

[APPELLATE COURT CAPTION]

**VERIFIED PETITION FOR PERMISSION TO STAY DIRECT APPEAL AND REMAND TO
FILE A [CHOOSE ONE: BELATED MOTION TO CORRECT ERRORS OR PETITION FOR
POST-CONVICTION RELIEF] IN THE TRIAL COURT**

The Appellant, by counsel, pursuant to Indiana Rule of Appellate Procedure 37, respectfully requests this Court to stay the direct appeal and remand to allow the Appellant to file a [CHOOSE ONE: Belated Motion to Correct Errors or Petition for Post-conviction Relief] in the trial court. In support of the Petition, counsel for Appellant states the following:

1. On [insert date], the Appellant was convicted of [insert offense(s)], and on [insert date], the Appellant was sentenced to [insert sentence].

2. On [insert date], the Appellant timely filed his Notice of Appeal. [Specify status of appeal, i.e., waiting for competition of transcript or Appellant's Brief is due on (insert date)].

3. Since the initiation of the appeal, the Appellant has discovered new evidence that would support a [CHOOSE: Belated Motion to Correct Errors OR Petition for Post-conviction Relief]. [Specify new evidence, how and when the new evidence was discovered, and some case law that you will use to support your argument down at the trial level].

4. A stay or dismissal of the appeal in order to present issues to the trial court, then an appeal involving all appellate and post-conviction issues is a procedure approved by the Indiana Supreme Court. Woods v. State, 701 N.E.2d 1208 (Ind. 1998) (citing to Hatton v. State, 626 N.E.2d 442 (Ind. 1993) and Davis v. State, 267 Ind. 152, 368 N.E.2d 1149 (1977)); see also Prewitt v. State, 819 N.E.2d 393, 402 (Ind.Ct.App. 2004). This procedure is available for dealing with issues where an evidentiary hearing is necessary, but there is no need or desire to wait until the original appeal is decided before pursuing post-conviction relief. Hatton v. State, 626 N.E.2d 442 (Ind. 1993).

5. Remanding to the trial court is necessary for the administration of justice in this case. The recently discovered evidence is critically important and needs to be developed as soon as possible while the events are still fresh in the minds of the witnesses.

6. Further, developing the information before the trial court at this juncture would promote judicial economy regardless of the result of the [CHOOSE ONE: Belated Motion to Correct Errors OR Petition for Post-conviction Relief]. Were the lower court to grant the motion and order a new trial, an unnecessary appeal would be circumvented. However, following an evidentiary hearing, were the trial court to deny this motion, Appellant would have an adequate Record in which to raise the issue as part of his direct appeal.

WHEREFORE, the Appellant, by counsel, respectfully requests this Court to grant a stay of his direct appeal, issue an Order to remand the case to the trial court for the filing of [CHOOSE ONE: a Belated Motion to Correct Errors OR a Petition for Post-Conviction Relief], and for all other relief just and proper in the premises.

(Attorney's Signature)

VERIFICATION

Under penalty of perjury, the foregoing representations are true and accurate to the best of my knowledge and belief.

(Attorney Signature)

REFERENCES

Indiana Rule of Appellate Procedure 37(A) (a Motion for Remand must be verified and demonstrate that remand will promote judicial economy or is otherwise necessary for the administration of justice).

CASE LAW

Thomas v. State, 797 N.E.2d 752 (Ind. 2003) (an appellate attorney was not ineffective for failing to look outside the record for evidence and then, using the evidence, to file a Petition to Stay Proceedings pursuant to the Davis/Hatton procedure).

Prewitt v. State, 819 N.E.2d 393 (Ind.Ct.App. 2004) (staying an appeal and pursuing post-conviction relief was a proper procedure for presenting a Brady violation where the Defendant did not conclude his investigation into the possible Brady violation until after the time to file a Motion to Correct Errors had run).

Woods v. State, 701 N.E.2d 1208 (Ind. 1998) (recognizing that a proper use of a petition to remand to the trial court would be a situation in which the appellant is raising ineffective assistance of counsel that requires evidence outside of the record). See also Brewster v. State, 697 N.E.2d 95 (Ind.Ct.App. 1998).

Schlabach v. State, 842 N.E.2d 411 (Ind.Ct.App. 2006) (Appellant, pursuant to Ind. App. Rule 37, properly filed a Davis/Hatton petition for a stay and remand due to newly discovered evidence in the form of juror's affidavit detailing that the jury asked two questions to the court about the summons, which were answered by the trial court without Defendant's knowledge).