

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

**BRIEF OF PROPOSED *AMICI CURIAE*,
DOUGLAS WARNEY, CLARENCE ELKINS, CHRISTOPHER OCHOA,
DENNIS FRITZ AND KEVIN GREEN, WRONGFULLY CONVICTED PERSONS,
IN SUPPORT OF PETITIONER'S APPLICATION FOR PERMISSION TO APPEAL
URGING REVERSAL OF THE DECISION OF THE COURT OF CRIMINAL APPEALS**

Bradley A. MacLean (BPR # 9562)
STITES & HARBISON, PLLC
Financial Center, Suite 1800
424 Church Street
Nashville, Tennessee 37219
Phone: (615) 782-2237
Fax: (615) 742-7210
Email: bradley.maclean@stites.com

Counsel for *Amici Curiae*

Of Counsel:

Alison Flaum, Esq.
Steven Drizin, Esq.
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern University School of Law
357 E. Chicago Avenue
Chicago, IL 60610
(312) 503-6608

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Counsel for *Amici Curiae*

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Center on Wrongful Convictions
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Northwestern University School of Law
357 E. Chicago Avenue
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INTEREST OF *AMICI CURIAE*

Amici are persons once wrongfully convicted and now completely exonerated by post-conviction DNA testing and analysis. Their interest in this case stems from their concern that the Tennessee Post-Conviction DNA Analysis Act is being construed in a manner that unfairly curtails the efforts of innocent people to pursue both their own vindication and true justice for the community at large. Indeed, had *amici's* cases been reviewed under a standard akin to the Tennessee Act as it has been interpreted in this case, every single one would still be incarcerated – if not executed – and the true perpetrator of the crimes of which they were convicted would likely still be at large. *Amici* therefore hope that their real world experiences in proving their innocence will assist the Court in deciding a case that will determine not only the fate of innocent Tennessee prisoners but also the prospect of providing real justice – for all who wish to see the right people punished for their crimes – in the state of Tennessee.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici, all innocent men, once stood precisely in the shoes of Sedley Alley – convicted on the basis of seemingly unassailable evidence, often including their own confessions. Each was convicted of – or pleaded guilty to – a heinous crime; each was sentenced to a lengthy term of imprisonment or to death; each was ultimately exonerated. And every single one would still be incarcerated – or dead at the hands of the state – if he had been denied the DNA testing that Sedley Alley now seeks.

The lower courts in this case have determined that the relief available under Tennessee’s Post-Conviction DNA Analysis Act is highly limited. They have effectively ruled that DNA testing is available only in the rare “silver-bullet” case – such as a single-perpetrator rape of a single victim – where a single piece of unanalyzed biological evidence can potentially exonerate a defendant. They have therefore prohibited DNA testing in cases where redundant results on multiple items of evidence or secondary comparisons of the evidence DNA to other DNA profiles could well demonstrate a defendant’s innocence.

While such limitation may seem, at first blush, a reasonable restriction, it is, in fact, neither logical nor fair and accordingly renders Tennessee’s innocence protection scheme insufficient to truly identify and address wrongful convictions. Indeed, as *amici*’s cases show, the lower courts’ interpretation of the Tennessee act threatens to transform legislation clearly designed to aid the innocent, see *Ensley v. State*, 2003 WL 1868647, at *2 (Tenn. Crim. App. April 11, 2003) (Act intended to “provide[]... relief to those who assert that they have been wrongfully convicted of a crime”), into a mechanism for denying relief even in truly meritorious

cases.¹ In doing so, the lower courts have been constrained to disregard the incontrovertible scientific potential of DNA and the real world scenarios that have lead to many exonerations in the past. For these reasons, *amici* respectfully urge this Court to reverse the appellate court’s affirmation of the post-conviction court’s denial of Mr. Alley’s request for post-conviction DNA testing.

¹ Notably, the Tennessee statute contemplates broader post-conviction relief than many analogous provisions in other jurisdictions. It is not, for example, limited to cases where identity was contested at trial. *C.f., e.g.*, 725 Ill. Comp. Stat. Ann. 5/116-3(b)(1) (“[t]he defendant must present a prima facie case that...identity was the issue in the trial”); Tex. Code Crim. Pro. art. 64.03(a)(1)(B) (“[a] convicting court may order forensic DNA testing under this chapter only if the court finds that...identity was or is an issue in the case”). Moreover, as the appellate court noted, it is uncontested that “[t]he Post-Conviction DNA Analysis Act was created because of the possibility that an innocent person has been wrongfully convicted or sentenced.” *Alley v. State*, No. W2006-01179-CCA-R3-PD, slip op. (Tenn. Crim. App. at Jackson, June 22, 2006) [hereinafter June 22, 2006 Court of Appeals Decision] at 18, *citing Shuttle v. State*, 2004 WL 199826, at *4 (Tenn. Crim. App., at Knoxville Feb. 3, 2004), *perm. to appeal denied*, (Tenn. Oct. 4, 2004). It must therefore be presumed to require that meaningful relief be provided to all who make a colorable case for such a “possibility,” not merely those who, by dint of fate, were convicted in cases where innocence can be determined from a single, silver-bullet DNA test. *See National Gas Distrib., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991) (meaning of a statute must be determined in light of the general purpose of the legislation and in a manner consistent with that intent); *Loftin v. Langsdon*, 813 S.W.2d 475, 478-79 (Tenn. Ct. App. 1991) (same).

