IN THE TENNESSEE SUPREME COURT
WESTERN DIVISION
AT JACKSON

SEDLEY ALLEY	)	
	)	**No. _____**
Petitioner-Appellant,	)	
	)	**W2006-01179-CCA-R3-PD**
v.	)	**Death Penalty Case**
	)	
STATE OF TENNESSEE	)	**EXECUTION DATE: June 28, 2006**
	)	**1:00 a.m.**
Respondent-Appellee	)	

MOTION FOR STAY OF EXECUTION

Submitted By:

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Despite the potential to prove actual innocence by conducting DNA testing on items of evidence that could definitively tie a third party to the act of murder and the crime scene, Sedley Alley faces execution because the courts of this State have thus far failed to secure his rights for DNA testing necessary to prove actual innocence.

Two days ago it was revealed that the State of Texas had executed an innocent man, Carlos DeLuna. In DeLuna's case, the man that the Texas Courts had called a "phantom" suspect, Carlos Hernandez, was indeed the killer. *New Evidence Suggests a 1989 Execution in Texas Was a Case of Mistaken Identity*, Chicago Tribune, June 24, 2006. Mistakes happen. Innocent people get executed. Recognizing this reality, the Supreme Court of North Carolina (our sister state) recently granted Jerry Wayne Conner a brief stay of execution and ordered DNA testing of crime scene evidence. See Exhibit 1 (State v. Conner, No, 219A91-5, Order of the North Carolina Supreme Court, May 10, 2006).[1] Lest an innocent man be executed, prudence and justice dictate the same course here: This Court should order a brief stay, grant permission to appeal, and order DNA testing.

* * *

Our state legislature passed the Post-Conviction DNA Analysis Act to prevent the incarceration and execution of innocent people. The United States Supreme Court has spoken recently about the power of DNA to exonerate the wrongfully convicted in another Tennessee case, House v. Bell, 547 U.S. ___, 2006 U.S.Lexis 4675 (2006), and the right to prove innocence by

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[1] The North Carolina Supreme Court's action, granting Conner limited relief by summarily reversing the lower court's ruling, was pursuant to North Carolina's post-conviction DNA act which is similar in all relevant respects to our DNA statute. Mr. Conner, like Alley, had confessed to a horrific crime. Mr. Conner, like Alley, raised claims challenging the reliability of his confession. Ultimately, recognizing the power of DNA technology to get to the truth, North Carolina granted testing in a ruling which the Raleigh News-Observer described as a "sensible and appropriate interpretation of the legislature's intent." See "...test for the truth," *The News and Observer*, May 12, 2006, p. A20, Exhibit 2.

showing third party guilt in Holmes v. South Carolina, 547 U.S. ___ (2006). The decision below, however, ignores both the intent of the legislature and the lessons of the Supreme Court in both *House* and *Holmes*.

The lower courts were fundamentally confused about the law in this area as well as the power of DNA technology to exonerate the innocent by proving that a third party committed the crime. Almost every day in this country innocent suspects and defendants are exculpated when DNA testing on probative items of crime scene evidence both excludes the accused and affirmatively shows a another person really committed the crime, either through a "hit" in the CODIS databank or by direct comparison with the third party's DNA profile. The courts below simply ignored this reality; indeed, they would not even acknowledge Alley's uncontroverted offer of proof concerning such cases. Worst of all, by explicitly and arbitrarily refusing to acknowledge the power of DNA testing to exculpate Alley by affirmatively proving third party guilt, the Court of Criminal Appeals' analysis runs directly counter to Holmes v. South Carolina, 547 U.S. ___ (2006). Exactly as in *Holmes*, the Court of Criminal Appeals has improperly focused solely on the prosecution's case while ignoring the unreliability of its evidence. Holmes, 547 U.S. at ___, slip op. at 9. Exactly as in *Holmes*, the Court of Criminal Appeals has improperly refused to consider "defense challenges to the prosecution's evidence." Id.

Moreover, the opinion of the lower court misconstrues the factual and legal arguments made by Alley. Also, the opinion is directly contrary to this Court's January 2006 opinion in Griffin v. State 182 S.W.3d 795, 800 (Tenn. 2006), as well as the Court of Criminal Appeals decisions in Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 Tenn. Crim. App. LEXIS 80, and Haddox v. State, 2004 WL 2544668 5-6 (Tenn. Crim. App Nov. 10, 2004).

The questions presented in this case are of great importance not only to Mr. Alley, but to law enforcement, victims, persons wrongfully incarcerated, and to the public. Indeed, Mr. Alley's filing today is joined by three separate groups of amici, including victims of violent crime, persons who were convicted by overwhelming evidence and later exonerated by DNA testing, and a group of state Innocence Projects.

The State will no doubt argue that Mr. Alley's claims come too late in the day. This is the same refrain they have been using since Mr. Alley discovered in 2004 that the State hid evidence that would prove his innocence. The song rings hollow, though, when one looks at Mr. Alley's actual efforts to prove his innocence, once proof of his innocence (not simply his protestations) was discovered.

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, CCA 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, CCA 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 discovery of this evidence turned Mr. Alley's case on its head, 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, CCA 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, CCA Apx. 149-151 (Report of Dr. Walter Hofman, M.D.)(victim died quickly after sustaining injuries) and Exhibit TT, CCA Apx. 296-297 (Affidavit of Dr. Hofman).

Moreover, additional evidence also points to the victim's boyfriend – not Sedley Alley – as the killer. The boyfriend admits that he was with her that night, and he, unlike Alley, had a motive to harm her: She was leaving town to join her fianceé in California. See Reply Exhibit CC, CCA Apx. 152-157 (Affidavit of April Higuera).

