No. 06-5552

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SEDLEY ALLEY, Appellant,

v.

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

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

BRIEF OF WILLIAM L. GIBBONS

PAUL G. SUMMERS
Tennessee Attorney General

MICHAEL E. MOORE
Solicitor General

HEATHER C. ROSS
Senior Counsel
Civil Rights and Claims Division

JENNIFER L. SMITH
Associate Deputy Attorney General
Criminal Justice Division
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3487

STATEMENT RE: SIXTH CIRCUIT RULE 26.1

Appellee, William L. Gibbons, District Attorney General for the Thirtieth Judicial District of Tennessee, is an official of the State of Tennessee. Pursuant to Rule 26.1(a), a statement of disclosure of corporate affiliations and financial interest is not required.

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This appeal arises from an action filed under 42 U.S.C. § 1983 by appellant, Sedley Alley ("appellant" or "Alley"), a death-sentenced prisoner in custody pursuant to a judgment of a state court.[1] Alley appeals from a final judgment of the district court entered April 20, 2006, dismissing his complaint for failure to state a claim. (R. 20: Judgment; R. 19: Order of Dismissal) Alley filed a timely notice of appeal on April 21, 2006. (R. 22: Notice of Appeal) This appeal is from a final judgment disposing of all claims with respect to all parties. Jurisdiction is proper in this Court under 28 U.S.C. § 1291.

[1]The district court concluded that Alley's action was properly before it under § 1983 and 28 U.S.C. § 1331, and appellee Gibbons assumes for purposes of this appeal that the court's jurisdiction was properly invoked.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Does a convicted state prisoner have a federal constitutional right to post-conviction DNA analysis of evidence related to his conviction for purposes of demonstrating his alleged factual "innocence"?

II. May a federal court grant injunctive relief under the guise of 42 U.S.C. § 1983 where such relief necessarily dispossesses a state court of evidence over which it has *custodia legis*?

III. Is Alley's claim for DNA testing, asserted over twenty years after his conviction and two years after the state court denied his request for DNA analysis under Tennessee's Post-Conviction DNA Analysis Act, barred by the applicable statute of limitations?

IV. Where a state prisoner has previously sought, and was denied, DNA testing through state post-conviction DNA proceedings, do the doctrines of claim and/or issue preclusion bar a subsequent suit for the same relief in federal court?

V. In a capital case involving a state prisoner, what is the permissible scope of an appointment order under 21 U.S.C. § 848(q)(8)?

INTRODUCTION

Alley's present appeal yet again puts this Court in the position of deciding a last-minute barrage of filings from a state prisoner whose execution is imminent. Despite his confession in 1985 and no claim of innocence for nearly 20 years, Alley filed a civil action under 42 U.S.C. § 1983, a mere 42 days before his scheduled execution, claiming a constitutional right to DNA testing to demonstrate his "innocence" of the offense.[2] The timing of Alley's filing — a matter of his own choosing — has required both the district court and this Court (not to mention the defendants in this matter) to discard ordinary rules of procedure and decide this case as if in crisis.

By seeking injunctive relief, however, Alley invokes the federal court's equitable powers. But equity must take into consideration both the State's strong interest in proceeding with its judgment more than 20 years after the verdict and the lateness of Alley's filing. *See Gomez v. United States*, 503 U.S. 653, 654 (1992) ("There is no good reason for this abusive delay, which has been compounded by last minute attempts to manipulate the judicial process. A court may consider the last minute nature of an application to stay execution in deciding whether to grant

[2]Alley's first claim of innocence came exactly 30 days before his previous execution date in 2004.

equitable relief"); *Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992) (court may resolve against last-minute petitioner any doubts and uncertainties as to the sufficiency of his submission). In view of the eleventh-hour nature of Alley's filings, this Court should resolve the balance of the equities against Alley and in favor of the judgment below.

STATEMENT OF THE CASE

Sedley Alley was convicted in 1987 for the kidnapping, aggravated rape and premeditated first-degree murder of Suzanne Collins and sentenced to death. The Tennessee Supreme Court affirmed his convictions and sentence on direct appeal, *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989), and the United States Supreme Court denied certiorari. *Alley v. Tennessee*, 439 U.S. 1036 (1990). Alley's convictions and sentence were upheld by the trial court on post-conviction and subsequently affirmed by the Tennessee Court of Criminal Appeals. *Alley v. State*, 958 S.W.2d 138 (Tenn. Crim. App. 1997) (app. denied Sept. 29, 1997).

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

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

On May 4, 2004, thirty days before that execution date, Alley filed a petition in the Shelby County Criminal Court for post-conviction DNA analysis, arguing for the first time in nearly twenty years of trial and post-conviction litigation that he was factually innocent of the murder. *See* Tenn. Code Ann. § 40-30-301 *et seq*. (also known as the "Post-Conviction DNA Analysis Act of 2001") (copy attached). The trial court denied relief, and the Tennessee Court of Criminal Appeals affirmed. *Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004). The United States Supreme Court denied certiorari on March 28, 2005. *Alley v. Tennessee*, 544 U.S. 950 (2005).

In the meantime, however, the federal district court in Alley's habeas corpus proceeding stayed his June 2004 execution pending a decision by this Court in *Abdur'Rahman v. Bell*, Nos. 02-6547, 02-6548, and the district court's subsequent ruling on Alley's post-judgment motion under Fed. R. Civ. P. 60(b).[3] *Alley v. Bell*,

[3]The Court decided *Abdur'Rahman* in December 2004, but the decision was subsequently vacated by the United States Supreme Court in light of *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005), in which the Court "clarif[ied] the circumstances

U.S.D.Ct. No. 2:97-cv-3159 (Donald, District Judge) (Doc.Entry No. 122). After the district court rejected Alley's Rule 60 motion in November 2005 and his subsequent Rule 59 motion to alter or amend the judgment on March 22, 2006, the Tennessee Supreme Court entered an order on March 29, 2006, re-setting Alley's execution for May 17, 2006.

