

IN THE INDIANA

COURT OF APPEALS

**VERIFIED PETITION FOR PERMISSION TO FILE SUCCESSOR**

**PETITION FOR POST-CONVICTION RELIEF**

Asserting his ability to establish the reasonable probability that the verdict would have been different with newly discovered evidence of actual innocence, Darryl Pinkins, by counsel, 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. With the Successor Petition (Exhibit A) and other Exhibits offered 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, 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 years for the rape, consecutive to twenty-five years for criminal deviate conduct, and concurrent to ten years for the robbery.
2. Pinkins appealed, after a delayed *Davis/Hatton* proceeding. The state and federal decisions denying relief are at *Pinkins v. State*, 799 N.E. 2d 1070 (Ind. Ct. App. 2003) trans. den. March 5, 2004; *Pinkins v. Davis*, 2005 WL 2128193 (U.S.Dis.Ct. 2005); *Pinkins v. Buss*, 215 Fed.Appx.535, 2007 WL 444975 (C.A. 7 (Ind.)); and Petition for *Writ of Certiorari* denied October 1, 2007, No. 07-5003.
3. Pinkins now seeks to bring successor post-conviction legal claims of: 1) newly discovered evidence, 2) ineffective assistance of appellate counsel, and 3) violation of due process.

**Actual innocence**

4. An essential element of each of the claims is the probability of a difference result, the required showing of harm.
5. TrueAllele interpretation technology has analyzed the data in Cellmark Forensics files created as a result of the prior post-conviction actions of Darryl Pinkins and, separately, Roosevelt Glenn. Cites.

6. 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 B) and vitae (Exhibit C) Dr. Perlin began research work, in 1999, to solve problems of forensic identification associated with DNA mixtures.

7. In fact, 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.

8. This state-of-the art DNA analysis technology has identified four (4) distinct individuals as contributing to the DNA evidence in the assault at issue, and the four distinct (4) individuals are people **other than** Pinkins, Glenn, the victim, and the 5<sup>th</sup> person, who left the hair known as Exhibit 59D.

9. Forensic analysis by TrueAllele interpretation technology exonerates Darryl Pinkins of the serious crimes of rape, deviant conduct, and robbery for which he continues to be imprisoned.

10. Forensic conclusions as a result of TrueAllele interpretation technology applied to biological evidence recently have met the reliability hurdles in other jurisdictions, each time offered by the government to prove guilt.

11. TrueAllele first was offered as evidence in a trial court, in 2009, in the murder case of Foley v. State of Pennsylvania. The admissibility was affirmed by opinion of March 1, 2012. Cite.

12. 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, New York also admitted TrueAllele results.

13. 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.

14. The theory and technique have been extensively peer reviewed in publications. Cites.

15. The Affidavit (Exhibit) and supporting Vitae (Exhibit) of Dr. Greg Hampikian also are offered in support of this petition.

16. Dr. Hampikian PhD, is a professor in the department of Biology at Boise State University in Boise, Idaho. His PhD is in Genetics, from the University of Connecticut. He 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.

17. 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.

18. In his 2008, post-conviction testimony (Exhibit ) in *Glenn v. State* (Exhibit) Dr. Hampikian noted that research in DNA mixtures was advancing. He offered his opinion, based on knowledge available in 2008, that the forensic evidence did not support an opinion that the victim and only two other persons were in the mixture.

19. After the 2008 testimony in the Glenn post-conviction proceeding, Dr. Hampikian stayed in communication with Frances Watson, the lawyer for Pinkins and Glenn.

20. 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.

21. Dr. Hampikian has now reviewed the TrueAllele results from the analysis of the data from Cellmark Forensics files FOR4863. Dr. Hampikian's opinion in the Glenn post-conviction case was confirmed and bolstered by the results obtained using the TrueAllele interpretation technology method.

22. It is Dr. Hampikian's opinion that the forensic evidence supports the victim's statement that she was assaulted by five men, and, with a high degree of scientific certainty, those men were not Pinkins, Glenn, or Durden.

## Legal Representation In Prior Challenges

23. Pinkins's first petition for post-conviction relief was by litigated by virtue of a *Davis/Hatton* proceeding. The attorney at the time of the evidentiary hearings and resulting direct and post-conviction appeal was Charles Stewart. Charles Stewart was again appointed as public defender counsel by the trial court after a delay of more than a decade, further explained below.

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

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

27. Thereafter, Pinkins sought to hold the direct appeal in abeyance and seek a *Davis/Hatton* action with private counsel, Scott King, Lake County, Indiana. Leave to proceed with the post-conviction action was granted on June 29, 1992.

