the procedural history relating to Mr. Alley's attempts to obtain DNA testing. Finally, we will address the proceedings in the lower court.

I.
HOW DNA CAN EXONERATE SEDLEY ALLEY

Any statement of facts about this case must begin by acknowledging the tragic death of Suzanne Collins. There is no dispute that Ms. Collins death was a violent one. Ms. Collins suffered over 100 injuries to her body. The horror and tragedy of Ms. Collins murder understandably creates strong emotions in all of those who have been called upon to review the facts of this case. It is likewise understandable that those who have looked at this case want someone to be held accountable. But when emotions get involved, the truth can become obscured. Science knows no emotion. The injuries which bring out such a strong visceral response, also tell us that we can identify the true perpetrator of this crime through DNA testing

The injuries to Ms. Collins body show that 1) she fought with the perpetrator, 2) the perpetrator's body came into contact with her body, and 3) the perpetrator must have deposited some of his biology on items at the crime scene. Regardless of whether the state recovered the victim's fingernail, and lab reports indicated they did, the autopsy report and pictures of victim's finger document that the victim suffered injury to the finger and nail. This injury is consistent with the trial testimony that the victim, who was physically fit, would have fought her attacker.[6] Thus, it is

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[6]That the victim would have fought her attacker was confirmed through witness interviews conducted by defense investigator, April Higuera. See Affidavit of April Higuera, p. [], Apx []. Ms. Higuera was present and ready to testify at the May 30, 2006, evidentiary hearing. However, the trial court refused to allow her to testify. Ms. Higuera prepared an affidavit as an offer of proof of her testimony and was filed with the Court. Apx. 441-451. Her offer of proof was later stricken after (continued...)

reasonable to believe that the victim likely caused injury to her attacker, including scratching his skin and likely causing bleeding from the perpetrator.

In addition to the injury to the finger and nail, the victim also suffered bruising to her thighs as well as bruising and contusions to the areola and nipple. The latter injuries are consistent with a bite and it has been suggested that the perpetrator bit the victim. Certainly then, the perpetrator would have left behind his saliva and possibly mucous. The former injuries are consistent with a sexual assault

Beyond these injuries, the victim was also impaled with a thirty-inch stick. When the victim's nude body was found, the stick was inserted into the victim's vagina. It was recovered by the medical examiner, wrapped in evidence paper, and stored at the criminal court clerk's office. The stick itself is very rough. The prosecution argued that the perpetrator of the crime broke the stick off and handled in by making into a murder weapon. Multiple items of biology can be found on the stick. First, given the nature of the stick itself and perpetrator's handling of it, it is very likely that he cut himself on the stick, thus, his blood would be found on the stick and other items of evidence. In addition, the perpetrator would have left his skin cells or sweat on the stick. It is thus possible that the perpetrator left semen[7] at the scene which can be detected on the stick. Indeed a recent evidence view of the wrapper which held the stick revealed a biological stain on the wrapper that is consistent

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[6](...continued)
an apparent *ex parte* discussion with the Assistant District Attorney General. See Affidavit of Kelley Henry, Apx. 460. Mr. Alley filed an Amended Notice of Appeal, challenging the trial court's order striking the offer of proof as "irrelevant." Apx. 461.

[7]There is absolutely no proof in the record that the victim ever engaged in sexual relations. Indeed, defense investigation establishes the victim's decision not to engage in sexual relations. See Affidavit of April Higuera, Apx. 447-448.

with a blood/semen mixture. There is also hair on the stick. It is possible that some of this hair was left by the perpetrator.

Perhaps the most important item of evidence which can be subjected to DNA testing, is the pair of men's underwear found at the scene amongst the victim's clothing. Nearby the victim's body were the victim's clothes which were apparently removed from the victim by the perpetrator and a pair of men's bikini underwear which authorities always believed came from the perpetrator. This underwear will likely contain what forensic experts call usual wearer cells. These are the cells that the usual wearer of the underwear will deposit simply by virtue of the underwear coming in contact with the body. The underwear can contain urine, skin cells, or even semen. The underwear can be examined by a forensic scientist and a male DNA profile can be developed that can be compared with other items left at the scene.

Because of the clear sexual overtones of the injuries to the victim, the medical examiner took swabs from the victim's vagina, nose, mouth, and breast area. At trial, the state argued that although they could not prove penile penetration, they could not rule out that possibility. These injuries and items of evidence all establish the strong likelihood that the perpetrator this crime must have left behind his biology, be it his own blood, skin cells, saliva, sweat, hair, or semen.

The record is therefore clear that the perpetrator must have left his biology on items at the crime scene. The state has never addressed this basic fact. What then can be done with this biology?

The facts in the record establish that DNA forensic expert Gary Harmor examined the crime scene evidence and documented various items of evidence which can be subjected to DNA testing. Those items of evidence include:

(1) *Red Underwear*: A pair of red underwear was found at the scene near the body.

Reply, Exhibit K (crime scene photo), Apx 92-93. The prosecution maintained that such underwear was left by Sedley Alley. See Closing Arg. p. 39, 54-55 (linking red underwear to the killer, noting that it was "important" that such underwear was left at the scene). In particular, this underwear can be tested for skin cells to identify the person who wore the underwear. See Reply Exhibit L (red underwear), Apx 94-95.

(2) *The Victim's Red T-Shirt*: This shirt contains a large spot of biological material just below the Marine Corps insignia. This spot may contain saliva, semen, mucous, and/or other biological material which can be subjected to STR (Short Tandem Repeat) DNA testing. See Reply Exhibit B, Apx 67-69. The shirt also contains a possible bloodstain on the back, as well as perspiration. Reply Exhibit C, Apx 70-71 All of these stains can likewise be subjected to DNA analysis.

(3) *The Stick*: The stick contains much biological material. Visual inspection reveals the existence of blood and numerous hairs, which are attached to the stick in numerous places. See Reply Exhibit D (collective exhibit: hairs identified), Apx 72-76. There may be semen on the stick, but the existence of semen can only be specifically determined under laboratory conditions.[8]

(4) *Paper Wrapped Around Stick*: The stick was wrapped in paper. Reply Exhibit E, Apx 77-78. There are various stains on the paper used to wrap the stick. In particular, there are two spots which are indicative of a mixture of blood and semen. See Reply Exhibit F (fluid mixture stains from inside paper), Apx 79-80. These are critical pieces of biological evidence which can be subjected to STR DNA analysis to identify the actual perpetrator.

(5) *Fluid-Stained Grass From Beneath The Vaginal Area*: Grass was recovered from beneath the victim's vaginal area, from which fluid dripped. The discoloration of the grass itself clearly establishes the existence of biological material, including blood and/or semen, and/or other material. See Reply Exhibit G (collective exhibit), Apx 81-84. DNA testing of the grass samples can identify the donor of any of the biological samples contained on the grass.

