No. _____

SUPREME COURT OF THE UNITED STATES
October Term, 2005

SEDLEY ALLEY,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the Tennessee Supreme Court
Brief of *Amici Curiae* in support of Alley's Petition

Association in Defence of the Wrongly Convicted; Arizona Attorneys for Criminal Justice; California and Hawai'i Innocence Projects; Colorado Innocence Project; Cooley Innocence Project; Georgia Innocence Project; Innocence Project New Orleans; Jacqueline McMurtrie, Director, Innocence Project Northwest Clinic; Northern Arizona Justice Project; Innocence Project of Minnesota; North Carolina Center on Actual Innocence, Northern California Innocence Project; Ohio Innocence Project; Post-Conviction DNA Project at Duquesne University School of Law; Rocky Mountain Innocence Center; Texas Center for Actual Innocence; Texas Innocence Network; and Wisconsin Innocence Project

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that investigate and litigate claims of wrongful conviction. *Amici* have assisted numerous prisoners in proving their innocence, frequently through post-conviction DNA testing. In the course of this work, *amici* frequently pursue DNA testing under statutes similar to the one at issue in this case, section 40-30-301 of the Tennessee Code. *Amici* hope to inform this Court of DNA's extraordinary potential to discover the truth, and to describe how, when states provide a statutory right to postconviction DNA testing, those statutes should be interpreted to avoid unconstitutional arbitrariness or irrationality.

SUMMARY OF ARGUMENT

The conviction and punishment of innocent people, and the simultaneous escape of the guilty, is inevitable in our criminal justice system. ***Kansas v. Marsh***, 548 U.S. ___ (2006)(Scalia, J., concurring) (slip.op. at 18)("Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly."). These inevitable errors mean that the system should take advantage, to the fullest extent reasonably possible, of techniques that have the potential to find the truth, and thereby to minimize errors.

DNA testing is a uniquely powerful tool for doing just that. Since 1989, post-conviction DNA testing has freed 180 innocent people. *See* Case Profiles at http://www.innocenceproject.org/case (last visited June 20, 2006). In almost every one of those 180 cases, the police, prosecutors, and judges involved in the conviction believed the evidence of guilt was very strong. *See* Riter, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 834 (2005)("In many cases where convictions appeared

[1] Both parties have granted *amici* written permission to file a brief. Copies of the letters of consent have been filed herewith. No counsel for either party authored the brief in whole or in part. No one other than the *amici* contributed monetarily to its preparation or submission.

to be based on solid, and in some cases overwhelming, evidence, results of post-conviction DNA testing have proven actual innocence."). And in many of the cases—indeed, more than half—the innocent person had to engage in protracted litigation to obtain DNA testing that could prove whether the person in prison or on death row actually committed the crime. *Id*. at 827. In each case, DNA testing proved that the evidence presented at trial—which once looked so strong—was simply wrong, and that the person convicted was actually innocent.

Sedley Alley could become the 181st post-conviction DNA exoneration. Like the 180 before him, the evidence of his guilt has seemed overwhelming to those involved in the case (including, most recently, the State courts that denied DNA testing). And also like the 180 before him, untested biological evidence has the potential to prove whether Alley actually committed the crime.

But the State courts in Alley's case have refused to allow testing. Order Denying Post-Conviction DNA Analysis, (Higgs, J., May 31, 2006)(hereinafter "Higgs Order"); ***Sedley Alley v. State***, No. W2006-01179-CCA-R3-PD (Tennessee Court of Criminal Appeals at Jackson, June 22, 2006)(hereinafter "Alley II"). The State courts first concluded that Alley's confession provides overwhelming evidence of his guilt. But in at least 35 of the first 130 post-conviction DNA exonerations, the innocent person confessed to the crime. *See* Causes and Remedies of Wrongful Convictions at http://www.innocenceproject.org/causes/ (last visited June 22, 2006). The trial court failed to recognize that false confessions—counter-intuitive though they are—happen with surprising frequency. *See* Drizin & Leo, *The Problem Of False Confessions In The Post-DNA World*, 82 N.C.L.REV. 891 (2004)(describing 125 proven false confessions). Though confessions can be powerful evidence of guilt in some cases, the confession in this case pales in comparison to the potential probative value of the DNA testing Alley requests.

Moreover, because the lower courts believed the evidence against Alley at trial was overwhelming, they predicted that the results of the DNA testing would not be favorable to Alley. *See, e.g.*, ***Alley II*** at 29 ("It is more likely than not than [sic] any blood on the tree limb belongs to the victim."). But that ignores the requirements of Tennessee's statute, which directs courts to assume favorable DNA test results, and only then assess whether

those favorable results might create a reasonable probability of a different outcome. *See* Tenn. Code Ann. § 40-30-304(1).

The lower courts also concluded that Tennessee's post-conviction DNA testing statute—which was created to allow DNA testing to find the truth—permits testing only to exclude the defendant as a contributor of crime scene evidence, but not to match the DNA to a third party, even though that procedure has the same extraordinary potential to find the truth. But in 66 of the post-conviction DNA exonerations, DNA testing matched a known alternate suspect or an offender in the national databank, not only freeing an innocent person but also identifying an offender and preventing further crimes. *See* Case Profiles at http://www.innocenceproject.org/case/ (last visited June 20, 2006). The lower courts' decisions to prevent DNA matches to third parties not only potentially prolongs the incarceration of the innocent but also aids the guilty in escaping apprehension for their crimes. Even where DNA might confirm guilt, denying access to DNA testing prolongs doubt and suspicions that could otherwise be resolved, and thereby undermines trust and confidence in the criminal justice system.

