

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

SEDLEY ALLEY,	)	
	)	No. _____
Petitioner-Appellant,	)	
	)	From the Court of Criminal Appeals
	)	at Jackson
v.	)	No. W2006-001179-CCA-R3-PD
	)	
STATE OF TENNESSEE,	)	
	)	CAPITAL CASE
Appellee.	)	

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**BRIEF OF PROPOSED *AMICI CURIAE***

**ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE; CALIFORNIA AND HAWAII INNOCENCE PROJECTS; 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,**

**IN SUPPORT OF PETITIONER’S APPLICATION FOR PERMISSION TO APPEAL URGING REVERSAL OF THE DECISION OF THE COURT OF CRIMINAL APPEALS**

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James W. Price, Jr.  
BPR Number 03538  
Price, Rogers, Hill & Kolarich  
315 Deadrick Street, Suite 1230  
Nashville, TN 37238  
615-244-5772  
615-244-5821

Counsel for *Amici Curiae*

*OF COUNSEL:*  
Byron Lichstein  
Wisconsin Bar No. 1048483  
Keith A. Findley  
Wisconsin Bar No. 1012149  
John A. Pray  
Wisconsin Bar No. 1019121  
Wisconsin Innocence Project  
University of Wisconsin Law School  
975 Bascom Mall  
Madison, WI 53706  
(608) 265-2741

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND .....	2
CONCLUSION.....	32
CERTIFICATE OF SERVICE .....	33

**TABLE OF AUTHORITIES**

**STATUTES:**

Summary of State Statutes providing right to post-conviction DNA Testing .....21

Summary of State Statutes allowing DNA testing when indemnity is not at issue at trial.....22

Tennessee Code Annotated § 40-30-303 to 305 .....22

Tennessee Code Annotated § 40-30-304(1) .....3, 26

Tennessee’s Post Conviction DNA Analysis Act TCA 40-30.301 *et. seq.* .....1

28 U.S.C. § 2244(d)(1) .....24

**CASES:**

*Alley v. Key*,  
No. 06-5552, 2006 WL 1313364 (6<sup>th</sup> Cir. May 14, 2006) at \*5 .....5

*Alley v. State*,  
2004 Tenn. Crim. App. Lexis 471, 27-28; *Alley II* at 11 .....30

*Alley v. State*,  
No. W2006-01179-CCA-R3-PD  
(Tennessee Court of Criminal Appeals at Jackson,  
June 22, 2006).....3, 4, 10, 11, 14, 28, 30

*Brady v. Maryland*,  
373 U.S 83 (1963).....26, 27

*Bruner v. State*,  
88 P.3d 214, 216 (Kan. 2004).....7

*Commonwealth v. Godschalk*,  
679 A.2d 1295, 1297 (Pa. Super. 1996).....6

*Crawford v. State*,  
No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, \*3  
(Tenn. Crim. App. August 4, 2003).....30, 31

<b><i>Griffin v. State</i></b> , 182 S.W.3d 795, 799 (Tenn. 2006).....	22, 24, 25
<b><i>Griffin v. State</i></b> , No. M2003-00557-CCA-R3-PC, slip op. at 10, 2004 WL 1562390, (Tenn.Crim.App. July 13, 2004) (Tipton, J., dissenting).....	23
<b><i>Holmes v. South Carolina</i></b> , 126 S.Ct. 1727 (2006).....	9
<b><i>House v. Bell</i></b> , 547 U.S. (2006 Sup. Ct., 2006 WL 584475).....	7, 8
<b><i>People v. Henderson</i></b> , 799 N.E.2d 682, 690 (Ill. App. 2003) .....	7
<b><i>Smith v. United States</i></b> , 348 U.S. 147, 152-3 (1954) .....	10
<b><i>State v. Peterson</i></b> , 836 A.2d 821, 826, 827 (N.J. Super. 2003) .....	7, 26
<b><i>Strickland v. Washington</i></b> .....	26
<b><i>United States v. Bagley</i></b> , 473 U.S. 667, 682 (1985).....	27
<b><i>United States v. Reynard</i></b> , 220 F.Supp.2d 1142, 1168 (S.D.Cal. 2002).....	15
<b><i>Vore v. U.S. Dept. of Justice</i></b> , 281 F.Supp.2d 1129, 1136 (D.Ariz. 2003) .....	15

