No. 05-10958

IN THE
SUPREME COURT OF THE UNITED STATES

SEDLEY ALLEY,

Petitioner,

v.

WILLIAM R. KEY, Criminal Court Clerk, and
WILLIAM L. GIBBONS, District Attorney General
for the Thirtieth Judicial District of Tennessee,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT GIBBONS

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CAPITAL CASE

QUESTION PRESENTED

Does a death-sentenced state prisoner, whose conviction and sentence have been upheld on direct appeal, state post-conviction and federal habeas corpus proceedings, have a federal constitutional right to post-conviction DNA analysis of evidence related to his conviction for purposes of demonstrating his alleged factual "innocence"?

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STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered May 14, 2006. (Pet. App. A) The court of appeals denied rehearing on May 16, 2006. (Pet. App. B) Petitioner filed his petition for writ of certiorari in this Court on May 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RELEVANT STATE STATUTORY PROVISIONS

The State of Tennessee provides a statutory procedure for DNA analysis of biological evidence related to certain criminal convictions, including first degree murder. Relevant provisions of Tennessee's Post-Conviction DNA Analysis Act of 2001, Tenn. Code Ann. § 40-30-301, *et seq.*, are reproduced in an Appendix to respondent's brief in opposition. (BIO App. 1)

STATEMENT OF THE CASE

1. Procedural History

The petitioner, Sedley Alley, was convicted in 1987 for the kidnapping, aggravated rape and premeditated first-degree murder of Suzanne Collins and sentenced to death. The Tennessee Supreme Court affirmed his convictions and sentence on direct appeal, *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989), and this Court denied certiorari.

Alley v. Tennessee, 439 U.S. 1036 (1990). Alley's convictions and sentence were upheld by the trial court on post-conviction and subsequently affirmed by the Tennessee Court of Criminal Appeals. *Alley v. State*, 958 S.W.2d 138 (Tenn. Crim. App. 1997) (app. denied Sept. 29, 1997).

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

On December 9, 2003, the State of Tennessee filed a motion in the Tennessee Supreme Court requesting the setting of an execution date. The Tennessee Supreme Court granted the State's motion on January 16, 2004, setting Alley's execution for June 3, 2004.

On May 4, 2004, thirty days before his execution date, Alley filed a petition in the Shelby County Criminal Court for post-conviction DNA analysis, arguing for the first time in nearly twenty years of trial and post-conviction litigation that he is factually innocent of the murder. *See* Tenn. Code Ann. § 40-30-301 *et seq*. (also known as the "Post-Conviction DNA Analysis Act of 2001") (BIO App. 1). The trial court denied

relief, and the Tennessee Court of Criminal Appeals affirmed. *Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). This Court denied certiorari on March 28, 2005. *Alley v. Tennessee*, 544 U.S. 950 (2005).

On April 5, 2006, forty-two days before his rescheduled execution date, invoking federal court jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331, Alley filed a complaint, subsequently amended, in the United States District Court for the Western District of Tennessee requesting injunctive relief in the form of access to certain evidence introduced in his criminal trial for purposes of DNA testing. (BIO App. 3) Alley sued only William R. Key, Criminal Court Clerk for the Thirtieth Judicial District of Tennessee, the physical custodian of the evidence at issue. However, the district court subsequently permitted William L. Gibbons to intervene as a defendant in his official capacity as District Attorney General for the Thirtieth Judicial District.[1]

The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), and, on April 20, 2006, the district court dismissed Alley's complaint for failure to state a claim upon which relief may be granted. (Pet. App. C) Alley appealed from the district court's judgment, and, on May 14, 2006, the Sixth Circuit affirmed, concluding that there exists no general constitutional right to post-judgment DNA

[1]Alley committed his offenses and was convicted in the Thirtieth Judicial District (*i.e.,* Shelby County) of the State of Tennessee. Respondent Gibbons, the District Attorney General of that district, prosecuted Alley and, thereafter, defended the State's judgment in state post-conviction proceedings.

testing. *Alley v. Key*, No. 06-5552, slip op. at 5. (Pet. App. A) The court denied Alley's petition for rehearing on May 16, 2006.