28. Nick Thiros, Lake County, Indiana, also appeared as private counsel in the post-conviction proceeding, from January 31, 1997, through February 7, 2000.

29. On February 22, 2000, Charles Stewart again was appointed by Lake County as public defender to pursue the direct appeal and post-conviction claims.

30. During the evidentiary proceedings on the post-conviction action, Frances Watson, Wrongful Conviction Clinic, Indianapolis, Indiana, served as co-counsel.

31. After the decision of the Indiana courts was final, Pinkins filed his federal habeas with the assistance of the Wrongful Conviction Clinic and attorneys Frances Watson and Victoria Bailey, Indianapolis, Indiana.

32. Attorneys Watson and Bailey represented Pinkins in the appeal to the 7<sup>th</sup> Circuit Court of Appeals, Chicago, Illinois.

33. Victoria Bailey appeared in the filing for a Writ of Certiorari to the United States Supreme Court.

34. Representation in this current action is provided by Frances Watson, Wrongful Conviction Clinic, IU McKinney School of Law, Indianapolis, Indiana.

### Issues Litigated in Prior Challenges

35. The original post-conviction petition was filed December 16, 1992, alleging ineffective assistance of counsel (Exhibit)
36. On January 16, 2002, the petition was amended to include an allegation of newly discovered evidence. (Exhibit)
37. The claims of newly discovered evidence and ineffective assistance of trial counsel were denied in findings and conclusions by the post-conviction court on November 25, 2002. (Exhibit)
39. Pinkins appealed, his brief filed on 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.
40. The convictions were affirmed on December 8, 2003, *Pinkins v. State*, 799 N.E. 2d 1070 (Ind. Ct. App. 2003) trans. den. March 5, 2004.
41. Pinkins pursued his remedies into federal habeas with a filing on March 4, 2005, raising ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and a Brady violation. The latter two claims had not been litigated through one round of state court proceedings and were procedurally defaulted. 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 argument. *Pinkins v. Davis*, 2005 WL2128193 (U.S.Dis.Ct.) (Exhibit).
42. By order of May 30, 2006, Pinkins sought and was granted leave to appeal to the 7<sup>th</sup> Circuit Court of Appeals, only as to the question of ineffective assistance of trial counsel, with briefing due by July 10, 2006. The appeal was unsuccessful, and the 7<sup>th</sup> Circuit procedurally defaulted consideration of the sleeping lawyer operative facts given state direct appeal/post-conviction appellate counsel’s failure to refer to those facts in Pinkins’ state Petition to Transfer. *Pinkins v. Buss*, 215 Fed. Appx. 535, 2007 EL444975 (C.A. 7 (Ind.)).
43. An unsuccessful Petition for Writ of Certiorari to the United States Supreme Court was filed, seeking review of the issue of the application of the *O’Sullivan v. Boerchel* precedent to prevent consideration of the sleeping lawyer operative facts within the ineffective assistance of trial counsel legal claim.

## **Newly Discovered Evidence Now Relying on TrueAllele**

44. 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's 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 excluded (sic) 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 postconviction 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's 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.

*Pinkins v. State*, 799 N.E. 2d at 10 – 14.

45. True Allele interpretation technology was not available at the time of the prior state court post-conviction litigation, which began for Darryl Pinkins in 1992, and ended when transfer was denied March 5, 2004.

46. In 2014, by virtue of the pro bono services of Dr. Mark Perlin, TrueAllele interpretation technology identified four separate genotypes (in addition to the victim) in the DNA mixtures.

47. Furthermore, the TrueAllele interpretation technology results of the four genotypes were compared to the DNA profile of a hair, Exhibit 59A, which Exhibit 59D profile was first obtained and offered in the Roosevelt Glenn post-conviction action. The Exhibit 59D profile is of the fifth assailant.

49. In addition, in support of the elements of a newly discovered evidence claim, Pinkins now may present facts, discovered and first made of record in the Roosevelt Glenn post-conviction proceeding, which proceeding was litigated after the *Davis/Hatton* decision in Pinkins.

50. The hair, found in collecting forensic evidence, pubic combing of the victim, was tested in the Roosevelt Glenn proceeding and a full DNA profile was obtained. That profile is newly discovered evidence in the Pinkins' case, most particularly because Exhibit 59D is from a person other than the four (4) persons who left the DNA mixture.

52. Furthermore, in the Glenn post-conviction proceeding, the hair said to be the head hair of Roosevelt Glenn was tested using the mitochondrial testing method. The hair had no root so a nuclear profile was not available. The mitochondrial profile of Glenn was compared to the mitochondrial profile from the hair, and Glenn was excluded. (Exhibit).



