IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA,	)	No. CR–87–0135–AP
	)	
Appellee,	)	Pima County Superior Court
	)	Nos. CR14065 and CR15397
v.	)	
	)	
FRANK JARVIS ATWOOD,	)	(Capital Case)
	)	
Appellant.	)	
	)	
	)	

APPELLANT'S MOTION FOR STAY OF EXECUTION DUE TO PENDING SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF

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Appellant Frank Atwood, through counsel, respectfully moves this Court to grant a stay of his execution, currently scheduled for 10:00 a.m. on June 8, 2022, to permit time for ruling on his recently filed successive petition for post-conviction relief. This motion is brought pursuant Arizona Rule of Criminal Procedure 32.18 and Mr. Atwood's rights to due process and freedom from cruel and unusual punishment under the United States and Arizona constitutions. *Montgomery v. Superior Court*, 178 Ariz. 84, 87 (App. 1993) ("[A]t a minimum, the United States Constitution requires that the states provide every [postconviction] litigant an 'adequate opportunity to present his claims fairly.'"), *quoting Ross v. Moffitt,* 417 U.S. 600, 616 (1974); *Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976); U.S. Const. amend. V, VIII, XIV; Ariz. Const. art. 2 §§4, 15.

Counsel for Appellee, Jeffrey Sparks, objects to the requested stay.

Mr. Atwood filed a notice and successive petition for post-conviction relief on June 1, 2022. A copy of that petition and its exhibits accompanies this motion as Appendices A and B. The Superior Court accepted the notice, appointed counsel, and ordered the petition be filed on June 2, 2022. Appendix C. The petition presents three, non-precluded claims for relief based upon substantial evidence of his innocence of the September 17, 1984, abduction and murder of Vicki Lynne Hoskinson. That evidence includes an exculpatory police report that had been withheld by the State for decades, despite defense counsel's pretrial request and the

trial court's order that such information be disclosed. The factual basis for those claims and the stay requested here is summarized below.[1]

I. Relevant Factual Background

A. The Evidence at Mr. Atwood's Trial

Mr. Atwood's trial was a close case. As this Court observed, there was a dearth of direct evidence, and as a result "the jury convicted [Mr. Atwood] based on circumstantial evidence and, perhaps in part, based on the testimony of alcohol abusers and drug users[.]" *State v. Atwood*, 171 Ariz. 576, 595, 653 (1992). Witnesses who purported to place the victim with Mr. Atwood were universally impeached with their earlier statements that were inconsistent with their later testimony and were, in many instances, exculpatory to Mr. Atwood. Most significantly, the State's timeline of the crime was implausible verging on impossible. A detective testified it would have taken Mr. Atwood at least one hour to complete travel necessary under its theory of the crime. Other evidence, including traffic conditions and signs the victim's remains had been buried, suggested the minimum time was even longer. The victim, however, disappeared sometime after 3:30 p.m., and a reliable witness could account for Mr. Atwood's location no later than 4:40 p.m., and perhaps earlier. There State's timeline left no margin for error and was highly unlikely.

[1] The facts below are summarized from Mr. Atwood's post-conviction petition and are presented without their corresponding citations to exhibits and record evidence. A fuller summary of the facts, including relevant citations, may be found in the appendices accompanying this motion.

In his defense, Mr. Atwood called a witness who saw him alone in his car during the minutes immediately after the victim was abducted, a strong alibi. He also called numerous witnesses who observed the victim in the company of an unknown woman at the Tucson Mall on the evening she disappeared, long after Mr. Atwood could have committed the offense. Two of these witnesses positively identified the distinctive red, white, and blue dress the victim was wearing at the time of her abduction.

B. The Third Party Suspect

Substantial evidence outside the trial record demonstrates that the true culprit in this case was not Mr. Atwood, but a woman named Annette Fries. Based on a description provided by one of the mall witnesses, police produced a composite sketch of the woman seen with the victim at the mall. Approximately ten other witnesses independently identified that sketch as Fries.

After being identified, Fries was brought in for questioning. She told police that she spent the afternoon of September 17 at home and that evening at a motel with her boyfriend. Her proposed alibi was quickly revealed to be a lie, however, as a boarder in her home told police that she was not home that afternoon, and the motel she named had no record of her staying there. Additionally, the man Fries called her boyfriend had obtained a restraining order against her just days before, citing a pattern of incessant harassment and abuse that included terrorizing his juvenile grandson.

Fries was known for erratic, strange, and criminal behavior. In 1982, she was charged in connection with an arson and insurance fraud scheme. After her counsel filed a Rule 11 motion, she was ordered to the hospital for an in-patient evaluation, diagnosed with schizoaffective disorder, and ultimately deemed incompetent to stand trial and not restorable. The charges were dismissed without prejudice on that basis just weeks after the victim disappeared. More recently, investigation has uncovered a woman's accusation that she was molested by Fries when she was a child.

During the Hoskinson investigation, a young man named Abe Rodriguez reported to police that days before the crime he had seen Fries outside of a bank in downtown Tucson, eyeing him suspiciously and standing next to a dark brown Datsun 280Z with blue and gold California plates. Other witnesses also placed Fries with a brown Datsun. Notably, that car was similar to Mr. Atwood's, who drove a black Datsun 280Z with blue and gold California plates. Rodriguez further told police that later on the same day as the first sighting, he observed Fries and the brown Datsun a second time, cruising outside an elementary school watching children on the playground.

Both before and after the abductions, numerous people reported attempted kidnappings of children on the northwest side of Tucson that were committed either affirmatively by Fries or by a woman matching her description. Two of these attempted abductions, occurring the week before Vicki Lynne was kidnapped, were of children who lived in an apartment complex 100 feet from the intersection where the

victim's bike was discovered on the day of the kidnapping. Several witnesses also placed either Fries or her brown Datsun in the victim's neighborhood on the afternoon of September 17, including the neighborhood mailman, who an hour before the abduction saw a woman matching Fries' description in a dark brown car parked at a Circle K the victim visited just before disappearing.

C. The *Brady* Material

Beginning in the summer of 2021, the Attorney General's office permitted undersigned counsel to review their case file to identify exculpatory material that had not previously been disclosed. During the course of this lengthy review, counsel found a September 19, 1984, memorandum by FBI Special Agent Small (the Small memorandum). It memorialized a tip phoned into the Phoenix police by an anonymous female earlier that day, stating that she had seen the victim in a car with Arizona license plate 3AM618. Appended to the memo was a license plate report showing that plate was registered to a 1980 Toyota owned by Richard Rhoads of 5742 N. Trisha Ln, Tucson. Incredibly, Richard Rhoads was Annette Fries next-door neighbor.

