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INTRODUCTION

During his lifetime, Sedley Alley twice petitioned the Tennessee courts for DNA testing that could have exonerated him from his first-degree murder conviction and death sentence. The Tennessee courts rejected Alley's petitions based on an interpretation of Tennessee law that the Tennessee Supreme Court has now determined to have been wrong. Every other death row inmate in Tennessee has had the opportunity to benefit from the change in law by petitioning or re-petitioning for DNA testing, which Tennessee permits a convicted individual to seek "at any time." Tenn. Code Ann. § 40-30-303. Alley, however, has been denied that right. The State executed Alley in 2006, after his petitions for DNA testing were wrongly denied, but before the Tennessee Supreme Court corrected the lower courts' erroneous interpretation of the law. Today the State opposes the right of Alley's Estate to bring a petition for DNA testing on his behalf on the remarkable theory that by executing Alley the State has extinguished any right he had to relief. Neither Tennessee nor federal law countenances that perverse reasoning or a result that precludes Alley's family and the people of Tennessee from learning whether an innocent man was put to death by the State.

Tennessee law empowers state courts to supply rules of procedure where none is specified, and here, Tennessee law provides for the state's civil law of survivorship to apply to post-conviction petitions for DNA testing. The Tennessee Supreme Court has held that "a post-conviction proceeding is a hybrid affair, involving an appeal from a criminal prosecution which is considered under *civil rules of procedure*." *Watkins v. State*, 903 S.W.2d 302, 305 (Tenn. 1995). Applying the civil rules of

survivorship here would advance the purposes of Tennessee’s Post-Conviction DNA Analysis Act of 2001 (the “Act”), which include using DNA testing “to aid in identifying the true perpetrators of the crimes,” *Powers v. State*, 343 S.W.3d 36, 51 (Tenn. 2011)—a purpose that does not abate when a convicted individual is executed, as the true perpetrator may remain at large.

Applying state law in this manner would also safeguard important constitutional interests. Denying a right of survivorship for the Estate’s petition would violate the Due Process guarantee of both the federal and Tennessee constitutions, as well as the Tennessee Constitution’s special protection for reputational rights. At the very least, denying a right of survivorship would raise complex and difficult questions of constitutional law, which the Court can and should avoid by reading the Act to provide a right of survivorship, as Tennessee law permits.

This petition likely presents the final opportunity for the Alley Estate, standing in the shoes of Sedley Alley, to seek and obtain DNA testing capable of exonerating Alley from the crime for which he was executed. The State wrongly denied Alley the right to obtain that testing during his lifetime. It should not now be entitled to wrongly deny that right to Alley’s Estate.

JURISDICTIONAL STATEMENT

The Shelby County Criminal Court held that it did not have subject matter jurisdiction to consider the Estate’s petition for DNA testing pursuant to the Post-Conviction DNA Analysis Act of 2001. The criminal court entered a final order dismissing the petition on November 18, 2019. The Estate filed a timely notice of

appeal on November 18, 2019. This Court has jurisdiction under Tenn. Code Ann. § 16-5-108(a)(2).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether Sedley Alley’s Estate may seek DNA testing under the DNA Analysis Act of 2001 for the purpose of exonerating Alley, where Alley was denied such testing before his execution because of a since-rejected legal rule.

STATEMENT OF THE CASE

A. Alley Is Convicted of the Murder of Suzanne Collins.

Sedley Alley was convicted and sentenced to death for the 1985 murder of U.S. Marine Corps Lance Corporal Suzanne Collins in Millington, Tennessee. *State v. Alley*, 776 S.W.2d 506, 508 (Tenn. 1989). Alley maintained throughout his life that he had no memory of murdering Suzanne Collins. He told his legal team that he was intoxicated on the night of the murder, had been coerced and led by police to confess to acts he did not remember, and that he did not think he had committed the crime. Alley also maintained throughout his life that if he *had* committed the murder of Suzanne Collins, then he deserved to be executed.

Alley pursued state and federal post-conviction relief, without success. *Alley v. State*, 882 S.W.2d 810 (Tenn. Crim. App. 1994); *Alley v. State*, 958 S.W.2d 138 (Tenn. Crim. App. 1997), *perm. app. denied* (Tenn. Sept. 29, 1997); *Alley v. Bell*, 101 F. Supp. 2d 588 (W.D. Tenn. 2000); *Alley v. Bell*, 307 F.3d 380 (6th Cir. 2002), *cert denied*, 540 U.S. 839 (2003).

B. Alley Is Denied the Right to Petition for DNA Testing Under the DNA Analysis Act Before His Scheduled Execution.

In 2001, the Tennessee General Assembly passed the DNA Analysis Act. Tenn. Code Ann. §§ 40-30-301, *et seq.* The Act permits certain convicted individuals to petition for DNA testing of evidence related to the investigation or prosecution of the crime of conviction that “may contain biological evidence.” § 40-30-303. Courts must grant access to DNA testing under the Act if, in relevant part, a petitioner shows that a “reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis.” § 40-30-304(1).

Alley exercised his rights under the Act and petitioned for post-conviction DNA testing in Shelby County Criminal Court. He asked the court to order the State to test biological samples from the crime scene, including swabs taken from Suzanne Collins’ body and various body and pubic hairs found at the crime scene. *See Alley v. State (Alley I)*, 2004 WL 1196095, at *3 (Tenn. Crim. App. May 26, 2004). The trial court denied the petition, concluding that Alley had failed to demonstrate a reasonable probability that he would not have been prosecuted or convicted if DNA from the biological samples did not match his DNA. *Id.* at *1 (quoting trial court). The Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied permission to appeal. *Id.* at *13, *perm. to appeal denied*, (Tenn. Oct .4, 2004), *cert. denied*, 544 U.S. 950 (2005). The Tennessee Supreme Court scheduled Alley’s execution to take place on May 17, 2006.

The day before his scheduled execution, Governor Phil Bredesen accepted the recommendation of the Tennessee Board of Probation and Parole and granted Alley a fifteen-day reprieve to allow him to petition again for DNA testing based on newer science and other evidence that had not been included in his first petition. Three days later, Alley filed an expedited petition for modern DNA testing of three items he had not identified previously. *See Alley v. State (Alley II)*, 2006 WL 1703820, at *1, *3 (Tenn. Crim. App. June 22, 2006).

One of the issues Alley’s petition presented was whether the DNA Analysis Act allowed a petitioner to compare the results of his DNA testing to the DNA of a third party or to a public DNA database of known criminals. Alley proposed to test the evidence and then run the DNA results through a public database to check for a match to a known criminal. *Id.* at *8. If the DNA matched a third party, Alley argued it would be compelling evidence of his innocence and would show a “reasonable probability” that he would not have been prosecuted or convicted if the exculpatory DNA testing results had been available, thereby satisfying the statutory element. Tenn. Code Ann. § 40-30-304.

The trial court denied Alley’s petition for DNA testing, and the Court of Criminal Appeals affirmed. *Alley II*, 2006 WL 1703820, at *4 (quoting trial court); *id.* at *24 (affirming). The appellate court held that the Act did not permit a petitioner to compare DNA results to a third-party database because, under its interpretation of the Act, “results of DNA testing must stand alone and do not encompass a speculative nationwide search for the possibility of a third[-]party perpetrator.” *Id.*

at *9. The court construed the Act's definition of "DNA analysis" to be "limited to the performance of DNA analysis which compares the petitioner's DNA to samples taken from biological specimens gathered at the time of the offense" because the Act was meant to "establish the innocence of the petitioner and not to create conjecture or speculation that the act may have possibly been perpetrated by a phantom defendant." *Id.* at *9, *14. Days later, the Tennessee Supreme Court denied permission to appeal. Appellate Record 3 (hereinafter "AR").

The State of Tennessee executed Sedley Alley the next day, on June 28, 2006, at Riverbend Maximum Security Institution in Nashville. AR 27.

C. After Alley's Execution, the Tennessee Supreme Court Abrogates the Lower Court Decisions That Denied Alley DNA Testing Under Tennessee's Act.

After Alley's execution, the Tennessee Supreme Court took up the issue of DNA comparisons with a third party under the Act in a case brought by Rudolph Powers, a man convicted of aggravated rape and robbery in Tennessee. In *Powers v. State*, Powers argued that exculpatory results would create a reasonable probability that he would not have been prosecuted or convicted if "the DNA profile developed from the evidence was uploaded into a DNA database and matched another profile in the system." 343 S.W.3d 36, 39 (Tenn. 2011). The Court of Criminal Appeals had rejected this argument, relying on the previous holding in Alley's pre-execution case: "The results of DNA testing must stand alone and do not encompass a speculative nationwide search for the possibility of a third party perpetrator." *Powers v. State*, 2010 WL 571801, at *10-11 (Tenn. Crim. App. Feb. 18, 2010) (quoting *Alley II*, 2006 WL 1703820, at *9); *see also Crawford v. State*, 2003 WL 21782328, at *3 (Tenn. Crim.

