CAPITAL CASE
EXECUTION DATE: 5/17/06 at 1:00 a.m.

IN THE
SUPREME COURT OF THE UNITED STATES

SEDLEY ALLEY,

Petitioner,

v.

WILLIAM KEY,
Defendant-Respondent;

WILLIAM L. GIBBONS,
Intervenor-Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents what Judge Luttig has called "one of the most important criminal law issues of our day," Harvey v. Horan, 285 F.3d 298, 304 (4th Cir. 2002)(Luttig, J., concurring): Whether the Constitution provides a right to post-conviction access to evidence for DNA testing to establish actual innocence. Judge Luttig has concluded that such a right exists. Id. The questions presented are:

1. Does a death-sentenced inmate have a right under the Eighth and/or Fourteenth Amendments to the post-conviction disclosure of forensic evidence for purposes of DNA testing, especially where there is substantial evidence already demonstrating that he is actually innocent of the offense for which he has been convicted and sentenced to death?

2. Where executive clemency proceedings provide the failsafe for exonerating the innocent, do the Eighth and/or Fourteenth Amendments provide a death-sentenced inmate the right to release of evidence for DNA testing in order to establish actual innocence in clemency?

3. Under the due process clause of the Fourteenth Amendment, does a death-sentenced inmate seeking to establish actual innocence through DNA testing have a right to the release of evidence for testing:
   a. As a matter of procedural due process?
   b. As a matter of substantive due process? and/or
   c. Given the state's obligation to disclose exculpatory evidence?

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DECISIONS BELOW

The opinion of the Sixth Circuit panel upholding the District Court's denial of DNA testing is attached as Appendix A. The order denying rehearing is attached as Appendix B. The District Court opinion is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered May 15, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. Sedley Alley filed a complaint in the District Court pursuant to 28 U.S.C. §1331 and 42 U.S.C. §1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides, in relevant part, that "cruel and unusual punishments [shall not be] inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No state shall ... deprive any person of life ... without due process of law ...."

42 U.S.C. § 1983 provides, in relevant part, that "Every person who, under color of [State law] subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...."

INTRODUCTION

The New York Times reports today that, Douglas Warney, who now has full blown AIDS, will be wheeled out of a New York prison, a free man. Just like Sedley Alley, Mr. Warney confessed to committing a crime he did not commit. Just like Sedley Alley, Dr. Richard Leo concluded that Mr. Warney's confession was coerced. Just like Sedley Alley, the prosecution resisted DNA testing, arguing that testing could not exonerate Warney.

Warney confessed to the stabbing death of a prominent community activist. Like Alley, his confession included details from the crime scene that prosecutors said only the guilty could know. However, also like Alley, Warney's confession included many inaccurate details regarding the murder that prosecutors glossed over. In addition, another person's blood was present at the scene. DNA testing of the blood at the scene revealed that Warney did not commit the murder, and another man, already in jail for murder, confessed last week. See "Inmate To Be Freed As DNA Tests Upend Murder Confession," New York Times, May 16, 2006.

Sedley Alley was convicted of a rape-murder, and there are forensic samples with biological evidence that can be subjected to DNA testing to identify the perpetrator, including the victim's underwear, underwear next to the body believed to be worn by the assailant, and blood and skin cells on a stick used to violate the victim. All of this evidence (as well as biological evidence from other pieces of the victim's clothing and cups and beer bottles near the body) could be subjected to STR (Short Tandem Repeat) DNA testing to prove Sedley Alley's actual innocence.

If the STR DNA tests on these various items yield the same male profile and/or matches a DNA profile from a convicted serial offender in the CODIS DNA database, or matches the boyfriend of the victim (a suspect who fits the description of the abductor and had a motive to commit the

crime), then Sedley Alley would be able to make a showing of "actual innocence" far stronger than the evidence produced in House v. Bell, U.S.No. 04-8990. In fact, in more than forty post-conviction DNA exoneration cases, many with fact patterns that seemed prospectively more improbable than this case, innocents were exonerated by "hits" made with DNA databases, thus identifying the true perpetrator.[1] STR DNA testing can definitively establish Sedley Alley's actual innocence. He has a right to subject the evidence to this ultimate truthseeking process.

STATEMENT OF FACTS

I. PREVIOUSLY SUPPRESSED EVIDENCE CASTS DOUBT ON SEDLEY ALLEY'S GUILT AND SEDLEY ALLEY REQUIRES ACCESS TO EVIDENCE FOR DNA TESTING TO PROVE HIS INNOCENCE

At trial in 1987, the prosecution claimed that Sedley Alley abducted the victim late on July 11, 1985, sexually assaulted her, and killed her shortly afterwards, before midnight.[2] There was evidence to support the prosecution's theory: Indeed, the jury ultimately convicted Sedley Alley of first-degree murder based on the proof presented at trial.[3] Defense counsel essentially assumed Sedley Alley's guilt and presented an insanity defense, but even then, the courts deemed the very foundation of that defense to be unreliable.[4] The jury found Alley guilty. But was it right?

Much has changed since 1987. The case for Sedley Alley's guilt began to unravel in 2004

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[1] See Maurice Possley and Steve Mills, Crimes Go Unsolved as DNA Tool Ignored, Chicago Tribune, Oct. 26, 2003 at 1 (An analysis of 115 DNA exonerations recently revealed that, of the 71 profiles entered into DNA databanks, 41 cold hits identified a new suspect in the crime).

[2] At trial, the prosecution asserted that the victim was killed around 11:00 p.m.. See Trial Tr. 284, 287 (Testimony of Virginia Taylor).

[3] See State v. Alley, 776 S.W.2d 506 (Tenn. 1989).

[4] Id. at 515-516.

when Alley first obtained previously-withheld evidence concerning the victim's time of death. What he learned for the first time in 2004-2005 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. July 12, 1985.[5]

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.[6] He did not, in fact, kill the victim.

Yet it is not simply the time of death which shows that Sedley Alley is innocent. Additional uncontested proof (much of which was secured after records concerning the time of death were finally unearthed in 2004) confirms that Sedley Alley is not the person who abducted and killed the victim. That evidence also points to the victim's boyfriend as the killer. And indeed, the boyfriend admits that he was with her the night of the abduction and he, unlike Alley, had a motive to harm her: She was leaving town to be with her fiancee in California.[7]

All told, in addition to the time of death evidence, the District Court had before it undisputed

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[5] See Sixth Circuit Joint Appendix (6th Cir. Apx.) at 134: Report of Sgt. Jim Houston (According to Dr. 6th Cir. Apx. 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"); and 6th Cir. Apx. at 45-46: Notes of Dr. 6th Cir. Apx. James S. Bell (from view of body at scene). As Sedley Alley has made clear elsewhere, these critical documents were withheld from him, despite the prosecution's assurance that it had provided him all exculpatory evidence. See Alley v. Bell, 6th Cir. No. 05-6876, Brief of Appellant, pp. 7-8.

[6] See 6th Cir. Apx. at 47: 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.). The State has never denied that Alley's whereabouts where known from 12:10 onward.

[7] See 6th Cir. Apx. at 51-52: Affidavit of April Higuera.

evidence[8] showing Sedley Alley's innocence, including proof that:

(1) 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;[9]

(2) 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;[10]

(3) 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;[11]

(4) Hairs and fingerprints found on items near the body are not Sedley Alley's but someone else's;[12] and

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[8]See 6th Cir. Apx. at 199-200: Apr. 18, 2006 Hearing (no disputed issues related to Plaintiff's evidentiary submissions and no disputed issues of material fact).

[9]See 6th Cir. Apx. at 48: Statement of Scott Lancaster (describing abductor); Compare 6th Cir. Apx. at 49: Booking photograph of Sedley Alley; and 6th Cir. Apx. at 50: Police Description of Sedley Alley.

[10] See 6th Cir. Apx. at 51-52: Affidavit of April Higuera (John Borup closely matches description of abductor, drove Dodge Aspen and was with victim the night she was abducted); 6th Cir. Apx. at 56: abductor's automobile initially described as a brown over brown station wagon; and 6th Cir. Apx. 57: Dodge Aspen.

[11] See 6th Cir. Apx. at 62: tire tracks at scene; 6th Cir. Apx. at 63-67 and 73-76: Sedley Alley's vehicle showing tires; 6th Cir. Apx. at 59-92: Report of Peter McDonald (Tire tracks at abduction scene did not come from Alley's vehicle); 6th Cir. Apx. at 98, 203: Report concerning shoe prints, and pictures of Sedley Alley's shoes.

[12] See 6th Cir. Apx. at 93: hairs not from Sedley Alley; 6th Cir. Apx. 94-97: fingerprints not from Sedley Alley.

(5) 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.[13] A taped statement from Alley was presented to the jury, but more than half of it was mysteriously missing.[14] 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 sentenced to death based on confessions proven to be false).

The jury heard no meaningful proof of Sedley Alley's innocence. First and foremost, the prosecution withheld the most critical evidence concerning the time of death. Without that evidence, the defense attempted an unreliable insanity defense. The jury thus heard nothing about Alley's actual alibi; nothing about the victim's boyfriend matching the description of the abductor or the boyfriend's being with the victim that night in a car matching the description of the "brown-over-brown" car identified as the abductor's; nor did the jury hear all the proof that tire tracks, shoe prints, fingerprints, and hairs exclude Sedley Alley as having committed the crime.[15] Instead, the jury convicted Alley based on unreliable evidence, including a demonstrably false custodial statement.

Twenty-one years after the offense, the unanswered question remains: Did Sedley Alley, in

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[13] See 6th Cir. Apx. at 143-153: 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 facts).

[14] See 6th Cir. Apx. at 143-156: outlining clear discrepancies between actual time span of statement and missing portions of statement.

[15] The jury did hear that a hair on one of the victim's socks was from someone other than Alley. Trial Tr. 883.

fact, kill the victim, or did the boyfriend, or someone else?[16] The time of death alone compels the conclusion that in convicting Sedley Alley, the jury convicted the wrong man. The description of the abductor not only excludes Alley, but it points to the boyfriend, who had motive and opportunity. Other evidence points to someone other than Sedley Alley.

This case presents an "authentic 'who-done-it' where the wrong man may be executed." House v. Bell, 386 F.3d 668, 709 (6th Cir. 2004)(Gilman, J., dissenting). Who or what can reliably answer the question of who committed this crime? Sedley Alley's answer is simple: DNA.

II. DNA CAN IDENTIFY THE ACTUAL KILLER AND ESTABLISH SEDLEY ALLEY'S ACTUAL INNOCENCE

A. SEDLEY ALLEY'S COMPLAINT

To prove his actual innocence, Sedley Alley filed a complaint in the United States District Court for the Western District of Tennessee, seeking, for purposes of DNA testing, release of evidence in the possession of William Key, the Criminal Court Clerk for the Thirtieth Judicial District at Memphis. 6th Cir. Apx. 1-15. Virtually all of the evidence sought in the complaint was introduced at the trial in this matter, and it currently is in the custody of Mr. Key in a vault in the Criminal Court Clerk's Office. See 6th Cir. Apx. 201.

As Sedley Alley made clear in his complaint, he seeks the evidence to test at his own cost[17] in order to "identify the perpetrator and exonerate Alley through court process and/or provide him

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[16]That someone else can be identified through the National CODIS DNA databank, as was the case in Mr. Warney's exoneration and over 40 other DNA exonerations. See Case Profiles section of www.innocenceproject.org, (including profiles of Frank Lee Smith, who claimed insanity at trial, sentenced to death, and exonerated eleven months after he died on death row, and Kirk Bloodsworth, who was the first man to be exonerated from death row).

[17] See 6th Cir. Apx. at 28-44.

a basis for relief through an application for executive clemency, commutation, or reprieve." 6th Cir. Apx. 1.[18] Sedley Alley has maintained in his complaint that he is entitled to production of the evidence given his Eighth and Fourteenth Amendment rights not to be executed while innocent; as a matter of substantive due process; as a matter of procedural due process under the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976); given his due process right to production of exculpatory evidence; and as violation of his fundamental rights to life and liberty.[19]

B. EVIDENCE WHICH SEDLEY ALLEY SEEKS TO TEST CAN IDENTIFY THE PERPETRATOR AND EXONERATE HIM

This is a classic case for DNA testing, as it involved a sexual assault. The undisputed record makes clear that documents identify semen as having being detected ("seminal type – substance detected") on vaginal swabs,[20] a swab of the right and left inner thighs,[21] and nasopharyngeal swabs.[22] Given this clear proof of semen in this case, Sedley Alley has, in his amended complaint, sought production of critical items of evidence which would contain semen, other bodily fluids, or

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[18] On March 29, 2006, the Tennessee Supreme Court set a May 17, 2006 execution date, at which point it appeared that Sedley Alley would need to invoke the clemency process under Tennessee law See Alley v. Bell, W.D.Tenn. No. 97-3159, R. 180 (Apr. 5, 2006 Motion Seeking To Confirm Counsel's Continued Representation In Clemency Proceedings). To meaningfully invoke that process he first needs access to the evidence for DNA testing to establish his actual innocence. Access that has been arbitrarily opposed by the State for more than two years. See also 6th Cir. Apx. at 202: Apr. 18, 2006 Hearing Tr. 62.

[19] See 6th Cir. Apx. at 1-14.

[20] See 6th Cir. Apx. at 139: Item 11: Vaginal Swabs: "Seminal Type –"H" Substance * * Detected **".

[21] See Id.: Item 12: Right Inner Thigh: "Seminal Type . . .* * Substance Detected **"; See Id.: Item 13: Left Inner Thigh: "Seminal Type . . . * * Substance Detected * *".

[22] See 6th Cir. Apx. 141: Item 3: Nasopharyngeal Swabs: "Seminal Type **"H" Substance Detected**".

skin cells from the person who committed the offense.