The Small memorandum had not previously been disclosed. Unlike other police reports in the prosecution file, it was not marked as being disclosed. Counsel thoroughly reviewed the defense file and could not locate it. A member of the trial defense team avows she had never seen it before, despite the defense's interest in such evidence. Indeed, trial counsel were not just interested in exculpatory tips made to

police—rather, they specifically sought disclosure of that exact class of evidence, and the court ordered the State to provide it. At trial, the defense expressly sought disclosure of records of phoned in tips containing exculpatory information. After some resistance, the prosecution eventually agreed to make that disclosure—but for whatever reason, the Small memorandum was not included, and it was never seen by the defense until its recent discovery by current counsel.

The significance of the Small memorandum is difficult to overstate. For the first time, it provides a direct, concrete link between Fries and this case. In the absence of any suggestion that her neighbor was actually spotted driving his own car with the victim in it, the logical implication is that someone who knew Rhoads called in a tip referencing his car for some reason. Annette Fries was such a person, and she had a good reason to place the call. By the time the anonymous tip was made, the drawing of Fries identifying her as a suspect had appeared in local media, and she had already been contacted by investigators and summoned for an interview. She was motivated to try to divert police attention. The idea that Rhoads' license plate number could randomly end up in the report, completely unconnected to the fact that his next-door neighbor was the prime suspect under investigation by police, is simply not credible. The coincidence is too great.

The Small memorandum is not only powerful evidence in its own right, but it fundamentally alters the character of the evidence Mr. Atwood presented at trial. Without a concrete link between Fries and the case, the mall sightings could be

dismissed as a case of mistaken identity with no basis in other evidence—which is precisely what the prosecutor argued to the jury. By establishing a near indisputable connection between Fries and the crime, the Small memorandum is strongly confirmatory of the mall witnesses, whose sightings exonerate Mr. Atwood. It also corroborates the wider, voluminous universe of other circumstantial evidence, described above, implicating Fries.[2] Because the memo was withheld despite counsel's request for production, Mr. Atwood was denied this strong confirmatory evidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (withheld evidence is material and grounds for relief when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

II. The Current Petition

Mr. Atwood's pending post-conviction petition raises three non-precluded claims for relief. All three claims assert his actual innocence, and all three are based on the factual basis summarized above, including the Small memorandum.

[2] As described in the petition, the false tip memorialized in the Small memorandum is consistent with the known M.O. of Fries' son, Todd, who was an adult in 1984. Todd has a troubling history of criminal behavior, including sexual violence, and he is currently incarcerated for masterminding a series of terroristic revenge attacks. Police caught Todd in part by his failed efforts to cover his trail by phoning in a false tip to police, mirroring the Small memorandum. Additionally, the attacks Todd committed included threatening displays of dead animal carcasses on his victims' property. The same distinctive style of attack using carcasses was also carried out, post-trial, against the defense trial witness who provided a description of Annette Fries at the mall and testified about her sighting. Todd was known to be close to his mother and would be motivated to both protect and avenge her.

The second and third claims in Mr. Atwood's petition arise under Rule 32.1(e) and (h) (newly discovered evidence and actual innocence, respectively). In the second claim, Mr. Atwood alleges that the Small memorandum constitutes newly discovered evidence that probably would have changed Mr. Atwood's sentence had it been known at the time of trial. In the third claim, he alleges that in light of the total universe of evidence, including the Small memorandum and other recently developed evidence, no reasonable juror would have found him guilty beyond a reasonable doubt. Neither of these claims has previously been adjudicated on the merits and are not otherwise subject to preclusion. Ariz. R. Crim. P. 32.2(b).

Mr. Atwood's first claim arises under Rule 32.1(a) (violation of the constitution). It alleges that the Small memorandum constituted material, exculpatory evidence, and that the prosecution's failure to disclose it violated his state and federal rights to due process under *Brady v. Maryland*, 373 U.S. 83 (1963). Ordinarily, claims arising under Rule 32.1(a) which are not raised in an initial petition are subject to preclusion in successive petitions. However, there is an exception to that rule "when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a)(3). Mr. Atwood's *Brady* claim fits into that exception.

This Court distinguishes between rights waivable by counsel and rights which require a knowing, voluntary, and personal waiver by the defendant. *Stewart v. Smith*, 202 Ariz. 446, 449-50 (2002), citing *Brown v. Artuz*, 124 F.3d 73, 77 (2nd Cir. 1997).

The former category "primarily involve trial strategy and tactics, such as what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *Brown*, *supra*, at 77 (citation and quotation omitted). The latter category involved more "fundamental" and structural questions about the trial process itself. *Id.* at 78

The *Brady* claim implicates the latter category of rights. The State's failure to disclose material, exculpatory evidence results in a fundamental violation of due process so great that the remedy for a successful *Brady* claim is "a new trial at which the [withheld] evidence is available[.]" *State v. Youngblood*, 173 Ariz. 502, 506 (1993). As that dramatic remedy demonstrates, the right to disclosure of exculpatory evidence is fundamental and requires a knowing waiver by the defendant. Such waiver was not made here. By its very nature, a defendant cannot "knowingly" waive a *Brady* claim until the basis for the claim—the withheld evidence—is uncovered. Moreover, Mr. Atwood vigorously sought disclosure of exculpatory information at trial, and even absent those efforts he had a constitutional expectation that such evidence would be disclosed by the State. *See Amado v. Gonzalez,* 758 F.3d 1119, 1136 (9th Cir. 2014) ("[D]efense counsel may rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce."). Accordingly, because Mr. Atwood did not knowing, voluntarily, and personally waive the due process right to disclosure at issue in this claim, it is not subject to preclusion under Rule 32.2(a)(3).

Allowing a petitioner to bring a *Brady* claim under Rule 32.1(a) in a successive petition is consistent with the overall scheme of Rule 32. Rule 32.4(b)(3)(A) generally requires a petitioner to file a notice alleging a Rule 32.1(a) claim "within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later." However, Rule 32.4(b)(3)(D) establishes an exception to this requirement, providing "The court *must* excuse an untimely notice requesting post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." (emphasis supplied.) Thus, the rules do contemplate circumstances when a 32.1(a) claim may be brought in a later proceeding—such as the situation here, where a *Brady* claim was discovered by a defendant only after filing a their initial post-conviction petition.

Precluding this claim from being raised under Rule 32.1(a) would also violate due process. To prevail on a *Brady* claim, a defendant need only show that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75-76 (2012), quoting *Kyles*, 514 U.S. at 434 (alteration original).

If Mr. Atwood is precluded from raising this claim under Rule 32.1(a), his alternative for raising this *Brady* claim would be the newly discovered evidence and actual innocence vehicles provided by Rules 32.1(e) and (h). Both of those provisions impose a more exacting standard of review than do *Brady* and its progeny. The former requires a showing that the newly discovered facts "*probably* would have changed the judgment." Ariz. R. Crim. P. 32.1(e) (emphasis supplied). The latter requires a showing "*by clear and convincing evidence* that the facts underlying the claim would be sufficient to establish that *no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt*." *Id.* 32.1(h) (emphasis supplied). While Mr. Atwood prevails under either of these standards, they require greater showings than the "undermine[ ] confidence in the outcome of the trial" standard governing *Brady* claims. *Kyles*, 514 U.S. at 434.

