APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRETT KIMBERLIN
Plaintiff,

v. No. 1:21-cv-02506-TWP

UNITED STATES DEPARTMENT OF JUSTICE,
U.S. ATTORNEY GENERAL MERRICK GARLAND,
ALCOHOL, TOBACCO AND FIREARMS,
INDIANA STATE POLICE SUPERINTENDENT
DOUGLAS CARTER,
BRIAN REITZ,
BROOKE APPLEBY,
MICHAEL OLIVER,
PATRICK DONOVAN,
KENNARD FOSTER,
SHIRLEY HENDERSON,
and
DONALD HENDERSON,
Defendants.

Order Directing Entry of Final Judgment

Plaintiff Brett Kimberlin brought this civil rights action against ten defendants in connection with his convictions for a series of bombings in Speedway, Indiana, in 1981. *See United States* v. *Kimberlin,* 805 F.2d 210 (7th Cir. 1986). Mr. Kimberlin's contends that he is innocent of these

convictions, but his numerous challenges to them have failed. See, e.g., *id.; Kimberlin* v. *United States,* Case No. IP 00-280-C-D/G (S.D. Ind. May 3, 2000); *Kimberlin v. United States*, Case No. 1:18-cv-01141-TWP-MPB (S.D. Ind. March 17, 2021). He served his sentence and is no longer in custody.

The Court dismissed Mr. Kimberlin's complaint pursuant to 28 U.S.C. § 1915A(b) and gave him an opportunity to show cause why this case should not be dismissed. Dkt. 17. Mr. Kimberlin responded and attached a proposed amended complaint. Dkt. 18. However, the proposed amended complaint does not correct the deficiencies noted in the Court's previous Order. For the reasons discussed below, this action is dismissed for failure to state a claim.

Mr. Kimberlin argues that his claims are not barred by *Heck v. Humphrey,* 512 U.S. 477 (1994), but the cases he cites in support of his argument are not applicable to his claims. Many of the cases he relies upon are excessive force cases which have long been recognized as not falling under *Heck. See, e.g., Gilbert v. Cook,* 512 F.3d 899 (7th Cir. 2008). Mr. Kimberlin does not raise an excessive force claim.

Other cases cited by Mr. Kimberlin *Armstrong v. Daily,* 786 F.3d 529 (7th Cir. 2015) and *Fields* v. *Wharrie*, 740 F.3d 1107 (7th Cir. 2014)-involve claims brought after a plaintiff's conviction had been overturned. Mr. Kimberlin's convictions have not been overturned.

Mr. Kimberlin claims that the Department of Justice and Assistant U.S. Attorney Brian Reitz violated his due process rights when they failed to follow recent federal directives regarding the review of DNA and microscopic hair evidence. He seeks a declaratory judgment. His original complaint raised this claim under the Declaratory Judgment Act. The Court dismissed the claim because "[t]he Declaratory Judgment Act cannot be used as a substitute for appeal or habeas corpus, coram nobis or other such procedures." *U. S. ex rel. Bennett v. People of State of Ill.,* 356F.2d 878, 879 (7th Cir. 1966). Mr. Kimberlin has appealed his conviction, pursued post-conviction relief, coram nobis, and a motion for DNA testing pursuant to 28 U.S.C. § 3600, all to no avail. *United States* v. *Kimberlin*, 805 F.2d 210 (7th Cir. 1986); *Kimberlin* v. United *States,* Case No. IP 00-280-C-D/G (S.D. Ind. May 3, 2000); *Kimberlin v. United States*, 1:18-cv-01141- TWP-MPB (S.D. Ind. March 17, 2021); *United States v. Kimberlin,* 1:79-cr-00007-TWP-MJD (S.D. Ind. June 12, 2020).

