IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS
DIVISION 2

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

No. 85-05085-87

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR DNA TESTING

In its Response to Petitioner's Petition for DNA Testing, the state offers three basic arguments against testing. First, it argues 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. Second, the state claims that Mr. Alley cannot prove that "the evidence is still in existence." Id. at 15-17. Finally, the state argues that Mr. Alley makes his application not for the purpose of delay rather than proving innocence. Id. at 17. For the reasons explained in detail, none of these arguments have merit.

While the state does not contest that this Court must assume exculpatory results when analyzing Mr. Alley's petition, it fails to deal with the fundamental reality that the Board of Probation and Parole clearly understood when it recommended testing – that redundant results could be obtained from the different pieces of evidence handled by the perpetrator, and recovered from the crime scene, that could exclude Mr. Alley and point towards another specific individual. Experience has shown, and the state does not deny, that DNA can demonstrate to a moral certainty that

confessions are false, eyewitnesses mistaken, and insanity defenses irrelevant.

DNA expert Gary C. Harmor of the Serological Research Institute has confirmed that there is evidence in the possession of the Criminal Court Clerk which can be subjected to DNA analysis, and that this analysis can identify the actual perpetrator of the offenses for which Petitioner has been convicted. Given exculpatory, redundant results on crime scene evidence, there is more than a reasonable probability that Sedley Alley would not have been prosecuted, convicted, or sentenced to death. Mr. Alley seeks only to prove his innocence and to ensure that justice is done; he has been diligently pursuing DNA testing since 2004 when previously suppressed material concerning the victim's time of death revealed to counsel that Sedley Alley is innocent.

I.

THE STATE IS FUNDAMENTALLY WRONG WHEN IT CLAIMS THAT SEDLEY ALLEY CANNOT ESTABLISH HIS INNOCENCE BECAUSE OF HIS STATEMENT TO THE POLICE AND/OR A PRIOR ATTEMPT TO OBTAIN DNA ANALYSIS OF DIFFERENT EVIDENCE

The state's argument that Mr. Alley cannot meet the reasonable probability standard is predicated on a series assumptions including: (1) that DNA testing cannot overcome confessions, eyewitness testimony, or an insanity defense; (2) that Mr. Alley's current request for DNA testing is not substantially different from his previous request, which was denied; and (3) that this Court can only weigh exculpatory DNA test results against Mr. Alley's defense at trial and the evidence introduced there. Each of these assumptions is demonstrably false.

With regards to the power of DNA to overcome confessions, the Court of Criminal Appeals explicitly recognized in Shuttle v. State, 2004 Tenn.Crim.App.Lexis 80, that it is possible for DNA to prove that certain incriminating statements were falsely given. Id., p. * 14 (petitioner entitled to DNA testing where petitioner contended "he was wrongly convicted at trial where he gave false

incriminating testimony," reversing lower's courts ruling denying defendant's petition for post-conviction DNA testing based upon his testimony at trial and at a prior post-conviction relief hearing in which he admitted killing the victim). Moreover, the state makes no attempt to deny that DNA testing has proven numerous confessions false in the past. See Petition at 26-28 and nn. 15 & 16. Similarly, DNA testing has shown that innocent people take guilty pleas or otherwise pursue seemingly inappropriate trial strategies. See e.g., Petition at 27, n. 16 (citing case of Chris Ochoa and Richard Danzinger).

In fact, just recently, Douglas Warney was exonerated based on DNA tests where the state used a false confession to convict him. See Exhibit A (*Man Freed After DNA Clears Him In '96 Killing Of Activist*). Significantly, Warney's "confession" is much like the "confession" used to convict Sedley Alley: Once alone with the suspect, a detective claimed that Warney confessed, giving details of the offense. This is similar to circumstances here. See Trial Tr. 696 (Anthony Belovich claimed that once Alley was alone with him, Alley confessed). Just as Warney's confession was proven false through DNA testing, Alley's statement can objectively be shown to be false through DNA analysis. This is especially true, where Professor Richard Leo, Ph.D., has established that Sedley Alley's "confession" in this case bears the hallmarks of a false confession. See Exhibit DD & p. 17, *infra*.