As organizations that work with post-conviction DNA statutes on a daily basis, and that are dedicated to using DNA evidence to discover the truth—whatever the truth may be—the undersigned amici fear the many missed opportunities that would occur if courts routinely employed analysis used by the lower courts in this case. DNA's unique power to find the truth should not be obstructed by apparently "strong" trial evidence or by an arbitrarily narrow reading of a statute designed to find the truth.

ARGUMENT

I. DNA can find the truth in cases where other kinds of evidence cannot.

A. DNA can disprove evidence that appears powerful.

The trial court and Court of Criminal Appeals repeatedly cited the "overwhelming" evidence and "breadth of incriminating proof at trial" as a reason to deny Alley DNA testing. Higgs Order at 21, 29, 31, 33, 35-6, 37, 40, 46; ***Alley II*** at 19-20, 21, 25, 27, 29.

The assumption below was that courts can trust seemingly "strong evidence" of guilt, even to the point of denying DNA testing that can determine whether that seemingly "strong evidence" is indeed reliable and accurate.

But if courts can learn anything from the DNA exoneration cases, the lesson should be that the evidence is often not as strong as it appears, and therefore courts should approach requests for post-conviction DNA testing without rigid or fixed judgments about the evidence. In failing to do so, the trial court in this case risked joining a group of prosecutors, judges, and defense attorneys who have failed to recognize the possibility of innocence in cases where the evidence appeared strong, only to be proven wrong by DNA evidence. A few of the many examples include:

- Trial counsel for former Texas inmate Chris Ochoa told Wisconsin Innocence Project attorneys that there was "not a chance" that Ochoa was innocent, because, among other things, he had confessed to the crime, provided details of the crime that policed claimed only the perpetrator could have known, and testified convincingly against his codefendant. Findley and Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS.L.REV. 291, 332. DNA testing proved Ochoa and his co-defendant were innocent and identified the real perpetrator. *Id.*

- The prosecutor in the case of Florida inmate Frank Lee Smith accused defense attorneys of "playing games" by requesting DNA testing in an effort to delay Smith's execution. DNA testing eventually proved Smith was innocent. (Smith died in prison during the legal fight over whether he was entitled to DNA testing). Freedberg, *DNA clears inmate too late*, ST. PETERSBURG TIMES, December 15, 2000.

- In denying inmate Bruce Godschalk DNA testing, the Pennsylvania Superior Court noted that: "[Godschalk's] conviction rests largely on his own confession which contains details of the rapes which were not available to the police." ***Commonwealth v. Godschalk***, 679 A.2d 1295, 1297 (Pa. Super. 1996). A federal court later ordered

DNA testing, which proved Godschalk's innocence. Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, THE N.Y. TIMES, February 15, 2002.

- The prosecutor in Douglas Warney's case opposed DNA testing by arguing that: "The jury knew that there was blood in that house that didn't belong to the victim or the defendant. And DNA testing isn't going to tell you any more." Craig, *Quest for genetic testing in Warney case rejected*, ROCHESTER DEMOCRAT AND CHRONICLE, December 17, 2004. DNA testing later exonerated Warney and identified the true perpetrator. Dwyer, *Inmate to Be Freed as DNA Tests Upend Murder Confession*, THE NEW YORK TIMES, May 16, 2006.

As these cases demonstrate, courts in other states have heeded the lessons of the DNA exoneration cases, by ordering DNA testing regardless of whether the other, untested evidence of guilt appears strong. Other courts have expressly recognized that the apparent strength of the State's case is no basis for denying DNA testing that has the potential to undermine that evidence. *See, e.g.,* ***People v. Henderson***, 799 N.E.2d 682, 690 (Ill. App. 2003) (ordering postconviction DNA testing despite the court's agreement that the evidence against the defendant "was indeed overwhelming," because Illinois's postconviction DNA testing statute is not limited to cases "where the proposed scientific testing will, by itself, completely vindicate a defendant"); ***State v. Peterson***, 836 A.2d 821, 826 (N.J. Super. 2003) (under New Jersey's postconviction DNA testing statute, "the strength of the evidence against a defendant is not a relevant factor in determining whether his identity as the perpetrator was a significant issue"); ***Bruner v. State***, 88 P.3d 214, 216 (Kan. 2004) (holding that, under Kansas's postconviction DNA testing statute, it is improper to deny testing on the basis that the evidence was overwhelming).

More support for the notion that initial assessments of "overwhelming" evidence cannot trump the need for DNA testing can be found in two recent decisions of this Court. In ***House v. Bell***, 547 U.S. ___ (2006 WL 1584475), this Court considered a Tennessee case in which, according to the dissenting justices in the Supreme Court, the evidence against the defendant was

overwhelming. As recounted by the dissenters, that overwhelming evidence included that the victim's daughter heard a deep-voiced man (the defendant had a deep voice) lure the victim out of her home by telling her falsely that her husband had been in a car wreck near the creek; witnesses saw the defendant emerge from the embankment near where, shortly thereafter, the victim's body was discovered; the defendant initially told police he had never left his girlfriend's trailer on the night of the murder, but then changed his story and "concocted an alibi we now know was a lie"; on the day the victim's body was found, the defendant had abrasions and bruises on his knuckles, hands, arm, and chest, consistent with injuries that would have been expected on the attacker; his girlfriend initially confirmed the defendant's alibi, but changed her story when police warned her that covering up a homicide was a serious offense; the girlfriend then told police that the defendant had left her home around the time of the murder and returned some time later "panting and sweating, shirtless and shoeless, and with various injuries"; the defendant attempted to conceal from police the pants that he had been wearing that night, and testing on those pants revealed that they were stained with the victim's blood. *Id*., Slip Op. at 12-14 (Roberts, C.J., dissenting).

