

2. Further, this evidence was only exculpatory evidence and thus, the State's conduct should be scrutinized heavily in how they have handled this evidence.
3. Further, the State should be judicially estopped from litigating in this post conviction relief case that stakes a claim that the Petitioner's conviction should not be disturbed but then treats the case as if there is no conviction.
 - a. Sparingly granted in civil cases, judicial estoppel in criminal cases (if even available) is rarer still. See *United States v. Levasseur*, 846 F.2d 786, 795 (1st Cir. 1988) (leaving open the question of whether judicial estoppel "may ever be invoked against the government in a criminal case"); *United States v. Lehman*, 756 F.2d 725, 728 (9th Cir. 1985) (same). This is hardly surprising as the Sixth Circuit "ha[s] often remarked that judicial estoppel should be applied with caution to 'avoid impinging on the truth-seeking function of the court.'" *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 485 (6th Cir. 2010) (citation omitted, collecting cases).
 - b. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8, 120 S. Ct. 2143, 147 L. Ed. 2d 164 (2000)). "[A]lthough there is no set formula for assessing when judicial estoppel should apply, . . . it is well-established that at a minimum, 'a party's later position must be 'clearly inconsistent' with its earlier position[.]'" *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 546 F.3d 752, 757 (6th Cir. 2008) (citations omitted). It is an "equitable doctrine that preserves

the [**7] integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218 (6th Cir. 1990).

4. The State provided no investigative reports in discovery to the Petitioner.
5. It is believed that the State is probably still relying on this 'investigatory subpoena' to subvert the narrow strictures of Tenn. Sup. Ct. R. 28 and Rule 16, which is, respectfully, acting in bad faith and against the Orders of this Court.

To address all of this, the Petitioner would request:

1. To sanction the State on how they have handled the exculpatory evidence in the ATM machine. This includes all forms of relief including the granting of the post conviction relief claim.
2. To compel the state to provide all subpoenas of all kinds they have issued in this case and until proper examination and preserve the request to quash and destroy and/or preserve and provide to Dylan Adams and Zachary Adams the exculpatory evidence they are obtaining for the potentially forthcoming new jury trial on the merits.
3. For such further and general relief to which the Petitioner is authorized.

RESPECTFULLY SUBMITTED:

DTB

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NOTICE: I WILL PRESENT THIS MOTION AS DIRECTED BY THE COURT.

CERTIFICATE OF SERVICE

The undersigned certifies that he has on the 2 day of MAY 2025, sent a true and correct copy of the following to the person(s) listed below in compliance with the Tennessee Rules of Civil Procedure, Rules 5 and/or 5A, by the following indicated method(s):

Amy Weirich: apweirich@tndagc.org

Christopher Boiano: cvboiano@tndagc.org

- U.S.P.S., first-class postage pre-paid
- Via Fax
- Via Email
- Hand-delivery by:
- Certified Mail, Return Receipt Requested

DTB

DOUGLAS THOMPSON BATES, IV