IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE
DIVISION II

SEDLEY ALLEY,
Petitioner

-vs- NO. P-8040

STATE OF TENNESSEE,
Respondent

RESPONSE OF THE STATE TO PETITIONER'S PETITION FOR DNA TESTING PURSUANT TO T.C.A. §40-30-301 *ET SEQ*.

Comes now the State of Tennessee and in Response to petitioner's Petition for Post-Conviction DNA Testing pursuant to T.C.A. §40-30-301, the Post-Conviction DNA Analysis Act of 2001, would submit the following.

The petitioner is before the Court seeking DNA testing of certain evidence introduced in his trial as well as other evidence that was not introduced. The petitioner was set for execution on May 17 and obtained a last minute, fifteen (15) day reprieve from the Governor on May 15, 2005 to petition this Court for testing. This is the second request for testing filed by petitioner Alley since §40-30-301 was enacted by the Tennessee Legislature in 2001. The petitioner's first filing was in May of 2004, one month before his last execution date, and sought testing of a number of items. This Court denied the testing and the defendant appealed to the Tennessee Court of Criminal Appeals. The Court of Criminal Appeals affirmed the denial of the testing in

Alley v. State, W2004-01204-CCA-R3-PD. (May 26, 2004), (Application for Permission to Appeal Denied October 4, 2004). For the reasons set out below, the State submits that the petitioner has raised no additional arguments that would justify testing of DNA material and justify a different judicial ruling than the one previously rendered by the trial court and affirmed by the Tennessee Court of Criminal Appeals in 2004.

The facts of this case are horrendous and heartbreaking. The petitioner was convicted of the offense of Murder during the Perpetration of Aggravated Rape, Aggravated Rape and Aggravated Kidnaping by a jury and sentenced to death. The proof established before the jury is that the petitioner, beyond any reasonable doubt, murdered and sexual mutilated the victim, Suzanne Marie Collins, a young Marine training at the Millington Naval Air Station to learn avionics. There was not proof introduced or discovered since the trial that indicate that the petitioner had ever met the victim before. The following fact recitation includes the findings of the Tennessee Supreme Court in *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989) and *Alley v. State*, W2004-10204-CCA-R3-PD (May 26, 2004) in addition to other references from the testimony in the original trial.

> The victim was Suzanne Marie Collins, age 19, a lance corporal in the U.S. Marine Corps stationed at the Millington Naval Base, while she was pursuing courses in avionics. She was described by her roommate as a friendly, happy, outgoing person, always ready to help others with their problems. In the Marines, she was, "on the honor desk", which required the achievement of high standards, academically and otherwise and that, "you be a real motivated, squared-away Marine."

At approximately 10:00 p.m. on 11 July 1985 she left her barracks dressed in physical training gear, a red Marine T-shirt, red Marine shorts, white socks and tennis shoes and went jogging on the Base, north of Navy Road. Her roommate indicated that the victim had been too busy that day to work out at the gym, which was closed at that time of night. Her body was found the next morning in Orgill Park, which adjoins the Naval Base, north of Navy Road.

Defendant was not in the military service but was married to a military person and they lived on the Naval Base. He was employed by a Millington heating and air conditioning company. He was almost 30 years old, had two children, born of an earlier marriage, living in Kentucky, and had a history of alcohol and substance abuse.

The State called numerous witnesses who observed some of the movements of defendant and victim that night.