(6) *Victim's Bra*: On a portion of one cup of the bra, there is a biological stain. See Reply Exhibit I, Apx 87-89. This is highly significant in identifying the perpetrator, as the victim sustained an injury to the top of the breast, which the prosecution asserted came from the perpetrator biting the victim. The stain on the bra may contain saliva or other bodily fluids associated with the injury to the breast. DNA testing can be

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[8] The record establishes the state's contentions about contamination of the stick are of no concern. One can hardly assert that blood and/or semen found on the stick was deposited on the stick by court or clerk's office personnel, members of the District Attorney's Office, or others. That was deposited when the victim was killed.

conducted on the bra.[9]

The facts in the record establish that items of evidence in this case can be subjected to STR (short tandem repeat) DNA analysis. STR DNA testing can extract a male DNA profile. That profile taken from a single item of evidence can be used to exonerate Mr. Alley in numerous ways. First, if the DNA doesn't match Mr. Alley, that is proof that he is not the contributor of the DNA. Second, the profile can be placed in the CODIS Databank and "hit" on a serial offender, as has happened in forty-nine of the 180 DNA exoneration cases.[10] Third, because there are multiple items of evidence to be tested, there is the potential for redundant DNA test results. Redundant test results means that a forensic scientist can generate an STR male DNA profile from, for example, the men's red underwear and saliva from the breast area of the victim's t-shirt. If the male DNA profiles match each other and don't match Mr. Alley, that would prove that Mr. Alley is not the perpetrator of the crime. Moreover, the DNA profile from the men's underwear and the saliva on the shirt could be compared to a male DNA profile developed from biology left on the stick/murder weapon. Again, if all three match each other and don't match Mr. Alley, that is proof that Mr. Alley is not the attacker.

More importantly, the male DNA profile can be used to identify the true perpetrator. This

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[9]Eight additional items from the crime scene also contain apparent items of biology, including possible perpetrator blood, hair and saliva that can subjected to DNA testing which could exonerate Mr. Alley. These items were discussed in detail in the petition, the reply, at the evidentiary hearing, and are reflected in the exhibits to the reply and Exhibit PP. Because of page limitations, the evidence will not be recounted in detail here. See Apx 49-51, & Reply Exs. H, J, M, N, O, P, Q, R, S, T, U: Apx. 85-86, 90-91, 96-123.

[10]The case of Frank Lee Smith is one such case. Mr. Smith was the first death row DNA exoneration. Mr. Smith presented an insanity defense at trial. He was exonerated eleven months after his death.

can be done by plugging the DNA profile into the CODIS databank (this usually requires eight or more markers) or by comparing the DNA profiles from a highly probative item, such as the men's underwear found near the body, more than one matching item to the victim's boyfriend.

Even if a DNA profile from any one item of evidence contains only three markers, those markers can generate a random match probability on the order of between one in one thousand to one in three thousand. If four markers are generated the random match probability could be in the hundreds of thousands. If it's five markers it could be in the millions. And on it goes. And if more than one item of evidence has the same DNA profile, and it doesn't come from Alley or the victim, these redundant results create a persuasive DNA crime scene reconstruction pointing towards the guilt of a third party. May 30, 2006 Hearing Transcript, p. 28 Apx. 329.

A chart graphically depicting the power of redundant DNA testing to exonerate Mr. Alley was provided to the lower court in exhibit PP. See Apx. 252-256. The State has never offered an 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.

II.
SEDLEY ALLEY HAS CONSISTENTLY SOUGHT TO OBTAIN RELIEF ON THE BASIS OF INNOCENCE IN MULTIPLE FORUMS FOR TWO YEARS FOLLOWING THE DISCOVERY OF SUPPRESSED EVIDENCE ESTABLISHING THAT HE COULD NOT HAVE COMMITTED THE OFFENSE BECAUSE THE VICTIM WAS KILLED AT A TIME WHEN LAW ENFORCEMENT KNEW HIS WHEREABOUTS

Mr. Alley has sought access to the crime scene evidence for purposes of DNA testing since his counsel discovered suppressed evidence which establishes that he could not have committed this murder. What was learned for the first time in 2004, and confirmed in 2005, was that, at the time of trial, authorities knew that the victim was killed not at 11:00 p.m on July 11, 1985, but, during

the early morning hours the next day: She died at 3:30 a.m. on July 12, 1985. See Reply Exhibit X, Apx. 140-141: Report of Sgt. Jim Houston (According to Dr. James S. Bell, M.D., the victim had been dead "approximately six (6) hours when he saw the body and made the crime scene at 9:30 AM, 7-12-85"); Reply Exhibit Y, Apx. 142-144: Dr. James S. Bell (from view of body at scene: victim died no earlier than 1:30 a.m.). *This evidence was unconstitutionally withheld by the State for nearly 20 years.*

The significance of that revelation cannot be overstated. That revelation puts the case in a whole new light, because this previously-withheld time of death provides powerful proof that Sedley Alley is actually innocent. Indeed, authorities have records documenting Sedley Alley's exact whereabouts on July 12, 1985 from 12:10 a.m. onward, and Sedley Alley was at home when the victim was killed. See Reply Exhibit Z, Apx. 145-146: Naval Investigation Radio Log (Alley picked up for questioning at 12:10 a.m., released at 1:00 a.m., and under surveillance at home at 1:27 a.m.). Sedley Alley did not, in fact, kill the victim. As demonstrated by a timeline of the events showing Sedley Alley's whereabouts in relation to the time of death (Reply Exhibit AA, Apx. 147-148: Timeline), Sedley Alley simply could not have committed the offenses for which he has been convicted. See also Reply Exhibit BB, Apx. 149-151 (Report of Dr. Walter Hofman, M.D.)(victim died quickly after sustaining injuries) and Exhibit TT, Apx. 296-297 (Affidavit of Dr. Hofman).

Moreover, additional evidence also points to victim's boyfriend – not Sedley Alley – as the killer.[11] The boyfriend admits that he was with her that night and he, unlike Alley, had a motive to

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[11]At the May 30, 2006, hearing, the trial court, despite claiming to have thoroughly reviewed the record, indicated that he was unaware that Mr. Alley had previously indicated that the boyfriend was a possible suspect. "I must tell you that I handled the post-conviction matter, Mr. Campbell, you know, back in 2004 and this business about the boyfriend doing it, of a possibility that he did it, is (continued...)

harm her: She was leaving town to be with her fiancee in California. See Reply Exhibit CC, 152-157 (Affidavit of April Higuera). In addition to exculpatory DNA evidence and time of death evidence showing that Sedley Alley is innocent and would not have been prosecuted, convicted, or sentenced to death, proof of Sedley Alley's innocence includes the following:

(1) As Dr. Richard Leo, Ph.D., has made clear, the inculpatory statement introduced against Sedley Alley is unreliable and not true, lacking any real indicia that Sedley Alley's responses were based on any actual knowledge of what occurred. See Reply Exhibit DD: Affidavit of Dr. Richard Leo, Ph.D., Apx. 158-169; See State v. Alley, 776 S.W.2d 506, 509 n. 1 (Tenn. 1989)(statement introduced against Alley did not comport with the facts).[12] A taped statement from Alley was presented to the jury, but it was tampered with: More than half of it was mysteriously missing. See Reply Exhibit EE, Apx. 170-171 (Affidavit of Janet Santana); Compare Reply Exhibit FF, Apx. 172-173 (interrogation log showing actual time of interrogation, which was significantly longer than that of "confession" introduced at trial). See also Drizin & Leo, The Problem Of False Confessions In The Post-DNA World, 82 N.C.L.Rev. 891 (2004)(identifying 125 persons who gave false confessions to crimes they did not commit, including 9 who were sentenced to death based on confessions proven to be false).

