IN THE INDIANA

COURT OF APPEALS

CASE NUMBER: _____

DARRYL PINKINS,	)	
	)	LAKE COUNTY SUPERIOR COURT
Petitioner	)	
	)	CRIMINAL DIVISION ROOM 1
v.	)	
	)	CAUSE: 45G01-9001-CF-00005
STATE OF INDIANA,	)	
	)	HONORABLE RICHARD MAROC, JUDGE
Respondent	)	

VERIFIED PETITION FOR PERMISSION TO FILE SUCCESSOR

PETITION FOR POST-CONVICTION RELIEF

Asserting actual innocence and the ability to establish the reasonable probability that the verdict would have been different with newly discovered evidence, Darryl Pinkins, by counsel, Frances Watson, files his **Verified Petition for Permission to File Successor Petition for Post-Conviction Relief,** pursuant to the Constitution of the United States, the Constitution of Indiana, Indiana Rules of Procedure for Post-Conviction Remedies, and Indiana Code 35-38-7 et seq. Attaching and incorporating Exhibits, including the proposed Successor Petition, **Exhibit A**, in support, Darryl Pinkins would show the Court:

1. Darryl Pinkins is held at the Miami Valley Correctional Facility, Carlisle, Indiana, as a result of the challenged convictions. The judgments were imposed by the Lake County Superior Court, Criminal Division One, Crown Point, Indiana, after trial by jury, cause no. 45G01-9001-CF-00005. Pinkins was sentenced for rape, criminal deviate conduct, and robbery, on June 14,

1991. He received forty (40) years for the rape, consecutive to twenty-five (25) years for criminal deviate conduct, and concurrent to ten (10) years for the robbery. The current release date is January 22, 2021.

2. Pinkins appealed, after a delayed *Davis/Hatton*[1] proceeding. The state and federal decisions denying relief are at *Pinkins v. State*, 799 N.E. 2d 1070 (Ind. Ct. App. 2003) trans. denied 812 N.E. 2d 797, March 5, 2004 (**Exhibit B**); habeas corpus denied, *Pinkins v. Davis*, 2005 WL 2128193 (U.S.Dis.Ct. 2005) (**Exhibit C**); affirmed *Pinkins v. Buss*, 215 Fed.Appx.535, 2007 WL 444975 (C.A. 7 (Ind.)) (**Exhibit D**); rehearing denied, *Writ of Certiorari* denied October 1, 2007, 128 S. Ct. 238, 169 L.Ed. 2d 155.

3. Pinkins seeks permission to pursue successor post-conviction legal claims of: 1) newly discovered evidence under Indiana common law and I.C. 35-38-7 et seq., 2) ineffective assistance of appellate and *David/Hatton* counsel under the Constitutions of the United States and Indiana, and 3) violation of due process under the Constitutions of the United States and Indiana and *Brady* precedent.

Actual innocence

4. An essential element of each of the claims is the probability of a difference result, the required showing of harm. TrueAllele interpretation technology has analyzed data in Cellmark Forensics files, Pinkins Case File F901011, Glenn Case File 06-0055, and Glenn Case File FOR 4863. The files exist by virtue of DNA testing in the prior post-conviction actions of Darryl Pinkins and, separately, co-defendant Roosevelt Glenn. Newly discovered DNA technology has dissected the mysteries of the biological mixtures tied to this crime. The resulting math and state-of-the art science exonerate Darryl Pinkins.

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[1] *Hatton v. State*, 626 N.E. 2d 442 (Ind. 1993), trans.denied*; Davis v. State*, 267 Ind. 152, 368 N.E. 2d 1149 (1977). See also Indiana Appellate Rule 37(A).

5. **Dr. Mark Perlin.** The creator of the True Allele interpretation technology, Dr. Mark Perlin, PhD, PhD, MD, founded Cybergenetics in 1994. As detailed in his supporting Affidavit (**Exhibit E**) and Vitae (**Exhibit F**), Dr. Perlin began research work, in 1999, to solve problems of forensic identification associated with DNA mixtures. TrueAllele was conceived with the express purpose of providing definition to complex DNA mixtures, such as the one in this case. Cybergenetics TrueAllele products infer genotypes and match them, extracting considerably more identification information from challenging data. The theory has been extensively peer reviewed in publications, as noted in Dr. Perlin's Affidavit.

