No. _____

In The
Supreme Court of the United States

JAMES PERRY HYDE,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For Writ Of Certiorari To The Tennessee Court Of Criminal Appeals, Eastern Division At Knoxville

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

State inmates have a Fourteenth Amendment due process liberty interest in demonstrating innocence with new DNA evidence. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009). DNA analysis has the power to demonstrate innocence not only by identifying the presence of a genetic profile different from the criminal defendant's, but also by revealing the absence of a genetic profile. "Recent scientific advances in DNA analysis have made 'it literally possible to confirm guilt or innocence beyond any question whatsoever.'" *Osborne*, 557 U.S. at 59. All fifty states, the District of Columbia, and the federal government have enacted legislation requiring post-conviction DNA testing. Tennessee restricts the required DNA testing to comparing identifiable genetic profiles, creating a split among the lower courts. In this case, the Tennessee courts held that petitioner could not test for the absence of DNA, which would support the claim of innocence that no crime occurred.

The question presented is whether it is consistent with due process to prevent post-conviction DNA testing for the absence of a genetic profile.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Tennessee Court of Criminal Appeals were Petitioner James Perry Hyde and Respondent, State of Tennessee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James Perry Hyde, respectfully prays that a writ of certiorari issue to review the opinion of the Tennessee Court of Criminal Appeals at Knoxville.

OPINIONS BELOW

The Tennessee Court of Criminal Appeals decision, decided July 31, 2013, is unreported. App. 1. The Tennessee Supreme Court decision denying review, dated January 16, 2014, is also unreported. App. 26.

JURISDICTION

Petitioner seeks certiorari review of a judgment of a lower state court, the Tennessee Court of Criminal Appeals, which was subject to discretionary review by a state court of last resort, the Tennessee Supreme Court. The Tennessee Court of Criminal Appeals entered an opinion and judgment affirming the ruling of the post-conviction DNA court on July 31, 2013. App. 1. Petitioner timely sought discretionary review from the Tennessee Supreme Court, but such review was denied on January 16, 2014. App. 26. This petition is timely because it is being filed within 60 days of a granted extension. U.S. SUP. CT. R. 13.5. Jurisdiction is conferred pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

TENN. CODE ANN. § 40-30-302

> As used in this part, unless the context otherwise requires, "DNA analysis" means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes.

TENN. CODE ANN. § 40-30-304

> After notice to the prosecution and an opportunity to respond, 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;

(2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;

(3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

STATEMENT OF THE CASE

State inmates have a Fourteenth Amendment due process liberty interest in demonstrating innocence with new DNA evidence. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009). DNA analysis has the power to demonstrate innocence not only by identifying the presence of a genetic profile different from the criminal defendant's, but also by revealing the absence of a genetic profile. "Recent scientific advances in DNA analysis have made 'it literally possible to confirm guilt or innocence beyond any question whatsoever.'" *Osborne*, 557 U.S. at 59. All fifty states, the District of Columbia, and the federal government have enacted legislation requiring post-conviction DNA testing. Tennessee restricts the required DNA testing to

comparing identifiable genetic profiles, creating a split among the lower courts. In this case, the Tennessee courts held that petitioner could not test for the absence of DNA, which would support the claim of innocence that no crime occurred. **The question presented is whether it is consistent with due process to prevent post-conviction DNA testing for the absence of a genetic profile**.

James Perry Hyde ("Petitioner") was tried for the alleged rape of a child stemming for an incident purported to have occurred in Tennessee in 1992. (P.C., Vol. VII, p. 501).[1] Petitioner was convicted primarily from physical evidence and testimony regarding a red enema bag ("enema device"). *Id.* The state claimed Petitioner used the enema device to penetrate his daughter, Ms. Scarlett Hyde. *Id.*

In 2011, Mr. Hyde, with the assistance of the University of Tennessee College of Law Innocence and Wrongful Convictions Clinic, filed a petition pursuant to the Tennessee Post-Conviction DNA Analysis Act of 2001, TENN. CODE ANN. § 40-30-301 *et seq*. (the "Tennessee post-conviction DNA Act"), in order to test any biological material that remained on the enema device, which was the only physical

[1] The state appellate record consists of nine volumes. When not included in the Appendix, Petitioner will refer to the record by volume and page number as follows: (P.C., Vol. #, p. #). Included in the Appendix are the decisions from the lower state courts below, the petition for post-conviction DNA testing, and its supporting exhibits.

evidence used to convict him. (P.C., Vol. I, p. 1). The Act states that if a petitioner meets certain eligibility requirements, he or she ***shall*** be granted access to post-conviction DNA testing of evidence in order to prove the petitioner's innocence or improper conviction. TENN. CODE ANN. § 40-30-301. There is no time bar to such petitions. *See* TENN. CODE ANN. § 40-30-303.

The post-conviction DNA court held two hearings on the petition, on April 3 and April 26, 2012. (P.C., Vol. VIII and IX). Experienced forensic serology and DNA analyst Katherine Cross provided undisputed testimony that if Petitioner had committed the offense with the enema device, it was more likely than not there would still be enough biological material to generate a DNA profile on the device. (P.C., Vol. I, p. 12-14; P.C., Vol. I, p. 86-87). She also testified that it was more likely than not that there would be recoverable DNA evidence present on the device despite any after-use water washing or the passage of time. (P.C., Vol. I, p. 12-14; P.C., Vol. I, p. 86-89).

Petitioner requested the DNA evidence from the enema device be compared against his own DNA profile as well as the DNA profile of the alleged victim. If the profile comparison demonstrates that only Petitioner's DNA was on the enema device, then it would affirmatively identify the Petitioner as the only person who used the device, affirming his claim of innocence. In other words, this would provide exculpatory evidence of first party innocence because there would be no physical evidence showing the

alleged victim was ever sexually abused with the enema device. On the other hand, if the alleged victim's DNA is discovered on the enema device, it would affirm Petitioner's conviction by identifying that the instrument had been used on her.

Despite the post-conviction DNA court finding that Petitioner had met the requirements of the Tennessee post-conviction DNA Act, the court denied the petition. *Hyde v. State*, No. 11CR390 (Tenn. Crim. May 16, 2012). App. 8. The court concluded the type of testing sought was not within the scope of TENN. CODE ANN. § 40-30-302. The court construed "for identification purposes" to require a positive identification of a possible perpetrator. App. 19. Petitioner timely appealed to the Tennessee Court of Criminal Appeals.

After briefing and argument, the Court of Criminal Appeals entered its opinion and judgment on July 31, 2012. *See Hyde v. State*, No. E2012-01243-CCA-R3-PC (Tenn. Crim. App. July 31, 2013). App. 1. The state appellate court affirmed the judgment of the trial court, determining that "compared . . . for identification purposes" in the statute does not require DNA testing that serves to determine the presence or absence of a DNA. *Id*. at 6-7. The lower court's holding requires Petitioner to assert an alternative person or perpetrator in order to construct a DNA test that compares DNA from crime-scene evidence to another DNA specimen.

Petitioner applied for discretionary review to the Tennessee Supreme Court, asserting that the Court of Criminal Appeals' ruling impermissibly limits the scope of TENN. CODE ANN. § 40-30-304 to those DNA tests which would establish possible third party guilt while neglecting tests to establish first party innocence in violation of federal due process under the Fourteenth Amendment and the equivalent Tennessee constitutional provision. The Tennessee Supreme Court denied review. App. 26. Petitioner hereby timely petitions this Court for certiorari review. *See* 28 U.S.C. § 2101.

REASONS FOR GRANTING THE WRIT

State inmates have a Fourteenth Amendment due process liberty interest in demonstrating innocence with new DNA evidence. *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009). DNA analysis has the power to demonstrate innocence not only by identifying the presence of a genetic profile different from the criminal defendant's, but also by revealing the absence of a genetic profile. "Recent scientific advances in DNA analysis have made 'it literally possible to confirm guilt or innocence beyond any question whatsoever.'" *Osborne*, 557 U.S. at 59. All fifty states, the District of Columbia, and the federal government have enacted legislation requiring post-conviction DNA testing. Tennessee restricts the required DNA testing to comparing identifiable genetic profiles, creating a

split among the lower courts. In this case, the Tennessee courts held that petitioner could not test for the absence of DNA, which would support the claim of innocence that no crime occurred. The question presented is whether it is consistent with due process to prevent post-conviction DNA testing for the absence of a genetic profile.

The Tennessee Court of Criminal Appeals ignored DNA's power to prove first party innocence when it ruled that the DNA statute only applies to those seeking testing for third party guilt. "Modern DNA testing provides powerful new evidence unlike anything known before." *Id*. at 62. The advent of DNA profiling has transformed and modernized forensic science as well as the United States criminal justice system. *See People v. Wesley*, 533 N.Y.S. 2d 643, 644 (Sup. Ct. 1988), *aff'd*, 183 A.D.2d 75, (1992), *aff'd*, 83 N.Y.2d 417 (1994) (calling DNA evidence "the single greatest advance in the 'search for truth', and the goal of convicting the guilty and acquitting the innocent, since the advent of cross-examination.").

I. The Importance Of DNA In Proving Innocence Is Undeniable.

DNA profiling's power is clearly evident in its ability to identify. The probability that a DNA sample will randomly match with someone the sample was not taken from "is rarer than *one in a trillion* among unrelated individuals." *Harvey v. Horan (Harvey II)*, 285 F.3d 298, 304-305 (4th Cir. 2002).

Despite Judge Learned Hand's assurances that "the ghost of the innocent man convicted . . . is an unreal dream," *McKithen v. Brown*, 481 F.3d 89, 91-92 (2d Cir. 2007) (quoting *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923)), hundreds of individuals have been exonerated, including from death row, since 1989. *DNA Exonerations Nationwide*, Innocence Project, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited May 22, 2014); *see also* Samuel R. Gross, *Convicting the Innocent*, 4 AM. REV. L. & SOC. SCI. 173, 176 (2008) (reporting that there have been "perhaps 600-700 exonerations of all types across the country over a period of thirty-five years.").

The traditional avenues of post-conviction relief often leave final convictions undisturbed because courts are unable to reliably revisit facts due to witnesses' fading memories and physical evidence degrading. Brandon Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2921 (2010). However,

> where DNA evidence is available, the risk that important evidence will be lost over time – and that the defense will suffer prejudice as a result – is diminished. DNA evidence is less susceptible to losing its probative value over time than other types of evidence. Once the sample is tested and profiled, it can be matched against a sample taken from a suspect at any time in the future, however distant. Because a person's genetic code (unlike a name or physical attribute) is fixed, it retains its evidentiary

> value over time. Moreover, properly preserved genetic material can be kept indefinitely, so that a defendant can have the material tested independently for accuracy.