(2) The abductor was 5'8" with a medium build; short, dark brown hair; a dark complexion, and no noted facial hair; while Sedley Alley was 6'4" with a slender build, medium to long reddish-brown hair, medium complexion, and a mustache and beard. See Reply Exhibit GG, Apx. 174-175: Statement of Scott Lancaster (describing abductor); Compare Reply Exhibit HH, Apx. 176-177: Booking photograph of Sedley Alley; and Reply Exhibit II, Apx. 178-179: Police Description of Sedley Alley.

(3) The victim's boyfriend closely matches the description of the abductor, he admits that the victim was with him in his car that night, he drove the type of car described by witnesses to the abduction (brown-over-brown station wagon), and had a motive to harm the victim. See Reply Exhibit CC, Apx. 152-157: Affidavit of April Higuera (John Borup closely matches description of abductor, drove Dodge Aspen and was with victim the night she was abducted); Reply Exhibit JJ, Apx. 180-181 (Abductor's automobile initially

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[11](...continued)
a new matter for me. I mean, it's a new concept for me." May 30, 2006, Transcript p. 77, Apx 378.

[12] In the *Warney* case, Professor Leo concluded that Warney's confession was false. See Reply Exhibit A, Apx. 66. Professor Leo was absolutely right: DNA tests proved that Warney was innocent and that his "confession" was false.

described as a brown over brown station wagon); Reply Exhibit KK, Apx. 182-183 (Dodge Aspen).[13]

(4) The tire tracks and shoe prints from the abduction scene are not from Sedley Alley's automobile or Sedley Alley's shoes, but from someone else. See Reply Exhibit LL, Apx. 184-219: Report of Peter McDonald (Tire tracks at abduction scene did not come from Alley's vehicle); Reply Exhibit MM, Apx. 220-226: Report concerning shoe prints.

(5) Hairs and fingerprints found on items near the body are not Sedley Alley's but someone else's. See Reply Exhibit NN, Apx. 220-226 (fingerprints not Alley's). See also Trial Tr. 882-883 (no hairs at scene matched Alley).

Upon establishing all of these facts, in 2004, Mr. Alley filed a Petition under the Tennessee Post-Conviction DNA Analysis Act requesting access to certain items of evidence for DNA testing. Unfortunately, Mr. Alley's lawyers with the Post-Conviction Defender's Office were not trained in the science of DNA and did not understand the items of evidence that should have been requested, the importance of redundant DNA results, or the significance of DNA databank searches. Nevertheless, Mr. Alley litigated his Petition through the Court of Criminal Appeals, the Tennessee Supreme Court, and the United States Supreme Court.

At the same time, Mr. Alley's federal attorneys sought to reopen his habeas petition on the grounds that the withholding of evidence of Mr. Alley's innocence constituted a fraud on the court. Mr. Alley only recently lost that case in the Sixth Circuit Court of Appeals and continues to litigate that case in the United States Supreme Court. Had Mr. Alley been able to reopen his habeas case, he could have requested to test the evidence in discovery in federal court.

Mr. Alley also sought DNA testing in federal court through a complaint filed pursuant to 42

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[13]See also, Affidavit of April Higuera, Apx 444-445, Borup fixed up his brown Dodge Aspen to make it loud. The abductor's car was described as being loud. Ms. Higuera's affidavit also outlines Borup's history of jealousy, unexplained injury to his arm after the incident, the fact that he had a dark tan, and his admission that he jogged with the victim and would therefore know her route and be able to get on to the base.

U.S.C. § 1983. Mr. Alley lost that case in federal court, but, has filed a Petition for Writ of Certiorari in the United States Supreme Court. Mr. Alley lost not on the grounds that the DNA would not exonerate him, but, on the grounds that the Sixth Circuit has not yet recognized a federal constitutional right of access to evidence to do DNA testing financed by the petitioner himself.

Mr. Alley then sought access to the evidence through executive clemency. After a five hour hearing, the Board of Probation and Parole agreed that Mr. Alley should be granted a thirty day reprieve to conduct the DNA testing. The Governor, however, believes that he does not have the power to order the testing. He directed Mr. Alley to file the Petition at issue here.

The testing that Mr. Alley first sought in 2004 takes 30 to 60 days to complete. There is no doubt that had the State agreed to the testing, it would be complete by now.

III.
SUMMARY PROCEEDINGS IN THE LOWER COURT

As previously stated, Mr. Alley's attorney immediately prepared a thirty-five page Petition for DNA testing. The Petition identified items of evidence that Mr. Alley knew to exist and requested additional items of evidence for which he requested discovery in order to determine whether the evidence had been destroyed. The trial court scheduled a May 30, 2006 evidentiary hearing on the Petition. On May 24, 2006, the State filed a response to the Petition. The State's response was not supported by any evidence. The state offered three basic arguments against testing. First, it argued that Sedley Alley cannot meet the "reasonable probability" standard because exculpatory results could not, in its view and based on prior rulings, overcome Mr. Alley's confession, the eyewitness testimony, and Mr. Alley's use of an insanity defense at trial Response at 14-15. In making this argument, the State never addressed the real world examples provided of

cases where DNA testing did, in fact, overcome cases of "overwhelming" guilt from detailed confessions and other proof, including cases where the defendant's did not contest guilt or innocence at the sentencing phase. Second, the state claimed that Mr. Alley cannot prove that "the evidence is still in existence." Id. at 15-17. Finally, the state argued that Mr. Alley made his application for the purpose of delay rather than proving innocence. Id. at 17. In making this argument, the State refused to respond to Mr. Alley's allegations that the State withheld exculpatory evidence for almost two decades and Mr. Alley's contention that upon the discovery of this suppressed evidence he immediately sought access to the crime scene evidence for DNA testing, and sought such in multiple forums for two years.

On May 25, 2006, Mr. Alley followed up on his request for discovery already contained in the Petition, with a formal "Motion for Depositions" so that he could establish whether certain items of evidence (including the broken fingernail, swabs of seminal fluid found on the victim's thighs, blood and hair found in Alley's car) have in fact been destroyed. In his reply to the State's Response to the Petition, Mr. Alley provided the Affidavit of Ms. Vanessa Potkin, Reply Exhibit OO, in further support of his request for discovery. Ms. Potkin recounted her experience with numerous cases where evidence initially declared by prosecutors and lab personnel to be destroyed were eventually discovered, and exculpatory DNA results produced, after hearings or extended searches instigated by representatives of inmates seeking the tests. At the hearing on May 30, 2006, the trial judge refused Petitioner to conduct discovery, crediting the state's hearsay assertions that certain items of evidence were destroyed. Apx. 306-307.