In his proposed amended complaint, Mr. Kimberlin argues that *Skinner* v. *Switzer,* 562 U.S. 521 (2011), established his right to bring a procedural due process claim under § 1983 for "DNA matters." Dkt. 18-1 at 34. In *Skinner,* the Supreme Court held that a state prisoner's § 1983 claim for DNA testing was not barred by *Heck. Id.* at 534. In contrast, Mr. Kimberlin is a federal convict who has previously pursued his DNA claim under 28 U.S.C. § 3600. Furthermore, his proposed amended complaint

does not seek DNA testing as Skinner did. Instead, Mr. Kimberlin acknowledges that the DNA evidence in his case has been lost or destroyed, and he seeks damages related to his allegedly wrongful conviction. Dkt. 18-1 at 2. Thus, he has no viable claim under *Skinner.*

Mr. Kimberlin next argues that his claims are not barred because the defendants' misconduct occurred after his trial ended, but the majority of Mr. Kimberlin's claims involve alleged misconduct before and during his trial such as jury tampering, malicious prosecution, and fabrication of evidence. In *Heck,* the Supreme Court

> was drawing a conceptual distinction between constitutional wrongs that occur and are complete outside a criminal proceeding (for example, unreasonable searches) and constitutional wrongs that occur within a criminal proceeding. Constitutional violations of the first type are independently actionable regardless of their impact on a conviction, which takes them outside the *Heck* rule-but with the important qualifier that the scope of recovery cannot include conviction-related injuries. On the other hand, § 1983 claims for constitutional violations of the second type-i.e., those that occur at trial-fall within the *Heck* rule.

Johnson v. Winstead, 900 F.3d 428, 436 (7th Cir. 2018) (footnote omitted). Mr. Kimberlin's claims

against the defendants are alleged wrongs that occurred within the criminal proceedings against him. Such claims are barred by *Heck*.

One exception is Mr. Kimberlin's Fourth Amendment claim, which falls into the category of wrongs occurring outside a criminal proceeding. The Court dismissed Mr. Kimberlin's Fourth Amendment claim for failure to allege injuries unrelated to his conviction. His proposed amended complaint attempts to revive his Fourth Amendment claim against detective Brooke Appleby, but his alleged injuries all flow from his conviction and incarceration. Thus, he still fails to state a claim for which relief can be granted.

Although Mr. Kimberlin's proposed amended complaint does not include an access to courts claim, his response brief argues that defendants' misconduct prevented him from bringing nonfrivolous claims. To state a viable access to courts claim, a plaintiff must allege that the defendants' actions prejudiced the plaintiff's non-frivolous legal claim. *In re Maxy*, 674 F.3d 658, 660 (7th Cir. 2012) ("[T]o satisfactorily state a claim for an infringement of the right of access, prisoners must also allege an actual injury."). But as stated in the Court's original dismissal order, none of the underlying claims raised in Mr. Kimberlin's original complaint, and restated in his proposed amended complaint, are viable. Thus, he has no viable access to courts claim..

Mr. Kimberlin's second new claim is that

defendants Department of Justice and Merrick Garland violated the Administrative Procedures Act (APA), 5 U.S.C. § 702, when they failed to respond to his requests to "investigate, comply with [DOJ] directives, and hold accountable corrupt government officials." Dkt. 18-1 at 44. He seeks an injunction ordering the Department of Justice to respond to his complaints in a timely manner. Section 702 states, in part: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Mr. Kimberlin has not identified a relevant statute that the Department of Justice or Merrick Garland has violated or disregarded. This claim is dismissed for failure to state a claim for which relief can be granted.

For these reasons, this action is properly dismissed pursuant to 28 U.S.C. § 1915A.

Given the dismissal of this action, the pending motion for default judgment, dkt. [20], and motion to issue a scheduling hearing, dkt. [19], are **denied as moot.**

Judgment dismissing this action with prejudice as to the plaintiff's claims against the Indiana State Police, and without prejudice as to all other claims shall now issue.

IT **IS SO ORDERED**.