**INTERNET CITATIONS:**

Case Profiles at <a href="http://www.innocenceproject.org/case">http://www.innocenceproject.org/case</a> .....	2
Case Profiles of Gilbert Alejandro, A.B. Butler, Kevin Byrd, Wiley Fountain, Brandon Moon, and Ben Salazar, at <a href="http://www.innocenceproject.org/case/search_profiles.php">http://www.innocenceproject.org/case/search_profiles.php</a> .....	14
Case Profile of Kirk Bloodsworth, <i>available at</i> <a href="http://www.innocenceproject.org/case/display_profile.php?id=21">http://www.innocenceproject.org/case/display_profile.php?id=21</a> .....	17

Case Studies: David Vasquez, <i>available at</i> <a href="http://www.dna.gov/case_studies/convicted_exonerated/vasquez">http://www.dna.gov/case_studies/convicted_exonerated/vasquez</a> .....	20
Case Profile of Douglas Warney, <i>available at</i> <a href="http://www.innocenceproject.org/case/display_profile.php?id=180">http://www.innocenceproject.org/case/display_profile.php?id=180</a> .....	16
Case Profile of Earl Washington at <a href="http://www.innocenceproject.org/case/display_profile.php?id=80">http://www.innocenceproject.org/case/display_profile.php?id=80</a> .....	16
Causes and Remedies of Wrongful Convictions at <a href="http://www.innocenceproject.org/causes/">http://www.innocenceproject.org/causes/</a> .....	3
CODIS: Combined DNA Index System at <a href="http://www.fbi.gov/hq/lab/codis">http://www.fbi.gov/hq/lab/codis</a> .....	14, 15
Kahn, <i>Rapist linked to 1982 slaying: Earl Washington Jr. had been wrongfully condemned in the case</i> , The Associated Press News, March 10, 2004, <i>available at</i> <a href="http://www.truthinjustice.org/real-rapist.htm">http://www.truthinjustice.org/real-rapist.htm</a> .....	17
Kassin and Gudjonsson, <i>True Crimes, False Confessions</i> , SCIENTIFIC AMERICAN MIND, June 2006, <i>available at</i> <a href="http://www.sciammind.com/print_version.cfm?articleID=000635C8-590A-128A-982D83414B7F0000">http://www.sciammind.com/print_version.cfm?articleID=000635C8-590A-128A-982D83414B7F0000</a> .....	12
Searching FBI Records for Clues at <a href="http://www.fbi.gov/page2/june05/serviceunit061705.htm">http://www.fbi.gov/page2/june05/serviceunit061705.htm</a> .....	14
Statistics for Tennessee at <a href="http://www.fbi.gov/hq/lab/codis.tn.htm">http://www.fbi.gov/hq/lab/codis.tn.htm</a> .....	15

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Borteck, <i>Pleas for DNA Testing: Why Lawmakers Should Amend State Postconviction DNA Testing Statutes To Apply to Prisoners Who Pled Guilty</i> , 25 CARDOZO L. REV. 1429, 1463 (2004) .....	23
Craig, <i>Quest for genetic testing in Warney case rejected</i> , ROCHESTER DEMOCRAT AND CHRONICLE, December 17, 2004 .....	6
Dwyer, <i>Inmate to Be Freed as DNA Tests Upend Murder Confession</i> , THE NEW YORK TIMES, May 16, 2006 .....	6