On April 5, 2006, invoking federal jurisdiction under 42 U.S.C. §1983 and 28 U.S.C. § 1331, Alley filed a complaint in the United States District Court for the Western District of Tennessee requesting injunctive relief in the form of access to certain evidence introduced in his criminal trial, and thus made part of the state-court record of that proceeding, for purposes of DNA testing.[4] (R. 1: Complaint) Alley sued only William R. Key, Criminal Court Clerk for the Thirtieth Judicial District of Tennessee, the physical custodian of the evidence at issue. However, the district court subsequently permitted William L. Gibbons to intervene as a defendant in his official

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under which a Rule 60(b) motion for relief may run afoul of the AEDPA's restriction on second and successive habeas petitions." *Id.* at 2. *See Bell v. Abdur'Rahman*, 125 S.Ct. 2991 (2005).

[4]Tenn. R. App. P. 24(a) provides that the "record on appeal" shall consist, *inter alia*, of "the original of any exhibits filed in the trial court."

capacity as District Attorney General for the Thirtieth Judicial District.[5] (R. 9: Order Granting Motion to Intervene)

The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6), and on April 20, 2006, the district court dismissed Alley's complaint for failure to state a claim upon which relief may be granted. (R. 19: Order of Dismissal) Alley appealed from the district court's judgment.

STATEMENT OF THE FACTS

Sedley Alley confessed to the 1985 kidnapping, aggravated rape and murder of Suzanne Marie Collins.[6] After his arrest on the morning her body was found, Alley led law enforcement officials on a walk-through of the crime scene, identifying the place where Collins' body was found and the tree from which he obtained the branch used in his sadistic attack. Suzanne Collins' hair and blood matching her ABO type were found on Alley's car. Three witnesses identified Alley's car, both by sight and

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[5]Alley committed his offenses and was convicted in the Thirtieth Judicial District (*i.e.*, Shelby County) of the State of Tennessee. Appellee Gibbons, the District Attorney General of that district, prosecuted Alley and, thereafter, defended the State's judgment in state post-conviction proceedings. Gibbons thus has a direct interest, not only in the subject matter of this action, namely preservation of the evidence introduced by the State at Alley's criminal trial, but in securing the finality of the State's judgment through execution of Alley's lawfully imposed sentence.

[6]The facts of Alley's crime are set forth in detail in the opinion of the Tennessee Supreme Court on direct appeal from his convictions and death sentence. *Alley*, 776 S.W.2d at 508-10.

sound, as the one involved in her abduction. At trial, Alley contended that he was not guilty by reason of insanity, specifically that one of his "alternate personalities" — referred to as "Power," "Death," and/or "Billie" — was in control at the time of the offense such that "Sedley" could neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of the law. *State v. Alley*, 776 S.W.2d 506, 510 (Tenn. 1989). On post-conviction, Alley faulted trial counsel for, among other things, deficient investigation in connection with the presentation of his insanity defense at trial. According to Alley, certain of his birth records, including records pertaining to his urinary tract dysfunctions, were essential to the presentation of the defense, a claim rejected by the Tennessee state courts. *Alley*, 958 S.W.2d at 150. This Court also rejected the claim. *Alley*, 307 F.3d at 400-01. Indeed, Alley's primary complaints before this Court, even as recently as 2002, dealt with allegations of trial court error and other deficiencies related to his insanity defense. *See, e.g.*, *id.* at 391.

Not until April 2004 did Alley claim, for the first time in a petition for post-conviction DNA analysis filed pursuant to the State's Post-Conviction DNA Analysis Act, that another person committed the murder of Suzanne Collins. In that action, Alley sought DNA analysis of various items of biological evidence obtained in connection with the investigation of the case, namely: (1) vaginal, oral, rectal and

nasopharyngeal swabs from the victim; (2) swabs taken from the victim's left and right inner thighs; (3) head hairs, which did not match Alley, found on the victim's sock; (4) a body hair collected from the victim's waistband; (5) a pubic hair found on the inside of the victim's shoe; (6) a hair found on the stick used to sexually mutilate the victim; and (7) blood and hair samples of the victim. Alley argued to the state court that the samples contain "biological evidence which will establish the identity of the person or persons who committed the sexual assault and murder of the victim in this case." *Alley v. State*, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095 (Tenn. Crim. App. May 26, 2004) (app. denied Oct. 4, 2004).[7]

The state court denied Alley's petition, finding that he failed to meet the statutory criteria for obtaining post-conviction DNA testing of the evidence in question. After considering Alley's allegations concerning his innocence — which are virtually identical to the allegations asserted in this action — the state court

[7]Alley further argued, as he does here, that certain evidence at his trial is unreliable because (1) his confession was coerced; (2) "recently discovered documents" from the medical examiner indicate that the victim's time of death may have been later than previously thought; (3) description of the perpetrator by Scott Lancaster does not match Alley; (4) description of the perpetrator's vehicle given by witnesses does not match Alley's vehicle; (5) tire tracks at the scene do not match Alley's vehicle; (6) fingerprints on a beer bottle recovered near the victim's body are not identical to Alley's; and (7) shoe prints at the "abduction scene" do not match the shoes Alley was wearing on the night of the murder. *Alley*, slip op. at 4. (R. 11: Motion to Dismiss, Exh. 5).

concluded that the DNA testing Alley sought, even if establishing that a third party had contact with the victim at some point in time, would not be inconsistent with the State's theory at trial, the substance of Alley's confession, or the overwhelming evidence presented at trial identifying Alley as the perpetrator. *Id.* at 10-14.

On April 5, 2006, Alley filed an action in the United States District Court under 42 U.S.C. § 1983 seeking injunctive relief in the form of access to certain items of physical evidence introduced at his state criminal trial — now part of the state court record and thus in the "possession" of the state trial court[8] — for the purpose of conducting DNA analysis, which he contended would "exclude [him] as having committed" the 1985 murder of Suzanne Collins and thus provide a "basis for relief through an application for executive clemency, commutation, or reprieve." [U.S.D.Ct. Doc. Entry Nos. 1 and 6 at p. 6] Alley claimed that, to deny him access to the requested evidence would violate his constitutional rights to procedural due process, substantive due process, his due process right to the production of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and his rights under the Eighth and Ninth Amendments. [*Id*. at pp. 8-14] Alley further contended that, by

[8]*State v. Cawood*, 134 S.W.3d 159, 163-64 (Tenn. 2004) (citing *Ray v. Tennessee*, No. M1999-00237-COA-R3-CV, 2000 WL 388718 (Tenn. App. Apr. 18. 2000) (court clerk is "the mere hand of the court; his possession is the possession of the court, and to interfere therewith is to invade the jurisdiction of the court itself.").