53. Darryl Pinkins has never had his post-conviction claims analyzed with the knowledge that the head hair has been shown to be from a person other than Roosevelt Glenn.

54. Consideration of the newly discovered evidence claim as presently offered is merited and would probably produce a different result. TrueAllele analysis identifying four unknown genotypes, coupled with the profile from Exhibit 59D, which constitutes evidence of the fifth assailant, and further adding the fact that the head hair is now known to be the head hair of a person other than Roosevelt Glenn.

### **Ineffective Assistance of Appellate Counsel**

55. The ineffective assistance of appellate counsel claim could not have been raised in the prior state post-conviction proceeding. Appellate counsel's deficiencies were ongoing at that time, and thus yet were formed as a matter of law and fact.

56. Appellate counsel failed to preserve the denial of due process claim for full state and federal review as counsel failed to raise the issue in the direct and post-conviction appeal.

57. Additionally, appellate counsel failed to preserve the ineffective assistance of trial counsel claim for full and fair review through federal court because the sleeping lawyer operative facts were omitted from Pinkins' Petition to Transfer.

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

postconviction petition and subsequent appeals, so any error by counsel that led to a default of Pinkins's 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.

### **Denial of due process**

58. This ground for relief could have been raised in the prior state proceeding but was not. While post-conviction evidence was presented to challenge the state's trial use of serology inclusion evidence in the face of DNA exclusions facts, appellate attorney Charles Stewart did not present the issue when taking the direct and post-conviction appeal.

59. Regardless, the State used false and misleading evidence in the trial by virtue of the testimony of state expert witness Kim Epperson and the resulting arguments by deputy prosecutors tied to the claim that serology inclusion evidence was relevant and probative in the face of the then-existing DNA exclusion evidence.

### **Facts Common to Legal Claims**

60. The facts which support the legal claims are cumulative, particularly in regard to the proof of a reasonable probability of a different result upon new trial, and the entire record of proceedings will be offered in support of these claims.

61. Darryl Pinkins, Roosevelt Glenn, and William Durden were identified as suspects in these crimes after police traced a pair of coveralls left with the victim of the crimes which occurred in the early hours of Saturday morning, December 9, 1989.

64. Pinkins, Glenn, and Durden had returned to work at Luria Brothers on Monday morning and reported their coveralls stolen.

65. The State arrested Pinkins, Durden, and Glenn and two other men, Jackson and Daniels, all five of whom worked at Luria Brothers. At the time of the arrests, the state had no individual identifications.

66. The victim made her first identification of any of the five (5) men arrested months after, in May 1990, when she attended a pretrial hearing and identified Pinkins.

67. In addition to the identification of Pinkins, the prosecution also believed (mistakenly) they had found the head hair of Glenn on the victim's clothes.

68. In August 1990, the State, through Kim Epperson, was advised that all five of the men arrested were excluded from the DNA mixtures. (Exhibit)

67. Given that Pinkins, Durden, and Glenn were together that night, the head hair was thought (mistakenly) to be Glenn's, and the victim had come to pretrial and made an identification of Pinkins, the State dismissed Daniels and Jackson.

68. According to the prosecution's theory, at trial in 1991, and at *Davis/Hatton* hearing in 2001, the DNA evidence supported their position that Pinkins, Glenn, Durden, and "two unknowns" committed the crimes. (Exhibit)

69. Using this argument, the state has consistently claimed that Pinkins, Glenn, Durden were perpetrators of heinous acts despite the fact that their biological material was lacking in the multiple semen stains tested and after the victim stated each of five men ejaculated.

70. In a misleading and illogical extension of its argument that the mixture held "two unknowns," the State presented irrelevant serology inclusion evidence. The prosecution offered evidence that serology could do what DNA could not. When Kim Epperson told the jury that serology results linked Pinkins, she knew that statement was misleading because the men had been excluded from the stains by the DNA testing.

71. As to the claim of newly discovered evidence:

(a) TrueAllele interpretation technology, now available, reliable, and admissible, has been applied to decipher the DNA mixture in this case.

(b) The mixtures of biological fluids from the sweater and jacket cuttings have been decoded.

(c) Genotypes of four (4) separate assailants were detected in the mixture.

(d) In addition, forensic examination has identified the DNA profile of a fifth assailant, the person who contributed the hair from the combing of the victim, known as Exhibit 59D.

(e) The person who left the hair is not one is not one of the four assailants identified as contributing to the mixtures.

(f) True Allele results could be pursued by the prosecution to convict the persons who committed these crimes.

(g) Pinkins now may present evidence that the hair, found on the victim's sweater, was not from Roosevelt Glenn.