A Naval officer driving north toward the lake on the Base passed two male Marines jogging north, and later saw a female Marine in red T-shirt and red shorts also jogging north. After passing the lone Marine he saw a white male near an old station wagon with wood paneling that was parked on an empty lot near the buffalo pens. The two Marines testified that as they jogged north a female Marine was jogging south and shortly thereafter they encountered a station wagon with wood grain paneling also going south that swerved over into the north lane towards them. The car continued on southward and when they were several hundred yards further north they heard a female voice screaming in distress, "Don't touch me", "Leave me alone." They immediately

turned around and ran south in the direction of the scream. It was too dark to see any activity very far ahead and before they reached the scene they saw the station wagon drive off toward the main gate. At that time they were about 100 yards away and were able to observe that the station wagon was off the road in the grass, near the fence, on the left or wrong side for a vehicle going south. Suspecting a kidnaping they continued on to the gate and gave a full report of what they had witnessed. The gate guard remembered seeing the car that contained a man and a woman and had Kentucky plates. He testified at trial that it appeared that the man was holding the woman. The two Marine witnesses accompanied military security personnel on a tour of the residential areas of the Base looking for the station wagon, without success. The Naval Investigation Service put out a "be on the look out" (BOLO) for a vehicle that was described by the witnesses as a brown or green Ford or Mercury station wagon with woodgrain on the sides. The witnesses also stated that the car had a bad muffler and was very loud. The BOLO went to the Memphis Police Department, the Shelby County Sheriff's Department, and other local law enforcement offices.

Shelby County Sheriff Deputy Ducrest heard the BOLO and headed to the Millington Area to search for the car. He suspected that the car was heading toward Edmund Orgill State Park near the navy base. While heading up the road to the park he was required to assist in breaking up a fight between civilians and military personnel. He arrived at the scene around midnight on July 12. While on the scene he observed a Mercury station wagon that matched the description of the BOLO coming from the area of Orgill Park. He stopped this car and found that it was driven by the petitioner.

The petitioner told Ducrest that he had been on the navy base earlier and had just been jogging in Edmund Orgill Park. Deputy Durcrest testified that the petitioner's story sounded suspicious because has was not dressed for jogging and only his face, shirt collar and hair were wet and not the areas of his shirt that would be wet from sweating. Especially on a July night in Millington. The time the car was stopped was 12:15 am. He voluntarily accompanied NIS officers back to NAS Millington and was interviewed along with his wife. Their responses had allayed any suspicion that defendant had been connected with a kidnaping and they were allowed to go home. Navy investigators called back the two Marine witnesses who described the car and had them come back to headquarters to view the defendant's vehicle. While there, they identified the vehicle by it's physical appearance as well as by the sound it made as the vehicle that they saw on the base and saw driving from where they heard the screams. The petitioner's car had a Kentucky license plate. All of these events occurred before approximately 1:00 a.m., 12 July 1985. The victim's body was found shortly before 6:00 a.m. by deputies from the Shelby County Sheriff's Office. After this discovery the defendant was promptly arrested by the military police at his home. When arrested the petitioner was laundering a pair of blue jean shorts that he had been wearing. These shorts later tested positive for human blood in 31 different areas.

After appropriate Miranda warnings defendant waived the presence of an attorney and gave a lengthy statement of his activities that resulted in the death of Suzanne Collins to officers of the Naval Investigating Service on the morning of 12 July 1985.

The statement was tape recorded with defendant's permission. A narrative account of the relevant events of that evening as he related them to the Naval officers follows.

About 7:00 p.m. on 11 July 1985, his wife left with two women to go to a Tupperware party. Defendant had been drinking beer before they left and by approximately 9:00 p.m. he had consumed an additional six-pack and a fifth of wine. At that time he drove his 1972 Mercury station wagon, with a Kentucky license tag to the Mini Mart and purchased another six-pack. He was depressed, lonely and unhappy. He had no friends "of his own" here. He missed his two children, his mother and father, all Kentucky residents. He was torn between going to Kentucky, staying where he was, or driving the car into a wall to kill himself. He drove to the north side of the Base, parked on a lot near the golf course and started running toward Navy Lake. He ran past a girl jogging and before he got to the lake he stopped, she caught up with him and they had a brief conversation. He did not know her name and had never seen her before. They turned around and jogged back to his car. He stopped there out of breath, and she continued on toward the gate at Navy Road. He started driving down the road toward that gate in spite of his apparent recognition that he was drunk and weaving from side to side on the roadway. Parenthetically, the asphalt road in that vicinity has narrow lanes, no curb, the grass covered shoulders and nearby terrain are approximately level with the roadway. He heard a thump and realized he had struck the girl jogger. Quoting from his statement, "she rolled around and screamed a couple of times and I ran over and grabbed her and told her I was going to take her to the hospital. I helped her into the car and we started towards. . . ."