As previously stated, the Court scheduled an evidentiary hearing for May 30, 2006. In anticipation of the Hearing, and in reply to the States's Response, Petitioner 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. Petitioner also provided the Court with numerous real world examples of how just such evidence had produced exonerations in other similar cases. Petitioner's reply made clear that Petitioner 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, 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. Petitioner 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 –
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 go this 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 attached 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. 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 Apx. 378 with 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 also officers of the Court. All of this was in a summary proceeding. The trial court denied DNA testing in a written order and concluded that certain items of evidence didn't exist, because the Assistant District Attorney had been told they

didn't exist. Apx. 411-412.[14]

ARGUMENT

I. 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 and Confrontation Clauses of the Tennessee and United States Constitutions.

In his DNA motion, Sedley Alley identified various items of crime-scene evidence that could be subjected to testing and produce exculpatory results. Citing to routine practice in post-conviction testing around the nation, Alley further pointed out that if obtained, exculpatory test results could be run through DNA databases to specifically identify the profile extracted from the crime-scene evidence. Alley demonstrated that such DNA database comparisons had led to exonerations in convictions similar to his, where apparently "overwhelming evidence of guilt" consisted of detailed confessions.

Rather than deal with the reality of how DNA testing actually works to prove innocence or confirm guilt, Judge Higgs engaged in a strained reading of this Court's decisions in Earl David Crawford v. State, 2003 WL 21782328 (Tenn. Crim. App. August 4, 2003) and Sedley Alley v. State ("*Alley I*"), 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004). Although neither *Crawford* nor *Alley I* even mention DNA databases, Judge Higgs cited the cases in support of his proposition that "[DNA] testing can not be used to identify some third party that petitioner now contends was involved in the crime or some 'phantom' defendant found in the database." (Higgs Order at 24; *see*

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[14]The Judge's May 31, 2006, indicates that it would have been unfair to the state to take evidence at the May 30, 2006, hearing because the State wouldn't have had notice to have its own expert present. That is untrue. First, the State was on notice having been present when Mr. Harmor reviewed the crime scene evidence. Second, the TBI CODIS supervisor was also present when Mr. Harmor viewed the evidence and was present at the hearing. Significantly, the State has not presented any testimony or affidavit from the TBI forensic scientists refuting any of the scientific matters before the Court.

also id. at 30, 34, 36, 47).

As explained in detail below, Judge Higgs' 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, Judge Higgs has 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[15]

[15] One other way Alley can be vindicated by a databank hit is to have the DNA profile found on probative crime scene evidence in this case match a DNA profile from another unsolved crime that was committed while Alley was incarcerated or known to be somewhere else. Profiles from unsolved crimes are kept in the database. This is really just another way of proving third party guilt.

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)).

The "no third party guilt" rule proposed by Judge Higgs is similarly irrational and cannot withstand constitutional scrutiny. Once the legislature creates a post-conviction remedy whereby inmates are entitled to get DNA testing to raise a reasonable probability they wouldn't have been convicted or even prosecuted, it is utterly irrational to then prevent applicants from using the technology to exculpate by proving third-party guilt, much less access a state run database that is designed to solve crimes by identifying suspects who have left their DNA at crime scenes in very incriminating places.

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).

A. The Higgs "No Third Party Guilt" Rule Falls Afoul Of *Holmes*

In *Holmes*, the Court found that a defendant's constitutional rights are violated by an evidence rule "under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." Slip op. at 1. In reaching this conclusion, the Court explained that the Constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote." Id. at 6 (citations omitted). In the specific case of third-party guilt evidence, the operative principle is the connection between the defense evidence and the crime -- evidence that is "remote" or "lack[s] connection with the crime" is properly excluded. Id. at 7 (*citing* 40 A. Am. Jur. 2d. Homicide §286, pp. 136-138 (1999)). However, the South Carolina rule did not serve this operative principle because:

> the trial judge does not focus on the probative value or potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value... Furthermore, as applied in this case, the South Carolina Supreme Court's rule seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence.

Id. at 9. Given this lack of logic, the Court found the South Carolina rule "'arbitrary' in the sense that it does not rationally serve the ends that ... third-party guilt rules were designed to further." Id. at 11.

It is clear that Judge Higgs' third-party-guilt rule is also arbitrary and does not serve the ends that the Act were designed to further. Initially, it is revealing that Judge Higgs does not attempt to explain the rationale behind his blanket prohibition on using DNA evidence to identify third parties. See e.g., Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (state failed to explain underlying rationale of voucher rule, rule rejected as not "in accord with traditional and fundamental standards of due process."). Judge Higgs does imply, however, that *any* third-party comparisons are automatically "conjecture" or "speculation" and not permitted. Obviously, Judge Higgs has repeated the South Carolina mistake of not focusing on the probative value or potential adverse effects of Mr. Alley's proposed third-party comparisons.

Here, Mr. Alley seeks DNA testing only on items that are directly connected to the crime-scene such as the murder weapon, underwear linked to the perpetrator at trial, and the clothing worn by the victim during the assault. None of this evidence is remote or lacking connection to the crime. While it is possible that DNA unrelated to the true perpetrator is on any one of these items, it is inconceivable that the same male DNA profile could be on the murder weapon, the red underwear, and the victim's clothing. No single person who was not involved in the crime could have his DNA on all of these items. Mr. Alley has simply requested that the court consider the possibility that redundant results could point to the same third party, and also the possibility that this third party could be identified through use of DNA databases.

Instead of weighing the possibility that a single third party could be connected to the crime-scene through redundant results or a database match, Judge Higgs refused to consider this real-world scenario. Like the South Carolina courts, Judge Higgs seems to take this tack based on his total acceptance of the state's version of the case against Mr. Alley. While Judge Higgs took all assertions

of state's counsel at face value, he simply refused to believe that Mr. Alley and his counsel seek to prove innocence. (*Compare* Higgs Order at 25 ("as an officer of this court, Assistant District Attorney General Campbell's credibility on this issue is accepted by the court") *with id.* at 49 ("this court does not believe petitioner seeks relief under the Act for purpose of demonstrating actual innocence.")). Moreover, Judge Higgs also refused to consider additional exculpatory evidence such as the time-of-death revelations when considering the reasonable probability prong. (*See id.* at 47). The end result of this highly one-sided process is to deprive Mr. Alley of any opportunity to conduct highly probative testing essentially on the say-so of the state.

Such an approach does not accord with the fundamental purposes of the DNA Act. *See, e.g.*, Shuttle v. State, 2004 WL 199826 at *5 ("[t]he Act was created because of the possibility that a person has been wrongfully convicted or sentenced." (quoting Ricky Flamingo Brown, Sr. v. State, No. M2002-02427-CCA-R3-PC, 2003 Tenn.Crim.App. LEXIS 528, at *7 (Tenn.Crim.App. June 13, 2003).

In fact, as the legislative history of the Post-Conviction DNA Act makes clear, the Act was passed specifically not only to exonerate the innocent, but also to identify actual perpetrators of offenses who, without DNA testing, are roaming free. As Senator Cohen explained, the Post-Conviction DNA Analysis Act was one of the "most important bills . . . in the Legislature, because we're talking about freedom and we're talking about apprehending the right person and not incarcerating somebody wrongly." Legislative Tape #3 on SB 796: Senate Judiciary (May 15, 2001)(Senator Cohen). As he later stated:

> We need to free the innocent and then find the guilty, and if we don't find the guilty the victim doesn't know who did it and if we don't free the innocent, we've got some serious victims whose liberty has been taken in the name of the state.