The mere fact that a defendant may have pursued a trial defense based on diminished capacity or insanity does not mean that DNA testing cannot prove innocence or show to a reasonable probability that a prosecution would not have been undertaken. See Tenn. Code Ann. §40-30-304(1). In this context, it is clear that the state's assertion that Mr. Alley cannot use DNA test results to support a different theory than the one he relied on a trial runs counter to the plain meaning of the

DNA statute, and the real world experience of DNA exonerations. In fact, Frank Lee Smith was actually innocent and exonerated through DNA tests, even though his trial attorneys defended him by claiming insanity. See Case Profiles: www.innocenceproject.org. The fact that trial attorneys wrongly assumed a defendant's guilt and used an insanity defense doesn't mean that the defendant is, in fact, guilty.

The state suggests that the prior ruling of the Court of Criminal Appeals and federal district court regarding Mr. Alley's request for testing should bar relief. Response at 14-15. However, the state fails to even acknowledge that Mr. Alley requested testing on entirely different items in his last request to this Court. See Petition at 2-3 (specifying differences between prior request and current request). Moreover, as more fully explained *infra*, the different items of evidence at issue in this petition contain significant biological evidence which can indeed identify the perpetrator. Under Tennessee law none of the evidence at issue in this case was "previously subjected to DNA analysis" and testing of this evidence "could resolve an issues not resolved by previous analysis." Tenn. Code Ann. §40-30-304(3). -305(3). See pp. 6-9, *infra* (discussing items of evidence at issue and the findings of DNA expert Gary C. Harmor concerning the existence of biological evidence on all such items). This is a legal proceeding which is independent from any prior rulings and must be considered on its own merits.

Ultimately, the state's general denials of the value of DNA testing in this case are belied by a careful, evidence-item by evidence-item analysis of the potentials of DNA testing. It was this careful analysis that the Board of Probation and Parole understood when it recommended testing. This Court should recognize that the prior adjudication does not bar relief here, because we are now talking about different pieces of evidence which clearly contain biological samples which are

relevant to the identity of the perpetrator, and which, under Tennessee law, have never been subjected to DNA analysis.[1]

II.

UNDER TENNESSEE LAW, SEDLEY ALLEY ESTABLISHES THE EXISTENCE OF BIOLOGICAL SAMPLES WHICH HAVE NEVER BEEN SUBJECTED TO DNA ANALYSIS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT HE WOULD NOT HAVE BEEN PROSECUTED, CONVICTED, OR SENTENCED TO DEATH

Sedley Alley is entitled to DNA analysis under Tennessee law, because he establishes the existence of samples which have never been tested, and presumed exculpatory results from those DNA tests establish a reasonable probability that he never would have been prosecuted or convicted (Tenn. Code Ann. §40-30-304), or sentenced to death (Tenn. Code Ann. §40-30-305) had such exculpatory DNA tests existed at the time of trial.[2]

A.

Sedley Alley Establishes The Existence Of Significant Biological Samples Which Can Establish His Innocence

Under Tenn. Code Ann. §40-30-304(2) and §40-30-305(2), DNA testing can (or may) be

---

[1] Of course, the rulings in federal court are of absolutely no significance here. Plainly, Mr. Alley was denied testing in that forum because of the district court's conclusion that there exists no federal right to testing. See e.g., Alley v. Key, 2006 U.S.Dist.Lexis 29925 (W.D.Tenn. 2006). The federal courts also made a serious error in trying to claim that Sedley Alley would not be innocent. In reaching that conclusion, the Sixth Circuit relied on Alley's statement to the police as well as eyewitness identification. But, as shown *supra*, this case involves a false confession (See Exhibit DD, Affidavit of Dr. Richard Leo, Ph.D.), and the "eyewitness identification" of the abductor in fact excludes Alley as the perpetrator: The abductor was described at trial as 5'8", medium build, dark complexion (Trial Tr. 150: Scott Lancaster), while Alley was 6'4", thin build, and a light complexion. See p. 18, *infra*; Compare Exhibits GG, HH, II (Alley not the abductor described by eyewitnesses).