App. Aug. 4, 2003) (construing “DNA analysis” under the Act to “limit[] [the statute’s] reach to permit only the performance of a DNA analysis which compares the petitioner’s DNA samples to DNA samples taken from biological specimens gathered at the time of the offense.”); *Alley II*, 2006 WL 1703820, at *9 (“[N]or does the statute open the door to any other comparisons the petitioner may envision.”).

The Tennessee Supreme Court reversed the lower court’s decision in *Powers*, concluding that the court’s cramped interpretation of “DNA analysis” was incorrect and that “[t]here is nothing in the[] provisions [of the Act] limiting the DNA analysis” to a comparison between crime scene evidence and only the petitioner’s DNA samples. 343 S.W.3d at 49. Instead, “[i]f the comparison between a DNA profile developed from crime scene evidence and a petitioner’s DNA profile does not return a match, and uploading the crime scene DNA profile into a database has the potential to establish a petitioner’s innocence and identify the true perpetrator of the crime, then the trial court may issue an order providing for such a comparison.” *Id.*

The Tennessee Supreme Court further described that the Act has two purposes: its “primary purpose is the identification of those who commit crimes,” but the “secondary purpose ... is to exonerate those who have not committed crimes.” *Id.* at 52. “Construing the Act to allow a petitioner to access a DNA database in order to analyze a DNA profile developed from biological material found at a crime scene that does not match his or her own profile clearly effectuates both of those purposes—a positive ‘hit’ would not only cast considerable doubt on a petitioner’s guilt of the crime

for which he or she was convicted, but also could potentially identify the true perpetrator and subsequently prove a petitioner's innocence." *Id.* at 52-53.

In so ruling, the Tennessee Supreme Court abrogated the Court of Criminal Appeals' decision in Alley's case, which had denied him access to DNA testing on the eve of his execution.

D. Alley's Estate Petitions for The DNA Testing He Was Wrongly Denied Before His Execution.

Following Alley's execution, his only child, April Alley, became the personal representative of her father's estate. AR 13. The probate court in Davidson County determined that April Alley, as personal representative of her father's estate, has authority to exercise any and all rights of her father, Sedley Alley, including rights provided in the Post-Conviction DNA Analysis Act of 2001. *Id.*

Counsel then assisted April Alley in filing this petition, in part due to troubling information counsel received from Missouri law enforcement about a man named Thomas Bruce. Bruce had been indicted in St. Louis for the brutal rape and murder of a woman at a Catholic Supply store and the severe beating of an elderly woman. Law enforcement had reason to believe Bruce may have been a serial offender, and further investigation revealed that Bruce had been taking courses in the same town and at the same flight training school that Suzanne Collins attended in the months leading up to her murder. AR 13. In the petition, the Estate asked "to test for DNA on the existing evidence against preserved samples of Mr. Alley and the Combined DNA Index System (CODIS)." AR 32. The absence of Alley's DNA on the tested items "would undermine the state's theory that Sedley Alley was the person who committed

the heinous acts against Suzanne Collins.” *Id.* “If a number of these items ... produced a male DNA profile that matched each other, but excluded Sedley Alley, these redundant results would further strengthen the inference that a man other than Alley committed this crime.” AR 32-33. Also, “[i]f testing of these items of evidence produced a DNA profile that produced a ‘hit’ or matched a profile of an offender in the FBI’s CODIS DNA database, that would be powerful exculpatory evidence that a person other than Alley committed the murder.” AR 33.

The State opposed the Estate’s petition mostly on procedural grounds. AR 63. The State argued that the Estate had no authority as a “person” to bring the petition under the Act or any other state law, AR 63-68; that the petition was not justiciable because the Estate did not itself have standing, AR 69-70; that the petition was moot because, among other reasons, “unlike a live defendant under the care of the Tennessee Department of Correction,” Alley “cannot claim that he is wrongfully imprisoned,” AR 70-72; and that all of the claims were precluded because Alley had a “full and fair” opportunity to litigate them under the prior interpretation of the law, AR 72-80. As to the merits, the State speculated that certain evidence might be tainted after years in State custody and claimed, contrary to the Estate’s petition, that “the estate has not shown that much of the evidence is still in existence or in a condition that DNA analysis could be conducted.” AR 81. The State further opposed the Estate’s proposal to use genealogy services to conduct additional third-party investigation, echoing the erroneous argument made fifteen years ago that no third-party testing is permitted under the Act because doing so “goes well beyond the scope

of the Act.” AR 82. Finally, the State argued that even if DNA testing produced exculpatory results, Alley would still have been prosecuted and convicted based on his confession and other evidence, and there was no “reasonable probability” of a different result even if the DNA on all of the physical evidence did not match Alley. AR 82-85.

Because the State claimed that the Act did not permit the Estate’s petition to be filed, the Estate argued in reply that the U.S. and Tennessee Constitutions required the petition to be considered. AR 121-129. At the very least, the difficult constitutional issues presented would require the court to read any ambiguity in the Act in favor of the petition, applying the canon of constitutional avoidance. AR 129.

The Court granted the State a sur-response in which the State argued that the Estate had no constitutional right to bring a post-conviction petition for DNA testing. AR 135-138. The Estate filed a final sur-reply, arguing that the State’s position misunderstood the nature of collateral review and failed to account for vital constitutional interests at stake. AR 143-147.

E. The Criminal Court Concludes It Lacks Jurisdiction to Consider the Petition.

On November 18, 2019, the Shelby County Criminal Court dismissed the petition. The court held that Tennessee law “contain[ed] no provisions which would allow someone to file a post-conviction action of any kind of behalf of a deceased person,” AR 160, and concluded that nothing in Tennessee’ case law or statutes provided a civil right of survivorship for petition rights under the Act, AR 161-162. The court did not find the probate court’s adjudication of the Estate’s rights to be

binding on it, and further concluded that the Estate had suffered no injury the court could redress and so lacked standing to pursue the petition. AR 171-172. The court considered the Estate's constitutional claims on the merits and rejected them. AR 173-174. The lower court did not consider any of the other procedural or merits arguments presented in the petition or its opposition, but concluded only that the court "is without jurisdiction to consider Petitioner's claims." AR 174.

STANDARD OF REVIEW

This Court reviews legal issues *de novo*, without giving a presumption of correctness to the legal conclusions of the trial court. *State v. Jordan*, 2020 WL 2301192, at *9 (Tenn. Crim. App. May 8, 2020) (citing *State v. Carter*, 160 S.W.3d 526, 531 (Tenn. 2005)).

SUMMARY OF ARGUMENT

In 2001, the Tennessee General Assembly enacted the Post-Conviction DNA Analysis Act to ensure that every person “convicted of” and “sentenced for” certain crimes could petition for DNA testing if that person met the statutorily enumerated criteria. In doing so, the General Assembly addressed the need for a procedural mechanism to take account of advances in forensic science, specifically DNA testing. In the decade leading up to the passage of the Act, DNA testing had exonerated many prisoners, some of whom had confessed to crimes they did not commit. As a consequence of these wrongful convictions, perpetrators remained at large while an innocent person sat in prison. DNA testing revealed this injustice and often lead to the apprehension of the real offender.

The issue in this case is whether the Estate of an executed man retains the right to petition for DNA testing under the DNA Analysis Act or whether the State’s execution of a person precludes the prospect of exoneration. Sedley Alley plainly possessed the right to petition for DNA testing during his lifetime. He twice attempted to obtain DNA testing and was twice rebuffed based on an incorrect and cramped interpretation of the statute. By the time the Tennessee Supreme Court

corrected those errors, it was too late for Sedley Alley. The State had already executed him for a crime that he had no memory of committing.

The State opposes this petition based solely on the fact that Sedley Alley is not here to assert the right to file it *himself*. That argument stands at odds with basic principles of procedure under Tennessee law, as well as federal and Tennessee constitutional guarantees.