Despite the powerful nature of this evidence, postconviction DNA testing was conducted. That testing established that semen on the victim's nightgown and panties came from the victim's husband, not from the defendant. *Id*., Slip Op. at 20 (majority opinion). Additional new evidence suggested that the blood stains on the defendant's pants could have been deposited after the crime, while the pants were being transported to the crime laboratory, and new witnesses offered testimony that the victim's husband regularly abused his wife and had confessed to the killing. *Id.* at 22-31. In light of this new evidence, this Court ruled that, despite the once-overwhelming appearance of the evidence, the new evidence made it "more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *Id*. at 34. ***House*** powerfully demonstrates that initial assessments that the evidence of guilt was strong cannot trump the need to examine significant new evidence, because that new evidence might reveal that the evidence was not so overwhelming after all.

The point was made clearly as well in this Court's recent decision in ***Holmes v. South Carolina***, 126 S.Ct. 1727 (2006).

There, the State court had ruled that the defendant could not present evidence of guilt of a third party if the evidence of the defendant's guilt was overwhelming. The State court ruled that, "[i]n view of the strong evidence of appellant's guilt—especially forensic evidence—… the proffered evidence … did not raise 'a reasonable inference' as to appellant's own innocence." *Id*. at 1734. In language equally applicable to the State courts' analyses in this case, this Court noted the flaw with such exclusive focus on the apparently overwhelming nature of the State's case:

> Under this rule, the trial judge does not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerns the strength of the prosecution's case: If the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value.

Id. The problem with this mode of analysis, the Court ruled, is that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id*. at 1735.

Although, procedurally, ***Holmes*** addresses rules governing admissibility of third-party perpetrator evidence at trial, rather than postconviction, the holding is informative here because its focus is on the reasons for considering third-party perpetrator evidence, not on procedural posture. ***Holmes*** emphasizes the illogic of excluding such evidence based solely on the apparent strength of the State's unchallenged case, and that illogic applies equally well to postconviction DNA evidence that can identify a third-party perpetrator as it does to third-party evidence offered at trial.

B. Although counter-intuitive, false confessions occur with surprising frequency, in part as a natural result of well-accepted police interrogation techniques.

The lower courts placed great weight on Alley's confession, to the point of denying him even the possibility of proving that confession false. Higgs Order at 31, 35-6, and 37; ***Alley II*** at 2, 19, 21, and 23. But this Court has long recognized that innocent people sometimes falsely confess. In ***Smith v. United States***, 348 U.S. 147, 152-3 (1954), this Court described the risk of erroneous convictions "based upon untrue confessions," noting that a confession may be unreliable "if it is extracted from one who is under the pressure of a police investigation."

The Court's caution has been borne out by the DNA exoneration cases (out of which at least 35 included false confessions[2]) as well as social science research about the causes of false confessions. Research has suggested, first, that certain groups of people, including juveniles and the mentally retarded, are especially vulnerable to false confessions. But even more troubling, research has suggested that false confessions—even among mentally healthy, intelligent adults—are a predictable byproduct of the prevailing method of police interrogation in America. That method, known in its most common iteration as the "Reid Technique," relies on two basic steps: 1) convincing the suspect that the police have insurmountable evidence of his guilt, and 2) convincing the suspect that confessing is the only way to lessen the negative consequences that will flow from the suspect's inevitable conviction. Kassin, *On the Psychology of Confessions*, 60 AM. PSYCHOL. 215, 220 (2005). Thus, an interrogation under the "Reid Technique" typically begins with the interrogator telling the suspect about evidence (real or manufactured) that indisputably establishes the suspect's guilt. After building the suspect's feeling that he has been caught, the interrogator then offers the suspect justifications that minimize the moral seriousness of the crime or explanations for why the suspect will be better off if he confesses.

Police have long believed that these techniques can be very effective in eliciting a confession from a guilty person. But recent research demonstrates what perhaps should have been obvious: the same process that increases the ability of police to obtain true confessions from the guilty also increases the risk of

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[2] *See* Causes and Remedies of Wrongful Convictions, The Innocence Project, at http://www.innocenceproject.org/causes/.

false confessions from the innocent. A recent study found, for example, that the more interrogation techniques police employ—such as minimizing the seriousness of the offense or implicitly offering leniency in return for a confession—the higher rate at which both innocent and guilty suspects confess. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCIENCE 481, 484 (2005).