[2] In addition to attached Exhibits A-OO, Petitioner is also providing a CD containing a powerpoint presentation which illustrates the evidence available for redundant DNA testing and how that evidence can exonerate Sedley Alley in this case. Additionally, examples of similar DNA exonerations are provided.

ordered if evidence "is still in existence" and can be subjected to DNA analysis. As Petitioner will fully establish at this Court's scheduled May 30, 2006 hearing, Petitioner easily meets this standard. Indeed, on May 22, 2006, defense DNA expert Gary C. Harmor, of the Serological Research Institute in Richmond, California, conducted a preliminary evaluation of evidence in the possession of the Criminal Court Clerk.

As a result of that preliminary evaluation, Mr. Harmor has identified numerous actual or potential biological samples in this case which exist, which have never been DNA tested, and which now can be subjected to DNA testing to identify the perpetrator of the offenses for which Sedley Alley has been convicted.[3]

Nevertheless, Mr. Harmor has identified, and would testify about, the existence of the following biological samples which are now in the possession of the Criminal Court Clerk, and all of which can be subjected to DNA analysis:[4]

(1) *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 Exhibit B. The shirt also contains a possible bloodstain on the back, as well as perspiration. Exhibit C. All of these stains can likewise be subjected to DNA analysis.

---

[3] Under the circumstances, Mr. Harmor has not conducted any actual laboratory analysis: That must await actual transfer of the evidence to a lab.

[4] In its response, the state misstates the evidence at issue here, only mentioning the stick and the red underwear at the crime scene, as well as blood samples, and a fingernail. As clearly demonstrated in this section, the actual pieces of evidence currently at issue are the victim's t-shirt, the stick, the paper wrapping from the stick, fluid-stained grass, the victim's underwear, the victim's bra, the victim's jogging shorts, the red underwear, the victim's shoes, a sock, exercise belt, beer bottles and styrofoam cups.

(2) *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 Exhibit D (collective exhibit: hairs identified). There may be semen on the stick, but the existence of semen can only be specifically determined under laboratory conditions.[5]

(3) *Paper Wrapped Around Stick*: The stick was wrapped in paper. Exhibit E. 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 Exhibit F (fluid mixture stains from inside paper). These are critical pieces of biological evidence which can be subjected to STR DNA analysis to identify the actual perpetrator.

(4) *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 Exhibit G (collective exhibit). DNA testing of the grass samples can identify the donor of any of the biological samples contained on the grass.

(5) *Victim's Underwear*: The crotch of the victim's underwear is stained from biological material which can be subjected to DNA analysis. See Exhibit H.

(6) *Victim's Bra*: On a portion of one cup of the bra, there is a biological stain. See Exhibit I. This is highly significant in identifying the perpetrator, as the victim sustained

[5] The state's contentions about contamination of the stick are frivolous. 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. If the District Attorney wishes to claim otherwise, obviously a hearing on the matter would be required.

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 conducted on the bra.

(7) *Victim's Jogging Shorts*: The victim's jogging shorts contain a possible blood stain which can also be subjected to DNA testing. Exhibit J.

(8) *Red Underwear*: A pair of red underwear was found at the scene near the body. Exhibit K (crime scene photo). 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 Exhibit L (red underwear). The state is disingenuous to now claim in its response that the red underwear had nothing to do with the crime. That's completely contrary to what the District Attorney's Office argued at trial, and this new assertion is undermined by the location of the underwear at the crime scene. See Exhibit K. The state is estopped from making its new, contradictory argument to this Court.

(9) *Victim's Left Shoe*: There is a possible blood spot on the front right part of the shoe (Exhibit M), and there is also a hair on the sole of the shoe which appears to have a root on it (Exhibit N). Both such items can be DNA tested to identify the source of the blood and the hair. The existence of blood is highly significant, as the victim fought her attacker, raising the clear possibility that it is the perpetrator's blood which is on the shoe.

(10) *Victim's Right Shoe*: There is also a possible blood spot on this shoe as well (Exhibit O), not to mention three apparent stains on the sole from dried fluid (Exhibit P), as

well as a possible hair stuck to the shoelace. DNA testing could establish that the blood, fluid on the sole, and the hair came from the perpetrator.

(11) *Victim's Sock*: The sock clearly contains an apparent blood stain (Exhibit Q) and at least one hair stuck to the heel of the sock and another near the toe area (Exhibit R: collective exhibit) and other possible biological material contained in various stains on the sock.

(12) *Exercise Belt*: The victim's exercise belt contains biological stains (Exhibit S), as well as at least two different hairs, one on the velcro, and another near the band of the belt.