6. This DNA interpretative technology has identified, as contributing to the DNA mixtures evidence recovered from the assaults at issue, genetic material from four unknown individuals. The **four unknown** genotypes (major jacket, major sweater, minor jacket-sweater, and minor jacket-jacket) are from individuals **other than** Pinkins, Glenn, the victim, and an individual representing the **5th unknown genotype,** the person who left the hair known as Exhibit 59D.[2]

7. Forensic conclusions as a result of TrueAllele interpretation technology applied to biological evidence have met the reliability hurdles in other jurisdictions, each time offered **by the government** to prove guilt. TrueAllele based analysis was offered as evidence for the first time in a Pennsylvania trial court, in 2009, in the murder trial of Kevin Foley, a former state trooper accused of killing his lover's husband. Admissibility was upheld March 1, 2012, *Foley*

[2] The hair known as Exhibit 59D was found from a combing of the victim. Exhibit 59D was first tested in the Glenn post-conviction action, and a full nuclear profile of an "unknown" was obtained. The genotype of the person who left the hair known as Exhibit 59D is distinct from each of the four genotypes identified by TrueAllele interpretation technology. Note that Exhibit 59D is wholly separate from Exhibit 71A, which is the hair the state erroneously told the jury came from Roosevelt Glenn. Though a nuclear profile was not obtained from Exhibit 71A, mitochondrial DNA testing resulted in an absolute exclusion of Roosevelt Glenn.

v. State of Pennsylvania, 38 A. 3d 882 (2012).

8. In 2014, **prosecution evidence** based on the TrueAllele interpretation technology was admitted as reliable for genotyping identification purposes by trial courts in Ohio and Louisiana. In 2015, a New York trial court also admitted TrueAllele results.

9. California, Louisiana, Maryland, Massachusetts, New York, Pennsylvania, South Carolina, Virginia, Oman, Australia, England and Northern Ireland crime laboratories have purchased the TrueAllele system. Three are currently using the system.

10. **Dr. Greg Hampikian.** Also offered in support of this request to file a successor petition are an Affidavit (**Exhibit G)** and supporting Vitae (**Exhibit H**) of Dr. Greg Hampikian. Dr. Hampikian, PhD, is a professor in the department of Biology at Boise State University in Boise, Idaho, holding a PhD in Genetics, from the University of Connecticut. Dr. Hampikian has held teaching and research positions at The Yale University Medical School, the Centers for Disease Control and Prevention (CDC), the Georgia Institute of Technology, Emory University, and Clayton College and State University. Presently, Dr. Hampikian teaches Forensic Biology, Advanced Genetic Analysis, Biotechnology, Forensic Evidence in Cold Cases, DNA Evidence in Wrongful Convictions, and Genetics and serves as the Director of the Idaho Innocence Project.

11. Dr. Hampikian became aware of the issues tied to the DNA mixture in the Pinkins' case when Dr. Hampikian served as an expert witness, in 2008, to give post-conviction testimony in the case of co-defendant Roosevelt Glenn. *Glenn v. State of Indiana*, (Ind. Ct. of App. 2009) Memorandum Decision (**Exhibit I**). In his post-conviction testimony, in 2008, Dr. Hampikian noted that research in DNA mixtures was advancing. He offered his opinion, based on knowledge available at that time, that the results of the forensic DNA analysis should not be construed as identifying only two unknown persons as contributing to the mixtures.

12. After his 2008 post-conviction testimony in the Glenn post-conviction proceeding, Dr. Hampikian stayed in communication with Frances Watson, the lawyer for Darryl Pinkins and Roosevelt Glenn. As Dr. Hampikian became familiar with the TrueAllele method being developed by Dr. Mark Perlin, he recognized that the True Allele method might achieve yet more defining results from the existing data. Dr. Hampikian was instrumental in connecting Dr. Mark Perlin to Frances Watson, the attorney for Darryl Pinkins (**Exhibit G**).

13. Dr. Hampikian has reviewed the TrueAllele results from the analysis of relevant data from Cellmark Forensics files F901011, FR06-0055, and FOR4863. In Dr. Hampikian's opinion, the whole of the forensic evidence identifies genotypes of five unknown persons (major jacket, major sweater, minor jacket-sweater, minor jacket-jacket, and Exhibit 59D). With scientific certainty, Pinkins was not one of the five persons who assaulted the victim, leaving biological evidence.