In Alley's case, it was not only the confession that convinced the lower courts, but also the details that accompanied it. However, the false confession cases belie the notion that confessions supposedly accompanied by details are necessarily reliable. In Christopher Ochoa's case, for example, the signed confession provided details that only the police or the true perpetrator would have known. Findley & Scott, *supra*, at 332. Later, when DNA tests proved Ochoa's innocence, it became clear that the details described in the confession came from the police, not Ochoa, and that Ochoa knew nothing about the crime. The same series of events characterized New York's Central Park jogger case, in which five boys gave detailed descriptions of raping a woman (including apologies and descriptions of motivation), only to have those confessions proven false when DNA identified the true perpetrator and exonerated the boys. Kassin & Gudjonsson, *True Crimes, False Confessions*, SCIENTIFIC AMERICAN MIND, June 2006, *at* www.sciammind.com/article.cfm?articleID=000635C8-590A-128A-982D83414B7F0000.

Given all this, it is risky to believe so strongly in the truth of a confession that the possibility of innocence is rejected before it can even be tested using readily available DNA evidence.

II. DNA testing can find the truth in several different ways, not only by excluding the defendant from a single item of evidence.

The lower courts in this case held that DNA evidence could only be used postconviction to exclude the defendant. But that ignores the full power of DNA evidence.

Some kinds of forensic testing are useful primarily for excluding a given suspect. Blood typing, for instance, has conclusive probative value only insofar as a given suspect's blood type *does not match* the blood type of the perpetrator. Thus, if the

perpetrator's blood or semen reveals blood type A, and the suspect is type B, this is conclusive evidence that the suspect is innocent. But if the perpetrator and suspect share type A, then blood typing proves little because type A is common in the general population.

Like blood typing, DNA can conclusively prove a suspect's innocence by excluding that suspect as the source of blood or semen found at a crime scene. But the similarities end there, because DNA testing has other characteristics that dwarf the probative value of blood typing. First, DNA is found in many different kinds of biological material, not just bodily fluids. Second, DNA can be extracted from much smaller samples than are necessary for blood typing. Third, and most pertinent to Alley's case, DNA can provide conclusive proof through means other than simply excluding a known suspect from highly probative crime scene evidence. Unlike blood typing, DNA can be used to *match* an unknown person to crime scene evidence, thereby conclusively establishing not only the suspect's innocence but also the true perpetrator's identity. This section elaborates on the different ways in which DNA can reveal the truth.

A Excluding the defendant as the source of DNA on one item of highly probative evidence.

Perhaps the most well-known kind of DNA exoneration is a simple exclusion—using DNA to exclude a defendant from a single item of highly probative biological evidence. Unfortunately, this approach is effective only in a very specific kind of case: where the defendant was convicted of a sexual assault and semen that could only have come from the perpetrator was found in close proximity to the victim.

B. Matching crime scene DNA to a known suspect or unknown person in the DNA databank.

The lower courts in this case ridiculed the idea of attempting to match crime scene DNA to an unknown "phantom offender" in the national DNA databank. Higgs Order at 24; ***Alley II*** at 11. But that exact process is, increasingly, how law enforcement agencies solve crime at the investigative stage of a case. Over 3.2 million DNA profiles from 174 different labs are

housed within the FBI's CODIS databank, enabling identification of suspects nationwide. *See* CODIS: Combined DNA Index System at http://www.fbi.gov/hq/lab/codis (last visited June 19, 2006); s*ee also*, Searching FBI Records for Clues at http://www.fbi.gov/page2/june05/serviceunit061705.htm (last visited June 20, 2006). As of April 2006, CODIS had aided over 34,000 investigations and helped link DNA profiles from crime scenes to convicted felons over 16,000 times. *See Id.* In Tennessee, CODIS has aided over 115 investigations. *See* Statistics for Tennessee at http://www.fbi.gov/hq/lab/ codis.tn.htm (last visited June 20, 2006).

Just as law enforcement agencies have become adept at solving crimes pre-trial through use of the DNA databank, so too have innocent prisoners found salvation through post-conviction DNA testing that identified the true perpetrator. In many of those cases, merely excluding the defendant as the source of crime scene evidence would not have been enough; matching the true perpetrator was necessary to conclusively prove innocence. Indeed, federal DNA statutes are premised in part on a recognition that "[i]t is crucial for defendants to have access to the CODIS system in circumstances that possibly establish innocence," and that "DNA matching exonerates any other persons who might wrongfully be suspected, accused, or convicted of the crime." ***Vore v. U.S. Dept. of Justice***, 281 F.Supp.2d 1129, 1136 (D.Ariz. 2003) (quoting ***United States v. Reynard***, *2*20 F.Supp.2d 1142, 1168 (S.D.Cal. 2002), quoting 146 Cong. Rec. H8572-01, at *H8578, and H.R. Rep. 106-900(I), at *10).

Take the recent exoneration of Douglas Warney, who was convicted based on his confession to a fatal stabbing in New York in 1996. After the crime, investigators found a bloody knife, bloody towels, and bloody tissues in the victim's bathroom, as well as defensive wounds on the victim's hand and blood underneath the victim's fingernails. Case Profile of Douglas Warney, available at: http://www.innocenceproject.org/case/display_profile. php?id=180 (last visited June 20, 2006). Investigators performed blood typing on the knife, towels, and tissues, but obtained an insufficient amount of material under the victim's fingernails. Although blood typing on the towels and tissues excluded both Warney and the victim, prosecutors charged and convicted Warney based on his confession.