Legislative Tape S-75 on SB 796: Joint Session (June 7, 2001). By not allowing DNA testing the state is "doing what's the worst thing the state could ever do, and that's to take somebody and deprive them of their liberty wrongly, but they're also letting the criminal out there prey on others." Legislative Tape #3 on SB 796: Senate Judiciary (May 15, 2001)(Senator Cohen).

The ruling below also defies real-world experience and is an insult to victims. Mr. Alley cited to numerous cases where DNA database comparisons not only exonerated a wrongly convicted person, but also resulted in the apprehension of the true perpetrator. (*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). Of course, it is invariably true that when a wrongful conviction occurs, the real culprit escapes punishment. If nothing else, the risk that a third party may have escaped punishment deserves consideration when looking at an application for DNA testing. It is good for law enforcement and good for victims.

B. The Higgs Rule Violates Established Principles of Procedural Due Process

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 Judge Higgs 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 Judge Higgs' "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, Judge Higgs also ignored the reality of how exonerations work. He 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 is Judge Higgs' 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 Judge Higgs' 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. 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).

II. 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 Judge Higgs, falls afoul of the Constitution. Indeed, it is apparent that Judge Higgs erred as a matter of state law, and that his readings of *Crawford* and *Alley I* miss the mark. On these grounds alone, he should be reversed.

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.

Judge Higgs 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.

This Court's 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 Judge Higgs recoils 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 Judge Higgs 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. Judge Higgs' attempt to avoid this analysis by reference to inapplicable precedent is reversible error.

III. The Trial Court Misapplied The Reasonable Probability Standard Of Tennessee Law, And There Is A Reasonable Probability That Sedley Alley Would Not Have Been Prosecuted, Convicted, Or Sentenced To Death Given Male DNA From The Same Third Party On The Numerous Items Of Evidence Sought To Be Tested

A. 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, Such As Skin Cells/Semen From The Men's Red Underwear Left By The Assailant At The Scene; Semen/Blood/Skin From The Stick Used As A Murder Weapon; And Saliva From The Victim's Shirt And Bra

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"). 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. This is in stark contrast to the more demanding standards set forth in other states' DNA statutes. *See, e.g.*, Okla. Stat. title 22 § 1371.1(A) (2000) (to obtain DNA testing, defendant must show that exculpatory results will prove "factual innocence," meaning that "by clear and convincing evidence...no reasonable jury would have found the defendant guilty beyond a reasonable doubt in light of the new [DNA] evidence"). While reciting the reasonable probability language of TENN. CODE ANN. § 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 cases such as Alley's, where there are numerous relevant items of physical/biological evidence from the victim's body and scene, favorable results necessarily include redundant results, test results that reveal that a number of probative items of the crime scene evidence all contain DNA from the same person, a man other than Sedley Alley. For the most part, the lower court ignored the probative value of redundant results. It's ruling -- that Alley's case does not meet the requirement of TENN. CODE ANN. § 40-30-304(1) -- is simply contrary to the scientific capacity of DNA testing in this case and prevailing legal authority.

In evaluating Alley's request for DNA testing, the lower court was required to consider the probative value of redundant DNA test results. It did not. There can be no question that DNA test

results which exclude Mr. Alley and show that male DNA from the underwear that the perpetrator left at the scene matches skin cells/blood or semen from the stick that the perpetrator broke off a tree, sharpened into a weapon, inserted in the victim's vagina and used to kill her, and saliva on the victim's shirt/bra, would, in the words of the Court of Criminal Appeals, "undermine confidence in the outcome of the prosecution" or "have created a reasonable doubt in the mind of one or more jurors."

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.

As detailed in his Petition, Alley seeks testing on a number of probative items of crime scene evidence, including most pertinent:

- Men's Underwear Found at Scene Nearby Victim's Body

Police recovered a pair of men's red bikini underwear from the crime scene, on the ground near the victim's body. It was the State's theory at trial that the red underwear belonged to the man who sexually assaulted and murdered Ms. Collins. DNA can be obtained from skin cells, sweat and/or semen on the underwear. DNA analysts routinely sample and perform testing on various areas of an item of evidence for habitual wearer DNA. As the name implies, habitual wear DNA refers to a profile obtained from various portions of an item of clothing to which establishes the DNA profile of the wearer of the item. For example, on the underwear, habitual wearer DNA would be obtained through testing the crotch and waist areas.

- The tree branch/murder weapon

The assailant broke a branch off of its tree at the crime scene, cleaned it, sharpened it into a weapon, and used as a tool to kill the victim, repeatedly inserting into her vagina. (This item was found protruding from the body near the right and left thighs, which yielded a positive finding for seminal substance.) There is blood on the stick, and semen may be found on it as well. In addition, due to the significant physical contact that the assailant had with the stick there is every reason to believe it contains DNA (sweat/skin cells) from the assailant. Weapons, such as this murder weapon stick, are, similar to clothing, now considered common items of evidence for DNA testing precisely

because they can contain sweat or skin cells from perpetrators. Also, recent examination of the paper which the stick was originally wrapped in has revealed an apparent blood-fluid mixture on the stick wrapping.

- Victim's Shirt/Bra

Recent examination of the victim's shirt and bra has revealed biological stains on the front of the victim's shirt and bra, which could be saliva. The victim was bruised on the upper breast and it was believed that the assailant may have bitten her breast.

In its decision and order denying testing, the lower court purported to address Mr. Alley's argument that redundant results would easily satisfy the "reasonable probability" requirement. The court stated it would first "examine each item separately to determine" whether the reasonable probability requirement was met. (Order at 32). The court continued that next, it would "consider Petitioner' argument that redundant DNA would result in overwhelming exculpatory evidence to the point that petitioner would not have been prosecuted or convicted." (Order at 32). While the court did go on to entitle a section of its opinion "REDUNDANT DNA" (Order at 46-48), absent from this section is any meaningful discussion of redundant results. In fact, the court conflated Mr. Alley's arguments about establishing third party guilt (through CODIS or a match to the victim's boyfriend) with his argument regarding redundant results; the court's "REDUNDANT DNA" section deals almost exclusively with third party guilt arguments. The court addresses redundant results in a few lines, simply characterizing the argument as "unpersuasive" and stating: ". . . this court once again notes that the victim lived in a marine barracks and had a very regimented schedule. She likely came into contact with the same people on a daily basis; thus, multiple deposits of biological material like hairs would not be uncommon [sic]". (Order at 48). This is just nonsensical; certainly, a jury

hearing the evidence in this case would reject such an argument and Mr. Alley would not have been convicted. No one but the true killer could have reasonably deposited skin cells on the underwear that the perpetrator left at the scene *and* skin cells/blood on the branch which was pulled off a tree at the scene, made into a weapon, and used to murder the victim, *and* saliva on her shirt/bra.