Drizin & Leo, <i>The Problem Of False Confessions In The Post-DNA World</i> , 82 N.C.L.REV. 891 (2004) .....	3
Findley and Scott, <i>The Multiple Dimensions of Tunnel Vision in Criminal Cases</i> , 2006 WIS.L.REV. 291, 332 .....	5, 12
Order Denying Post-Conviction DNA Analysis, (Higgs, J., May 31, 2006) .....	3, 4, 10, 14, 28
Saul M. Kassin, <i>On the Psychology of Confessions</i> , 60 AM. PSYCHOL. 215, 220 (2005) .....	11
Levine, <i>Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer</i> , WASHINGTON POST, Sept. 6, 2003 .....	17
<i>The Multiple Dimensions of Tunnel Vision in Criminal Cases</i> , 2006 WIS.L.REV. 291, 332 .....	5
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Representative Briley, Legislative Tape #2 on HB 770: House Judiciary (April 18, 2001).....	29
Rimer, <i>DNA Testing In Rape Cases Frees Prisoner After 15 Years</i> , THE NEW YORK TIMES, February 15, 2002.....	6
Riter, <i>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</i> , 74 FORDHAM L. REV. 825, 834 (2005) .....	2, 19
Russano et al., <i>Investigating True and False Confessions Within a Novel Experimental Paradigm</i> , 16 PSYCHOLOGICAL SCIENCE 481, 484 (2005).....	11
Saltzman & Daniel, <i>Man Freed in 1997 Shooting of Officer</i> , BOSTON GLOBE, Jan. 24, 2004 .....	18
Senator Cohen, Legislative Tape #3 on SB 796, Senate Judiciary (May 15, 2001) .....	29
Senator Cohen, Legislative Tape #1 on SB 796, Finance Ways and Means (May 31, 2001) .....	29
Senator Cohen, Legislative Tape #s-75 on SP 796, Session (June 7, 2001) .....	30

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Weber and Rothstein, *Man freed after 6 years; Evidence was flawed*, THE BOSTON HERALD, January 24, 2004 .....18

U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 21-22 (1999).....13

## INTRODUCTION

When testable evidence is available, DNA analysis is an invaluable tool for pinpointing the guilty party to a scientific certainty - at any stage of the criminal process, and no matter how strongly other evidence currently weighs against a defendant. DNA evidence can exclude a defendant from suspicion, help identify the real perpetrator, or, at the very least, cast serious doubt as to a defendant's guilt due to the redundant appearance of another's genetic materials.

The fact that Petitioner Sedley Alley has already been convicted (on what the Court has deemed "overwhelming evidence of his guilt," no less) does not diminish DNA's usefulness in the present case. Although much of the testable evidence here comprises clothing, on which saliva, blood and hairs could have been deposited prior to the murder, if DNA evidence were to establish the "redundant" presence of a third party's genetics at the murder scene, crucial doubt could be cast on the case against Alley.

In drafting the Tennessee Post Conviction DNA Analysis Act, T.C.A. 40-30.301 *et seq.*, the Tennessee legislature intended courts to take full advantage of DNA testing technology in the search for justice. Because there is no requirement that a defendant seeking postconviction DNA tests asserted his innocence at trial, and because the DNA statute puts no time limits on testing requests, Alley's request is timely and not immediately deniable. Tennessee does not require pre-test proof that the results are likely to be exculpatory, and the DNA statute does not limit testing to evidence that could definitively exclude a defendant. Thus, Alley is entitled to pay for DNA testing on all available evidence, in hopes that a redundant pattern will establish the presence of a third

party at the murder scene, but with no guarantees that the results will implicate anyone but himself.”

## BACKGROUND

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 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 181<sup>st</sup> 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 lower 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 lower 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 lower 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 Postconviction DNA Analysis Act, 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 the method of 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 a narrow reading of a statute designed to find the truth. We address these points further below.

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

***A. DNA testing 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 trial court quoted approvingly from the 6th Circuit Court of Appeals' 2004 opinion in Alley's case: "[T]he compelling evidence of Alley's guilt – including his confessions, his description to law enforcement authorities of his acts, and the eyewitness testimony against him – strongly suggest that he could never accurately be considered actually innocent of the crime." *Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6<sup>th</sup> Cir. May 14, 2006) at \*5. The premise of these quotes is 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 of this 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 police 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 was innocent. Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, THE NEW YORK 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 the United States Supreme Court. In *House v. Bell*, 547 U.S. Supreme Court (2006 WL 1584475), the Supreme 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 late on the night of her murder 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 subsequent 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, the Supreme 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 the Supreme Court's recent decision in *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006). There, the South Carolina Supreme 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 South Carolina 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 lower courts' analyses in this case, the Supreme 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. Indeed, the Court of Criminal Appeals' analysis repeatedly assumed that Alley's confession was true and analyzed his requests for DNA testing by referring to the events described in the confession. See *Alley II* at 24 (testing of victim's bra and t-shirt will not yield probative results because confession denied contact with victim's breast), 24 (testing on victim's underwear will not yield probative results because confession denied penile penetration), 28 (testing of biological material on grass will not yield probative results because confession denied ejaculation).