2. The Crime

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

Nineteen-year-old Suzanne Marie Collins, a lance corporal in the United States Marine Corps, was stationed at the Millington, Tennessee, Naval Air Station. At approximately 10:00 p.m. on the night of July 11, 1985, she left her barracks to go jogging on the base. Shortly before 6:00 a.m. the following morning, her body was found in a nearby park. She had multiple injuries to her skull consistent with blows from the rounded end of a screwdriver, bruises on her neck, consistent with strangulation, and bruises and abrasions over her entire body front and back. She had also suffered severe internal injuries and bleeding as the result of the insertion of a thirty-one-inch long,

[2]Alley's petition is replete with statements denominated "fact" that have no foundation in the state court record of Alley's criminal trial or post-conviction proceedings. For example, Alley's confession has never been challenged, nor found by any court, to have been involuntary or otherwise materially unreliable. To the contrary, the physical evidence introduced at trial corroborates his confession in all material respects. There is no evidentiary basis to support Alley's claim that the victim's time of death is inconsistent with the State's theory at trial and/or Alley's confession to police. Eyewitness descriptions of the perpetrator and the perpetrator's vehicle were subject to cross-examination at trial and fully evaluated by Alley's jury. Indeed, comity dictates that factual determinations made or implied in connection with a state criminal conviction be presumed correct in federal proceedings. *See, e.g.*, 28 U.S.C. § 2254(e)(1). Thus, even if Alley could articulate some constitutional basis establishing a right to post-conviction DNA testing, he should not be permitted to bolster his request by challenging the accuracy and/or reliability of the convicting evidence.

broken tree limb into her vagina, more than once and to a depth of twenty inches. While the cause of death was multiple injuries, the pathologist testified at trial that the victim was alive when the tree limb was inserted into her body.

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

Their responses initially allayed any suspicion that he was connected with a kidnapping, and they were allowed to go home. In the meantime, however, the two Marine witnesses had returned to headquarters and identified Alley's vehicle by sight and by sound as the one they had seen on the base in the vicinity of the victim's screams.

Collins's body was found shortly before 6:00 a.m. that morning, and Alley was promptly arrested by military police at his home. At the time of his arrest, Alley was laundering a pair of blue jean shorts that he had been wearing; the shorts later tested positive for human blood in 31 different areas. After his arrest, Alley gave a lengthy statement to investigators describing his activities the night before and admitting his role in the victim's murder. He accompanied officers over the route he had taken and to the location of the murder, identifying the tree from which the limb he used had been broken. Alley always insisted that he did not have sexual relations or attempt to have sexual relations with Collins at any time. Rather, he admitted taking off her clothes, dragging her by the feet to a tree, and penetrating her in the vagina with a tree limb he had broken off. A branch was protruding from Collins' vaginal area when her body was found. Blood stains on Alley's vehicle were consistent with the victim's blood type. Hair found on and in Alley's car were visibly consistent with the victim's hair.

Alley raised an insanity defense at trial, presenting evidence that he was diagnosed as suffering from a multiple personality disorder. One of Alley's experts testified that he had possibly two alternate personalities and that, if either of those personalities had been

in control at the time of the offense, he could neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of the law. He was unable to say, however, that such an alternate personality was in control at the time of the offense. At trial, the expert testified that, during hypnosis sessions designed to discover the nature of Alley's subsequently-claimed amnesia of the night in question, Alley gave inculpatory statements. Another of Alley's experts testified that, while he was of the opinion that petitioner suffered from a multiple personality disorder in July of 1985, he had no opinion as to whether an alternate personality was in control at the time of the offense. The State presented rebuttal expert testimony that Alley was neither insane nor suffered from a multiple personality disorder.

3. The Opinions Below

Alley's § 1983 complaint in federal district court, filed more than 20 years after his conviction, sought only injunctive relief in the form of access to state trial evidence for purposes of DNA testing.[3] On April 20, 2006, the district court dismissed the complaint for failure to state a claim upon which relief may be granted, concluding that:

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[3]Aside from the factual inaccuracies noted in fn. 2, *supra*, respondent further notes that Alley's current recitation of the evidence he seeks to have tested is different from that sought in his Amended Complaint in the district court. (Compare Petition, pp. 13-18, with BIO App. 9) Specifically, Alley made no request of the federal district court to test a broken fingernail (which is not part of the state court record and has never been shown to exist), rape kit samples, including vaginal and other swabs from the victim's body, or blood removed from Alley's car, none of which is in the possession of either respondent. Indeed, the chart attached as an appendix to Alley's petition, which purports to demonstrate various "DNA Testing Scenarios," was never presented to the district court for consideration in the first instance.

(1) Alley failed to demonstrate that the "life interest" he asserted to support his procedural due process claim "bestows upon him 'the post-conviction legal right to access or discover the evidence relating' to his conviction;" (2) there is "no substantive due process right of access to evidence to present claims in executive clemency proceedings or otherwise that could form the basis for an action under § 1983;" (3) *Brady* and the due process principle it vindicates provide Alley no "due process right to post-conviction release of evidence related to his conviction;" and (4) neither the Eighth nor Ninth Amendments require the "release of evidence to bring claims of innocence in clemency" or otherwise provide a basis for relief under § 1983. (Pet. App. C, pp. 20-30)