Those items of evidence include: (1) a stick found inside the victim which protruded near the left and right inner thighs where semen was found;[23] (2) the victim's white underwear found at the scene;[24] (3) a pair of red underwear also found at the scene which is likely the perpetrator's;[25] (4) the victim's shorts;[26] (5) her bra;[27] (6) her shirt;[28] and (7) her shoes and a sock.[29] Especially with regard to the stick and the two pairs of underwear, Sedley Alley expects to identify semen, urine, skin cells, or other biological samples from the perpetrator, just as biological materials were detected on swabs.[30]

C. THE DNA REVOLUTION: CONCLUSIVE PROOF OF ACTUAL INNOCENCE

Advanced DNA testing is not a simple change in technology – it represents a paradigm shift

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[23] See 6th Cir. Apx. at 7: Items 13 & 35; Compare 6th Cir. Apx. at 139: Items 12 & 13 (semen detected on thighs)

[24] See Id.: ¶10e, Item 5.

[25] See Id.: ¶10f, Item 6.

[26] See Id.: ¶10c, Item 3a.

[27] See Id.: ¶10d, Item 3b.

[28] See Id.: ¶10a, Item 1.

[29] See Id.: ¶10b, h, i, Items 2, 8, 9.

[30] Sedley Alley has also sought to test additional items found near the body which would contain biological evidence (likely in the form of saliva or sweat), including styrofoam drinking cups (Id.: ¶10j, Items10, 11, 12); beer bottles located near the body (Id., ¶10n, Items 36, 37, 38), and grass samples and blood-stained grass found under the body or in proximity to the body. Id., ¶¶10l & m, Items 14, 18, 19, 20, 21, 22, 23, 24. There is also a fingernail which, as noted *infra*, upon testing can also identify the perpetrator.

in science and law enforcement.[31] Since the time of Suzanne Collins' murder, forensic DNA technology has revolutionized the nation's criminal justice system. DNA has become the foremost technique for conclusively identifying – and excluding – criminal suspects in cases where biological material (such as blood, saliva, skin, semen or hair) is left at a crime scene. Postconviction DNA Testing: Recommendations for Handling Requests, Nat'l Instit. Just., Off. Just. Programs, U.S. Dept. Just., Pub. No. NCJ 177626 (Sept. 1999) at 1.

Critically, STR (Short Tandem Repeat) DNA tests can conclusively identify the perpetrator of a crime *even where only microscopic amounts of biological material are recovered.* Id; Using DNA to Solve Cold Cases, Nat'l Instit. of Just., U.S. Dept. of Just., Pub. No. NCJ 194197 (July 2002). STR technology has thus made it possible to identify perpetrators of violent crimes through DNA testing of skin cells and sweat from weapons (such as gun handles, knifes and ligatures).[32]

Without question, DNA testing is a far more precise[33] and accurate[34] way of establishing guilt

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[31] STR DNA testing is the standard in DNA technology and is used by the federal government and all fifty states to operate the national and local DNA databanks. The STR system was selected to build the nation's extensive DNA databases because it is sufficiently robust to remain the standard technology for many years into the future.

[32] The sensitivity of STR testing, combined with the state and federal DNA databanks (which contain STR profiles of convicted offenders and unsolved crimes) have enabled law enforcement officials to solve thousands of "cold cases," some decades old and cases with no other leads or suspects before a match in the databank pointed to the perpetrator. As of December 2005, there were 2,952,820 offender profiles in CODIS's National DNA Index System. See NDIS Statistics, available at http://www.fbi.gov/hq/lab/codis/clickmap.htm.

[33] The likelihood that any two individuals (except identical twins) will have the same 13-loci STR DNA profile can be as high as 1 in 1 billion or greater.

[34] A study of laboratories that conduct DNA testing found that in nearly 23% of cases, DNA test results excluded the *primary suspects.* In the cases reported by the FBI as part of this study, DNA test results *excluded 20 percent of the suspects, and only 60 percent matched the primary suspect.* Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to

or innocence than almost any other type of evidence, including eyewitness identifications, confessions, microscopic hair comparison and conventional serology. In the words of the former Attorney General John Ashcroft, DNA testing is nothing less than "the 'truth machine' of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." News Conference on the DNA Initiative (12/4/02), available at http://www.usdoj.gov/archive/ag/speeches/2002/030402 newsconferncednainitiative.htm. For this reason, President George W. Bush recently endorsed a dramatic expansion of the use of "DNA evidence to prevent wrongful conviction," stating "In America, we must make doubly sure no person is held to account for a crime he or she did not commit." George W. Bush, State of the Union Address (2/2/05).

D. DNA ROUTINELY EXONERATES THE ACTUALLY INNOCENT

Thousands of wrongly accused have been cleared by DNA pre-trial and the use of DNA in the post-conviction context has, to date, led to the exoneration of at least 175 innocent individuals – including thirteen who were at one time sentenced to death, before DNA proved that each of their states had come perilously close to executing an innocent man. See www.innocenceproject.org/caseprofiles. As the DNA exoneration cases demonstrate, DNA is capable of scientifically establishing innocence even in cases where the proof of guilt at trial appears overwhelming, **including cases where the defense at trial was insanity, where the accused falsely confessed, and even where the accused pled guilty.**

In over thirty cases, DNA has exonerated individuals who were wrongfully convicted based on false confessions to the crime (with many "confessions" containing details of the crime that were

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Establish Innocence After Trial, Nat'l Instit. Just, Research Report, (June 1996) at xxviii.

not released to the public).[35] DNA testing also has proven the innocence of numerous individuals who not only confessed, but then went on to plead guilty to rapes/rape-murders that they simply did not commit.[36] DNA testing has also exonerated people (such as Frank Lee Smith) who, despite their actual innocence, were defended at trial on the basis of insanity.[37] Especially where there is already other proof of actual innocence, Sedley Alley's case falls well within the mainstream of cases where

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[35] See Godschalk v. Montgomery County District Attorney's Office, 177 F.Supp.2d 366 (E.D.Pa. 2001)(despite compelling "confession" of Godschalk, he was granted access to evidence for DNA testing, and was later exonerated).

The case of Eddie Joe Lloyd is also illustrative. Lloyd was convicted of the 1984 rape and murder of a sixteen year-old girl, whose body was found in an abandoned garage. Police questioned Lloyd after he wrote letters to them, asking questions and purporting to provide information about the crime. After being interrogated by the authorities, Lloyd, who, had a history of mental illness and was hospitalized at the time, gave a chillingly accurate and detailed taped confession to the crime, which contained unreleased details (including the fact that a bottle had been inserted in the victim's rectum). After seventeen years of wrongful imprisonment, in 2002, DNA testing of sperm from the victim's body, the bottle, and long johns that had been used to strangle her excluded Lloyd and demonstrated his innocence. Jodi Wilgoren, Confession Had His Signature; DNA Did Not, The New York Times, August 26, 2002 at 1; David Zeman and Ben Schmitt, How Justice Failed Eddie Joe Lloyd, Detroit Free Press, October 24, 2002. Like Lloyd, Alley has a history of mental illness.

Finally, the case of Jerry Frank Townsend is another false confession case. After Townsend was convicted based on a confession, a Fort Lauderdale police officer began reinvestigating one of the crimes attributed to Townsend, the rape and murder of thirteen-year-old girl, at the request of her mother. When DNA testing was done on a semen sample from the victim's shorts, it cleared Townsend of the murder and implicated another man, Eddie Lee Mosley, who was already found responsible for a series of rapes and murders around the Fort Lauderdale area, including the rape murder for which Frank Lee Smith was sent to death row after, like Alley, presenting an unsuccessful insanity defense. See, n. 39. Paula McMahon and Ardy Friedberg, Legal Twist Holds Up Charges in Murders; Suspect Mentally Unfit to Face Trial in Rape, Killing Cases, Sun-Sentinel, May 6, 2002 at 1B.

[36] See e.g. Case profiles of Chris Ochoa (Texas), John Dixon (New Jersey), Frank Townsend (Florida), David Vasquez (Virginia) at http//www.innocenceproject.org.

[37] Like Jerry Townsend (n. 35 *supra*), Frank Lee Smith was convicted and sentenced to death for the rape and murder of an eight year-old, a crime actually committed by Eddie Lee Mosley. Smith died of cancer on death row before he could be released. See Ardy Friedberg and Paula McMahon, 21-Year Inmate to Go Free; Miami-Dade Drops Charges in 2 Murders, Rape Case for Mentally Disabled Man, Sun-Sentinel, June 15, 2001.

DNA testing has led to exoneration.

E. DNA TESTING IS CAPABLE OF PROVING THAT SEDLEY ALLEY IS ACTUALLY INNOCENT

Without dispute, DNA testing is capable of providing scientific evidence determinative of Sedley Alley's factual innocence or guilt. The scientific conclusion that he is innocent can be drawn from using DNA to prove that cells on the victim's underwear, the perpetrator's underwear, the stick, and other items came from the same person – and not Sedley Alley.[38] This protocol of testing can produce redundant results. The significance of which cannot be overstated. If the testing yields a Male DNA profile which is the same as the semen on the thighs, the male DNA in the victim's underwear, and male DNA on the perpetrator's underwear, the stick, or other items, and that male profile is not Sedley Alley, then, Mr. Alley is exonerated. Moreover, that male DNA profile can be inserted in the CODIS database and, as has been the case more than 40 times, the real perpetrator can be identified. In addition, the male DNA profile can be compared to the suspect boyfriend. Any of these scenarios will exonerate Alley, how else would that male profile DNA end up on the male underwear at the scene - it can only the DNA of the perpetrator.

The victim's naked body was found under a tree in a grass field. She had been beaten, manually strangled and impaled with a stick. She had over 100 external injuries to her body,[39] and there were indications – including, significantly, a broken fingernail – that she struggled with her assailant. The assailant's underwear was found at the scene nearby the victim's body. During the autopsy, evidence was collected from the victim including rape kit samples and the branch handled

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[38] See Chart, Appendix D, Graphically Depicting DNA testing scenarios.

[39] Trial Tr. 926.

by the assailant. It has always been the State's theory that the perpetrator broke off the tree branch, cleaned it off, sharpened it, then beat, strangled, raped and murdered the victim, afterward cleaning himself off with one of her socks, and leaving his underwear at the crime scene. The State used rudimentary, now out-dated testing of the physical evidence to link Alley to the crime and establish his identity as the assailant, arguing in part that blood on his shorts belonged to the victim.

STR DNA testing of the various items of critical biological evidence is capable of demonstrating that Sedley Alley is not the person who committed this crime. DNA testing is capable of showing that the same man's DNA is on the underwear at the crime scene, on the stick used as the murder weapon and underneath the victim's fingernails. Mr. Alley's innocence would be demonstrated by DNA test results which show that he is not the source of the DNA and/or that the DNA belongs to the alternative suspect described *supra*, or some serial offender in the CODIS databank . See case profile of Calvin Willis at http//www.innocenceproject.org (after twenty-two years in prison for rape in Louisiana, Calvin Willis was exonerated after DNA testing showed that there was male DNA underneath the victim's nails which matched DNA on a pair of men's underwear that the assailant left at the crime scene).

1. DNA TESTING OF TWO PAIRS OF UNDERWEAR FOUND AT THE SCENE CAN ESTABLISH ACTUAL INNOCENCE

The victim's underwear was found at the scene, as well as a pair of men's red bikini underwear (State's Exhibit 35), which under the state's longstanding theory, belonged to the man who sexually assaulted and murdered Ms. Collins.[40] At trial, the prosecution made clear the

[40] Trial Tr. 458-461.

significance of both pairs of underwear, including the perpetrator's.[41] DNA testing of these two pieces of evidence will reveal the identity of the person who left any skin cells, sweat, urine, or semen on both items.

While the skin cells and sweat from the underwear could not be tested at the time of trial, today such clothing is a common item of evidence for DNA testing and by targeting and testing key areas analysts are able to generate the DNA profile of the wearer. Using DNA to Solve Cold Cases, Nat'l Instit. of Just., U.S. Dept. of Just., Pub. No. NCJ 194197 (July 2002)(listing clothing as a common item of evidence for DNA testing; What Every Law Enforcement Officer Should Know About DNA Evidence; Nat'l Instit. Just. Programs, U.S. Dept. Just. (Oct. 1999) (same).[42]

Here, the unique genetic DNA profile of the assailant who not only assaulted the victim but wore the red underwear and left them at the scene can be generated by STR DNA testing of skin cells and sweat from on and inside the underwear, as well as from any semen or other bodily fluids contained by those articles.[43]

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[41] See Closing Arg. p. 39: "We know something she didn't do, and that is she didn't wear red men's bikini underwear. That becomes important as you all realized a little later on." Id at 54-55: "You saw something from the scene that did not belong to Suzanne Marie Collins. You saw her underwear. It's got her name in it. You saw it and we had it identified for you by her roommate. And you found something else out there at the scene."

[42] DNA testing of skin cells has resulted in the exoneration of more than one person. See Rachel Graves, DNA Links Prison Inmate to '86 Killing of Newlywed, HOUSTON CHRONICLE, July 31, 2003 (seventeen years after the brutal rape and murder of Debra Oliver, Charles Ray Bailey's DNA was recovered from a sock used to gag the victim). See also "Man Freed in 1997 Shooting of Officer," BOSTON GLOBE, 6th Cir. Apx.n. 24, 2004.

[43] The state's forensic examiner, Paulette Sutton, also testified that she identified thirty one areas in Alley's shorts that screened positive for blood; only one area was sufficient for further testing, and with regard to this stain she could confirm it was human blood, but could not determine ABO type. Trial Tr. 848. It was the prosecution's theory not only that Alley left his underwear at the scene, but the State argued to the jury that, in doing so, he got the victim's blood on his shorts, when

2. DNA TESTING OF THE MURDER WEAPON CAN IDENTIFY THE ASSAILANT

Aside from the victim's and the assailant's underwear, STR testing can be performed on the DNA (sweat and skin cells) left by the assailant on the tree branch/murder weapon, which the assailant broke off, cleaned, and used as a tool and kill the victim. Since perpetrators often leave sweat and shed skin cells on the handles of weapons, DNA testing of biological material recovered from weapons and criminal instruments has in recent times increasingly been used to exclude and include suspects as possible perpetrators and to solve a variety of crimes. See, e.g., State v. Hale 335 Ore. 612, 616 (DNA testing of the grip of a revolver found in the perpetrator's house revealed multiple DNA patterns, most damningly including the profile of the rape-murder victim).