Ten years later, Warney sought post-conviction DNA testing. Because he had already been excluded as the source of foreign blood on the towels and tissues, a DNA exclusion would have been merely cumulative and not enough to overturn his conviction. Rather, Warney needed the DNA to match an unknown offender, and he needed evidence that the unknown offender had committed the crime alone. That, indeed, is what occurred: DNA from the bloody towel and tissues, along with DNA from the fingernail scrapings, matched Eldred Johnson, Jr., a prison inmate serving a life sentence for other crimes. When prosecutors interviewed him, Johnson admitted that he had committed the crime alone and did not know Warney. Warney was released from prison. *Id.*

Other cases also illustrate the importance of DNA analysis that not only excludes the defendant but also identifies the true perpetrator. For example, Earl Washington was convicted of a 1982 rape and murder based on his confession and an eyewitness identification. *See* Case Profile of Earl Washington at: http://www.innocenceproject.org/case/display_profile.php?id=80 (last viewed June 21, 2005). Although DNA testing in 1993 excluded Washington from DNA on a seminal stain found at the crime scene, Washington was not released until authorities ran the crime scene DNA through the CODIS databank and obtained a "hit" on the true perpetrator, Kenneth Maurice Tinsley, a prisoner who was already serving two life sentences for other crimes. Kahn, *Rapist linked to 1982 slaying: Earl Washington Jr. had been wrongfully condemned in the case*, The Associated Press News, March 10, 2004, *available at* http://www.truthinjustice.org/real-rapist.htm. Without running the profile through CODIS, authorities never would have solved the case.

C. Discovering a redundant unknown profile on multiple items of crime scene evidence likely handled by the perpetrator.

A third method of establishing truth through DNA testing has been called "redundancy," because it involves finding the same unknown profile on multiple items of crime scene evidence. Redundancy becomes important when excluding a defendant from an unknown profile on a single item of evidence is not enough to

prove innocence, because it is only *likely* (not *certain*) that the unknown profile came from the perpetrator. But if that same unknown profile is found on not one, but multiple items of crime scene evidence on which the perpetrator would likely have left DNA, then the inference becomes powerful that the unknown profile belongs to the perpetrator. And if the defendant does not match the redundant unknown profile, then the defendant is likely if not certainly innocent.[3]

For example, Stephen Cowans was exonerated in 2004 with redundant evidence. Cowans was convicted in the 1997 shooting of a Boston police officer. Weber and Rothstein, *Man freed after 6 years; Evidence was flawed*, THE BOSTON HERALD, January 24, 2004. During the shooting, the perpetrator dropped his baseball hat and then fled through a nearby home where he drank from a glass of water and removed his sweatshirt. At trial, the injured officer identified Cowans as his shooter and an expert testified that a latent thumbprint left on the drinking glass matched Cowans's.[4] Despite the apparent strength of the evidence against him, in May 2003 Cowans obtained DNA testing of the drinking glass, sweatshirt and baseball hat. Not only was Cowans excluded from all three items, but the three items contained the same unknown male profile.

Redundancy of the three items was crucial to proving Cowans's innocence because, unlike semen left behind in a sexual assault, the baseball hat, drinking glass, and sweatshirt were not certain to contain the perpetrator's DNA. Because it was possible that i) the perpetrator did not leave DNA behind on the items, and ii) the items contained incidental DNA from people other than the perpetrator, simply excluding Cowans from the items likely would not have been enough to prove his innocence. But because DNA

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[3] The Court of Criminal Appeals misconstrued the redundancy argument when it addressed the issue as if the redundancy claim focused on the absence of Alley's DNA from each of the crime scene items. While the complete absence of any of Alley's DNA at the crime scene is not insignificant, the point of the redundancy argument is that the *presence* of *the same third-party's* DNA on multiple pieces of crime scene evidence presents powerful evidence of that person's guilt, rather than that the redundant absence of Alley's DNA proves his innocence.

[4] This testimony was later discredited when re-examination showed the fingerprint did not match Cowans. Saltzman & Daniel, *Man Freed in 1997 Shooting of Officer*, BOSTON GLOBE, Jan. 24, 2004.

on all three items not only excluded Cowans but also matched each other, the testing led to only one reasonable conclusion: a single person—the perpetrator—left DNA behind on all three items. Because the three items excluded Cowans and matched each other, Cowans was exonerated.

The case of Roy Criner, a man wrongly convicted of a 1986 sexual assault and murder, also illustrates the importance of considering redundancy. In Criner's case, the State relied on incriminating statements and serology testing on semen collected from the victim. *See* Riter, *supra*, 74 FORDHAM L. REV. at 825. Believing they had sufficient evidence to convict Criner, the police and prosecutors failed to test other physical evidence found at the crime scene, such as a cigarette found in close proximity to the victim's body, a clump of blonde hair clutched in the victim's hand, and the victim's clothing.

In 1997, seven years after trial, DNA testing was performed on semen collected from the victim's vaginal and rectal swabs. *Id*. The results confirmed, without doubt, that the semen did not come from Roy Criner. *Id*. Nonetheless, the Texas Court of Criminal Appeals denied Criner's motion for a new trial, on the new theory that Criner wore a condom during the assault and that the semen was from a consensual partner. *Id*.

Criner then obtained post-conviction DNA testing on the cigarette. Testing on the cigarette not only excluded Criner, but also identified a profile that matched the profile found in the semen. *Id*. This proved that the semen came from someone who had been at the crime scene, and not from a prior consensual partner. Since the redundant profile excluded Criner, he was pardoned based on innocence. *Id*.

III. Tennessee's DNA statute, which resembles similar statutes in other states, should be interpreted to take full advantage of DNA's power to find the truth.