On appeal, the Sixth Circuit affirmed, finding that Alley was deprived of no substantive or procedural due process right to post-conviction DNA testing.[4] The court observed that state-imposed requirements for securing DNA analysis under Tennessee's Post-Conviction DNA Analysis Act do not themselves create any unconstitutional deprivation, and that the actions of defendant Key, a court clerk, in denying Alley access to state court evidence in accordance with state law did not "shock the conscience." *Alley v. Key*, No. 06-5552, slip op. at 3-4. (Pet. App. A) The court also rejected Alley's contention that *Brady* created a right to post-conviction DNA analysis under the

[4]Ironically, Alley faults the depth of the court of appeals' analysis in this case, charging that the decision was rendered without "any real analysis" and in a summary fashion. (Petition, p. 21) What he fails to convey, however, is that it was Alley's own timing in the filing of his § 1983 action — a mere 42 days before his scheduled execution — and subsequent request for expedited determination by the Sixth Circuit that placed the court in the untenable position of deciding this appeal in less than one week on the basis of simultaneous briefing.

circumstances presented, citing with approval the district court's observation that "it remains purely a matter of speculation whether the evidence [Alley] requests will tend to exculpate or otherwise prove favorable to him." Slip op. at 4. Finally, the court of appeals found no constitutional entitlement to post-conviction testing by virtue of the Eighth and Ninth Amendments, correctly observing that "Alley files his § 1983 action as a 'legally guilty' man." Slip op. at 5. After concluding that there exists no general constitutional right to post-judgment DNA testing, the court further observed that "[t]he compelling evidence of Alley's guilt — including his confession, his description to law enforcement authorities of his acts, and the eyewitness testimony against him — strongly suggest that he could never accurately be considered actually innocent of the crime."[5] Slip op. at 5.

ARGUMENT

I. TENNESSEE HAS ALREADY PROVIDED A JUDICIAL REMEDY FOR POST-CONVICTION CLAIMS OF INNOCENCE BASED ON DNA ANALYSIS.

Alley asserts that the issue of post-conviction DNA testing is a matter of national importance, citing to statistics maintained by Alley's co-counsel, the Innocence Project, of various exonerations based upon DNA testing. (Petition, pp. 23-24) In essence, Alley asks this Court to declare a constitutional right to "continually challenge a valid

[5]Significantly, Alley's appeal in the § 1983 action seeking DNA testing was decided by the same panel of judges who had already heard and decided his federal habeas corpus appeal, including, just one week earlier, an appeal from the district court's denial of a Rule 60(b) motion. *Alley v. Bell*, No. 05-6876 (6th Cir. May 9, 2006). The panel was thus well versed in the details of the crime and the evidence presented in the state criminal proceedings.

conviction based on whatever technological advances may have occurred since his conviction became final." *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002). But this Court has repeatedly declined to impose mechanisms for collateral attacks of state convictions. In *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1978), the Court made clear that States have "substantial discretion to develop and implement programs to aid prisoners seeking to secure post-conviction review." And, like many states,[6] Tennessee makes specific provision for state prisoners to obtain post-conviction DNA analysis that may provide potentially exculpatory results. The Post-Conviction DNA Analysis Act of 2001, codified at Tenn. Code Ann. §§ 40-30-301 *et seq.*, established the procedure in Tennessee for a person convicted of certain enumerated offenses, including first degree murder, to petition the state trial court for DNA analysis of any evidence in the possession or control of the prosecution, law enforcement, laboratory or court, that is related to the investigation and/or prosecution that resulted in the judgment of conviction. Tenn. Code Ann. § 40-30-303. As the lower courts observed, Alley himself

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[6]*See, e.g.,* Arkansas, A.C.A. § 16-112-202; California, Cal. Penal Code § 1405; Colorado, C.R.S.A. § 18-1-413; Connecticut, C.G.S.A. § 54-102kk; Delaware, 11 Del. Code § 4504; District of Columbia, DC ST § 22-4133; Florida, Fla. Stat. Ann. § 925.11; Georgia, Ga. Code Ann. § 5-5-41; Idaho, I.C. § 19-4902; Indiana, Ind. Code Ann. § 35-38-7-7; Kansas, K.S.A. § 21-2512; Louisiana, L.S.A. C.Cr.P. art. 926.1; Maine, 15 M.R.S.A. § 2138; Maryland, M.D. Code Crim. P. § 8-201; Minnesota, M.S.A. § 590-01; Montana, M.C.A. § 46-21-110; Nebraska, Neb. Rev. St. § 29-4122; New Hampshire, N.H. Rev. Stat. 651-D:2; New Jersey, N.J.S.A. § 2A: 84A-32a; New Mexico, N.M.S.A. 1978 § 31-1A-2; North Carolina, N.C.G.S.A. § 15A-269; North Dakota, N.D.C.C. 29-32.1-1 5; Ohio, R.C. § 2953.72; Pennsylvania, 42 Pa.C.S. § 9543.1; Rhode Island, R.I. Gen. Laws 1956 § 10-9.1-12; Texas, Tex. Code Crim. Proc. Ann. art. 64.03; Utah, U.C.A. 1953 § 78-35a-301; Virginia, Va. Code Ann. § 19.2 - 327.1; Washington, R.C.W.A. § 10.73.170; West Virginia, W.Va. Code § 15-2B-14; *Jenner v. Dooley*, 590 N.W.2d 463 (S.D. 1999) (South Dakota standard for post-conviction DNA analysis).