Here, as the prosecution maintained, the person who killed Ms. Collins broke the branch off of its tree at the crime scene, cleaned it, and inserted more than once into the victim's vagina.[44] This item was found protruding from the body near the right and left thighs, which yielded a positive finding for seminal substance. See p. 7 & nn. 17-20, *supra*. There is blood on the stick, and semen would be found there as well. In addition, due to the significant physical contact that the assailant had with the stick there is every reason to believe it contains DNA (sweat/skin cells) from the assailant.[45]

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he put his shorts back on without his underwear. See Closing, p.55. In addition to demonstrating that someone other than Alley is the source of the male DNA on the victim's underwear and the underwear that the assailant left at the scene, DNA testing can also establish that, contrary to the state's assertion at trial, the blood on Mr. Alley's shorts does not come from the victim.

[44] See e.g., Closing, pp. 57, 144.

[45] Also, there "was blood evidence or red material evidence on the external aspect of this three branch, or stick, that was protruding from between the legs" (Trial Tr. 914), which could match other male DNA on the weapon. Given the severity of injuries and beating the victim sustained, it

3. DNA TESTING OF ADDITIONAL EVIDENCE CAN IDENTIFY THE PERPETRATOR AS WELL

DNA testing of other items can likewise establish the identity of the assailant. There were over 100 injuries to the victim's body, she was severely beaten and died, in part, as a result of manual strangulation. There is evidence that she struggled, fought with her attacker, and, according to the autopsy report, had a "fractured left mid finger nail." DNA testing can reveal the assailant's DNA underneath her nails and exclude Alley from that DNA. See People v. Hayes, 284 A.D.2d 1008, 726 N.Y.S.2d 891 (N.Y. App. Div. 2001)(the Appellate Court affirmed the lower court's grant of testing for a defendant convicted in 1983 of a strangulation death, defendant had scratches on his hands and arms, court found that "there is a reasonable probability that the verdict would have been more favorable to defendant if a DNA test had been conducted on the victim's fingernail scrapings and those test results had been admitted at trial").

In addition, the victim had bruising on the inside of her thighs, consistent with someone "pushing the legs open with fingers."[46] In addition, it was observed during the autopsy that ". . . inside the thighs between the legs, there was abrasions of the inner thighs around the sexual area of the individual, the perineal area or private part area . . . "[47] As adverted to earlier, reports identified substances on a vaginal swab, swab from the right inner thigh, left inner thigh, and an oral swab, which also tested weakly positive for acid phosphatase [AP], which is a screening test for semen.

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is certainly possible that the assailant bled during the attack.

[46] Trial Tr. 920.

[47] Trial Tr. 914-915.

Although there was no sperm seen, that is not determinative, because sperm may be overlooked,[48] and even without sperm, other biological evidence may still exist with the rape kit, as confirmed by the seminal type and acid phosphatase found here.

Thus, while evidence contained in the rape kit confirms the existence of biological evidence on the underwear and stick, it also makes clear that testing of such items could independently provide proof of identity, because STR or Y-Chromosome DNA tests (which target male only DNA) are capable of demonstrating that the victim's body orifice and thigh swabs contain male DNA, which does not belong to Sedley Alley.

4. DNA TESTING CAN IDENTIFY THE ASSAILANT AND ESTABLISH SEDLEY ALLEY'S ACTUAL INNOCENCE

All told, therefore, DNA analysis of critical pieces of evidence – notably the victim's underwear, the red underwear at the scene, the stick – can identify the person whose cells are on those items, including semen, blood, urine, sweat, skin, hair. Sedley Alley's innocence would be demonstrated by DNA test results which show that the same man – someone other than Sedley Alley – is the source of the DNA from the victim's underwear, the DNA on the assailant's underwear at the crime scene, and DNA on the stick-murder weapon, and DNA from underneath the victim's fingernails.[49] DNA testing can also show that skin, sweat, and other fluids were deposited by the

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[48] In many cases, critical biological evidence such as spermatozoa, was overlooked during the original investigation of the crime, has been identified when the evidence was re-examined in the post-conviction testing context. Testing of "overlooked" evidence has not only exonerated the wrongly convicted, but it also has led to the identification of the perpetrators of crime, such as in the case of Michael Mercer, exonerated in 2003 of the 1991 rape of a woman in New York. See Wrong Man is Set Free by DNA, N.Y. POST, May 20, 2003, at 6; DNA Clears Rape Convict After 12 Years, *N.Y. TIMES,* May 20, 2003, at B.

[49] Testing of additional biological evidence could further support Mr. Alley's innocence. For example, a body hair was recovered from the victim's waistband. Trial Tr. 883. Through DNA

same person on the victim's shorts, bra, shirt, shoes, and sock. See also pp. 7-8 & nn. 24-28, *supra* (identifying other items sought in complaint). DNA testing can, without doubt, prove Sedley Alley's actual innocence.[50]

F. DNA ANALYSIS HAS EXONERATED THE INNOCENT IN CASES INVOLVING FALSE CONFESSIONS

As a final note, DNA analysis can, and does, lead to exonerations in cases involving false confessions. As noted earlier, Professor Leo has established that Sedley Alley's statement to the police is unreliable, the unreliability of which can be conclusively established through DNA. Professor Leo's published study (cited *supra*, pp. 5-6) shows that false confessions occur with alarming frequency. In fact, false confessions are among the leading causes of wrongful convictions nationwide. See Samuel R. Gross et. al., Exonerations in the United States: 1989 through 2003, (April 2004), available at http://www.law.umich.edu/newsandinfo/ exonerations-in-us.pdf (out of 328 proven DNA and non-DNA exonerations in U.S. during study period, 15% involved false

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testing this hair could be matched to the male DNA from the assailant's underwear. In addition, the state's proof at trial also included blood that was found on Alley's car just above the door handle going downward toward the front of the car. The state's forensic examiner Paulette Sutton testified that the blood was consistent with victim's ABO type and that it could be consistent with bloody head hair having been against the car. Trial Tr. 816-817. Also, there was staining, blood on headlights and front of car that the state attributed to victim (Trial Tr. 820, 824), and a fragment of head hair from Alley's car that the state's hair expert opined at trial was microscopically similar to victim's hair (Trial Tr. 881-882). DNA testing can conclusively demonstrate that the victim is not the source of the blood or hair from Alley's car.

[50] The finding of the same person's DNA on more than one item is considered a "redundant result" which is used to identify the perpetrator of an offense. In the context of DNA investigations, such redundant results have led to exonerations and/or new trials. See e.g., State v. Peterson, 364 N.J. Super. 387, 397 (App. Div. 2003)(in case where victim had been sexually assaulted and penetrated by a stick, DNA results from sperm and hair were identical and not Peterson's).

In Sedley Alley's case, redundant results from DNA testing of the two pairs of underwear, stick, and other items of evidence can conclusively establish, as in *Peterson* that Sedley Alley is actually innocent. See Appendix D (Chart).

confessions, with such confessions "heavily concentrated among the most vulnerable groups of innocent defendants," *i.e.*. the mentally disabled and juveniles).

The exceptional importance of the constitutional right of access to biological evidence for post-conviction DNA testing in a case involving a "confession" is illustrated by the case of Bruce Godschalk of Pennsylvania, a case adverted to earlier. After Godschalk was denied access to evidence by the state courts, he was granted that access by a federal court, which held that despite the overwhelming evidence of Godschalk's guilt, he was entitled to DNA testing. Godschalk, 177 F.Supp.2d at 370. Subsequent testing at two laboratories confirmed that a single assailant committed both rapes, absolutely excluded Godschalk as being the rapist, and he was freed after fifteen years of wrongful imprisonment. Sara Rimer, DNA Testing In Rape Cases Frees Prisoner After 15 Years, NEW YORK TIMES, February 15, 2002.[51]

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[51] The case of Chris Ochoa and Richard Danziger provides another example. In 1988, Ochoa was an employee of the Pizza Hut restaurant chain in Austin, Texas. After a young woman was found raped and murdered in another Pizza Hut restaurant, he was brought to the police station for questioning, under the theory that a "master key" had been used to gain access to the premises. After several hours of interrogation, Ochoa gave a detailed confession, which contained key details of the crime not available to the public. Ochoa described in graphic detail how he and a friend and fellow employee, Richard Danziger, raped the victim before Ochoa shot her in the head. Unlike many defendants who confess to crimes while in police custody, Ochoa did not recant his statements after he was released; instead, he pled guilty to the crime, and went on to testify in detail about the events of that night at Danziger's trial. Danziger was convicted on the basis of that testimony, in addition to the expert testimony that a pubic hair found near the victim's body was microscopically similar to Danziger's own. In 1998, however, a man named Achim Marino wrote to then-Governor (and now-President) George W. Bush, confessing to the murder and stating that he could not longer bear responsibility for the fact that two innocent men were in prison for his crimes. Post-conviction DNA testing subsequently confirmed Marino's claim and exonerated both Ochoa and Danziger -- excluding both men as the source of the semen found in the victim's body, with the single male DNA profile obtained a perfect match to Marino's own. See Mark Donald, Lethal Rejection, Dallas Observer, Dec. 12, 2002; Mark Wrolstad, Hair-Matching Flawed as a Forensic Science; DNA Testing Reveals Dozens of Wrongful Verdicts Nationwide, The Dallas Morning News, March 31, 2002.

G. THE OPINIONS BELOW

Notwithstanding clear, extensive, undisputed proof demonstrating that Sedley Alley is actually innocent (See pp. 3-5 & nn. 2-13) and notwithstanding the fact that DNA testing in this case could conclusively establish innocence, the District Court denied relief. The District Court concluded that, under the Eighth and Fourteenth Amendments, Sedley Alley has no constitutional right to access to the evidence he seeks to test. See 6th Cir. Apx. at 163-193.

On appeal, the Sixth Circuit agreed. It affirmed the District Court on the basis that "there exists no general constitutional right to post-judgment DNA testing." Appendix A, p. 3. Without conducting any real analysis or seeking to identify the life[52] or liberty interest[53] of Sedley Alley which is at stake, the Sixth Circuit panel summarily held that Sedley Alley has "no procedural due process right to post-conviction DNA testing." Id. The Court did not conduct any balancing of interests under *Mathews v. Eldridge*.

The panel also concluded that Sedley Alley has "no substantive due process right" to such evidence either, because denial of access did not "shock the conscience," and in the Court's view, the Clerk and the District Attorney were not acting arbitrarily or capriciously. Id., pp. 3-4. Compare Harvey v. Horan, 285 F.3d 298, 319 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing)(it is patently arbitrary to refuse access to evidence for DNA testing absent any legitimate

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[52] Sedley Alley has maintained that he has a life interest at stake protected by the due process clause because he is alive.

[53] Sedley Alley has maintained, *inter alia*, that he as a liberty interest not only in not being executed while innocent, but also in access to clemency proceedings in a case of innocence. See Harvey v. Horan, 285 F.3d 298, 314 (4th Cir. 2002)(Luttig, J., respecting denial of rehearing) (liberty interest in access to clemency process where *Herrera* requires invocation of clemency to establish innocence).

countervailing interest).

Sedley Alley has argued that he requires the evidence for DNA testing in order to establish a basis for obtaining clemency under *Herrera v. Collins*, 506 U.S. 390 (1993), and that as a matter of due process, he is entitled to evidence for clemency purposes. The Sixth Circuit dismissed this argument, however, concluding that: (1) Alley does not have a "substantive due process right to clemency proceedings" and that therefore (2) there could be no violation of substantive due process under the circumstances. Appendix A, p. 4. The Sixth Circuit did not specifically address any procedural due process rights which attach given *Herrera*'s holding.

The Sixth Circuit also rejected a contention that the state's duty to disclose exculpatory evidence also required its disclosure as a matter of due process. Appendix A, p. 4. The Court stated that *Brady v. Maryland*, 373 U.S. 83 (1963) did not support Alley's contentions, because Alley had yet to establish that the evidence actually exculpates him. The Sixth Circuit did not specifically address the contention that, under *Arizona v. Youngblood*, 488 U.S. 51, 55-58 (1988), a person still retains due process rights to potentially exculpatory evidence.

Finally, the Sixth Circuit held that, notwithstanding *Herrera*'s prohibition against the execution of the innocent, Sedley Alley was a "legally guilty man." Appendix A, p. 5. To be sure, he was convicted. The Sixth Circuit noted that at trial, there was a confession, a purported description of events to law enforcement authorities and "eyewitness testimony" which, according to the panel meant that Alley "could never accurately be considered actually innocent of the crime." Id. Of course, this begs the very question of actual innocence which Sedley Alley seeks to prove.

It thus appears that, directly contrary to Holmes v. South Carolina, 547 U.S. ___ (2006), the Sixth Circuit has thus ultimately used circular reasoning to conclude that it is because of Sedley

Alley's "legal guilt" that he is cannot prove he is "actually innocent."Notably, the Sixth Circuit has reached this conclusion of "actual guilt" by relying on unreliable evidence and ignoring exculpatory evidence. The Sixth Circuit: (1) relies on statements to the police which are unreliable (See p.5 & nn. 12-13, *supra*) and supposed "eyewitness testimony" ***when the eyewitness identification of the abductor actually proves that Alley is innocent and points the finger at the boyfriend*** (See pp. 4-5 & nn. 8-9); while (2) simultaneously ignoring all of the extensive evidence (See pp. 3-6) including time of death, exculpatory forensic evidence, and proof of the boyfriend's motive and opportunity – all of which show that Sedley Alley is, in fact, actually innocent.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE PRESENTED IS OF NATIONAL IMPORTANCE

Justice Luttig said it best. The existence of the right to DNA testing is "one of the most important criminal law issues of our day," Harvey v. Horan, 285 F.3d 298, 304 (4th Cir. 2002)(Luttig, J., concurring)

It goes without saying that the quintessential miscarriage of justice is the execution of an innocent person. See Schlup v. Delo, 513 U.S. 298, 324-325 (1995)("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."). Justice O'Connor has frankly expressed the fear that "the system may well be allowing some innocent defendants to be executed." See "O'Connor Expresses Death Penalty Doubt; Justice Says Innocent May Be Killed," Washington Post, July 4, 2001, p. A1. Unfortunately, Justice O'Connor was right.