"retaining and/or not releasing" the evidence identified in the complaint, the defendants are presently violating his constitutional rights under color of state law. (R. 6: Amended Complaint, pp. 2-3)

On April 20, 2006, the district court dismissed Alley's complaint for failure to state a claim upon which relief may be granted, concluding that: (1) Alley failed to demonstrate that the "life interest" he asserted to support his procedural due process claim "bestows upon him 'the post-conviction legal right to access or discover the evidence relating' to his conviction;" (2) there is "no substantive due process right of access to evidence to present claims in executive clemency proceedings or otherwise that could form the basis for an action under § 1983;" (3) *Brady* and the due process principle it vindicates provide Alley no "due process right to post-conviction release of evidence related to his conviction;" and (4) neither the Eighth or Ninth Amendments require the "release of evidence to bring claims of innocence in clemency" or otherwise provide a basis for relief under § 1983. [Doc. Entry No. 19, pp. 20-30] Alley appeals from that decision.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Alley's § 1983 complaint under Rule 12(b)(6), because there is no federal constitutional right — substantive, procedural or otherwise — to post-conviction DNA testing of evidence collected and/or introduced in a state criminal prosecution. Although affirmance of the district court's decision would be appropriate on that basis alone, the action would also be properly dismissed on a variety of procedural bases. First, the district court lacked the authority to grant injunctive relief, which would necessarily dispossess a state court of evidence in its possession and over which it has continuing jurisdiction. Second, Alley's claim is barred by the statute of limitations applicable to civil rights actions under 42 U.S.C. § 1983. Finally, because Alley has already sought, and been denied, DNA testing in the Tennessee state courts, his present claim is barred under doctrines of claim and/or issue preclusion. For any or all of these reasons, the judgment of the district court should be affirmed.

STANDARD OF REVIEW

The district court dismissed Alley's complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. Whether a district court has correctly dismissed a suit pursuant to Rule 12(b)(6) is a question of law and, therefore, subject to *de novo* review. *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir. 1991). In determining the propriety of a Rule 12 dismissal, the Court construes the complaint in the light most favorable to the plaintiff, accepting all factual allegations as true, and determines whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990). Although the plaintiff "enjoys the benefit of all inferences that plausibly can be drawn from well-pleaded allegations [in] the complaint," an order of dismissal is appropriate when it "appears beyond doubt that, under any reasonable reading of the complaint, the plaintiff will be unable to prove any set of facts that would justify relief." *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C.Cir. 1987). *See also Gregory v. Shelby County, Tennessee*, 220 F.3d 433, 446 (6th Cir. 2000).

ARGUMENT

I. THERE IS NO CONSTITUTIONAL RIGHT TO POST-JUDGMENT DNA TESTING OF SUCH EVIDENCE.

To state a successful claim under 42 U.S.C. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). "§1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citation omitted). Alley appeals from a district court decision dismissing his § 1983 complaint for failure to state a claim upon which relief can be granted. Specifically, the district court concluded that Alley has no constitutional right to post-conviction access to evidence DNA testing. (R. 19: Order of Dismissal, p. 17)

Although this Court has not addressed the question, the district court's decision is consistent with opinions by members of the Fourth Circuit Court of Appeals in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002) ("*Harvey I*"), and *Harvey v. Horan*, 285 F.3d 298 (4th Cir. 2002) ("*Harvey II*") (denial of petition for rehearing). Although the majority in *Harvey I* concluded that the prisoner's § 1983 action, asserting a due process right to DNA testing of certain evidence, was the functional equivalent of a habeas corpus petition, the concurring opinion authored by Judge King

analyzed the prisoner's claim as a § 1983 action under the various constitutional theories raised, concluding that, even as pled, the prisoner failed to demonstrate the violation of any federal constitutional right.[9] *Harvey I*, 278 F.3d at 383-88.[10] Likewise, here, the district court declined to recognize a constitutional right to post-conviction DNA testing, questioning "whether any Court is capable of satisfactorily formulating such a right given the infinite possibilities of science and the idiosyncracies of each case." (R. 19: Order of Dismissal, p. 23).[11]

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[9]The district court in this case likewise concluded that Alley's action was properly before it as a § 1983 action, and appellee Gibbons assumes for purposes of this appeal that the district court's jurisdiction was properly invoked.

[10]The only other reported decision addressing this issue, *Godschalk v. Montgomery County District Attorney 's Office*, 177 F.Supp.2d 366 (E.D.Pa. 2001), is no longer of any precedential value. Three years later, the same court declined to follow *Godschalk "as inconsistent with Heck and Leamer*," and because it relied upon the overruled district court decision in *Harvey*. *See Thomas v. Leach*, 2004 WL 1970139 at *2 (E.D.Pa. 2004)(attached) (on the habeas issue). Further, this Court is not bound by decisions of the Eastern District of Pennsylvania.

[11]Alley's reliance on the "views" expressed by Judge Luttig in *Harvey II* as support for some right to post-conviction DNA testing is misplaced, and even under that theory, his claim fails. First, Judge Luttig did not define any right, but speculated that any constitutional right to post-conviction DNA testing would have to be "very narrowly confined," and governed by "strict and limiting" standards. *Id.* at 321. Through repetition, Judge Luttig implies that the right would be limited to those cases where the testing "could prove beyond any doubt" that the individual did not commit the murder. *See id*. at 306, 310, 315, 317, 319. One possible candidate would be a convict who has "steadfastly maintain[ed] his factual innocence." *Id.* at 319. But in this case, Alley did not allege his factual innocence at trial, during appellate review, or in the post-conviction process. Moreover, as the state court properly recognized, the DNA testing sought would not necessarily demonstrate that Alley was not the

In the court below, Alley relied upon five general constitutional bases for his claimed entitlement to post-conviction DNA analysis: (1) procedural due process; (3) substantive due process; (3) the due process right to the production of exculpatory evidence; (4) Eighth Amendment principles; and (5) the Ninth Amendment. (R. 19: Order of Dismissal, p. 20) As set forth below, the district court correctly analyzed and rejected each premise.