It has long recognized that innocent people sometimes falsely confess. In *Smith v. United States*, 348 U.S. 147, 152-3 (1954) the Supreme Court described the risk of erroneous convictions "based upon untrue confessions," and the possibility existing 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<sup>2</sup>) 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

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<sup>2</sup> See Causes and Remedies of Wrongful Convictions, The Innocence Project, at <http://www.innocenceproject.org/causes/>.

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. Saul M. 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 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 PSYCHOLOGICAL 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. *See, e.g., Alley II* at 19-20. 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 and 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 and Gudjonsson, *True Crimes, False Confessions*, SCIENTIFIC AMERICAN MIND, June 2006, available at [http://www.sciammind.com/print\\_version.cfm?articleID=000635C8-590A-128A-982D83414B7F0000](http://www.sciammind.com/print_version.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. This is particularly so in a case like Alley's, where an expert on false confessions, Dr. Richard Leo, has concluded that Alley's confession is probably false. As Alley points out in his briefs, Dr. Leo has been right before, and it makes little sense to decline an opportunity to find out if he is right again in this case

## **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<sup>3</sup> reveals blood type A, and the suspect is type B, this is conclusive evidence that the suspect is innocent. But if the perpetrator is type A and the suspect is also type A, then blood typing proves little because type A is so 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. *See* U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, NATIONAL COMMISSION ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 21-22 (1999). Second, DNA can be extracted from much smaller samples than are necessary for blood typing. *Id.* at 23, 24. 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. *Id.* at 28. This section elaborates on the different ways in which DNA can reveal the truth.

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<sup>3</sup> Approximately 80 percent of people are "secretors," meaning they secrete their ABO blood group substances into other bodily fluids, such as semen. *House v. Bell, supra*, Slip Op. at 8-9.

***A Excluding the defendant as the source of DNA on one item of highly probative crime scene 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. Although very well-known, this approach is effective only in a very specific kind of case. In Texas, for instance, numerous defendants have been exonerated since 1989 based on an exclusion alone. *See, e.g.*, Case Profiles of Gilbert Alejandro, A.B. Butler, Kevin Byrd, Wiley Fountain, Brandon Moon, and Ben Salazar, at [http://www.innocenceproject.org/case/search\\_profiles.php](http://www.innocenceproject.org/case/search_profiles.php) (last visited June 23, 2006). In those cases, an exclusion alone was enough because each of those 14 defendants was convicted of a sexual assault where semen that could only have come from the perpetrator was found in close proximity to the victim. While an exclusion of that sort is sometimes enough to conclusively prove innocence, DNA can provide similarly conclusive proof in other ways when a simple exclusion is not enough.

***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); *see 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). The Tennessee state legislature recently recognized the importance of DNA databanks by passing Senate Bill 2615, which will require anyone arrested for a violent felony to submit a DNA profile, and will authorize the hiring of six new DNA data processors. CITE.

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 from wrongful conviction 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*, 220 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](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 already 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](http://www.innocenceproject.org/case/display_profile.php?id=80) (last viewed June 21,

2005). Although DNA testing in 1993 excluded Washington as the source of 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.

Kirk Bloodsworth’s case also illustrates how a databank search is often required to solve a case. Bloodsworth was convicted of a 1982 rape and murder based on the testimony of five eyewitnesses who thought they saw him with the victim at the crime scene. Case Profile of Kirk Bloodsworth, available at:

[http://www.innocenceproject.org/case/display\\_profile.php?id=21](http://www.innocenceproject.org/case/display_profile.php?id=21) (last viewed June 21, 2006). DNA testing of semen found at the crime scene excluded Bloodsworth and led to his release in 1992. But authorities did not run the crime scene profile through the CODIS databank until 2003, at which time they obtained a “hit” on Kimberly Shay Ruffner, a convicted sex offender serving time for a separate attempted rape and murder. (Incredibly, Bloodsworth and Ruffner had been in the same prison and had lifted weights together while Bloodsworth was wrongfully incarcerated). Levine, *Ex-Death Row Inmate Hears Hoped-for Words: We Found Killer*, WASHINGTON POST, Sept. 6, 2003.