In 2004, science confirmed that Texan Cameron Todd Willingham was convicted and executed on the basis of evidence about arson which has now been scientifically discredited. See "Report: Executed Texan May Be Innocent," United Press International, Dec. 9, 2004

(discussing *Chicago Tribune* investigation of Willingham case). Also in Texas, Ruben Cantu was executed for a crime which he apparently did not commit. See e.g., "Uncertain Justice: Efforts To Determine Whether A State Has Executed An Innocent Man Reflect The Country's Growing Unease With Capital Punishment," *Houston Chronicle*, 6th Cir. Apx.n. 24, 2006.

In this "American criminal justice system [which] rightly sets the ascertainment of truth and the protection of innocence as its highest goals," Harvey v. Horan, 285 F.3d 298, 299 (4th Cir. 2002) (Wilkinson, J., concurring); Tehan v. United States ex rel. Shott, 382 U.S. 406, 417 (1996) ("The basic purpose of a trial is the determination of truth"), it is "critical that the moral force of the criminal law not be diluted by [procedures] that leave[] people in doubt whether innocent men are being condemned." In Re Winship, 397 U.S. 358, 364 (1970).

To that end, forensic DNA technology has revolutionized the search for truth in our nation's criminal justice system and has helped to ensure that the innocent are not being wrongfully accused, convicted, and even executed. DNA has become the foremost technique for conclusively identifying – and excluding – criminal suspects in cases where biological material (such as blood, saliva, skin, semen or hair) is left at a crime scene. Postconviction DNA Testing: Recommendations for Handling Requests, Nat'l Instit. Just., Off. Just. Programs, U.S. Dept. Just., Pub. No. NCJ 177626 (Sept. 1999) at 1. "STR DNA tests can, in certain circumstances, establish to a virtual certainty whether a given individual did or did not commit a particular crime." See Harvey v. Horan, 285 F.3d 298 (4th Cir. 2002)(Luttig, J., concurring).

Importantly, DNA testing has resulted in the exoneration of 176 prisoners – 14 of whom were on death row – in this country. See www.innocenceproject.org. Even Congress has recognized the importance of DNA testing – just two years ago, the Justice for All Act was signed into law, which

incorporates the "Advancing Justice Through Technology Act" and the "Kirk Bloodsworth Post-Conviction DNA Testing Program" to test the DNA evidence of those already convicted of crimes who may be innocent, including death row inmates. And, "Federal and state governments are seeking to add millions of DNA profiles to anti-crime databases by including genetic information about people who are charged – but not yet convicted – of crimes." "More States May Hold DNA Profiles of Arrestees", USA Today, May 1, 2006.

Thus, in an era where criminal justice is being defined by DNA testing, Sedley Alley presents to this Court a question of exceptional importance. This petition presents "one of the most important criminal law issues of our day[:] . . . whether there exists under the Constitution of the United States a right, post-conviction, to access previously-produced forensic evidence for purposes of such, and related, DNA testing in order to establish – before the executive, if not also before the courts – one's complete innocence of the crime for which he has been convicted and sentenced." Harvey v. Horan, 285 F.3d 298, 304-305 (4th Cir. 2002)(Luttig, J., concurring). "The issue is of especial importance where the right is asserted by one who, for capital offense, has been sentenced to death, but the principle at stake is no different for one who has been sentenced not to death, but to a term of extended incarceration." Id.

Importantly, "These questions cannot long be avoided, now that science is available." Id. at 304, 312. See also Id. at 388, n.7 (King, J., concurring)("[I]t may be that the significant interest of our constitutional system in ensuring justice requires, under the due process clause, that prisoners enjoy access to evidence for the purpose of DNA testing. That however, is not an issue within our balliwick; if any such right exists, it must be recognized by judges of a higher pay grade than those of this Court."); Bradley v. Pryor, 305 F.3d 1287, 1291 (11th Cir. 2002) (Birch, J, concurring)("[J]ust

what rights, if any, does a convicted petitioner who has exhausted his direct appeals and post-conviction avenues of relief, enjoy relative to discovery and testing of DNA evidence?"). As Judge King has indicated, it is for our nation's Highest Court to answer this question of exceptional importance.

In Sedley Alley's case, a panel of the Sixth Circuit, in a very brief opinion, is now the first and only federal court of appeals to decide this important issue. See Appendix A. Finding no constitutional right, the Sixth Circuit has given its blessing to a scenario that Judge Luttig has described as "constitutionally intolerable":

> [It] would simply be "constitutionally intolerable," Herrera v. Collins, 506 U.S. at 419, 113 S.Ct. 853 (concurring opinion of O'Connor, J., joined by Kennedy, J.), for the government to withhold from the convicted, for no reason at all, the very evidence that it used to deprive him of his liberty, where he persists in his absolute innocence and further tests of the evidence could, given the circumstances of the crime and the evidence marshaled against the defendant at trial, establish to a certainty whether he actually is factually innocent of the crime for which he was convicted.

Harvey, 285 F.3d at 317-318 (Luttig, J., concurring). See also Crawford v. State, 278 Ga. 95, 99 (2004)(Fletcher, C.J., dissenting)(the Eighth Amendment cannot prohibit execution of the innocent if those seeking to prove their innocence are denied the fundamental tools necessary to prove their claims). American citizens agree: 91% of voters believe that it is necessary to "require courts to give convicted persons on death row the opportunity to have DNA tests conducted in order to prove innocence." See Peter D. Hart Research Association, Inc., polling data, March 2001.

This Court should therefore grant certiorari, lest we risk the situation all have sought to avoid – the execution of an innocent person. Compare Crawford v. Schofield, 542 U.S. ___ (2004) (Stevens, Souter, Ginsburg, JJ., dissenting from denial of stay of execution where petitioner sought

access to DNA evidence, but had received DNA testing previously). This case presents this Court with the opportunity to reaffirm its commitment to protecting the innocent – a sentiment shared by people throughout the Nation. For indeed, if innocent persons are executed or remain in prison, the guilty roam free.

II. SEDLEY ALLEY HAS A CONSTITUTIONAL RIGHT TO THE RELEASE OF EVIDENCE FOR DNA TESTING UNDER THE EIGHT AND/OR FOURTEENTH AMENDMENTS

Contrary to the conclusion of the Sixth Circuit panel, Sedley Alley does have a constitutional right to access to evidence for DNA testing. Such a right, founded in the Eighth and Fourteenth Amendments in particular, derives from settled jurisprudential principles: (1) The Eighth and Fourteenth Amendments prohibit the execution of the innocent, where executive clemency provides the failsafe for claims of actual innocence; (2) Under the Fourteenth Amendment, an individual with a protected life or liberty interest is entitled to process which dramatically enhances the search for the truth with minimal costs; (3) As a matter of substantive due process, the state cannot engage in arbitrary action without meaningful justification; and (4) As a matter of due process, a party facing criminal sanctions may not be denied exculpatory evidence, or face the loss of potentially exculpatory evidence. All told, these principles entitle Sedley Alley to access the evidence for DNA testing.

A. UNDER *HERRERA*, SEDLEY ALLEY HAS AN EIGHTH AND FOURTEENTH AMENDMENT RIGHT TO EVIDENCE FOR DNA TESTING TO SEEK CLEMENCY BASED ON ACTUAL INNOCENCE

When biological evidence is available from which DNA testing can be performed, the arbitrary denial of access to this evidence by State Actors constitutes and unconstitutional denial of access to evidence of actual innocence and access to the executive clemency process. This arbitrary

denial is the functional equivalent to the "flip of a coin" and is a denial of Mr. Alley's fundamental rights to life and liberty. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1997).

The Eighth and Fourteenth Amendments, "regardless of the verbal formula employed" categorically prohibit the execution of an innocent person, which is a "constitutionally intolerable event." Herrera v. Collins, 506 U.S. 390, 419 (O'Connor & Kennedy, JJ., concurring); Id., 506 U.S. at 431-432 (Blackmun, Stevens, Souter, JJ., dissenting)(It is "crystal clear" that the execution of an innocent person violates the Eighth Amendment, because such action "is at odds with any standard of decency that I can imagine."). The traditional – though not exclusive – remedy for one who is actually innocent is executive clemency. Absent relief through the judicial process, executive clemency proceedings are the failsafe mechanism for preventing the continued incarceration or execution of an innocent person. Herrera v. Collins, 506 U.S. at 411-412.[54]

Herrera thus establishes two indisputable propositions: (1) The Eighth and Fourteenth Amendment prohibit the execution of the innocent; and (2) An individual should pursue executive clemency to prevent his execution if innocent. These two propositions converge into one truth: Given *Herrera*'s right to be free from execution or continued incarceration if innocent, and *Herrera*'s requirement that Sedley Alley pursue his claims of innocence through clemency, Sedley Alley has the constitutional right to the release of evidence he has requested – especially where undisputed evidence in the record already demonstrates that he is innocent.

This case presents the constitutional conundrum resulting from *Herrera*. Sedley Alley clearly has a constitutional right not to be executed while innocent, but he cannot prove his actual innocence

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[54] Under Tennessee law, Sedley Alley may seek such clemency on the basis of actual innocence. See e.g., Tenn. Const. Art. III §6; Tenn. Code Ann. §40-27-101.

and enforce his federal constitutional rights absent DNA testing. State courts applying state law have not provided that right to DNA testing. The state executive has also denied access to the evidence. Thus, Sedley Alley finds himself with a constitutional right but no remedy. He will be executed despite actual innocence because the state has made the enforcement of his constitutional rights impossible. And now, the federal courts have concluded that Sedley Alley has no federal right which allows him to enforce his *Herrera* rights. The result of all of this is clear: The Eighth Amendment has been rendered meaningless for Sedley Alley. That certainly cannot be the law.

As Judge Luttig has made manifest, where clemency exists as a failsafe to prevent the incarceration or execution of the innocent, Sedley Alley has a constitutionally-protected interest in establishing his innocence to the executive. Judge Luttig explains:

> [C]lemency constituting the safety net of our criminal justice system for the prevention of miscarriages of justice, *see generally Herrera v. Collins*, 506 U.S. 390, 411-15, the noncapital prisoner retains (as does the capital prisoner, I believe), at least a residual, substantive liberty interest in meaningful access to existing mechanisms of executive clemency, which access would enable him to pursue his freedom from confinement from the executive based upon the claim that he is factually innocent of the crime for which he was convicted. *See id.* at 411-12 & n. 13 (explaining that clemency is the 'historic mechanism' for obtaining relief based upon factual innocence). This interest exists, I believe, even if there is no independent liberty interest in these mechanisms themselves; in the particular processes by which the executive exercises his discretion to grant or deny clemency; or in the freedom that would result from favorable executive action obtained through these mechanisms
> . . . .

Harvey v. Horan, 285 F.3d 298, 314 (4th Cir. 2002)(Luttig, J., respecting denial of rehearing).

What ineluctably flows from the right to pursue freedom through clemency is the constitutional right to access evidence necessary to make the pursuit of clemency meaningful. As Judge Luttig explains, denial of the right to evidence necessary to present a claim of innocence in executive clemency would render nugatory the right and duty to establish innocence in clemency:

> Were mere access to such evidence denied in circumstances where it is possible to prove the individual's innocence beyond all doubt, the incarcerated would be effectively foreclosed from recourse to the very executive processes that the Supreme Court has instructed are, collectively and appropriately, the safety net of our criminal justice system – and in precisely the circumstances in which the Court itself has repeatedly said that such recourse should lie, namely, where the system has failed by convicting the truly innocent.

Id. at 320.

Judge Luttig's observations are borne out by what occurs in the real world. Indeed, as a practical matter, courts have recognized that, in a case of innocence, such as this, which involves biological samples which can be tested, it is "unlikely that a viable petition for clemency is available . . . without the persuasive conclusions of . . . DNA tests." Cherrix v. Braxton, 131 F.Supp.2d 756, 768 (E.D.Va. 2001). Likewise, experience shows (in Virginia, for example) that "proceedings that culminated in executive clemency began in court with successful requests for access to court exhibits containing critical biological evidence that was ultimately subjected to DNA testing." Id.

In other words, what's happening in the real world is that DNA testing of court exhibits – exactly as Sedley Alley has requested here – has provided the vehicle for enforcement of the dictates of *Herrera* that innocence be established through clemency. Experience informs us that the necessary prerequisite for exoneration of the innocent through clemency has been the release of evidence for DNA testing – exactly as Sedley Alley has requested.

Given the clear Eighth Amendment right to be preserved from execution if innocent, as well as clemency's role in preventing miscarriages of justice, commentators have likewise concluded that an individual claiming innocence has a right to meaningful access to DNA analysis for purposes of seeking clemency. See e.g., Dietrich, A Unilateral Hope: Reliance On The Clemency Process As A Trigger For A Right Of Access To State-Held DNA Evidence, 62 Md.L.Rev. 1028 (2003). As

Dietrich explains:

> In relying on the clemency process to fulfill an articulated and unique position in the criminal justice system, it is imperative [to] uphold and maintain the integrity of the process. [The courts] must ensure that prisoners have the tools necessary to present a meaningful petition to the clemency authority. Part of this meaningful ability to access the clemency process should be the ability to access state-held evidence for the purposes of modern DNA testing.

Id. at 1045. See also Kreimer & Rudovsky, Double Helix, Double Bind: Factual Innocence And Postconviction DNA Testing, 151 U.Pa.L.Rev. 547, 601-603 (2002) (especially where *Herrera* recognizes that executive clemency is failsafe for innocence, "the State may not arbitrarily deny access to DNA evidence that could free an innocent prisoner.")(cited hereafter as *Kreimer & Rudovsky*).

Both the District Court and the Sixth Circuit believe, contrary to Judge Luttig and the clear import of *Herrera*, that Sedley Alley has no right to evidence for DNA testing, because he has no substantive right to clemency and/or clemency proceedings. This misses the mark. To be sure, a person seeking clemency does not have the right to *receive* clemency, but *Herrera* means that he or she has meaningful right to *pursue clemency*, **when the person seeks relief on the basis of innocence**. Judge Luttig properly recognizes that it is because *Herrera* requires the use of clemency that *Herrera* necessarily gives some constitutionally-protected access to the clemency process – though not any right to a particular result. See Harvey v. Horan, 285 F.3d at 314 (Luttig. J.).