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

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

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perpetrator in this case. Thus, even if this Court were persuaded by Judge Luttig's "view" as expressed in his concurring opinion in *Harvey II*, Alley would still have no right to post-conviction DNA testing under the circumstances of this case.

Harvey I, 278 F.3d at 388. The district court correctly concluded that Alley failed to "establish a legally recognized right to the evidence he requests" (R. 19, Order of Dismissal, p. 23) It follows, then, that no particular process is mandated by the Due Process Clauss of the Constitution for the release of such evidence. Nor does Tennessee's Post-Conviction DNA Analysis Act create any federal constitutional interest that would trigger a due process analysis in this case.[12] The requirements of procedural due process are triggered only by government action that deprives an individual of "life, liberty, or property," *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); Tenn. Const. art. I, § 8 (". . . no man shall be . . . deprived of his life, liberty or property, but by judgment of his peers or the law of the land"). Clearly, the criteria for obtaining DNA analysis under Tenn. Code Ann. § 40-30-301 *et seq*. does not operate to deprive Alley or anyone else of "life."

Therefore, a due process analysis would be warranted only if operation of the DNA Analysis Act terminated a legally cognizable "liberty" or "property" interest. *Roth*, 408 U.S. at 569. "[A] liberty interest created by state law is by definition

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[12]Moreover, neither Tennessee's Post-Conviction Act generally nor its DNA Analysis Act specifically are constitutionally mandated procedures. The State has no constitutional duty, as a matter of due process or otherwise, to provide post-conviction relief procedures. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Further, the Constitution has never been thought [to] establish [the Supreme] Court as a rule-making organ for the promulgation of state rules of criminal procedure. *Smith v. Robbins*, 528 U.S. 259, 274 (2000) (citation omitted).

circumscribed by the law creating it." *Montero v. Meyer*, 13 F.3d 1444, 1450 (10th Cir.), *cert. denied*, 513 U.S. 888 (1994). Thus, any "liberty" interest in DNA analysis is defined by the Tennessee statute that creates the right to obtain such analysis — § 40-30-301 *et seq.* — which clearly sets forth four criteria that must be met by any petitioner seeking to invoke its provisions. Alley possesses no liberty interest in obtaining DNA analysis where, as in this case, he cannot establish the statutory criteria for the testing.

The same analysis compels the conclusion that there is no "property interest" conferred by Tennessee law to obtain post-conviction DNA analysis without meeting the statutory criteria. Since no right to post-conviction DNA analysis exists outside of the confines of § 40-30-301 *et seq*., dismissal of Alley's petition for failure to meet the statutory prerequisites cannot, by definition, affect any "property interest" for which he would be entitled to claim procedural due process protection. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (claim of entitlement to welfare benefits grounded in the statute defining eligibility to them).[13]

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[13]Moreover, while Tennessee's DNA Act does not create a liberty interest and is not constitutionally mandated, to the extent that Alley avers he is entitled to post-conviction DNA testing to preserve his "life interest," the Act provides sufficient protection. *See, e.g. Wilkinson v. Austin*, 125 S.Ct. 2384, 2396 (2005). Under the DNA Act, a state criminal court *shall* order DNA analysis if it finds that there exists a reasonable probability that plaintiff would not have been prosecuted or convicted. Tenn.Code Ann. § 40-30-304 (emphasis added). Further, the state court *may* order

While a defendant facing the death penalty is presumed innocent, "[o]nce he has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera v. Collins*, 506 U.S. 390, 399 (1992). The convicted felon is "legally guilty." *Id.* at 419 (O'Connor, J., concurring). At that point, he has been afforded all the procedural due process required prior to deprivation of his life by lawful state processes: "the Constitution offers unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J., concurring). Thus, Alley's "life interest" cannot, as he insists, include the assumption that he is innocent. Instead, any "life interest" he retains is limited either to protection from summary execution, *Woodward*, 523 U.S. at 281 (Rehnquist, C.J., joined by three justices), or is at most, "minimal." *Id.* at 288 (O'Connor, J., concurring) (referring to judicial oversight of clemency hearings). *See also Connecticut Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (convicted felon forfeits most, if not all, of his substantive liberty interest in freedom from confinement).

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

DNA analysis if it finds that a reasonable probability exists that favorable results would have led to a more favorable verdict or sentence. Tenn.Code Ann. § 40-30-305 (emphasis added). In determining whether to order DNA analysis, the state courts are required to assume that the DNA analysis would reveal exculpatory results. *Shuttle v. State*, 2004 WL 199826 (Tenn. Crim. App. Feb. 26, 2004) (perm. app. denied).

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

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

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

Alley further claims a substantive due process right to DNA testing on two primary grounds: (1) that it "shocks the conscience" to withhold the evidence in this case; and (2) that he possesses some "life interest" to obtain evidence to present in state clemency proceedings. Neither argument supports the relief requested.

Substantive due process protects specific fundamental rights of individual liberty from arbitrary and capricious government action which "shocks the conscience," regardless of the procedural due process in place. *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988). In dismissing Alley's complaint, the district court correctly held that defendant Key's denial of access to evidence for post-DNA testing does not "shock the conscience." Because Key retains the evidence merely as a custodian, he wields no power over the evidence and could turn it over only pursuant to a state court order. Indeed, his actions are in full accord with state law. Nor does it "shock the conscience" for defendant Gibbons to oppose such access. Since Alley has no constitutional right to post-conviction DNA testing, it certainly is not arbitrary or capricious for Gibbons to oppose the recognition of a non-existent right.

Alley's argument seems to be that since the DNA testing will "prove" he is innocent, denying him the opportunity to prove his innocence "shocks the conscience." But Alley has already had a forum to address this claim. Aside from his criminal trial — recognized by the Supreme Court as the "decisive and portentous

event" in the determination of guilt or innocence, *Herrera*, 506 U.S. at 401 — Alley availed himself of state post-conviction DNA proceedings. (R. 11: Motion to Dismiss, Exh. 2) Even assuming, *arguendo*, the evidence and/or legal theories Alley now asserts are "different" for collateral estoppel purposes (See R. 19: Order of Dismissal, pp. 9-11), it is clear that Alley had an avenue under state law to obtain the testing he now seeks.