In recognition of DNA's extraordinary probative value, legislatures around the country have created statutes providing a right to post-conviction DNA testing.[5] The purpose of these

[5] Forty states and the District of Columbia now have such statutes. See Appendix.

statutes is to cut through traditional legal barriers so that DNA can reveal the truth whenever possible. A brief analysis of Tennessee's statute, and statutes like it from other states, reveals this purpose.

A. There is no requirement that the person seeking testing claimed innocence at trial.

Many post-conviction DNA statutes, including Tennessee's, allow a convicted defendant to seek DNA testing even if identity was not an issue at trial.[6] With almost any other post-conviction claim, the nature of the convicted person's defense at trial has enormous implications for the likely success of the post-conviction claim. For instance, a guilty plea results in waiver of most post-conviction claims, on the theory that legitimate legal claims should be presented at the defendant's initial trial, and therefore that defendants who decide to forgo a trial should be held to that decision. Not so with Tennessee's DNA statute, which recognizes that innocent people sometimes plead guilty, and therefore allows a convicted person to obtain DNA testing in spite of a guilty plea. *See* Tenn. Code Ann. § 40-30-303 to 305 (providing for postconviction DNA testing where the testing might change the outcome, without limitation to cases in which identity was an issue at trial); *cf.*, ***Griffin v. State***, 182 S.W.3d 795, 799 (Tenn. 2006) ("'The Post-Conviction DNA Analysis Act has no provision that even hints of waiver relative to a request to test evidence for the first time….' [Although] DNA analysis may be expressly waived, or even abandoned; we conclude that under normal circumstances, the right to DNA analysis under the Act may not be waived by implication." (quoting ***Griffin v. State***, No. M2003-00557-CCA-R3-PC, slip op. at 10, 2004 WL 1562390, (Tenn.Crim.App. July 13, 2004) (Tipton, J., dissenting)).

That Tennessee's DNA statute permits testing even for those who pled guilty suggests that the trial court placed undue weight on Alley's confession in denying him DNA testing. A false confession after police interrogation can be viewed as a less extreme version of a false guilty plea. If those who admit guilt in

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[6] *See* Appendix.

court, while accompanied by all the protections of counsel and fair process, can still obtain post-conviction DNA testing, then surely those who admit guilt under the pressure of police interrogation should not be barred from testing due to their confessions. The great weight the trial court placed on Alley's confession is therefore inconsistent with the spirit of Tennessee's DNA statute.

Similarly, under Tennessee's DNA statute (and the DNA statutes of many states), affirmative defenses such as insanity do not bar postconviction DNA testing. As with a guilty plea, an insanity defense often means that the defendant did not claim innocence at trial. Thus, the merit of most post-conviction claims following an unsuccessful insanity defense will almost always be evaluated with reference to whether the claims would have enhanced the original insanity defense. But Tennessee's DNA statute is specifically crafted to allow DNA testing even for defendants who claim insanity, because the statute recognizes that innocent people accused of crimes will sometimes elect an insanity defense, either because they believe such a defense is their only hope (despite their innocence), or because they truly do not know whether they committed the crime.

B. There are no time limits on when a convicted person can seek DNA testing, and successive requests for testing are allowed.

Another feature of Tennessee's post-conviction DNA statute, and many other DNA statutes elsewhere, is that there are no time limits restricting a defendant's access to testing, and successive requests for testing are allowed as long as the testing has the potential to develop significant evidence not produced by earlier rounds of testing.

Most other kinds of post-conviction claims are governed by strict time limits, from deadlines governing direct appeals in state court to deadlines governing the filing of federal habeas corpus petitions. 28 U.S.C. § 2244(d)(1). Similarly, most post-conviction claims are governed by strict waiver rules and rules barring successive petitions. Not so with Tennessee's DNA statute: because DNA technology rapidly evolves, which means that once untestable evidence may in the future become testable, and because the State's interest in finality carries much less weight if the

defendant's claim is actual innocence, the Tennessee legislature and legislatures elsewhere have wisely chosen not to erect the usual barriers to post-conviction relief. *See* ***Griffin****, supra.* DNA testing almost always relates to the issue of innocence, and innocence, unlike other legal claims, outweighs the principles underlying time limits and waiver rules.

Viewed in this light, the trial court was out of step with the spirit of Tennessee's DNA statute in choosing to consider DNA testing for one purpose (exclusion) but refusing to consider it for other equally probative purposes (such as matching a third party or establishing redundancy). When interpreting a statute designed to cut through traditional legal barriers in order to find the truth, it makes little sense to read that same statute as creating new legal barriers that inhibit truth-seeking.

C. Tennessee's DNA testing statute, like every other DNA statute in other states, does not require the defendant to show, before testing, that exculpatory test results are likely.

Every post-conviction DNA testing statute in the United States directs trial courts to assume that the testing will produce the most exculpatory results possible for the defendant, and to allow testing if those exculpatory results would sufficiently undermine confidence in the conviction to warrant a new trial. Tennessee's Postconviction DNA Analysis Act is no different; it explicitly requires courts to *assume* favorable DNA results: "the court shall order DNA analysis if it finds that: (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted *if exculpatory results had been obtained* through DNA analysis." Tenn. Code Ann. § 40-30-304 (emphasis added). It does not matter that the other evidence against the defendant appeared strong and that the exculpatory result therefore seems unlikely. In other words, a defendant is entitled to testing if the defendant's best-case scenario would undermine confidence in the conviction, regardless of whether that best-case scenario is likely.