(13) Numerous beer bottles found close to the body were opened and the contents drunk. See Exhibit T (collective exhibit). All such bottles can be swabbed to obtain skin cell and saliva DNA from the person(s) who drank from such bottles.

(14) Also, three (3) styrofoam cups were also found close to the body. See Exhibit U (collective exhibit); Exhibit V (crime scene diagram). As with the beer bottles, all such items can be swabbed, and any biological residue tested to identify the person(s) who drank from such cups.

All told, therefore, inspection of the evidence by Gary Harmor establishes the clear existence of numerous biological samples which can be subjected to DNA analysis. Those samples include, for example: blood; blood mixtures; mucous, semen; saliva; hairs. Because the proof conclusively establishes the existence of such evidence which, according to Mr. Harmor, can be tested using DNA analysis, Petitioner clearly meets his burden under Tenn. Code Ann. §§40-30-304(2) and/or -305(2).

Petitioner has also sought depositions to identify the location of other evidence which is

relevant to this case, including swabs, a fingernail, and other biological evidence. See Exhibit W (Motion For Depositions). While this Court can clearly order the testing of all evidence identified in paragraphs (1) through (14), *supra*, this Court should properly order discovery in order to enable Petitioner to locate evidence once in the possession of the University of Tennessee Toxicology Laboratory. Concerning that particular evidence, discovery is necessary for Petitioner to meet his burden under Tenn. Code Ann. §§40-30-304(2) and/or -305(2). While the state merely asserts that such evidence does not exist, the Court has before it absolutely no proof on this factual matter. The state's assertions are not evidence and simply cannot be credited. Rather, to resolve the factual issue of the existence of the swabs, etc., this Court should order discovery and afterwards conduct an evidentiary hearing on the existence of that additional evidence.[6]

B.

There Is A Reasonable Probability That Sedley Alley Would Not Have Been Prosecuted, Convicted, Or Sentenced To Death Based On DNA Tests Showing That Semen, Blood, Saliva, Skin Cells, Hair, And Other Bodily Fluids Found On Clothing, The Stick, And Other Evidence At The Crime Scene Was Deposited By The Victim's Boyfriend Or Someone Else

Given the existence of this substantial physical evidence which can be subjected to DNA analysis, the remaining question is whether there is a reasonable probability that Sedley Alley would not have been prosecuted or convicted (Tenn. Code Ann. §40-30-304(1)) or sentenced to death (Tenn. Code Ann. §40-30-305(1)) had it been known that the blood, saliva, semen, skin cells, and other bodily substances contained on the shirt, stick, stick wrapper, bra, underwear, grass under the victim, shoes, shorts, bottles and cups came not from Alley but from the victim's boyfriend or

[6] In fact, in numerous cases, relevant biological evidence has been recovered and tested, even after state agents claimed that it didn't exist. See Affidavit of Vanessa Potkin attached as Exhibit OO.

someone else. The answer to that is straightforward: Sedley Alley would never have been prosecuted, convicted or sentenced to death. Indeed, in many other cases, when DNA evidence points to another person, the innocent have been exonerated time and again.

1.

This Court Must Presume That All Biological Evidence From These Numerous Items Comes From Someone Other Than Sedley Alley And That Redundant DNA Findings From These Items Shows That Such Other Person Killed The Victim

In evaluating a request for post-conviction DNA testing under the statute, and in determining whether testing would create a reasonable probability that the defendant would not have been prosecuted or convicted, the court must presume favorable DNA test results. In cases, such as Mr. Alley's, where there are a number of items of evidence, favorable results necessarily include redundant results– results which show the same genetic profile on a number of items of crime scene evidence. In the context of post-conviction DNA investigations, and for the purpose of determining the "reasonable probability" requirement, the court necessarily must consider the cumulative effect of the test results of the evidence, not simply item by item, and must consider the probative value of redundant results. Kyles v. Whitley, 514 U.S. 419 (1995)(holding for purposes of *Brady*, the "cumulative effect of all suppressed evidence favorable to the defendant" must be considered "rather than considering each item of evidence individually).