First, the Act authorizes Alley's Estate to bring this petition because Alley possessed the right to petition for DNA testing under the Act during his lifetime and that right passed to his Estate under the applicable civil survivorship statutes. The Act itself does not address survivability, but Tennessee procedural law does and compels application of the civil survival statute here. State courts have inherent authority to fashion procedural rules when necessary, and the Tennessee Supreme Court's decision in *Watkins v. State*, 903 S.W.2d 302 (Tenn. 1995), establishes the framework for fashioning the correct procedural rule in this case. All of the factors the Supreme Court considered in *Watkins* point in the same direction here: the civil survival statute applies and the Estate retains the ability to exercise Sedley Alley's right to petition for DNA testing under the Act after his execution by the State. That outcome is consistent with myriad other cases where the Tennessee Supreme Court has applied a civil procedural rule in a post-conviction proceeding where no other rule is supplied. It also conforms with basic principles of justice by preventing the State from precluding the possibility of exoneration via execution. No statute, rule of procedure, or precedent compels a different outcome. Straightforward principles of

Tennessee procedure require application of the survivorship law here, and the Court can and should resolve this case on that statutory ground.

Second, the U.S. and Tennessee Constitutions require the same result. Although the State may not be required to provide a mechanism for DNA testing, once it makes testing available, the applicable procedures must comply with constitutional requirements. The DNA Analysis Act creates property and liberty interests that cannot be extinguished without due process of law under the U.S. and Tennessee constitutions. Extinguishing Sedley Alley’s right to petition upon his execution by the State violates due process because it ignores the significant private interests in obtaining DNA testing, results in almost certain deprivation of the vital property and liberty interests at stake, allows the State to cover up its own potential execution of an innocent person, and is completely at odds with the State’s interest in identifying Suzanne Collins’ murderer—an interest that did not evaporate upon Sedley Alley’s execution.

In addition, the Tennessee Constitution safeguards an individual’s reputation and requires that “all courts shall be open” and “every man, for an injury done him in his . . . reputation, shall have [a] remedy by due course of law, and right and justice administered without sale, denial, or delay.” Tenn. Const. art. I, § 17. Sedley Alley was convicted and executed for the murder of Suzanne Collins. He claimed that he had no memory of committing this crime. If there is the possibility of Alley’s innocence and if the Tennessee Constitution’s promise of a remedy for reputational

injury means anything, the Alley Estate must be permitted to petition under the Act for DNA testing of the only evidence that can clear the Alley name.

ARGUMENT

I. THE ACT AUTHORIZES ALLEY'S ESTATE TO PETITION FOR DNA TESTING.

Tennessee's Post-Conviction DNA Analysis Act of 2001 provides that "[n]otwithstanding ... any other provision of law governing post-conviction relief to the contrary, a person convicted of and sentenced for the commission of first degree murder ... *may at any time*, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution." Tenn. Code. Ann. § 40-30-303 (emphasis added). The Act itself does not address whether the right to petition for DNA testing survives an individual's death, but it does make clear that any general rule about post-conviction relief becoming unavailable upon the death or execution of the inmate does not automatically apply to the DNA Act. *Id.* ("[n]otwithstanding ... any other provision of law governing post-conviction relief to the contrary"). And general Tennessee law supports the conclusion that the Estate may seek relief under the Act. "[T]rial courts in Tennessee have inherent power to adopt appropriate rules of procedure to address the issues," when a necessary rule of procedure is not otherwise supplied. *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998). In post-conviction proceedings, the Tennessee Supreme Court has looked to the rules of civil procedure when other rules are silent. *E.g.*, *Watkins v. State*, 903 S.W.2d 302, 305 (Tenn. 1995) ("A post-conviction proceeding is a hybrid affair, involving an appeal from a criminal prosecution which is considered under *civil rules of procedure*").

Applying the logic of *Watkins* and similar decisions here, the civil rule of survivability should apply to this petition. Alley's right to petition for DNA testing under the Act survived his execution and has passed to his Estate by operation of Tennessee law.

A. Under *Watkins*, Tennessee's Civil Survival Statutes Apply to the Act.

The Tennessee Supreme Court has previously applied civil procedure rules to a post-conviction proceeding where no other rule of procedure was specified. In the leading case, *Watkins v. State*, the Supreme Court held that in some circumstances, rules of civil procedure apply to post-conviction proceedings. 903 S.W.2d 302, 305. For the same reasons the Supreme Court relied on in *Watkins* to apply the civil procedure rule at issue in that case, the rules of civil procedure governing survivability apply to the Estate's petition. *See* Tenn. Code. Ann. §§ 20-5-101, *et seq.*

In *Watkins*, the Tennessee Supreme Court considered whether tolling provisions in the rules of civil procedure apply to toll the statute of limitations for seeking post-conviction relief. 903 S.W.2d at 303. There, Curtis C. Watkins had been unable to timely proceed with his petition for post-conviction relief due to mental incompetence. *Id.* Tennessee law set a three-year statute of limitations for filing a post-conviction proceeding, which Watkins had exceeded unless the statute of limitations were tolled for the time he was mentally incompetent. *Id.* at 304. The post-conviction limitations statute contained no tolling provision and "[b]y its terms ... allow[ed] no exception to the three-year limitation for filing petitions for post-conviction relief." *Id.* Tennessee's civil saving statute, however, tolled the statute of limitations when a person was mentally incompetent at the time the cause of action

accrued. *Id.*; see Tenn. Code. Ann. § 28-1-106 (1980). The issue was whether to apply the civil rule when the post-conviction limitations statute did not address tolling.

The Supreme Court applied the civil saving statute to toll the post-conviction statute of limitations. *Watkins*, 903 S.W.2d at 305. In doing so, the Supreme Court reasoned that “[a] post-conviction proceeding is a hybrid affair, involving an appeal from a criminal prosecution which is considered under *civil rules of procedure*.” *Id.* The Supreme Court was not persuaded by the State’s counterargument that the limitations period the Code set for post-conviction proceedings was “a substantive element, and condition” in the law that could not be subject to tolling for any reason. *Id.* Instead, the Supreme Court relied on two other important considerations that justified applying the civil saving statute to post-conviction claims: the purpose of the post-conviction remedy and the necessity of safeguarding constitutional interests. Each of those considerations weighs just as persuasively in favor of applying the civil survival statutes to the Estate’s petition under the Act.

First, the Supreme Court in *Watkins* looked to the purpose of the post-conviction remedy because “[t]he procedural characteristics of the post-conviction remedy should be appropriate to the purposes of the remedy.” *Id.* at 305 (quoting ABA Standards for Criminal Justice, Standard 22-1.2 (2d ed. 1980)). The Court concluded that the post-conviction purpose is “not to convict, but to set aside a conviction which is void or voidable because of the abridgement of constitutional rights.” *Id.* Consistent with that purpose, “the procedure by which a criminal

conviction may be set aside is civil in nature, therefore it is tried under the Rules of Civil Procedure.” *Id.*

This case presents an even more compelling justification for application of the civil rule of procedure. The DNA Analysis Act does not establish any ordinary post-conviction remedy. The Act’s purpose is not to convict or even to ensure that convicted prisoners are imprisoned lawfully, but instead to permit convicted individuals to obtain DNA testing “to aid in identifying the true perpetrators of the crimes.” *Powers*, 343 S.W.3d at 51. That law-enforcement purpose is crucial and unique as far as post-conviction remedial purposes go and relief under the Act is expressly carved out from the normal “law[s] governing post-conviction relief.” Tenn. Code Ann. § 40-30-303. Applying the procedural survivorship rules of the civil survivor statute thus is clearly “appropriate to the purposes of the [Act’s] remedy,” as *Watkins* describes. 903 S.W.2d at 305. *Watkins*’ reliance on the remedial purpose of tolling statutes is especially relevant to this dispute about survivorship, since “if survivorship statutes are not siblings of time-bar statutes, they are at least cousins. Together they seek to balance repose and finality with the substantive policies served by enforcement of the cause of action.” *Crabbs v. Scott*, 880 F.3d 292, 295 (6th Cir. 2018) (Sutton, J.) (citing Dobbs’ Law of Torts §§ 241 (Statutes of Limitation: Foundational Principles and Rationales), 372 (Wrongful Death and Survival Actions) (2d ed. 2017)).