As Dietrich makes clear, given the scope of *Herrera*: "A constitutional right to meaningful access would only ensure that the prisoner would be provided with the tools to fully craft his or her plea of innocence. Once that plea arrives on the desk of the clemency authority, that authority would be free to reject or grant clemency based on whatever factors that authority sees fit." Dietrich, 62

Md.L.Rev. at 1045.

Ultimately, given *Herrera*'s dual conclusions that the Eighth Amendment prohibits the execution of the innocent but generally requires one to pursue innocence in clemency, Sedley Alley does have an Eighth and Fourteenth Amendment right to production of the evidence to present such evidence in clemency. *Herrera* indicates that his Eighth Amendment right may be protected through clemency, but it is obvious that he will receive no such protection if he cannot obtain the evidence which the executive requires to exonerate him.

Judge Luttig is right. His conclusion is supported by real-world experience, commentators, and common sense alike. *Herrera* and the Eighth and Fourteenth Amendments cannot, on the one hand, require an individual to show actual innocence through proceedings for executive clemency, but on the other hand not guarantee the ability to present in clemency perhaps the most compelling evidence of actual innocence: DNA tests. To give an innocent person an essentially meaningless "remedy" of clemency is not to provide a remedy at all, while making the Eighth Amendment right recognized by *Herrera* a nullity. Under *Herrera*, Sedley Alley does indeed have a constitutional right to the evidence he seeks, so that he may establish his innocence, especially in clemency.

B. UNDER THE FOURTEENTH AMENDMENT, SEDLEY ALLEY HAS A SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHT TO RELEASE OF EVIDENCE FOR DNA TESTING

While Sedley Alley has an Eighth and Fourteenth Amendment right flowing from *Herrera*, he is likewise constitutionally entitled to release of the evidence under the Due Process Clause of the Fourteenth Amendment. He is entitled to the evidence for at least three reasons: (1) Disclosure of the evidence is mandated by the *Matthews v. Eldridge* balancing test, in which no one has any legitimate interest in seeing Sedley Alley executed when "guilt can be quickly and definitively

determined by means of a simple test [and] there is no reason not to have it performed." Cooper v. Woodford, 358 F.3d 1117, 1125 (9th Cir. 2004)(Silverman, J., concurring); and (2) Substantive due process demands disclosure; and (3) It is exculpatory evidence within the meaning of *Brady v. Maryland* and *Arizona v. Youngblood*[55]

1. Sedley Alley Has A Procedural Due Process Right To The Evidence He Requests For DNA Testing

As noted *supra*, the Sixth Circuit found that Sedley Alley had no procedural due process right to access of the evidence, but it conducted no analysis. Any such analysis would have led to the inevitable conclusion that Sedley Alley is entitled to the evidence for testing.

There is little question that Sedley Alley has a life interest which is protectable as a matter of due process,[56] and he likewise has a liberty interest (deriving from *Herrera*, as noted by Judge Luttig) in not being executed while innocent and having access to clemency process. Because Sedley Alley has interests protected by the due process clause, the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976) applies. See e.g., Wilkinson v. Austin, 545 U.S. ___, ___ (2005); City of Los Angeles v. David, 538 U.S. 715, 717 (2003)(same).

"[T]he requirements of due process are flexible and call for such procedural protections as the particular situation demands." Wilkinson v. Austin, 545 U.S. at ___. In *Mathews*, this Court

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[55]Indeed it is the functional equivalent of the arbitrary destruction of exculpatory evidence long prohibited by this Court in Youngblood.

[56] Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288 (1997)(O'Connor, J, concurring)("A prisoner under sentence of death remains a living person and consequently has an interest in his life."); Id. at 291-292 (Stevens, J., dissenting)("There is no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does. . . .[I]t is abundantly clear that [a live human being] possesses a life interest protected by the Due Process Clause.")

adopted a framework which requires the balancing of three distinct factors:

> First, the private interest that will be affected by official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See Wilkinson, 545 U.S. at ___, quoting Mathews, 424 U.S. at 335.

Here, application of the *Mathews* framework leads inevitably to the conclusion that failure to release the evidence constitutes a violation of due process under the circumstances:

> First: There is little question that Sedley Alley's interest in life is of paramount value. There is no higher interest recognized by our constitution and laws. His right to be free from execution while innocent is also of paramount value.
>
> Second: (A) There is a serious risk of an erroneous deprivation of Sedley Alley's life if the evidence is not released for testing. Indeed, it already clearly appears that Sedley Alley did not commit the offense for which he has been convicted, especially where the time of death excludes him as the perpetrator, and the person identified as the abductor is not him, but appears to be the victim's boyfriend. See pp. ___, *supra*. The state's arbitary refusal to permit testing is the equivalent to the bad faith destruction of exculpatory evidence. See, Youngblood.
>
> (B) That grave risk of erroneous deprivation, however, will be eliminated as much as humanly possible through the release of the evidence for DNA analysis. The "probable value" of allowing release of the evidence for testing is immeasurable: DNA analysis of forensic evidence has revolutionized the justice system because it has the ability to dictate with pinpoint accuracy the identity of a person who committed an offense. The people of this Nation recognize this. Release for testing has immeasurable value precisely because such process will provide the unquestioned *accuracy* necessary to make a determination whether Sedley Alley's interests would be wrongly extinguished in the "quintessential miscarriage of justice." Schlup v. Delo, 513 U.S. 298, 324-325 (1995). Everyone's interest – Alley's, the state's, and the public's – lies in insuring the accuracy of his conviction and death sentence, and that interest will be manifestly served through the process requested – whose accuracy far exceeds any other truthseeking process imaginable.
>
> Third: There are virtually no burdens on the government. Perhaps it is for this reason that Mr. Key essentially agreed that the evidence should be released, so long as there is a court order. Indeed, the testing will take two weeks, and it will not cost the state a dime.

The facts of this case fit so cleanly within the *Mathews* framework that it is virtually certain that the due process right exists. Sedley Alley's paramount right to life fits cleanly into the equation, requiring disclosure of the evidence. The process requested will provide an indisputably accurate determination of guilt or innocence. This, too, mandates disclosure. And the cost of that process to the state is nil: The cost is born by Sedley Alley. Again: All due process considerations demand the disclosure of the evidence. It is also worth noting what the District Court said at hearing:

> What possible harm could it do to test the evidence in the time permitted and find out whether it has any value. And if you are a prosecutor . . . and your obligation is to do justice, how could you go wrong by having the evidence tested?

Apr. 18, 2006 Tr. 13-14. In other words, there is no legitimate interest weighing against Sedley Alley's request for the evidence. Because there is none, due process mandates disclosure.

Judge Silverman puts it this way: Where "guilt can be quickly and definitively determined by means of a simple test . . . there is no reason not to have it performed." Cooper v. Woodford, 358 F.3d at 1125 (Silverman, J., concurring). Agreed. In reality, what Judge Silverman is saying is simple: In the balance of all interests, testing is required. Without explicitly applying *Mathews*, he has done the *Mathews* analysis. And he is right. There is no legitimate reason to withhold the evidence when a quickly administered, highly accurate, simple test will protect the life of an individual, the state, and the public from a miscarriage of justice.

Without any *Mathews* analysis, however, the Sixth Circuit has dismissed the existence of this right. The Sixth Circuit is in error and should be reversed. This Court should grant certiorari. "Concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." Schlup v Delo, 513 U.S. at 325 citing T. Starkie, Evidence 756 (1824)("The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape

than that one innocent man should be condemned."). For that reason, under the *Mathews* test, there is only one conclusion to be drawn: Release of evidence for testing "is constitutionally required . . . as a matter of basic fairness." Harvey v. Horan, 285 F.3d at 315 (Luttig, J.)(citing *Mathews*).

2. *Brady* And Its Progeny Establish Sedley Alley's Post-Conviction Right To Potentially Exculpatory Evidence That Could Objectively Prove His Actual Innocence

The District Court did not dispute that DNA testing had the potential to exculpate Mr. Alley and thereby prevent his execution although he nonetheless denied access to this potentially exculpatory evidence on *Brady* grounds. See Brady v. Maryland, 373 U.S. 83 (1973). In other words, the potential "materiality" of the requested testing is assumed and not an issue in this appeal. Of course, the proper standard to evaluate materiality is well-established, and looks to the impact of the evidence on the finder-of-fact and to confidence in the verdict. See United States v. Bagley, 473 U.S. 667, 682 (1985)("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome").

The District Court and the Sixth Circuit rejected the straightforward application of *Brady/Bagley* without explicitly distinguishing the decisions of other federal courts that have recognized the right at issue. See Godschalk v. Montgomery County District Attorney's Office, 177 F.Supp.2d 366, 377 (E.D.Pa. 2001)(using *Brady/Bagley* analysis and holding that "there is indeed a reasonable probability that had DNA evidence which showed plaintiff was not the source of the genetic material found on the victims been disclosed to the defense, the result of the proceeding would have been different).

The Sixth Circuit concluded that Sedley Alley had yet shown that the evidence at issue is

already exculpatory. While it is certainly true that the evidence Mr. Alley seeks to test is only potentially exculpatory since DNA testing has not yet been conducted on it, and the results of testing cannot be divined ahead of time. However, this Court has made it clear that "potentially exculpatory evidence" is indeed subject to the protections of the Due Process Clause in "what might loosely be called the area of constitutionally guaranteed access to evidence." See Arizona v. Youngblood, 488 U.S. 51, 55-58 (1988) (internal citations and quotations omitted). In *Youngblood*, the Court considered the situation where the State failed "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant" and held that bad-faith destruction of such evidence violated due process. Id. at 57-58. The remedy for bad-faith destruction of potentially exculpatory evidence can include dismissal of the criminal indictment. See e.g., United States v. Bohl, 25 F.3d 904, 914 (10th Cir. 1994)(finding bad-faith destruction of potentially useful evidence and dismissing indictment); United States v. Cooper, 983 F.2d 928, 933 (9th Cir. 1993)(same).

Here, the action of the Defendants in denying access to the disputed evidence is the functional equivalent of its bad-faith destruction. Even though this vital evidence actually exists, Mr. Key – as an agent of the state itself – has prevented Sedley Alley from subjecting it to the DNA tests that would prove (or disprove) his innocence claim. For all practical purposes then, the evidence is missing, "destroyed," or otherwise unavailable. The fact that Mr. Alley could actually test this evidence but for the barriers erected by Defendants necessarily means that their actions in "destroying" this evidence are undertaken in bad faith. Put another way, there can be no doubt that Sedley Alley would have a *pre-trial right* to access this "potentially exculpatory" evidence, and, thus erection of technical barriers to access at this time amount to bad-faith destruction.

Moreover, federal courts have in fact recognized that *Brady* imposes duties on the state which continue through post-conviction proceedings. See Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997)(stating that the duty to disclose exculpatory information "extends to all stages of judicial process."); Thomas v. Goldsmith, 979 F.2d 746, 749-50 (9th Cir. 1992) (state under an obligation to come forward with any exculpatory evidence in its possession relevant to habeas corpus proceeding); Monroe v. Butler, 690 F.Supp. 521, 525-26 (E.D.La. 1988) ("[N]ondisclosure is unfair where it prevents a defendant from taking full advantage of postconviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial.").

In fact, this Court itself has characterized the *Brady* duty as "ongoing," and has also commented that prosecutors receiving exculpatory evidence after a conviction have a continuing ethical duty to disclose that information. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("[T]he duty to disclose [exculpatory information] is ongoing."); Imbler v. Pachtman, 424 U.S. 409, 427 n. 25 (1976) ("[A]fter a conviction is obtained, prosecutor is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon correctness of the conviction.")(citations omitted).[57]

It should be clear that the line from *Brady* and *Bagley* to *Ritchie* and to *Youngblood* naturally points towards the post-conviction disclosure of potentially exculpatory evidence that could be

---

[57] Additionally, numerous state courts have cited a *Brady*-like right as justification for ordering post-conviction DNA testing. Commonwealth v. Brison, 618 A.2d 420, 425 (Pa. Super. Ct. 1992); Commonwealth v. Reese, 663 A.2d 206, 207-08 (Pa.Super.Ct. 1995); Jenner v. Dooley, 590 N.W.2d 463, 471 (S.D. 1999); Dabbs v. Vergari, 570 N.Y.S.2d 765, 768 (Sup.Ct. Westchester Co. 1990); State v. Thomas, 586 A.2d 250, 251-52, 254 (N.J. App. Div. 1991) ("[W]e will not elevate form so highly over substance that fundamental justice is sacrificed."); Sewell v. State, 592 N.E.2d 705, 707-08 (Ind.App. 1992)

subjected to DNA testing to definitively prove innocence (or confirm guilt). Indeed, although the analysis below of fundamental principles of substantive and procedural due process provides independent justification to recognize a post-conviction right of access, these analyses should also be viewed as affirming the propriety of recognizing the post-conviction applicability of the basic *Brady* right to evidence that could be DNA tested in order to guarantee that an actually innocent person is not executed.

3. Refusal To Provide Access To Evidence For DNA Testing Also Violates Sedley Alley's Right To Substantive Due Process

Sedley Alley's due process right of access is also based in substantive due process. The Due Process Clause provides protection to the individual from the "arbitrary exercise of the powers of government." Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)) (holding that the Due Process Clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them"); County of Sacramento v. Lewis, 523 U.S. 833, 845 (1988)(noting that freedom from arbitrariness is at the core of due process). The Supreme Court has stated that actions which are shockingly arbitrary violate substantive due process. County of Sacramento, 523 U.S. at 850-851. This Court has not decided how extreme conduct must be to violate substantive due process, but has stated that "deliberate indifference" is sufficient to violate substantive due process. County of Sacramento, 523 U.S. at 851.

The state wields power over the evidence and could allow release for testing at any moment if it wished. The germane question for substantive due process purposes is the logic or fairness of defendants' refusal to allow DNA testing that could prove innocence. In other words, the appropriate question is whether the state, *for absolutely no reason whatsoever*, may deny a prisoner access to

evidence that could save him from the gallows. Substantive due process demands that the answer to this question is an emphatic no.

Respondents can identify no state interest in refusing access to evidence. Given Sedley Alley's willingness to pay for the testing here there will be *no* financial burden on the state. Obviously, the state can have no finality interest in executing an innocent man. See Herrera, *supra* (Of course, it is theoretically possible that DNA testing could confirm guilt -- but in that case finality interests are served too). In any event, the state's real interest is truth and justice, and DNA testing can only advance that interest. See Brady, 373 U.S. at 87-88 (describing the state's interests in actual justice).