Prior Legal Representation

14. Private counsel, William Drozda, represented Darryl Pinkins at the trial level through sentencing, withdrawing on June 14, 1991.

15. Deputy public defender Charles Stewart, Lake County, Indiana (now retired) appeared on July 15, 2001, by appointment, to pursue the direct appeal remedy.

16. With private counsel, Scott King, Pinkins sought to hold the direct appeal in abeyance and seek post-conviction relief alleging ineffective assistance of trial counsel. Leave to proceed with the post-conviction action was granted on June 29, 1992.

17. Private counsel Nick Thiros, Lake County, Indiana, later appeared as substitute counsel in the post-conviction proceeding, from January 31, 1997, through February 7, 2000.

18. Public defender Charles Stewart again was appointed, on February 22, 2000, to

pursue the direct appeal and post-conviction claims.

19. Pro bono co-counsel, Frances Watson, appeared at the evidentiary proceedings on the post-conviction action on April 22, 2002, to assist Charles Stewart, through the IU Wrongful Conviction Clinic, Indianapolis, Indiana.

20. Pro bono IU Wrongful Conviction Clinic attorneys Frances Watson and Victoria Bailey, Indianapolis, Indiana, filed the federal habeas and provided representation in the resulting appeal to the 7th Circuit Court of Appeals, Chicago, Illinois.

21. Pro bono counsel Victoria Bailey appeared in the filing for a Writ of Certiorari to the United States Supreme Court.

22. Pro bono representation in this current action is provided by Frances Watson, Wrongful Conviction Clinic, IU McKinney School of Law, Indianapolis, Indiana.

Issues Previously Litigated

23. The original post-conviction petition was filed December 16, 1992, alleging ineffective assistance of trial counsel (**Exhibit J**). Nine (9) years later, on January 16, 2002, the petition was amended to include an allegation of newly discovered evidence based on retesting of the existing evidence. (**Exhibit K**). After extensive post-conviction testimony, the claims of newly discovered evidence and ineffective assistance of trial counsel were denied in findings and conclusions by the Court on November 25, 2002 (**Exhibit L**).

24. Pinkins appealed, by counsel, Charles Stewart, with the brief filed August 8, 2003, raising three errors on direct appeal and two errors as post-conviction claims. The direct appeal issues alleged were (1) error in broken glass expert testimony, 2) error in accessory liability instruction, and 3) error in patronage of strip bars testimony. The designated "post-conviction" claims were: 1) DNA testing as newly discovered evidence, and 2) ineffective assistance of trial

counsel. The convictions were affirmed December 8, 2003, *Pinkins v. State,* 799 N.E. 2d 1070 (Ind. Ct. App. 2003) trans. den. March 5, 2004 (**Exhibit B**).

25. Pursuing his remedies into federal court, Pinkins filed his habeas on March 4, 2005, raising 1) ineffective assistance of trial counsel, 2) ineffective assistance of appellate counsel, and 3) a due process Brady violation. On August 30, 2005, the U.S. District Court for the Northern District of Indiana denied the writ, finding Pinkins had not met his burden as to the ineffective assistance of trial counsel argument. The latter two claims had not been litigated through one round of state court proceedings and were procedurally defaulted. *Pinkins v. Davis,* 2005 WL2128193 (U.S.Dis.Ct.) (**Exhibit C**).

26. As to the issue of ineffective assistance of trial counsel, by order of May 30, 2006, Pinkins was granted leave to appeal to the 7th Circuit Court of Appeals, with briefing due by July 10, 2006. The appeal was unsuccessful, with the Court defaulting consideration of the sleeping lawyer operative facts, given state *Davis/Hatton* appellate counsel's failure to refer to the sleeping lawyer facts in the Petition to Transfer to the Indiana Supreme Court. *Pinkins v. Buss,* 215 Fed. Appx. 535, 2007 EL444975 (C.A. 7 (Ind.) (**Exhibit D**).

27. An unsuccessful Petition for Writ of Certiorari to the United States Supreme Court sought review of the application of the *O'Sulllivan v. Boerckel,* 526 U.S. 383 (1999) procedural default precedent to prevent consideration of the sleeping lawyer operative facts within Darryl Pinkins' ineffective assistance of trial counsel legal claim.