Date: 3/2/2022

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

NONPRECEDENTIAL

DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 13, 2023*
Decided April 18, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-1622

BRETT KIMBERLIN,

Plaintiff-Appellant,

V.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-02506-TWP-MPB

Tanya Walton Pratt, *Chief Judge.*

ORDER

More than 40 years ago, juries convicted Brett Kimberlin of felonies related to a series of bombings in Speedway, Indiana. He maintains his innocence and, after a host of unsuccessful direct appeals, collateral attacks, and adjacent civil litigation, he sued the United States Department of Justice, the Bureau of Alcohol, Tobacco, and Firearms

*We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

and Explosives, the Indiana State Police, state and federal officials, as well as a juror and her husband—all of whom, he alleges, conspired to convict and imprison him. The district court screened the complaint and dismissed it after concluding that most of Kimberlin's claims were barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), and that the remainder of his complaint failed to state a claim. We affirm the judgment.

Over three jury trials during the early 1980s, Kimberlin was convicted of nearly three dozen counts related to eight bombs that exploded in Speedway, Indiana in the first week of September 1978. With minor exceptions, we upheld the convictions on direct appeal, rejected his collateral attacks, and denied relief in additional follow-on cases. *See United States* v. *Kimberlin,* 805 F.2d 210, 216 & n.2 (7th Cir. 1986) (affirming in four consolidated appeals and collecting prior cases); *United States* v. *Kimberlin,* 781 F.2d 1247, 1249 (7th Cir. 1985) (collecting additional cases). Relevant to our current purposes, on direct appeal Kimberlin contended that there were several irregularities at his trial, including the admission of tape recordings of Indiana State Police Detective Brook Appleby interviewing witnesses using hypnosis. While acknowledging the dangers of hypnosis testimony, we noted that the guilty verdict was supported by "strong, albeit circumstantial" evidence and concluded that the hypnosis testimony did not affect Kimberlin's substantial rights, even if it were inadmissible. *See* FED. R. EVID. 103(a); *Kimberlin,* 805 F.2d at 221, 223.

In 2018-almost 20 years after his prison sentence ended-Kimberlin began a new campaign of litigation. He first petitioned for a writ of error *coram nobis* to vacate his conviction. As relevant here, he alleged that the government had committed a "fraud upon the court" by failing to reveal that one of the jurors was Appleby's distant relative through marriage. Kimberlin later added a claim that a 2015 Department of Justice memo reviewing historical cases involving microscopic hair analysis invalidated the use of that evidence at the trial at which it was presented. The district court denied the petition, and we affirmed. *Kimberlin* v. *United States,* No. 21-1691, 2022 WL 59399, at *1 (7th Cir. Jan. 6, 2022) (nonprecedential decision). Second, Kimberlin moved under 18 U.S.C. § 3600 for DNA testing on the same decades-old hair evidence and, when the government was unable to locate it, argued that his convictions should therefore be vacated. The district court denied the motion and we affirmed, concluding that the motion was untimely and, in any event, it was not clear how a DNA test result from the hair could undermine Kimberlin's conviction. *United States* v. *Kimberlin,* No. 21-2714, 2022 WL 1553257, at *2 (7th Cir. May 17, 2022) (nonprecedential decision).

In September 2021-in the midst of these appeals-Kimberlin sued various federal and state agencies and officials, including Appleby, the supposedly related juror, and the juror's spouse for damages and declaratory relief. He alleged the defendants had violated his constitutional rights by fabricating the hair and hypnosis evidence, tampering with the jury,

failing to intervene to stop these misdeeds, and committing a "fraud upon the court" by covering up the conspiracy to this day. *See* 42 U.S.C. §§ 1983, 1985; *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). He next alleged that the federal government violated his due-process rights and Department of Justice policy by failing to preserve what he believed was exculpatory hair evidence for DNA testing. Finally, Kimberlin alleged that Appleby had violated his Fourth Amendment rights by illegally surveilling him, and that the Indiana State Police also violated his rights by failing to properly supervise or keep adequate records of Appleby's "secret, rogue investigation."