As Judge Luttig has noted: "[T]he right of access to evidence is sufficiently supported by the history and traditions that our criminal justice system be fair and that the innocent not be wrongfully deprived of their liberty, and by our now-settled practice . . . that all potentially exculpatory evidence be provided to the accused . . ." Harvey, 285 F.3d at 319 (Luttig, J.).

Thus, there exists no legitimate interest – let alone a compelling interest – justifying the withholding of evidence for DNA testing, when such evidence "could prove him absolutely innocent of the crime." Id. at 320 (Luttig, J.). As Judge Luttig notes, there is "patent arbitrariness [in] denying access to such evidence in the absence of any governmental interest whatsoever in the withholding of such." Id. at 319. There is a violation of substantive due process. In light of the interests at stake, denial of access here cannot be viewed as anything other than shockingly arbitrary, in violation of substantive due process.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

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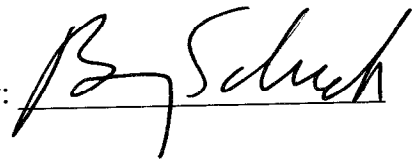
By: 

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 06-5552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAY 14 2006

LEONARD GREEN, Clerk

SEDLEY ALLEY,

Plaintiff-Appellant,

v.

WILLIAM R. KEY,

Defendant-Appellee;

WILLIAM L. GIBBONS,

Intervenor-Appellee.

On Appeal from the United States District Court for the Western District of Tennessee

Before: BOGGS, Chief Judge; RYAN and BATCHELDER, Circuit Judges.

BOGGS, Chief Judge. Sedley Alley, a death row inmate convicted in 1987 by a Shelby County, Tennessee jury of kidnaping, rape, and first-degree murder, appeals the district court's dismissal of his action brought pursuant to 42 U.S.C. § 1983 seeking injunctive relief in the form of access to certain physical evidence, now in the custody of the state court, for the purpose of DNA testing. William R. Key is the Clerk of the Criminal Court of the Thirtieth Judicial District

of Tennessee. William L. Gibbons is the District Attorney General of the same state judicial district.

We **AFFIRM** the decision of the court below.

I

Alley seeks access to test for DNA evidence, at his own cost, a stick found inside the victim's body, the victim's underwear found at the scene, another set of purportedly men's underwear also found at the scene, the victim's shorts, bra, shirt, shoes, and a sock. These items were introduced as evidence at his trial. He claims to expect to identify "semen, urine, skin cells, or other biological samples from the perpetrator . . . ." (Appellant's Brief, 12)

Alley confessed to most features of the brutal attack on 19 year-old Marine Suzanne Marie Collins only hours after it occurred, and he walked law enforcement authorities through the crime scene shortly after his arrest. He never asserted his innocence either at trial or until very lately in the nineteen years since his conviction. *See, e.g., State v. Alley*, 776 S.W.2d 506, 508-10 (Tenn. 1989). However, he now requests access to physical evidence as part of a last-minute claim of actual innocence.

Alley first sought post-conviction DNA analysis in a petition to the Shelby County Criminal Court, pursuant to Tenn. Code Ann. §§ 40-30-403 and 304, filing his request on May 4, 2004, following the federal district court's denial of his habeas petition and affirmance of that decision by our court. *Alley v. Bell*, 101 F. Supp. 2d 588 (W.D. Tenn. 2000), *aff'd*, 307 F.3d 380 (6th Cir. 2002), *cert. denied*, 540 U.S. 839 (2003). The state trial court denied Alley's DNA analysis petition, finding that Alley had not demonstrated that he was entitled to DNA analysis pursuant to § 40-30-303 or that he satisfied the requirements for a discretionary order for DNA testing pursuant to § 40-

30-304. The Tennessee Court of Appeals affirmed. *Alley v. State*, No. W2004-0124-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). The United States Supreme Court denied certiorari. *Alley v. Tennessee*, 544 U.S. 950 (2005). Alley then initiated this action, which was dismissed by the district court on April 20, 2006, for failure to state a claim on which relief may be granted. We granted Alley's motion for expedited briefing of the appeal from this dismissal. (Order, May 9, 2006)

II

A successful claim brought pursuant to 42 U.S.C. § 1983 must identify both a right guaranteed by the United States Constitution and a deprivation of that right by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Though this case and its expedited briefing schedule do not encourage a definitive ruling on all aspects of the matter, we agree for purposes of the dispute now before us, with the district court's ruling that there exists no general constitutional right to post-judgment DNA testing.

Specifically, we concur with the district court's finding that Alley enjoys no procedural due process right to post-conviction DNA testing. Nor does Tennessee's Post-Conviction DNA Analysis Act create such a right. Tenn. Code Ann. § 40-30-301 *et seq*. The state-imposed requirements for securing DNA analysis under the Act do not themselves create any unconstitutional deprivation. Finally, Alley was not deprived of his right under state law to petition for DNA analysis. His petition was simply denied under state law.

Similarly, we find that Alley has no substantive due process right that supports the relief he seeks. We find that the defendant's denial of Alley's request for access to the evidence does not

"shock the conscience." *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). Key, a clerk, may grant access only in accordance with state law. In this dispute, he has thus far operated consistently with state law. The conduct of Gibbons, the local District Attorney General, in opposing access likewise does not rise to the level of constitutional error here. It is neither arbitrary nor capricious for him to defend legally what has to date been viewed as valid state practice in the handling of extremely belated requests for examination of alleged DNA evidence. We note also that, though Alley seeks access to DNA testing as part of his campaign for executive clemency, he does not have a substantive due process right to clemency proceedings. *Herrera v. Collins*, 506 U.S. 390, 414 (1993). Therefore, no substantive due process right can attach to procedures, such as the access and testing desired here, that he seeks collaterally to his petition for clemency.

Nor does *Brady v. Maryland*, 373 U.S. 83 (1963) demand the relief Alley seeks. Alley's suit does not claim that he was denied access to this physical evidence during his trial, or even that he was denied a fair trial. *Brady* cannot be said to reach post-conviction access for DNA testing in the circumstances presented by the case before us. The district court correctly noted that *Brady* requires no relief in this matter because, *inter alia*, "it remains purely a matter of speculation whether the evidence Plaintiff requests will tend to exculpate or otherwise prove favorable to him." (District Court Opinion of May 4, 2004, at 19)

Neither the Eighth nor Ninth Amendments commands William R. Key to grant access to the physical evidence in this case for the purposes of DNA testing. It is true that a majority of the Supreme Court has said that the Eighth Amendment prohibits execution of innocents. See, e.g., *Herrera*, 506 U.S. 419 (O'Connor, J., concurring); *id.* at 431-32 (Blackmun, J., dissenting).

However, it is also true that Alley files his § 1983 action as a "legally guilty" man. *Id.* at 419 (O'Connor, J., concurring). 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, no matter the result of the analysis he now seeks. Moreover, the Ninth Amendment has never yet been understood, by any federal court, to require post-conviction DNA testing.

III

For the forgeoing reasons, we **AFFIRM** the ruling of the court below.

APPENDIX B

No. 06-5552

FILED

MAY 16 2006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

SEDLEY ALLEY,

Petitioner-Appellant,

v.

WILLIAM R. KEY, CRIMINAL COURT CLERK THIRTIETH JUDICIAL DISTRICT AT MEMPHIS, ET AL.,

Defendants-Appellees,

WILLIAM L. GIBBONS, DISTRICT ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY,

Intervenor-Appellee.

ORDER

BEFORE: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, ROGERS, SUTTON, COOK, MCKEAGUE, and GRIFFIN, Circuit Judges.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

*Judge Gibbons recused herself in this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

SEDLEY ALLEY,	)	
	)	
Plaintiff,	)	
	)	
V.	)	No. 2:06-CV-2201
	)	
WILLIAM R. KEY, Criminal Court Clerk for the Thirtieth Judicial District,	)	
	)	
Defendant,	)	
and	)	
	)	
WILLIAM L. GIBBONS, District Attorney General for the Thirtieth Judicial District,	)	
	)	
Intervenor.	)	

ORDER OF DISMISSAL

Plaintiff Sedley Alley ("Alley"), who is incarcerated under a sentence of death, brings this action pursuant to 42 U.S.C. § 1983 alleging that Defendant William R. Key ("Key"), in his capacity as Criminal Court Clerk for the Thirtieth Judicial District of Tennessee, has violated Plaintiff's rights under the Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States by refusing to produce evidence in Key's physical custody so that

Plaintiff may conduct D.N.A. testing that he believes may tend to exonerate him.

By order of April 11, 2006, the Court permitted William L. Gibbons ("Gibbons") to intervene in his capacity as Attorney General of the Thirtieth Judicial District. The Court did so on the representation of Gibbons' counsel, the Attorney General of Tennessee, that Key was "merely a custodian" and that Gibbons "has a far more direct interest in defending and pursuing the State's interests in its criminal procedures and the finality of the decisions of its criminal justice system."[1]

On April 13, 2006, Gibbons filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) alleging lack of subject matter jurisdiction and failure to state a claim. On April 17, 2006, Key filed a Motion to Dismiss adopting Gibbons' Motion.

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[1] At the hearing of this matter on April 18, 2006, Gibbons' counsel asserted that neither Gibbons nor Key has authority to release the evidence in question and that it is, in fact, under the control of the judicial branch in Tennessee. Counsel did, however, concede that Gibbons would comply with the orders of the federal judiciary in this proceeding. Key's counsel has also expressed his client's willingness to produce the evidence, if ordered to do so. The participation of Gibbons and Key in this proceeding appears to guarantee, at least, that the Court has before it parties who have the evidence in their physical control, can release it if ordered, and will act vigorously to protect whatever interest the "State" may have.

On April 18, 2006, the Court held a hearing which the parties attended and at which they had the opportunity to present proof, but did not. All parties agree that this case should be decided as a matter of law.

For the reasons set forth in this order, the Court grants Key's and Gibbons' Motions to Dismiss.

I. BACKGROUND

Plaintiff is an inmate under sentence of death currently incarcerated at Riverbend Maximum Security Institution, in Nashville, Tennessee. A Shelby County jury convicted Plaintiff of the July, 1985 murder of Suzanne Marie Collins and sentenced him to death. State v. Alley, 776 S.W.2d 506 (Tenn. 1989). Plaintiff's convictions and sentence were affirmed on appeal. See id., cert. denied, 493 U.S. 1036 (1990). Plaintiff's initial attempt to obtain post-conviction relief was ultimately denied. Alley v. State, 958 S.W.2d 138 (Tenn. Crim. App. 1997). Plaintiff was denied habeas corpus relief in the federal courts. Alley v. Bell, 101 F.Supp.2d 588 (W.D. Tenn. 2000), aff'd, 307 F.3d 380 (6th Cir. 2002), cert. denied, 540 U.S. 839 (2003).

Plaintiff thereafter sought, and was denied, post-conviction relief in state court in the form of access to biological evidence

for D.N.A. testing, pursuant to Tenn. Code. Ann. § 40-30-301 (et seq.). See Alley v. State, 2004 WL 1196095 (Tenn. Crim. App. 2004), cert. denied, 544 U.S. 950 (2005).

Plaintiff's motion for equitable relief from the judgment of the District Court denying him habeas relief has been denied, Alley v. Bell, no. 97-3159, doc nos. 169 and 176, and Plaintiff is currently appealing those judgments to the Sixth Circuit. See Alley v. Bell, no. 05-6876. In light of the District Court's ruling on Plaintiff's motion for equitable relief, and despite the pendency of his appeal in that matter, the Tennessee Supreme Court has scheduled the execution of Plaintiff's death sentence for May 17, 2006. State v. Alley, M1991-00019-SC-DPE-DD (Tenn. March 29, 2006).

II. THE INSTANT COMPLAINT AND MOTION

Plaintiff has filed suit under 42 U.S.C. § 1983, seeking access to evidence introduced at his trial so that he may subject it to D.N.A. testing to "exclude Plaintiff as having committed the homicide and/or provide information to identify the person(s) involved in Suzanne Collins' death." Amended Complaint at 6, ¶ 8. Thus, he seeks access to the evidence to demonstrate his actual innocence. Plaintiff avers that, despite the restrictions on a district court's exercise of its habeas jurisdiction, this Court is not barred from

exercising jurisdiction because the instant action does not question the validity of his conviction or sentence and does not seek his release from confinement. See generally Heck v. Humphrey, 512 U.S. 477 (1994). Plaintiff grounds his entitlement to the relief requested on numerous bases in the Eighth, Ninth, and Fourteenth Amendments to the Constitution.

Gibbons contends that the Court is barred from exercising jurisdiction because the action is the "functional equivalent of an application for a writ of habeas corpus brought without leave of the United States Court of Appeals for the Sixth Circuit." Memorandum In Support Of Motion To Dismiss and/or Opposition To Motion For Immediate Release Of Evidence ("Intervenor's Memorandum"), doc. no. 12 at 3. He also contends that Plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted, because Plaintiff cannot demonstrate that Key's refusal to allow D.N.A. testing of the requested items deprives Plaintiff of a constitutionally protected right. Id. at 9-12. Gibbons further argues that Plaintiff's prior unsuccessful post-conviction pursuit of D.N.A. testing precludes the granting of relief in this matter based on collateral estoppel, *res judicata*, and the Rooker-Feldman doctrine. Finally, Gibbons contends

that the statute of limitations applicable to this action bars Plaintiff's request for relief.

III. ANALYSIS

A. Jurisdiction

This action is not the functional equivalent of a second or successive habeas corpus petition.

Gibbons asserts that this Court lacks subject matter jurisdiction over Plaintiff's suit because it is the functional equivalent of a second or successive application for habeas relief and is, therefore, subject to the pre-clearance requirements of 28 U.S.C. § 2244(b)(3)(A). Gibbons argues that the "injunctive relief [Plaintiff] seeks is designed solely and necessarily to undermine his state court conviction and/or sentence." Intervenor's Memorandum at 4. Because Plaintiff seeks access to evidence he believes will allow him to demonstrate his innocence, Gibbons concludes that granting Plaintiff the relief requested will "'necessarily imply the invalidity of his conviction or sentence'" because "he seeks federal judicial relief for the sole purpose of undermining the state court judgment under which he is confined." Id. at 5 (quoting Heck, 512 U.S. at 480)). See also, Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002)("Harvey I"); Harvey v. Horan, 285 F.3d 298 (4th Cir.

