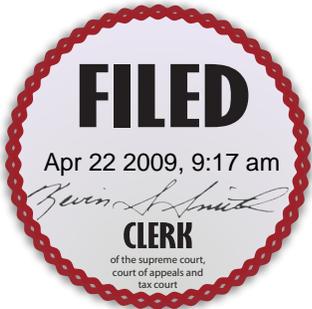


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE**  
**COURT OF APPEALS OF INDIANA**

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ROOSEVELT GLENN, )  
 )  
Appellant-Petitioner, )  
 )  
vs. ) No. 45A05-0808-PC-462  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Respondent. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Salvador Vasquez, Judge  
The Honorable T. Edward Page, Temporary Judge  
Cause No. 45G01-0311-PC-16

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April 22, 2009

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## Case Summary

Roosevelt Glenn appeals the denial of his petition for post-conviction relief. We affirm.<sup>1</sup>

### Issues

We address the following issues:

- I. Is Glenn entitled to a new trial based on newly discovered evidence?
- II. Has Glenn procedurally defaulted his claim that his 1993 rape conviction was obtained in violation of the due process clauses of the U.S. and Indiana Constitutions?
- III. Was Glenn's trial counsel ineffective?
- IV. Has Glenn procedurally defaulted his freestanding claim of fundamental error?

### Facts and Procedural History

In Glenn's direct appeal, another panel of this Court recited the following facts:

At approximately 1:00 a.m. on December 7, 1989, several men in a light green 1973 Pontiac Catalina bumped into Jill Martin's automobile as she drove south on I-65 in Lake County. Martin pulled over to the side of the road, but remained in her car with the engine running. The driver and two other men exited the green Pontiac and approached her car, asking whether she was all right. When a pickup truck pulled up behind Martin's car, the men sped away. Martin noted the license plate number of the car and later identified it as belonging to Gary Daniels.

Approximately one-half hour later, a light green Pontiac rear-ended or bumped M.W.'s car. M.W. exited her vehicle to inspect it for damage. Darryl Pinkins approached her and inquired whether she was all right. Then he grabbed her and, with the help of Glenn and another man, dragged her back to the green Pontiac. Glenn held the victim down in the back seat and told her, "Don't look at us, bitch. We'll kill you." Record at 721. Glenn gave the victim his green coveralls from work to put over her eyes. Then Glenn

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<sup>1</sup> By separate order, we deny Glenn's motion for oral argument.

undressed her and, despite her protestations that she had just suffered a miscarriage, raped her. After ejaculating on the victim's stomach, Glenn used the sleeve of her ski jacket to wipe off both their genital areas. During the next two hours, four other men in the car brutally raped and sodomized M.W.

Later, the men took M.W. back to her car. As another vehicle approached, they began throwing her clothes at her and threatened to kill her and her husband if she went to the police. M.W. still had the green coveralls used to cover her eyes during the assault. After telling her husband about the incident, M.W. informed the police and submitted to a rape kit. As a result of the attack, she hemorrhaged vaginally for three weeks and ultimately suffered a miscarriage.

After severing his case from that of his co-defendants, Glenn's first trial ended in a mistrial due to a deadlocked jury. At his second trial, however, Glenn was convicted of Rape, a class A felony.<sup>[2]</sup> The trial court sentenced him to thirty-six years of imprisonment.

*Glenn v. State*, No. 45A03-9307-CR-244, slip op. at 2-3 (Ind. Ct. App. Aug. 29, 1995).<sup>3</sup>

Glenn was represented by three different public defenders during his trials and on appeal. On appeal, Glenn raised five issues: (1) whether the trial court erred in admitting blood and hair samples obtained pursuant to a search warrant; (2) whether sufficient evidence supported his rape conviction; (3) whether the trial court erred in admitting his mug shot; (4) whether references to his post-*Miranda* silence constituted reversible error; and (5) whether the trial court erred in imposing an enhanced sentence. In an unpublished memorandum decision dated August 29, 1995, a unanimous panel of this Court affirmed Glenn's conviction and sentence. The panel addressed Glenn's sufficiency claim in pertinent part as follows:

Glenn claims the state's evidence is insufficient to establish his identity as one of M.W.'s five attackers on December 7, 1989. He challenges much of

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<sup>2</sup> The jury acquitted Glenn of a class B felony robbery charge, and the trial court declared a mistrial as to a class A felony sexual deviate conduct charge.

<sup>3</sup> A copy of our memorandum decision appears on pages 217-29 of Glenn's appellant's appendix.

the circumstantial evidence, claiming it fails to point surely and unerringly to his guilt. Particularly, he offers alternative explanations for incriminating evidence.

....

We find the evidence sufficient to support Glenn's conviction. We note that George Hennington, who was Glenn's cellmate in the Lake County Jail, testified that Glenn told him about his involvement in M.W.'s abduction. Glenn told Hennington that he and his friends were out looking for a girl to rob when they ran a green four-door Catalina into the rear of the victim's car. When she exited her car to look for damage, they grabbed her and forced her inside their car. Believing she might have seen his face, Glenn grabbed some coveralls to cover her head. He told Hennington that they drove away and, although he did not rape her, his friends did. Record at 1693-95. Glenn's recitation of the facts surrounding M.W.'s abduction is nearly identical to her own testimony.