The district court promptly dismissed Kimberlin's complaint for failure to state a claim. It principally determined that the claims regarding evidence fabrication, jury tampering, failure to intervene, "fraud upon the court," and destruction of exculpatory DNA evidence necessarily implied the invalidity of his conviction and were therefore barred under *Heck*, 512 U.S. at 486-87. His Fourth Amendment claim likewise failed, according to the court, because he did not allege an injury besides his conviction. The court otherwise concluded that Kimberlin's claim against the Indiana State Police, a state agency, was barred by the Eleventh Amendment.

The court gave Kimberlin an opportunity to amend his complaint. In his proposed amended complaint, Kimberlin removed the Indiana State Police as a defendant and added the agency's

superintendent, as well as the attorney who had litigated his recent postconviction cases on behalf of the federal government. He also added new claims under 42 U.S.C. § 1986, and the Administrative Procedure Act, *see* 5 U.S.C. § 702. And Kimberlin now argued that the defendants had engaged in concerted misconduct to "deprive him of meaningful and effective access to the Courts." The district court entered judgment against Kimberlin after determining that his proposed amended complaint failed to correct the deficiencies noted in the screening order, was untimely under § 1986, and failed to state an APA claim.

On appeal, Kimberlin argues only that *Heck* does not bar any of his claims. He has therefore forfeited, if not waived, any challenge to the district court's resolution of his claims dismissed on other grounds. *See Klein* v. *O'Brien,* 884 F.3d 754, 757 (7th Cir. 2018). *Heck* holds that a § 1983 plaintiff seeking damages on a theory that implies the invalidity of his conviction or imprisonment must first show the favorable termination of his conviction or sentence. 512 U.S. at 486-87. Although released from prison, Kimberlin's convictions have not been expunged and so the *Heck* bar continues to apply to him. *See Savory* v. *Cannon,* 947 F.3d 409, 419 (7th Cir. 2020) (en banc). Kimberlin, however, contends that his claims fall outside *Heck's* rule because they do not necessarily undermine his conviction or, alternatively, because he has alleged that the defendants' actions prevented him from invalidating his criminal conviction through the courts. We review de novo the district court's dismissal for failure to state a claim, accepting

Kimberlin's factual allegations as true and drawing all reasonable inferences in his favor. *Schillinger* v. *Kiley,* 954 F.3d 990, 994 (7th Cir. 2020).

We agree with the district court that, just as in *Heck* itself, most of Kimberlin's claims amount to allegations of malicious prosecution: a conspiracy by state and federal actors to fabricate and destroy evidence, lie to the court, improperly influence the jury, and then cover up their misdeeds. 512 U.S. at 479. Without this conspiracy, Kimberlin says, he "would not have been convicted and his conviction would never have been upheld on appeal." And the damages he seeks stem entirely from his conviction and imprisonment. These claims therefore necessarily imply the invalidity of his conviction and are barred by *Heck*. *Id.* at 484-86; *Clemente* v. *Allen,* 120 F.3d 703, 705 (7th Cir. 1997) (applying *Heck* to *Bivens* actions); *see also Amaker* v. *Weiner,* 179 F.3d 48, 52 (2d Cir. 1999) (applying *Heck* to claims under § 1985). That Kimberlin alleges the conspiracy to imprison him continued long after he was convicted does not change things. Proof that the defendants violated his rights as he describes would necessarily undermine the conviction, the maintenance of which was the alleged objective of that conspiracy.

Kimberlin cannot escape this conclusion by recasting his claim as alleging a denial of access to courts. In *Burd v. Sessler,* we held that *Heck* barred such claims when the remedy sought necessarily implied the invalidity of the underlying judgment for

to his conviction, it is not clear that he needed to—nominal damages are presumptively available for completed constitutional violations. *See Uzuegbunam* v. *Preczewski,* 141 S. Ct. 792, 802 (2021); *Calhoun* v. *DeTella,* 319 F.3d 936, 940-41 (7th Cir. 2003).