As discussed in great detail in Mr. Alley's petition, 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. Certainly, such results would create a reasonable probability that Mr. Alley would not have been prosecuted or convicted. See Laura Mansnerus, Citing DNA, Court

Annuls Murder Conviction from 1989, N.Y. Times, July 30, 2005 at 2 (The DNA also showed that the sperm in the victim's mouth came from an unknown man, the same man whose sperm was also in the victim's vagina and whose DNA was found underneath the victim's nails. Based on the results, Peterson's conviction was vacated); See also 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 the 1981 abduction, rape and murder after DNA testing showed that Yarris's DNA did not match semen found on the victim's underwear, which was consistent with DNA from skin cells found under her fingernails and in gloves believed to have been worn by the killer).

Proof that Sedley Alley would not have been prosecuted or convicted becomes clear when one considers the stains and evidence which he seeks to test. There is a biological stain on the front of the victim's shirt. The victim was bruised on the upper breast and there is evidence on her bra. There is blood and hair and possibly other substances on the stick. There is a blood-fluid mixture in the wrapping from the stick. There are biological stains in the victim's underwear and sock, evidence on her shoes (including possible bloodstains), and fluid from the body which drained onto the grass.

As noted *supra*, this Court is required to presume that all such evidence comes not from Sedley Alley but from someone else. Shuttle v. State, 2004 Tenn.Crim.App.Lexis 80. One easily sees that Sedley Alley would never have been prosecuted or convicted if the semen and blood on the stick came from the boyfriend (or some other person); the stain in the wrapping from the stick came from the boyfriend (or that same other person) as well; semen from that same person is found on the underwear; and that matches the DNA found from saliva or semen found on the victim's shirt; and matches blood on the victim's shoes and socks, stains on the bra, and/or stains on the red underwear.

Obviously, if all that evidence comes from the same person, we have identified the killer. Under *Shuttle*, at this point in the proceedings, that person is not Sedley Alley. Sedley Alley thus easily makes the "reasonable probability" showing required under Tennessee law, and he is entitled to testing.

In this regard, it is worthwhile noting the case of Ray Krone from Arizona, who was sentenced to death. There, as here, the victim received an injury to the breast from a what the prosecution argued was a bite. Ultimately, biological evidence from t saliva and blood, including from the victim's shirt, was subjected to DNA testing. DNA testing showed that saliva and blood found was inflicted not by Krone, but by another individual whose DNA profile was contained in a database, and who lived nearby the victim. Krone was exonerated. See *Ex-Inmate Relishes New Life After Death Row*, Salt Lake Tribune, April 22, 2006. So, too, Sedley Alley would be exonerated by exculpatory DNA tests, exactly as in *Krone*.

To reiterate: Where blood, semen, saliva, skin cells and other biological evidence from the same man – not Sedley Alley – can be found on the victim's shirt, underwear, shorts, bra, shoes, sock; the stick and its wrapper; the red underwear; and styrofoam cups and beer bottles, Sedley Alley meets the reasonable probability standard under Tennessee law. He is therefore entitled to the testing he has requested.

2.
In Applying The Reasonable Probability Standard,
This Court Must Assess "All The Available Evidence"

It is also significant that, when evaluating whether a DNA petitioner establishes a reasonable probability that he would not have been prosecuted or convicted (Tenn. Code Ann. §40-30-304(1)), or would have received a more favorable verdict with DNA results (Tenn. Code Ann. §40-30-

105(1)), this Court must consider "all the evidence" related to the petitioner's guilt.

As the Court of Criminal Appeals has explained: "[T]he post-conviction court must consider *all the available evidence*," which includes, but is not limited to "evidence presented at trial and any stipulations of fact made by either party." Alley v. State, 2004 Tenn.Crim.App.Lexis 471, p. *7 (emphasis supplied). In fact, the state here recognizes as much. See State's Response, p. 12. The Court of Criminal Appeals has done so as well, having considered evidence outside the trial record to determine whether DNA testing is required under the Tennessee statute. See e.g., Shuttle v. State, 2004 Tenn.Crim.App.Lexis 80 (DNA testing ordered based on petitioner's statements to trial counsel).