This stands in stark contrast to other kinds of post-conviction claims, such as claims of withholding exculpatory evidence under ***Brady v. Maryland,*** 373 U.S 83 (1963). With ***Brady*** claims, courts do not assume that the defendant's best-case

scenario would have occurred if the State had not withheld evidence; rather, with ***Brady*** claims, the defendant bears the burden of proving "a reasonable probability" that the best-case scenario would actually have occurred at trial. ***United States v. Bagley***, 473 U.S. 667, 682 (1985).

The different treatment given to claims for post-conviction DNA testing as opposed to claims of withholding exculpatory evidence has two sources. The first source lies, again, in DNA's unique power to find the truth. Unlike ***Brady*** claims, DNA testing claims have the potential to prove conclusively whether the defendant committed the crime. The second source, however, is even more fundamental: what is at stake with claims like Alley's is nothing more than testing. Alley does not at this point ask for any ultimate relief, and he will not be freed from prison just because his request for testing is granted.

Rather, Alley asks only that the courts test the hypothesis that his best-case scenario may be true. If DNA testing proves that Alley's best-case scenario—identifying the true perpetrator through a match to either an alternate suspect or a known offender in the CODIS databank—is true, then this will prove Alley actually innocent. The lower courts effectively disregarded the command of the statute to assume exculpatory results by denying testing based upon a prediction that exculpatory results were unlikely. The courts' refusal even to consider Alley's best-case scenario contradicts the logic and requirements of DNA testing statutes.

It is worth remembering that the criminal justice system will not suffer if Alley's best-case scenario does not come true. If testing comes back inconclusive, then Alley's fate likely will not change, and the system will be able to say that it did all it reasonably could to find the truth. And if testing proves that Alley committed the crime, then DNA will have once again done its job, and the criminal justice system will have achieved its goal of conclusively finding the truth.

D. The language and legislative history of the DNA testing statute do not support the State courts' conclusion that the statute only permits testing that can exclude Alley, not testing that might identify a third person.

Contrary to the rulings in the Tennessee courts, nothing in the language of Tennessee's statute prohibits comparisons to third-party DNA profiles, databanks, or redundant crime scene profiles. The statute simply does not limit the nature of the DNA comparisons that can be made with DNA profiles developed from crime scene evidence. Nor would it make sense to do so, since DNA evidence always derives its power from comparisons—whether the comparison is to the suspect's profile, or to other profiles that would determine who left the DNA at the crime scene, and hence who likely committed the crime.

The legislative history confirms that this was the broad purpose that motivated the legislature, and that the legislature never contemplated the possibility that a court would undermine the power of the DNA evidence by limiting it to defendant profile comparisons. In addition to emphasizing the importance of protecting the innocent, legislators repeatedly emphasized that postconviction DNA testing is also important because it can help identify the true perpetrator. Representative Briley argued: "Well all of us want *the guilty to be punished* and the innocent to go free—it is the basic American premise." Legislative Tape #2 on HB 770: Tenn. House Judiciary (April 18, 2001). Senator Cohen emphasized that the concern behind the statute was that, "[n]ot only are they [the State] doing the worst thing the state could ever do, that is take somebody and deprive them of their liberty wrongly, but *they are also letting a criminal out there prey on others*." Legislative Tape #3 on SB 796: Tenn. Senate Judiciary (May 15, 2001). Senator Cohen later added that, "If someone can be proven innocent and *allowed the police to find the guilty person*…they should have that right." Legislative Tape #1 on SB 796: Tenn. Finance Ways and Means (May 31, 2001). Recognizing the importance of permitting comparisons not only to free the innocent, but to identify and apprehend true perpetrators, Senator Cohen noted, "This bill is a law enforcement measure as well as liberty and justice measure." *Id*. Again emphasizing the point, Senator Cohen noted that, "if we do not fund this testing we are depriving [wrongly convicted people] of their liberties, they are victims, and then if we find out that *we can find the real culprit of the crime*, and if it be a rape crime or sexual assault crime, that person is committing more and more crimes." Legislative Tape #s-75 on SP 796: Session (Tenn. June 7, 2001). Because the

legislature was concerned about using the DNA testing to identify true perpetrators, as well as to exonerate the innocent, the legislature could not have meant to prohibit DNA testing and comparisons that would identify matches to third-parties.

CONCLUSION

DNA testing can reveal the truth in powerful ways. It makes no sense—and is contrary to the purpose of the postconviction DNA testing statute—to limit DNA testing as the lower courts have in this case.

Dated this 27th day of June, 2006.