previously sought, and was denied, state post-conviction relief in the form of access to biological evidence for DNA testing under Tennessee's Post-Conviction DNA Analysis Act. (BIO App. 18)

In *Harvey v. Horan*, 278 F.3d 370, 377 (4th Cir. 2002), the Fourth Circuit observed that, to allow a state prisoner to proceed under § 1983 under a claim for post-conviction DNA analysis would "judicially preempt legislative initiatives in th[e] area [of post-conviction DNA testing]." Particularly where Tennessee has already provided Alley with a judicial avenue to obtain DNA analysis to demonstrate his alleged factual innocence, this Court should decline his request to fashion, virtually out of whole cloth, a constitutional right to post-conviction DNA analysis.

This Court recognized in *Herrera* that "[t]he guilt or innocence determination in state criminal trials is 'a decisive and portentous event,'" 506 U.S. at 401 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)), where "'[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." 506 U.S. at 401 (quoting *id.*). Here, even aside from the jury determination that Alley is guilty beyond any reasonable doubt, both the Tennessee trial court and Court of Criminal Appeals have concluded that, even if "potentially favorable" results were obtained through DNA analysis, it would not negate the remaining evidence, which "strongly identifies [Alley] as the perpetrator." *Id.*, slip op. at 11-14. Likewise, the Sixth Circuit in this case found

that "[t]he compelling evidence of Alley's guilt . . . strongly suggest[s] that he could never accurately be considered actually innocent of the crime." (Pet. App. A, p. 5) Few rulings would be more disruptive of our federal system than to provide a federal forum to re-examine the factual underpinnings of a state criminal conviction in order to undermine the "accuracy" of the jury's guilt determination.

II. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO POST-CONVICTION DNA ANALYSIS.

Alley filed his action in the district court under 42 U.S.C. § 1983. To state a successful § 1983 claim, a plaintiff must identify a right secured by the United States Constitution and demonstrate a deprivation of that right by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citation omitted). Alley posits four independent constitutional sources for a right to post-conviction DNA analysis: (1) the Eighth and Fourteenth Amendments under this Court's analysis in *Herrera v. Collins*, 506 U.S. 390 (1992); (2) procedural due process under the Fourteenth Amendment; (3) the right of access to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) a substantive due process right to "prove" his innocence. None provides any basis for the relief Alley seeks, let alone supports a grant of certiorari.

1. There is no Eighth Amendment right to post-conviction DNA analysis.

Although the Eighth Amendment prohibits cruel and unusual punishment, it does not govern the adjudication and determination of guilt or innocence. The criminal trial "is the paramount event for determining the guilt or innocence of the defendant." *Herrera*, 506 U.S. at 416. While the Court in *Herrera* assumed for the sake of argument that it may be "constitutionally intolerable" to execute an innocent person, *Herrera*, 506 U.S. at 419, a convicted felon stands before the court as "legally guilty." *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring).

The Court's opinion in *Herrera* thus reiterated a firmly entrenched principle in the area of federal habeas corpus:

> Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . This rule is grounded in the principle that federal habeas courts sit to ensure the individuals are not imprisoned in violation of the Constitution — not to correct errors of fact.

Herrera, 506 U.S. at 400 (citing *Townsend v. Sain,* 372 U.S. 293, 317 (1963)).

Alley argues that *Herrera* establishes a constitutional right to develop evidence for use in state clemency proceedings in support of a claim of factual innocence — in essence, a federal forum for pre-clemency discovery. But it would be anomalous to read *Herrera* as providing a discovery mechanism to do the very thing the decision specifically prohibits habeas courts from doing, *i.e.*, to "correct errors of fact" in state criminal proceedings. If, as this Court made clear in *Herrera*, the "[f]ederal courts are not forums

in which to relitigate state trials," 506 U.S. at 1, then surely they may not be used as a stepping stone for challenging the factual outcome of state criminal trials elsewhere — and certainly not, as Alley's argument suggests, as a virtual extension of the state executive clemency function. Moreover, given the overwhelming evidence of guilt, including Alley's own confession, corroborated by a mountain of physical evidence and the circumstances of the offense, the DNA results Alley seeks could never "prove" his factual innocence. Both the Sixth Circuit and the district court correctly determined that the Eighth Amendment does not require post-conviction access to evidence for DNA testing. (Pet. App. A, pp. 4-5; Pet. App. C, pp. 26-27) Because this Court's Eighth Amendment jurisprudence does not support, or even suggest, the existence of a constitutional right to pre-clemency discovery, certiorari is not warranted in this case.