Meredith A. Bieber, *Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079, 1089 (2002).

II. All States, The Federal Government, And The District Of Columbia Have Recognized The Importance Of Exonerating The Innocent Through DNA Testing.

In *Herrera v. Collins*, 506 U.S. 390 (1993), this Court decided to substantially defer to legislatures in matters relating to post-conviction relief of the wrongfully convicted. *Id.* at 407 (citing *Medina v. California*, 505 U.S. 437, 445-446 (1992)). The Court reasoned that because the criminal process is so heavily based in tradition, this was the best avenue given the considerable expertise States have in criminal procedure. *Id.*

Both the federal government and States have recognized the immense value of DNA testing in the context of post-conviction review. New York became the first state to pass legislation granting the potentially wrongfully convicted access to post-conviction DNA testing in 1994 by addressing the specific needs of petitioners wishing to prove their innocence through post-conviction DNA profiling and

"[r]ecognizing the growing importance of DNA evidence in exonerating the wrongfully convicted and bringing the guilty to justice." *Recommendations Regarding Post-Conviction Access to DNA Testing and Databank Comparisons*, New York State Justice Task Force, http://www.nyjusticetaskforce.com/DNAAccessAndDatabankComparisons.pdf (last visited May 22, 2013). Nearly 20 years and over 300 exonerations later, on May 25, 2013, Oklahoma joined the other 49 states, the federal government, and the District of Columbia and adopted a post-conviction DNA testing statute. *See* OKLA. STAT. ANN. TIT. 22, § 1089. These statutes were passed to right a wrong in the American legal system. As a result, they now inhabit a veritable space in America's legal landscape.

This Court has continued to emphasize that state legislation is the "clearest and most reliable objective evidence of contemporary values." *Atkins v. Virginia*, 536 U.S. 304, 323 (2002) (citing *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). A survey of the legislative history of the United States' jurisdictions demonstrates that contemporary values demand providing a fair means to exonerate the wrongfully convicted.

When a state makes a procedure mandatory once certain substantive conditions are met, it creates a liberty interest for those wishing to use that procedure which is protected under the Due Process Clause. *See Hewitt v. Helms*, 459 U.S. 460, 469 (1982). Every state, including the District of Columbia and the federal government, has now enacted a post-conviction DNA statute. In every state except

Wyoming, *see* WYO. STAT. ANN. § 7-12-303, these statutes mandate post-conviction DNA analysis under statutorily defined conditions. While some statutes differ in their requirements to qualify for post-conviction DNA testing, one requirement is universal: DNA must be used for identification purposes.

III. The Jurisdictions Of The United States Are Split On Whether Testing For The Absence Of A Genetic Profile Is Required.

The lower courts interpreted the Tennessee post-conviction DNA Act as barring testing (1) when a petitioner cannot proffer whether an alternate perpetrator to the crime exists or who that alternate might be, and (2) when the petitioner requests testing to identify the presence or absence of a victim. Tennessee is the only state to have impermissibly limited the scope of identification for the purposes of post-conviction DNA analysis. In doing so, Tennessee has deprived petitioners of their Fourteenth Amendment procedural due process rights stemming from their liberty interest in mandated post-conviction DNA testing.

On the other hand, there are eleven states who have explicitly interpreted identification to include testing which would implicate either first party innocence or third party guilt without identifying who that third party might be. These states include Kansas, Illinois, Connecticut, Maine, California, New York, Florida, Montana, Maryland, Nebraska, and

Washington. The Court of Appeals in Kansas ruled that DNA testing is not limited to testing for the identity of the perpetrator. *State v. Smith*, 119 P.3d 679, 684 (Kan. Ct. App. 2005). In that case, petitioner was convicted of one count of rape and one of aggravated criminal sodomy. *Id.* at 682. He requested post-conviction DNA analysis, but made no other requests (i.e., did not specify which items had biological material, specify a testing parameter, or explain how a DNA test would be favorable, etc.). *Id.* The State contended that because petitioner was not searching for the perpetrator of the crime, the DNA test should not be performed. *Id.* at 683. Relevant to the issue at bar, the Kansas Court of Appeals ruled that, "DNA testing is intended to confirm or dispute the identity of individuals *involved in or at the scene of the purported crime.*" *Id.* at 684. Ultimately, because petitioner did not "once deny being the perpetrator", that is, never disputed engaging in intercourse and oral sodomy with the victim, the court denied testing. *Id.*

The Court of Appeals in Illinois also ruled that DNA testing is not limited to testing for the identity of the perpetrator. *People v. Dodds*, 801 N.E.2d 63 (Ill. Ct. App. 2003). There petitioner sought to test the blood spattered clothes he had been wearing that the State argued were covered in the victim's blood. *Id.* at 65. The court stated that because the "State relied heavily upon the blood evidence" and that there was virtually "no other physical evidence found linking defendant to the murder scene," petitioner was entitled to test the clothing for the victim's blood. *Id.*

Ultimately, the case was remanded to determine whether "the non-match for DNA evidence . . . could have supplied a favorable inference of defendant's innocence." *Id.* at 71-72.

The Connecticut Court of Appeals decided that testing for the absence of victim's DNA on the alleged instrumentality of the crime – there a knife – was provided for by the statute. In *State v. Cote*, 21 A.3d 589 (Conn. App. Ct. 2001), the court interpreted the statute to allow for the testing of the victim's DNA on the knife, the "dangerous instrument" used in the trial, and conducted the statutory analysis under the assumption that the victim's DNA was not there. The court went on to deny the petition "[b]ecause the evidence, derived from eyewitness testimony and physical evidence, amply supported the conclusion that the petitioner, in fact, used the knife to injure the victim . . . there was not a reasonable probability that the petitioner would not have been convicted." *Id.* at 595. The court also reasoned that even if the victim's DNA was not found on the knife, "a jury might infer at best either that (1) the petitioner used the knife to injure the victim . . . but for reasons unknown, the DNA no longer is detectable through DNA testing, or (2) the petitioner did not use that particular knife to injure the victim." *Id.* at 594-95.

The Supreme Court of Maine ruled that identity is always at issue in a trial. *State v. Donovan*, 853 A.2d 772 (Me. 2003). There, the court ordered DNA testing after it found that identity is an issue when an alleged victim identifies only the defendant as the

possible perpetrator of the crime, but the defendant claims that no crime occurred. *Id.* at 776.

The Supreme Court of California ruled that a defendant must demonstrate that the DNA testing sought would be relevant to the issue of identity rather than dispositive of it. *Richardson v. Superior Court*, 183 P.3d 1199, 1204 (Cal. 2008). Thus, a defendant need not show that a favorable test would conclusively establish his innocence, but only that the identity of the perpetrator was a controverted issue *as to which the results of the DNA testing would be relevant evidence. Id.*

The New York Supreme Court, Appellate Division, also addressed the possibility of using its post-conviction DNA statute to test for the absence of victim's DNA in *People v. Simpson*, 35 A.D.3d 901 (N.Y. 2006). There the petitioner requested that ropes and a red rag allegedly used to bind the victim be tested for the victim's DNA to determine whether the victim's allegations were truthful. *Id.* While the Court ultimately denied that the test would be exculpatory on other grounds, still opined that testing for the absence of victim's DNA was permitted by the statute. *Id*.

In *Reddick v. State*, 929 So.2d 34 (Fla. 2006), the petitioner requested that the court test for the victim's DNA on various items associated with the first degree murder and sexual battery of a young girl. Despite the fact that there was no physical evidence linking petitioner to the crime, the petitioner failed to

present any evidence that the victim's DNA would have transferred to his clothes given the prosecution's theory of the case. *Id.* at 35-36. Like the New York court in *Simpson*, the Florida Supreme Court opined that testing for absence of victim's DNA was permitted by the statute, but ultimately denied that the test was exculpatory on other grounds. *Id.*

In *State v. Belcher*, 317 S.W.3d 101 (Mo. Ct. App. 2010), the Missouri Court of Appeals interpreted the meaning of identification within its post-conviction DNA statute. The court reasoned that the statute required identity to be at issue in the trial and that identity is much broader than simple mistaken identification or third party guilt. *Id.* at 105. The court further opined that if the defendant claims innocence without claiming an affirmative defense, identity is almost always an issue. *Id.* Ultimately, it affirmed the denial of his motion for post-conviction DNA testing on other grounds. *Id.* at 106.

In *Arrington v. State*, 983 A.2d 1071 (Md. 2009), the Maryland Court of Appeals granted post-conviction DNA analysis to test petitioner's sweatpants against the victim to test whether or not blood found on the sweatpants belonged to the victim. The court noted that the absence of the victim's DNA on the sweatpants was a form of positive identification which would indicate first party innocence rather than third party guilt, but that both forms of identification were guaranteed under the post-conviction DNA statute. *Id.* at 1088-1089.

In *State v. Pratt*, 842 N.W.2d 800 (Neb. 2014), the Supreme Court of Nebraska allowed a petitioner DNA analysis testing against his own DNA for absence of DNA in a semen sample taken from a rape victim. The court noted that absence of the petitioner's DNA in the sample would act as positive evidence of first party innocence even though the petitioner was not testing the sample against another person or DNA database. *Id*. at 812-813. "We said that a possible DNA test result that excluded the defendants as contributors to the semen samples 'may be exculpatory' when the State's theory was that only the defendants raped the victim." *Id.*

In *State v. Thompson*, 229 P.3d 901 (Wash. 2010), the Washington Court of Appeals, in a decision similar to that in *Pratt*, granted post-conviction DNA analysis to prove that the DNA in a semen sample was not the petitioner's. By testing against the petitioner, absence of the petitioner's DNA would identify absence of the petitioner from the scene of the crime without having to positively identify a third party. *Id.* at 905-906. The court interpreted the need for identification purposes to include both third party guilt and first party innocence. *Id.*

CONCLUSION

State inmates have a Fourteenth Amendment due process liberty interest in demonstrating innocence with new DNA evidence. *District Attorney's*

Office for Third Judicial District v. Osborne, 557 U.S. 52, 68 (2009). DNA analysis has the power to demonstrate innocence not only by identifying the presence of a genetic profile different from the criminal defendant's, but also by revealing the absence of a genetic profile. "Recent scientific advances in DNA analysis have made 'it literally possible to confirm guilt or innocence beyond any question whatsoever.'" *Osborne*, 557 U.S. at 59. All fifty states, the District of Columbia, and the federal government have enacted legislation requiring post-conviction DNA testing. Tennessee restricts the required DNA testing to comparing identifiable genetic profiles, **creating a split among the lower courts**. In this case, the Tennessee courts held that petitioner could not test for the absence of DNA, which would support the claim of innocence that no crime occurred. **The question presented is whether it is consistent with due process to prevent post-conviction DNA testing for the absence of a genetic profile**.