The state linked Glenn to the rape of M.W. by amassing other evidence as well. The green coveralls left with the victim were identified as belonging to Luria Brothers, a scrap metal processing company where Glenn worked. The "greens" were further traced to Glenn by virtue of his job description and comparisons to another pair of his greens. They were the same size, cuffed on the bottom in the same fashion, bore the same dirt and wear patterns and had no burn holes.<sup>3</sup>

FN 3: Only "burners" are issued the type of green[s] used in the rape of M.W. The fact that the greens left with M.W. had no burn holes in them, even though they had been used and laundered many times, is significant because even experienced burners will get burn marks on their greens. Glenn was the only Luria Brothers employee classified as a burner but who worked exclusively as a payload operator.

Moreover, on Monday, December 11, 1989, Glenn and two of his co-defendants requested replacement greens at work.

The state also identified the green Pontiac used in the present crime. Although Glenn claimed that he never rode in the Pontiac, a hair recovered from the victim's sweater matched a standard taken from Glenn's hair. Mrs. Peterson, an expert in the field of hair comparison and analysis, testified that Glenn's hair was extremely fine and "on the very low side of the range for normal Negroid hairs." Record at 1389. Also, the pigment in his hair was located in large clumps with light yellow tinge in the background. Although the state's expert could not say the hair found on M.W.'s sweater definitely came from Glenn, she stated that it was unlikely that it came from anyone else.

We conclude that the evidence presented at trial was more than sufficient to allow a reasonable jury to convict Glenn of rape. We decline his invitation to reweigh the evidence and find no error.

*Id.* at 5-7 (footnotes citing to record omitted).

On November 14, 2003, Glenn filed his original petition for post-conviction relief. Subsequently, the post-conviction court granted Glenn's petition for the testing of hair samples and DNA evidence that had been presented at trial. On November 19, 2007, Glenn filed his third amended petition for post-conviction relief. The court held hearings on the petition in March and June 2008. On June 23, 2008, the post-conviction court recited the following pertinent findings from the bench:

6. It is clear from the decision of the court of appeals that a factor in determining that there was sufficient evidence for the conviction of [Glenn] was based in part on a hair that was identified as coming from him or likely to have come from him.

7. [Glenn] has returned to this court with a petition for postconviction relief. As amended, that petition for postconviction relief alleges three grounds for relief:

a) That there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence in the interest of justice.

b) The conviction was obtained in violation of the Constitution of the United States and the Constitution of the State of Indiana.

c) Ineffective assistance of counsel in violation of the Constitution of the United States, ... Amendment[s] 6 and 14 and the Constitution of the State of Indiana, Article 1, Section 12.

8. At the hearing on the petition for postconviction relief appellate counsel was not called as a witness and did not testify.

9. At the hearing on the petition for postconviction relief trial counsel was called as a witness and did testify.

10. At the trial of this case, as noted by the court of appeals, evidence was presented to the jury in an effort by the state to establish that a hair removed from the victim's sweater was a hair that belonged to [Glenn].

11. Evidence presented at the hearing on the petition for postconviction relief establishes that in fact the hair identified as belonging to [Glenn] was not his hair.

12. At the trial of this case evidence was presented by the prosecuting attorney regarding serological and DNA tests that were performed on specimens obtained from the victim, from the victim's sweater and from the victim's jacket. That evidence is significant, based on the victim's testimony at trial, that each of her five attackers used the jacket to wipe themselves after the rapes, and that other evidence of the rapes may have been deposited on the sweater.

13. The serological evidence presented ... to the jury by the prosecuting attorney was insufficient to establish that the petitioner was one of the five attackers of the victim.

14. Evidence was presented to the jury which established that either the science known at the time, the science available at the time or the evidence available at the time could [not] establish conclusively that [Glenn] was one of the victim's attackers or to exclude [Glenn] as one of the victim's attackers.

In fact, as best as can be determined from the evidence presented, both through the record at trial and at the hearing on the petition for postconviction relief, what evidence we do have ... that determinations could be made conclusively from, establish that the stains that can be identified come from two individuals who remain to this day unknown.

15. The defense at trial was a combination of alibi and insufficiency of the evidence.

16. It appears that both the trial counsel and the State of Indiana proceeded on the basis of scientific knowledge that was not at that time fully developed, but as ... we see now, has been developed to the point where certain conclusions may be drawn today from the evidence that could not be drawn then.

We specifically refer, for example, to the fact that the hair can now be identified by DNA evidence as not having come from [Glenn], when that determination could not have been made at the time of trial.

17. [Glenn] has alleged that the state arguing the serological evidence in the manner that it did to the jury denied him due process of law under both the Constitution[] of the United States and the Constitution[] of the State of Indiana because the state knew or should have known that that evidence would have the effect of misleading the jury.

18. After a careful review of the evidence presented at trial and a review of the arguments of counsel at trial, which of course in itself is not evidence, this court finds that the prosecuting attorney did not engage in conduct which was either knowingly or intentionally designed to mislead the jury.

19. Based on the totality of the record, it is the finding of this court that the jury was not misled on the issue of DNA analysis or serological evidence, as including [Glenn] as a contributor to one of the samples recovered from the sweater or the jacket, as testified to the jury.

20. Based on the evidence presented at the hearing on the petition for postconviction relief, it is the conclusion of this court ... that there is not evidence from which this court could conclude that [Glenn] was denied the effective assistance of counsel on appeal.

21. Based on the evidence presented at the hearing on the petition for postconviction relief, it is the conclusion of this court that there is not sufficient evidence from which this court can conclude that [Glenn] was denied the effective assistance of counsel in the trial court.

That determination is based on the court's finding of fact that [Glenn] was not prejudiced by counsel's handling of the trial either in the trial court or on appeal.

22. Based on the evidence presented at the hearing on the petition for postconviction relief, it is the conclusion of this court that [Glenn] was not denied due process of law by the presentation of evidence by the prosecuting attorney at trial regarding DNA and serology or by counsel's argument at trial to the jury. We reiterate our finding of fact that we believe the jury was presented the evidence in a way that permitted them to understand the issues of the evidence and that they were not misled.