Adopting the civil survival statute so that the State may not terminate both Sedley Alley’s life and his ability to seek exoneration via DNA testing not only advances the Act’s purpose of vindicating the wrongfully convicted, but it specially

furtheres the Act’s substantive law enforcement policies and “justice-finding” purpose. 343 S.W.3d at 51. If Sedley Alley did not murder Suzanne Collins, someone else did. The State’s interest in punishing the actual perpetrator would not abate merely because it has put the wrong person to death. Faced with the choice between applying a procedural rule that permits DNA testing versus one that limits DNA testing, the Act’s remedial purpose is best served by applying the rule that permits DNA testing when all of the Act’s enumerated prerequisites are met.¹

Second, the Supreme Court in *Watkins* held that the civil saving statute “is applicable to post-conviction proceedings” where “in the absence of a statute tolling the statute of limitations, application of the statute of limitations to the facts of this case would violate constitutional due process.” *Watkins*, 903 S.W.2d at 305-06. The Supreme Court adopted the procedural rule that would best safeguard individual constitutional rights, and applying the civil survival statutes here would serve the same purpose. As detailed in Section II, *infra* at 29, precluding Alley from bringing this petition through his Estate would run afoul of foundational Due Process principles, as well as Tennessee’s constitutional guarantee that “every man, for an injury done him in his ... reputation, shall have [a] remedy by due course of law, and right and justice administered without sale, denial, or delay.” Tenn. Const. art. I, §

¹ The Supreme Court also looks to why the civil rule is necessary in a particular case. *Whitehead v. State*, 402 S.W.3d 615, 625 (Tenn. 2013) (“Significantly ... in every case in which we have held the statute of limitations is tolled, the pervasive theme is that circumstances beyond a petitioner’s control prevented the petitioner from filing a petition for post-conviction relief within the statute of limitations.” (emphasis omitted)). In this case, Sedley Alley is not here himself to bring the petition because the State executed him in 2006.

17. In keeping with *Watkins*, this Court should apply Tennessee’s civil survival rules to this petition to protect the constitutional rights at stake. *See also Whitehead v. State*, 402 S.W.3d 615 (Tenn. 2013).

Applying Tennessee’s civil survival statute here means that Alley’s Estate may bring this petition for DNA testing under the Act. *See* Tenn. Code Ann. §§ 20-5-101 to 20-5-120. Tennessee Code § 20-5-102 provides that “[n]o civil action ... shall abate by the death of either party, but may be revived; nor shall any right of action arising hereafter based on the wrongful act or omission of another ... be abated by the death of the party wronged.” The State’s sole justification for not applying that provision here is because “[p]ost-conviction proceedings ... are not civil actions.” AR 66. But there are two problems with the State’s rejoinder. First, even if post-conviction proceedings are not civil actions as a general matter, the DNA Act expressly provides rights to obtain DNA testing “[n]otwithstanding ... any other provision of law governing post-conviction relief.” Tenn. Code Ann. § 40-30-303. Thus, the State’s reliance on the general nature and supposed “ordinary rules” for post-conviction relief—even if correct—is misplaced. But second, the State’s argument that post-conviction proceedings are categorically not civil actions is incorrect. *Watkins* holds that post-conviction proceedings are hybrid proceedings subject to the civil rules of procedure under certain circumstances, including the circumstances present here: an underlying statute provides a post-conviction remedy for a purpose that is

undoubtedly served by applying a particular civil rule where applying that rule will best safeguard individual constitutional liberties. *See* Section I.A., *supra* at 16.²

Applying the civil survivorship statute in this case is consistent with other instances where the Tennessee Supreme Court has adopted civil procedure rules when post-conviction statutes are silent. For example, in *State v. Nix*, the Supreme Court recognized that *Watkins* did not decide what standard for incompetency applied in the tolling context and adopted the civil competency standard. 40 S.W.3d 459, 463 (Tenn. 2001), *abrogated by Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 511-12 (Tenn. 2013) (determining that Tennessee Supreme Court Rule 28 § 11, adopted in 2002, expressly provided for a new competency standard and abrogating *Nix*); *see also* Tenn. Code Ann. § 28-1-106 (civil disability statute applied in *Nix*). And in *Reid v. State*, the Supreme Court extended the application of the civil competency standard to whether a petitioner is competent to proceed in a post-conviction action at all. 197 S.W.3d 694, 703 (Tenn. 2006); *see also id.* at 704 (rejecting criminal preponderance of the evidence standard). Another post-conviction procedural rule was at issue in *Graham v. State*. 90 S.W.3d 687 (Tenn. 2002). There, the Supreme Court faced the question of when the statutory 10-day period began to run for filing an appeal of the denial of a motion to reopen a post-conviction proceeding. *Id.* at 689-90 (citing Tenn. Code Ann. § 40-30-217(c)). The post-conviction statute did not “specifically identify”

² Moreover, the Supreme Court has recognized that, if anything, post-conviction proceedings require heightened procedural protections, not lessened ones. *Whitehead*, 402 S.W.3d at 627 (“[P]ost-conviction proceedings, unlike other ordinary civil proceedings, warrant heightened due process protections.” (collecting cases)).

when the 10-day period began. Since Rule 28 “provides that neither the rules of civil procedure nor the rules of criminal procedure apply to post-conviction petitions,” the Supreme Court had to “decide the issue without any controlling statutory language or rule of procedure.” *Id.* at 690. The Supreme Court stated that the rule “should be applied in a manner that promotes fairness, consistency, and uniformity,” and “to promote these principles” the Court “cho[se] to borrow the filing framework established by Tenn. R. Civ. P. 58.” *Id.* And in yet another case addressing the timeframe for reinstating a withdrawn petition for post-conviction relief, the Tennessee Supreme Court simply exercised its “inherent power to adopt appropriate rules of procedure” when a post-conviction “issue arises for which no procedure is specifically prescribed” in order to fashion an appropriate time period. *Pike v. State*, 164 S.W.3d 257, 266 (Tenn. 2005) (rejecting rule governing guilty-pleas and adopting a 30-day rule).

Put simply, the Tennessee Supreme Court has a long history of applying civil rules of procedure in the post-conviction context when the purpose of the post-conviction remedy and constitutional interests require it. Relying on the inherent “criminal” or “civil” nature of a post-conviction proceeding, as did the court below, is a complete red-herring. *See Whitehead v. State*, 402 S.W.3d 615, 627 (Tenn. 2013). The Tennessee Supreme Court’s precedents do not make such a categorical distinction.

B. No Tennessee Authority Compels a Different Result.

No Tennessee authority compels a different result than that Tennessee’s civil survivorship statutes apply to Alley’s petition for DNA testing, which he brings

through his Estate. The lower court concluded otherwise only by starting from a faulty premise: that the civil survivorship statute presumptively did not apply and that affirmative legislation is required before the civil rule can be employed. AR 162. Rather than undertake the careful analysis prescribed by *Watkins*, the court simply observed that “none of the other statutory provisions cited in [the Estate’s] various filings reference post-conviction actions.... In the Court’s view, had the General Assembly—or the Tennessee Supreme Court, in Rule 28—intended for someone to be able to file a motion for post-conviction DNA testing on behalf of a statutorily eligible person who had died, such a provision would have been placed in the appropriate statutes.” AR 160. And because “such a provision was not included in the statutes or Rule 28, this Court must presume that the drafters did not intend to confer such a right.” AR 160-161; *see also id.* at 162 (“[N]either the survivability statutes nor other authority interpreting these statutes designates a post-conviction matter as one which falls within the purview of the civil survivability statutes.”).

The lower court’s interpretive rule was pulled from thin air and runs directly contrary to both the text of the DNA Act and *Watkins*. As to the former, the Act does not suggest that the normal rules of post-conviction relief apply unless the Act specifically provides for something like a right to survivorship; instead, the Act furnishes rights notwithstanding the ordinary rules that govern post-conviction relief. As to the latter, *Watkins* employed no such presumption, and the *Watkins* framework, not any presumption about legislative intent, should guide courts in determining whether the civil rule (or some other rule) applies when a statute is

otherwise silent.³ The lower court failed to conduct the proper analysis under *Watkins*, which, as explained, looks to the purposes of the post-conviction and the constitutional interests at stake. Faithful adherence to *Watkins* demonstrates why the civil survivorship rule applies here.

The lower court was even more obviously wrong to rely on Tennessee’s “General Provisions” of Post-Conviction Procedure (the “post-conviction rules”), *see* Tenn. Code Ann. §§ 40-30-101, *et seq.*, and the Supreme Court’s rules expanding upon them, *see* Tenn. Sup. Ct. R. 28, to prohibit Alley’s Estate from pursuing this petition. AR 160 (“[A] plain reading of the applicable post-conviction statutes and Tennessee Supreme Court Rule 28 reveals that they (statutes and Rule 28) contain no provisions which would allow someone to file a post-conviction action of any kind on behalf of a deceased person.”)