**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 conclusion becomes inescapable that the unknown profile belongs to the perpetrator. And if the defendant does not match the redundant unknown profile, then the defendant must be innocent.<sup>4</sup>

For example, Stephen Cowans was exonerated in 2004 after using redundancy to prove his innocence. 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.<sup>5</sup> 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.

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<sup>4</sup> 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.

<sup>5</sup> 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.

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 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 Marlboro 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 belonged to a consensual partner. *Id.*

Criner then obtained post-conviction DNA testing on the Marlboro 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.*

The principle of redundancy can be extended from multiple *items* at a single crime scene to multiple *crime scenes* in which the same perpetrator likely committed the crime. The case of David Vasquez illustrates this innovative use of DNA to conclusively prove innocence. Vasquez pled guilty to the brutal rape and murder of a woman in her home in 1984. The evidence against the borderline-retarded Vasquez included two confessions, two witnesses who placed him near the scene of the crime the day before, and pubic hairs from the crime scene found to be consistent with Vasquez's hair. President's DNA Initiative, Case Studies: David Vasquez, *available at* [http://www.dna.gov/case\\_studies/convicted\\_exonerated/vasquez](http://www.dna.gov/case_studies/convicted_exonerated/vasquez) (last visited June 23, 2006).

Vasquez was exonerated when DNA testing demonstrated that several very similar rape/homicides had been committed by another man, Timothy Spencer. Although the physical evidence from the Vasquez case had been destroyed, the similarities between Vasquez's case and Spencer's crimes (along with an FBI report that concluded that the perpetrator in Vasquez's case could not have been mentally retarded) resulted in Vasquez's exoneration. *Id.*

While each item available for listing would not necessarily be conclusive of a different result for Mr. Alley, the same unknown DNA on more than one item could raise doubt beyond what was known at trial.

**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.<sup>6</sup> The purpose of these 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 other statutes like it from other states, reveals this purpose.

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

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<sup>6</sup> Forty states and the District of Columbia now have such statutes. 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).

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.<sup>7</sup> 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,<sup>8</sup> 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

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<sup>7</sup> 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).

<sup>8</sup> The cases of Chris Ochoa and David Vasquez, *supra*, are only two of the many examples.

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. See Borteck, *Pleas for DNA Testing: Why Lawmakers Should Amend State Postconviction DNA Testing Statutes To Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1463 (2004) (“it has been shown repeatedly that defendants falsely plead guilty in the same way that defendants falsely confess.”). If those who admit guilt in 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.<sup>9</sup>

***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. *See Griffin v. State*, 182 S.W.3d 795, 798-99 (Tenn. 2006) (Tennessee's "Act includes explicit language that makes DNA analysis available at any time.... This provision has no statutory time limit and gives petitioners the opportunity to request analysis at 'any time,' whether or not such a request was made at trial.").

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. These

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<sup>9</sup> Research on false confessions confirms that one category of false confessions includes innocent individuals who actually become convinced by the interrogation process that they must have committed the crime, even when they did not. Social scientists who study false confessions have identified several types of false confessions, including "voluntary (in which a subject confesses in the absence of external pressure), coerced-compliant (in which a suspect confesses only to escape an aversive interrogation, secure a promised benefit, or avoid a threatened harm), and coerced-internalized (in which a suspect actually comes to believe that he or she is guilty of the crime)." Kassir & Keichel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOLOGICAL SCIENCE 125 (1996). Others have delineated these categories further, dividing the "compliant" false confessions into "stress-compliant false confessions," and "coerced-compliant false confessions." Ofshe & Leo, *Coercion: An Interdisciplinary Examination of Coercion, Exploitation, and the Law*, 74 DENV. U. L. REV. 979, 997-1000 (1997).

legal restrictions are based on several theories: that most legitimate legal claims can be understood and recognized within a reasonable period of time after trial; that defendants should not “sandbag” courts by withholding potential claims for later petitions; and that, at some point, the State’s interest in finality outweighs a defendant’s right to litigate legal claims. 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. The statute should be read in the context of its overall purpose—allowing DNA testing to find the truth—a purpose which, in some cases, can only be achieved by considering third party matches and redundancy.