Nor does executive clemency create any substantive due process right to post-conviction testing. First and foremost, death row inmates do not have a constitutional right to clemency proceedings. *Herrera*, 506 U.S. at 414; *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001), *Workman v. Summers*, 111 Fed.Appx. 369, 371 (6th Cir. 2004)(attached). Rather, clemency itself is a matter of grace, which merely serves to exempt an individual from otherwise lawful punishment. *Herrera*, 506 U.S. at 413. Moreover, clemency proceedings are not part of the judicial process. *Ohio Adult Parole Authority v. Woodwar*d, 523 U.S. 272, 284 (1998). The proceedings "would cease to be a matter of grace committed to the executive authority if it were constrained by" judicial requirements. *Id.* The proceedings are rarely, if ever, appropriate for judicial review. *Id.* at 280. However, Justice O'Connor opined that "some minimal procedural safeguards apply to clemency proceedings." *Id.* at 289. Those minimal procedural safeguards may arise when the matter of clemency was

determined by a flip of a coin or where the State arbitrarily denied a prisoner any access to its clemency process. *Id.*

The existence of clemency proceedings, however, does not lead to a constitutional right to post-conviction access to evidence for DNA testing in order to establish innocence. Clemency proceedings "do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process." *Woodward,* 523 U.S. at 284. It is not the duty of the courts "to determine the quality of the evidence considered by the governor or his board." *Workman,* 245 F.3d at 853. Thus, in *Workman,* this Court declined to consider an inmate's allegation that the State presented false testimony during the clemency proceeding or the other substantive merits of the proceeding. *Workman,* 245 F.3d at 852-53.

Here, Alley does not allege that he has been denied access to the clemency proceedings or that a state official has flipped a coin to determine whether to grant clemency. Under the above case law and analysis, it is not appropriate — and certainly not constitutionally mandated — to require post-conviction DNA testing in order to prove innocence for clemency proceedings. *Workman,* 245 F.3d at 852-53. Therefore, the District Court correctly held that "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." (R. 19: Order of Dismissal, p. 26)

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

Alley also misplaces his reliance on *Brady v. Maryland*, 373 U.S. 83 (1963), as the source of some constitutional entitlement to DNA testing. Under *Brady*, a prosecutor is required to turn over to the defense exculpatory evidence, that, if suppressed, would deprive the defendant of a fair trial. *See also United States v. Bagley*, 473 U.S. 667, 675-76 (1985). Here, Alley does not claim that he was denied access to material exculpatory evidence during his prosecution or that he did not receive a fair trial. *See also Harvey I*, 278 F.3d 385 (King, J., concurring in part & in judgment). Moreover, *Brady* does not require post-conviction access to the evidence for DNA testing because it "remains purely a matter of speculation whether the evidence Plaintiff requests will tend to exculpate or otherwise prove favorable to him." (R. 19: Order of Dismissal, p. 27) Therefore, the District Court properly denied Appellant's *Brady claim.*

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

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

It would be anomalous to hold that the Eighth Amendment constitutionally requires further discovery in order to prove innocence, since a convicted felon is legally recognized as "guilty." Moreover, given the overwhelming evidence of guilt, including Alley's own confession, and the circumstances of the offense, the DNA results Alley seeks could never "prove" his innocence. The district court correctly determined that the Eighth Amendment does not require post-conviction access to evidence for DNA testing. (R. 19: Order of Dismissal, pp. 26-27)

Similarly, the district court properly noted that 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." (R. 19: Order of Dismissal, p. 29) Certainly, there is no case applying that standard to a situation such as the one before the Court.

5. There is no Ninth Amendment right to post-conviction DNA analysis.

The Ninth Amendment clarifies that constitutional rights shall not be construed to deny or disparage others retained by the people. U.S. Constitution, 9th Amend. It has never been utilized by any Court to require post-conviction DNA testing or to mandate any other post-conviction discovery mechanism. This claim was properly summarily dismissed.[14]

In sum, the district court correctly determined that Alley's complaint failed to state any constitutional right entitling him to access to state court evidence for purposes of DNA testing.

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[14]Alley's remaining constitutional claims set forth in his Amended Complaint are equally without merit. The constitutional right to access the court does not oblige a State to bolster such efforts by providing evidence. *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Clearly, Alley had the ability to access the court as shown by the filing of this claim as well as the state court claim for post-conviction DNA testing. *See also Harvey I*, 278 F.3d 386 (King, J., concurring in part & in judgment). His equal protection claim is also unavailing. Alley had the same right to seek DNA testing under state law as any other similarly situated inmate. His inability to meet the statutory criteria — applicable to all post-conviction petitioners — is immaterial to the analysis.

II. ALLEY'S COMPLAINT IS BARRED ON PROCEDURAL GROUNDS.

Aside from the district court's substantive analysis of Alley's claims, dismissal of this action would have been proper on other grounds as well.

1. A federal district court is without authority to dispossess a state court of property over which it has custodia legis.

When his attempts in state court to obtain DNA testing of certain biological evidence failed, Sedley Alley turned to the federal district court for relief, invoking the court's jurisdiction under 42 U.S.C. § 1983, authorizing redress, including injunctive relief, for the "deprivation [under color of state law] of any rights, privileges or immunities secured by the Constitution." Specifically, Alley requested that the federal court "order Defendants to immediately produce any and all evidence identified in paragraph 10 [of the Amended Complaint] so that [Alley], with counsel's supervision, can package and properly transfer such evidence to his DNA expert to allow DNA testing of all such evidence." (R. 6: Amended Complaint, p. 14) The 25 items of evidence identified in Alley's complaint are in the physical custody of the Clerk of the Criminal Court of the Thirtieth Judicial District of Tennessee, and 11 of those items are specifically identified in the complaint as being State's trial exhibits.