As noted, the Act makes crystal clear that those general provisions for post-conviction relief do not apply under the Act. Indeed, it is not clear that the post-conviction rules or Rule 28 would apply to petitions under the Act even in the absence of that clear *non obstante* clause. The post-conviction rules permit relief to be “granted when the conviction or sentence is void or voidable because of the

³ With respect to the limitations statute at issue in *Watkins*, the General Assembly subsequently amended it to *expressly* state that the “statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity.” *Seals v. State*, 23 S.W.3d 272, 276 (Tenn. 2000) (quoting Tenn. Code Ann. § 40-30-102(a)). Thus, the lower court’s presumption that affirmative legislation is required before the civil rules apply turns the inquiry on its head; in the context of limitations statutes, lawmakers must expressly state when the civil rules do *not* apply. *See id.* So too here.

abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The Supreme Court’s Rule 28 further elaborates that “[a] petition for post-conviction relief is an application to the court, filed by or on behalf of a person convicted of and sentenced for the commission of a criminal offense, that seeks to have the conviction or sentence set aside or an appeal granted on the ground or grounds that the conviction or the sentence ... violated the state or federal constitution.” Tenn. Sup. Ct. R. 28(2)(A). Petitions for DNA testing do not fit those parameters as the relief a petition seeks is merely DNA testing, not that any conviction or sentence be rendered void. Tenn. Code Ann. § 40-30-303. But given the Act’s *non obstante* clause, any reliance on the general rules of post-conviction relief to restrict the right of survivorship under the Act is clear legal error.

Nor does the Tennessee Supreme Court’s decision in *Carter v. Bell*, 279 S.W.3d 560 (Tenn. 2009), reject the application of civil survivability to petitions under the Act. The State has argued that *Watkins* is no longer good law in light of *Carter*, and the lower court presumably agreed, citing *Carter* substantively in its opinion but not *Watkins*. AR 161-62; *see also* AR 161-62 (citing *Carter* for the proposition that “statutes, court rules, and case law relevant to civil proceedings are generally inapplicable to post-conviction proceedings.”). But the Supreme Court has relied on *Watkins* after *Carter*, including in 2013 when the Supreme Court cited *Watkins* for the proposition that post-conviction proceedings are a “hybrid” civil and criminal “affair.” *Whitehead*, 402 S.W.3d at 627. In the same case, the Supreme Court cited

Carter for the consistent rule that “post-conviction proceedings are deemed to be ‘civil’ proceedings for some purposes. *Id.* at 626. That is directly contrary to the State’s misleading description of *Carter* as categorically holding that “[p]ost-conviction proceedings ... are not civil actions.” AR 66. Moreover, whatever is true of post-conviction proceedings generally, a petition for relief under the DNA Act does not automatically produce relief from the conviction and thus is less “criminal” and more “civil” than a typical hybrid petition for post-conviction relief.

Carter’s actual holding does not conflict with *Watkins* at all. In *Carter*, a habeas petitioner had asked the court of appeals to transfer his habeas case to a different court to be construed as a petition for post-conviction relief. *Carter*, 279 S.W.3d at 563. The Supreme Court held that the relevant transfer statute, Tenn. Code. Ann. § 16-1-116, “permits transferring an ‘original civil action’ only when the court in which it was filed ‘determines that it lacks jurisdiction,’” and that statutory condition could not be met “on its face” because the court *had* jurisdiction over *Carter*’s habeas petition. *Carter*, 279 S.W.3d at 564.⁴ The State and lower court are simply incorrect in their broad assertion that civil rules are “generally inapplicable”

⁴ The Supreme Court also said that a post-conviction proceeding was not an “original civil action” under the transfer statute. *Carter*, 279 S.W.3d at 565-66. But whether a post-conviction proceeding is formally an “original civil action” under the transfer statute (or, to take the other example from *Carter*, for purposes of the jurisdiction of the court of appeals) has no bearing whatsoever on whether rules of civil procedure can be applied to post-conviction proceedings in some contexts, as the Supreme Court has held in numerous cases. *Cf id.* at 565 (“[A] proceeding that is ‘civil in nature’ is not necessarily a ‘civil action’”).

to post-conviction proceedings, AR 162, as evidenced by the many Tennessee Supreme Court cases that would have come out differently if that were actually true. And, of course, the “generally applicable” rules for post-conviction relief are themselves inapplicable under the text of the Act itself.

The lower court also reasoned incorrectly that the Act prohibited Alley’s Estate from filing a petition for DNA testing because it uses the word “person” to describe who may file a petition. The Act allows a “person convicted of and sentenced for ... first degree murder” to file a petition, and as shown, Tennessee’s survivability statutes demonstrate that causes of action that belong to a natural “person” survive that person’s death and pass to the estate under the circumstances here. Tenn. Code Ann. §§ 20-5-101, *et seq.*; *supra* Section I.A. at 16. When an action survives death, “the suit [is] revived in the name of the persons entitled to *stand in the place*” of the decedent. *Holmes v. Dorris*, 399 S.W.2d 512, 516 (Tenn. Ct. App. 1964) (emphasis added). The State argued below, and the lower court agreed, that the Act’s use of the phrase “a person convicted of and sentenced” unambiguously excluded “anyone [from] bring[ing] a DNA testing action on such a person’s behalf.” AR 160 (lower court); AR 63-64 (State’s argument). That position ignores both the long tradition dating to 17th Century England of habeas petitions being brought by a next friend, *see Whitmore v. Arkansas*, 495 U.S. 149, 161-63 (1990); *see also Holton v. State*, 201 S.W.3d 626, 633-35 (Tenn. 2006), and how survivorship works.

When a cause of action survives death, the person entitled to pursue the survived action *stands in the place* of the decedent and it is the *decedent’s* entitlement

to relief that is adjudicated. It is irrelevant that neither April Alley nor the Estate were “convicted of and sentenced for ... first degree murder,” because no one disputes that Sedley Alley *was*. The right to petition for DNA testing is *his* right under the Act, and by operation of Tennessee law, Alley’s Estate is entitled to pursue it. Statutes do not say that any “person *or his Estate*” may pursue a cause of action. That would be redundant. For the same reason, the Davidson County Probate Court had no trouble concluding that “April Alley, as personal representative” of Alley’s Estate “is granted authority to exercise any and all rights of Decedent as provided in the Post-Conviction DNA Analysis Act of 2001,” with April Alley “being substituted for the Decedent and exercising Decedent’s legal rights as a ‘person’ as provided in Tennessee Code Annotated Section 40-30-303.” Supp. R. 60.

For similar reasons, the lower court’s analysis of “standing-related case law” was in error. AR 171-172. As to constitutional standing, the lower court concluded that the Estate could not show a “distinct and palpable injury,” or “[a] causal connection between the claimed injury and the challenged conduct,” because although “Mr. Alley can be said to have suffered a distinct and palpable injury in fact for standing purposes, Petitioner has not.” AR 171. But April Alley and the Estate need not show a “distinct and palpable injury” of their own because they *stand in the shoes* of Sedley Alley, and the injury that grants the Estate standing is his. The same is true in the well-established context of next-friend habeas petitions. *Whitmore*, 495 U.S. at 163 (“A ‘next friend’ ... simply pursues the cause on behalf of the detained person, who remains the real party in interest.”). The lower court further erred in

concluding that the Estate had not made “[a] showing that the alleged injury is capable of being redressed by a favorable decision of the court.” AR 171 (quoting *ACLU v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006)). The Estate seeks DNA testing, and a favorable decision will permit the Estate to obtain DNA testing. That is all that the constitutional standing doctrine requires. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 n.8 (1992) (observing that an individual can “enforce procedural rights ... so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing”); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (“[A] person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” (emphasis omitted)).

None of the counterarguments advanced by the State or the lower court compels this Court to do anything other than what *Watkins*’ reasoning requires: apply Tennessee’s civil survivability statutes to petitions for DNA testing under the Act.

II. THE U.S. AND TENNESSEE CONSTITUTIONS REQUIRE THAT THE ESTATE BE PERMITTED TO PETITION FOR DNA TESTING UNDER THE ACT.

If the Court concludes that the Act is incapable of vindication here, then the Act would be unconstitutional as applied in this case. *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 712 (Tenn. 2017) (observing that as-applied challenge is not to the statute “as written” but instead “how it operates in practice”); *Howell v. State*, 151 S.W.3d 450, 465 (Tenn. 2004) (rejecting “clear and convincing” standard and adopting preponderance of the evidence standard even though it “is at odds with

the standard set out in [the] Tennessee Code” because the statute as written “would be unconstitutional in its application”); *Burford v. State*, 845 S.W.2d 204, 205 (Tenn. 1992) (concluding that “while the statute of limitations is not unconstitutional on its face, it is unconstitutional as applied in petitioner’s case because it denies him due process under the state and federal constitutions.”).

