

Supreme Court, U.S.
FILED
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CLERK

No. 05-10958

CAPITAL CASE
EXECUTION DATE: June 28, 2006, 1:00 a.m.

IN THE
SUPREME COURT OF THE UNITED STATES

SEDLEY ALLEY,

Petitioner,

v.

WILLIAM KEY,
Defendant-Respondent;

WILLIAM L. GIBBONS,
Intervenor-Respondent

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

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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Sedley Alley respectfully supplements his petition for writ of certiorari to inform the Court of the significance of House v. Bell, 547 U.S. ____ (2006) and developments relating to Alley's recent argument in the Tennessee Court of Criminal Appeals.

At argument in the Court of Criminal Appeals on June 19, 2006, questions were raised whether Alley could meet the *Herrera* standard through DNA testing. Though House could not, Sedley Alley can. In fact, in state court, Sedley Alley filed a supplemental brief on the applicability of *House*, noting that while House's case "is not a case of conclusive exoneration" (House, 547 U.S. at ____), Alley can conclusively demonstrate his actual innocence through DNA testing.¹ Alley can do so because: (1) exculpatory DNA results from the perpetrator's underwear found at the scene would in and of themselves exonerate Alley; (2) redundant DNA results on different items of evidence from the scene would identify the actual killer, weaving a web of guilt around the person who deposited that DNA; and (3) running DNA results through the CODIS database can identify the actual perpetrator. In fact, those who have been exonerated have proven their actual innocence in the very ways Alley seeks to prove his innocence here.

As Sedley Alley explained to the Court of Criminal Appeals, how could a stranger's DNA get on underwear left next to the body, be found in the saliva stain on the victim's shirt and bra, or in the blood or semen on the stick recovered inside the victim's body? Should the DNA on these items match the victim's boyfriend (who had motive and opportunity), his DNA on the underwear, stick, t-shirt, and bra could not be credibly explained away. Counsel for the state claimed before the Court of Criminal Appeals that exculpatory DNA results excluding Alley would not exonerate him.

¹ Counsel who argued *House* for the state of Tennessee is the same counsel who represented the state before the Court of Criminal Appeals in this case. Interestingly, counsel never responded to Alley's *House* argument either through briefing or at argument.

Especially in light of the history of DNA exonerations in this country, however, that is not true.

The state's position before the Court of Criminal Appeals confirms the need to grant certiorari in this case, should the Tennessee courts refuse to disclose the DNA evidence. First and foremost, the state has refused to admit the existence of an actual innocence claim under *Herrera*. In addition, counsel for the state admitted that it is possible for Alley to obtain DNA results from crime scene evidence which could be matched to the actual perpetrator, including a serial offender in the CODIS databank. Nonetheless, counsel for the state has maintained that Alley has no right to obtain this result under the federal constitution or the state statute.

If the state's argument is adopted by the state courts, the result is apparent: One who is actually innocent *and* can prove his actual innocence through DNA *and* can identify the actual perpetrator would still get executed by the State of Tennessee, because Tennessee law would countenance such a result. This cannot be permitted under the Eighth and Fourteenth Amendments. The state's position underscores the importance of the questions presented in this case. This Court must grant certiorari to define the federal constitutional rights of a person who, like Alley, can demonstrate that he is actually innocent under *Herrera* through DNA testing but cannot obtain the evidence under state law.

Ultimately, the *only* edge that Paul House has on Sedley Alley in proving his innocence is that in *House*, DNA tests were actually performed. *House* confirms that DNA makes all the difference. Of course, Alley seeks precisely to conduct DNA tests. Because the potential DNA evidence is so much stronger proof of actual innocence here than the evidence presented in *House*, *House* provides compelling support for this petition. Where Alley can prove actual innocence through DNA testing (especially where there is already compelling proof of innocence including

alibi), there is simply no legitimate reason to deny him the testing, and the Eighth and Fourteenth Amendment prohibit the withholding of that evidence.

Even if one subscribes to the observation of Justices Scalia and Thomas in *Herrera* that a case presenting proof of actual innocence will never come before this Court because lower courts or a Governor would resolve the matter before such review became necessary, it does not follow that a case would not come before this Court where a state would unfairly and arbitrarily try to prevent a petitioner from gaining access to proof that would demonstrate actual innocence. Indeed, this is such a case. And if Alley loses, there is no doubt that his fate will be shared by others.

The petition should be granted.

Respectfully submitted,

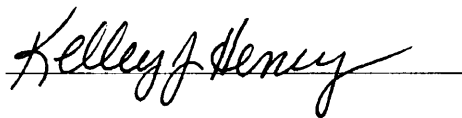
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By: 

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served email and overnight mail to Lenard Hackel, 301 Washington Avenue, Suite 203, Memphis, Tennessee 38103; and Heather Ross and Jennifer Smith, Office of the Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37202, this the 21st day of June, 2006.

Handwritten signature of Kelley J. Henry in cursive script, written over a horizontal line.