Facts Common to Legal Claims

28. The facts which support the legal claims are cumulative, including, but not limited to, the proof of a reasonable probability of a different result at any new trial. Forensic evidence not previously presented would be offered in support of these legal claims, as well as the whole

of the records of proceeding from the trial and *Davis/Hatton* action.

29. The crimes of rape, criminal deviate conduct, and robbery at issue occurred in the early morning hours of December 7, 1989, in Hammond, Indiana. The victim has been out drinking with friends. Later that evening, she stopped by the residence of two male friends. On her drive home, around 1:30 a.m., her car was rear-ended. When she exited, she was dragged into another vehicle. Five men took turns assaulting her over the course of the incident. In her first statements to police, she said each man ejaculated (**Exhibit M**).

30. Darryl Pinkins, Roosevelt Glenn, and William Durden were targeted as suspects in these crimes after police traced a pair of coveralls which had been left with the victim. The three men had returned to work at Luria Brothers Steel Mill on Monday morning, December 9, 1989, and reported their coveralls stolen. In addition to Pinkins, Glenn, and Durden, the authorities arrested Jackson and Daniels, who also worked at Luria Brothers. Each of the five men originally arrested were excluded by DNA testing results reported directly to Kim Epperson, eight months after their arrests, in August, 1990 (**Exhibit N**).

31. At the point of the initial DNA exclusions of Pinkins, Durden, and Glenn, authorities knew the three men were together that night. Given that the head hair from the victim's sweater was mistakenly thought to be Glenn's, and the victim had come to the pretrial five months after the arrests and made the only identification, of Pinkins, the state proceeded against Pinkins, Durden, and Glenn, and dismissed Jackson and Daniels.

32. The state obtained convictions against Pinkins and Glenn, as perpetrators of heinous acts, despite the fact that the victim stated each of the men ejaculated and their DNA was lacking in the multiple semen stains tested. According to the prosecution's theory, at trial in 1991, and at *Davis/Hatton* hearing in 2001, the DNA evidence supported the position that Pinkins, Glenn,

Durden and "two unknowns" committed the crimes.

33. In an illogical extension of its argument that the mixture held "two unknowns," the State presented irrelevant serology inclusion evidence, claiming that serology results could establish what DNA could not. When State Police Lab Analyst Kim Epperson told the jury that **general population** serology results linked Pinkins to the stains, and presented a wall-sized chart in support (**Exhibit O**) she knew the evidence was false and misleading because **individually** Pinkins, Glenn, and Durden **had been excluded** from the stains by the DNA testing (**Dr. Hampikian Affidavit, Exhibit G).**

34. Pinkins' trial attorney was William Drozda. He testified at the post-conviction hearing that, at the time of the trial, he was ill with a large polyp in his throat causing extensive, undiagnosed, sleep apnea, depression, and obesity. He medicated himself with No Doz because, "Unless I was actively engaged in following a thought or pursuing an action or both, I may fall asleep." He was particularly "having trouble staying awake during long testimony." Counsel Drozda's theory "was to let all the evidence in." He acknowledged that he did not know the difference between serology and DNA.

35. At the Pinkins' post-conviction evidentiary hearings, in 2002, the November 5, 2001, Cellmark analysis was offered (**Exhibit P**), absolutely confirming and further adding to the exclusions of Pinkins, Glenn, and Durden. If permission to file a successor is granted, in addition to True Allele analysis, Pinkins would offer, for the first time applied to his case, facts demonstrating that a nuclear DNA profile, obtained from an analysis of Exhibit 59D, is of "unknown" origin (**Exhibit Q**) and that post-conviction mitochondrial DNA analysis demonstrated that the head hair said to be Glenn's at Pinkins' trial is absolutely not Glenn's hair (**Exhibit R**).

Newly Discovered Evidence Now Relying on TrueAllele

36. Darryl Pinkins seeks the opportunity to offer the opinion testimony of Dr. Mark Perlin and Dr. Greg Hampikian, based on raw data from existing DNA testing files, to demonstrate actual innocence. TrueAllele interpretation technology is available, reliable, and admissible, and, coupled with the knowledge of the genotype from Exhibit 59D, wholly disputes the claim of "two unknowns."