2002)(denying petition for rehearing and rehearing en banc)("Harvey II"); and Kutzner v. Montgomery County, 303 F.3d 339 (5th Cir. 2002).

Plaintiff maintains that his suit is not, and should not be construed as, an action in habeas corpus. This is evident, he asserts, because "[s]hould [Plaintiff] receive the relief he is requesting, he will not be released immediately, nor will his conviction be overturned, nor his sentence reduced." Memorandum Of Law In Support Of Plaintiff's Complaint And Response To Intervenor's Motion To Dismiss ("Plaintiff's Memorandum"), doc. no. 13 at 5. Accordingly, Plaintiff argues, success on the instant motion "will not necessarily imply the invalidity of [Plaintiff's] convictions or sentences." Id. at 6 (quoting Wilkinson v. Dotson, 125 S.Ct. 1242, 1248 (2005)). See also Osborne v. District Attorney's Office, 423 F.3d 1050 (9th Cir. 2005); Bradley v. Pryor, 305 F.3d 1287 (11th Cir. 2002).

The issue appears to be one of first impression in this Circuit. There can be no doubt but that, with the instant action, Plaintiff hopes to set in motion legally significant events that will provide some relief from his present conviction and sentence. However, the standards governing this Court's determination about whether a § 1983 action is more properly construed as an action in habeas corpus are

objective standards concerned with the nature of the immediate relief requested, not subjective inquiries into the Plaintiff's motive for seeking redress for alleged constitutional violations. Harvey, 278 F.3d at 383 (King, J., concurring). Where a judgment in favor of Plaintiff will not "necessarily imply the invalidity of his conviction or sentence," Plaintiff's cause of action is not one for habeas corpus relief. Wilkinson v. Dotson, 125 S.Ct. 1242, 1247-48; Heck, 512 U.S. at 487. Were the Court to grant Plaintiff the relief requested, his underlying conviction and sentence would remain intact. Thus, success in this suit cannot call into question the validity of Plaintiff's conviction and sentence. If Plaintiff wishes to challenge his sentence and conviction on the basis of any subsequent D.N.A. testing of the specified pieces of evidence, he will, at least as far as the federal courts are concerned, be required to seek habeas corpus relief in an action wholly separate from the instant matter. Therefore, Plaintiff's § 1983 action is not the functional equivalent of an application for habeas corpus relief, and this Court may properly exercise jurisdiction under 28 U.S.C. § 1331.

B. Preclusion and Statute of Limitations

Plaintiff is not precluded from seeking the relief requested.

Gibbons contends that the Court should not exercise jurisdiction because: 1) the Plaintiff is collaterally estopped from bringing this suit in the federal courts on the basis of his unsuccessful state court post-conviction action seeking access to certain items of evidence; 2) *res judicata* and the Rooker - Feldman doctrine bar Plaintiff from seeking the requested relief; and 3) the applicable statute of limitations has expired.

1. Collateral Estoppel

Collateral estoppel applies to preclude litigation of issues that have already been decided. Hutcherson v. Lauderdale County, Tennessee, 326 F.3d 747, 758 n. 3 (6th Cir. 2003). The federal courts are required to give the same preclusive effect to a state court judgment as would any state court considering the same action. Id. at 758. Gibbons contends that Plaintiff is collaterally estopped from seeking access to the evidence requested. Gibbons premises his objection on his assertion that the issue posed, the Plaintiff's entitlement to specifically requested items of evidence, was previously decided by the state courts. Because Plaintiff was

unsuccessful in his previous attempt to obtain certain items for D.N.A. testing, Gibbons now contends that issue preclusion bars Plaintiff from seeking to re-litigate the matter in the federal courts. He concludes: "Because the state criminal courts necessarily determined that there was NO reasonable probability of a finding of innocence or a more favorable sentence, the plaintiff is collaterally estopped from re-litigating the issue." Intervenor's Memorandum at 16.

Plaintiff responds that the issue he seeks to adjudicate is not whether a reasonable probability exists that he would have been found innocent or received a more favorable sentence if D.N.A. testing revealed exculpatory evidence, but, rather, whether he is deprived of his constitutional rights when the State denies him access to evidence for D.N.A. testing. He maintains that this narrow issue has never been decided, much less discussed, in the state courts. Moreover, he asserts that the items of evidence requested in the instant suit are wholly separate from those at issue in his state court litigation and have, therefore, never been the subject matter of any prior suit.

Gibbons' reliance on collateral estoppel is misplaced. Only in the broadest sense are the issues between the previous state action

and the present similar: Plaintiff here seeks access to evidence for D.N.A. testing. However, the real issue before the Court, Plaintiff's various theories of constitutional entitlement to the evidence, has not been litigated previously. A fair reading of the state court opinions indicates that Plaintiff's constitutional claims were not addressed by the state courts and were not relevant to the disposition of the post-conviction action. Rather, it appears that the state courts merely determined that Petitioner was not entitled to D.N.A. testing of the evidence pursuant to state statutory and case law. See Alley, 2004 WL 1196095 at *7-13. Thus, no state court has ruled on the constitutional issues before the Court. Therefore, Plaintiff's suit is not barred by collateral estoppel.

2. *Res Judicata* and Rooker-Feldman

Res Judicata applies to bar subsequent re-litigation of "'all claims that were actually litigated or could have been litigated in the first suit between the same parties.' Four elements must be established before res judicata can be asserted as a defense: (1) the underlying judgment must have been rendered by a court of competent jurisdiction; (2) the same parties were involved in both suits; (3) the same cause of action was involved in both suits; and (4) the underlying judgment was on the merits." Hutcherson, 326 F.3d at 758 (citations omitted).

In arguing that the instant suit should be barred by *res judicata*, Gibbons again asserts that Plaintiff is merely seeking to replicate the previous state court action. He contends that Plaintiff seeks identical relief, against identical parties, that the subject matter is identical, and that the causes of action are identical to those previously raised. Thus, he concludes, the claims in this suit "were actually litigated or could have been litigated in the first suit." Id.

Plaintiff responds that the evidence identified in his Amended Complaint has never been the subject of any state-court claims. Furthermore, Plaintiff argues that the state courts refused to adjudicate the constitutional claims he now raises when they considered the other evidence.

Applying the elements of *res judicata* set forth above, the Court is satisfied that Plaintiff's claims are not precluded. The parties are not the same. The subject matter of the post-conviction proceedings is distinct from the subject matter of the instant suit, that is, the evidence sought is not the same. Compare Amended Complaint at 7 (identifying various pieces of physical evidence), with Petition For Post-Conviction DNA Analysis Pursuant To Tenn. Code

Ann. § 40-30-301 Et Seq., exhibit 2 to Intervenor's Memorandum (seeking access for D.N.A. testing to numerous biological samples including hairs and swabs taken from the victim's body). The specific causes of action are not identical where Plaintiff had no explicit basis for pleading any constitutional claims in the statutory action alleged to be preclusive. There is, therefore, no indication that Plaintiff's constitutional claims about the evidence then requested "could have been litigated." It was apparently discretionary whether the Tennessee courts would consider Plaintiff's constitutional claims in the state courts, and, exercising that discretion, the state courts chose not to adjudicate them. It would be inequitable to deny Plaintiff a federal forum for his constitutional claims because he was denied the previous opportunity to litigate those claims, through no fault of his own, when the state courts apparently refused to consider his invocation of

constitutional protections.[2] Accordingly, *res judicata* does not preclude Plaintiff's action.

Plaintiff is not barred from seeking relief based on the Rooker-Feldman doctrine. The Rooker-Feldman bar is confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S.Ct. 1517, 1521-22 (2005). Petitioner does not contend that the harm he suffers resulted from the previous state court judgment. He does not seek to have that judgment rejected. He merely seeks to have constitutional claims, which the state courts did not address, adjudicated insofar as those claims apply to evidence which was not before the state courts and which was not relevant to the previous state court proceedings. The Court's decision on Plaintiff's constitutional claims cannot call into

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[2] The Court notes that there is passing authority suggesting that the failure of the state courts to address Plaintiff's constitutional claims may not be alone sufficient to defeat the assertion of *res judicata*. In Pittman v. Michigan Corrs. Organization, 123 Fed.Appx. 637, 640 (6th Cir. 2005), the federal plaintiff conceded that he raised constitutional claims in his previous state court litigation, as has Plaintiff, but he argued that *res judicata* was inapplicable because the state courts "did not specifically address them." The Sixth Circuit was not persuaded: "[The Plaintiff] cites no authority, and we have found none, for his assertion that the state court's failure to address individually each of his issues means that they were 'not decided' for purposes of *res judicata*."

question the state law grounds forming the basis of the Tennessee courts' decision not to grant Plaintiff access to the evidence he previously requested. That evidence is not even the subject matter of this action. Therefore, the present action is not an "appeal" of the state court proceedings. Plaintiff's suit is not the "'paradigm situation in which Rooker-Feldman precludes a federal district court proceeding.'" Id. at 1527 (citations omitted). Plaintiff's action is not barred by Rooker-Feldman.

3. It is unclear on this record whether Plaintiff's action is barred by the applicable statute of limitations.

Gibbons contends that, if Plaintiff's action is proper under § 1983 and is not subject to preclusion, it is barred by the applicable statute of limitations. In § 1983 actions, federal courts apply the relevant state statute of limitations, although "federal standards govern when the statute begins to run." Sharpe v. Cureton, 319 F.3d 259, 266 (6th Cir. 2003)(citing Wilson v. Garcia, 471 U.S. 261, 267 (1985)). Gibbons asserts that the applicable Tennessee statute of limitations is Tenn. Code Ann. § 28-3-104(a)(3), which imposes a one-year limitation on relief under federal civil rights statutes. See Roberson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005); Sharpe, 319 F.3d at 266. Plaintiff asserts that his action cannot be subject to § 28-3-104(a)(3) because he seeks access to D.N.A. testing and Tennessee does not impose a limitations period on post-conviction actions to obtain evidence for D.N.A. testing. See Tenn. Code Ann.

§ 40-30-303. Therefore, Plaintiff contends, there is no limitations period for his suit.

Plaintiff may not claim that his suit concerns only the constitutional violations he suffers at the hands of Key and then attempt to incorporate into his action the lack of limitations period for a state court action that he believes has not provided a forum for the constitutional claims he presently alleges. See Plaintiff's Memorandum at 28 n. 11 ("The message from the state courts in this case was clear: The PostConviction DNA Act does not permit the litigation of federal constitutional claims, and only permits the application of state law."). Plaintiff's theory, which this Court has accepted, is that this is a civil rights action under 42 U.S.C. § 1983. Plaintiff is bound by the Tennessee statute of limitations governing such actions in the state courts. Roberson, 399 F.3d at 794.

The question, therefore, is when the statute of limitations began to run. "The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action. A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence." Sevier v. Turner, 742 F.2d 262, 273 (6th Cir. 1984)(citations omitted). In applying this test, courts seek to determine "'what event should have alerted the typical lay person to protect his or her rights.'" Roberson, 399 F.3d at 794 (quoting Hughes v. Vanderbilt Univ., 215 F.3d 543, 548 (6th Cir. 2000)).

The Court's inquiry in this case is fundamentally complicated by the fact that the constitutional right of which Plaintiff asserts he has been deprived has never been recognized or defined by a court of binding authority.[3] The Court is left to consider the following question: Where the existence and contours of a constitutional right are speculative, how is a court to discern precisely when that right has been denied such that the plaintiff should know that the right he asserts needs protection?

Gibbons reasons that, at the latest, Plaintiff knew or should have known of any alleged injury based on his access to evidence by May 5, 2004, when the State of Tennessee moved to dismiss his state court petition seeking such access. Intervenor's Memorandum at 19. Thus, Gibbons contends, the statute of limitations for the instant action expired on May 5, 2005. Plaintiff asserts that the one-year limitations period was not commenced upon the filing of the State's motion in opposition to his state court petition because the evidence he now requests is separate and distinct from that requested in state court, and, further, that Key has only recently denied him

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[3] The only federal case recognizing and applying a constitutional right similar to any of those claimed in this suit appears to be Godschalk v. Montgomery County District Attorney's Office, 177 F.Supp.2d 366 (E.D. Penn. 2001). The District Court in Godschalk concluded that the due process protections recognized by Brady v. Maryland, 373 U.S. 83 (1963) entitled an inmate to evidence for D.N.A. testing in order to seek exculpatory evidence post-conviction. Godschalk, 177 F.Supp.2d at 370. Judge Luttig, expressing his "views" on the subject, has also speculated that there exists some post-conviction right of access to D.N.A. testing of evidence. HarveyII, 285 F.3d at 310-20.

access to the requested evidence, thus ripening his constitutional claims about the denial of access.

As discussed above, this Court must determine what event should have alerted Plaintiff, as a "typical lay person," that action was required to protect any constitutional right of access to evidence. Roberson, 399 F.3d at 794. It should have been clear to Plaintiff, in May of 2004, that the State of Tennessee would not observe any constitutional right of access to evidence when the State refused to convey evidence upon his request in the state courts.[4] Moreover, that alleged constitutional deprivation was again apparent on May 17, 2004, when the Shelby County Criminal Court denied Plaintiff access to the evidence while refusing to consider his assertion of a constitutional right of access. The Tennessee Court of Criminal Appeals affirmed the judgment of the post-conviction court later that month, and, on October 4, 2004, the Tennessee Supreme Court denied permission to appeal. Finally, on March 28, 2005, the U.S. Supreme

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[4] Plaintiff suggests in his memorandum, p. 23 n. 10, that the limitations period could not have commenced during the state-court proceedings because the specific evidence at issue there differs from the evidence at issue in this suit. A denial of access to the evidence requested in 2004 would constitute a constructive denial of the general right Plaintiff asserts. See Harvey, 278 F.3d at 384 (King, J. concurring). The operative inquiry is when Plaintiff should have known that action was required to protect his alleged constitutional right. Thus, because it is not likely that the State's position about the alleged right would have differed as to any evidence requested by Plaintiff, Plaintiff should have known that his purported constitutional right to access evidence was in jeopardy when the State first failed to grant his request for evidence.