As recognized by modern crime scene investigators, in the context of DNA investigations, redundant results (DNA test results that establish the same genetic profile on a number of probative items of evidence, such as from a victim's body, evidence used in the attack, and/or left at a crime scene) are often key to establishing the identity of the perpetrator of a crime. Redundant results have served as the basis for several post-conviction DNA exonerations. Michael A. Fuoco, *DNA Test Said to Clear Death Row Inmate Jailed 21 Years in Rape, Murder Case*, POST-GAZETTE, July 29, 2003 (Nicholas Yarris was exonerated after twenty-one years on death row in Pennsylvania prisons for a 1981 abduction, rape and murder that redundant DNA test results later proved he did not commit; the DNA results established that Yarris was not the donor of semen found on the victim's underwear, the DNA profile of which was consistent with DNA from skin cells found under her fingernails and in gloves believed to have been worn by the killer, thus, demonstrating that the semen did not simply come from a consensual sex partner and did in fact belong to the killer); profile of Calvin Willis at http//www.innocenceproject.org (after twenty-two years in prison for rape in Louisiana, Calvin Willis was exonerated by DNA testing that showed that there was male DNA underneath the victim's fingernails which matched DNA on a pair of men's underwear that the assailant left at the crime scene); Jonathan Saltzman and Mac Daniel, *Man Freed in 1997 Shooting of Officer Judge Gives Ruling After Fingerprint Revelation*, BOSTON GLOBE, January 24, 2004 (Cowans, who was convicted of shooting a police officer in 1997, based on officers' identification

and partial print match, was exonerated after DNA testing excluded him as the source of DNA on evidence the assailant left at or near the crime scene, including "sweat from the brim of a baseball cap," a sweatshirt, and "saliva from the rim of a glass mug... used by the assailant"; a new trial was granted based on the DNA test results, but the charges were dismissed after State reviewed prints and found a non-match).

In a similar fashion, Larry Peterson was recently exonerated based on redundant post-conviction DNA test results. Similar to Alley's case, the victim in Peterson's case had been sexually assaulted and murdered; her partially clothed body was found in a wooded area and a stick had been inserted into her vagina. *See State v. Peterson*, 364 N.J. Super. 387, 397 (App. Div. 2003). Peterson was convicted of the crime based primarily on the testimony of four individuals who claimed that he confessed (and these alleged confessions contained non public details of the crime) as well as testimony from a state's forensic expert that seven hairs from the victim's body and a stick, which was used as a weapon and found at the scene, were microscopic "matches" to Peterson. *Id.* While the results of testing on each piece of evidence alone may not have been sufficient to undermine his conviction and show innocence, the Appellate Division of New Jersey granted testing, holding that "DNA testing could show that defendant was not the source of the semen found on the outside of the victim's pants, the blood under her fingernails or of the hairs discovered on and near the body that [the State's expert] testified had the same characteristics as defendant's hair. In addition, DNA testing could show that all of this evidence, including the hairs on the sticks found at the crime scene, had a common identifiable source other than defendant who could have had access to the victim around the time of the murder" and that "DNA test results that not only tended to exculpate defendant but to implicate someone else would be evidence' of the sort that would probably change

the jury's verdict if a new trial were granted.'" *State v. Peterson*, 364 N.J. Super. at 398. DNA testing was ordered and, in the post-conviction re-examination, additional, critical semen evidence was identified which had been completely overlooked in the original examination - there was sperm on every body orifice swab from the victim. The post-conviction DNA results showed that the hairs that had been microscopically matched to Peterson actually belonged to the victim. The DNA also showed that sperm from the victim's mouth and vagina came from an unknown man and this same man's DNA was found underneath the victim's fingernails. Based on these redundant results, Peterson's conviction was vacated and the charges against him dismissed. *See* Maurice Possley, *Convict Seeks New Trial on Basis of Flawed Hair Analysis*, CHI. TRIB., Jul. 29, 2005; Laura Mansnerus, *Case Dropped Against New Jersey Man After 18 Years*, N.Y. Times, May 27, 2006.

In the instant case, the lower court erroneously evaluated the probative value of the evidence only by considering each item in isolation. The court dismissed DNA results showing skin cells, blood and/or hair originate from a man other than Alley on the stick that the perpetrator broke off a tree, sharpened as a weapon and used to kill the victim, reasoning, "given that the limb was taken from a public park" arguments about its probative value lack merit. (Order 28-29). The court acknowledged that "arguably had semen not belonging to the defendant been found on the limb, the question becomes a more difficult one. . ." but ultimately ruled such a result would also be lacking in probative value based on the fact that Alley's confession (which contradicted by several aspects of physical evidence) does not include mention penile penetration. (Of course, this is no way means that the assailant did not penetrate the victim with his penis as well. In fact, the State at trial left open this possibility, suggesting to the jury while penile penetration could not be proven, it was certainly possible.) The lower court also hypothesized that any such semen could just have come

to be on the stick from transfer from a previous act of consensual sex. (Order at 29).

The lower court also used consensual sex as a rationale for why it believed that saliva, from a man other than Alley, on the victim's bra and shirt would not be probative. (Order at 38). The court stated that it gave "considerable weight to the potential effect on the jury that exculpatory results might have with regard to [the underwear]" left by the assailant at the scene." (Order at 33). The court ruled, "However, given the overwhelming evidence against the defendant and the fact that the state never specifically tied the underwear to the defendant at trial" the court ruled petitioner failed to establish reasonable probability. (Order at 33-34). Again, the court's ruling is confused. While the state did not directly link the underwear to Alley at trial, the state unequivocally argued that the underwear belonged to the assailant and were left by him at the scene.

In sum, in evaluating the evidence item by item the court reasoned that particular evidence would not be probative because the victim was murdered in a public place and theoretically she could have had consensual sex prior to her murder. However, these facts/possibilities do nothing to undermine the significance of redundant results -- no one but the true killer could have reasonably deposited skin cells on the underwear that the perpetrator left at the scene *and* skin cells/blood on the branch, *and* saliva on her shirt/bra.

B. 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

This Court has made clear that 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,* this Court 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." This 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 lower court erred in finding *Haddox* distinguishable an uninformative because Alley gave police a confession and "multiple courts have described the evidence against Alley as 'overwhelming'." (Order at 21). 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.

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 TENN. CODE ANN. § 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 is 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 under oath 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.").

In its reading of Saine v. State, No. W2002-03006-CCA-R3-PC, 2003 Tenn. Crim. App. LEXIS 1135 (Tenn. Crim. App. Dec. 15, 2003), the lower court overlooked the critical fact that the rape defendant in *Saine* was, in part, denied testing of the victim's underwear because of the questionable probative value of the evidence; there was never any claim that the victim had worn the panties in connection with the rape. The court, therefore, ruled "the petitioner failed to establish that 'a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis.'" *Id.* at *11-12; (quoting Tenn. Code Ann. § 40-30-404(1) (Supp. 2001). In *Shuttle*, in reversing the post-conviction court's denial of Shuttle's petition for DNA analysis, the court distinguished that case from *Saine*, stating:

> [W]hile the evidence to be tested in Carl E. Saine could not be directly linked to the rape, the record in [Shuttle] indicates the evidence [which consisted of blood underneath the victim's fingernails and blood on the petitioner's jeans] to be tested will likely be linked to the commission of the offense. Therefore, if we assume DNA testing would reveal the blood underneath the victim's fingernails and on the petitioner's jeans was not the blood of the victim nor the petitioner, the petitioner has shown a reasonable probability that he would not have been prosecuted or convicted with this favorable DNA evidence.