37. The mixtures of biological fluids from the sweater and jacket cuttings have been decoded. Genotypes of four unknown persons were detected in the mixtures, and two of the four unknowns are capable of data base comparison. In addition, forensic examination has identified the DNA genotype of a fifth unknown, the person who contributed the hair from the combing of the victim, known as Exhibit 59D. The genotype of the person who left Exhibit 59D is distinct from the genotypes of the four unknowns identified as contributing to the mixtures. The five unknown genotypes (major jacket, major sweater, minor jacket-sweater, minor jacket-jacket and Exhibit 59D) are from persons other than Pinkins, Glenn, and Durden, and the victim (**Dr. Perlin Affidavit, Exhibit E**).

38. Darryl Pinkins raised and litigated a newly discovered evidence claim in his prior *Davis/Hatton* state proceeding. In resolving that claim on appeal, this Court found:

> A. DNA Testing
> Pinkins claims that the post-conviction court erred in concluding that DNA testing performed in 2001 did not require a vacation of Pinkins' convictions and sentences. Alternatively, he claims that the test results met the standard for newly discovered evidence that would entitle him to a new trial. In essence, Pinkins maintains that recent technological advances in DNA science have made the 1990 testing obsolete and, therefore, the 2001 testing should have been considered favorable to him.
> With regard to this issue, the post-conviction court made the following findings about the 2001 DNA testing that are supported in the record:

Cellmark Diagnostics DNA analyst, Juliette Harris, testified that in 2001, she compared evidence collected in this case with known standards from the petitioner. She explained that the technology she used, Polymerase Chain Reaction (PCR), enables analysts to obtain DNA profiles from smaller samples of genetic material than the technology that was used when the evidence was originally tested in 1990, using the methodology Restriction Fragment Length Polymorphism (RFLP). After testing all samples and comparing those samples with the known standard from the petitioner, Juliette Harris was able to isolate profiles from only two unidentified males and a female believed to be the victim. She was able to exclude the petitioner's DNA profile from the DNA profiles she had isolated for every sample except one. The DNA sample from which the petitioner could not be excluded was scientifically insignificant since Juliette Harris could not do a complete comparison on that sample. She concluded that her results were essentially the same as the original 1990 results. Juliette Harris further testified that the DNA results were neutral in that they could neither include nor exclude the petitioner as one of the perpetrators of the assaults on M.W. Juliette Harris also testified that the DNA evidence was neutral, since five men assaulted M.W. and only two DNA profiles in addition to M.W.'s were developed.
Appellant's App. p. 789.

Although Pinkins maintains that the DNA testing conducted in 2001 should have been considered favorable to him, Indiana Code section 35-38-7-19 dictates that the results must be favorable not the fact that the science of the testing has become more advanced. Specifically, the statute provides that a new trial may be ordered "if the results of post-conviction DNA testing and analysis are favorable to the person who was convicted of the offense." (Emphasis added). If the statute provided otherwise and permitted the scientific procedure alone to satisfy the standard, a DNA scientist could simply testify that a method performed in the original testing had been superseded, and the petitioner could then be afforded a new trial without any additional showing.
As recounted above, Harris testified that the results of the 1990 testing and the 2001 testing were "basically" the same. PCR Tr. p. 200, 217. That is, the DNA tests showed that Pinkins could be neither included nor excluded as one of M.W.'s assailants. That said, Pinkins has failed to demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.
We also reject Pinkins' contention that the 2001 DNA testing results constituted newly discovered evidence. To prevail on such a claim, a defendant must establish the following requirements: (1) the evidence was not available at trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result. Godby v. State, 736 N.E.2d 252, 258 (Ind. 2000).