Although there may not be a free-standing constitutional right to post-conviction access to DNA testing, if a state chooses to provide DNA testing, the procedures provided must comply with constitutional guarantees. Because Tennessee has chosen to provide a post-conviction procedural right to seek DNA testing, the procedures available for vindicating that right must conform with the federal and state constitutions. *Whitehead*, 402 S.W.3d at 622-23; *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000); *see also Dist. Attorney’s Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 89-90 (2009) (Stevens, J., dissenting) (citing *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)). Here, the Act would violate both constitutions if interpreted to deny the Estate the right to bring this petition and seek to determine whether the State executed an innocent person, including Due Process rights that both constitutions guarantee, as well as the Tennessee Constitution’s special protection for reputational interests. In all events, the weighty constitutional concerns that would be implicated by denying the Estate’s petition here require this Court to construe the statute to avoid those constitutional concerns, under both Tennessee and federal law.

A. The Due Process Clause Requires That Alley’s Estate Be Permitted to Petition for DNA Testing on Alley’s Behalf.

When lawmakers provided a mechanism for post-conviction DNA testing, they created rights associated with that procedure, and those rights are entitled to the constitutional protections of due process under both the federal and Tennessee constitutions. A “state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.” *Osborne*, 557 U.S. at 68. Here, both property and liberty interests flow from the DNA Analysis Act, and the Act cannot be applied to deprive Sedley Alley (or his Estate) of those interests without due process of law.

1. Procedural Due Process Requires Adequate Protection of the Property and Liberty Interests At Stake.

a. The Act creates a property interest.

The Act creates no fewer than three property interests, each protected by the federal and Tennessee constitutions. The State cannot deprive Alley, or his Estate, of these interests without satisfying due process.

First, Alley had a property interest in his reputation that passed to his Estate. The Tennessee Constitution expressly places reputation alongside other quintessential forms of property, making a Tennessean’s reputation one of the most important possessions he owns, akin to “land,” “goods” and even his “person.” *See* Tenn. Const. art. I, § 17 (“[A]ll courts shall be open; and every man, for an injury done him in his lands, goods, person[,] or reputation, shall have [a] remedy by due course of law, and right and justice administered without sale, denial, or delay.”). This state-created reputational interest, like all state-created property rights, is alone sufficient

to require the State to demonstrate the adequacy of the procedures used to deprive Alley (and now his Estate) of the opportunity to clear his name as Tennessee law allows. *See* Section II.C., *infra* at 46.

Second, Alley had a property interest in the procedural right created by the DNA Analysis Act. Under Tennessee law, it is “well settled that a vested right of action is as much property as are tangible things and is protected from arbitrary legislation.” *Morris v. Gross*, 572 S.W.2d 902, 905 (Tenn. 1978). “Such a vested right of action enjoys the full protection of the due process clauses of the Federal and State Constitutions.” *Id.* Before extinguishing Sedley Alley’s property interest in his cause of action under the DNA Analysis Act, which is not an ordinary post-conviction remedy focused only on release, the State must employ procedures that comport with due process. *Id.* (“[T]he legislature ordinarily may change existing remedies for the enforcement of rights, including those which have already vested, without denying due process of law, provided, a substantial remedy to redress that right by some effective procedure is given.”).

Third, Alley had a property interest in non-discretionary exoneration compensation that is inextricably linked to his entitlement to petition for DNA testing. Whether a state statute “provides a protectible entitlement must be decided on a case-by-case basis.” *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981) (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979)). Particularly important is whether the statutory regime contains a clear standard to determine eligibility, as well as whether the statutory regime creates a discretionary

or mandatory decision framework. *Id.* 466-467 (contrasting statute requiring that government “shall” do something “unless” certain criteria are met with a statute “having no definitions, no criteria, and no mandated ‘shalls,’ [which] creates no analogous duty or constitutional entitlement”).

Tennessee’s exoneration compensation regime creates a “protectible entitlement.” *See id.* at 466. Under Tennessee’s exoneration compensation statute, “any person” may seek exoneration. Gubernatorial exoneration applies “to any person the governor finds did not commit the crime for which the person was convicted.” Tenn. Code Ann. § 40-27-109(a). Upon exoneration, the Board of Claims “[s]hall” hear a claim and award exoneration compensation “not to exceed ... \$1,000,000.” Tenn. Code Ann. § 9-8-108(a)(7). In that way, exoneration compensation is mandatory, not “simply a unilateral hope.” *Dumschat*, 452 U.S. at 465. That contrasts with clemency, an entirely separate process under Tennessee law. *Compare* Tenn. Code Ann. § 40-27-101 (clemency), *with* § 40-27-109 (exoneration). The governor’s clemency is a discretionary power, affording the governor broad power “to grant reprieves, commutations[,] and pardons in all criminal cases after conviction,” with virtually no limitations. Tenn. Code Ann. §§ 40-27-101, *et seq.* Exoneration and its related compensation, however, “shall” be awarded where the governor determines a convicted individual’s innocence, and is therefore particularly defined in state law by clear eligibility standards and mandatory directions to provide the entitlement. Although the General Assembly was under no obligation to provide such an entitlement, once it did, the State cannot deprive Alley of the entitlement to

exoneration compensation without due process. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 556-557 (1974) (holding that Due Process Clause applied to “insure that [a] state-created right is not arbitrarily abrogated”).

That due process obligation is no less applicable to Alley’s Estate. In fact, Tennessee’s exoneration compensation statute contemplates a premature death, and provides that exoneration compensation flows to an exoneree’s heirs. Tenn. Code Ann. § 9-8-108(a)(7)(C).⁵

The Act creates each of the property rights described—an individual property right in reputation that flows from the Tennessee Constitution itself, a property right in the Act’s cause of action, and a property right in exoneration compensation—and under the federal and Tennessee constitutions, those property rights cannot be denied without due process of law.

b. The Act creates a liberty interest.

Alley also possessed during his lifetime “a liberty interest in demonstrating [his] innocence with new evidence under state law,” which the federal and Tennessee constitutions protect. *Osborne*, 557 U.S. at 68. Although states may not be required to provide any post-conviction procedures to establish innocence, once a state elects

⁵ Just as the right to exoneration compensation flows to an individual’s estate under Tennessee law, so too does the obligation to pay restitution. *See State v. Al Mutory*, 581 S.W.3d 741, 749 (Tenn. 2019). It would be especially problematic to cut off the possibility of exoneration after death (through an action by the estate) while simultaneously maintaining the obligation for the estate to pay restitution. *Cf. id.* at 756-57 (Lee, J., concurring in part and dissenting in part) (“[A] deceased defendant’s family or estate may be saddled with fines, fees, restitution, or other civil consequences of the conviction—even when the conviction is wrongful.”).

to provide such a post-conviction proceeding, that proceeding creates a liberty interest that itself “beget[s] yet other rights to procedures essential to [its] realization.” *Id.* The Tennessee General Assembly has given convicted individuals the right to prove their actual innocence in court even after exhausting ordinary criminal appeals and other as-of-right post-conviction procedures. Tenn. Code. Ann. § 40-30-117. The Act provides an essential mechanism for obtaining evidence necessary to prove oneself actually innocent and vindicate the liberty interest created by Tennessee post-conviction procedures.

The procedures Tennessee provides for accessing DNA testing through the Act may well represent the only means of pursuing the right to prove one’s innocence and removing the stigma of a conviction for first-degree murder. Those procedures must satisfy the demands of the due process clause. “[W]here the State attaches ‘a badge of infamy’ to the citizen, due process comes into play.” *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” procedural protections “are essential.” *Id.*; see also *Paul v. Davis*, 424 U.S. 693, 708 (1976) (observing that “governmental action” which deprives an “individual of a right previously held under state law,” combined with stigmatization, infringes a liberty interest). Under the specific circumstances of this case, in which Alley was wrongly denied access to DNA testing that might prove his innocence and safeguard other protectable property interests, the liberty interest Alley possessed during his lifetime cannot be afforded due process without permitting his Estate to petition for the DNA

testing Alley was wrongly denied. The State not only stigmatized the Alley name, but also deprived Alley and his Estate of other property and liberty interests.