Respectfully submitted,

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Appendix

The forty states (plus the District of Columbia) with post-conviction DNA testing statutes are:

> Arizona, Ariz. Rev. Stat § 13-4240 (2002); Arkansas, Ark. Code Ann. § 16-112-202 (2006); California, Cal. Penal Code § 1405 (2002); Colorado, Col. Rev. Stat. § 18-1-413 (2003); Connecticut, Ct. Stat § 54-102J (7) (2003); Delaware, 11 Del. Code § 4504 (2006); D.C. Code Ann. § 22-4133 (2002); Florida, Fla. Stat. Ann. 925.11 (2002); Georgia, Ga. Code Ann. § 5-5-41 (2006); Hawaii, Haw. Rev. Stat. § 844D-123 (2006); Idaho, Idaho Code Ann. § 19-4902 (2006); Illinois, 725 Ill. Comp. Stat. Ann. 5/116-3 (2005); Indiana, Ind. Code Ann. § 35-38-7-7 (2002); Iowa, Iowa Code § 81.10 (2005); Kansas, Kan. Stat. Ann. § 21- 2512 (2005); Kentucky, Ky. Rev. Stat. Ann. § 422.285 (2006); Louisiana, La. Code Crim. Proc. Ann. art. 926.1 (2006); Maine, 15 Me. Rev. Stat. Ann. § 2138 (2005); Maryland, Md. Code Ann., Crim. Proc. § 8-201 (2006); Michigan, Mich. Comp. Laws Serv. § 770.16 (2006); Minnesota, Minn. Stat. § 590.01 (2005); Missouri, Mo. Rev. Stat. § 547.035 (2006); Montana, Mont. Code Ann. § 46-21-110 (2005); Nebraska, Neb. Rev. Stat. § 29-4122 (2005); New Hampshire, N.H. Rev. Stat. Ann. 651-D:2 (2006); New Mexico, N.M. Stat. Ann. § 31-1A-2 (2006); New Jersey, N.J. Stat. Ann. § 2A:84A-32a (2006); New York, N.Y. Crim. Proc. Law § 440.3 (2002); North Carolina, N.C. Gen. Stat. Ann. § 15A-269 (2006); North Dakota, N.D. Cent. Code 29-32.1-15 (2006); Ohio, Ohio Rev. Code Ann. § 2953.72-81 (2006); Oklahoma, 22 Okla. Stat. §§ 1371, 1371.1, 1372 (2002); Oregon, Ore. Rev. Stat. T. 14, Ch. 138 Prec. 138.005 (2003); Pennsylvania,

> 42 Pa. Cons. Stat. § 9543.1 (2005); Rhode Island, R.I. Gen. Laws § 10-9.1-12 (2006); Texas, Tex. Code Crim. Proc. Ann. art. 64.03 (2001); Utah, Utah Code Ann. § 78-35a-301 (2006); Virginia, Va. Code Ann. § 19.2-327.1 (2006); Washington, Wash. Rev. Code § 10.73.170 (2006); West Virginia, W.Va. Code § 15-2B-14 (2006); and Wisconsin, Wis. Stat. § 974.07 (2006).

Statutes that do not require that identity was an issue at trial include:

> These statutes include: Arizona, Ariz. Rev. Stat. Ann. § 13-4240 (2006); California, Cal. Penal Code § 1405 (2006); Colorado, Colo. Rev. Stat. Ann. § 18-1-413 (2005); Connecticut, Conn. Gen. Stat. Ann. § 54-102kk (2006); District of Columbia, D.C. Code Ann. § 22-4133 (2006); Florida, Fla. Stat. Ann. § 925.11 (2005); Hawaii, Haw. Rev. Stat. § 844D-123 (2006); Indiana, Ind. Code Ann. § 35-38-7-7 (2006); Kansas, Kan. Stat. Ann. § 21- 2512 (2005); Kentucky, Ky. Rev. Stat. Ann. § 422.285 (2006); Louisiana, La. Code Crim. Proc. Ann. art. 926.1 (2006); Maryland, Md. Code Ann., Crim. Proc. § 8-201 (2006); Montana, Mont. Code Ann. § 46-21-110 (2005); Nebraska, Neb. Rev. Stat. § 29-4122 (2005); New Hampshire, N.H. Rev. Stat. Ann. 651-D:2 (2006); New Mexico, N.M. Stat. Ann. § 31-1A-2 (2006); North Carolina, N.C. Gen. Stat. Ann. § 15A-269 (2006); Rhode Island, R.I. Gen. Laws § 10-9.1-12 (2006); Tennessee, Tenn. Code Ann. § 40-30-304, 305 (2005); Texas, Tex. Code Crim. Proc. Ann. art. 64.03 (2005); Virginia, Va. Code Ann. § 19.2-327.1 (2006); Washington, Wash. Rev. Code § 10.73.170 (2006); West Virginia, W.Va. Code § 15-2B-14 (2006); Wisconsin, Wis. Stat. § 974.07 (2006). States that require identity be a contested issue include: Arkansas, Ark. Code Ann. § 16-

112-202 (2006); Delaware, 11 Del. Code § 4504 (2006); Georgia, Ga. Code Ann. § 5-5-41 (2006); Idaho, Idaho Code Ann. § 19-4902 (2006); Illinois, Ill. Comp. Stat. Ann. 725 5/116-3 (2005); Iowa, Iowa Code § 81.10 (2005); Maine, 15 Me. Rev. Stat. Ann. § 2138 (2005); Michigan, Mich. Comp. Laws Serv. § 770.16 (2006); Minnesota, Minn. Stat. § 590.01 (2005); Missouri, Mo. Rev. Stat. § 547.035 (2006); New Jersey, N.J. Stat. Ann. § 2A:84A-32a (2006); North Dakota, N.D. Cent. Code 29-32.1-15 (2006); Ohio, Ohio Rev. Code Ann. § 2953.72-81 (2006); Pennsylvania, 42 Pa. Cons. Stat. § 9543.1 (2005); Utah, Utah Code Ann. § 78-35a-301 (2006).