On the way to the hospital defendant said that she called him names such as a drunken bastard and threatened to get him in trouble and he tried to calm her down, without success. When he reached the traffic light on Navy Road near the 7/11 store he turned left and again went to the north part of the Base in the vicinity of the lake. He described in considerable detail the subsequent events, that included hitting her a few times, holding her down on the ground, and sticking a screwdriver in the side of her head, under circumstances apparently calculated by defendant to appear to be accidental. All of these actions were because she would not listen to his pleas not to turn him in. He insisted that he did not have sex with her at any time, nor did he even try at any time. He insisted that he was scared of the trouble she was threatening him with and was drunk and could not think clearly. After sticking the screwdriver in her head and her collapse, he decided to make it appear that she had been raped. He took off her clothes, and dragged her by the feet over near a tree. There he broke off a tree limb, inserted it in her vagina and "pushed it in." He then ran to the car and drove away. During the interview he was shown a screw driver that was found at the scene and he identified it as the one that he used on the victim. (Transcript of Evidence Vol. 5 defendant's statement introduced as exhibits 55, 56, 57 page 708 - 718).

The petitioner's confession was introduced at trial. At no time was the content or voluntariness of the confession contested by the defense.

After he completed his statement to naval investigators he was allowed to talk to his wife with an investigator supervising the visit. At this time the petitioner told his wife that "he had killed the gal in Orgill park". (Transcript of Evidence Vol. 5 page 619).

The defendant then voluntarily led naval investigators over the route he had taken the night before. This was done around 4:00 in the afternoon of July 12. The NIS officers who accompanied the petitioner had not been to the crime scene and stated in trial that they had to rely on the petitioner for the directions. He showed them the location where he abducted the victim and led them to where he killed her in Orgill park. By the time they were in Orgill park the crime scene had been cleaned and there was no markers or tape to indicate where the crime scene was. The petitioner was able to correctly find the area and showed them the tree from which he broke the branch that he used to kill the victim. This tree was some distance away from where the body was found. (See appendix 1 attached).

While the petitioner was at NIS headquarters, he executed a consent to search of his vehicle. On his vehicle was found stains that appeared to be blood on the exterior of his car. Swabs of these stains were tested and several stains were found to match the victim's blood type. There were also hairs found on and in the car that visibly matched the victim's hair.

The pathologist, Dr. James Bell, testified that the cause of death was multiple injuries. He also identified several specific injuries, each of which could have been fatal. The victim had bruises and abrasions over her entire body, front and back. He testified that the injuries to the skull could have been inflicted by the rounded end of defendant's screwdriver that was found near the scene, but not by the pointed end. He identified the tree branch that was inserted into the victim's body. It measured 31 inches in length and had been inserted into the body more than once, to a depth of twenty

inches, causing severe internal injuries and hemorrhaging. The pathologist was of the opinion that the victim was alive when the tree limb was inserted into her body. There were also bruises on the victim's neck consistent with strangulation. From his notes, that he prepared at the crime scene, Dr. Bell opined that the victim had been dead for six to eight hours *at least*.