With that we now come to what is in many respects the essence of this case, and that's whether there exists newly discovered evidence which requires a vacation of [Glenn's] judgment of conviction and sentence in the interest of justice.

23. It is the finding of this court that the evidence which established that, through DNA analysis, the hair in question was not that of [Glenn] and was not available at trial, and that therefore the first prong of that test has been met.

24. It is ... the finding of this court that the evidence regarding the hair DNA analysis is material and relevant in the sense that it was previously used to prove that [Glenn] was present, and there is now evidence to establish that that is no longer the case.

25. It is the finding of this court that such evidence is not cumulative.

26. It is the finding of this court that the evidence is not merely impeaching.

27. It is the finding of this court that that evidence is not privileged or incompetent.

28. It is the finding of this court that due diligence was used to discover that evidence, and it obviously could not have been discovered prior to the first trial because such technology and science [were] not available at that time.

29. The evidence that the hair is not that of Roosevelt Glenn is worthy of credit.

30. As the testimony ... at this hearing has established, this evidence [can] be produced upon a retrial of the case, should it be necessary to do so.

31. And this involves a combination of both the second factor of it is material and relevant and whether that evidence would probably produce a different result. This is in some respects a reverse side of the argument because it is not meant to show that Mr. Glenn was in fact not there, ... or that Mr. Glenn was there but simply to contradict testimony presented to an earlier jury that he was there. And so that turns on whether or not it will probably make a difference in the outcome of the trial.

The court of appeals clearly relied on the hair in support of its argument that there was sufficient evidence, and unlike cases where there is but one attacker, one DNA result that definitely belongs to that attacker, and it is later shown through DNA evidence later developed that the person accused and convicted was not the person who left that sample, which is of course in the public mind what DNA evidence means, we have to consider whether or not, if we took away all DNA evidence, all serological evidence and all evidence

regarding the hair, whether or not there was sufficient evidence presented at trial for the jury to conclude that [Glenn] was guilty beyond a reasonable doubt and also to consider in that whether or not the evidence that was presented regarding the serology, the DNA and the hair had the effect of tainting the jury's verdict.

This attack on [M.W.] was brutal in the extreme. One cannot but read through her testimony without coming away with a genuine feeling of the terror she felt that night, especially as she described each of the individual attacks on her, distinguished each of them and remembered their relative levels of brutality, especially attacker[s] number three and five.

But the evidence presented to the jury, I believe, was sufficient to establish certain things that despite the invitation for me to reweigh the evidence, I think are simply what has been established previously to a jury and that is:

... Darryl Pinkins was the driver of that vehicle. Darryl Pinkins was the person who approached [M.W.] during those early morning hours. He was the driver of a vehicle which the evidence sufficiently established as the vehicle of Gary Daniels.

The evidence established that Mr. Pinkins, Mr. Durden and Mr. Glenn left work together, and as of some time after work ended, were together when their paychecks were cashed by Ms. Anderson [at Bowens Liquors in Gary]. There is evidence that they may have been, let's assume for this purpose probably were, the individuals who abandoned a car on I-94 at approximately eleven thirty [p.m.]. That would be consistent with the statements made to Ms. Anderson, that the reason that they were later than usual was because their car broke down.

Ms. Anderson never testified as to how they left those premises except she testified that she offered them some assistance, but apparently they already had the matter in hand. That's twelve thirty-five [a.m.].

Twenty-five minutes later Ms. Martin is bumped going south on I-65. The place where the checks were cashed was at 21st and Grant, very nearby, but a few miles. After the one o'clock attack or attempted attack on Ms. Martin in which an individual got out of the car after her being bumped, walked up to her and said, "Are you all right, ma'am," at the same time two individuals were coming out of that vehicle; at one thirty-seven, some distance away but certainly within that distance timewise, [M.W.] is bumped by an identical vehicle where the exact same scenario is carried out.

Is that sufficient to convict Mr. Glenn? No, because there is no testimony from Ms. Martin that Mr. Glenn was one of the individuals. There is no testimony from [M.W.] that the individual that grabbed her and dragged her to the back seat of the car was Mr. Glenn. But you have the evidence that was presented by two individuals who say that Mr. Glenn confessed his

involvement to them, and [Glenn] invites this court to reweigh that evidence and say that that is not sufficient.

And on that point this court does disagree. The evidence given by the two individuals who testified before the jury that Mr. Glenn confessed his involvement, although gave different versions ... to these individuals<sup>[4]</sup> and then to the jury, has to be taken in light of the other facts that were presented, that ... there were lies that were told. There [was] a sequence of events ... from which a jury could easily conclude that Mr. Glenn, whichever one of the five, was one of the five in that vehicle.

.... I conclude that [Glenn] has failed to establish that the newly discovered evidence is sufficient to exonerate Mr. Glenn, and I therefore recommend that the petition for postconviction relief be denied.

Appellant's App. at 22-35. This appeal ensued.

## **Discussion and Decision**

### ***Standard of Review***

Criminal defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a petition for post-conviction relief.

*Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied* (2003).

Postconviction procedures do not afford a petitioner with a super-appeal, and not all issues are available. Rather, subsequent collateral challenges to convictions must be based on grounds enumerated in the postconviction rules. If an issue was known and available, but not raised on direct appeal, it is waived. If it was raised on appeal, but decided adversely, it is *res judicata*.

*Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001) (citations omitted), *cert. denied* (2002).