2. Because Alley has no constitutional right to the evidence he requests for DNA testing or otherwise, he has no procedural due process right to such testing.

The balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), controls the level of procedural due process required when government action deprives an individual of life, liberty or property. Its analytical framework weighs the risk of erroneous deprivation under current procedures and the benefit of additional or substitute procedures against the Government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. The *Mathews* balancing test is relevant only to the extent that a private individual has a legally recognized liberty or

property interest. *Harvey I,* 278 F.3d at 388. The district court correctly concluded that Alley failed to "establish a legally recognized right to the evidence he requests" (Pet. App. C, p. 23) It follows, then, that no particular process is mandated by the Due Process Clause of the Constitution for the release of such evidence.

While a defendant charged with a capital crime is presumed innocent, "[o]nce he has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1992). The convicted felon is "legally guilty." *Id.* at 419 (O'Connor, J., concurring). At that point, he has been afforded all the procedural due process required prior to deprivation of his life by lawful state processes: "the Constitution offers unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J., concurring).

Thus, Alley's "life interest" cannot, as he insists, include the assumption that he is innocent. Instead, any "life interest" he retains is limited either to protection from summary execution, *Woodward*, 523 U.S. at 281 (Rehnquist, C.J., joined by three justices), or is at most, "minimal." *Id.* at 288 (O'Connor, J., concurring) (referring to judicial oversight of clemency hearings). *See also Connecticut Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (convicted felon forfeits most, if not all, of his substantive liberty interest in freedom from confinement).

There is simply no due process requirement "that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Herrera*,

506 U.S. at 399. And, even if such a right existed, the DNA analysis requested by Alley would not accomplish that end. As the state court correctly observed, even "favorable" results, *i.e.*, results that eliminate Alley as the source of biological evidence, would not demonstrate his innocence of murder. Under these circumstances, any "interest" Alley may have in DNA testing could never outweigh the State's "all but paramount" interest in the finality of its criminal judgment. *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). As this Court correctly observed, to permit constant attempts to circumvent a legally binding criminal conviction would "paralyze our system for enforcement of the criminal law." *Herrera*, 506 U.S. at 399.

When a convicted murderer's minimal life interest is weighed against the State's "all but paramount" interest in the finality of its criminal judgment and in "execut[ing] its moral judgment in [this] case," as well as the interest of the victims of violent crime to "move forward knowing the [State's] moral judgment will be carried out," *Calderon*, 523 U.S. at 556, the Fourteenth Amendment does not constitutionally mandate a procedural due process right to post-conviction DNA testing of evidence, particularly in view of the procedural safeguards already existing under state law.

Nor does Tennessee's Post-Conviction DNA Analysis Act create any federal constitutional interest that would trigger a due process analysis in this case.[7] The

[7]Neither Tennessee's Post-Conviction Act generally nor its DNA Analysis Act specifically are constitutionally mandated procedures. The State has no constitutional duty, as a matter of due process or otherwise, to provide post-conviction relief procedures. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). And this Court has made clear that "the Constitution has never been

requirements of procedural due process are triggered only by government action that deprives an individual of "life, liberty, or property," *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); Tenn. Const. art. I, § 8 (". . . no man shall be . . . deprived of his life, liberty or property, but by judgment of his peers or the law of the land"). Clearly, the criteria for obtaining DNA analysis under Tenn. Code Ann. § 40-30-301 *et seq*. do not operate to deprive Alley or anyone else of "life."

Therefore, a due process analysis would be warranted only if operation of the DNA Analysis Act terminated a legally cognizable "liberty" or "property" interest. *Roth*, 408 U.S. at 569. "[A] liberty interest created by state law is by definition circumscribed by the law creating it." *Montero v. Meyer*, 13 F.3d 1444, 1450 (10th Cir.), *cert. denied*, 513 U.S. 888 (1994). Thus, any "liberty" interest in DNA analysis is defined by the Tennessee statute that creates the right to obtain such analysis — § 40-30-301 *et seq.* — which clearly sets forth four criteria that must be met by any petitioner seeking to invoke its provisions. Alley possesses no liberty interest in obtaining DNA analysis where, as in this case, he cannot establish the statutory criteria for the testing.