When federal law establishes constitutional grounds for granting relief (as with *Brady*), state law may provide relief that is *more* expansive. *Danforth v. Minnesota*, 552 U.S. 264, 287-88 (2008). However, due process commands that "under no circumstances may [a state] confine petitioners to a *lesser* remedy." *Id.*, quoting *Harper v. Virginia Dep't Taxation*, 509 U.S. 86, 102 (1993) (emphasis supplied). Precluding petitioners from raising newly discovered *Brady* claims under Rule 32.1(a) and thus restricting them to more demanding provisions of Rule 32.1 confines defendants to a lesser remedy, in violation of due process. U.S. Const. amend. V, XIV; Ariz. Const. art. 2 §4. Basic fairness dictates that the State should not be able to unconstitutionally

withhold material, exculpatory evidence and, when that evidence is belatedly disclosed, reap the benefit of a more demanding standard of review attributable to its own error.

III. Prayer for Relief

Mr. Atwood is scheduled to be executed in a matter of days for a crime which he did not commit, and which he indisputably is not guilty of beyond a reasonable doubt. Substantial evidence exonerates Mr. Atwood and inculpates a third party, including powerful confirmatory evidence which dramatically alters the entire complexion of the case in Mr. Atwood's favor and which Mr. Atwood sought before trial yet was suppressed by the State for nearly four decades. Even if Mr. Atwood's *Brady* claim is deemed precluded, his petition alleges two other grounds for relief which are not precluded and under which he will also likely prevail. Mr. Atwood must be given the opportunity to have a court examine and rule on the merits of this compelling, new evidence of his innocence. Unless this Court grants a stay, however, such review will not be possible, because Mr. Atwood will be dead.

For the foregoing reasons, Mr. Atwood respectfully requests that this Court grant this motion and stay his June 8, 2022, execution.

RESPECTFULLY SUBMITTED this 3rd day of June, 2022.

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APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Respondent/Plaintiff, vs. FRANK JARVIS ATWOOD, Petitioner/Defendant.	Pima County Nos. CR14065 & CR15397 **PETITION FOR POST-CONVICTION RELIEF** Hon. Catherine Woods, Div. 17

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I. INTRODUCTION

Frank Atwood did not kill Vicki Lynne Hoskinson. The specter of a third-party suspect, Annette Fries, has always haunted this case. The prosecution's case against Mr. Atwood was almost entirely circumstantial, and there was an uncommonly large amount of evidence pointing to Fries. Today, the evidence implicating Fries is impossible to explain in a universe where Frank Atwood committed this crime.

Worse, the State knew it had a third-party-suspect problem with Fries, but when police received a highly credible tip linking Fries to the disappearance, the State failed to share that information with Mr. Atwood's attorney, in direct violation of Mr. Atwood's right to due process and the prosecution's corresponding duties under *Brady v. Maryland,* 373 U.S. 83 (1963). Now, this Court must act to prevent the execution of a man for a crime he did not commit, on a conviction obtained with the State violating the Constitution.

II. PROCEDURAL HISTORY

Following a jury trial, Petitioner Frank Jarvis Atwood was found guilty of one count each of kidnapping and first-degree murder. The state sought the death penalty, and just one aggravating factor was found: under former A.R.S. §13-703(F)(1), Mr. Atwood was adjudged to have had a prior foreign conviction bearing a possible sentence in Arizona of life imprisonment or death. Finding no mitigating evidence sufficient to call for leniency, the court imposed a death sentence in May 1987.

The Arizona Supreme Court affirmed Mr. Atwood's conviction and sentence.

State v. Atwood, 171 Ariz. 576 (1992). Thereafter, Mr. Atwood filed a post-conviction petition. This Court denied all claims for relief on January 28, 1997. Mr. Atwood then filed a petition for writ of habeas corpus in United States District Court, pursuant to 28 U.S.C. §2254. Habeas corpus proceedings were temporarily stayed to allow Mr. Atwood to exhaust certain claims in a successive post-conviction petition in this Court, which was denied on January 2, 2009. The District Court thereafter denied Mr. Atwood's habeas petition on January 27, 2014. *Atwood v. Ryan,* 2014 WL 289987 (D. Ariz. Jan. 27, 2014). The Ninth Circuit affirmed. *Atwood v. Ryan*, 870 F.3d 1033 (9th Cir. 2017).

Mr. Atwood then filed a pro se successive post-conviction notice and petition in this Court on April 23, 2019, raising *inter alia* the invalidity of the sole aggravating factor making him eligible for the death penalty. After the appointment of counsel and filing of an amended petition, this Court denied relief on June 22, 2020, and the Arizona Supreme Court denied review on May 4, 2021. Mr. Atwood filed another successive post-conviction notice on June 25, 2021, seeking to develop and present new evidence regarding the reliability of the sole physical evidence against him, a paint sample taken from the bumper of his car. After counsel was appointed, a petition was filed on November 19, 2021. The petition was denied without an evidentiary hearing on February 2, 2022.

Mr. Atwood filed an application in the Ninth Circuit for authorization to file a second or successive habeas petition in federal district court, but that application was

denied on May 27, 2022. *Atwood v. Shinn*, No. 22-70084 (9th Cir.). *See* 28 U.S.C. §2244(b)(3)(A) (requiring authorization from the Court of Appeals before a successive habeas petition may be brought in district court).

After securing an expedited briefing schedule from the Arizona Supreme Court based on representations about the timeline for the use of execution drugs as constrained by the State's obligations under its execution protocol for lethal injection, on April 7, 2022, the State filed a motion for an execution warrant. On May 3, 2022, the Arizona Supreme Court issued the execution warrant, scheduling the execution for June 8, 2022. Mr. Atwood's execution is currently set to occur at 10:00 a.m. on that day.

III. RELEVANT FACTS

Frank Atwood's conviction was based upon unreliable, contested evidence, and the State's theory of the crime relied on a timeline that was implausible and contradicted by the evidence. At trial, Mr. Atwood presented evidence that another person, Annette Fries, was responsible for this crime. Substantial additional evidence—including evidence improperly withheld by the State—strongly corroborates the Fries, and not Mr. Atwood, is the true culprit, through avenues that were unknown or unavailable at trial.

A. The Victim's Disappearance

On September 17, 1984, around 3:30 p.m., eight-year-old Vicki Lynne Hoskinson left her home on Hadley Road in northwest Tucson on her bicycle to place a card in a mailbox at a nearby Circle K store located at Wetmore and Romero, a short distance

from her home. RT3/3/1987 at 53. Around 3:50 p.m., after Vicki Lynne had failed to return home, her mother sent her other daughter, Stephanie, to look for her younger sister. Around 4:00 p.m., Stephanie found Vicki Lynne's bike lying in the middle of the street near the intersection of Root and Pocito, a residential area. Exhibit 1, Zobenica Report re: Stephanie Hoskinson (9/19/1984). Vicki Lynne's mother contacted police, who launched a massive search for the missing girl, but Vicki Lynne was not found. As described below, Mr. Atwood was identified as a suspect on September 20; arrested in Kerrille, Texas; and charged with kidnapping. Despite months of searching, however, Vicki Lynne had not been located.