For the aforementioned reasons, Mr. Hyde respectfully requests that this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

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June 15, 2014

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 26, 2013

JAMES PERRY HYDE v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Hamblen County
No. 11CR390 Thomas Wright, Judge

No. E2012-01243-CCA-R3-PC

(Filed Jul. 31, 2013)

Petitioner, James Perry Hyde, has appealed from the Hamblen County Criminal Court's dismissal of his Petition for Forensic DNA Analysis pursuant to Tennessee Code Annotated section Title 40, Chapter 30, Part 3. After review of the entire record, we conclude that the analysis sought by Petitioner is not included within the statutory definition of "DNA analysis." We therefore affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Stephen Ross Johnson, Knoxville, Tennessee, for the appellant, James Perry Hyde.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Greg W. Eichelman, District Attorney General; and Victor Vaughn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Following a jury trial in July 1993, Petitioner was convicted of rape of a child and was sentenced to serve twenty-five years' incarceration in the Tennessee Department of Correction. The conviction and sentence were affirmed on direct appeal to this court. *State v. James Perry Hyde,* No. 03C01-9401-CR-00010, 1996 WL 426543 (Tenn. Crim. App. July 31, 1996) *perm. app. denied,* concurring in results only (Tenn. March 2, 1998). The proof at trial was that Petitioner committed the offense in September 1992, by inserting an enema device filled with cough syrup into the victim's rectum. *Id.* at *6. Petitioner gave a statement to an investigator with the District Attorney General's office, which was summed up in the investigator's testimony at trial as follows:

> [Petitioner] told me that on September 14, 1992, that he could remember having [the victim] take off her clothes. He said he then remembered giving [the victim] an enema with some cough syrup and he placed it in her rectum. He told me he loved [the victim] very much. Said, I can't remember anything else that happened. I remember it happening upstairs in the bathroom. This

> happened in the morning hours after [his wife] went to work. I don't know why I did this.

Id.

This court further summarized the investigator's testimony about Petitioner's statement regarding the rape as follows:

> According to [the investigator] the appellant refused to swear that the statement was true due to his religious beliefs. However, he did state, "This did happen in Hamblen County, Tennessee, and I am giving the statement to get it off my conscience and to help [the victim]." Williamson specifically asked the appellant whether he was making the statement "so [the victim] would leave him alone" or because it was the truth. He replied that the statement was true.

Id.

Petitioner, who was fifty-one years old at the time of his trial, testified in his own defense. He denied giving the victim a cough syrup enema and denied ever having any sexual contact with the victim. *Id.* at *7. Petitioner explained the inculpatory statements to police by stating the interview was intense, he was called a liar, he went into shock, and he "would have probably signed or done anything to get out of there." *Id.* at *8. Petitioner also testified that he did *not* refuse to swear that the statement was true because of his religious beliefs; rather,

Petitioner asserted that he refused to swear to the truth of the statement simply because the statement was not true.

Petitioner seeks DNA testing to confirm whether or not female epithelial skin or mucous membrane cells are in or on the enema device. Petitioner submitted the affidavit and supplemental affidavit of a forensic serologist/DNA analyst, who concluded, among other things, that if the enema device was actually used as the proof showed at trial, then epithelial skin cells or mucous membrane cells of the victim should still be on the device, even if Petitioner had used it before it was seized and even if it had been washed.

Relying upon our supreme court's opinion in *Powers v. State,* 343 S.W.3d 36 (Tenn. 2011), Petitioner argues that the Post-Conviction DNA Analysis Act (Tenn. Code Ann. §§ 40-30-301 – 40-30-313) requires the enema device to be subjected to DNA testing. Petitioner's theory is that the testing will confirm the lack of any female epithelial skin cells or mucous membrane cells on the device and thus prove his innocence of the crime for which he was convicted, or that it is more likely than not he would not have been convicted.

Controlling the issue on appeal is the fact that Petitioner has no desire to compare DNA evidence found on the enema device with the DNA of any known person (such as the victim) or any as yet unknown perpetrator (such as from a DNA database).

Petitioner's sole goal is to use DNA testing to show a lack of evidence to support his conviction, and *not* to use DNA testing for identification of the perpetrator of a crime.

Thus, Petitioner's reliance upon *Powers* is misplaced. The issues and the holding in *Powers* were stated as follows:

> We granted the petitioner's application for permission to appeal to determine (1) whether the General Assembly intended to permit petitioners proceeding under the Act to use DNA database matches to satisfy their burden and (2) whether the Court of Criminal Appeals' interpretation of the statute served to preclude the development of scientific evidence supportive of actual innocence. We hold that the Post-Conviction DNA Analysis Act permits access to a DNA database if a positive match between the crime scene DNA and a profile contained within the database would create a reasonable probability that a petitioner would not have been prosecuted or convicted if exculpatory results had been obtained or would have rendered a more favorable verdict or sentence if the results had been previously available.

Powers, 343 S.W.3d at 39.

The interpretation of the Act which is mentioned above in the *Powers* opinion is this court's holding in *Crawford v. State,* E2002-02334-CCA-R3-PC, 2003 WL 21782328 (Tenn. Crim. App. Aug. 4, 2003). As

quoted in *Powers,* the holding of *Crawford* which was abrogated by *Powers* is that the definition of "DNA analysis" contained in Tennessee Code Annotated section 40-30-202 **only** permits "DNA analysis which compares the petitioner's DNA samples to DNA samples taken from biological specimens gathered at the time of the offense." *Powers,* 343 S.W.3d at 49 (quoting *Crawford,* at *3).

The holding in *Powers* does not require DNA analysis of a trial exhibit to determine the presence or absence of DNA which might belong to the victim. In order to determine if the DNA Analysis Act is applicable as provided in Tennessee Code Annotated sections 40-30-304 and 40-30-305, the type of testing requested must still fit the definition of "DNA analysis" contained in Tennessee Code Annotated section 40-30-302. *See Powers,* 343 S.W.3d at 53-54 (while we have determined that the Act contemplates the type of DNA analysis sought by the Petitioner, the remaining question is whether he is entitled to it under the facts . . . "

Tennessee Code Annotated section 40-30-302 states that "'DNA analysis' means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is *analyzed* and *compared* with DNA from *another biological specimen* for *identification purposes.*" (emphasis added). In essence, Petitioner seeks to attack the sufficiency of the evidence to support his conviction for rape of a child. He hopes to do this by poof that DNA from the female victim cannot be located in or on an enema device used twenty

years ago in the commission of the crime. This type of DNA analysis is not authorized by the plain language of the statute, or in the holding of our supreme court in *Powers*. Petitioner is not entitled to relief in this appeal.

CONCLUSION

The judgment of the trial court is affirmed.

/s/ Thomas T. Woodall
THOMAS T. WOODALL,
JUDGE

IN THE CRIMINAL COURT FOR THIRD JUDICIAL DISTRICT OF TENNESSEE, AT MORRISTOWN, TENNESSEE

JAMES PERRY HYDE,	§	
Petitioner,	§	
	§	
vs.	§	**No. 11CR390**
STATE OF TENNESSEE	§	
	§	
Respondent,	§	

ORDER

(Filed May 16, 2012)

This case involves a Post-Conviction Petition for Forensic DNA Analysis Pursuant to T.C.A. §40-30-301 *et. seq*. The case came before the court again on April 26, 2012 for hearing with the presence of the Petitioner and his counsel from the U. T. Innocence Project Legal Clinic, including attorney, Steve Johnson, and with Assistant District Attorney, Victor Vaughn and DA investigator Teddy Collingsworth. The purpose of this hearing was to determine whether the court would order the requested DNA testing on the enema bag at issue in this case. The court heard arguments on this issue and, after carefully considering the arguments of counsel, the written documents submitted in support of and opposition to Mr. Hyde's Petition, which included two affidavits from Mr. Hyde's proposed expert as well as the trial transcript and virtually the entire court file of proceedings from indictment through post conviction

denial and appellate affirmation, the court makes the following findings of fact and conclusions of law:

Introduction

1. This is a Post-Conviction Petition for Forensic DNA Analysis Pursuant to T.C.A. §40-30-301, *et. seq*. This Code Section, known as the Post-Conviction DNA Analysis Act of 2001 (hereafter "PCDNA Act" or "the Act"), provides, among other things, that a person convicted of rape of a child may, at any time, file a petition seeking forensic DNA analysis of evidence in the possession of the court and related to the investigation or prosecution that resulted in the judgment of conviction when such evidence "may contain biological evidence." T.C.A. §40-30-303.

2. Petitioner is serving a 25 year sentence for rape of a child, a Class A felony. "The conviction was based upon evidence that the petitioner had inserted an enema device filled with cough syrup into the rectum of his 11-year-old daughter." *State v. Hyde,* No. E-2000-00806-CCA-R3-PC (Tenn. Crim. App. March 22, 2001) p.1 (hereafter referred to as "Post-Conviction Appeal").

3. The PCDNA Act requires the court to order DNA analysis if four factors set forth in T.C.A. §40-30-304 are present. In the instant case, the evidence requested for testing, the enema apparatus, is in existence in the custody of the court; and, according to petitioner's expert, is in a condition that would allow a potentially meaningful analysis to be

conducted. T.C.A. §40-30-304(2). This satisfies the second factor for mandatory testing under the Act.

4. The State has not contested the final two requirements set forth in T.C.A. §40-30-304(3)&(4). The dispute in this case centers around whether or not there is a reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results were obtained through the proposed DNA analysis and were available at the time of the charging decision or trial. T.C.A. §40-30-304(1).

5. Petitioner also asserts that if he is unable to satisfy the four factors for the mandatory testing provision of the Act, he still should receive an order for DNA analysis under T.C.A. §40-30-305 because the allegedly potential exculpatory DNA results would have rendered his verdict or sentence more favorable if they had been available at the time of trial and sentencing.

Factual Background

6. This court has reviewed the entire record in this case including the trial transcript and the post-conviction evidentiary transcript because a "determination of the evidence and surrounding circumstances is necessary to evaluate whether exculpatory results would have prevented prosecution or conviction or would have resulted in a more favorable verdict or sentence." *Patterson v. State,* 2006 Tenn. Crim. App. LEXIS 844 (October 26, 2006), quoting

State v. Tucker, 2004 Tenn. Crim. App. LEXIS 46 (January 23, 2004).