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<sup>4</sup> In addition to discussing M.W.'s assault with George Hennington, Glenn told fellow jail inmate George Carter that his attorney had told him "that semen that could possibly match his through DNA was found on the victim's upper arm garment[,] i.e., her jacket. Tr. at 1647. Glenn also told Carter that the car in which he was riding home from work broke down, that he and his companions went to cash their checks and purchase oil, and that they returned to find the side window broken and their clothing stolen from the vehicle. Glenn told Carter that "he then called his girlfriend who he lived with, she picked him up and they went home." *Id.* at 1649. Carter relayed this information to the police, who, along with the prosecution, had been unaware of the location of seminal fluid on M.W.'s jacket. *Id.* at 2899, 2906.

“Post-conviction proceedings are civil proceedings, and a defendant must establish his claims by a preponderance of the evidence.” *Stevens*, 770 N.E.2d at 745. Because Glenn is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince us “that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court.” *Id.* Stated differently, Glenn must convince us “that there is *no* way within the law that the court below could have reached the decision it did.” *Id.* “We do not defer to the post-conviction court’s legal conclusions, but do accept its factual findings unless they are clearly erroneous.” *Id.* (citations and quotation marks omitted).

### ***I. Newly Discovered Evidence***

A person who has been convicted of a crime may file a petition for post-conviction relief alleging “that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice[.]” Ind. Post-Conviction Rule 1(1)(a)(4). Pursuant to Indiana Code Section 35-38-7-5, a person who has been convicted of certain crimes, including rape, may petition the sentencing court “to require the forensic DNA testing and analysis of any evidence that ... is relative to the investigation or prosecution that resulted in the person’s conviction[.]” To obtain an order requiring such testing, the petitioner must present prima facie proof that, among other things, the evidence is material to identifying the petitioner as the perpetrator of the offense and that a reasonable probability exists that the petitioner would not have been convicted of the offense “if exculpatory results had been obtained through the requested DNA testing and

analysis.” Ind. Code § 35-38-7-8. If the results of the DNA testing and analysis are favorable to the petitioner, then the court must order appropriate relief, which may include a new trial. Ind. Code § 35-38-7-19. A petition filed pursuant to this statutory authority is considered a petition for post-conviction relief. Ind. Post-Conviction Rule 1(1)(d).

A petitioner claiming that he is entitled to relief on the basis of newly discovered evidence must establish the following:

- (1) that the evidence has been discovered since the trial;
- (2) that it is material and relevant;
- (3) that it is not cumulative;
- (4) that it is not merely impeaching;
- (5) that it is not privileged or incompetent;
- (6) that due diligence was used to discover it in time for trial;
- (7) that the evidence is worthy of credit;
- (8) that it can be produced upon a retrial of the case; and
- (9) that it will probably produce a different result.

*Torrence v. State*, 263 Ind. 202, 206, 328 N.E.2d 214, 216-17 (1975) (citation and quotation marks omitted). “Regarding the final and critical ninth factor, the defendant must raise a strong presumption that the result at any subsequent trial in all probability would be different.” *Reed v. State*, 702 N.E.2d 685, 691 (Ind. 1998). In determining whether the newly discovered evidence will probably produce a different result, the post-conviction court “should consider the weight which a reasonable trier of fact would give the proffered evidence and the probable impact of it in light of all the facts and circumstances shown at the original trial of the case.” *Torrence*, 263 Ind. at 206, 328 N.E.2d at 217.

In this case, the post-conviction court found, and both parties agree, that the only factor at issue is whether the recent DNA analysis establishing that the hair found on M.W.’s sweater was not Glenn’s will probably produce a different result at retrial. Glenn contends that it would, “especially in the context of a fair trial that included accurate presentation of

the existing DNA evidence and adequate challenges to all aspects of the state's case including the junk serology and the use of the informants." Appellant's Br. at 27. We disagree with Glenn's contention for five reasons, denoted (1) through (5) below.

(1) Dana Peterson, the State's hair comparison expert at trial, did not state definitively that the hair in question came from Glenn. *See, e.g.*, Tr. at 1390<sup>5</sup> (direct examination: "My opinion is the hairs matched the head hair standards from Roosevelt Glenn, and I find because of the unique characteristics that I found in this hair that it would be *very unlikely* that the hair could come from someone else.") (emphasis added); *id.* at 1398-99 (cross-examination: "With a fingerprint, you can say, 'Yes, this fingerprint definitely came from this person.' With hair analysis, I cannot say, 'Yes, that hair definitely came from that person barring everyone else.'"). Thus, the fact that the hair did not come from Glenn is not as significant as Glenn would have us believe.

(2) M.W. was raped by five men. As such, the fact that the hair found on her sweater did not come from Glenn does not exonerate him; it merely means that he was not the source of the hair.

(3) We believe that Glenn overstates the alleged deficiencies in the DNA and serological evidence that the State presented at trial. Kim Epperson, an Indiana State Police serologist and DNA analyst,<sup>6</sup> detected seminal fluid on the vaginal/cervical swab from

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<sup>5</sup> Citations to the trial transcript are denoted "Tr." Citations to the post-conviction hearing transcript are denoted "PCR Tr. I" (for the three-volume transcript of the hearing on March 17, 2008) and "PCR Tr. II" (for the separately paginated six-volume transcript of the hearings on March 18, June 16, and June 23, 2008).

<sup>6</sup> Epperson was killed in a traffic accident in 1995.

M.W.'s rape kit, in four locations on M.W.'s jacket, and in two locations on M.W.'s sweater.