2004 Tenn. Crim. App. LEXIS 80, at *17.

Unlike the evidence in *Saine* and similar to the evidence in *Shuttle* and *Haddox*, the evidence in Alley - the underwear and stick -- are clearly "linked to the commission of the crime." DNA testing is capable of showing that DNA (sweat, skin cells, semen, and/or blood) on the men's underwear from the scene, on the stick that the assailant used as a weapon, and other crime scene

evidence comes from the same man, someone other than Sedley Alley. The lower court was required to presume these results, that DNA from all of this evidence does comes not from Sedley Alley, but from someone else. One easily sees that Sedley Alley would never have been prosecuted or convicted if skin cells, hair, blood on the stick comes from the same person whose DNA is on the underwear and who saliva is on the victim's shirt. Certainly, such results would create a reasonable probability that Mr. Alley would not have been prosecuted or convicted. In the words of the appellate courts such results would undermine confidence in the verdict or "would have created a reasonable doubt in the mind of one or more jurors."

Opinions from our sister state of Florida confirm the clear error in the trial court's application of the "reasonable probability" standard here. For example, in Swafford v. State, 871 So.2d 874 (Fla. 2004), the Florida Supreme Court remanded for post-conviction DNA testing of available evidence in capital case. In Ortiz v. State, 884 So.2d 70 (Fla. App. 2004), the court of appeals specifically ordered DNA testing in a sexual assault case because Ortiz maintained that DNA found on swabs and the victim's clothing came from someone other than him. As the court recognized, if someone else's DNA was found on such swabs "we cannot say there is no reasonable probability that the jury would have reached a different verdict if presented with DNA evidence that excluded Ortiz." Id. at 71. Exactly as in *Ortiz*, "DNA evidence that exclude[s]" Alley, if found on the numerous items of evidence at issue, establishes a reasonable probability that he would not have been prosecuted, convicted, or sentenced to death.

The Florida Court of Appeals reached a similar conclusion in Schofield v. State, 861 So.2d 1244 (Fla. App. 2003), which involved a homicide. In that case, as here, where the victim struggled with her assailant, the court of appeals recognized that if DNA from fingernail scrapings and hairs

from murder scene did not match Schofield, there was a reasonable probability that petitioner would not have been convicted.

Similarly, in Riley v. State, 851 So.2d 811 (Fla. App. 2003), the trial court (much like the trial court here) denied DNA testing of bloodstained clothing from the crime scene and Riley's apartment, contending that "the testing would not exonerate Riley" because "there was an abundance of other evidence against Riley." Id. at 812. The Court of Appeals reversed and ordered further proceedings, recognizing – exactly as Alley has argued here – that proof of DNA from a third party would establish innocence. Further, the Court of Appeals also properly acknowledged the unreliability of evidence used against Riley, which, in conjunction with exculpatory DNA tests, could mean that Riley was, in fact, innocent. As in *Riley*, the trial court here erroneously failed to appreciate the potential for exoneration arising from third-party DNA on relevant evidence, while ignoring the unreliability of evidence used against Alley, including the "confession," which even the Tennessee Supreme Court acknowledges lacks reliability.

Again, in Hampton v. State, 924 So.2d 34 (Fla. App. 2006), the trial court denied DNA testing in a sexual assault case, relying on its belief that "an exclusionary DNA test result would not exonerate the defendant," notwithstanding Hampton's assertion that he would be exonerated if DNA profiles from semen recovered from the crime excluded him. On appeal, the Court of Appeals reversed, concluding that if DNA tests revealed DNA profiles "none of which matched the defendant, then such evidence could exonerate the defendant." The court thus remanded for further proceedings. See also Carter v. State, 913 So.2d 701 (Fla. App. 2005)(rejecting trial court's assertion that exculpatory DNA tests would not exonerate petitioner, and remanding for further proceedings); Block v. State, 885 So.2d 993 (Fla. App. 2004)(adopting defendant's theory that if DNA proved that

particular knife did not cause victim's injury, defendant might be able to reduce conviction to lesser offense, and remanding for further proceedings).

All of these Florida cases make manifest that the trial court erred by failing to find a reasonable probability of a different outcome if DNA from a third party – not from Alley – is identified on the numerous items of evidence recovered at the crime scene. Just as the Florida Court Of Appeals reversed all of these cases, this Court is compelled to reverse here, because DNA evidence from a third party on the evidence does, in fact, exonerate Sedley Alley: It creates a reasonable probability that he would not have been prosecuted, convicted, or sentenced to death were it known that someone else's male DNA – not Alley's – was strewn all over the crime scene.

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 trial court now claims. See Notice Of Filing, Affidavit of April Higuera (victim was not unchaste, as the trial court now claims), 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 trial court 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).

IV. Sedley Alley Was Improperly Denied An Evidentiary Hearing Before An Impartial Adjudicator: The DNA Petition Should Be Remanded For An Evidentiary Hearing Before An Impartial Judge

Finally, 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. This Court should reverse the judgment below and remand for a full evidentiary hearing before an impartial adjudicator.

A. The Trial Court Improperly Denied Sedley Alley An Evidentiary Hearing To Enable Him To Establish His Entitlement To DNA Testing Under Tennessee Law

As this Court has repeatedly stated: "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.

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

As the Tennessee Supreme 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, this Court has itself 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 petitioner is not

entitled to relief" that a summary dismissal without a hearing is appropriate. Ensley v. State, *supra*, p.*12 (emphasis supplied).

2. Sedley Alley Is Entitled To A Remand For An Evidentiary Hearing On His Entitlement To DNA Testing Under Tennessee Law

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) petitioner 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 this Court 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 was available to explain how, through testing of the evidence, Sedley Alley could be exonerated under Tenn. Code Ann. §40-30-304(1), & -305(2). 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, after 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), 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., Petitioner'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 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.

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 provided 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 have then claimed 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.[16]

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

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[16] 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.

depends. *Griffin* prohibits such a result. The case must be remanded for further 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. Sedley Alley Was Improperly Denied An Adjudication Of His DNA Petition By A Completely Impartial Adjudicator

One of the clear explanations for the trial judge's arbitrary actions in prohibiting the presentation of highly relevant evidence and denying even an offer of proof is apparent from the record: The judge was not completely impartial. This is not a bald accusation: It is supported by clear evidence not only that the judge prejudged the issues, but also by clear proof from a court employee showing that the judge was unfairly biased in favor of the District Attorney. See Apx. 460. Sedley Alley has been denied due process of law under the Fourteenth Amendment, as his DNA petition was decided by a judge who was not unbiased.

Perhaps most telling is the fact that after the judge denied an evidentiary hearing but heard arguments from the parties, he briefly recessed to chambers, after which he announced a ruling from the bench. Without question, that ruling was not written in the matter of minutes the judge stepped off the bench: It was clearly written before the judge ever convened the proceedings. The judge's recitation is virtually verbatim the order which the judge then issued the next day – an order which the judge stated in open court he was going to issue the day after the proceedings in open court. The judge's statement that he was to issue a written order, after which he read verbatim the order which later issued, *when that order was not written during a brief recess but before the proceedings itself*, makes clear that the judge had, as a matter of fact, prejudged the case. He had already made his

decision before he denied a hearing and heard arguments: The judge read what he had written before the proceedings. Compare Order, pp. 1-3 (Apx. 387-389) with Transcript, pp. 79-82, Apx. 378-381.