The following March, a major investigative report ran in the Tucson Citizen. The article identified deficiencies in the investigation into Vicki Lynne's disappearance, most notably asking why police had failed to act on substantial evidence indicating that an unrelated woman, and not Mr. Atwood, was responsible for the disappearance. Exhibit 2, Tucson Citizen Article (3/21/1985). Three weeks later, on April 11, 1985, a man searching for his missing dog found human skull in a desert area near the 7300 block of Ina Rd., in the far northwestern outskirts of Tucson. The area was fenced off and at least several minutes' walk from the road. Further searching uncovered additional bones. Exhibit 3 at 1-2, Van Skiver Report re: Bone Discovery (4/12/1985). The Ina Road area where the remains were recovered had been thoroughly searched the previous fall, but that search was unsuccessful. Exhibit 4, Supplement to Search Report (10/29/1984). A

comparison of dental records confirmed that the recovered remains were those of Vicki Lynne Hoskinson. No cause of death was ever determined. *Atwood*, 171 Ariz. at 594. Mr. Atwood was charged with first degree murder.

B. The Case Against Mr. Atwood

1. Mr. Atwood's Identification and Arrest

Mr. Atwood is a native of Los Angeles, California. In September of 1984, he and a companion, James McDonald, headed east from California in Mr. Atwood's car, a black 1975 Datsun 280Z with blue and gold California license plates. The back of the car was "completely loaded" with Mr. Atwood's and McDonald's belongings. RT2/11/1987 p.m. at 6, 10, 19. On Friday, September 14, the two men arrived in Tucson, spending the night at the home of some acquaintances. The following day, Mr. Atwood and McDonald left Tucson for Mount Lemmon, where they camped for two nights. On Monday, September 17, they left Mount Lemmon, returned to Tucson, and headed to De Anza Park near Speedway and Stone, where several of McDonald's acquaintances were congregated. *Id.* 11-12.

Mr. Atwood initially became a suspect in Vicki Lynne's disappearance after a teacher named Sam Hall saw Mr. Atwood and his car around 3:15 p.m. on the afternoon of September 17 in the vicinity of Homer Davis Elementary, just east across Romero Road from where Vicki Lynne's bike was discovered at Root and Pocito. Mr. Atwood was alone in his car when he was observed by Hall, who thought Mr. Atwood was

behaving strangely. Finding Mr. Atwood suspicious, Hall recorded his license plate number, which he provided to police. Exhibit 5, Gosting Report re: Hall (9/19/1984). After running the plate number provided by Hall and discovering the car belonged to Mr. Atwood, investigators' attention focused on him, ultimately leading to his arrest in Kerrville, Texas, on September 20.

2. Mr. Atwood's Activities on the Afternoon of September 17

Mr. Atwood never denied being in the vicinity of Homer Davis on the afternoon of September 17, but explained he had gone to that area to try to buy drugs from another party. Specifically, Mr. Atwood testified that on his and McDonald's first night in Tucson on September 14, he used drugs with a person he met in the parking lot of the Wetmore and Romero Circle K, later giving this person a ride to their home in the Flying H Trailer Park, adjacent to Homer Davis Elementary on the northwest side of town. RT5/6/1987 at 120. The following day, he and McDonald left to go camping on Mount Lemmon. Upon returning to Tucson on September 17, the pair drove to De Anza Park. Mr. Atwood then left the park to return to the northwest side in an attempt to score drugs again. It was during this trip to the northwest side that he was seen by Sam Hall and other witnesses who placed in the vicinity of the Flying H around 3:00 p.m. Exhibit 5, Gosting Report re: Hall (9/19/1984); Exhibit 6, Clark Report re: Egger (9/20/1984).

Mr. Atwood subsequently returned to De Anza Park, where he met up with McDonald. McDonald told investigators that Mr. Atwood arrived back at the park around 4:00 or 5:00 p.m. RT2/11/1987 at 139. McDonald testified that when he reconnected with Mr. Atwood that afternoon, Mr. Atwood did not seem anxious or nervous. RT2/12/1987 a.m. at 45. Mr. Atwood and McDonald then left the park for the home of Thomas Parisien at 14 West Kelso, approximately two miles from De Anza Park. RT3/10/1987 at 188. Parisien estimated Mr. Atwood and McDonald arrived at his house sometime near 4:00 p.m., as he had been watching *Hawaii Five-0* on television, which aired from 3:00 to 4:00 p.m., and the episode was nearing its conclusion. *Id.* at 188-190.

Richard Murray was a car salesman whose place of employment was located on North Stone Avenue approximately a block away from Parisien's Kelso address. He testified that on the afternoon of September 17, he had occasion to drive down Kelso. Parked on the north side of the street a half block from Stone, the location of Parisien's house, Murray spotted a black Datsun Z car with blue and gold California plates. The car had two occupants, and the person in the driver's seat resembled Mr. Atwood. RT3/11/1987 at 23-27. Approximately 20 to 25 minutes later, Mr. Kelso drove back past the Kelso address. He saw the car again, but could not tell if it was occupied. Both sightings occurred before 5:00 p.m. *Id.* at 28. Assuming the latest possible time for the

second sighting of 5:00 p.m., Murray's testimony placed Mr. Atwood at Parisien's house no later than 4:40 p.m.

After spending the rest of the afternoon in Tucson, Mr. Atwood and McDonald left town headed east towards Texas, where Mr. Atwood was arrested three days later. RT2/11/1987 p.m. at 19-20.

3. The Implausibility of the Prosecution Theory of the Crime

The prosecution's theory of the case was that Mr. Atwood struck the victim's bicycle with his car, placed the victim in his car, drove over the bicycle, drove to the Ina Road location where the victim's remains were later discovered, killed the victim somewhere during this process, and then returned to town, where he met with James McDonald at De Anza Park. The minimal physical evidence the state proffered to support this theory was shoddy, however, and the State's proffered eyewitnesses provided testimony that contradicted their earlier statements and was patently unreliable. Most significantly, the overall timeline required for the prosecution's theory to hold was implausible if not impossible, and witnesses provided an alibi for Mr. Atwood during the commission of the crime itself.

a. Dearth of Compelling Physical Evidence

The physical evidence supporting this theory was scant and contested. Following his arrest in Texas, FBI agents processed Mr. Atwood's car, looking for blood, hair fiber, soil, fingerprint, or any other physical evidence connecting Vicki Lynne to the interior of

Mr. Atwood's car or the belongings found inside of it, including clothes and a knife belonging to Mr. Atwood. Evidence collected was sent to the FBI Crime Lab in Washington for examination. RT2/13/1987 at 46-48, 52-59. No such evidence was found. Additionally, while two latent prints were recovered from Vicki Lynne's bicycle, neither matched Mr. Atwood. Exhibit 7, Latent Print Report (12/20/1984).