(h) Importantly, Pinkins will establish, beyond doubt, that he is not one of the five (5) men who committed the acts against M.W.

72. As to the claim of ineffective assistance of appellate counsel:

(a) Charles Stewart failed to preserve the ineffective assistance of trial counsel and denial of due process arguments for full state and federal court review.

(b) Stewart failed to couch his ineffective assistance of trial counsel argument in cumulative terms and omitted key errors of trial counsel from the analysis. Rather, Stewart set forth certain errors as direct appeal and other errors as post-conviction, each error resolved in a vacuum.

(c) Aware of the argument that the state had committed misconduct when offering serology inclusions in the face of DNA exclusions, Stewart never raised the error as a stand-alone claim or as cumulative fault of counsel.

76. As to the due process violation:

(a) Factually alleged by virtue of the testimony of state expert witness Kim Epperson and the resulting arguments by deputy prosecutors tied to the claim that serology inclusion evidence was relevant and probative in the face of the DNA exclusion evidence.

(b) This claim should have been litigated in the original *Davis/Hatton* appellate action, but for the failures of appellate counsel.

## Argument

77. In addition to the erroneous microscopic hair comparison, the facts at Pinkins' trial included serology inclusion 'results' by a State of Indiana Police Laboratory DNA analyst in the face of DNA exclusions, and the assertion that the DNA mixture contained the victim and "two unknowns." In *Melendez-Diaz*, 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." Cite.

78. Forensic evidence will now establish that the hair from the victim's sweater was not Glenn's hair, the serology inclusions were irrelevant and highly prejudicial, and the biological forensic mixtures contained genotypes of the victim and four (4) unknowns. The fifth unknown assailant left the hair identified as Exhibit 59D.

79. Since 1969, the Indiana Rules for Post-Conviction Relief have procedurally governed the use of the newly discovered evidence remedy. *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1991), *trans. denied.*, was ground-breaking in terms of access to DNA testing to support newly discovered evidence claims. *Sewell*, 592 N.E.2d, at 708.

80. 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."

81. Pursuant to the December 2001, amendments to the Indiana Post-Conviction Rules, an individual seeking the statutory remedy of "Post-Conviction DNA Testing and Analysis" must seek relief under the post-conviction rules:

A petition filed by a person who has been convicted or sentenced for a crime by a court of this state that seeks to require forensic DNA testing or analysis of any evidence, whether denominated as a petition filed pursuant to Ind. Code 35-38-7-5 or not, is considered a Petition for Post-Conviction Relief. P-C.R. 1(1)(d).

82. In *Bunch v. State*, an initial post-conviction proceeding, the Court considered claims of newly discovered evidence, ineffective assistance, and a denial of due process. Bunch claimed, inter alia, that advancing arson science supported a reasonable probability of a different result. 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.**

## Summary

83. Darryl Pinkins is prepared to offer the testimony of Dr. Mark Perlin and Dr. Greg Hampikian to show actual innocence. TrueAllele interpretation technology identifies genotypes of four (4) distinct persons, other than the victim. A fifth, distinct, person left the hair known as Exhibit 59 D. Each of the five genotypes (four identified from the mixtures and one from Exhibit 59A) are known to be from persons other than Pinkins, Glenn, and Durden. Added to this TrueAllele result is the fact that Pinkins may now present evidence that the hair, found on the victim's sweater, was not from Roosevelt Glenn.

84. Charles Stewart failed to preserve the ineffective assistance of trial counsel and denial of due process arguments for full state and federal court review. Stewart failed to couch his ineffective assistance of trial counsel argument in cumulative terms and omitted key errors of trial counsel from the analysis. Aware of the argument that the state had committed misconduct when offering serology inclusions in the face of DNA exclusions, Stewart never raised the error as a stand-alone claim or as cumulative fault of counsel in the appeal.

85. The Brady violation is alleged by virtue of the use of the serology inclusion evidence in the face of the DNA exclusion evidence. This claim should have been litigated in the original *Davis/Hatton* action, but for the failures of appellate counsel.

Wherefore,

Respectfully submitted,

\_\_\_\_\_  
Darryl Pinkins, Petitioner

State of Indiana        )  
                                  )        SS:  
County of Miami        )

Darryl Pinkins, being duly sworn upon his oath, does depose and state that I have subscribed to the foregoing; that I know the contents thereof; and that the matters and allegations set forth are true.

\_\_\_\_\_  
Darryl Pinkins

Subscribed and sworn to before me, a Notary Public, this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Notary Public

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Printed

\_\_\_\_\_  
Commission Expires

\_\_\_\_\_  
County of Residence