7. An exhaustive review of the evidence presented at trial is contained in the Court of Criminal Appeals decision on the direct appeal of the conviction, *State v. Hyde,* 03C01-9401-CR-00010 (Tenn. Crim. App. July 31, 1996) pgs. 3-14. The case was affirmed on direct appeal with the Court of Criminal Appeals finding sufficient evidence to establish the elements of the offense beyond a reasonable doubt. "Specifically, the appellant's admissions to various individuals and the medical testimony amply support the verdict." *id.* at p. 29

8. In the Post-Conviction appeal, the Court of Criminal Appeals opined that petitioner's "conviction was based in great measure upon an admission by the petitioner to an investigator with the district attorney general's office:

> [The petitioner] told me that on September 14, 1992, that he could remember having [the victim] take off her clothes. He said he then remembered giving [the victim] an enema with some cough syrup and he placed it in her rectum. He told me he loved [the victim] very much. [He] [s]aid, I can't remember anything else that happened. I remember it happening upstairs in the bathroom. This happened in the morning hours after [my wife] went to work. I don't know why I did

> this. . . . I am giving the statement to get it off my conscience and to help [the victim].

Post Conviction Appeal at p. 1-2.

9. The child-victim in this case made allegations against the petitioner of both a general and specific nature in several settings. For example, in the presence of police Captain Moore the child stated to Petitioner, "you know what you've done." *Trial Transcript* p. 203. The victim told Captain Moore, during his transportation of her, "that she had been abused." *id.* The victim asked the youth services officer that Captain Moore turned her over to if the officer "knew what sex abuse was" and "if we were going to make her go home." *Trial Transcript* p. 212-13. The specific allegations that were revealed at trial came through two physicians who had examined and treated the child while she was hospitalized. On September 18, 1992 the victim told Dr. Jones, among other things, that her father had poured cough syrup into her vagina. *Trial Transcript* p. 228, 230. On November 9, 1992 the victim, told Dr. Lynn, among other things, that cough syrup had been placed inside her body by her father. *Trial Transcript* pgs. 243-44. Dr. Lynn also testified that the child had great difficulty "separating out what would be the vaginal vault and what would be the rectal vault. . . ." *Trial Transcript* p. 251.

10. After the incident involving Captain Moore coming to the home and temporarily removing the child, she was placed at Children's Hospital; and,

after the mother, Linda Hyde, was first able to visit with the child the mother "became terrified of [her] husband," *Trial Transcript* at p. 299, filed for divorce and ended up contacting an investigator from the district attorney's office and a worker at the department of human services. *Trial Transcript* at p. 299-300.

11. Following her visit with her daughter, and report to the DA investigator and DHS worker, Linda Hyde found cough syrup under the bathroom sink, a location where she never kept cough syrup. *Trial Transcript* p. 301. Following an interview of the child-victim, with the consent of Ms. Hyde, the district attorney's investigator retrieved the cough syrup from the Hyde residence and found various other items during a search of the residence, including an enema bag under the bathroom sink where the cough syrup had been found by Ms. Hyde. *Trial Transcript* pgs. 157-159.

12. After recovering the cough syrup and enema bag from the Hyde residence the investigators interviewed the petitioner. At some point prior to petitioner's booking, while he was in the sheriff's office he telephoned his wife and told her he was "going to jail." *Trial Transcript* p. 302. His wife asked him "did you do it?" *id.*

"And he said, well, if it walks like a duck and quacks like a duck, it must be a duck." *id.*

13. Sheriff Long overheard petitioner speak to someone on the telephone saying that he didn't want

to put the child through it, "testifying in court, that he was just going to go ahead and tell about it." *Trial Transcript* p. 181. Shortly thereafter, petitioner gave the confession to the investigator.

14. During a conversation with a DHS worker, Melissa Thomas, the petitioner admitted that he had given the child an enema. *Trial Transcript* p. 474.

15. Petitioner's trial counsel interviewed the child-victim prior to trial, during which "she did confirm all three counts in my presence." *Post-Conviction hearing Transcript* p. 15.

16. In this factual context, along with other circumstantial evidence and statements, this Court FINDS that the most damaging corroborating evidence involved the medical testimony. In examinations by Dr. Jones and Dr. Lynn, the child's rectum was described as "lax," *Trial Transcript* p. 240, and "grossly abnormal," *Trial Transcript* p. 231, consistent with rectal penetration. *Trial Transcript* p. 232. Quoting from Dr. Jones' trial testimony:

> I did think that her rectal exam was grossly abnormal however. Most of the time when a child is in that position or an adult is in position for that exam, there's a lot of apprehension. And when you try to do a rectal exam, there's usually a pretty significant amount of resistence to that. Nobody wants that done; no matter how much you can override that psychologically, you still don't want that to happen.

> And on [the child-victim's] exam, the minute I touched her bottom or her rear end, her anus opened up widely, which is not usually the case. There's usually a constriction of that muscle. And when I further went and did a rectal exam and put my finger in her bottom, there was absolutely no resistence and there never was any.
>
> . . .
>
> [These findings are] consistent with some form of rectal penetration, usually forceful, because the child again or anyone is trying to not have somebody do something to them. And over a long period of time, that results in the muscle becoming loose and lax and not having full rectal tone.

Trial Transcript at pgs. 231-232.

17. Years later, the child-victim recanted her allegations against her father, but under oath in court when called to testify at the petitioner's original post-conviction hearing, the child, then 19 years old, "testified that the statement of recantation that she had made to the petitioner was untrue. The victim stated that what she had told the doctors before the charges were made against the petitioner was the truth." *Post-Conviction Appeal* at p. 3.

18. Following his conviction at trial the petitioner "attempted suicide in the courtroom. . . ." *Post-Conviction Transcript* p. 44.

19. Petitioner's expert has opined that if the enema device in the court's possession was inserted into the rectum of the child-victim then it is more likely than not that there would be "epithelial skin cells or mucous membrane cells of the victim present on the enema." *Affidavit of Katherine L. Cross,* Para. 2.c. Ms. Cross also opines that "the passage of time alone should not have diminished the presence of any biological evidence on the enema." *id.* at Para. 2.d.

20. After a previous hearing, at the court's request, Ms. Cross also opined that even if the enema had been washed with water after use, "it is more likely than not that the enema bag would still contain epithelial skin cells or mucous membrane cells of the victim that could be obtained through DNA analysis;" *Supplemental Affidavit of Katherine L. Cross,* at Para. 4.c. and, that even if the enema had been used on someone else after it was used on the victim it is still "more likely than not that DNA evidence of the victim would be expected to be found on the instrument. . . ." *id.* at Para. 4.e.

21. The "DNA analysis" proposed by petitioner would merely be "testing for female epithelial skin cells or mucous membrane cells inside the white nozzle of the enema" to "determine whether the enema was actually used on a female." *Affidavit of Katherine L. Cross,* at Para. 2.d.

Legal Analysis

22. The State has not challenged the credentials of Ms. Cross as an "expert witness." The court accepts Ms. Cross as an expert in the field of forensic DNA analysis and testing. Ms. Cross' experience and education support this finding. Ms. Cross has previously testified as an expert in Tennessee as well as several other states. *See*, Curriculum Vitae of Katherine L. Cross, attached as Exhibit A to the *Affidavit of Katherine L. Cross.*

23. The State has submitted no expert opinion regarding this matter, submitting only the Assistant District Attorney's opinion that the absence of the victim's DNA "would only establish that [the petitioner] cleaned the enema bag and suppository." *State's Response* at Para. 7.

24. Without any expert opinion to call into question whether the proposed analysis would lead to potentially exculpatory material, the State apparently dismisses the opinion of the petitioner's proposed expert, asserting only their non-expert analysis of the potential tests results that the "absence of such evidence would only serve to corroborate the petitioner's statement to investigators that he always washed the instrumentality whenever he used it." *State's Response* at p. 3, Argument Para. 1.

25. Since the State has chosen to present no other expert opinion on this subject and the court is unaware of any basis to question Ms. Cross's conclusions, the court will accept the opinions proffered by

petitioner's expert and must "assume that the DNA Analysis will reveal exculpatory results" in making the determination as to whether to order testing under the Act. *Shuttle v. State,* 2004 Tenn. Crim. App. LEXIS 80 at p. 5 (Feb. 3, 2004) perm. app. denied (2004).

26. In the present case the potential exculpatory evidence that could result from DNA testing described by Ms. Cross is that she would find DNA of the petitioner on the enema but would find no female epithelial skin cells or mucous membrane cells on the enema. Since her opinion is that if the enema had been inserted into the victim's rectum she would expect to find female epithelial skin cells or mucous membrane cells in the instrument despite the passage of time, despite subsequent usage and despite it being washed with water after usage. Thus, the absence of the female cells on the enema device would be exculpatory from the standpoint that it could be viewed as lending support to Petitioner's assertion at trial, and subsequently, that the rape did not occur. In other words, based on Ms. Cross's testimony, if the rape had occurred, she would expect to find female epithelial skin cells or mucous membrane cells in the device.

27. This is not a typical DNA analysis scenario in that the requested testing will not eliminate the petitioner as the perpetrator nor ID anyone else as the perpetrator; and, because it is possible that, under Ms. Cross's opinion, the enema device may have been inserted in the rectum of the victim but not

contain any of her DNA, testing will not prove that the crime was not committed.

28. The purposes of the PCDNA Act are "first, to aid in the exoneration of those who are wrongfully convicted and second, to aid in identifying the true perpetrators of the crimes. *Powers v. State,* 343 S.W.3d 36, 51 (Tenn. 2011).

29. The PCDNA statute is thus focused on identifying or ruling out potential perpetrators through "a comparison between the DNA contained in "a human biological specimen" and "another biological specimen,". . . ." *Powers* at p. 49.

30. The "DNA analysis" that may be petitioned for under the Act "means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes." T.C.A. §40-30-302.

31. The petitioner in this case does not seek to compare one biological specimen with another biological specimen for purposes of identification. He hopes only to show that there are no female epithelial skin cells or mucous membrane cells on the enema device, not to identify the source of any cells on the device. Thus there will be no comparison between biological specimens as authorized by the Act.

32. This Court CONCLUDES that the PCDNA Act does not cover or apply to the requested testing in this case for the purpose of determining whether

female epithelial skin cells or mucous membrane cells are in existence on the enema device. Because the Act does not apply, the Petition is not well taken and will be dismissed.