The lone piece of physical evidence purporting to independently link Mr. Atwood to the missing girl—a smear of pink paint allegedly found on the bumper of his car—was contested and dubious. While the prosecution produced an expert, James Corby, to opine that the pink paint from the bumper matched the victim's bicycle, experts produced by the defendants disagreed with this conclusion. RT3/4/1987 p.m. at 40; RT3/16/1987 at 29-48; RT3/13/1987 p.m. at 79, 81-84, 92-94. Moreover, a smear of blue paint that was on top of—and thus deposited after—the pink paint on the bumper made the State's paint theory even less likely, as it would have required Mr. Atwood to have a second collision with a blue object at the exact same area on his bumper in the roughly 72-hour period between the victim's disappearance and his arrest. RT3/5/1987 p.m. at 47-48.[1]

[1] During a previous proceeding, prior counsel raised the possibility that the pink paint had been planted on the bumper, an allegation supported by the absence of any mention of the pink paint from the earliest FBI reports of the car being processed and photos which suggest the bumper was at some point removed from and reattached to the car. This claim was dismissed by the previous judged assigned to this matter, Hon. John Coughenour, following a one-day

Another prosecution witness, accident reconstructionist Paul Larmour opined that certain marks on the underside of Mr. Atwood's car were consistent with the car running over the bicycle. That conclusion, however, was informed by the fact that those marks "were in the general vicinity of the paint transfer and contact mark on the front of the car." RT2/24/1987 at 220. Thus, his opinion relied on the dubious assumption that the pink paint on the bumper originated from the bicycle. While Larmour also concluded that the paint on the bumper matched the bicycle, he did not conduct any kind of scientific analysis of the paint. *Id.* at 217. Rather, he based that conclusion on a visual inspection and his experiences working in an auto body shop as a youth. *Id.* at 217-18. For the defense, engineering professor Jack Humphrey disputed Larmour's findings, concluding that Larmour's analysis was flawed and that the marks on the underside of the car were not consistent with the bicycle. RT3/17/87 at 13-42.

Contrary to both Larmour and Corby's conclusions that Vicki Lynne's bicycle was run over by Mr. Atwood's car was the testimony of Clifford McCarter, an accident investigator with the Pima County Sheriff's Department. RT3/16/1987 at 41-42. McCarter testified that on September 17, he examined both the Root and Pocito area and Vicki Lynne's bicycle and concluded there were no signs on the street or on the

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evidentiary hearing. *See* Atwood v. Ryan, No. CV-98-116-TUC-JCC (D. Ariz.), Order Denying Claim 1-B (9/10/2012).

bicycle itself of an accident between a bike and a car. *Id.* at 43-45. This conclusion was consistent with the testimony of Betty Bodman, one of the first neighbors to notice the bike in the middle of the intersection, who also testified that when she saw the bike, it did not appear damaged. RT2/17/1987 at 116. Another sheriff's deputy who viewed the bike on September 17 echoed this conclusion, testifying that he did not see evidence that the bike had been in an accident. RT3/11/1987 at 35.

b. The Implausibility of the State's Timeline

At Mr. Atwood's trial, Pima County Sheriff's Department Detective Gary Dhaemers testified that he had timed himself retracing the shortest possible route from, roughly, where the bike was found, to where the victim's remains were found, to De Anza Park, concluding that the route would take approximately one hour. RT2/24/1987 at 92-93. Assuming a timeline that is maximally generous to the prosecution's theory—in which Vicki Lynne was kidnapped immediately after leaving home at 3:30 p.m. and Murray spotted Mr. Atwood just seconds after he arrived at Parisien's at 4:40—the State's sequence of events is barely credible, leaving just ten minutes to spare. Under a more sober reading, the State's timeline is flat out impossible.

First, we know that Vicki Lynne was not kidnapped as soon as she left her house. She was going to the Circle K to mail a birthday card to a relative in New Mexico. That card was received several days later. RT3/3/1987 at 63. Thus, Vicki Lynne must have gone from her house, to the Circle K, and back to Root and Pocito before being

kidnapped, a process that would have taken at the very least several minutes. This fact further narrows the already constrained window for Mr. Atwood to have completed this crime under the prosecution's theory.

Second, Dhaemers' calculation was based on a route that terminated at De Anza Park. But Murray spotted Mr. Atwood and McDonald at *Parisien*'s house no later than 4:40 p.m. Mr. Atwood would have had to go to De Anza Park first to pick up McDonald, then head to Parisien's, a couple miles away, adding additional minutes to the minimum time needed to complete the route.

Third, there is no reason to believe that Mr. Atwood would have taken the most efficient route to the necessary destinations on the prosecution's timeline. Mr. Atwood grew up in Los Angeles. Testimony indicated that he was not familiar with Tucson streets and required directions to get around. RT2/17/1987 at 32. The suggestion that an out-of-towner like Mr. Atwood would instinctively be able to plan a complex route from the northwest side, to the far outskirts to Tucson, and back to just north of downtown in the middle of the city in a maximally efficient manner is not plausible.

Fourth, Dhaemers' testimony indicated that his timing was based upon him driving from the Romero and Wetmore area roughly to the section of Ina Road near where the remains were discovered, with him then immediately heading back towards town as part of the timing exercise. RT2/24/1987 at 90. The victim's remains were not found on or even near Ina Road, however, but in a desert area surrounded by a fence

several minutes' walk from the road itself. Exhibit 3 at 1-2, Van Skiver Report re: Bone Discovery (4/12/1985). Dhaemers' timeline failed to account for the time it would have taken Mr. Atwood to either drive off road or carry the victim to the location where the bones were later recovered. Either would significantly add to the time necessary for Mr. Atwood to complete the crime on the prosecution's theory.

Fifth, the route chosen by Dhaemers contradicts the testimony of one of the prosecution's own witnesses. Dhaemers based his calculations on a route that initially went north from the Root and Pocito area. RT2/25/1987 at 92-93. The State, however, called a man named Michael Young, who testified the he saw a man matching Mr. Atwood's description headed *south* in that area between 3:30 and 4:00 p.m. RT2/18/1987 at 14-15.[2] This would be the opposite direction from the Ina Road location, adding still more time necessary to complete the route. Dhaemers admitted that his calculation did not take Young's information into account. RT2/25/1987 at 90.

Finally, the state's timeline fails to take into account the existence of adipocere on the victim's remains. Medical examiner Richard Froede's post-mortem examination found the presence of adipocere on the skeletal remains that were recovered in April 1985. Exhibit 8 at 5, Post-Mortem Report (4/13/1985). Adipocere is a wax-like substance that appears on bones post-mortem through bacterial action when the remains

[2] Young's testimony is discussed in greater detail at §III(B)(3)(c), *infra*.

are exposed to the right combination of temperature and humidity. Dr. Froede explained that while adipocere may begin to form within the first few days of death, it typically takes several months of development to become recognizable. RT2/27/1987 at 42-44.