ARGUMENT

I. Post-Conviction DNA Testing Limited Only To Comparison Of Evidentiary DNA Against The Defendant's DNA Profile Is Not Sufficient To Identify Wrongful Convictions.

DNA cases are as varied as crime itself; there is no universal template. Some DNA cases present relatively straight-forward scenarios where the DNA in question clearly belongs to the true perpetrator and to no one else. Examples of these cases include single-assailant rape cases where the DNA has been recovered from the victim and where it is uncontested that the victim had no intimate contact with anyone other than the assailant.² These cases, however – where a simple “evidence DNA v. defendant DNA” comparison is capable of producing a definitive exonerative result – are few and far between.

Vastly more common are cases wherein exclusion of a particular defendant as the source of a particular piece of evidentiary DNA, standing alone, is not necessarily conclusive proof of innocence. In such cases, additional steps are required to ascertain the full truth. Here, only a secondary comparison – revealing that the evidence DNA matches a known alternative suspect or a DNA profile in a known offender database – has the capacity to provide solid proof that the

² Another example is provided by cases where a single DNA profile appears on numerous pieces of evidence in a manner that precludes coincidental deposit and where it is uncontested that no innocent party could have contributed that DNA – cases often referred to as “redundant hit” or “redundancy” cases. Significantly, the Court of Appeals in this case misapprehended entirely the redundancy argument advanced below by Mr. Alley – namely that the discovery of the same (non-Alley) DNA profile on numerous pieces of evidence, even without secondary comparisons identifying the true source of that DNA, would prove that Mr. Alley could not have been the perpetrator as no one but the perpetrator could possibly have left his or her DNA on multiple items of evidence given the facts of this case. The Court of Appeals, however, believed that Mr. Alley’s redundancy claim amounted to an assertion that the *absence* of Mr. Alley’s DNA on multiple items of evidence – as opposed to the repeated *presence* of an *unknown* DNA profile – would amount to exoneration. June 22, 2006 Court of Appeals Decision at 11. This was manifestly incorrect. *See, e.g.*, Petitioner’s Reply to State’s Response to Petition for DNA Testing at 1, 2, 5, 11; [Appellate] Brief of Sedley Alley at 9, 10, 13, 22, 30-38; Supplemental [Appellate] Brief of Sedley Alley at 2, 9.

defendant did not commit the crime. Far from “creat[ing] conjecture or speculation,” *Alley v. State*, No. 85-05085-87, Order Denying Post-Conviction DNA Analysis (Tenn. Crim. Ct. May 31, 2006) at 9 [hereinafter Higgs Order], quoting *Alley v. State*, W2004-01204-CCA-R3-PD at 9-10 (Tenn. Crim. App. at Jackson May 26, 2004), in such cases this secondary comparison provides the only means of conclusively determining guilt or innocence. See *House v. Bell*, 547 U.S. ---, --- S. Ct. ---, 2006 WL 1584475, at *20 (June 12, 2006) (noting that post-conviction investigation limited only to comparison of biological evidence to defendant’s DNA profile can be insufficient to prove innocence and that full evaluation of innocence claims may require, *inter alia*, secondary investigation of alternative suspects). It is just such a case that the Court confronts in the instant matter.³

II. No One Knows The Insufficiencies of Limited Post-Conviction DNA Testing Better Than The Amici – Who Would Never Have Been Exonerated Without Precisely The Kind Of Testing That Has Been Denied In This Case.

Each one of the *amici*’s cases – as well as the scores of other cases outlined in the attached chart⁴ – demonstrates, conclusively, that post-conviction DNA testing limited only to comparisons of evidence samples against the defendant’s DNA profile is by no means sufficient to provide true justice for the wrongfully convicted, for the victims of crime or for the community at large. Simply put, none of the *amici* – all of whom have been exonerated in their

³ *Amici* note that in many cases – including the case at bar – these secondary comparisons involve analysis of DNA profiles already in the possession of the state or the defense and accordingly do not require collection of DNA from additional parties. Thus, without taking a position on the correctness of the lower courts’ rulings that the Tennessee Post-Conviction DNA Analysis Act cannot be used to compel the collection of DNA from third parties, see Higgs Order at 8, citing *Crawford v. State*, 2003 WL 21782328 (Tenn. Crim. App. August 4, 2003); June 22, 2006 Court of Appeals Decision at 11, *amici* submit that even if this Court were to endorse such a reading of the Act, the testing sought by Mr. Alley would likely not run afoul of that limitation.