33. Notwithstanding this Court's legal conclusion regarding the applicability of the PCDNA Act to the requested testing in this case, for the purpose of creating a complete record for appellate review and in the interests of justice and judicial economy, the court will engage in the "reasonable probability" analysis of T.C.A. §40-30-304(1). A reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis exists when exculpatory DNA results "undermine confidence in the outcome of the prosecution." *Alley v. State,* 2004 Tenn. Crim. App. LEXIS 471 at p. 9(May 26, 2004), perm. app. denied(2004)

34. As stated earlier, the court must begin with the proposition that the DNA analysis "will prove to be exculpatory." *Powers* at p. 55. The evidence against the petitioner "must be viewed in light of the effect that exculpatory DNA evidence would have had on the fact finder or the State." *Powers* at p. 55. "[T]he analysis must focus on the strength of the DNA evidence as compared to the evidence presented at trial-that is, the way in which 'the particular evidence of innocence interacts with the evidence of guilt.' (Citation omitted)." *Powers* at p. 55.

35. In *Powers* the petitioner was seeking testing of a biological specimen from the underwear of the

rape victim by comparison of the DNA on the underwear with the DNA profiles in a DNA databank. The court, assuming the most favorable results for the petitioner, assumed that the DNA from the underwear would "match the profile of a prior offender contained in a DNA database," *Powers* at p. 58, and not the petitioner's DNA. "Under such circumstances, we must conclude that a reasonable probability exists not only that a jury would not have convicted the petitioner, but also that the State would have chosen not to prosecute him." *Powers* at p. 58. Clearly that conclusion is true in *Powers* because such exculpatory DNA results would essentially exclude the petitioner as the perpetrator in that rape.

36. The instant case is completely different. Hyde does not seek a comparison of a biological specimen with anything. He seeks to show there is no biological specimen on the instrumentality of rape. The potentially exculpatory results of the analysis sought by Mr. Hyde could be construed as supportive of his claim that the rape did not occur, but it would not conclusively exclude that as a possibility, nor eliminate petitioner as the perpetrator nor indicate that someone else could have been the perpetrator as the *Powers* analysis might have shown. *See, Payne v. State,* 2007 Tenn. Crim. App. LEXIS 927(Dec. 5, 2007) (*Lack* of DNA does not support "reasonable probability finding.)"

37. This was not simply a "he said, she said," or "swearing contest" type of case where any evidence supporting the version of one side or the other would

be important. The case began with extraordinary behavior of an 11 year old child who wanted to get away from her home and then made general and specific allegations against her father, which were corroborated by her physical exam by two physicians, the confession and other incriminating statements of the petitioner and the retrieval of the instrumentality of rape from the location the petitioner said the rape occurred. Moreover, having reviewed the entire transcript this court FINDS the Petitioner's trial testimony to be unbelievable, even without the aid of personal observation. To believe the Petitioner's testimony, the fact-finder would have to believe Petitioner successfully cheated on numerous employment tests, (*Trial Transcript* pgs. 426-431) and was able to install sophisticated aviations equipment without the ability to read (*id.*); and the fact-finder would have to disbelieve the Police Captain, the DHS worker, the petitioner's wife, the petitioner's child, the Sheriff and two investigators from the DA's office, almost all of which testimony Petitioner *only* disputes as to the inculpatory portions. For example, Hyde admits at trial that he went to the DHS office and spoke with Melissa Thomas about how he might get to visit with the victim, *Trial Transcript* p. 483 v. 477, but denies admitting to her that he had given the victim an enema. *Trial Transcript* p. 484 v. 474. Perhaps more telling is his admission to the truth of nearly every fact in his statements to the police except the inculpatory ones. *See, Trial Transcript* pgs. 432-463.

38. Although the Court has found the State's opinion regarding the exculpatory nature of the proposed testing to be without support, given the fact that the testing would not conclusively prove that the rape did not occur, and in light of the overwhelming evidence of guilt recited above, the Court takes as true the State's position that "the petitioner would have been prosecuted regardless of DNA testing." *State's Response,* P. 3, Argument, Para. 1. Thus, this Court CONCLUDES that Mr. Hyde would have been prosecuted even if there were DNA testing done showing no female epithelial skin cells or mucous membrane cells on the enema device.

39. Similarly, in light of petitioner's confession and incriminating statements, the victim's corroborating allegations, the medical proof's corroborating findings and the corroborating physical evidence found in petitioner's home, this Court CONCLUDES that even if DNA testing were done on the enema device and no female epithelial skin cells or mucous membrane cells were detected, confidence in the petitioner's conviction for the crime of rape of a child would not be undermined. The potentially exculpatory DNA evidence is not particularly strong while the evidence presented at trial supporting the petitioner's conviction is very strong. Accordingly, the Court FINDS that there is not a reasonable probability that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis and therefore the petition will be DENIED.

40. Petitioner also contends that the Court should order the requested DNA testing because favorable results "would have rendered the petitioner's verdict or sentence more favorable" to him. T.C.A. §40-30-305(1). This code section allows the Court to order DNA testing upon such a finding if the three factors other than the "reasonable probability factor" from the mandatory testing provision, T.C.A. §40-30-304(2),(3)&(4), are also present. There is no issue regarding the other three factors, but the Court cannot conceive of how the allegedly exculpatory result petitioner hopes for, no female epithelial skin cells or mucous membrane cells on the enema device, would have resulted in a lesser charge or a lesser sentence. Such evidence does not tend to indicate a basis for a finding of guilt on a lesser included offense, nor provide a mitigating factor on which the sentencing court would have relied in reducing the sentence imposed.

CONCLUSION

For the reasons set forth above, this Court finds that the PCDNA Act does not apply to the testing requested by petitioner; and, that even if the Act applies to the testing requested by the petitioner, there is not a reasonable probability that petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis, nor that he would have received a more favorable verdict or sentence on the basis of the allegedly exculpatory test results. Therefore, the

Petition is DENIED and DISMISSED. Costs are taxed to Petitioner.

Enter:

/s/ Tom Wright
Tom Wright
Circuit Court Judge

CERTIFICATE OF SERVICE

I, Teresa West, Circuit Court Clerk for Hamblen County, do hereby certify that a true and exact copy of this document has been served upon

Carly O'Rourke 865-974-6782

by placing a true and exact copy in the (U. S. Mail), or by (fax), or by (hand) delivery.

This the 16 day of May, 2012.

/s/ Teresa West
Clerk

/s/ Donna Templin
Deputy Clerk

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JAMES PERRY HYDE v. STATE OF TENNESSEE

Circuit Court for Hamblen County
No. 11CR390

No. E2012-01243-SC-R11-PC

ORDER

(Filed Jan. 16, 2014)

Upon consideration of James Perry Hyde's application for permission to appeal and the record before us, the application is denied.

PER CURIAM

EXHIBIT 1

IN THE CRIMINAL COURT FOR THIRD JUDICIAL DISTRICT OF TENNESSEE, AT MORRISTOWN, TENNESSEE

JAMES PERRY HYDE,	)	
Petitioner,	)	
	)	**No. 11-CR-390**
vs.	)	
STATE OF TENNESSEE,	)	
	)	
Respondent	)	

SUPPLEMENTAL AFFIDAVIT OF KATHERINE L. CROSS

(Filed Sep. 25, 2012)

Comes now the affiant Katherine Cross, after being duly sworn, and states as follows:

(1) I am Katherine L. Cross of Guardian Forensic Sciences in Abington, PA. Attached and incorporated herein by reference is the most recent version of my curriculum vitae. *See Curriculum Vitae* (attached hereto as *Exhibit A*).

(2) I have been provided and reviewed a number of materials concerning the prosecution and conviction of Mr. James Perry Hyde. These records include transcripts and exhibits pertaining to Mr. Hyde's trial and post-conviction proceedings. The specific materials I have reviewed are appended hereto in two notebooks and are fully incorporated herein by reference. *See Post-Conviction*

DNA Hearing Exhibit Notebooks One and Two (attached as *Exhibit B* and *C*).

(3) I have also been provided a copy of the Court's Order of April 9, 2012, in which the Court has posed three issues for me to address:

a. *Whether DNA will be in or on the instrument if it had been washed?* My answer to this question is yes, DNA will be in or on the instrument even if washed with water.

b. *Whether DNA analysis would simply repeat the examination previously performed during the investigation of the case?* My answer to this question no. The device has never been subjected to DNA testing or analysis.

c. *Whether the DNA evidence of the victim would be expected to be found on the instrument if the instrument had been used subsequently on someone else?* My answer to this question is yes. If someone had used the device at a later point in time after it was used on the alleged victim, then I would expect to find DNA evidence from both a major and minor contributor.

(4) The bases for my opinions, to a reasonable degree of scientific certainty, are as follows:

(a) Provided to me is the image of the enema bag used in the alleged rape of Scarlet Hyde presented as Exhibit 6 in the original trial. I understand that according to the prosecution's theory of the ease, as accepted by the jury, Mr. Hyde raped his daughter anally

with a red-and-white enema during September 1992.

(b) DNA analysis can and should be performed on the evidence. DNA analysis, in particular DNA testing for epithelial skin cells, has never been conducted on the enema device. While the instrument was previously tested by presumptive chemical testing for the presence of blood, by visual examination for the presence of any biological material, and a toxicological analysis was performed on the instrument, it has never been subjected to more advanced, and much more discrete, DNA testing. *See Post-Conviction DNA Hearing Exhibits* Notebook One, Tab 19 (*State v. James Perry Hyde* Trial Exhibit 15).

(c) If the enema bag had been washed with water after use, then it is more likely than not that the enema bag would still contain epithelial skin cells or mucous membrane cells of the victim that could be obtained through DNA analysis. I have previously tested items that have been subject to water exposure, including rinsing by hand and rain exposure. In both instances, DNA profiles were still present and identifiable.

(d) There is no information in the materials I have reviewed to indicate that the enema instrument used in the alleged rape has been washed since its collection by law enforcement during the initial investigation. In Mr. Hyde's statement, which was written by someone else but apparently signed by Mr.

Hyde, the following sentence is contained: "I have problem with my bowels. I have a red enema bag. I use and keep it under the bathroom sink. I wash it out with water and that is all I use in it." *See Post-conviction DNA Hearing Exhibits* Notebook One, Tab 14 (*State v. James Perry Hyde* Trial Exhibit 9, Statement of James Perry Hyde, pg. 2). From this statement, which is the only information about the washing of the device, it is unclear how often the device was washed or when. There is certainly no information to indicate that the device was washed with water after it was last used.

(e) It is more likely than not that DNA evidence of the victim would be expected to be found on the instrument if the enema instrument had been used subsequently on someone else. The Locard Principle supports the concept of cross-transference where the most recent DNA contributor's cells will be the most prevalent because their DNA deposit will remove and replace some, but not all, DNA cells from a prior DNA contributor of the same instrument. DNA testing of an instrument used by more than one person will show that the most recent DNA contributor has a majority of the DNA cells present on the instrument while previous DNA contributors have present but smaller DNA profiles. While there is no indication that Mr. Hyde used the enema bag during the nine days between the alleged incident and seizure, had Mr. Hyde used the device in the interim, his DNA would be present. This would result in

Mr. Hyde's DNA being the major contributor and the victim's DNA as being the minor contributor.