The same analysis compels the conclusion that there is no "property interest" conferred by Tennessee law to obtain post-conviction DNA analysis without meeting the statutory criteria. Since no right to post-conviction DNA analysis exists outside of the confines of § 40-30-301 *et seq*., the State's denial of access to evidence for DNA testing

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thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure." *Smith v. Robbins*, 528 U.S. 259, 274 (2000) (citation omitted).

due to his failure to meet the statutory prerequisites cannot, by definition, affect any "property interest" for which he would be entitled to claim procedural due process protection. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (claim of entitlement to welfare benefits grounded in the statute defining eligibility to them).[8]

3. The right to exculpatory evidence under* Brady v. Maryland*, 373 U.S. 83 (1963), does not create a right to post conviction DNA testing.

Alley also misplaces his reliance on *Brady v. Maryland*, 373 U.S. 83 (1963), as the source of some constitutional entitlement to DNA testing. Under *Brady*, a prosecutor is required to turn over to the defense exculpatory evidence, that, if suppressed, would deprive the defendant of a fair trial. *See also United States v. Bagley,* 473 U.S. 667, 675-76 (1985). Here, Alley does not claim that he was denied access to material exculpatory evidence during his prosecution or that he did not receive a fair trial. *See also Harvey I*, 278 F.3d 385 (King, J., concurring). Moreover, *Brady* does not require post-conviction access to the evidence for DNA testing because it "remains purely a matter of speculation whether the evidence Plaintiff requests will tend to exculpate or otherwise prove favorable to him." (Pet. App. C, p. 27) Indeed, this Court recently reiterated that the principle supporting *Brady* was "the avoidance of an unfair trial to the accused." *United States v. Ruiz*, 536 U.S. 622, 632 (2002) (Thomas, J., concurring) (quoting *Brady*, 373

[8]Moreover, while Tennessee's DNA Act does not create a liberty interest and is not constitutionally mandated, to the extent that Alley avers he is entitled to post-conviction DNA testing to preserve his "life interest," the Act provides sufficient protection. *See, e.g. Wilkinson v. Austin*, 125 S.Ct. 2384, 2396 (2005).

U.S. at 87). That concern is not implicated in the circumstances presented here, since petitioner's direct appeal, post-conviction and federal habeas proceedings have long since concluded. The lower courts properly denied Alley's *Brady* claim, and certiorari is not warranted on this basis.

4. There is no substantive due process right to post-conviction DNA testing.

Alley further claims a substantive due process right to DNA testing, because the state's actions in refusing him access to the evidence are "shockingly arbitrary," especially where such evidence "could prove him absolutely innocent of the crime." (Petition, pp. 39-40) First, not a single court, state or federal, viewing Alley's contentions regarding the usefulness of proposed DNA testing in this case has found that any such analysis would undermine the overwhelming evidence identifying him as the perpetrator and supporting his murder conviction. Further, while it is true that substantive due process protects specific fundamental rights of individual liberty from state action which "shocks the conscience," *see Rochin v. California*, 342 U.S. 165 (1952), the respondent's actions in this case cannot accurately be characterized as either arbitrary or capricious, let alone shocking.

In dismissing Alley's complaint, the district court correctly found that the denial of access to evidence for post-conviction DNA analysis by respondent Key, a clerk of court, does not "shock the conscience." Since Key retains the evidence merely as a custodian, he wields no power over the evidence and could release it only pursuant to a

state court order. Indeed, his actions are in full accord with state law. Nor does it "shock the conscience" for respondent Gibbons, the prosecutor in Alley's criminal case, to oppose such access. Because Alley has no right, either within the confines of Tennessee's Post-Conviction DNA Analysis Act or under any provision of the federal constitution, to post-conviction DNA testing, it certainly is not arbitrary or capricious for Gibbons to oppose the recognition of a non-existent right. In essence, Alley argues that if DNA testing will "prove" he is innocent, denying him that opportunity "shocks the conscience." But Alley has already had a forum to address this claim. Aside from his criminal trial — recognized by this Court as the "decisive and portentous event" in the determination of guilt or innocence, *Herrera*, 506 U.S. at 401 — Alley availed himself of state post-conviction DNA proceedings. (Pet. App. C, pp. 3-4)

Nor does executive clemency create any substantive due process right to post-conviction testing. Death-sentenced inmates do not have a constitutional right to clemency proceedings. *Herrera*, 506 U.S. at 414; *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001), *Workman v. Summers*, 111 Fed.Appx. 369, 371 (6th Cir. 2004)(attached). Rather, clemency itself is a matter of grace, which merely serves to exempt an individual from otherwise lawful punishment. *Herrera*, 506 U.S. at 413. Moreover, clemency proceedings are not part of the judicial process. *Ohio Adult Parole Authority v. Woodwar*d, 523 U.S. 272, 284 (1998). The proceedings "would cease to be a matter of grace committed to the executive authority if it were constrained by" judicial