- c. Whether framed as a property or liberty interest, the Estate's interest in bringing this petition is significant, the risk of erroneous deprivation is high, and the State's contrary interest is minimal.**

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *see also* Tenn. Const. art. I, § 8 (“[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.”). The Tennessee Supreme Court has observed that “[a]lthough the terms on occasion have been viewed as synonymous, the United States Supreme Court’s interpretations of the United States Constitution establish a minimum level of protection while this Court, as final arbiter of the Tennessee Constitution, is always free to extend greater protection to its citizens.” *Seals v. State*, 23 S.W.3d 272, 277 (Tenn. 2000) (internal citation omitted).

“Due process is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 277 (citations omitted). In determining what procedural protections a particular situation demands, courts consider three traditional factors, all three of which establish that the Estate must be allowed to bring this petition: (1) the private interests at stake are weighty; (2) the procedures will result in the erroneous deprivation of those interests if the Estate is not allowed

to proceed, making the small procedural change advocated by the Estate significantly valuable; and (3) the State’s interest in opposing the Estate’s opportunity to bring this petition is nearly non-existent, while the expense of testing is actually non-existent. *See id.* (citing *Mathews*, 424 U.S. at 335, to evaluate post-conviction procedures).

First, the weightiness of the private interests at stake in obtaining DNA testing under the Act cannot be overstated. *See Mathews*, 424 U.S. at 335. In many circumstances, DNA testing is simply the only realistic way that an individual wrongly convicted of a crime may hope to prove his innocence. And the evidence shows that wrongful convictions do occur, as demonstrated by exonerations throughout the country, including 22 in Tennessee.⁶ Those exonerations show that

⁶ *See National Registry of Exonerations*, Mich. State Univ. Coll. of Law, <https://bit.ly/314sj7j> (last visited August 17, 2020) (“National Registry of Exonerations”); *see also DNA Exonerations in the United States*, The Innocence Project <https://bit.ly/2YbzUyV> (last visited August 17, 2020) (“DNA Exonerations in the United States”). Since 1989, there have been 2,658 proven wrongful convictions in the United States, including 21 exonerations of inmates who served time on death row. *See National Registry of Exonerations; DNA Exonerations in the United States*. Post-conviction DNA testing, specifically, has proven the innocence of 375 wrongly convicted individuals. *See DNA Exonerations in the United States*.

In addition, the relief the Alley Estate seeks and is entitled to under the DNA Analysis Act and *Powers v. State*—DNA testing and comparison to the DNA databanks—has proven overwhelmingly effective in obtaining exonerations and identifying the true perpetrator of the crime. An analysis of the first 115 DNA exonerations revealed that, of the 71 profiles that were entered into DNA databanks, 41 cold hits identified a new suspect in the crime. *See Maurice Possley & Steve Mills, Crimes Go Unsolved as DNA Tool Ignored*, Chi. Tribune, Oct. 26, 2003, at A1. For nearly half of the DNA exonerations to date (180 exonerations), the test results identified the real perpetrator, through a CODIS hit or other post-DNA investigation. “Those actual perpetrators went on to be convicted of 152 additional violent crimes, including 83 sexual assaults, 36 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.” *DNA Exonerations in the United*

innocent people do sometimes confess to crimes they did not commit, a phenomenon that has now been studied and well-documented.⁷ The private interest in obtaining access to the only evidence that might prove one's innocence is weighty indeed. In this case, it is too late for Sedley Alley to be freed from prison, but the incalculable damage to his reputation remains and can be remedied, and if DNA testing exonerates him, Alley's Estate will be entitled to compensation up to the significant sum of \$1,000,000.

Second, there is a high risk of deprivation if the Estate is not permitted to proceed with this petition, and the procedural safeguard advocated by the Estate is

States; Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 5 (2011).

⁷ Nearly a third of DNA exonerations involve innocent people who were wrongly convicted based on a confession that turned out to be false. *See* DNA Exonerations in the United States. That number more than doubles when wrongful convictions involving murders are considered in isolation. *Id.* Of those exonerations involving DNA evidence, 102 involved false confessions. *Id.* The real perpetrator ultimately was identified in 76 (75%) of the investigations. *Id.* These individuals had committed 48 additional crimes (for which they were ultimately convicted) while the wrongfully convicted person remained imprisoned, including 25 murders, 14 rapes, and 9 other violent crimes. *Id.*

False confessions can be difficult to identify. Studies have shown that false confessions are often richly detailed and contain facts about the crime that are verifiable, accurate, and not in the public domain, through a process called "contamination," where police communicate or "feed[]" specific facts of a crime to a suspect, inadvertently or deliberately, through leading questions and assertions, before or during an interrogation. Brandon L. Garrett, *The Substance of False Confessions*, 62 *Stan. L. Rev.* 1051, 1053 (2010); Saul Kassin, *Why Confessions Trump Innocence*, 67 *Am. Psychologist* 431, 439-40 (Apr. 30, 2012), <https://bit.ly/315GSas>. These confessions play outsized roles in the ultimate conviction because confessions are highly persuasive to juries, most of whom "do not understand the influence of police interrogation practices, and have only a rudimentary understanding of the dispositional and situational factors that would lead someone innocent to confess." *Id.* at 434.

highly valuable. *See Mathews*, 424 U.S. at 335. This may well be the last opportunity for the Estate to obtain DNA testing of the evidence used in Alley’s case. The Estate simply advocates application of the civil survival statute. Precluding the Estate from bringing this petition will almost certainly deprive Alley (though his Estate) from ever obtaining exculpatory results through DNA testing, and with it, any possibility of vindicating his reputational, property, and liberty interests. By contrast, permitting the Estate to bring the petition will entirely safeguard each of these vital interests.

Third, the government’s interest also favors the Estate’s ability to petition for DNA testing. The government has an interest in accurately identifying the perpetrators of crimes, particularly where DNA testing could reveal a perpetrator at large. *Powers*, 343 S.W.3d at 51. Moreover, the “fiscal and administrative burdens” that the Estate’s petition would entail are small, being only the cost of testing the evidence relevant to Sedley Alley’s prosecution and conviction. *Mathews*, 424 U.S. at 335; *see also Little v. Streater*, 452 U.S. 1, 15-16 (1981) (a state’s “monetary interest” in the costs of blood testing “is hardly significant enough to overcome private interests as important as those” presented by a false paternity conclusion).⁸ The procedural rule advocated by the State—that the ability to petition under the Act dies with the prisoner—has essentially no value to the State because it stands at cross-purposes with the Act itself.

⁸ Moreover, it is not even clear that there would be *any* cost since the Estate has offered to pay for the testing itself.

Weighing the private interests at stake in light of the high risk of deprivation, the value of the procedural safeguard sought by the Estate, and the State's minimal interest in opposing this petition reveals that denying the Estate the right to petition here cannot comport with the constitutional demands of due process. *Watkins*, 903 S.W.2d at 306-07 ("The nature of the private interest at stake [determines] the weight to be given the private interest as against the governmental interest in determining what process is due."); *see also Little*, 452 U.S. at 15-16. The Estate simply advocates adoption of the procedural civil survivorship rule so that the cause of action survives Sedley Alley's death and passes to his Estate rather than being extinguished upon his death, as advocated by the State.

2. The State's Opposition To DNA Testing in This Case Offends Other Deeply Rooted Due Process Principles

Two other deeply rooted Due Process principles underscore the constitutional problems with allowing the State in this case to extinguish Sedley Alley's ability to seek exoneration by extinguishing his life.

First, the Due Process Clause generally prohibits the government from skewing procedures in its own favor or feathering its own nest. *See, e.g., Tumey v. Ohio*, 273 U.S. 510, 531 (1927); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972); *see also Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972). That would run afoul of the principles that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome," as well as the ideal that "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136 (1980) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). But yet here, the State's

position would foreclose any possibility that Alley could demonstrate that the State convicted the wrong person and executed an innocent man. Few issues are more important to debates over the death penalty than the extent to which it leads to the execution of the innocent. The State should not be able to shield its implementation of the death penalty from this most fundamental scrutiny by depriving the condemned and his estate from seeking exoneration. Simply put, by executing an individual the State should not simultaneously cut off his route to exoneration, especially when the net result may be to perpetrate the most serious of Due Process violations—the execution of the innocent—without detection.

Second, Due Process also prohibits the government from undertaking a course of action that “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” or “transgresses any recognized principle of fundamental fairness in operation.” *Osborne*, 557 U.S. at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). Given the State’s role in both improperly denying Alley’s access to DNA testing during his life and then executing Alley before the Tennessee Supreme Court corrected the error, this case presents the rare instance where the State’s actions in opposing DNA testing have violated this core promise.