In *Shuttle*, the defendant sought DNA testing of blood found on his clothing and material from underneath the murder victim's nails. While the defendant maintained his innocence initially to counsel, at trial he testified that he killed the victim. In granting DNA testing, the Court of Criminal Appeals specifically considered evidence outside of the trial record:

> In summary, for purposes of the Act, we must assume that DNA testing will reveal exculpatory evidence; namely, that the blood underneath the victim's fingernails and the blood on the petitioner's jeans was not the blood of either the victim or the petitioner. In the event DNA testing reveals such findings, the test results would be inconsistent with the state's theory at trial, inconsistent with the petitioner's trial testimony, consistent with the petitioner's first statement to his trial counsel, and consistent with the petitioner's latest testimony. 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. *See Tenn. Code Ann. § 40-30-304(1)* (2003).
>
> In the recent case of *Carl E. Saine v. State, No. W2002-03006-CCA-R3-PC, 2003 Tenn. Crim. App. LEXIS 1135, at *6 (Tenn. Crim. App. Dec. 15, 2003)*, a petitioner convicted of assault and rape requested spermatozoa discovered on the victim's torn panties be submitted for DNA testing. The petitioner argued that although [*16] he assaulted the victim, he left the victim while she was still unconscious, and a third party could have then entered the room and committed the rape. *2003 Tenn. Crim.*

*App. LEXIS 1135 at *10.* The lower court denied DNA testing finding that despite any favorable DNA evidence, the petitioner would have still been prosecuted and convicted. *Id.*; *see Tenn. Code Ann. § 40-30-304(1)* (2003). On appeal, a panel of this court upheld the lower court's denial based upon the fact that the victim identified the petitioner as her rapist; she gave detailed testimony regarding the rape; and other evidence corroborated her testimony regarding the rape. *Carl E. Saine, 2003 Tenn. Crim. App. LEXIS 1135, at **10-11.* This court further noted that no evidence was presented at trial that the victim wore the panties containing spermatozoa at any time during or after the rape, and, therefore, **the evidence was not a primary factor** in proving the petitioner's guilt. *2003 Tenn. Crim. App. LEXIS 1135 at **11-12.*

However, *Carl E. Saine* is distinguishable from the case at bar. Unlike the petitioner in Carl E. Saine who admitted to assaulting the victim but denied raping her, the petitioner in the case [*17] at bar now denies ever harming the victim. Furthermore, while the petitioner in Carl E. Saine theorized that a third party could have possibly raped the victim after he assaulted her and left her, the petitioner in the present case gave a detailed explanation of the events, which he initially described to his trial counsel. Finally, while the evidence to be tested in Carl E. Saine could not be directly linked to the rape, the record in the present case indicates the evidence 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. Accordingly, we reverse the judgment of the post-conviction court and remand for DNA testing.

Id. at 15-17.

And indeed, this only makes sense, especially where this Court is required to determine whether, in the first place, the petitioner would have been prosecuted in light of favorable DNA evidence. See Tenn. Code Ann. §40-30-304(1). The decision to prosecute requires an analysis of *all* evidence, not just evidence which could (or was) used at trial. Thus, it is clear that a petitioner would not be prosecuted where DNA evidence is exculpatory and other remaining evidence indicates that he is, in fact, innocent of a charge. That calculation can only be made through assessment of all the extant evidence of the petitioner's guilt or innocence. Compare Schlup v. Delo, 513 U.S. 298,

331-332 (1995)(when assessing whether a person is actually innocent, reviewing court must consider new evidence of innocence in light of evidence produced at trial: court cannot focus merely on proof of guilt established at trial).[7]

Here, there is clear evidence that Sedley Alley would never have been prosecuted, convicted, and/or sentenced to death in light of all the evidence – especially in light of presumed exculpatory DNA proof showing that someone else's blood, semen, and saliva were found on the victim or the items sought to be tested.

For example, what was learned for the first time in 2004 and 2005 was that, at the time of trial, authorities knew that the victim was killed during the early morning hours the next day: She died at 3:30 a.m. on July 12, 1985. See Exhibit X: 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"); Exhibit Y: 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 means 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.

---

[7] For this reason, the state is incorrect in claiming that this Court should only look at exculpatory DNA evidence to evaluate the reliability of the "outcome of the prosecution." Response, p. 12. Further, any failure of this Court to fully consider evidence of third-party guilt and/or Sedley Alley's actual innocence would violate due process of law and fundamental fairness under the Fourteenth Amendment. See Holmes v. South Carolina, 547 U.S. ___ (2006)(when assessing a party's innocence, state must consider evidence presented by the petitioner which demonstrates that someone else committed the offense for which he has been charged).