requirements. *Id.* The proceedings are rarely, if ever, appropriate for judicial review. *Id.* at 280. While Justice O'Connor has observed that "some minimal procedural safeguards apply to clemency proceedings," *id.* at 289, nothing in this Court's jurisprudence even remotely supports the existence of a constitutional right to access to evidence for DNA testing in order to buttress an application for clemency. Clemency proceedings "do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process." *Woodward,* 523 U.S. at 284. It is not the duty of the courts "to determine the quality of the evidence considered by the governor or his board." *Workman*, 245 F.3d at 853. Thus, the Sixth Circuit in *Workman* declined to consider an inmate's allegation that the State presented false testimony during the clemency proceeding or the other substantive merits of the proceeding. *Workman,* 245 F.3d at 852-53. Here, Alley does not allege that he has been denied access to clemency proceedings or that a state official has arbitrarily made the determination whether to grant clemency.

Moreover, this Court's habeas jurisprudence has consistently rejected the cognizability of a substantive actual innocence claim based on newly discovered evidence absent an independent constitutional violation occurring in the underlying state criminal proceeding. "Federal courts are not forums in which to relitigate state trials." *Herrera*, 506 U.S. at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). If, as *Herrera* reiterates, claims of innocence based on newly discovered evidence provide no

independent constitutional claim, then surely there exists no constitutional right to post-conviction "discovery" of evidence to demonstrate factual innocence.

III. THE FEDERAL DISTRICT COURT WAS WITHOUT AUTHORITY IN ANY EVENT TO DISPOSSESS THE STATE COURT OF PROPERTY OVER WHICH IT HAS CONTINUING JURISDICTION UNDER STATE LAW.

Aside from the district court's substantive analysis of Alley's constitutional claims, correct in all respects, the district court also lacked authority to grant the injunctive relief sought because state law had already vested in the state judiciary *in rem* jurisdiction over the evidence at issue. In his Amended Complaint, Alley requested that the federal court "order Defendants to immediately produce any and all evidence identified in paragraph 10 [of the Amended Complaint] so that [Alley], with counsel's supervision, can package and properly transfer such evidence to his DNA expert to allow DNA testing of all such evidence." (BIO App. 16) Alley alleged that the 25 items of evidence identified in his complaint are in the physical custody of the Clerk of the Criminal Court of the Thirtieth Judicial District of Tennessee; 11 of those items were specifically identified in the complaint as being State's trial exhibits. (BIO App. 9)

Under Tennessee law, a court clerk lacks independent authority to release and/or dispose of evidence in his possession as an officer of the court, such possession being subject to the trial court's orders. *State v. Cawood*, 134 S.W.3d 159, 163-64 (Tenn. 2004) (citing *Ray v. Tennessee*, No. M1999-00237-COA-R3-CV, 2000 WL 388718 (Tenn. App. Apr. 18, 2000) ("When a trial court clerk possesses property as an officer

of the trial court, the clerk's possession of such property is subject to the trial court's orders.") (Court clerk is "the mere hand of the court; his possession is the possession of the court, and to interfere therewith is to invade the jurisdiction of the court itself."). Alley's complaint thus seeks federal injunctive relief effectively dispossessing the state criminal court of property that is *in custodia legis*[9] and, under state law, subject to the orders of the court having jurisdiction of Alley's criminal offense.

Where property is in the custody of a court of competent jurisdiction, another court of concurrent jurisdiction may not deprive it of the right to deal with such property or interfere with its possession. The rule against the concurrent exercise of *in rem* or quasi *in rem* jurisdiction (*i.e.*, where control of the *res* is essential to the court's judgment) applies even as between federal and state courts and, particularly in that context, is necessary "to avoid unseemly and disastrous conflicts in the administration of our dual system . . . and to protect the judicial processes of the court first assuming jurisdiction." *See Penn Gen. Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935).[10]

Moreover, it is of no import that proceedings in Alley's original criminal prosecution have concluded. Where, as here, state law provides that continuing possession of property is "subject to the trial court's orders," that assertion of jurisdiction

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[9]"In the custody of the law." *Black's Law Dictionary*, 346 (5th Ed. 1979).

[10]Although § 1983 actions are generally *in personam* actions, the sole relief requested in this case — injunctive relief in the form of possession of state court evidence — certainly renders the action quasi *in rem* for purposes of the rule against concurrent jurisdiction of the *res*.

is sufficient to vest in the state judiciary *in rem* jurisdiction over the property at issue. *See, e.g., United States v. $506,231*, 125 S.3d 442 (7th Cir. 1997); *Scarabin v. DEA*, 966 F.2d 989 (5th Cir. 1992) (state law granted exclusive jurisdiction over the res where statute provided that seized property "shall be retained under the direction of the judge," and, when no longer needed, "shall be disposed of according to law, under the direction of the judge"); *United States v. One 1979 C-20 Van*, 924 F.2d 120, 122 (7th Cir. 1991) (federal jurisdiction over seized property barred where state law did not allow state officials to transfer property without judicial order); *Seizure of Approximately 28 Grams of Marijuana*, 278 F. Supp. 2d 1097, 1102-03 (N.D. Cal. 2003) (additional citations included).