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. See Kathy Swedlow, *Don’t Believe Everything You Read: A Review of Modern ‘Post-Conviction’ DNA Testing Statutes*, 38 CAL. W. L. REV. 355 (2002).<sup>10</sup> 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 seems likely. See, e.g., *State v. Peterson*, 836 A.2d 821, 827 (N.J. Super. 2003) (noting that postconviction DNA testing statutes do not “require a convicted person to make a threshold showing that there is a ‘reasonable probability’ DNA testing will produce favorable results”).

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

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<sup>10</sup> As in Tennessee, many states’ DNA statutes require merely a showing that favorable DNA test results would produce a “reasonable probability of a different outcome” at a new trial—a standard “identical to the prejudice standard set forth in *Strickland v. Washington*,” which is significantly less demanding than requiring proof of a different outcome. Swedlow, *supra*, at 369-70.

(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 Tennessee’s DNA testing statute do not support the lower courts’ conclusion that the statute permits only testing that can exclude Alley, not testing that might identify a third person..***

The trial court held that:

The testing sought by the petitioner can only be used to compare the petitioner’s own DNA and the DNA of the victim and either identify the petitioner as the contributing source or exclude him as the source of biological materials found on certain pieces of evidence related to the crime. As the Court of Criminal Appeals previously made clear, the testing can not be used to identify some third party that petitioner now contends was involved in the crime or some “phantom” defendant found in a database. The statute and the case simply do not contemplate such a result.

Higgs Order at 24-25.

Similarly, the Court of Criminal Appeals stated:

The Act’s reach is limited to the performance of DNA analysis which compares the petitioner’s DNA to samples taken from biological specimens gathered at the time of the offense... This Court rejects any implied testing of third party individuals or the need to “run” DNA testing results through a DNA database for “hits.”

***Alley II*** at 11(internal citations omitted).

But 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.<sup>11</sup> Nor would it make sense to do so, since DNA

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<sup>11</sup> The statute requires “DNA analysis” any time four statutory criteria are met, and none of the four criteria addresses whether the DNA is being used to exclude the defendant or to identify a third party. In addition, the statutory definition of the term “DNA analysis” also does not support the trial court’s limitation. “DNA analysis” is defined as “the process through which deoxyribonucleic acid (DNA) in a human biological

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: 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: 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: 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

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specimen is analyzed and compared with DNA from another biological specimen for identification purposes.” This definition speaks generically of comparing DNA profiles—it does not restrict which DNA profiles can be compared.

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 (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.

Despite the language of the statute and the legislative history, the Court of Criminal Appeals in both *Alley I* and *Alley II* held that the statute “only permits the performance of a DNA analysis which compares the petitioner’s DNA samples to DNA samples taken from biological specimens gathered at the time of the offense.” *Sedley Alley v. State*, 2004 Tenn. Crim. App. Lexis 471, 27-28; *Alley II* at 11. Neither *Alley I* nor *Alley II* offered any analysis as to how the statutory language supports the conclusion; both cases merely cited to another case, *Earl David Crawford v. State*, No. E2002-02334-CCA-R3-PC, 2003 WL 21782328, \*3 (Tenn. Crim. App. August 4, 2003).

But *Crawford* dealt with a factual situation that plainly does not apply to Alley’s case. In *Crawford*, although no crime scene evidence was preserved for testing, the *pro se* appellant nonetheless moved the court to conduct DNA analysis of samples from the victim and the victim’s relatives. In denying the request, the Appeals Court stated: “The statute clearly limits its reach to permit only the performance of a DNA analysis which compares the petitioner’s DNA samples to DNA samples taken from biological specimens gathered at the time of the offense if all four statutory criteria are met.” *Crawford, supra* at \*3.