But Kimberlin's illegal-search claim fails for a different reason: it is untimely. His § 1983 claims fall under Indiana's two-year statute of limitations. IND. CODE § 34-11-2-4; Richards v. *Mitcheff,* 696 F.3d 635, 637 (7th Cir. 2012). Illegal-search claims generally accrue at the time of the search-here, as the state notes, more than 40 years before Kimberlin filed this suit in September 2021. *Dominguez,* 545 F.3d at 589. His amended complaint further confirms that he became aware of Appleby's searches, at the absolute latest, in the spring of 2019, when he discussed the investigation in his *coram nobis* proceedings. The state officers raised the issue of timeliness in their brief on appeal- their first opportunity, *cf. United States* v. Williams, 62 F.4th 391, 393 (7th Cir. 2023) (exhaustion defense properly raised first on appeal)- and Kimberlin does not explain in his reply brief how his claim could be timely. The district court therefore properly dismissed Kimberlin's Fourth Amendment claim, but we modify its judgment so that this dismissal is with prejudice.

Finally, throughout this case, Kimberlin has asserted that our resolving his suits primarily on procedural grounds implied that, had we reached the

merits, he would have prevailed. But precisely because we did not reach the merits, we took no position on the veracity of his claims then, nor do we now. Under *Heck,* that determination cannot be made through a civil suit in the first instance but must await the invalidation of his conviction by other means. 512 U.S. at 487.

AFFIRMED AS MODIFIED

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
June 23, , 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-1622

BRETT KIMBERLIN,
Plaintiff-Appellant,

V.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,
Defendants-Appellees.
Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-02506-TWP-MPB

Tanya Walton Pratt, *Chief Judge.*

ORDER

Petitioner filed a petition for rehearing and rehearing en banc on June 8, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition for rehearing. Accordingly, the petition for rehearing and rehearing en banc is **DENIED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Case No. 1:79-cr-00007-TWP-MJD

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRETT C. KIMBERLIN,

Defendant.

ORDER ON MOTION FOR DNA TESTING AND RELATED PENDING MOTIONS

This matter is before the Court on Defendant Brett C. Kimberlin's ("Kimberlin") Motion for DNA Testing, (Dkt. 3) and several related motions – Defendant's Amended Reply to Government's Opposition to DNA Testing and Request for Sanctions for Destruction of DNA Evidence, (Dkt. 28), Defendant's Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, (Dkt. 29), and, Defendant's Motion for Appointment of Counsel, (Dkt. 32). For the reasons stated below, the Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, previously filed in Case No. 1:18-cv-01141-TWP-MPB on October 8, 2019, and re-docketed in this action as Docket 29, is **granted**. The

remaining requests, including the Motion for DNA Testing are **denied.**

I. DISCUSSION

As an initial matter, the Court grants Kimberlin's Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, Dkt. 29, and the supplemental authority is considered by the Court is making the rulings herein. The Court will address the request for DNA testing, before turning to the request for sanctions and appointment of counsel.

A. Motion for DNA Testing

The Court has considered Kimberlin's verified motion for DNA testing. (Dkt. 3.) The DNA testing provision of 18 U.S.C. § 3600(a) applies to individuals "sentenced to imprisonment or death pursuant to a conviction for a Federal offense." Kimberlin was sentenced in this action for committing federal offenses, but is no longer under a sentence of imprisonment, or in custody in any way, for those offenses. *See United States v. Kimberlin*, IP 79-cr-7-01 (S.D. Ind. July 8, 2005).

Furthermore, the Code of Federal Regulations makes clear that § 3600(a) does not apply after a defendant is released from imprisonment:

> Inapplicability following release. The requirement of section 3600A to preserve biological evidence ceases to

> apply when the defendant or defendants are released following imprisonment, either unconditionally or under supervision. The requirement does not apply during any period following the release of the defendant or defendants from imprisonment, even if the defendant or defendants remain on supervised release or parole.