During the pre-trial period of this case, the petitioner maintained that he was mentally ill and was insane at the time of the offense. He was treated for a number of months at Middle Tennessee Mental Health Institute after the trial court found that he was not competent to stand trial. He was subjected to hypnosis and sodium Amytal treatment by Dr. Allen Battle to attempt to discover the nature of the petitioner's claimed amnesia of the night in question. He concluded that the petitioner was suffering from multiple personality disorder and had at least two additional personalities present in his body. He supported an insanity defense. Dr. Battle testified at the trial that the petitioner gave inculpatory information during these sessions. (See appendix 2 attached) . The petitioner defended his case by claiming that he was not guilty by reason of insanity. He never claimed that he had not killed the victim. At trial, a number of letters were produced that the petitioner wrote from jail to his wife where he discussed faking a mental defense. The jury rejected his claim.

After the petitioner was convicted and his conviction affirmed, he proceeded in post-conviction to attack his conviction by claiming that his trial counsel was ineffective for not competently putting on his mental defense. The petitioner actually had two complete post-conviction hearings before two different judges. The petitioner

never alleged that he confessed falsely or that he was innocent of the crime. The trial counsel never testified that he had told them he was innocent of this charge. The only issue raised was whether he was allowed to fully present his mental defense.

After his post-conviction petition was denied in state court, the petitioner filed a federal habeas corpus petition in the federal district court Western District of Tennessee. He again alleged that he was denied effective assistance of counsel due to a failure to completely develop his mental defense. He made no claim that he was innocent or that his confession was false or coerced. His federal habeas corpus petition was denied by the district court and the denial was affirmed by the 6th Circuit Court of Appeals. *Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002) , cert. denied, 540 U.S. 839 (2003).

The petitioner has filed for DNA testing under this statute before. On May 4, 2004 he filed a similar petition less than one month before his last execution date. He was seeking testing on other items including hairs recovered on different pieces of evidence and on swabs taken by the medical examiner from the victim. The petitioner also alleged in his Petition that DNA testing should be allowed because it would establish that someone else killed the victim in this case and he is actually innocent of the charge. This is the first time the petitioner, through counsel, claimed he was innocent of the murder of Susan Collins. Though the mechanism for testing this evidence was codified several years prior, the petitioner waited until less than one month before his scheduled execution date to seek this relief. His request was denied by the trial court and this decision was affirmed by the Court of Criminal Appeals in *Alley v. State*, supra.

The petitioner now again seeks DNA testing pursuant to statute. In order to obtain a favorable ruling by the court, the petitioner must satisfy all four components of the statute. Failure to meet any of the qualifying criteria is fatal to the action and justifies summary dismissal by the trial court. See, e.g., Sedley Alley v. State, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095, *2 (Tenn. Crim. App. May 26, 2004); William D. Buford v. State, No. M2002-02180-CCA-R3-PC, 2003 WL 1937110, *6 (Tenn. Crim. App. Apr. 24, 2003) (copies attached).

T.C.A. §40-30-304 provides:

> After notice to the prosecution and an opportunity to respond, the court shall order DNA analysis if it finds that:
>
> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
>
> (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
>
> (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

In order to successfully obtain DNA testing, the petitioner must establish that Part 1 of the Statute is met. In this case, as outlined above, the evidence proving that the defendant committed this heinous act is overwhelming.

The "reasonable probability" standard is a familiar one in the post-conviction context, applicable to ineffective assistance of counsel and Brady claims in post-conviction proceedings and evaluation of newly discovered evidence in error coram nobis proceedings. A "reasonable probability" of a different result exists when the evidence at issue, in this case potentially favorable DNA results, undermines confidence in the outcome of the prosecution. See, e.g., State v. Workman, 111 S.W.3d 10, 18 (Tenn. 2002); State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999); Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994). The DNA Analysis Act requires the trial court to consider whether favorable DNA analysis, considered in light of the other evidence adduced at trial, would give rise to a reasonable probability that the petitioner would not have been convicted or prosecuted.