The above is accurate to the best of my knowledge and belief.

Further, the affiant saith not.

/s/ Katherine L. Cross
Katherine L. Cross

STATE OF PENNSYLVANIA)
)
COUNTY OF MONTGOMERY)

On this 18th day of April, 2012, before me, Nicole Hays (Notary Public), personally appeared Katherine L. Cross personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to this instrument, and acknowledged that they executed it as their free act and deed.

/s/ Nicole Hays
Notary Public

My Commission Expires: 07/27/2013

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Nicole Hays, Notary Public
Upper Moreland Twp., Montgomery County
My Commission Expires July 27, 2013
Member, Pennsylvania
Association of Notaries

EXHIBIT 2

IN THE CRIMINAL COURT FOR THIRD JUDICIAL DISTRICT OF TENNESSEE, AT MORRISTOWN, TENNESSEE

JAMES PERRY HYDE,	)	
Petitioner,	)	
	)	**No. 11-CR390**
vs.	)	
STATE OF TENNESSEE,	)	
	)	
Respondent	)	

STIPULATION

(Filed Sep. 25, 2012)

It is stipulated and agreed that the enema bag, entered into evidence in *State v. James Hyde* Case No. 92-CR-420, is currently in the possession of the Hamblen County Circuit and General Sessions Court Clerk, Teresa West as ordered by Judge Wright on September 12, 2011.

Date: 4/26/12

/s/ Carly Summers-O'Rourke
Carly Summers-O'Rourke
Clinic Attorney for the Petitioner
Licensed pursuant to
Tenn. Sup. Ct. R. 7, sec. 10.03,
supervised by Stephen Ross Johnson
[BPR #022140] and Anne E. Passino
[BPR#027456]

Date: 4/26/12

/s/ Victor J. Vaughn
Victor Vaughn
Assistant District Attorney
3rd Judicial District for the
Respondent

IN THE CRIMINAL COURT FOR THIRD JUDICIAL DISTRICT OF TENNESSEE, AT MORRISTOWN, TENNESSEE

JAMES PERRY HYDE,	§	
Petitioner,	§	
	§	
vs.	§	**No. 11CR390**
	§	
STATE OF TENNESSEE	§	
	§	
Respondent,	§	

ORDER

(Filed Apr. 9, 2012)

This action came on for a hearing on preliminary motions on April 3, 2012. The court has entered separate orders relating to petitioner's preliminary motions except the motion related to taking testimony from petitioner's expert witness via telephone. The court has deferred ruling on that until the court determines if it is going to grant petitioner's request to submit the potential DNA evidence to the expert witness for examination.

The state has alleged that any further examination would be fruitless because no DNA evidence was found on the instrument used by the petitioner to penetrate the victim when it was examined by the TBI during the original investigation of the case; and, because the petitioner stated that he always washed the instrument with water after it had been used.

In reviewing the petitioner's expert's affidavit the court does not find that these issues have been addressed and therefore, the court invited counsel for petitioner to submit a supplemental affidavit addressing the issue of whether the expert will still expect to find DNA evidence in or on the instrument if it had been washed with water after being inserted in the victim. In addition, the supplemental affidavit should address whether the proposed examination would simply repeat the examination previously performed during the investigation of the case.

IN THE CIRCUIT COURT FOR HAMBLEN COUNTY, TENNESSEE

JAMES PERRY HYDE,	)	
Petitioner	)	
	)	**No.** 11CV061
vs.	)	**Division**
STATE OF TENNESSEE,	)	
	)	
Respondent	)	

PETITION FOR FORENSIC DNA ANALYSIS PURSUANT TO T.C.A. § 40-30-301 et. seq.

(Filed Apr. 5, 2011)

Comes the Petitioner, James Perry Hyde, in this action by and through counsel and petitions this Court for an order allowing the forensic DNA analysis of certain evidence that was unable to be tested during the trial of Petitioner pursuant to T.C.A. §40-30-301 et. seq. Furthermore, the Petitioner requests this Court to order funding of this DNA analysis pursuant to T.C.A. §40-30-301 et. seq. In support of this Petition, Petitioner would state the following:

1. The Petitioner is currently serving a twenty-five (25) year sentence for rape of a child. Petitioner was found guilty by a jury verdict on July 29, 1993. Specifically, the jury found the defendant guilty of the allegation that on September 14, 1992, the Petitioner inserted

an enema device filled with cough syrup into his daughter's rectum.

2. The daughter's name is Scarlett Hyde. Scarlett Hyde had a history of mental illness and a pattern of making false allegations. She took the stand during trial but refused to answer any questions, and the Petitioner was not afforded an opportunity to confront her. Her allegations were submitted only through the testimony of medical professionals and allowed to be admitted as evidence used to make a medical diagnosis. The allegations she made to medical professionals were vague.

3. Regarding these allegations, post-trial Scarlett Hyde recanted and stated that Mr. Hyde never committed the acts she alleged involving the enema device. On May 14, 1999, Scarlett Hyde admitted that her father never sexually abused her in a recorded interview with Alison Carpenter, an investigator for post-conviction attorney William Bell. The signed and notarized transcription of this recantation is attached as Exhibit C. Scarlett Hyde later testified that the recantation was false, making any objective forensic evidence even more critical to her credibility and the issue of Mr. Hyde's guilt or innocence.

4. The State's theory of the case was that Petitioner inserted an enema device filled with cough syrup into his daughter's rectum even though the victim never mentioned an enema to anyone, only that cough syrup was

poured into her. The Petitioner acknowledged that he owned an enema device with a red enema bag but maintained that it was his and he used it only on himself for the treatment of chronic bowel problems. Petitioner was adamant that he was the only one in the family who ever used this device, on himself, and only with water in the enema bag.

5. The primary evidence that secured Petitioner's conviction was a statement given by the Petitioner to investigators with the District Attorney's office. The circumstances under which the statement was made raise serious doubts as to its accuracy. Petitioner had a history of anxiety problems and panic attacks, heart problems which required him to take daily medicine, and mental impairment. The interrogation lasted for seven (7) hours, part of the time in a small, overheated office. The Petitioner was not given a meal, did not take his medication, and maintained his innocence in a statement given after the first four (4) hours of questioning. Only after seven (7) hours of interrogation and inquiry as to whether his daughter would have to testify at a trial did the Petitioner sign a very brief statement. Petitioner has always maintained that the admission was false and given only so that his minor daughter would not have to go through the ordeal of testifying and so that he would be allowed to go home.

6. A red enema bag with a white hose ("enema device") was entered into evidence as Exhibit

6 and placed within an envelope labeled Exhibit 7 at the Petitioner's trial in 1993. According to testimony, the enema device was seized on September 23, 1992, only nine days after the rape reportedly occurred. If this device had been used in the way the State claimed, there would be enough traces of cough syrup in the enema bag for testing. There would also be female epithelial skin cells or mucous membrane cells present in the nozzle end of the hose, which is the portion the State claimed was inserted into Scarlett Hyde's rectum.

7. Prior to trial, the enema device was tested by the FBI but the FBI was unable to detect tissue-like substances through either a micro or macroscopic analysis. At the time, the FBI did test the enema device for the presence of cough syrup but none was found. The lab report was not submitted at trial so the jury was unaware that no cough syrup had been found.

8. No DNA analysis has ever been performed on this evidence, but it is believed that this evidence likely contains biological evidence that was unable to be detected at the time of trial. Counsel for Petitioner has consulted with Katherine Cross, an experienced forensic serology and DNA analyst. Ms. Cross believes it is likely that the enema device contains biological evidence, specifically epithelial skin or mucous membrane cells inside the nozzle of the enema. Due to the manner in which it was allegedly used, Ms. Cross believes

female cells would be found, even after the passage of time.

9. If evidence of the lack of cough syrup had been entered at trial, as well as the absence of female DNA, it is more likely than not that the Petitioner would not have been convicted. The lack of any female DNA on the enema device, as well as the absence of any evidence of cough syrup, would show it is more likely than not that the enema was not used on Scarlett Hyde. This would support Petitioner's contention that the admission he gave to investigators in the District Attorney's office was in fact false and that no crime occurred. A reasonable probability exists that the Petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis of this evidence.

10. Katherine Cross' curriculum vitae and affidavit are attached in support of this petition as Exhibits A and B.

11. The evidence is currently in the possession of the Office of the Hamblen Circuit Court Clerk in Morristown, Tennessee.

12. This piece of evidence is still in existence and in such a condition that the DNA analysis requested may be conducted.

13. This application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or the administration of justice since

Petitioner is currently serving a 25 year sentence at 100%.

14. Based on this expert consultation, Petitioner now seeks a court order for DNA analysis of the enema device entered as Exhibit 6 and placed within an envelope labeled Exhibit 7 at Petitioner's trial.

15. Petitioner requests that the enema device be transferred from the Office of the Hamblen Circuit Court Clerk in Morristown, Tennessee, to National Medical Services Crime Lab in Willow Grove, Pennsylvania.

16. National Medical Services Crime Lab meets the standards adopted pursuant to the DNA Identification Act of 1994, 42 U.S.C. § 14131 et seq.

17. The Petitioner requests that the Court order the funding of the DNA analysis for the previously untested enema device pursuant to T.C.A. §40-30-306, which states that "[i]n the case of an order issued pursuant to [T.C.A.] §40-30-304, the court shall order the analysis and payment, if necessary."

Respectfully submitted this 23 day of March, 2011.

/s/ Brooke Givens
Brooke E. Givens
[– SGM w/ permission]
Clinic Attorney for the Petitioner

/s/ Sarah McGee
Sarah G. McGee
Clinic Attorney for the Petitioner

University of Tennessee
College of Law Innocence Clinic
1505 W. Cumberland Avenue
Knoxville, Tennessee 37996
(865) 974-2331

CERTIFICATE OF SERVICE

We hereby certify that a true and accurate copy of the foregoing document has forwarded to the following, by placing same in the United States Mail, postage prepaid and addressing it to:

C. Berkeley Bell
Attorney for Respondent
407 W. 5th N. Street
Morristown, TN 37814
Phone: (423) 581-6700
Fax: (423) 587-6429

This the 23 day of March, 2011.