28 C.F.R. § 28.22

Kimberlin was paroled in 1993, before 18 U.S.C. § 3600(a) was enacted. (Dkt. 3 at 2.) Kimberlin has not cited any case applying § 3600(a) to a person no longer imprisoned or otherwise in custody, and the Court has not identified any such case. Kimberlin has filed multiple supplemental authorities in support of his position. Of the recent cases provided to the Court by Kimberlin, all but one involved defendants who were still incarcerated for their crimes. The lone exception, *In re Stevens*, 956 F.3d 229, 232 (4th Cir. 2020), involved Kimberlin's motion for a successive habeas petition which was granted by the Fourth Circuit Court. But Stevens was on parole and therefore satisfied the custody requirement of § 2255. *Id.* at 232, n1. This Court could not grant a request for a successive habeas petition even if Kimberlin were imprisoned or on parole. *Adams v. United States*, 911 F.3d 397, 403 (7th Cir. 2018) (district courts lack jurisdiction to consider successive petitions unless previously approved by the circuit court).

Kimberlin argues that neither this Court's prior denial of his 2005 motion for DNA evidence, nor the fact he is no longer incarcerated, bar his current motion because Assistant United States Attorney General Peter Kadzik waived all procedural defenses to challenges to microscopic hair evidence in a 2015 letter. (Dkt. 28 at 1; Dkt. 19-1.) That letter states, in part:

> [I]n federal post-conviction proceedings, in the interest of justice, the government is waiving reliance on the statute of limitations for collateral attack on the convictions and any procedural-default defenses in order to permit a resolution on the merits of any legal claims arising from erroneous statements in laboratory reports or testimony.

(Dkt. 19-1 at 2.) But a federal district court only has jurisdiction to review a federal conviction in post-conviction proceedings if Kimberlin is in custody. *Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (holding that the custody requirement is jurisdictional). This jurisdictional requirement is not a waivable defense. 18 U.S.C. § 3600(a) is not applicable to convicted felons who are no longer imprisoned and the Kadzik letter cannot extend the reach of the statute to include them.

For these reasons, Kimberlin's verified Motion for DNA Testing, (Dkt. 3), is **denied**.

B. Other Pending Matters

Kimberlin's amended reply to the Government's response includes a motion for sanctions for the destruction of evidence. (Dkt. 28.) The Government states, albeit without submitting an affidavit in support, that efforts to locate the hair samples from the 1981 trial have been unsuccessful and that the evidence was likely destroyed. (Dkt. 27 at 2-3.) Kimberlin argues that the Government's timeline "clearly demonstrate[s] that the loss or destruction of the DNA hair evidence in the instant case was done in bad faith." (Dkt. 28 at 7.) But Kimberlin's recitation of the Government's timeline incorrectly states that the evidence was likely destroyed with the case file by the Bureau of Alcohol Tobacco Firearms and Explosives ("ATF") in 2012. The Government actually argued that ATF policies provided for the destruction of evidence when Kimberlin exhausted his appeals in 1987. A certificate of destruction would have then been placed in the case file which could have been destroyed in 2012 pursuant to ATF policy. (Dkt. 27 at 2- 3.) Kimberlin has not shown that the evidence was destroyed in bad faith or that he is entitled to sanctions. Therefore, his motion for sanctions, (Dkt. 28), is **denied.**

C. Motion for Appointment of Counsel

In addition, Kimberlin's Motion for Appointment of Counsel, (Dkt. 32), is **denied.** Although he argues that 18 U.S.C. § 3600(b)(3)

provides for the appointment of counsel, that statute is not applicable in this case because Kimberlin in no longer in custody. Moreover, the substantive Motion for DNA testing was fully briefed by the parties prior to Mr. McShane's sudden passing. Thereafter, Mr. Kimberlin competently represented himself as evidence by the fact that his submissions of supplemental authorities is granted and the submissions have been considered by the Court.