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. In other words, the State prevented Mr. Alley from raising a legal claim of his innocence in federal court by withholding the evidence that would support such a claim. Mr. Alley only recently lost that

case in the Sixth Circuit Court of Appeals and continues to litigate it in the United States Supreme Court.

Mr. Alley also sought DNA testing in federal court through a complaint filed pursuant to 42 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 days to complete. There is no doubt that had the State agreed to the testing, it would be complete by now. Indeed, if the State had agreed to the testing in April 2006, as the Clerk of the Criminal Court in Shelby County was prepared to do until prosecutors stepped in, the testing would have been completed before the May 17 execution date. It is the State that is obstructing Mr. Alley's access to evidence which has the power to completely exonerate him. It is the State who hid evidence that they had a duty to disclose. It is the State who is afraid to admit that they might have made a mistake.

Mistakes do happen. Innocent men do confess, raise insanity defenses, even plead guilty Does Tennessee want to be like Texas who executed an innocent man? What is the harm in taking 30 days to eliminate all doubt from this case?

The execution of an innocent man is a mistake that cannot be taken back. Where "guilt can

be quickly and definitively determined by means of a simple test, there is no reason not to have it performed."Cooper v. Woodford, 358 F.3d 1117, 1125 (9th Cir. 2004)(Silverman, J., concurring). The North Carolina Supreme Court recognized the reasonableness of such a course of action in Conner. This Court should likewise grant Mr. Alley's application for permission to appeal, reverse the lower court and order that the crime scene evidence in this case be tested pursuant to Mr. Alley's proposed testing plan. The stay need not be lengthy. As the record below reflects, the testing can be accomplished in as little as 30 days.

Respectfully Submitted,

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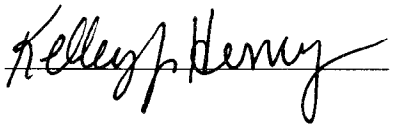
CERTIFICATE OF SERVICE

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



APPENDIX 1
State v. Jerry Wayne Conner
No. 219A91-5
Order of the North Carolina Supreme Court
May 10, 2006

No. 219A91-5 FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

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(State v Jerry Wayne Conner)

STATE OF NORTH CAROLINA
v
JERRY WAYNE CONNER

From Gates
(90 CRS 648-9, 90 CRS 812-13)

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ORDER

" Defendant's motion for stay of execution is allowed. Defendant's petition for writ of certiorari is allowed for the limited purpose of reversing the trial court's denial of DNA testing and remanding this case to Gates County Superior Court for entry of an order requiring that biological evidence in the possession of the State be DNA tested pursuant to N.C.G.S. 15A-269. Except as otherwise allowed herein, defendant's petition for writ of certiorari and supplemental petition for writ of certiorari are denied.

By order of the Court in Conference, this 10th day of May, 2006.

s/ Timmons-Goodson, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of May 2006.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

Shaula A. Brannan
Assistant Clerk

Copy to:
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Kenneth Rose, Attorney at Law, For Jerry W. Conner (by E-Mail)
Mr. Mark Kleinschmidt, Attorney at Law, for Jerry Conner
Mr. Steven Arbogast, Special Deputy Attorney General, For State of NC (by E-Mail)
Troy Cahill (by E-Mail)
Mr. Frank R. Parrish, District Attorney
Mr. Nell Wiggins, Clerk of Superior Court
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Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)
Warden Marvin Polk
Reuben Young, Office of the Governor

APPENDIX 2

...test for the truth
The News & Observer, p. A20
May 12, 2006

1 of 33 DOCUMENTS

The News & Observer (Raleigh, North Carolina)

May 12, 2006 Friday
Final Edition

SECTION: EDITORIAL/OPINION; Pg. A20

LENGTH: 322 words

HEADLINE: ...test for the truth

BODY:

Jerry Wayne Conner's life may very well hang by a microscopic thread of DNA. If the DNA tests ordered this week by the state Supreme Court exonerate him for the 1990 rape of a Gates County teenager, his conviction for the murder of the girl and her mother will likely be challenged as well.

On the other hand, if the test confirms Conner did rape the girl, his chance of avoiding execution will be diminished.

It is exactly this sort of life or death case the legislature had it mind with a 2001 law requiring additional DNA tests in cases where such tests could possibly confirm or disprove the guilt of a convicted person.

Conner was scheduled to be put to death at 2 a.m. this morning. The Supreme Court on Wednesday stayed the execution, saying the 2001 DNA testing law applied to Conner's case. That ruling overturned a decision by a Gates County judge that denied Conner's request for further DNA tests.

Wednesday's ruling was a sensible and appropriate interpretation of the legislature's intent. A DNA test of a semen sample recovered from the teenage victim was ruled inconclusive 15 years ago. DNA testing has improved significantly in recent years, however. Both common sense and justice argue that if more advanced and accurate DNA testing is available, it must be used before the state of North Carolina executes someone.

The deaths of Minh Rogers and her 16-year-old daughter Linda were horrific. They were killed and the daughter raped at the family's country store in Gates County. Conner is said to have confessed to the crimes. However, his IQ of 82 marks him as borderline retarded, and his defense team also has raised serious questions about his mental state at the time. Conner now says he did not commit the murders or the rape.

Putting a North Carolinian to death is a serious undertaking. The legislature realized that when it passed the DNA law. The Supreme Court now has shown wisdom in putting the law into action.

LOAD-DATE: May 12, 2006