/s/ Brooke Givens
Brooke E. Givens
[– SGM w/ permission]
Clinic Attorney for the Petitioner

/s/ Sarah McGee
Sarah G. McGee
Clinic Attorney for the Petitioner

EXHIBIT A

Katherine L. Cross

Experience

Jan 2011 – Present
Guardian Forensic Sciences
Ft. Washington, PA

Forensic Biologist/DNA Technical Leader

- Currently consulting on forensic DNA/serology cases and establishing PCR analysis using CE technology on forensic casework for start-up company. Duties include implementing/validating/ performing PCR/STR DNA testing, issuing reports based on analytical results for forensic casework, courtroom testimony, training new employees, troubleshooting technical difficulties, and obtaining lab accreditation. Also, to provide lectures and training to area law enforcement, attorneys, schools, and medical personnel.

Jan 2002 – Dec 2010
NMS Labs Willow Grove, PA

DNA Analyst/Forensic Biologist/ Technical Leader

- Currently performing PCR analysis using CE technology on forensic casework. Duties include issuing reports based on analytical results

for forensic casework and courtroom testimony, training new interns/employees, troubleshooting technical difficulties, member of the lab accreditation project, and responsibility to implement/ validate/perform PCR/STR DNA testing. Also, to provide lectures and training to area law enforcement, attorneys, schools, and medical personnel.

Jan 1997-Dec 2001
Acadiana Crime Lab New Iberia, LA

DNA Analyst/DNA Technical Leader

- Performed PCR analysis using CE technology on forensic casework. Duties included issuing reports based on analytical results for forensic casework and courtroom testimony, responsibility for maintaining the QC records for equipment and reagents in the section, ordering reagents and supplies, training new interns/employees, daily management of technicians on biological testing, troubleshooting technical difficulties, chair of the lab accreditation project, and responsibility for helping to implement/validate PCR/STR testing. Also, to provide lectures and training to area law enforcement, attorneys, schools, and medical personnel several times a year.

Designated as DNA Technical Leader by DAB Waiver in February 2000.

Jan 1994 – Dec 1996
NC State Bureau
of Investigation Raleigh, NC

Special Agent/DNA Analyst-Serologist

- Trained and court qualified in conventional identification of body fluids and PCR analysis. Developed, validated and implemented the existing PCRSTR technology for the NCSBI. Worked forensic casework and issued reports for STR analysis as well as developed and validated new systems for use in casework. As a team leader, administrative responsibilities included ordering reagents and supplies, managing standing purchase orders and requests, management of weekly time sheets and overtime hours, management of vacation schedules, and case file review of all conventional serology and STR cases.

Aug 1992 – Oct 1993
Charlotte PD
Crime Lab Charlotte, NC

College Intern

- Conducted tests on serological evidence (ABO, sperm identification), entered data in computer, assisted in typing and filing reports

Education

- University of Florida in Gainesville, 2004-2005. Master of Science Education Degree in Pharmacology with a concentration in Forensic DNA and Serology
- University of North Carolina at Charlotte, 1989-1993. Bachelor of Science Degree in Biology with a concentration in genetics
- Attended additional graduate level courses at NC State University in Biochemistry, Statistics and Genetics

Further Training & Presentations:

- MAAFS Meeting – State College, PA – May 19-21, 2010
- AFDAA Summer Meeting – Austin, TX – July 16-17, 2009
- ABI HID University – Austin, TX – July 15, 2009
- CE Users Meeting – Montgomery County MD – June 4, 2009
- ASCLD/LAB International Preparation Course – Flushing, NY – May 6-8, 2008

- CE Users Meeting – ATF Lab, MD – April 10, 2008
- AAFS Workshop: DNA Mixture Interpretation: Principles and Practice in Component Deconvolution and Statistical Analysis – Washington, D.C., February 19, 2008
- CE Users Meeting – Anne Arundel County Crime Lab – March 22, 2007
- 2007 American Academy of Forensic Sciences Meeting – San Antonio, TX – Feb. 20-24, 2007
- AFDAA Summer Meeting – Austin, TX – July 27-28, 2006
- 2006 MAAFS Meeting – Richmond, VA – May 2006
- Workshop on LCN DNA Analysis – 2006 MAAFS Meeting – Richmond, VA – May 2006
- Presentation: Biological Evidence Collection – Abington PD and Montgomery County DA's Office – April 2006
- Master's Program at the University of Florida – Spring 2004 to Fall 2005
- Joint Forensic Meeting (CSFS, MAAFS, MAFS, SAFS) – Orlando, FL – September 2004
- DNA Auditor Training – Rich Guirerri, Heather Seubert – Orlando, FL – September 2004

- Presentation: Histological Concerns for DNA Analysis – MAAFS Meeting – Wilmington DE – April 2004
- MAAFS Annual Meeting – Wilmington DE – April 2004
- Hair Analysis for DNA Workshop – MAAFS – Wilmington DE April 2004
- American Academy of Forensic Sciences Annual Meeting in Dallas, TX – February 2004
- Promega's 14th International DNA Symposium in Phoenix, AZ – October 2003
- TBI Y-STR Symposium; Nashville, TN – May 2003
- MAAFS Meeting; Annapolis, MD – May 2003
- Promega's 13th International DNA Symposium in Phoenix, AZ – October 2002
- International Association of Bloodstain Pattern Analysts (IABPA) Meeting – Harrisburg, PA – October 2-4, 2002
- AFDAA (formerly SWGDAM) Meeting and Workshops – July 2002
- Blood Spatter Interpretation School – NMS (Bob Spalding – Instructor) – June 11-12, 2002
- MAAFS Meeting, Frederick, MD – April 2002

- MAAFS Workshop – "STR Analysis – Beyond the Core 13" Frederick, MD – April 2002
- Foundation Lecture – "Biology/ DNA Analysis – The NMS Challenge" given April 5, 2002 with Arthur Young
- AFDAA (formerly SWGDAM) Meeting and Legal and Courtroom Testimony Workshop – January 2002
- Promega's 12th International DNA Symposium (Statistics Workshop) in Biloxi, MS – October 2001
- AFDAA (formerly SWGDAM) Meeting and Mixture Interpretation Workshop – July 2001
- Promega's 11th International DNA Symposium in Biloxi, MS – October 2000
- Microscopy for Biologists Workshop with Ed Jones, Jr. – Shreveport, LA – September 25-29, 2000
- SAFS Fall Meeting and Auditing/ DNA Workshop – Asheville, NC – September 2000
- American Academy of Forensic Sciences Annual Meeting – Reno, NV – February 2000
- SWGDAM (Southwestern Working Group on DNA Analysis Methods) Meeting and Courtroom Testimony Workshop – January 2000

- Promega's 10th International DNA Symposium in Orlando, FL – September 1999
- SWGDAM Meeting and Statistics Workshop – July 1999
- ACS (American Chemical Society) Lecture – CE technology in forensics given with Arthur Young – New Orleans, LA – Spring 1999
- DNA Evidence: Evaluating, Interpreting, Reporting, and Presenting (Class) – Shreveport, LA – January 1999
- Promega's Expert Testimony Workshop – October 1998
- Promega's 9th International DNA Symposium in Orlando, FL – October 1998
- FBI School on QA/QC in the Laboratory – September 1998
- SWGDAM Meeting and DNA/FBI Workshop – May 1998
- Perkin-Elmer Advanced AmpFISTR & ABI Prism 310 Genetic Analyzer Class – May 1998
- American Academy of Forensic Sciences Annual Meeting – San Francisco, CA – February 1998
- Promega's Workshop on Statistics for Forensic DNA – September 1997

- Promega's 8th International DNA Symposium in Scottsdale, AZ – September 1997
- 1 week DNA workshop at the North Louisiana Crime Lab in Shreveport – August 1997
- NSFTC school "Auditing for Laboratory Managers" – April 1997
- Taught the STR/DNA Workshop at the Fall SAFS Meeting in Raleigh – October 1996
- Summer Institute of Statistics at N.C. State University – Modules on Use of Statistics in Forensic Casework – July 1996
- N.C. State University – Statistics for Geneticists – June/July 1996
- FBI School in PCR Typing for Forensic Use – April 1996
- SAFS Spring Meeting in Auburn, AL – April 1996
- Blood Spatter Pattern Analysis II – NCSBI – October 1994
- Bloodstain Pattern Analysis – NCSBI – October 1994
- Luminol Course – NCSBI – October 1994

Professional Organizations/ Certifications:

- Fellow of the ABC (American Board of Criminalistics)
- Mid-Atlantic Association of Forensic Scientists – MAAFS

- International Association of Blood-stain Pattern Analysts (IABPA)
- Southern Association of Forensic Scientists – SAFS
- Association of Forensic DNA Analysts and Administrators – AFDAA (formerly Southwestern Working Group on DNA Analysis Methods – SWGDAM)
- American Academy of Forensic Sciences (AAFS)

Court Experience:

- Testimony in Kona, HI in serology and DNA analysis
- Testimony in Sunbury, PA in DNA analysis
- Testimony in Honsdale, PA in blood stain pattern, ABO, and DNA analysis
- Testimony in Manassas, VA in blood stain pattern analysis
- Testimony in Beaver County, PA in DNA analysis
- Testimony in Marion, NC in DNA analysis
- Testimony in Monroe, NY in serology and urine identification
- Testimonies in U.S. Federal Court in Philadelphia, PA in serology and DNA analysis
- Testimony in U.S. Federal Court in Allentown, PA in serology and DNA analysis

- Testimony in Puerto Rico in DNA analysis
- Testimony in Monticello, NY in serology
- Testimony in Albion, NY in serology and urine identification
- Testimony in Trenton, NJ in serology and DNA analysis
- Testimonies in Philadelphia, PA in crime scene analysis, serology, and DNA analysis
- Testimony in Lebanon County, PA in serology
- Testimonies in Delaware County, PA in serology and DNA
- Testimony in Lehigh County, PA in DNA analysis
- Testimonies in Bucks County, PA in species id, DNA analysis, crime scene, semen id
- Testimonies in York County, PA in blood id, DNA analysis and bloodspatter
- Testimonies in Montgomery County, PA in DNA analysis, serology, and bloodspatter
- Testimonies in Wilmington, DE in serology and DNA analysis
- Testimony in Knoxville, TN in blood id and DNA analysis
- Testimonies in St. Mary Parish, LA in DNA analysis/Serology.