> In resolving this claim, we set forth the post-conviction court's findings in addition to those that are quoted above:
> The results of the DNA re-testing done by Cellmark Diagnostics in 2001 fail to meet the standard for newly discovered evidence which would entitle the petitioner to a new trial. Notwithstanding the improved DNA testing procedure which enables analysts to detect DNA profiles from smaller samples of genetic material, the 2001 results are consistent with the 1991 results which were admitted as evidence at the petitioner's trial. It is the result of the DNA testing, not the process used to obtain the result, that is material to the petitioner's guilt or innocence. In both the 1991 and the 2001 tests, only two DNA profiles were isolated in addition to the victim's. Thus, the 2001 results are merely cumulative evidence. Moreover, it cannot be said that production of the 2001 results would probably produce a different verdict. It is undisputed that M.W. was assaulted by five men. Using existing technology, the DNA profiles of the other assailants cannot be isolated. Accordingly, the 2001 results are consistent with the jury's conclusion that the petitioner was one of five men who assaulted M.W. Evidence of two unidentified DNA profiles cannot exonerate the petitioner.
> Appellant's App. p. 793-94.
>
> Pinkins raises the same arguments with respect to newly discovered evidence as he did in the previous claim regarding the subsequent DNA testing. Even if it could be assumed that some of the scientific procedures proffered at the original trial were erroneous, it remains that both the 1990 and 2001 tests revealed that only two of the suspects' DNA profiles were isolated from the physical evidence. Thus, Pinkins has failed to meet the standard of newly discovered evidence, and he has not shown that the post-conviction court's conclusion with regard to the subsequent DNA testing was error.
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> *Pinkins v. State*, 799 N.E. 2d at 10 – 14.

39. This new evidence of five unknown genotypes, with three of the five being in sufficient detail to permit data-base comparison, is material and relevant, not cumulative, not merely impeaching, competent, admissible, worthy of credit, able to be offered in any retrial, and would produce a different result. True Allele interpretation technology was not available at the time of the prior state court post-conviction evidentiary litigation, which began for Pinkins in 1991, upon conviction, and ended when transfer was denied by the Indiana Supreme Court, March 5, 2004. The Affidavit of Mark Perlin, PhD, MD, PhD, the creator of TrueAllele interpretation technology, states that the concept had its infancy in 1999. The initial

admissibility of TrueAllele results, meeting the reliability hurdle of *Daubert/Frey*, came in a Pennsylvania trial court, in 2009, upheld in 2012. Dr. Perlin is well-credentialed. He has not been compensated for his analysis and opinion in this case. He would testify in any retrial.

40. Why is this material evidence, not cumulative, and capable of producing a different result? M.W. was raped by five men, and she said all ejaculated. Now, unknown genotypes of five persons have been identified. If this case were tried anew, the state would have the testimony of a victim who had been drinking over the course of the evening before the traumatic attack and who made her first and only identification in a suggestive pretrial setting months after the events. Against this asserted 'proof' would stand 1) forensic DNA evidence identifying five unknown genotypes (major jacket, major sweater, jacket-jacket, sweater-jacket, and Exhibit 59D), 2) a head hair, Exhibit 71A, shown by mitochondrial DNA testing to be from a person other than Roosevelt Glenn, and 3) no serology inclusion evidence supported by a wall sized exhibit, because competent counsel would object and establish that the serology inclusion evidence was irrelevant and highly prejudicial.

Ineffective Assistance of Appellate Counsel

41. The ineffective assistance of appellate counsel claim could not have been raised in the prior state appeal and *Davis/Hatton*[3] proceeding. Appellate counsel's deficiencies were yet formed as a matter of law and fact.

42. Clearly, Stewart failed to preserve the ineffective assistance of trial counsel claim for

[3] Whether a defendant received effective assistance during an appeal is considered a factual, not legal, question. *Evolga v. State*, 722 N.E. 2d 370 (Ind. Ct. App. 2000). Ineffective assistance of appellate counsel requires proof of deficient performance and resulting prejudice. *Garrett v. State*, 992 N.E. 2d 710 (Ind. 2013). In that Pinkins perfected a direct appeal combined with a post-conviction action, and the right to the effective assistance of post-conviction counsel is not governed by the *Strickland* standard (*Graves v. State,* 823 N.E. 2d 1193, 1195 (Ind. 2005)) the issue will require extensive development and analysis when litigated.

full federal review, because the sleeping lawyer facts were omitted from Pinkins' Petition to Transfer. The 7th Circuit Court of Appeals (**Exhibit D**) found:

> In this case Pinkins did not present through one entire round of state review his theories that counsel was ineffective for allegedly sleeping during trial and for failing to meaningfully challenge the state's serology evidence. The theory that counsel slept through portions of the trial was never presented in his petition for transfer, and the theory that trial counsel should have done a better job of challenging the serology evidence was never presented at all. Pinkins maintains that he alerted the Indiana Supreme Court to the facts of these two theories because he included citations in his petition to transfer that referenced his brief to the state appellate court and the response brief filed by the state in that court, but those references concerned only his arguments that counsel was ineffective for failing to object to the pre-trial identification procedure and for failing to object to evidence concerning his frequenting strip clubs. Consequently, he did not fairly present these theories to the Indiana courts. Pinkins also argues that a procedural default may be set aside if caused by "attorney error that constitutes ineffective assistance of counsel." But Pinkins had no federal constitutional right to counsel in pursuing his state post-conviction petition and subsequent appeals, so any error by counsel that led to a default of Pinkins' theories in state court cannot constitute cause to excuse default in the federal collateral proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 756-57, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Accordingly, Pinkins *541 failed to exhaust his state-court remedies, resulting in procedural default of these theories.
>
> *Pinkins v. Buss,* 215 Fed. Appx. 535, *540*

43. In addition, counsel failed to couch the ineffective assistance of trial counsel factual allegations which were raised in cumulative terms. Counsel designated certain errors as direct appeal and other errors as post-conviction, each error thus resolved in a vacuum.

43. Appellate and *Davis/Hatton* counsel omitted entirely from the state court factual allegations key errors of trial counsel, including trial counsel's lack of objection to the serology evidence and trial counsel's failure to preserve the *Brady* violation based on the use of the serology inclusion evidence.

44. Finally, appellate and *Davis/Hatton* counsel failed to raise the *Brady* violation due process violation as a stand-alone claim.

Denial of Due Process

45. This allegation is based on the testimony of state expert witness, Kim Epperson, and resulting arguments by deputy prosecutors that suggested serology inclusion evidence was relevant and probative in the face of then existing, clear, DNA exclusions. This constitutional claim should have been litigated in the original *Davis/Hatton* appellate action as a stand-alone claim but for the failures of counsel.

46. The state may not convict with false and misleading evidence, regardless of the deficiencies of trial and appellate counsel. Kim Epperson lied to the jury, using absolutely irrelevant and overstated serology inclusion results. The state relied on this false evidence to convict.

Legal Summary

47. In 1969, Indiana adopted the Rules for Post-Conviction Relief, therein specifying that, in addition to claims of constitutional deficiencies, a petitioner could seek relief using the common law remedy of newly discovered evidence. Effective July 1, 2001, Indiana codified a post-conviction DNA testing statute. Pursuant to Ind. Code § 35-38-7-19, "if the results of post-conviction DNA testing and analysis are favorable to the person who was convicted of the offense," the court shall order appropriate relief, including "a new trial or any other relief as may be appropriate under Indiana law or court rule." The 2001 amendments to the Indiana Post-Conviction Rules incorporated the IC 35-38-7 remedy, "Post-Conviction DNA Testing and Analysis," into the post-conviction procedure.

48. S*ewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1991), *trans. denied*, was ground-breaking in terms of providing for defense access to post-conviction DNA testing and analysis to support a claim of newly discovered evidence.

49. More recently, *Bunch v. State, 964 N.E. 2d 274* (Ind. Ct. App. 2012) an initial post-conviction proceeding and a non-DNA case, the Court considered claims of newly discovered evidence, ineffective assistance, and denial of due process. Bunch asserted, i*nter alia*, that advancing arson science supported a reasonability probability of a different result as to her felony-murder conviction for a house fire which killed her young son. In granting relief, the Indiana Court of Appeals distinguished *Pinkins:*

> **Bunch analogizes this evidence to DNA analysis, which has been considered newly discovered evidence even though the DNA evidence itself existed at the time of trial. As Chief Justice Roberts has explained, "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure -- usually but not always through legislation."** District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 2312 (2009); see also Sewell v. State, 592 N.E.2d 705, 708 (Ind. Ct. App. 1992) (noting, in deciding petitioner's right to discovery of rape kit for purpose of obtaining DNA analysis, that "[a]dvances in technology may yield potential for exculpation where none previously existed."), trans. denied; State v. Behn, 868 A.2d 329, 343 (N.J. Super. Ct. 2005) ("[I]t is well-known by now that the use of DNA testing has upset many convictions which took place before the technique was developed."), cert. denied, 183 N.J. 591 (N.J. 2005). In Indiana, the potential for post-conviction DNA testing and analysis to affect the outcome of a criminal case is recognized and addressed by Indiana Code chapter 35-38-7. **But see Pinkins v. State, 799 N.E.2d 1079, 1092 (Ind. Ct. App. 2003) (noting that in order to be granted a new trial based on subsequent DNA testing, the statute "dictates that the results must be favorable -- not the fact that the science of the testing has become more advanced. . . . If the statute provided otherwise and permitted the scientific procedure alone to satisfy the standard, a DNA scientist could simply testify that a method performed in the original testing had been superseded, and the petitioner could then be afforded a new trial without any additional showing."), trans. denied.**
>
> *964 N.E. 2d at 289.*