Froede speculated that rainy weather in late September of 1984 might have created conditions hospitable to the formation of adipocere for a body dumped in the desert. RT2/27/1987 at 43. Dr. Kris Sperry, a forensic pathologist experienced with bodies left in desert environments, disagreed with this conclusion. Exhibit 9 at ¶¶1, 3, Sperry Affidavit (8/14/1996). Sperry opined that the weather conditions which prevailed in Tucson from late September through mid-October of 1984 would result in rapid skeletonization of remains. Such skeletonization would prevent the formation of adipocere in a body dumped in the open desert. *Id.* at ¶¶4-5. In order for adipocere to form in a desert environment, remains would need to be buried in a grave of a depth of one to two feet or more. *Id.* at ¶7. Further, the absence of tooth marks on the remains make it unlikely that body had been buried but later disinterred by scavengers. There was also no evidence of a grave near the location where the bones were discovered. *Id.* at ¶¶8-10. Based on this information, Sperry concluded that the available evidence supported the hypothesis that the victim's remains were buried in a grave for at least two months and later disinterred and scattered by a human actor, and that the theory that the body had been dumped or haphazardly covered in dirt at the Ina Road site was not supported by the evidence. *Id.* at ¶¶12-13.

The presence of adipocere on Vicki Lynne's remains thus demonstrates that her body was buried, rending the prosecution's theory of the case untenable. The State's timeline is, charitably, suspect even without this additional testimony about the condition of the bones. It would be impossible for Mr. Atwood to have not only completed Dhaemers' route while *also* digging a grave and burying a body within the narrow timeframe permissible by the prosecution's theory. Exhibit 10, Luis Garcia Affidavit (8/8/1996) (concluding that it would have taken Mr. Atwood at least two hours to dig a grave at that location).

c. The Unreliability of the State's Witnesses

The prosecution attempted to bolster its fraught theory of the crime with the testimony of several witnesses, purporting to implicate Mr. Atwood in Vicki Lynne's disappearance. Universally, however, these witnesses provided unreliable testimony that, in most cases, differed markedly from the statement the witnesses first made to police.

For example, the prosecution presented the testimony of a man named Ernest Bernsienne, who testified to incriminating statements Mr. Atwood allegedly made in advance of the crime. On cross-examination, however, Bernsienne was definitively impeached, as he was forced to admit personal animosity that had previously led him to

attempt to frame Mr. Atwood for a crime on at least one other occasion.[3] Bernsienne was not credible.

The prosecution's direct evidence purporting to tie Mr. Atwood to the crime fares even worse. It presented the testimony of three witnesses—Michael Young, Robert, McCormick, and Nora Wilson—who alleged they saw Mr. Atwood with a child in his vehicle in moving through northwest Tucson. Yet as the Arizona Supreme Court noted, Mr. Atwood's trial counsel "stress[ed] apparent inconsistencies in" all three of these purported sightings. *Atwood*, 171 Ariz. at 612. Those inconsistences thoroughly undermine the credibility of each of these witnesses' trial testimony.

Michael Young, for example, testified he saw Mr. Atwood's car twice, the second time with a child in the passenger seat. RT2/18/1987 A.M. at 14-20, 77-82. Yet when Young was interviewed by police days after the disappearance, he made no mention of the second sighting of Mr. Atwood or the child he saw in the car, producing those details only months later, long after Mr. Atwood had been publicly identified as a suspect and arrested. RT5/14/1986 at 114; RT5/15/1986 at 10-11. Young also testified he saw

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[3] Bernsienne provided evasive, transparently contradictory information about his membership in an occult organization and was caught lying about his own criminal history and military service. RT3/2/1987 at 30-34, 40-48, 61-62, 64-65. Bernsienne was forced to admit that he previously tried to get Mr. Atwood arrested as revenge for a theft, going so far as to wear a wire on behalf of Oklahoma police in an unsuccessful attempt to set up Mr. Atwood during a drug transaction. *Id.* at 73-81. He was also cross-examined about his romantic interest in Mr. Atwood and prior statements to police that he was "hurt and offended" when that interest was not reciprocated. RT3/3/1987 at 8-10, 31-33.

Mr. Atwood headed *south* on Romero—that is, the opposite direction from Ina Road. RT2/18/1987 A.M at 15. That direction of travel is inconsistent with the State's theorized timeline of Mr. Atwood's travel. *See* §III(B)(3)(b), *supra*. The window for Mr. Atwood to have committed this crime under the State's theory is sufficiently narrow that if Young really did see Mr. Atwood travelling south, as he testified, that evidence is exculpatory.

Robert McCormick testified he saw Mr. Atwood with a child in his car as they drove past him, noting the car had blue and gold California plates. RT2/18/1987 A.M. at 107, 109-10. However, the first time McCormick spoke to investigators, by phone on September 24, he said he did not get a good look at the driver, did not remember any details of the driver's appearance other than that it was a man, and could provide no description of the other occupant. RT2/23/1987 at 32, 34-40. He made no mention of the license plates. *Id.* at 36. He provided no description of Mr. Atwood or the victim until a second meeting with investigators a week later, after images of both had been widely publicized and McCormick had seen them on television. *Id.* at 42-44.

The third witness, Nora Wilson, testified she saw Mr. Atwood in a car accompanied by a child, then saw him again 20 minutes later, alone. RT2/19/1987 A.M. at 86-87, 90-99. The prosecutor placed particular emphasis on Wilson' identification in closing arguments. RT3/24/1987 at 10. But like Young and McCormick, her initial report to investigators differed from her later testimony and was inconsistent with an

identification of Mr. Atwood. In her first police interview, she described the license plate of the car she saw as white (Mr. Atwood's plate was blue and yellow). RT5/14/1986 at 10. She stated the second time she saw the car, she could not see inside it at all. *Id.* at 11-12. And she provided none of the identifying information she would later rely on to identify Mr. Atwood, describing Mr. Atwood, as Young and McCormick had, only later, after his appearance was well publicized. *Id.* at 12-14. In short, Young, McCormick, and Wilson testified to specific sightings of Mr. Atwood despite earlier providing police with information that was at most ambiguous or in some instances excluded Mr. Atwood as the person they had seen. Inconsistencies between initial statements to police and later testimony, where the earlier statements were favorable to the defendant, are highly exculpatory. *Smith v. Cain*, 565 U.S. 73, 76 (2012).

Similarly, the prosecution called two neighborhood boys, Rick Vario and Bryon Curry, who testified that they saw a dark-colored Datsun 280Z driving directly towards Vicki Lynne at the time she disappeared. RT2/17/1987 at 119-23; *id.* at 165-67. However, the testimony of both of these boys was frequently inconsistent with their prior statements or, in some instances, *exculpatory* to Mr. Atwood.