It should be clear from the factual context of *Crawford* that the Court's language was not directed at the situation presented in Alley's case. Crawford's request for testing was frivolous, because there was nothing to test, and the Court's language was merely an overly broad explanation that a request for testing must make some comparison to actual crime scene evidence. Because there is no reason to think that *Crawford* was intended to apply to the factual situation here, all language extending *Crawford* to the facts of this case should be overruled. Tennessee's DNA statute should be read in light of its language and purpose—allowing DNA to find the truth—and should therefore accommodate requests like Alley's that have the potential to conclusively determine the identity of the perpetrator.

Indeed, courts in other jurisdictions, interpreting statutes similar to Tennessee's, have recognized that the DNA results derive much of their probative force from comparisons to alternative suspects, redundant crime scene profiles, or convicted offender profiles in the CODIS databank. For example, a Wisconsin court recently ruled that DNA testing could be performed under Wisconsin's very similar DNA statute in a case where the *only* purpose for the testing is to develop a profile that can be searched against the DNA databank to look for an alternative perpetrator. In that case, David Bintz was convicted of murder primarily on his own alleged confession. The State initially theorized that the victim had been sexually assaulted before she was murdered. But when, prior to trial, analysis of the semen from the dead woman excluded Bintz, the State changed its theory and argued to the jury that the woman must have engaged in consensual sex with someone else prior to her murder. The jury convicted, knowing full well that the semen was not Bintz's. The new postconviction DNA testing thus is not

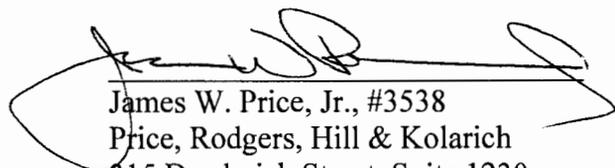
being conducted to exclude Bintz—pretrial testing already excluded Bintz—but solely to determine if the semen might match a convicted felon in the databank, thereby identifying a third-party as the killer and exonerating Bintz. Associated Press, *Crime Lab To Check '87 Murder Evidence*, (Madison, Wis.) CAPITAL TIMES, at C12, May 17, 2006.

### 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. This Court should interpret the statute to permit DNA testing in cases like this, where DNA testing—with the potential to exclude the defendant, identify an alternative perpetrator, or identify redundant crime scene DNA profiles—might demonstrate that what appears to be strong evidence of guilt could be wrong.

Dated this 26<sup>th</sup> day of June, 2006.

Respectfully submitted,



James W. Price, Jr., #3538  
Price, Rodgers, Hill & Kolarich  
315 Deaderick Street, Suite 1230  
Nashville, TN 37238-1230  
(615) 244-5772  
(615) 244-5821 – Facsimile

CERTIFICATE OF SERVICE

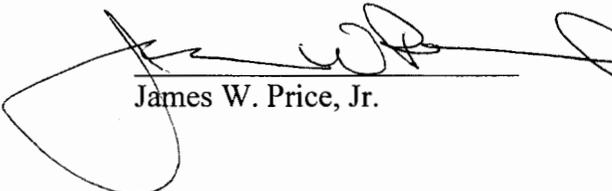
I hereby certify that a true and exact copy of the foregoing has been served upon the following:

Jennifer Smith, Esq.  
Office of the Attorney General  
425 Fifth Avenue North  
Nashville, TN 37243  
*Counsel for Respondent-Appellee*  
*(Via Hand Delivery)*

Barry C. Scheck, Esq.  
Vanessa Potkin, Esq.  
Colin Starger, Esq.  
THE INNOCENCE PROJECT  
100 5<sup>th</sup> Avenue, 3<sup>rd</sup> Floor  
New York, New York 10011  
*Counsel for Petitioner-Appellant*  
*(Via E-Mail)*

Paul R. Bottei, Esq.  
Kelley J. Henry, Esq.  
Office of the Federal Public Defender  
Middle District of Tennessee  
810 Broadway, Suite 200  
Nashville, TN 37203  
*Counsel for Petitioner-Appellant*  
*(Via E-Mail)*

This the 26<sup>th</sup> day of June, 2006.

  
James W. Price, Jr.