This constitutes a fundamental violation of Sedley Alley's rights. Where a judge has decided a case against a party before ever hearing his evidence or his arguments, there is a clear appearance of impropriety, lack of impartiality, and the requirement of recusal. Alley v. State, 882 S.W.2d 810 (Tenn.Cr.App. 1994). The Tennessee Supreme Court has put it this way:

> In the trial of any lawsuit the judge must be careful not to give an expression to any thought, or to infer what his opinion would be in favor or against either of the parties in the trial..Neither the Tennessee Constitution nor the statutory provision covers in terms the case of a judge who has already decided the controversy before he has heard it. However, such a case falls within the meaning of both, that is, of the provision in each that no judge shall preside in any case in which he may have been of counsel, or in which he may have presided in any inferior court. The purpose of these two provisions is to guard against prejudgment of the controversy.

Leighton v. Henderson, 414 S.W.2d 419, 420-421 (Tenn. 1967). Judge Higgs "already decided the controversy before he . . . heard it." His prejudgment voids his ruling, and the matter must be remanded under *Leighton*. In similar circumstances, the Tennessee Court of Appeals has reached a similar conclusion. See Earls v. Earls, 2001 WL 504905 (Tenn.App. 2001). As the Mississippi Supreme Court held just months ago, when a judge has "decided [an] issue prematurely" exactly as occurred here, recusal is warranted, and the matter must be remanded for consideration before a new, impartial arbiter. Mississippi United Methodist Conference v. Brown, 2006 Miss.Lexis 108 (2006).

And Judge Higgs' lack of impartiality is not simply limited to his recitation of his pre-ordained judgment at the end of the hearing. On the very day this Court ordered briefing, counsel learned that Assistant District Attorney Campbell went to Judge Higgs (without notice to Alley's counsel) to get him to enter an order striking Alley's notice concerning the testimony of April

Higuera. The impropriety in this situation is confirmed by the fact that the order striking Alley's notice uses the *exact* caption typeface and lettering used by the District Attorney in his pleadings and *not* the typeface and caption used by the trial court when issuing previous orders. The judge's order was prepared by the District Attorney and presented to the judge *ex parte*.[17]

When a judge engages in such *ex parte* contact with a party, there is an appearance of impropriety which warrants recusal. State v. Cash, 867 S.W.2d at 749 (ordering recusal based on appearance of impropriety, based in part on *ex parte* contact between the judge and prosecutor). In fact, the Supreme Court of Florida has ordered recusal in similar circumstances, in which a trial court *ex parte* asked the prosecutor to draft his proposed order in a capital case. See Roberts v. State, 840 So.2d 962, 968-969 (Fla. 2002). See also State v. Riechmann, 777 So.2d 342 (Fla. 2000). As the Supreme Court explained in *Roberts*:

> The most insidious result of *ex parte* communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

Roberts, 840 So.2d at 969, quoting Rose v. State, 601 So.2d 1181, 1183 (Fla. 1992). See also Disciplinary Action Against Judge For Engaging In *Ex Parte* Communication With Attorney, Party, Or Witness, 82 A.L.R.4th 567.

Because the trial judge prejudged the case and engaged in conduct establishing an appearance of impropriety, Sedley Alley is, under the due process clause of the Fourteenth Amendment, the

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[17] The same judge and district attorney engaged in identical conduct in the case of Howell v. State, No. W2005-02214-CCA-R9-PD, in which the Assistant District Attorney prepared (after an *ex parte* discussion with the judge) an order denying post-conviction relief which the judge then signed. The improper *ex parte* communication between the judge and the Assistant District Attorney was revealed in that case as it has here, where it was apparent from the face of the judge's order that the order had been prepared by the District Attorney's Office: Indeed, the judge's order contained the identical typographical errors contained in the state's response to the petition.

Tennessee Constitution, and Tennessee law, entitled to a remand for consideration of his petition before a new, neutral arbiter.

C. Sedley Alley Is Entitled To A Remand On The Question Of The Existence Of Additional Samples Which Can Be Subjected To DNA Analysis

The trial court also erroneously concluded that additional evidence from the UT Toxicology Lab and/or the Shelby County Morgue did not exist.

Even if a post-conviction court need not conduct a live evidentiary hearing concerning the existence of evidence under Tenn. Code Ann. §40-30-304(2) or -305(2), a court must at least have before it sworn testimony based on personal knowledge. Compare Buford v. State, 2003 Tenn.Crim.App.Lexis 370 (state presented sworn affidavits concerning non-existence of evidence). That has not occurred here. Without allowing Petitioner discovery to establish the existence *vel non* of evidence once in the possession of the UT Toxicology Lab and/or the morgue, the trial court concluded that the evidence in question did not exist, given hearsay statements made by the prosecutor on issues for the which the prosecutor has absolutely no personal knowledge.

As the Supreme Court explained in *Griffin*, such "factfinding" is not factfinding at all. Moreover, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Tenn.R.Evid. 602; State v. Powers, 101 S.W.3d 383, 413 (Tenn. 2003). The Assistant District Attorney has no personal knowledge whether various items of evidence exist: He only presented hearsay to the trial court.

Under these circumstances, a remand for a full hearing on this question is likewise mandated – especially where Sedley Alley presented an affidavit indicating the possible existence of evidence in issue. See Apx. 227-232. As the Florida Court of Appeals has emphasized, "A finding by the trial

court that DNA does or does not exist is a factual determination. In making factual determinations, a trial court can consider only sworn evidence." Borland v. State, 848 So.2d 1288, 1289 (Fla. App. 2003). Here, however, the trial court did just the opposite: It made a factual determination based on unsworn hearsay. Such factfinding was fatally defective and cannot stand. The matter must be remanded. See also Thompson v. State, 922 So.2d 383 (Fla. App. 2006)(question of existence of evidence for DNA testing must be resolved by evidentiary hearing); Marsh v. State, 852 So.2d 945 (Fla. App. 2003)(same).

D. The Case Must Be Remanded To The Trial Court For An Evidentiary Hearing Before A Neutral And Unbiased Judge

All told, the trial court failed to hold an evidentiary hearing to consider all the evidence as required by *Griffin*. It ignored the Innocence Project's presentation of this case to establish innocence. The trial court prejudged the case, as is evident from the judge's reading of an order which was prepared before the hearing; the judge was also biased and not impartial, and acted in concert with the District Attorney's office *ex parte* and behind Sedley Alley's back. The judge decided a disputed factual matter by crediting the nonsworn statement of someone who lacked personal knowledge concerning the actual existence of evidence. The matter must, at a minimum, be remanded for further proceedings.

CONCLUSION

There is already abundant proof that Sedley Alley did not commit the offenses for which he was convicted and for which he stands condemned. Sedley Alley is entitled to DNA testing to establish his innocence. The trial court's denial of DNA testing is fraught with substantive and procedural errors. DNA testing should be ordered, and/or the matter remanded.

Respectfully Submitted,

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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 12th day of June, 2006.