Under Tennessee law, a court clerk lacks independent authority to release and/or dispose of evidence in his possession as an officer of the court, such possession

being subject to the court's orders. *State v. Cawood*, 134 S.W.3d 159, 163-64 (Tenn. 2004) (citing *Ray v. Tennessee*, No. M1999-00237-COA-R3-CV, 2000 WL 388718 (Tenn. App. Apr. 18. 2000) ("When a trial court clerk possesses property as an officer of the trial court, the clerk's possession of such property is subject to the trial court's orders.") (Court clerk is "the mere hand of the court; his possession is the possession of the court, and to interfere therewith is to invade the jurisdiction of the court itself."). Alley's complaint thus seeks federal injunctive relief effectively dispossessing the state criminal court of property that is *in custodia legis*[15] and, under state law, subject to the orders of the court having jurisdiction of Alley's criminal offense.

Where property is in the custody of a court of competent jurisdiction, another court of concurrent jurisdiction may not deprive it of the right to deal with such property or interfere with its possession. The rule against the concurrent exercise or *in rem* or *quasi in rem* (where control of the *res* at issue is essential to the court's judgment) jurisdiction applies even as between federal and state courts and, particularly in that context, is necessary "to avoid unseemly and disastrous conflicts in the administration of our dual system . . . and to protect the judicial processes of the

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

court first assuming jurisdiction." *See Penn Gen. Casualty Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935).[16]

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

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

Tennessee law is clear that state and/or local officials in possession of property used as evidence in a criminal prosecution hold such property for the court itself and are "subject to the trial court's orders." *Ray v. Tennessee*, *supra*, at 4. Moreover, a state trial court's authority to determine the custody and control of evidence held in the court clerk's office — not only whether custody and control may be granted to another, but also the terms and conditions of such custody — includes "the right to exercise control over physical evidence after a case has been concluded." *Ray v. State*, 984 S.W.2d 236, 238 n.4 (Tenn. Crim. App. 1997).

Because the Shelby County Criminal Court is vested with *in rem* jurisdiction over the property at issue, the district court was without authority to grant the injunctive relief requested in this case. In any event, however, as stated above, the district court correctly determined that Alley had no constitutional right to the post-conviction DNA testing sought and declined Alley's request to direct the removal of the evidence from the state court. *See Hilliard v. U.S. Postal Service*, 814 F.2d 325 (6th Cir. 1987) (Court may affirm on any ground supported by the record even if different from those relied on by the district court).

2. Alley's claims are barred by the statute of limitations applicable to federal civil rights actions under 42 U.S.C. § 1983.

The applicable statute of limitations in a civil rights action is determined by state law, but federal law governs when the statute begins to run. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1985). In Tennessee, civil rights actions must be brought within one year of the alleged constitutional violation. Tenn. Code Ann. § 28-3-104(a)(3); *Holmes v. Donovan*, 984 F.2d 732, 738 n.11 (6th Cir. 1993).[17] The one-year period begins to run when the plaintiff knew or "through the exercise of reasonable diligence should have known of the injury that forms the basis of his action." *Sharpe v. Cureton*, 319 F.3d 259, 266 (6th Cir. 2003).

The injury Alley allegedly seeks to remedy in the instant action is his denial of access to evidence for the purpose of conducting DNA testing. (R. 6: Amended Complaint, ¶¶ 2, 50) But he was obviously long aware of the existence of the evidence (both the physical evidence and the biological evidence removed therefrom), since they were made exhibits to his murder trial nearly 20 years ago. Moreover, Alley knew he had a post-conviction remedy to obtain DNA analysis of biological evidence

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

in 2001, upon passage of the Post-Conviction DNA Analysis Act. Alley knew of his "injury," *i.e.*, the State's denial of the evidence for his DNA testing, by May 2004. After Alley filed his DNA petition in state court, the State moved to dismiss the Petition on May 5, 2004. (R. 11: Motion to Dismiss, Exh. 3) At the very latest, then, Alley knew that the State would not grant access to evidence for purposes of conducting DNA testing by May 5, 2004. He cannot now claim he is seeking different evidence to circumvent the statute. Alley knew, or certainly "should have known," in May 2004 that the state denial would apply to all evidence requested for DNA analysis. Indeed, he should have sought all evidence he thought was relevant in that petition.

Thus, Alley had, at the very latest, until May 5, 2005 to file a § 1983 claim. He did not file the instant claim until April 5, 2006, nearly one year after the statute of limitations had expired. Alley cannot contend that the statute only began to run after he requested the evidence from the Criminal Court Clerk. Alley knew or should have known that the clerk, as custodian and an arm of the court, would have no alternative but to deny access absent a court order. Nor can he contend that because the constitutional contours of his right are not defined that he did not know when the statute would begin to run. That argument confirms only that there is no right. Alley's own pleading establishes that the "right" he seeks to vindicate is the right to

access the evidence, and his claimed "violation" would have occurred, at the latest, when the state court denied access in May 2004.

Moreover, the district court correctly held that Alley cannot avoid the one-year statute of limitations applicable to § 1983 claims by alleging that his claim is more analogous to Tennessee's DNA Act, which does not have a statute of limitations. Alley's theory — accepted by the district court — is that this is a § 1983 civil rights action. He is, therefore, bound by Tennessee's statute of limitations governing such actions. (R. 19: Order of Dismissal, p. 16)

Alley had until May 5, 2005 to file a § 1983 claim. Therefore, Alley's claims are barred by the one-year statute of limitations.

3. Alley is collaterally estopped from alleging that a reasonable probability existed that he would not have been prosecuted or convicted or that he would have received a more favorable verdict or sentence. That issue was necessarily decided in state court.

Alley cannot relitigate the issue, and the federal courts are bound by, the following state court final decision:

> "[E]ven assuming that DNA testing would reveal that Alley was not the source of the specimen tested, there is no reasonable probability that Alley would have received a more favorable verdict or sentence, or that he would not have been prosecuted or convicted."

The state law of collateral estoppel applies in civil rights actions brought under 42 U.S.C. §1983, even if the state court's decision may have been erroneous. *Allen*

v. McCurry, 449 U.S. 90, 94, 101, 120 (1980). The preclusive effect of a state court judgment in a federal proceeding is governed by state law. *Intel Corp. v. Advanced Micro Devices, Inc*., 12 F.3d 908, 914-15 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2675 (1994). *See* 28 U.S.C. §1738 (judicial proceeding has the "same full faith and credit in every court" in the United States as by the law or usage in same state).