Tennessee law is clear that state and/or local officials in possession of property used as evidence in a criminal prosecution hold such property for the court itself and are "subject to the trial court's orders." *Ray v. Tennessee, supra*, at 4. Moreover, a state trial court's authority to determine the custody and control of evidence held in the court clerk's office includes "the right to exercise control over physical evidence after a case has been concluded." *Ray v. State*, 984 S.W.2d 236, 238 n.4 (Tenn. Crim. App. 1997). Because the Shelby County Criminal Court is vested with *in rem* jurisdiction over the property at issue, the district court was without authority to grant the injunctive relief requested in this case, even if Alley could establish some constitutional basis for such relief.

IV. EVEN IF ALLEY HAD ASSERTED A COGNIZABLE CONSTITUTIONAL CLAIM, HIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS APPLICABLE TO FEDERAL CIVIL RIGHTS ACTIONS UNDER 42 U.S.C. § 1983.

Alley's certiorari petition should be denied for yet another reason — even if somehow cognizable under § 1983, his claim for relief is time-barred. The applicable statute of limitations in a civil rights action is determined by state law, but federal law governs when the statute begins to run. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1985). In Tennessee, civil rights actions must be brought within one year of the alleged constitutional violation. Tenn. Code Ann. § 28-3-104(a)(3); *Holmes v. Donovan*, 984 F.2d 732, 738 n.11 (6th Cir. 1993).[11] The one-year period begins to run when the plaintiff knew or "through the exercise of reasonable diligence should have known of the injury that forms the basis of his action." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003).

As pled, the injury Alley allegedly seeks to remedy in the instant action is his denial of access to evidence for the purpose of conducting DNA testing.[12] (BIO App. 16)

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[11]The Sixth Circuit has held that the one-year statute applies regardless whether the relief sought is monetary, punitive, or injunctive. *Cox v. Shelby County Community College,* 48 Fed. Apx. 500, 507 (6th Cir. 2000).

[12]Of course, Alley's present claim is merely a step toward his ultimate complaint that the Eighth Amendment prohibits the execution of a factually innocent person, a claim that would only be cognizable for a state prisoner, such as Alley, in a federal habeas corpus action under 28 U.S.C. § 2254. For purposes of this appeal, however, respondent assumes that Alley's claim, as pled, stopping just short of a "direct" challenge to his state conviction, is sufficient invoke the jurisdiction of the district court under § 1983 and would not constitute a prohibited successive habeas application under 28 U.S.C. § 2244.

But he was obviously long aware of the existence of the evidence (both the physical evidence and the biological evidence removed therefrom), since they were made exhibits to his murder trial nearly 20 years ago. Moreover, Alley knew he had a state post-conviction remedy to obtain DNA analysis of biological evidence in 2001, upon passage of Tennessee's Post-Conviction DNA Analysis Act. Alley knew of his "injury," *i.e.*, the State's denial of the evidence for his DNA testing, by May 24, 2004.[13] *See Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). (BIO App. 18) At the very latest, then, Alley knew, or certainly "should have known," in May 2004 that the state court's decision was applicable to all evidence requested for DNA analysis at that time. And, to the extent he now seeks additional items, particularly items in the custody of respondent Key, Alley was on notice, in view of the 2004 decision of the Court of Criminal Appeals, that the state courts would not likely view favorably additional requests for testing. In any event, he cannot now avoid the statute of limitations by claiming that respondent Key only recently denied him access to items in the possession of the state court.

At the very latest, then, Alley had until May 26, 2005, to file a § 1983 claim. He did not file the instant claim until April 5, 2006, nearly one year after the statute of limitations had expired. Alley cannot contend that the statute only began to run after

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[13]Indeed, respondent Gibbons specifically opposed Alley's request for access to the evidence for DNA testing on May 5, 2004. Respondent Key has never been empowered, independent of state court authorization, to release the evidence, a fact long established under Tennessee law. *See* Argument III, *supra*.

he requested the evidence from the Criminal Court Clerk. Alley knew or should have known that the clerk, as custodian and arm of the court, would have no alternative but to deny access absent a court order. Nor can he contend that, because the constitutional contours of his right are not defined, he did not know when the statute would begin to run. That argument confirms only that there is no such right. Alley's own pleading establishes that the "right" he seeks to vindicate is a right of access to the evidence, and the asserted "violation" of that "right" would have occurred, at the latest, when the state court denied access in May 2004. Alley's claims are thus time-barred.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been forwarded by First-Class U.S. mail, postage prepaid, on this the 26th day of May, 2006, to:

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