Epperson performed ABO blood typing<sup>7</sup> and enzyme typing<sup>8</sup> on those areas to determine the blood and enzyme types of the person (or persons) who left the stains. She obtained blood and saliva samples from M.W., Glenn, Durden, Pinkins, Barry Jackson, and Gary Daniels, a janitor at the Luria Brothers plant and the owner of the green Pontiac in which M.W. was raped.

Epperson determined that M.W.'s ABO blood type was B; that she secreted her blood type in her other bodily fluids; that her PGM type was 2-1, her PGM sub type was 2-1+, and her Peptidase A type was 1; and that approximately one in 217 persons in both the general population and the white population has that combination of serological markers. Tr. at 1262, 1265-66. Epperson described Glenn's test results as follows:

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<sup>7</sup> Epperson stated, "In the ABO system, there are four blood types, you're either type A, type B, type AB or type O. And these factors, this ABO type, are genetically determined, ... and that type never changes your whole life." Tr. at 1262.

<sup>8</sup> Epperson testified that

enzymes are substances kind of like ABO type, they're genetically inherited. You get that type and it stays that type your whole life, it never changes. In this case, I ran three enzyme tests on the blood samples, and the reason I selected these three enzymes is because these enzymes are also found in seminal fluid. The enzymes I selected are ... PGM, PGM sub, and Pep[tidase] A.

....  
In the PGM system, there are three possibilities: You're either a type 1, a type 2, or a type 2-1.... Those three types ... can be broken down into smaller categories, and there are ten smaller categories [i.e., PGM sub types]....

....  
.... In [the Peptidase A] system, there are three possibilities. You're either a type 1, a type 2, or a 2-1.

Tr. at 1264-66.

The ABO type of Roosevelt Glenn's blood was type O, the saliva standard from Roosevelt Glenn did not show a blood type; he is a nonsecretor so his ABO blood type would not show up in his other body fluids. His enzyme types were PGM type 2-1, PGM sub type two plus one plus (2+1+), Pep[tydase] A type 1.

*Id.* at 1269-70. She stated that approximately four percent of both the general population and the black population has that combination of serological markers. *Id.* at 1270.

Epperson testified that based on her serological testing, Glenn, Durden, and Pinkins could not be excluded as contributors to the seminal fluid samples that she analyzed. *Id.* at 1296.<sup>9</sup> She also acknowledged that the men were not “the ones that definitely left those samples[.]” *Id.* Specifically, with respect to sample 3.1, taken from M.W.'s jacket, Epperson testified that because Glenn is a nonsecretor, “the ABO typing on that stain would be consistent with Roosevelt Glenn's standard; I wouldn't detect his type.” *Id.* at 1293. With respect to enzymes, Epperson testified that sample 3.1 contained a PGM sub type 2+1+ that “could have come from Roosevelt Glenn.” *Id.* at 1294. On cross examination, Epperson

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<sup>9</sup> Epperson explained,

In the testing that I do, we can include an individual as having contributed to a certain stain, for example, as having contributed to the seminal stain; however, we cannot positively identify that. I cannot say with one hundred percent certainty that that individual's seminal fluid is there. However, I can positively exclude somebody as having contributed to a seminal stain. If there is something that doesn't match in an individual's blood stain, if that substance is not present in the seminal stain, then I will exclude that individual; I will say with one hundred percent certainty that individual's seminal fluid is not there.

Tr. at 1296.

acknowledged that sample 3.1 also contained PGM sub types that “would be consistent with all the PGM sub groups[.]” *Id.* at 1344.<sup>10</sup>

In comparing serological testing and DNA testing, Epperson stated,

The serology testing that I do is more sensitive than the DNA test, and what that means is that ... I can determine my serology type with a very, very, very small amount of body fluid present. With DNA testing, you need a much larger quantity of the fluid present in order to get results. However, my serology testing is not as specific as DNA testing, and by specifics, what I mean is DNA testing can eliminate many, many, many more people in the population than what I can eliminate by serology testing. DNA is much more specific as an identifier.

*Id.* at 1310. She further stated that “[w]ith DNA testing, you’re only going to identify those individuals who have that minimum amount of sperm cells that you need to pick up DNA typing[.]” *Id.* at 1320.<sup>11</sup>

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<sup>10</sup> Glenn’s arguments regarding the serological test results focus primarily on sample 3.1. For the sake of completeness, we note that the vaginal/cervical swab was found to contain ABO type B, PGM type 2-1, PGM sub type 2-1+, and Peptidase A type 1. Epperson could not detect any markers in that sample that were foreign to M.W., “even though [she knew] that there [was] seminal fluid there.” Tr. at 1284-85. She stated that blood was present in the sample, which could have “cover[ed] up or mask[ed] any seminal fluid types[.]” *Id.* at 1287. The amount of seminal fluid in 3.2 was sufficient to reveal the presence of ABO types A and B but was insufficient to reveal the presence of other serological markers. Samples 3.3 and 3.4 both contained ABO types A and B, PGM type 2-1, PGM sub type 2-1+, and Peptidase A type 1. The samples from the sweater contained ABO types A and B, PGM type 2-1, and Peptidase A type 1; no PGM sub type could be determined.

<sup>11</sup> Epperson clarified this statement as follows:

With RFLP [restriction fragment length polymorphism] testing and PCR [polymerase chain reaction] testing [an older and a newer form of DNA analysis, respectively], both, you need sperm cells to be present. If an individual has been vasectomized, you wouldn’t be able to do DNA testing; there wouldn’t be sperm cells there. If an individual had a low sperm count, you might be able to get results with PCR testing, again, depending on the number of sperm that are there. But it would be unlikely that you would get results on RFLP testing.

Tr. at 1320-21.