- Testimonies in Acadia Parish, LA in Bloodspatter/Serology.
- Testimonies in Lafayette Parish, LA in DNA-PCR
- Analysis/Bloodspatter
- Testimonies in Iberia Parish, LA in Bloodspatter/Serology/DNA analysis
- Testimonies in St. Martin Parish, LA in DNA analysis/Serology
- Testimonies in St. Landry Parish, LA in DNA analysis/Serology
- Testimonies in the state of North Carolina as an expert witness in serology and DNA analysis

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EXHIBIT B

IN THE CRIMINAL COURT FOR HAMBLEN COUNTY, TENNESSEE

JAMES PERRY HYDE,	)	
Petitioner	)	
	)	**No.**
vs.	)	
STATE OF TENNESSEE,	)	**Division**
Respondent	)	

AFFIDAVIT OF KATHERINE L. CROSS

Comes now the affiant Katherine Cross, after being duly sworn, and states as follows:

(1) I am Katherine L. Cross, a consultant with National Medical Services Crime Lab. My curriculum vitae is attached as EXHIBIT A and incorporated herein by specific reference.

(2) I have evaluated the overall facts and circumstances surrounding the trial of James Perry Hyde, as provided to me by the attorneys in this matter. My conclusions are as follows:

(a) It is my understanding that the Petitioner was convicted of rape of a child, specifically the rape of his daughter Scarlett Hyde. I understand that according to the prosecution's theory of the case, as accepted by the jury, the Petitioner raped his daughter anally with a red-and-white enema during September 1992.

(b) I understand that this enema was labeled Exhibit 6 during the trial of Petitioner, that it is contained within an envelope labeled Exhibit 7, and that it is currently held at the Office of the Hamblen County Circuit Court Clerk in Morristown, TN.

(c) In my professional opinion, this enema likely contains biological evidence. Specifically, if the enema had been used on the alleged victim in the fashion advanced by the State at trial, then there should be epithelial skin cells or mucous membrane cells of the victim present on the enema.

(d) In my professional opinion, the passage of time alone should not have diminished the presence of any biological evidence on the enema. Furthermore, current technology allows even a very small amount of trace evidence to be tested if present on the enema.

(e) Additional DNA analysis can and should be performed on this enema.

(f) In my professional opinion, testing for female epithelial skin cells or mucous membrane cells inside the white nozzle of the enema could determine whether the enema was actually used on a female. Specifically, the item could be tested by taking a vacuum swabbing from inside the white nozzle of the enema, and then running a test to determine if there are female epithelial skins cells or mucous membrane cells present.

(g) The absence of female skin or mucous membrane cells would be exculpatory for Petitioner. In my opinion, a reasonable probability exists that if such exculpatory results had been obtained through earlier analysis, Petitioner would not have been prosecuted and convicted.

(h) This type of testing would cost approximately $1100 in its entirety.

(i) The evidence in this case has never previously been subjected to this type of DNA analysis.

The above statement and the information contained in the attached curriculum vitae are accurate to the best of my knowledge and belief.

Further, the affiant saith not.

/s/ Katherine L. Cross
Katherine L. Cross
Consultant for National
Medical Services Crime Lab
Willow Grove, Pennsylvania

Sworn to and subscribed before me
this 23 day of February, 2011.

/s/ Susan O'Neill
Notary Public
My Commission Expires: 1-4-2014

EXHIBIT C

May 14, 1999

Interview with Scarlett Hyde

Investigator Alison Carpenter
Obtained a recorded statement from Scarlett Hyde
This the 14th day of May , 1999.

/s/ Scarlett Hyde
Scarlett Ann Hyde

/s/ Alison Jan Carpenter
Alison Carpenter

/s/ Heather LaForce
Notary Public

[SEAL]

My Commission Expires: 1/7/2002

Interview With Scarlett Hyde,
Daughter Of James Perry Hyde

Investigator Alison Carpenter

Friday May 14, 1999

ALISON: Scarlett, I'm Alison Carpenter and I'm here to talk to you about some things that your dad apparently is in the penitentiary right now and it's something you accused him of doing several years ago. Can you talk about that?

SCARLETT: Oh, yeah. Um, when I was younger, I was going through a real hard time. I was very rebellious and I have real bad depression, so they put me in Lake Shore. When they put me in Lake Shore, they had me on all these kinds of medicines and stuff and they were putting weird ideas in my head and stuff and it was like I was drugged up all the time. So, they put ideas in my head and stuff and one day I just blurted it out, I said, "Well, he sexually abused me." But, he really didn't and I was just really messed up at the time. Half the time I didn't know who I was, didn't know what day it was or anything. I mean they had me so drugged up and he didn't really do it. I want him out, you know, because he really didn't do it.

ALISON: What kind of drugs were they giving you?

SCARLETT: Oh, gosh they had me on Depaco, Amemphermine, what else was it, Prozac. I don't

even remember half of the stuff they had me on. But, they had me on like, anti psychotic stuff. I mean, they just really put me like a zombie.

ALISON: How old were you?

SCARLETT: I was eleven.

ALISON: Eleven years old?

SCARLETT: Um hum.

ALISON: Ok. Um.

SCARLETT: I was also at Children's hospital and they drugged me up too. They had me on a bunch of medications.

ALISON: Why – Why would you say this about your father?

SCARLETT: I don't know, I just. I was mad and confused at the time. I just said it for no apparent reason.

ALISON: Were your parents divorced or were they still together?

SCARLETT: They were still together at the time.

ALISON: Yes. Ok.

SCARLETT: I was just really messed up as a kid. I was rebellious. I wouldn't go to school. I-I mean I was just real messed up.

ALISON: Was your father trying to do right by you and make you go to school.

SCARLETT: Oh, yes. He was very overprotective of me. He would take me camping. He would take me everywhere. And he would try to help me anyway that he could.

ALISON: Did you testify at trial that your father did this?

SCARLETT: No. Actually, I went in the courtroom and I was scared of the Judge because I had never been in a courtroom before. And I was planning that day, on telling 'em. "Y'all can go home, it never really happened." But I got scared and I ran out of the courtroom and that night my mom said that he went to jail. I cried that night because I really love my father and I really.. I almost killed myself over saying that. I didn't mean to say that. I mean, if I had been in my right mind at the time, I would have *never* said a thing like that.

ALISON: When was the first time that you brought it to somebody's attention, hey this really isn't true.

SCARLETT: I've never really brought it.. I've told friends, you know. I've told friends, you know it never really happened you know, because like one time when I was fixin to kill myself, it was over that. I felt so bad that you know, when I come to my senses, and when they changed my medication and got me stable, I come to my senses and I was like, "how could I have said a thing like that? How could I have been so messed up in the head?" I told my friends, you know, it really didn't happen and I wish I could get him out of jail, but I don't know how.

ALISON: And how long ago was this?

SCARLETT: Oh, it's not been long ago. I've had many friends over the years and I told them.

ALISON: How old are you now?

SCARLETT: Eighteen.

ALISON: Ok, so, seven years ago. From the point in time that you said that this happened when you said this happened originally.

SCARLETT: um, hum.

ALISON: Just until recently you have not changed your story?

SCARLETT: No. No, I haven't. I been afraid to because I was afraid people would hound me or something.

ALISON: Have you ever spoke to maybe a psychologist or psychiatrist and told them look, I've done this and I want to change it. I want to make things right?

SCARLETT: No, I was afraid to. I was afraid they might put me somewhere.

ALISON: Yea.

SCARLETT: I was afraid they might think I was crazy and put me back in there and I didn't want to be drugged up again and messed up in the head again. You know. I didn't want that to happen because

had I been not drugged up, and in a sound mind, I wouldn't have said a thing like that. I wouldn't have.

ALISON: Ok.

SCARLETT: To mention the doctor that drugged me up, he was fired. So,-so I have proof that you know they had me drugged up and stuff.

ALISON: Ok. Is there anything that you can tell me that would lead other people to really recognize that you've made a mistake in alleging this and that you want to make everything right.

SCARLETT: What do mean like? I don't understand.

ALISON: Besides what you told me, is there anything else?

SCARLETT: No, there's nothing else.

ALISON: Ok. You just made a mistake. You were young.

SCARLETT: Yeah, I was young. I was rebellious. I was under a lot of medication and people were putting weird ideas in my head. Crazy stuff.

ALISON: Have you told your mother that it wasn't the truth.

SCARLETT: No, I haven't yet. I've been afraid to.

ALISON: Are you not in good relationships with your mother?

SCARLETT: No, not right now. Not right now.

ALISON: Have you told your grandmother?

SCARLETT: Yes. I've told my grandmother. And you know I was so happy that I got to talk to him yesterday. I told him I was so sorry and you know I'm just glad that he's forgiven me for it, and I really want him out. So, I want my daddy back.

ALISON: Yea, it's easy to forgive your child for whatever, you know.

SCARLETT: Yea.

ALISON: Love is unconditional.

SCARLETT: And I mean it's not like I did it just to get back at him for something, cause I was never mad at him. It's just at the time I was just a sick kid.

ALISON: Wanting attention really bad?

SCARLETT: Um, hum. Yeah. I was real sick in the head, then.

ALISON: Do you think that hurt when you said you wanted to go into the courtroom that day, and say "Look you all can go home, and you know, this isn't true and I didn't mean it." Do you think that further messed you up, later on, you know the suicide attempts? Has it taken you awhile to kind of get your life straightened out because of what you did to your father?

SCARLETT: Yeah, yeah it's been because after that they thought, well, oh, this kid ain't safe. She needs to go here and there. I've been almost everywhere in Tennessee.

ALISON: You seem like you really have your life together right now. . . .

SCARLETT: Right now.

ALISON: . . . You seem very sincere and you seem like you really got it going on.

SCARLETT: Yeah, but my medicine, they've got me on good medicine right now. They've got me on a new anti-depressant called Selexa and it's really working for me.

ALISON: Good.

SCARLETT: And I'm not on all that medicine no more. They've got me on like two medications and it's doing great.

ALISON: Ok. So, there's not any professional that you have told, "my father did not do this, I want to make it right."

SCARLETT: No, I haven't told any professionals, because I've been scared.

ALISON: Ok.

SCARLETT: to. I've been scared to.

ALISON: Um, today is May 14, 1999 and it is approximately 11:45 a.m. and I thank you very much

Scarlett. Ok, again it's May 14, 1999 and I just wanted to make sure that no one has forced you to come in here. Have you been forced to come in here?

SCARLETT: No.

ALISON: Has anyone promised you anything to come in here and tell me what you have today?

SCARLETT: No.

ALISON: Ok, you're just in here because?

SCARLETT: Because I want to straighten things out.

ALISON: Ok, and um you say this willingly and freely . . .

SCARLETT: Yes.

ALISON: . . . to make things right.

SCARLETT: Yes.

ALISON: Ok, and you're not under any medication which you normally are under that would cause you to do this.

SCARLETT: Right.

ALISON: Alright and your middle name, you're Scarlett Ann Hyde?

SCARLETT: Yes.

ALISON: And what's your date of birth?

SCARLETT: [Omitted].

ALISON: Ok, thank you Scarlett.

SCARLETT: Alright.