Because the DNA Act's focus is on the potential impact of DNA analysis on the criminal prosecution, the trial court's inquiry is limited to the "evidence and surrounding circumstances" of the prosecution. In making its determination, a trial court should consider "all the evidence available, including the evidence at trial and/or any stipulations of fact by the petitioner or his counsel and the state. In addition, the opinions of this court on either the direct appeal of the conviction or the appeals in any previous post-conviction or habeas corpus actions may provide some assistance." Mitchell v. State, No. M2002-01500-CCA-R3-PC, 2003 WL 1868649, *5 (Tenn. Crim. App. Apr. 11, 2003) (app. denied Oct. 13, 2003); Willie Tom Ensley v. State, M2002-01609-CCA-R3-PC, 2003 WL 1868647, *4 (Tenn. Crim. App. Apr. 11, 2003) (copies attached). Previous incriminating statements by the petitioner, as well as prior

pleas and defenses, are relevant to the trial court's inquiry. Clayton Turner v. State, No. E2002-02895-CCA-R3-PC, 2004 WL 735036, *3 (Tenn. Crim. App. Apr. 1, 2004); David I. Tucker v. State, M2002-02602-CCA-R3-CD, 2004 WL 115132, *2 (Tenn. Crim. App. Jan. 23, 2004).

Nothing in the statute requires or permits the court to reevaluate the credibility or validity of the evidence submitted at trial, or to consider new evidence, aside from the DNA test results, supporting a different theory than the one relied on by the defendant at trial. Rather, the statute 's reach is limited to the performance of a DNA analysis which only compares the petitioner's DNA to samples taken from biological specimens gathered at the time of the offense. Earl David Crawford v. State, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, *3 (Tenn. Crim. App. Aug. 4, 2003) ("The statute does not authorize the trial court to order the victim to submit new DNA samples years after the offense nor does the statute open the door to any other comparisons the petitioner may envision."); Sedley Alley, at *9-10 ("The purpose of the Post Conviction DNA Analysis Act is to establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant. . . the Act does not permit DNA analysis to be performed upon a third party. Rather the results of the DNA testing must stand alone."). In his current application, the petitioner again alleges that the court should hold that certain evidence should not be considered reliable. This includes the petitioner's confession, a witnesses identification, the time of death and other allegations. All these claims were made in

his prior petition filed in 2004 and were rejected by the court. See *Sedley Alley v. State*, supra, W2004-01204-CCA-R3-PD, at *3.

In making that determination as a threshold matter under Tenn. Code Ann. §40-30-304, "the Act requires that the court assume that the DNA analysis will reveal exculpatory results in the court's determination as to whether to order DNA testing." Jack Jay Shuttle v. State, No. E2003-00131-CCA-R3-PC, 2004 WL 199826 (Tenn. Crim. App. Feb. 26, 2004). Therefore, assuming that DNA testing will reveal exculpatory evidence on the underwear or stick, in light of the overwhelming evidence of Alley's guilt, he cannot demonstrate that he would not have been prosecuted or convicted if given the benefit of DNA analysis.

The defendant gave a full confession to the police and drove the police to locations and showed the police where certain events happened. *State v. Alley,* 776 S.W.2d 506 (Tenn. 1989). Other witnesses at trial established that the petitioner was the perpetrator of this crime. Furthermore, at trial, the petitioner brought a defense of insanity, claiming that he suffered from Multiple Personality Disorder and should not be held responsible for his killing and raping the victim. The petitioner did not claim that he did not commit the killing, but rather that different personality of his was in control, and that personality was responsible for the killing and rape of the victim. Based on petitioner's statement and the evidence available at trial, as well as the trial strategy of the petitioner, the petitioner can not satisfy Part 1 of the Statute, "[a] reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis"; and his request should

be denied without the necessity of a hearing. *Saine v. State*, No. W2002-03006-CCA-R3-PC (December 15, 2003). This is reinforced by the previous ruling in this case were the Court of Criminal Appeals stated:

> Upon our review of the record before us, including the Petitioner's motion and the State's response, we conclude that the post-conviction court properly considered all of the evidence before it. Moreover, we conclude that the record supports the post-conviction court's conclusions that the Petitioner had failed to establish that (1) a reasonable probability exists that the petitioner [*36] would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis and (2) a reasonable probability exists that analysis of the evidence will produce DNA results which would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceedings leading to the judgment of conviction. See Tenn. Code Ann. § § 40-30-304(1), -305(1). Accordingly, the post-conviction court did not err by denying the Petitioner's request for DNA analysis.[1]

Furthermore, the petitioner sought *habeas corpus* relief in the Federal District Court for the Western District of Tennessee seeking DNA testing of the same and other evidence requested in this petitioner. The District Court denied his request for testing and the 6th Circuit Court of Appeals affirmed the denial. *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006). Judge Boggs wrote in the opinion; "The 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." *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) *5.

In part two of the statute the petitioner must prove that the evidence is still in existence and is in such condition that DNA analysis can be conducted. In this case the

[1] *Alley v. State*, supra W2004-01204-CCA-R3-PD at page 10.

petitioner is asking to test (1) the tree branch that was used to kill the victim; (2) red underwear found at the crime scene; (3) blood samples taken from the petitioner's automobile; (4) fingernail from the victim.

The State submits that tree branch has been in the custody of the Criminal Court Clerk for twenty years. The branch was not placed in a sealed container and has been stored on a shelf in the property room. It is currently in a bin, loose, along with other evidence in the case. (See appendix 3 attached). The possibility of contamination is so high that any result would be meaningless. The petitioner can not show, that any DNA evidence that could be obtained from the end of the branch that was protruding from the victim dates from the time of the offense.

The red underwear was found at the crime scene. There is no proof that it was connected to the murder of the victim. The victim was murdered in a public park where large amount of trash was lying around. The underwear had no significance in the conviction of the petitioner. Because of the lack of ties to the crime itself, the underwear, even if some other person's DNA was found on it, would not exclude or make the petitioner "innocent" of the crime for which he confessed and was convicted. Any DNA results that did not contain the victim or petitioner would not have lead to the petitioner not being charged or resulted in a more favorable verdict.

The blood and hair from the car was stored at the University of Tennessee at Memphis after it was tested in 1985 by technology that existed at the time that matched the victim's blood group and hair. That evidence does not exist due to a malfunction

of the storage freezer in 1990.

The broken fingernail requested by the petitioner does not exist. The only reference to a broken fingernail is from the autopsy report that noted that one of the fingernails of the victim was broken. The broken piece does not exist. Furthermore, had the fingernail had been found, it would have been stored with the other evidence from the medical examiner that was lost when the freezer malfunctioned in 1990.

In addition, Part 4 of the act, "[t]he application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice", also acts as a bar to testing in this case due to the history of the petitioner's claims already pursued in State and Federal Court. At trial, in State Post-Conviction, and Federal Habeas proceedings, the petitioner has never claimed that someone else had done the crime. His attack was always as to his mental condition at the time of the offense and the failure of his counsel to successfully present his insanity claim to the jury. The petitioner filed his prior request for DNA testing less than one month prior to his last execution date. The court found that this delay violated part (4) of the statute. After two more years passed, the petitioner went to the Governor, not the court, less than a week before his next scheduled execution date and attempted to get the governor to order testing. The governor granted a short reprieve so that the petitioner could file a petition in the post-conviction court to seek DNA testing. This petition was file a week after getting the reprieve. The petitioner could have filed this petition at any time during the two years since the last denial. He decided to try to bypass the court. The actions of the petitioner violate part four of the act.

Therefore, based on the above, the State moves this Honorable Court to Dismiss the petitioner's Petition for Post-Conviction DNA Analysis without the necessity of a hearing.

Respectfully submitted,

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JOHN W. CAMPBELL
Assistant District Attorney General

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J. ROBERT CARTER, Jr.
Assistant District Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was caused to be delivered to Kelley Henry, attorney for petitioner, on this the 24th day of May, 2006.