Epperson sent portions of the seminal fluid samples to Gene Screen, an outside laboratory, for DNA testing. The testing detected two specific DNA profiles, neither of which matched Glenn's. According to Epperson, the DNA testing did not exclude Glenn as one of M.W.'s rapists because "there still could be semen there from individuals that just isn't concentrated enough to pick up DNA bands from." *Id.* at 1346. Glenn's DNA expert, Cellmark Diagnostics' Karen Quandt, who had conducted additional DNA testing on the seminal fluid samples at the State's request, testified to the same effect on cross examination. *See id.* at 2303 ("Q And you're not saying that there were no banding patterns that were contributed by Roosevelt Glenn in this matter, are you? A No. Q You haven't eliminated him, [have] you? A We did not detect his DNA. Q You're not eliminating him as possibly contributing some unknown bands, you don't know whether there were more or not, do you? A No."); *id.* at 2338 ("Q Mrs. Quandt, isn't it true that this evidence doesn't prove nor disprove that Roosevelt Glenn raped [M.W.]? A That's correct.").

In his closing argument, deputy prosecutor Joe Curosh told the jury, "[T]his is my recollection of what was said and if, at any time, my memory differs from your own, use your own memory. I'm going to recount what I believe the evidence to have been." *Id.* at 2936. Curosh summarized Epperson's testimony as follows:

If you remember, we went through the blood, and Kim told you that the blood testing is very, very sensitive, they can detect minute quantities of blood. She also qualified as a DNA expert. She said the serology is more sensitive than the DNA, but if you can raise the bands, the DNA is more specific, you can really lay into it and identify where it originated.

In regards to the blood, you can't even -- if she saw someone take blood out of my arm and she knew in the back of her mind that was my blood, that would be the only way she could say for sure it was my blood using the

serology testing. All she can say using the serology test is that it's consistent with, she can never say it came from this person unless she eyeballs and sees who it came from, because that's very important.

And she talked about how she developed the standards and she used all the markers that were available and that can be used in dealing with semen, and she went through and she reviewed the various forensic samples.

....

If you look, we have, in particular, the semen stain on the ski jacket left front [sample 3.1], we have got two plus (2+) and two plus (2+), and if you recall, this is a fairly rare series of factors, it's only found [in] three point seven five (3.75) or almost four (4) percent of the black population with these particular combinations.

Now, this particular one is unique, she told you, or rare in the black population, and that is found here. ...

I'm not saying, and I don't want you to get the idea, that that absolutely tells you he did it, but this does point in the direction of Roosevelt Glenn.

*Id.* at 2262-64.

In her closing argument, Glenn's public defender, Karen Freeman-Wilson, accused the State of manufacturing and manipulating evidence. She stated, "Well, Kim Epperson prepared the evidence for DNA testing because she knew that she couldn't tell you anything with her whole blood typing." *Id.* at 3010. Regarding the serological evidence, Freeman-Wilson observed,

We know from Epperson's testimony that the mixed stain [sample 3.1] could have come from anyone, being anyone in the world. You heard me ask her, I said, now, we have got two plus one (2+1), two minus (2-), one plus one minus (1+1-). How many PGM sub types do we have, and so she listed them. And I said, "So that means that could have come from anyone, anyone in the world," and she said, "Yes, you're right."

*Id.* at 3014. She also pointed out that the State's DNA testing had excluded Glenn as a contributor to the genetic material found in the seminal fluid stains. *Id.* at 3010-11.

At the hearing on his petition for post-conviction relief, Glenn called several witnesses who criticized various aspects of Epperson's testimony, as well as a chart she used to illustrate the results of her serological testing. Throughout his brief, Glenn makes several arguments regarding Epperson's serology test results, which for purposes of this issue we distill to the following three: the serology test results were misleading and irrelevant because they were inconclusive; the State relied on and misstated the serology test results in closing argument; and the serology test results were misleading and irrelevant because DNA testing excluded Glenn as a contributor to the seminal fluid stains. We address each argument in turn.

As for the first, Glenn advances the following contention:

Epperson's frequency calculations about each person's particular combination of markers as found in the general population were misleading and irrelevant. These frequencies are absolutely irrelevant to the stains that were examined, especially in light of the non-discriminatory statistics the serology can produce. The only way it would be relevant that Glenn's combination of markers only appears in approximately four in one hundred people is if it could be concluded that his exact combination of markers was the only combination of markers found in a particular stain.

Appellant's Br. at 33. We note, however, that Epperson did not testify to such a conclusion, and thus the jury could not have been misled by her testimony, regardless of the relevance of the serological test results.

As for the second, Glenn makes the following assertion:

[Deputy prosecutor] Curosh not only reiterated the irrelevant statistic that Glenn's particular combination is found in 3.75% of the African American population, but he misquoted Epperson's testimony in such a way as to prejudice Glenn even more than as before. While Epperson testified that 3.75% frequency pertained to [Glenn's] particular combination, Curosh

indicated that it was the PGM subtype 2+ found in stain 3.1 that was prevalent in 3.75% of the African-American population. In actuality, 0% of the population could be excluded from contributing to that stain. This evidence, as it was presented and reiterated to the jury during closing arguments, likely created the false final impression that Glenn was a contributor to the seminal stains.

*Id.* at 33-34. We reiterate that in cross-examining Epperson, Glenn’s counsel established that “anyone in the world” could have contributed to stain 3.1. Tr. at 3014. Moreover, Curosh told the jurors to rely on their own memory in evaluating the evidence, and the trial court instructed the jury that the comments of counsel are not evidence. *Id.* at 412. “We presume that the jury follows the trial court’s instructions.” *Harris v. State*, 824 N.E.2d 432, 440 (Ind. Ct. App. 2005). As such, it is extremely doubtful that the jury was misled by Curosh’s comments.