⁴ See Exhibit A.

respective jurisdictions – would have been able to prove their innocence without post-conviction DNA analysis that went beyond simply comparing DNA from the crime to DNA from the defendant.

Moreover, any one of these innocent men could have been confronted with – and derailed by – accusations that the secondary comparisons conducted in their cases were no more than dubious efforts to search for a “phantom” perpetrator, *see* Higgs Order at 9, 24, *citing Alley v. State*, 2004 WL 21782328 (Tenn. Crim. App. May 26, 2004); June 22, 2006 Court of Appeals Decision at 11; their cases were virtually indistinguishable from Mr. Alley’s at the time. Indeed, each case involved precisely the type of “overwhelming” evidence of guilt – confessions, eyewitness testimony, forensic hair “matches,” even a guilty plea – cited with understandable concern by the lower courts in this case. *See* Higgs Order at 21, 23, 33, 40, 45; June 22, 2006 Court of Appeals Decision at 19 -20 (recounting all seemingly incriminating evidence), 21 (referring to evidence of guilt as “overwhelming”); *see also* Appellant’s Exhibit PP to May 30, 2006 hearing (Apx. 233-270) (noting other exonerations in cases once deemed to represent “overwhelming” evidence of guilt).⁵

Finally, *amici*’s cases also demonstrate that a post-conviction DNA testing scheme that encompasses comparison of crime scene DNA to the DNA of a known alternate suspect or to DNA profiles collected in a forensic DNA database is neither cumbersome nor a fantastical search for a chimerical true perpetrator. On the contrary, their cases – and the thirty thousand other cases where DNA database searches have resulted in linking offenders to crime scene

⁵ With respect to the post-conviction court’s position that Mr. Alley’s original insanity defense ought to foreclose according any sincerity to his current claim of innocence, *amici* note that in at least seven recent exonerations, the exonerated defendant had pleaded guilty to the crime in question. *See* Alex Leary, *Exonerations Stir Bids to Expand DNA Testing*, St. Petersburg Times, January 30, 2006, *available at* 2006 WLNR 1656288.

DNA⁶ – plainly establish the near-miraculous ability of such searches to, virtually effortlessly, produce dramatic crime-solving results.⁷ Indeed, law enforcement entities the world over extol the tremendous benefits of DNA database technology. *See, e.g.,* Nicholas Wade, *Wider Use of DNA Lists is Urged in Fighting Crime*, *The New York Times*, May 12, 2006, available at 2006 WLNR 8163713.

Thus, against this backdrop – and particularly in the wake of the Supreme Court’s recent re-affirmation of a defendant’s right to full and fair consideration of substantiated evidence of third party guilt, *Holmes v. South Carolina*, 547 U.S. ---, 126 S. Ct. 1727 (2006) – amici’s experiences belie the notion that post-conviction comparison of crime scene DNA to the DNA of other specific suspects or to the already-collected DNA of known offenders can be summarily deemed – even in the face of “overwhelming” evidence – a mere ploy or a fruitless exercise. *See* June 22, 2006 Court of Appeals Decision at 11 (“This court rejects...the need to ‘run’ DNA testing results through a DNA database for ‘hits.’...The results of DNA testing must stand alone and do not encompass a speculative nationwide search for the possibility of a third party

⁶ The FBI, which operates the national Combined DNA Index System (CODIS), reports that as of April 2006, CODIS has produced over 32,500 DNA database “hits,” assisting in more than 34,100 investigations. *See* FBI Website, available at <http://www.fbi.gov/hq/lab/codis/success.htm>. Notably, this number does not include many of the matches made, and crimes solved, via state database searches.

⁷ The case of Tennessee’s first post-conviction DNA exoneree, Clark McMillan, provides another vivid example of the power and benefits of a DNA database search. Mr. McMillan was exonerated in 2002 after DNA testing excluded him as the source of semen collected from the victim of a 1980 rape. Given the facts of the case – a single perpetrator assault upon a victim who had not had any prior sexual activity – this exclusion was sufficient to prove absolute innocence. Authorities nonetheless subsequently submitted the recovered DNA profile to a DNA databank and discovered the true perpetrator to be a serial rapist, who, having escaped prosecution in the case in which Mr. McMillan was prosecuted, had gone on to commit another violent sexual assault. *See* H.R. 2859, 2004 Sess. (Tenn. 2004) available at <http://www.state.tn.us/sos/acts/103/pub/pc0880.pdf>.