For example, Curry vacillated in his description of the diver of the car he saw, in some places telling investigators he vividly remembered the driver's "piercing" blue eyes but on other occasions stating that the driver was wearing sunglasses and their eyes were not visible. RT2/17/1987 at 183-84; Exhibit 70 at 9, Curry Interview (9/20/1984). He

admitted that at first he could provide only a "vague description" of the driver and that he was able to provide significantly more detail only after seeing Mr. Atwood's picture repeatedly on television and in the newspaper. RT4/8/1986 at 176, 185. Additionally, while the back of Mr. Atwood's car was heavily loaded with his and McDonald's belongings, Curry testified that he did not see clothes, boxes, or anything else in the rear of the vehicle he encountered on September 17. *Id.* at 185; RT2/11/1987 p.m. at 19. Curry also testified that while the car he saw may have been black, it could also have been brown. RT2/17/1987 at 166.

In both his police statements and testimony, Vario provided information that was exculpatory for Mr. Atwood. For example, he stated both at trial and to police that the car he saw could have been black, but it also could have been green. RT2/17/1987 at 120; Exhibit 71 at 4, Vario Interview (9/20/1984). In both instances, he also stated that the car he saw had louvers across the rear window, which Mr. Atwood's car lacked. RT2/17/1987 at 120, 140; Exhibit 71 at 7, Vario Interview (9/20/1984). He also described the car as being a model year no older than 1980, whereas Mr. Atwood drove a 1975 model. RT2/17/1987 at 138; Exhibit 71 at 5, Vario Interview (9/20/1984).[4] Vario also admitted on the stand that after he passed Vicki Lynne and the vehicle, he did

[4] Curry similarly told investigators that the car he saw was probably a 1980. Exhibit at 4, Curry Interview (9/20/1984).

not hear a collision between a car and a bicycle, voices, screaming, or anything else indicating an accident or other incident had occurred. RT2/17/1987 at 135-36. He also admitted that he had seen Mr. Atwood on television prior to making his in-court identification. *Id.* at 145.

d. Mr. Atwood's Alibi During the Commission of the Crime

Perhaps the greatest weakness in the State's theory of the crime is that Mr. Atwood presented witnesses who established his alibi *during the period immediately after Vicki Lynne was kidnapped.* A boy from Vicki Lynne's neighborhood named Dennis Fought testified that on the afternoon of September 17, after school, he went to the home of friend Michelle Soco. Around 3:30 p.m., Dennis, Michelle, and two other children, one boy and one girl, left Michelle's house and walked up Pocito toward the Wetmore and Romero Circle K to buy milk. RT3/6/1987 P.M. at 45-47. Two of the four children had bicycles with them during this trip. *Id.* at 46. During the walk, Dennis noticed a pink bicycle lying in the middle of Pocito, which he recognized as belonging to Vicki Lynne Hoskinson. *Id.* at 46-47. After a brief stop at the Circle K, Dennis and his friends went back to Michelle's house along the same route, and he observed that Vicki Lynne's bicycle was still laying in the road. *Id.* at 47-48.

Around the same time, a woman named Patricia Brown had parked her car in the parking lot of the same Circle K. She went there after picking her son up from school, which let out at 3:25 p.m. RT3/6/1987 P.M. at 56-58. Upon arriving, she sent her son

into the store to buy a newspaper while she waited in the car. *Id.* at 58. While her son was in the store, Brown noticed a group of four children—two boys and two girls—two of whom had bicycles, in front of the Circle K. She recognized one of the children as Michelle Soco, who lived two doors down from her. *Id.* at 59. In other words, this was the same group of four children including Dennis Fought who minutes earlier had seen Vicki Lynne's bicycle lying in the middle of the road as they made their way to the Circle K. Brown said she observed this group of children between 3:30 and 3:35 p.m. *Id.*

Brown further testified that after her son returned from buying the newspaper, she began to exit the parking lot, making her way to turn south onto Romero. RT3/6/1987 P.M. at 60. As she attempted to exit the lot, however, she got stuck behind a vehicle that was going so slow that she eventually had to pull around it. She described the vehicle as a dirty, black Datsun 260 or 280Z with blue and gold California plates. *Id.* at 61. As she passed the car, she looked inside and observed that the car had only one occupant, a "scroungy" man with long hair and facial hair. *Id.* at 62. During her trial testimony, she positively identified this person as Mr. Atwood. *Id.* at 63. Brown testified that, like her earlier sighting of Michelle, Dennis, and friends, this sighting occurred between 3:30 and 3:35 p.m. *Id.* at 62.

The sequence of these sightings is highly exculpatory. First, Dennis Fought sees Vicki Lynne's bicycle abandoned in the middle of the road, thus *after* she has been kidnapped. Next, Patricia Brown sees Dennis and his companions at the Circle K, a

destination they reached only after observing the abandoned pink bike. Finally, moments later, Brown sees Mr. Atwood at the same store—alone in his car. Brown's sighting of Mr. Atwood occurred *after* Vicki Lynne was kidnapped, and yet she did not see Vicki Lynne in his car, proof that someone other than Mr. Atwood committed the kidnapping.

It is not plausible that Vicki Lynne was in the car and Brown simply failed to see her. The back of Mr. Atwood's vehicle was "completely loaded" with his and McDonald's belongings, meaning a kidnapped child, if in the car, would have to have been in the front seat area observed by Brown. RT2/11/1987 p.m. at 19. Yet Brown saw no one other than Mr. Atwood in the car. Also, Vicki Lynne's mother testified that her daughter would have fought and screamed if she was abducted, as she had been taught to do in school. RT3/3/1987 at 84-85. Such commotion would have drawn Brown's attention had Vicki Lynne been in Mr. Atwood's car.

Moreover, it is not reasonable to suggest that Mr. Atwood would have kidnapped a child vigorously resisting her abduction, driven a few blocks, and then decided to idle in a busy parking lot for an unknown period of time before continuing on his way. Not only is such behavior unlikely, it is also inconsistent with the State's tight timeline, which required Mr. Atwood to proceed directly toward Ina Road after the abduction, not fritter away untold minutes in a parking lot. Mr. Atwood's presence and unhurried appearance is, however, consistent with his stated reason for being in that part of town in the first

place—his quest to find his earlier drug connection, who he first met at that same Circle K store several days prior. RT5/6/1987 at 120; §III(B)(2), *supra*.

C. The Original Suspect

Before Sam Hall's tip caused investigators to shift their attention to Mr. Atwood, the primary focus of the investigation was a woman named Annette Fries. Multiple eyewitnesses placed Vicki Lynne in the company of Fries in the hours after her disappearance, and voluminous other evidence pointed to Fries as the likely culprit.