III. CONCLUSION

For the foregoing reasons, Kimberlin's Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, Dkt. [29], is **GRANTED.** Kimberlin's Motion for DNA Testing, Dkt [3], Amended Defendant's Reply to Government's Opposition to DNA Testing and Request for Sanctions for Destruction of DNA Evidence, Dkt. [28], and Motion for Appointment of Counsel, Dkt. [32] are each **DENIED.**

SO ORDERED Date: 6/12/2020

Tanya Walton Pratt

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

DOJ Seal

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, DC 20530

September 15, 2015

The Honorable Richard Blumenthal
United States Senate
Washington, DC 20510

Dear Senator Blumenthal:

This responds to you letter to the Attorney General and the Federal Bureau of Investigation (FBI) Director, dated April 28, 2015, regarding the FBI's review of federal and state criminal cases in which the results of microscopic hair comparison analyses were used. We are sending identical responses to the other Senators who joined in your letter and we apologize for our delay in responding.

As you are aware, the Depart of Justice (the Department, and the FBI are engaged in a review of historical cases involving testimony and laboratory reports regarding microscopic hair comparison analysis. The Department and FBI have developed a process to systematically identify and review all cases that resulted in a conviction in which microscopic hair comparison analysis was conducted, a positive associate between evidential hair and a known sample was identified, and the har was not submitted for mitochondrial DNA analysis. We have given the highest priority to reviewing capital cases. To date,

21,614 cases have been identified as having the potential to meet the above stated criteria and the FBI has completed its review of 95% of those cases. Of those 95%, 3,118 contained positive associates between evidentiary hair and a known sample. So far, 89% of the 3,118 have been marked as complete following a review.

The FBI's methodology for processing identified cases was carefully constructed in coordination with the Innocence Project (IP), the National Association of Criminal Defense Lawyers (NACDL), and the Department. A coordinated effort with multiple parties throughout the country is being implemented to obtain information to conduct reviews. Tis process requires multiple attempts to obtain pertinent case file materials via telephone and letter. If no response is receive, assistance is sought from the applicable stat's attorney general, the OP, the NACDL, and the Department. In the event that pertinent materials are obtained after a reviewed matter is close, it is reopened and the review resumes. The FBI has received valuable assistance by following this process, including, but not limited to, obtained several testimony transcripts.

The FBI anticipates completing reviews of all identified cases by the end of the calendar year 2015. This means the identified case files will be reviewed to determine if further action is required. This review process, however, is dependent on the responses and cooperation the FBI receives from contributors of the evidence, prosecutor's offices, and others.

One the files have been review and notifications are made, individuals seeking to challenge their convictions based on erroneous states in laboratory reports of testimony will file their claims in an appropriate court proceeding, such as a direct appeal, collateral review, or petition for a writ of habeas corpus. In state courts, the claims will be subject to state laws and procedures regarding post-conviction challenges. Since the United States is not a party to the underlying state court criminal proceedings, it does not have jurisdiction to intervene in post-conviction proceedings. However, in our notification letters to state prosecutors and defense counsel, we are informing them that in federal post-conviction proceedings, in the interest of justice, the government is waiving reliance on the statute of limitations for collateral attack on any legal claims arising from erroneous statements in laboratory reports of testimony. Specifically, the government will not dispute that the erroneous statements should be treated as false evidence and that knowledge of the falsity should be imputed to the prosecution. This will allows the parties to litigate the effect of the false evidence on the conviction in light of the remaining evidence in the case. In addition, in cases where it is clear that a defendant is actually innocent, the government will consent to vacating the conviction.

In addition to the above actions, the FBI continues to be involved in the forensic science community. The FBI has enjoyed a long history of working with the National Institute of Standards and Technology (NIST) and has already partnered with NIST, through the Department, to strengthen and enhance

the practice of forensic science through the establishment of the Organization of Scientific Area Committees (OSAC). The mission of the OSAC is to develop standards of practice and guidance documents with the forensic science disciplines represented in the organization. The FBI is well-represented in the OSAC with over 35 members currently employed in the FBI's Science and Technology Branch.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

/s/
Peter J. Kadzik
Assistant Attorney General