Collateral estoppel, or issue preclusion, precludes re-litigation of individual issues which were actually and necessarily determined in a former action between the named parties or their privies on a different cause of action. *Allied Sound, Inc. v. Neely*, 909 S.W.2d 815, 820 (Tenn.App. 1995). It is not relevant that the state court did not render a decision on the federal constitutional issues raised in the instant action. Collateral estoppel prevents relitigation of the issue necessarily decided, even if the cause of action is different. *Dickson v. Godfrey*, 825 S.W.2d 692, 694 (Tenn. 1992); *Morris v. Esmark Apparel, Inc.*, 832 S.W.2d 563, 565 (Tenn. Ct. App. 1991) (app. denied).

Where the two causes of action are different, the collateral effect of the first judgment is limited to only those matters actually litigated and determined in the original action. *Andrew Johnson Bank v. Bryant, Price, Brandt, Jordan & Williams*, 744 S.W.2d 581, 584 (Tenn.App. 1987). The party seeking to invoke collateral estoppel must show that:

(1) the issue is identical to the prior suit;
(2) the issue was actually litigated and decided on its merits in the prior suit;
(3) the party against whom collateral estoppel is asserted is a the party in the earlier suit and that party had a full and fair opportunity to litigate the issue in the prior suit;
(4) that the prior suit is final.

Trinity Industries, Inc. v. McKinnon Bridge Co., Inc., 77 S.W.3d 159, 184 (Tenn.Ct.App. 2001). However, it is not necessary that the party utilizing estopppel be the same party from the initial suit. *Allen*, 449 U.S. at 95.

Under Tennessee's DNA Analysis Act, upon filing a Petition in state criminal court, a convicted felon must show that if the DNA results proved exculpatory, there is a reasonable probability that he would not have been prosecuted or convicted and/or that there is a reasonable probability that he would have received a more favorable verdict or sentence. Tenn.Code Ann. §§ 40-30-0304(1) and -305(1). *See also Ensley v. State*, No. M2002-01609-CCA-R3-PC, 2003 WL 1868647 (Tenn.Crim.App. Apr. 11, 2003). If the convicted felon cannot show that reasonable probability, the court must deny the petition. Tenn.Code Ann. §§ 40-30-0304(1) and -305(1). In considering the petition, the court is required to assume that the DNA analysis would reveal exculpatory results. *Shuttle v. State*, 2004 WL 199826 (Tenn. Crim. App. Feb. 26, 2004) (app. denied). (R. 11: Motion to Dismiss, Exh. 1)

Unquestionably, Alley filed a petition in state criminal court pursuant to the Tennessee's DNA Analysis Act, seeking DNA testing of certain biological evidence

introduced in his criminal trial. He had a clear interest at that time in showing that exculpatory results would have altered his conviction or sentence and, thus, to include any and all the items of evidence in his petition that he believed would prove his innocence. In denying Alley's petition, the state criminal court and Court of Criminal Appeals held that there was no reasonable probability that exculpatory DNA results would affect plaintiff's prosecution, conviction, verdict or sentence. (R. 11: Motion to Dismiss, Exhs. 4 and 5) Both courts addressed the potential exculpatory value of the biological specimens requested, including the context in which the specimens were deposited on the physical evidence from whence they were obtained, assumed that the results were exculpatory, considered the defense evidence at trial, and found in the negative on the pivotal, threshold issue. *Id.*

The decision of the state court denying the DNA Petition is final. The Tennessee Supreme Court denied permission to appeal on October 4, 2005, and the Supreme Court thereafter denied certiorari. *See Alley v. Tennessee*, 125 S.Ct. 1695 (2005).

Thus, each cause of action Alley now asserts must be approached with the understanding that, "even assuming that DNA testing would reveal that Alley was not the source of the specimen tested, there is no reasonable probability that Alley would have received a more favorable verdict or sentence, or that he would not have been

prosecuted or convicted." This issue was litigated on its merits, Alley had a full and fair opportunity to litigate the issue in the prior suit, and the decision is final. It is irrelevant that the current action raises constitutional issues instead of state law issues. Alley is collaterally estopped from re-litigating this individual issue.

The preclusive effect of this issue requires dismissal of the instant action, because the threshold issue is the same or even more restricted in this federal action. Even assuming, *arguendo*, there exists a substantive due process right to post-conviction DNA testing, it would be a "very narrowly confined" right. *Harvey II*, 285 F.3d at 321 (Luttig, J., concurring). As discussed above, a convicted felon forfeits most, if not all, of his substantive liberty interest in freedom from confinement, *Dumschat*, 452 U.S. at 464, and with it many of the procedural protections that attach when the state infringes upon that interest. *Woodward*, 523 U.S. at 288 (O'Connor, J., concurring). Indeed, Judge Luttig implies in his concurring opinion that such a right would be limited to those cases where the testing "could prove beyond any doubt" that the individual did not commit the crime. *See, e.g.*, *Harvey II*, 285 at 306.

Against that backdrop, it is clear that the parameters of the state statutory right to post-conviction DNA analysis are much greater. Tennessee permits post-conviction DNA when there is merely a "reasonable probability" that the DNA results "would

have" led to a more favorable verdict or sentence. *See* Tenn.Code Ann. §§ 40-30-304(1) and -305(1). In determining whether to order DNA analysis, the state court must "assume that the DNA analysis will reveal exculpatory results." *Shuttle , supra*. Utilizing this analysis, the actual testing need not be done to determine the relevant threshold issue as to whether a convicted felon is permitted to conduct DNA analysis, since the court's analysis assumes a result that is favorable to the petitioner.

Although no court has ever defined the contours of a constitutional right to post-conviction DNA testing, surely a "reasonable probability" standard establishes the outer limits of any possible federal substantive right. A "reasonable probability" standard is much easier standard to meet than the "beyond reasonable doubt" standard, suggested by Judge Luttig.

Here, the state courts necessarily determined that Alley is not entitled to post-conviction DNA testing because, even if the DNA evidence proved that he was not the source of the DNA, there is still no reasonable probability that Appellant would not have been prosecuted or convicted; and further, there would still be no reasonable probability that he would have received a more favorable verdict or sentence. Because the state criminal courts necessarily determined that there was no reasonable probability of a finding of innocence or a more favorable sentence, Alley

is collaterally estopped from re-litigating this issue. Thus, he could never meet a stricter federal standard on the threshold issue of entitlement to post-conviction DNA testing under any substantive due process right even assuming *arguendo* that one exists.[18]

4. Because the Federal Public Defender's Office is barred from bringing a private civil action, this action should have been dismissed at the outset as the unauthorized practice of law. This Court should clarify the scope of an appointment order under 21 U.S.C. § 848(q)(8).