As for Glenn’s third argument, both Epperson and Glenn’s own post-conviction experts acknowledged that a rapist can leave sufficient seminal fluid to allow for serological testing but not leave a sufficient quantity of the nucleated cells required for DNA testing. *See, e.g.*, Tr. at 1320 (Epperson: “With DNA testing, you’re only going to identify those individuals who have that minimum amount of sperm cells that you need to pick up DNA typing[.]”); PCR Tr. I at 171-72 (Dr. Greg Hampikian: “Q. Now, there are other reasons, or are there as far as you know, reasons why genetic material, semen, body fluids of some type might be deposited, and yet a DNA profile is not able to be isolated from that sample. Some of those being the person had a low or no sperm count; is that correct? A. That would be one of the reasons you would get less DNA, sure.”); PCR Tr. II at 208-09 (Lisa Black: “Q. And you heard me discuss this with Dr. Hampikian that it was possible to detect your

markers, the serological markers, in a substance that did not contain sperm or nucleated cells, is that correct? A. That's correct."); *id.* at 284-85 (Dr. Rick Staub: "Q. Isn't it possible then for bodily fluid to be deposited by a contributor, you then to do DNA analysis of that stain, sample, and not be able to produce or identify a DNA profile? A. It's possible, and that is determined by the quantity of fluid that's actually deposited there. Q. And whether or not there are nucleated cells, correct? A. That's correct."); *id.* at 288 ("It's possible that if you have a mixture of two individuals, one could have contributed a lot of cells and one [a] very small number of cells, yes, that's possible.").<sup>12</sup>

Stated differently, the so-called "DNA exclusions" are not as "exculpatory" as Glenn asserts. Appellant's Br. at 34. In sum, we agree with the post-conviction court's conclusion that "the jury was not misled on the issue of DNA analysis or serological evidence[.]" Appellant's App. at 26-27.

(4) The record indicates that the jury was fully apprised of the inconsistencies in the informants' testimony and of their potential motives for testifying against Glenn. "It is the unique province of the jury to weigh trial testimony and to assess witness credibility."

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<sup>12</sup> Glenn takes issue with Epperson's characterization of serological testing as being more "sensitive" than DNA testing, noting that DNA testing is substantially more discriminating in terms of being able to identify or exclude a specific individual as having contributed to a given sample. We note that although Dr. Hampikian opined that Epperson's use of the term "tends to confuse people[.]" PCR Tr. I at 173, Dr. Staub agreed with Epperson's definition. *See* PCR Tr. II at 206 ("Q. So in this case there's been talk about serology being more sensitive than RFLP [DNA] testing. What does that mean to you? A. Well, what it means is that if you do a serology test on biological fluid, you don't need a whole -- a whole lot of that to get a reading, a serological reading, and, you know, I would agree with that. So sometimes you can get serological readings where you can't get DNA by the old technology.").

*Morrison v. State*, 609 N.E.2d 1155, 1159 (Ind. Ct. App. 1993). We decline Glenn’s invitation to invade the jury’s province in this case.<sup>13</sup>

(5) Finally, we note that the State significantly undermined Glenn’s alibi defense. We summarize that defense as follows. At approximately 11:00 p.m. on December 6, 1989, Glenn left work with fellow Luria Brothers employees Durden and Pinkins in Durden’s red Escort, which broke down on Interstate 80-94 and stopped beneath an overpass. The men walked to a payphone, where Glenn used a calling card to call his girlfriend at 11:46 p.m. Glenn’s girlfriend picked them up in her automobile, and they dropped her off at her apartment. The men then drove to Bowens Liquors, where they cashed their checks at 12:25 a.m. They purchased oil at a nearby Amoco gas station and returned to Durden’s car. Glenn used his girlfriend’s car to push Durden’s car off the interstate and into a parking lot. Durden told the others that his passenger window had been broken. All three men’s green work coveralls had been stolen from the car. Durden put oil in his car and jump-started it. Glenn and Pinkins followed Durden home, where they arrived at approximately 1:15 a.m. Glenn took Pinkins home and searched for someplace to buy beer. Between 1:35 and 2:00 a.m.—when M.W. was being abducted and raped—Glenn saw his longtime friend Derrick Blakely on the street. The two men purchased beer and went to Blakely’s sister’s house. Glenn drank a few beers and then drove to his girlfriend’s apartment and went to bed. When Glenn, Durden, and Pinkins reported for work the following Monday, December 11, they told

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<sup>13</sup> We also decline Glenn’s implicit invitation to reassess M.W.’s credibility based on her consumption of alcohol on the night she was raped and reweigh her fortuitous identification of Pinkins at a pretrial hearing as the man who approached and abducted her after she was rear-ended by the green Pontiac. Likewise, we decline to speculate on the basis for or assign any probative value to the jury’s deadlock in Glenn’s first trial.

assistant yard manager Kevin Barker that their greens had been stolen from Durden's car and requested replacement greens.

The State rebutted Glenn's alibi defense with the following evidence. A police officer observed an unattended vehicle under an overpass near Bowens Liquors that night and encountered two or three black men walking up a nearby exit ramp. The men confirmed that the vehicle belonged to them and declined an offer to hail a tow truck. No broken glass was subsequently found under the overpass, where Durden's car was purportedly looted. Police determined that a phone call had been made from the payphone in question at 11:46 p.m. Glenn, Durden, and Pinkins cashed their checks at Bowens Liquors at 12:25 a.m., later than their customary time and approximately one hour before M.W.'s abduction. They told the cashier that their car had broken down and refused her offer of a ride, saying that they already had a car. Pinkins bought some beer and cognac, and the three men left the store at approximately 12:35 a.m. The only oil purchased at the Amoco station near Bowens Liquors that night was sold at 6:12 a.m., hours after M.W.'s rape. Moreover, Glenn did not attempt to contact Blakely about his alibi defense until September 1991—nearly two years after M.W.'s rape—even though he knew Blakely's mother's address and telephone number.