50. In a decision issued the same term as *Osborne*, the United States Supreme Court noted that a study of wrongful convictions found that "in the bulk of these trials of innocent defendants" the most common invalid science used was "serological analysis and microscopic

hair comparison." *Melendez-Diaz*, 557 U.S. 305 (2009). Just last week, April 20, 2015, the FBI announced in the conjunction with the United States Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) that the FBI concluded that hair comparison examiners' testimony, in at least 90 percent of trial transcripts the Bureau analyzed as part of its Microscopic Hair Comparison Analysis Review, contained erroneous statements.

51. Indiana provides a remedy for Darryl Pinkins through the common law, Rules for Post-Conviction Relief, and I.C. 35-28-7 et seq. In the state's case against Darryl Pinkins, in 1991, jurors were offered forensic facts now known to be false. Jurors were urged to find that the forensic evidence revealed two unknown genotypes, thus permitting the state to combine the two unknowns with Pinkins, Glenn, and Durden to achieve five perpetrators. True Allele technology and Exhibit 59D now support innocence with five unknown genotypes. In addition, the head hair jurors were advised matched Roosevelt Glenn's head hair is, in fact, without doubt, not Glenn's hair. Finally, serology inclusion evidence was false, irrelevant, and prejudicial in the face of then existing and absolute DNA exclusions of Pinkins, Glenn, and Durden.

52. The mystery of DNA mixtures has been solved. Science now supports the innocence of Darryl Pinkins. Importantly, as well, the genotypes of the real perpetrators are available for the pursuit of justice.

Wherefore, Darryl Pinkins prays that the Court grant him leave to file his Successor Petition for Post-Conviction Relief and for all other just and proper relief.

AFFIRMATION

I affirm under the penalties for perjury that the foregoing representations are true to the best of my knowledge and belief.

Respectfully submitted,

_____

Frances Watson, Attorney 8532-49
IU McKinney Law Clinic
530 W. New York Street
Indianapolis, Indiana 46202

CERTIFICATE OF SERVICE

I hereby affirm that a copy of the Verified Petition for Permission to File Successor Petition for Post-Conviction Relief and Exhibits was duly served on the Attorney General of Indiana by leaving a copy at the Office of the Attorney General, Statehouse, Indianapolis, Indiana 46202, on May 1, 2015.

Respectfully submitted,

_____

Frances Watson, Attorney 8532-49
IU McKinney Law Clinic
530 W. New York Street
Indianapolis, Indiana 46202

IN THE INDIANA

COURT OF APPEALS

CASE NUMBER: _____

DARRYL PINKINS,	)	
	)	LAKE COUNTY SUPERIOR COURT
Petitioner	)	
	)	CRIMINAL DIVISION ROOM 1
v.	)	
	)	CAUSE: 45G01-9001-CF-00005
STATE OF INDIANA,	)	
	)	HONORABLE RICHARD MAROC, JUDGE
Respondent	)	

APPEARANCE

Party Information: Darryl Pinkins
Indiana Department of Corrections
Miami Valley Correctional Facility
Carlisle, Indiana

Attorney Representing Darryl Pinkins:

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Tel: 317 274-5551
Fax: 317 274-8901
fwatson@iupui.edu

Respectfully submitted,

_____

Frances Watson, Attorney 8532-49
IU McKinney Law Clinic
530 W. New York Street
Indianapolis, Indiana 46202

CERTIFICATE OF SERVICE

I hereby affirm that a copy of the Appearance was duly served on the Attorney General of Indiana by leaving a copy at the Office of the Attorney General, Statehouse, Indianapolis, Indiana 46202, on May 1, 2015.

Respectfully submitted,

_____

Frances Watson, Attorney 8532-49
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