Appellee Gibbons further avers that this action should have been dismissed by the district court at the outset, because the Federal Public Defender is not authorized pursue a civil rights actions on behalf of Sedley Alley or any other individual. There is no provision for the appointment of a Federal Public Defender in a civil action, and the office of Federal Public Defender is barred from instituting any action on its own. *See* 18 U.S.C. § 3006A(g)(2)(A) ("Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law"); Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures,* Vol. II, Ch. VI. Moreover, Canon 5 of the Code of Conduct for Federal Public Defender Employees provides:

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[18]For analogous reasons and as set forth below, appellee Gibbons also contends that Alley's action is barred by *res judicata* and the Rooker-Feldman Doctrine. (*See* R. 11: Motion to Dismiss; R. 12: Memorandum, pp. 16-18)

> A federal public defender employee should regulate extra-official activities to minimize the risk of conflict with official duties.
>
> D. Practice of Law. A defender employee should not engage in the private practice of law. Notwithstanding this prohibition, a defender employee may act pro se and may and may, without compensation, give legal advice to and draft or review documents for a member of the defender employee's family, so long as such work does not present an appearance of impropriety and does not interfere with the defender employee's primary responsibility to the defendant office. Note: See 18 U.S.C. § 3006A(g)(2)(A) (prohibiting public defenders from engaging in the private practice of law). See also 18 U.S.C. § 203 (representation in matters involving the United States); 18 U.S.C. § 205 (claims against the United States).

In describing the unique — and limited — role of public defenders generally, one federal district court in Nevada aptly observed:

> The office of public defender is sui generis. Unlike other public offices, it is not established to serve the public generally. Such offices have been created in implementation of the obligations created by the Sixth and Fourteenth Amendments to the United States Constitution, to the end that every person charged with crime shall have an opportunity to be represented by counsel and to receive a fair trial. *Recipients of the services of a public defender's office are only those indigents in whose aid a court or magistrate appoints a public defender to render legal advice and assistance.* As noted, the relationship thus created is a strictly professional one.

Sanchez v. Murphy, 385 F.Supp. 1362, 1365 (D. Nev. 1974) (emphasis added).[19]

[19]Like the federal statute at issue here, the Nevada statute implicated in *Sanchez* expressly prohibited the private practice of law.

Alley did not initiate this action *pro se*; rather, acting outside the scope of its enabling statute and/or any appointment order entered pursuant to that statute, the Federal Public Defender, acting on his own initiative, filed this action on Alley's behalf. When presented with the question below, the district court allowed the matter to proceed under the authority of 21 U.S.C. § 848(q)(8), which allows attorneys appointed in death penalty cases to "represent the defendant throughout every subsequent stage of available judicial proceedigns, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures . . . ." The district court deemed the appointment of the Federal Defender by U.S. District Judge Donald in Alley's § 2254 action filed in the U.S. District Court for the Western District of Tennessee as sufficient to permit the instant § 1983 action. However, appellee disagrees that § 848(q)(8) should be read so broadly as to permit an independent civil rights action.[20]

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[20]Nor may this matter be deemed an "ancillary matter" related to Alley's federal habeas corpus action and/or some potential executive clemency proceeding. *See, e.g., Howard*, 429 F.3d at at 849 (noting that a district-wide challenge to the requirement that pretrial detainees wear leg shackles should be made in the context of "actual prosecutions" and not in the civil context, because the Federal Public Defender — the only available attorney to represent the criminal defendants — "cannot pursue a civil class action on their behalf . . . and [indeed] is barred from instituting any action on

Because the scope of the appointment statute is in question, appellee requests clarification of this Court concerning the permissible actions that may be initiated in reliance of an appointment order under the guise of § 848(q)(8). Specifically, the Court should clarify that a § 1983 action is outside the scope of permissible proceedings for which appointment is authorized under 18 U.S.C. §§ 3006A(a), (g)(2)(A) and the Code of Conduct for Federal Public Defender Employees.[21] *See also United States v. Howard*, 429 F.3d 843, 849 (9th Cir. 2005) ("The Federal Public Defender cannot pursue a civil class action . . . because there is no provision for the appointment of a Federal Public Defender in a civil action, and the office of Federal Public Defender is barred form instituting any action on its own.").

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its own.").

[21]Even beyond the obvious question of whether Federal Defender employees possess the requisite expertise to pursue civil rights actions on behalf of death-sentenced inmates in the specialized area of § 1983 litigation, one practical implication of the private-practice prohibition is that a Federal Public Defender appointed pursuant to 18 U.S.C. § 3006A(g)(2)(A) is deemed an "employee of the government" for purposes of 28 U.S.C. § 2671 (defining "federal employees" for purposes of the Federal Tort Claims Act) and acts within the escope of that employment when representing his clients. *Sullivan v. United States*, 21 F.3d 198, 202 (7th Cir. 1994). Aside from being a clear violation of federal law, the private practice of law by a federal defender employee, even if limited to capital cases, undermines the rationale behind the extension of FTCA protections to Federal Defenders while "acting within the scope of his office or employment" and calls into question the existence of immunity in civil litigation initiated on behalf of state inmates.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

PAUL G. SUMMERS
Tennessee Attorney General

MICHAEL E. MOORE
Solicitor General

_____
HEATHER C. ROSS
Senior Counsel
Civil Rights and Claims Division

_____
JENNIFER L. SMITH
Associate Deputy Attorney General
Criminal Justice Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I hereby certify that this BRIEF OF WILLIAM L. GIBBONS complies with the type-volume limitation set out in Rule 32(a)(7)(B)(i), in that it contains 11,655 words of proportionally spaced font.

JENNIFER L. SMITH
Associate Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been sent by fax and by first-class mail, postage prepaid, to Paul R. Bottei, Office of the Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on the 8th day of May, 2006.

JENNIFER L. SMITH
Associate Deputy Attorney General