As mentioned *supra*, the greens that the rapists placed over M.W.'s head during the assault were the same size as another pair of Glenn's greens and were "cuffed on the bottom in the fashion, bore the same dirt and wear patterns and had no burn holes." *Glenn*, slip op. at 6-7. Barker testified that when Glenn and his coworkers requested replacement greens, they stated that their missing greens had been in Glenn's car, which they claimed had been

stolen. Glenn, however, did not own a car. Barker made the following notation on Glenn's receipt for the replacement greens: "Received second pair 12-11-89 on account of stolen car." Tr. at 1128-29. Glenn initialed the receipt. Barker testified that Glenn "seemed withdrawn and nervous" when he requested the replacement greens. *Id.* at 1130. The State presented evidence that Glenn occasionally rode with Daniels in the green Pontiac in which M.W. was raped and that Daniels stopped driving the Pontiac to work immediately after the police visited Luria Brothers to investigate the rape. Finally, while attending a pretrial hearing, M.W. happened to see Pinkins enter the courtroom and recognized him as the man who approached and abducted her after the Pontiac rear-ended her vehicle.

Considered as a whole, the circumstantial evidence tending to prove that Glenn was one of M.W.'s five rapists is sufficient to convince us that the newly discovered evidence regarding the hair on M.W.'s sweater would probably not produce a different result on retrial.

## ***II. Due Process***

Next, Glenn claims that his conviction was obtained in violation of the due process clauses of the federal and state constitutions. Glenn's argument appears to be based on the State's alleged suppression of DNA and serological evidence favorable to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and on the State's alleged presentation of false or misleading DNA and serology evidence in violation of *Napue v. Illinois*, 360 U.S. 264 (1959).

The State suggests, and we agree, that Glenn's *Brady* claim is a nonstarter because there is no indication that the State suppressed any evidence, favorable or otherwise. The

State also asserts that Glenn’s due process claim is procedurally defaulted. Our supreme court has stated, “In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.” *Sanders v. State*, 765 N.E.2d 591, 592 (Ind. 2002). The State points out that

[i]f the State knew or should have known its evidence was false and misleading, then Glenn’s counsel should have known it as well. That is, the alleged falsity of the evidence was not uniquely with[in] the knowledge of the prosecution. Instead, the “false” nature of the evidence arises from its supposed irrelevance in light of DNA findings. Those DNA findings existed and were presented at trial.... In short, there is nothing new about this particular claim. It should have been raised on direct appeal. Because it was not, it is no longer available for collateral review.

Appellee’s Br. at 26. We agree.<sup>14</sup>

### ***III. Ineffective Assistance of Trial Counsel***

Glenn contends that his trial counsel, Karen Freeman-Wilson, was ineffective in “fail[ing] to discover, prevent the use of, and/or preserve the errors relating to the false physical hair comparison testimony and the irrelevant/false serology testing results.”

Appellant’s Br. at 37. Our standard of review is well settled:

to prevail on an ineffective assistance of counsel claim, the petitioner must show both deficient performance and resulting prejudice. As for the first prong—counsel’s performance—we presume that counsel provided adequate representation. Accordingly, counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference. The second prong—the prejudicial effect of counsel’s conduct—requires a showing that there is a reasonable probability that, but for counsel’s unprofessional

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<sup>14</sup> Given our determination that Glenn’s due process claim is procedurally defaulted, we need not address his contention that the post-conviction court erred in refusing to allow him to question the trial prosecutors regarding the DNA and serological evidence presented at trial.

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

*Allen v. State*, 749 N.E.2d 1158, 1166-67 (Ind. 2001) (citations, brackets, and quotation marks omitted), *cert. denied* (2002). “Failure to satisfy either prong will cause the claim to fail. Most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone.” *Polk v. State*, 822 N.E.2d 239, 245 (Ind. Ct. App. 2005) (citation omitted), *trans. denied*.

We have already determined that Glenn is not entitled to a new trial based on the discovery that he was not the source of the hair found on M.W.’s sweater. As such, he cannot establish any prejudice arising from Freeman-Wilson’s allegedly deficient performance *vis-à-vis* the hair comparison evidence. We have also agreed with the post-conviction court’s conclusion that the jury was not misled by the State’s DNA and serological evidence. Consequently, Glenn cannot establish that he was prejudiced by Freeman-Wilson’s allegedly deficient performance in this regard.

#### ***IV. Fundamental Error***

Finally, Glenn contends that he is entitled to post-conviction relief on the basis of fundamental error, which he claims resulted from alleged prosecutorial misconduct in the presentation of Epperson’s scientific testimony. Our supreme court has stated that freestanding claims of fundamental error may not be raised in a post-conviction proceeding. *See Sanders*, 765 N.E.2d at 592 (stating that “the fundamental error exception to the contemporaneous objection rule applies to direct appeals.”). Moreover, Glenn’s fundamental error claim is essentially a rehashing of his other claims, which we have already decided

against him. Consequently, this argument fails. Therefore, we affirm the denial of Glenn's petition for post-conviction relief.

Affirmed.

ROBB, J., and BROWN, J., concur.