Court denied certiorari. At no point during this chain of events did Plaintiff seek to protect the claimed right.

The effect of the State's action on Defendant Key is more problematic. As Gibbons asserts in his Motion To Intervene, Key is a Shelby County employee and custodian of the evidence. He acknowledges physical possession. Demand was made on Key for the first time within one year of the filing of this complaint.

To the extent that mere denial of access to evidence is the constitutional harm of which Plaintiff complains, his action may be barred by the one-year statute of limitations applicable to actions under federal civil rights statutes. Plaintiff has had at least constructive knowledge of the constitutional violation he alleges here since May, 2004, at the latest. His suit was filed on April 5, 2006. Tenn. Code Ann. § 28-3-104(a)(3).[5]

However, Plaintiff also argues that the limitations period has only recently been triggered by the ripening of his constitutional claims about clemency. See Plaintiff's Memorandum at 23 n. 10. Any supposition that the action is barred based on when Plaintiff knew that he would not be granted the evidence as a matter of right necessarily overlooks the amorphous nature of the right asserted by Plaintiff. See generally Harvey, 285 F.3d at 310-11 (Luttig, J., respecting the denial of rehearing en banc)(asserting that the post-

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[5] Neither Alley nor Gibbons addresses whether equitable tolling of the statute of limitations is appropriate in this case, and, if so, how the Court should approach that analysis. Because this issue is not before the Court, the Court makes no ruling on it.

conviction due process right to testing of D.N.A. evidence "*legitimately* draws upon the principles that underlay" a number of recognized procedural and substantive due process rights)(emphasis in original). Thus, to the extent that Plaintiff alleges constitutional harm independent of the mere denial of access - for instance, that he would be effectively denied the opportunity to present his case for clemency - the Court must determine whether there is any constitutional basis for the right of access to evidence that he asserts before determining whether all claims based on that right are time-barred. Therefore, the Court will consider whether Plaintiff states a cause of action for the violation of any constitutional right.

C. Plaintiff's Constitutional Entitlement to the Release of Evidence

Plaintiff asserts that he is entitled to the release of the evidence requested pursuant to: 1) procedural due process; 2) substantive due process; 3) the due process right to the production of exculpatory evidence; 4) Eighth Amendment principles; and 5) the Ninth Amendment. Plaintiff's Memorandum at 11. Respondent maintains that no such constitutional right exists under any provision of the Constitution.

1. Procedural Due Process

Plaintiff first contends that his right to procedural due process under the Fourteenth Amendment requires release of the requested evidence. Plaintiff asserts that, because he possesses a fundamental interest in his life, due process requires that he be allowed access to evidence which may allow him to preserve that life interest by demonstrating his innocence of the crime for which he is sentenced. Plaintiff maintains that the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), establishes the analytical framework for his procedural due process claim. In Mathews, the Supreme Court held as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.[6] Applying that test, Plaintiff concludes that the process to which he is entitled to protect his life interest is release of the evidence because "[h]is right to life is paramount, the release of evidence for DNA testing is of exceptional value because it will provide the most accurate determination of Plaintiff's innocence, and there is no burden on the government." Plaintiff's Memorandum at 15.

The Mathews test is relevant only to the extent that Petitioner is able to show that he has some legally recognized liberty or property interest in the evidence he requests. Plaintiff's argument fails because he cannot demonstrate that the life interest which he asserts bestows upon him "the post-conviction legal right to access or discover the evidence relating" to his conviction. Harvey, 278 F.3d at 388 (King, J., concurring). Plaintiff has no state law right to the evidence. As noted above, no court of binding or persuasive authority has concluded that federal law encompasses such a right. Thus, because Plaintiff can articulate no established legal right to

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[6] Plaintiff's reliance on the Mathews test presupposes that the life interest he asserts is subsumed within the sphere of the liberty interests the test normally serves to protect. The Court assumes that Plaintiff is correct. However, there were divisions on the Supreme Court when it last spoke about whether and to what extent a death sentenced inmate retains a life interest protected by due process. Compare Ohio Adult Parole Authority, 523 U.S. at 281 (Rehnquist, C.J., joined by three justices)(concluding that whatever residual life interest remains after a death sentence is limited to protection from summary execution), with id. at 288-89 (O'Connor, J., joined by three justices)(recognizing a broader life interest after a death sentence).

the evidence, he is not entitled to process before being deprived of the evidence. Were the Court to recognize, without the aid of precedent or more clearly articulated reasoning, some post-conviction constitutional right to D.N.A. testing of evidence, the Court would lack a clearly defined right and a clear standard for its enforcement, leaving the development of the substance, form, and operation of the right to nothing more than the Court's prerogative. Although it is questionable whether any Court is capable of satisfactorily formulating such a right given the infinite possibilities of science and the idiosyncracies of each case, this Court is particularly ill-suited to do so. Plaintiff cannot establish a legally recognized right to the evidence he requests. Therefore, the Court concludes that he has no procedural due process right to the release of the evidence.

2. Substantive Due Process

Plaintiff claims that he is entitled to the evidence under the substantive due process protections of the Fourteenth Amendment. Plaintiff grounds his substantive due process argument on two principles: 1) it "shocks the conscience" to withhold the evidence arbitrarily in this matter; and 2) Plaintiff's life interest must include the right to obtain evidence of his innocence for presentation in clemency proceedings. Plaintiff's Memorandum at 16.

In arguing that denying him access to the requested evidence "shocks the conscience," Plaintiff posits a number of essentially

inapposite constitutional absolutes. See Plaintiff's Memorandum at 16-17. The operative inquiry confronting a court considering a substantive due process claim premised on the alleged "conscience shocking" behavior of some state official is whether her power is wielded egregiously or as an "instrument of oppression." County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998)(citations omitted). Key's conduct in this matter does not "shock the conscience" where he simply retains the evidence for safekeeping and releases it only in accordance with state or federal law. Defendant does not appear to have any power over the evidence which he could wield arbitrarily or oppressively. Because there is no demonstrable state or federal entitlement to post-conviction release of the evidence on demand, Key's refusal to do so cannot "shock the conscience." In effect, Plaintiff here seeks to have the Court construe a constitutionally protected right to access the evidence post-conviction, so that the Court may then conclude that a state actor who fails to acknowledge that right violates due process. For the reasons stated above, such an exercise of constitutional divination would be imprudently undertaken by this Court.

Plaintiff also contends that he has a substantive due process right of access to the evidence to establish his actual innocence during clemency proceedings. This argument is unavailing because, given that there is "no constitutional right to clemency proceedings," Workman v. Summers, 111 Fed.Appx. 369, 371 (6th Cir. 2004), it cannot be argued persuasively that a potential clemency

applicant is constitutionally entitled to what amounts to discovery for the preparation of a clemency application.

Plaintiff premises his argument on language from the Supreme Court's decision in Herrera v. Collins, 506 U.S. 390, 415 (1993), opining that clemency is the "fail-safe" mechanism in our criminal justice system for allowing the convicted to present judicially barred or frustrated claims of actual innocence. See Plaintiff's Memorandum at 18-19. Thus, Plaintiff reasons, due process requires that he have the "ability to establish his innocence to the Executive through the testing of the evidence at issue here." Id. See also Harvey II, 285 F.3d at 314 (Luttig, J., respecting the denial of rehearing). Although Herrera does recognize the historical role of clemency in the Anglo-American criminal justice system, Chief Justice Rehnquist explains that clemency's role is not one of constitutional dimension, but, rather, of grace. 506 U.S. at 413-14. See also Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 280-81 (1998). Thus, the Constitution does not "require [a] prisoner to show actual innocence through proceedings for executive clemency, but on the other hand not guarantee the ability to show actual innocence at such proceedings." Plaintiff's Memorandum at 19. The Constitution simply does not require clemency. To the extent that the Constitution requires judicial oversight of clemency proceedings, it requires no more than "*minimal* procedural safeguards," Ohio Adult Parole Authority, 523 U.S. at 290 (O'Connor, J., concurring)(emphasis in original), to protect against arbitrariness in denying access to the process itself and ensuring that the executive's exercise of her

clemency power is not grossly arbitrary, as in, for example, "flipping a coin" to determine the fate of the applicant. Id. The Court has never extended whatever "*minimal* procedural safeguards" are implicated in a state executive's exercise of her clemency power to include judicially mandated discovery of evidence. Therefore, because there is no substantive due process right of access to evidence to present claims in executive clemency proceedings or otherwise, such a right cannot be the basis for an action under § 1983.

3. The Due Process Right to Exculpatory Evidence

Plaintiff also contends that due process requires that the requested evidence be released to him because of his right to the disclosure of exculpatory evidence. See Brady v. Maryland, 373 U.S. 83 (1963). Brady held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. The due process concerns of Brady are implicated where the prosecution's withholding of evidence denies the defendant a fair trial. U.S. v. Bagley, 473 U.S. 667, 675 (1985).

This claim is unavailing. Plaintiff does not allege that the State failed to satisfy its Brady obligations regarding this evidence during his prosecution or that he has been denied a fair trial based on the refusal to grant access to the evidence. Plaintiff cannot

show that the evidence would have been favorable to his defense at trial because it remains purely a matter of speculation whether the evidence Plaintiff requests will tend to exculpate or otherwise prove favorable to him. Thus, Brady and the due process principle it vindicates are not implicated and do not provide Plaintiff with a due process right to the post-conviction release of evidence related to his conviction. Therefore, Brady and its progeny cannot be the basis for this § 1983 action.

4. Eighth Amendment Principles

Plaintiff argues that he is entitled to release of the evidence pursuant to fundamental Eighth Amendment principles. He first contends that, accepting Justice O'Connor's premise that it is "constitutionally intolerable" to execute an innocent person, see Herrera, 506 U.S. at 419, the Eighth Amendment requires that he be allowed to access evidence to demonstrate his innocence during clemency. However, as Justice O'Connor subsequently made clear in Herrera, persons, like Plaintiff, convicted and sentenced to death are not entitled to any presumption that they are innocent. Id. at 420. Simply put, upon a constitutionally sufficient adjudication of guilt, the convict may no longer invoke the protections afforded the presumptively innocent. Id. 419-20 ("Petitioner therefore does not

appear before us as an innocent man on the verge of execution. He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again. Consequently, the issue before us is not whether a State can execute the innocent."). Despite Plaintiff's impassioned assertions of factual innocence, he remains, before this Court, legally guilty. Therefore, the question raised by Plaintiff's Eighth Amendment claim is not whether he will be executed despite his innocence, but, rather, whether the Eighth Amendment requires this Court to order that he be allowed access to evidence to present his claim of innocence more effectively in clemency proceedings. As discussed *supra*, whatever Constitutional protections are implicated when a state inmate petitions for executive clemency, they do not include the judicially mandated discovery of evidence. Accordingly, the Eighth Amendment does not require release of the evidence to bring claims of innocence in clemency.

Plaintiff also asserts that the Eighth Amendment requires release of the evidence because the failure to do so exhibits a "deliberate indifference" to the potential for harm to Plaintiff. Plaintiff's Memorandum at 21. He contends that "[w]hen a state actor clearly knows that evidence in his or her possession could establish

an inmate's innocence, the person who fails to release that evidence is acting with deliberate indifference to the clearly foreseeable harm that the inmate will remain unjustly incarcerated and/or physically harmed by being executed - notwithstanding the inmate's actual innocence." Id. The "deliberate indifference" thread of Eighth Amendment jurisprudence has developed to formulate a test for evaluating a prison inmate's claim that prison conditions violate the Eighth Amendment. The inquiry is whether prison officials have demonstrated a "'deliberate indifference' to the inmates' health or safety." Hope v. Pelzer, 536 U.S. 730, 737-38 (2002)(citations omitted). The test has never been applied in the context which Plaintiff here asserts, that is, that a criminal court clerk acts with "deliberate indifference" in refusing to release evidence that state law forbids him from summarily releasing at his pleasure. Plaintiff's pursuit of the requested evidence has nothing to do with the conditions of his confinement or with the state officers charged with overseeing his confinement. Thus, his "deliberate indifference" argument is unavailing. Plaintiff's Eighth Amendment claims do not establish a constitutional right to the evidence.

5. Ninth Amendment

Plaintiff briefly proposes that the Ninth Amendment "provides him additional protections which entitle him to release of the evidence under the circumstances." Plaintiff's Memorandum at 22. Plaintiff cites no authority, nor is the Court aware of any authority, supporting his proposition about the sudden and sweeping reach he imputes to the Ninth Amendment. Therefore, this claim does not merit further consideration. Plaintiff's proposed Ninth Amendment right is unavailing.

IV. THE ALLEGED IMPROPRIETY OF PLAINTIFF'S COUNSEL BRINGING SUIT

Gibbons contends that Plaintiff's counsel, an employee of the Federal Public Defender's Office, has engaged in the unauthorized private practice of law by filing this suit. Plaintiff's counsel was authorized to bring this action pursuant to the mandate of the federal statute under which he was appointed to represent Plaintiff during his federal habeas corpus proceedings. See 21 U.S.C. § 848(q)(8)(repealed and re-codified at 18 U.S.C. § 3599). There has been no unauthorized practice of law.

V. CONCLUSION

Plaintiff's action is properly before this Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331. However, Plaintiff's action fails to state a claim upon which relief can be granted. Accordingly, Key's and Gibbons' Motions To Dismiss are GRANTED.

IT IS SO ORDERED, this 20th day of April, 2006.

S/ *Samuel H. Mays, Jr.*
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

(Please See Attached Electronic File)

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via facsimile and email to Leonard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and by facsimile and email to Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 16th day of May, 2006.

Paul R Botte

Respectfully Submitted,

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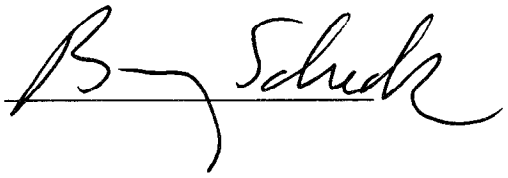
By: 

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served via facsimile and email to Leonard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and by facsimile and email to Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 16th day of May, 2006.