See Exhibit Z: 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 (Exhibit AA: Timeline), Sedley Alley simply did not commit the offenses for which he has been convicted. See also Exhibit BB (Report of Dr. Walter Hofman, M.D.)(victim died quickly after sustaining injuries).

Moreover, additional evidence also points to victim's boyfriend – not Sedley Alley – as the killer. And indeed, 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 be with her fiancee in California. See Exhibit CC (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 proof:

(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 Exhibit DD: Affidavit of Dr. Richard Leo, Ph.D.; See State v. Alley, 776 S.W.2d 506, 509 n. 1 (Tenn. 1989)(statement introduced against Alley did not comport with the facts).[1] A taped statement from Alley was presented to the jury, but it was tampered with: More than half of it was mysteriously missing. See Exhibit EE (Affidavit of Janet Santana); Compare Exhibit FF (interrogation log showing actual time of interrogation, which was significantly longer than

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

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 Exhibit GG: Statement of Scott Lancaster (describing abductor); Compare Exhibit HH: Booking photograph of Sedley Alley; and Exhibit II: 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 Exhibit CC: Affidavit of April Higuera (John Borup closely matches description of abductor, drove Dodge Aspen and was with victim the night she was abducted); Exhibit JJ (Abductor's automobile initially described as a brown over brown station wagon); Exhibit KK (Dodge Aspen)

(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 Exhibit LL: Report of Peter McDonald (Tire tracks at abduction scene did not come from Alley's vehicle); Exhibit MM: Report concerning shoe prints.

(5) Hairs and fingerprints found on items near the body are not Sedley Alley's but someone else's. See Exhibit NN (fingerprints not Alley's). See also Trial Tr. 882-883 (no

hairs at scene matched Alley).

When considering "all the available evidence," Sedley Alley is entitled to DNA testing under Tennessee law. The testing should be ordered.

III.
THE PETITION IS MADE TO ESTABLISH INNOCENCE
AND NOT FOR THE PURPOSE OF DELAY

As a final note, the District Attorney's assertion of delay rings hollow. The Board of Probation and Parole clearly recognized that Mr. Alley's request was not made for the purpose of delay when it recommended that DNA testing be performed. Significantly, it is the District Attorney who withheld the time-of-death evidence in this case which shows that Sedley Alley is innocent. Sedley Alley has been trying valiantly to have that withheld evidence considered in federal court, and continues to do so. Alley v. Bell, U.S.No. 05-10960. It is the District Attorney who opposed DNA testing in 2004. It is the District Attorney who specifically intervened in federal court proceedings in 2006 to thwart Sedley Alley's attempts to get DNA testing – even when Sedley Alley made clear in April 2006 that he could conduct tests in a matter of weeks and have the results reported before the then-pending May 17, 2006 execution date.

The requested testing can be completed expeditiously. The state is the one delaying the proceedings in this case, not Sedley Alley. A quick and expeditious ruling and testing of the evidence will result in a final determination of Sedley Alley's guilt. This Court should grant the petition to allow the DNA testing to proceed.

CONCLUSION[9]

This Court should grant the petition for DNA analysis.

Respectfully Submitted,

Barry Scheck
Vanessa Potkin
Colin Starger
The Innocence Project
100 5th Avenue, 3rd Floor
New York, NY 10011
(212) 364-5359
FAX (212) 364-5341

Paul R. Bottei #17036
Kelley J. Henry, #21113
Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
FAX (615)736-5265

[9]This reply was prepared after receiving the State's response via fedex on Thursday, May 25, 2006. Counsel was unable to complete this reply in time to deliver an original to the Clerk's office in Memphis by close of business. To give the Court sufficient time to review this reply prior to the hearing on Tuesday, counsel have caused this document to be faxed to the Clerk's Office. An original will be filed at the opening of business on Tuesday, May 30, 2006. This reply is counsel's attempt to answer most of the points raised by the State. However, given the time constraints, it should not be construed as a complete. Counsel reserve the right to expand on these arguments through witnesses, evidence and arguments at the May 30, 2006, hearing, as well as after discovery is completed.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via fax to counsel for the State, District Attorney General William Gibbons on this 26th day of May, 2006.