It is a fundamental premise of our legal tradition that wrongdoers should not benefit from their wrongs. While on death row, Sedley Alley tried not once but twice to vindicate his right to petition for DNA testing. The State advocated for and obtained an incorrect ruling on the meaning of the DNA Analysis Act, with the result

being that Sedley Alley was executed without obtaining testing of the evidence that could have established that he was innocent of murdering Suzanne Collins. If Alley were alive today he would be able to vindicate his rights under the Act *himself* under the correct interpretation of the law, but the State extinguished that possibility by executing him. And having executed Alley, the State now points to his execution as the sole ground for opposing the Estate's ability to petition under the Act. That argument is conscious-shocking and inconsistent with basic notions of fairness older than, but protected by, the Due Process Clause. Whatever may be true of petitioners who died of natural causes or slept on their rights (rather than having them denied based on State arguments ultimately deemed erroneous), denying the Estate the ability to vindicate the Act would plainly violate Due Process.

B. The Tennessee Constitution's Reputational Guarantee Requires That the Estate Be Permitted to Petition for DNA Testing on Alley's Behalf.

Separately, the Tennessee Constitution protects an individual's reputation alongside other forms of property and bodily integrity. That reputational protection requires the Estate to be permitted to bring this petition on Alley's behalf under the unique and extraordinary circumstances of this case.

The Tennessee Constitution promises that "all courts shall be open; and every man, for an injury done him in his lands, goods, person[,] or reputation, shall have [a] remedy by due course of law, and right and justice administered without sale, denial, or delay." Tenn. Const. art. I, § 17. The framers of the Tennessee Constitution were heavily influenced by the Pennsylvania Constitution, and like many other provisions of the Tennessee Constitution, this provision has its origins in the

Pennsylvania Constitution, which contains the same language. Pa. Const. art. I § 1; *see generally State ex rel. Haynes v. Daugherty*, 2019 WL 4277604, at *6 (Tenn. Ct. App. Sept. 10, 2019) (“When Tennessee held its constitutional convention in 1796, a mere six years [after adoption of the Pennsylvania Constitution], 24 of the Tennessee delegates were former residents of either Virginia or Pennsylvania, and at least five of the delegates from Pennsylvania served on Tennessee’s drafting committee. While no records were kept of the committee’s deliberations concerning Tennessee’s Bill of Rights, . . . a textual analysis readily reveals the influence of the Pennsylvania Constitution.” (footnote omitted)), *appeal denied*, (Feb. 19, 2020). Tennessee courts have looked to Pennsylvania decisional law when construing identical constitutional provisions. *See, e.g., State v. Marshall*, 859 S.W.2d 289, 294 (Tenn. 1993) (“There is no indication in the journals chronicling the historical development of the Constitutions of Tennessee, nor in any prior Tennessee Supreme Court cases, that the delegates to Tennessee’s Constitutional Convention in 1796 intended, when they adopted, verbatim, the language that was contained in [a specific article] of the Pennsylvania Constitution of 1790, that such language have any meaning other than that which had been, and continues to be, attributed to it in the context of the Pennsylvania Constitution of 1790.”); *State v. Deuter*, 839 S.W.2d 391, 396 (Tenn. 1992) (looking to Pennsylvania decisional law); *Mayhew v. Wilder*, 46 S.W.3d 760, 772 (Tenn. Ct. App. 2001) (same); *Moncier v. Harris*, 2018 WL 1640072, at *6 (Tenn. Ct. App. Apr. 5, 2018) (same), *appeal denied*, (Aug. 10, 2018).

The Pennsylvania Constitution, like the Tennessee Constitution, explicitly references “reputation,” making it a “fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection.” *R. v. Dep’t of Pub. Welfare*, 636 A.2d 142, 148-149 (Pa. 1994); *In re J.B.*, 107 A.3d 1, 16 (Pa. 2014) (collecting cases). Those who wrote and ratified the Tennessee and Pennsylvania Constitutions likely recognized that “[w]hile reputational harm in isolation may appear abstract, such injury can be the occasion for more concrete harms.” *Schanne v. Addis*, 121 A.3d 942, 946 n.1 (Pa. 2015). Both founding documents place “reputational interests on the highest plane, that is, on the same level as those pertaining to life, liberty, and property.” *Am. Future Sys. v. Better Bus. Bureau*, 923 A.2d 389, 395 n.7 (Pa. 2007); *Norton v. Glenn*, 860 A.2d 48, 56 (Pa. 2004) (“The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being”).⁹

Because reputation is a fundamental enumerated constitutional right akin to a property interest, it receives the same constitutional protections as other enumerated rights. Pennsylvania courts apply strict scrutiny to infringements of a person’s reputation. *Pennsylvania Bar Ass’n v. Commonwealth*, 607 A.2d 850, 857 (Pa. 1992). “Strict scrutiny requires that a statute which restricts a fundamental

⁹ The Supreme Court has observed the importance of this intangible property in other contexts. *E.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966) (“Society has a pervasive and strong interest in preventing and redressing attacks upon reputation.”).

right must be justified by a compelling state interest and also be narrowly drawn to express only the legitimate state interests at stake.” *Id.*; see also *City of Memphis v. Hargett*, 414 S.W.3d 88, 102-03 (Tenn. 2013) (same). For example, the Pennsylvania Supreme Court determined that even though state law required mental hospitals to retain all records and no state law provided for expungement when an individual was improperly committed, the Pennsylvania Constitution’s protection of reputation required that such procedures must exist. See *Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978). This Court should apply the same scrutiny here.

The DNA Analysis Act, if interpreted to preclude the Estate from bringing this petition, would impose an unconstitutional limitation on a procedural right that is essential to protecting one’s reputation. Tennessee indisputably denied Alley during his lifetime the DNA testing to which he was entitled on the basis of a legal error, corrected only after the State had executed him. Under those circumstances, no compelling interest justifies denying Alley, through his Estate, the right to petition for DNA testing that could clear his name simply because the State’s execution curtailed the procedural availability of the substantive law meant to protect his reputation. Indeed, the law-enforcement purposes of the Act are *undermined* by such a construction. Article I, Section 17 of the Tennessee Constitution means that established courts must be available to which citizens may resort for the enforcement of rights denied or redress of wrongs done them. *Staples v. Brown*, 85 S.W. 254, 255 (Tenn. 1905). If that promise means anything, it must mean that Alley, now his

Estate, is entitled to the same redress that Alley *himself* was entitled to have during his lifetime, but for Tennessee’s erroneous (then and now) interpretation of the Act.

Sedley Alley was wrongly denied the opportunity to petition for DNA testing and clear his name of a first-degree murder conviction and death sentence. There could be no worse injury to Alley’s reputation and to his family name. This petition may well present the last opportunity to ensure “right and justice administered without sale, denial, or delay,” as the Tennessee Constitution prescribes. There is no better case for this Court to give meaning to the Tennessee Constitution’s guarantee of a remedy for injuries done to reputation, a constitutionally enumerated fundamental right.

C. The Court Need Not Resolve These Constitutional Issues If It Applies the Civil Survivorship Statute as Required By *Watkins*.

“[U]nder Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties. If issues in a case can be resolved on non-constitutional grounds, courts should avoid deciding constitutional issues.” *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995) (citations omitted); *see also New York v. United States*, 505 U.S. 144, 170 (1992) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). Interpreting the Act to prohibit the Estate from bringing this petition would violate both the U.S. and Tennessee constitutions. *See* Sections II.A and II.B, *infra* at 31, 42. At the very least, such an interpretation would raise difficult questions under

both constitutions that this Court would be required to resolve. Because that outcome is not compelled by statute, rule, or precedent, the Court should apply the civil survivorship statute as the Estate advocates, avoiding the need to address the constitutional infirmities that would otherwise arise. *Powers*, 343 S.W.3d at 53; *Owens*, 908 S.W.2d at 926; *see also Watkins*, 903 S.W.2d at 305-06 (conducting statutory analysis first and reaching constitutional issues only as alternative holding). Because the Act is at least susceptible to application of the civil survivorship statute, this Court can and should apply it. *Owens*, 908 S.W.2d at 928 (“[C]ourts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties. In this case, there is a statutory basis for our decision. Thus, resolution of the constitutional arguments is not necessary.”).

CONCLUSION

For the reasons set forth above, this Court should reverse the decision below and permit the Estate to proceed with its petition for DNA testing on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, a true and exact copy of the foregoing was forwarded via email and the Court’s electronic filing system to:

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