1. Eyewitness Sightings and Fries' Identification

a. The Mall Sightings

Late in the evening of September 17, 1984, a woman named Konnie Koger contacted police with information about the disappearance of Vicki Lynne earlier in the day. She was interviewed by police soon thereafter, beginning at 11:20 p.m. Exhibit 11, Barkman Report re: Koger (9/20/1984). Koger was an employee at Cartoon Junction, a toy store inside Tucson Mall. Earlier that evening, around 7 p.m., while Koger was working, a woman and girl entered the store. Koger noted that the woman held the girl tightly by the hand, as if the woman "was afraid the child would run away," but the girl shied away from the woman's touch. During their time in the store, the girl repeatedly complained that she wanted to go home, at one point telling the woman "you're not going to take me home." The girl was crying and gave Koger the impression she had "been crying for a while." As Koger approached the pair, the girl clung onto Koger's leg

and continued to repeat that she wanted to go home. *Id.* at 2-6. Eventually, the woman bought a Garfield doll using cash taken from a white bank envelope.[5] The pair then exited the store. After waiting on two other customers, Koger left the store and observed the woman and girl on the lower level of the mall. The woman spoke briefly with a man, giving Koger the impression they knew each other. The woman then departed, with the girl in tow. *Id.* at 5-7.

When Koger returned home from work later that night, she watched the late local news on television. The station ran a story about Vicki Lynne's disappearance, including a picture of the missing girl. Koger reported that the girl looked familiar, and after a few minutes' reflection she recognized her as the girl she had seen in Cartoon Junction earlier that evening. At her husband's suggestion, Koger contacted authorities and was interviewed by police later that night. Exhibit 11 at 7, Barkman Report re: Koger (9/20/1984).

When the police arrived, Koger was shown a picture of Vicki Lynne, which she positively identified as the girl she had seen earlier that evening. Exhibit 11 at 2, Barkman Report re: Koger (9/20/1984).[6] When asked what the girl was wearing, Koger

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[5] In a pretrial interview, Koger specified that the woman paid with a $20 bill taken from a First Interstate Bank Envelope. RT3/9/1987 Koger Excerpt, at 38.

[6] After being shown a photo of Vicki Lynne at Mr. Atwood's trial, Koger repeated this conclusion, testifying that she was positive that the girl she saw at the mall was Vicki Lynne. RT3/9/1987 Koger Excerpt, at 17-19.

stated that she "was dressed patriotic" in a red, white, and blue dress with vertical stripes. *Id.* at 5. Koger's description was consistent with the dress Vicki Lynne was wearing at the time of her disappearance.[7] Investigators subsequently brought a dress for Koger to view that was almost identical to the one Vicki Lynne was wearing but with some slight color variations. Koger said that other than the color variations the dress matched the one worn by the girl she saw earlier that evening. *Id.* at 7-8.

During her police interview, Koger also gave a physical description of the woman she observed accompanying the girl, describing her as in her 30s, with dark, dyed hair that was beginning to show at the roots and looked as if it had been permed. The woman was approximately 5'5" and "sturdy," neither skinny nor fat. She noted that the woman wore dangling turquoise earrings, carried a brown leather purse, and was wearing a brown, round brimmed hat made out of a woven material. Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984). She reported the woman had a prominent "Roman" nose, a deep "scruffy" voice, and was carrying a very full shopping back from Mervyn's department store. *Id.* Koger described the woman as dirty, stating she "looked like she needed a bath. *Id.* at 3. Based on the physical description Koger provided, police

[7] Koger never had the opportunity to see any clothes belonging to Vicki Lynne before she called police, as the photo of the missing girl Koger saw on the evening news only showed her from the neck up. RT3/9/1987 Koger Excerpt, at 18.

prepared a composite drawing of the woman seen with Vicki Lynne. *Id.* at 8; Exhibit 12, Composite Drawing of Suspect.

The following day, police canvassed the mall looking for witnesses who had seen Vicki Lynne or the woman in the composite drawing there the previous day. Numerous witnesses said that they had. For example, Teri Pongratz was working in the mall's food court at a restaurant called Hotdog on a Stick on the evening of September 17. Shown the composite drawing and a picture Vicki Lynne, Pongratz reported that she had seen both of them in the mall the previous evening, and that the woman had purchased food from her restaurant. She specifically recalled that "the child was complaining and the woman was being real strange." Exhibit 13 at 3-4, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984). Pongratz remarked that the woman was being "very harsh with the child." *Id.* at 4. A friend of Pongratz, Sylvia Graham, had been with her on the evening of September 17, and she also recalled seeing the woman and the girl matching the composite and photo. Like Pongratz, Graham also thought the woman was treating the child harshly. *Id.* At Mr. Atwood's trial, after viewing a picture of Vicki Lynne, Graham testified that she was the girl she saw in the food court on September 17. RT3/6/1987 p.m. at 72. Both Pongrtaz and Graham described the woman as being in her 30s with curly brown hair. Exhibit 13 at 4, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984).

Susan Rossi, who worked at La Rocca's pizza in the mall, told an investigating FBI agent that she believed she saw the female suspect and Vicki Lynne on the evening of September 17 as well, around 6:30 p.m. Like Koger, Rossi remembered that the woman had a distinctive, "rough" voice. Exhibit 14 at 2, Doyle Report re: Mall Witnesses (9/18/1984).

Kimberly Hilbert was also working in the mall food court on the evening of September 17. She worked at Burger Express, which was located near Hotdog on a Stick. Exhibit 13 at 2-4, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984). Shown the composite drawing and a picture of Vicki Lynne, Hilbert was certain that she had seen both of them in the food court the previous evening. *Id.* at 3.[8] She described the woman has having shoulder length brown hair, graying in front, and that she carried a large brown leather purse and was "pulling the girl along." *Id.* At trial, Hilbert testified that the girl was wearing a red, white, and blue striped dress." RT3/6/1987 p.m. at 94.

Today, Hilbert continues to believe the girl she saw was Vicki Lynne. Exhibit 15 at ¶4, Declaration of Kimberly Ann Sampson (8/27/2021). She states that she saw fear

[8] The police report states that Hilbert saw the woman and girl "at approx. 1645 to 1700 hrs," i.e. 4:45 to 5:00 p.m. Exhibit 13 at 3, Van Skiver Report re: Hilbert, Graham, and Pongratz (10/17/1984). At trial, however, Hilbert testified that the actual time of the sighting was at "about 6:30, quarter to seven." RT3/6/1987 p.m. at 92. In a recent declaration, Hilbert confirmed that the police report misstated the time of her sighting. Exhibit 15 at ¶11, Declaration of Kimberly Ann Sampson (8/27/2021).

in Vicki Lynne's eyes, recalling that "We made brief eye contact, and I saw in her eyes that she needed help. Even today, it makes my cry to remember what I witnessed." *Id.* at ¶7.

Another mall worker, Mervyn's employee Cindy Cherne, also recognized the composite drawing. Cherne identified the composite as a Mervyn's customer[9] who regularly visited the store twice a week. She said the woman had been in the store around 2:00 p.m. on September 17. Consistent with Koger and other witnesses' descriptions, she said the woman regularly wore a brown floppy hat and carried a large brown purse. Exhibit 16, Bullock Notes re: Cherne (9/19/1984).

An employee of the Tucson Mall Spencer Gifts, Jesse Jackson, told investigators that around 5:00 or 5:15 p.m. he saw a dirty woman jerking a child down the aisle at his store. Jackson felt that the child, who was crying and screaming, seemed to be fighting the woman and trying to get away. Jackson could not provide a description of the child, but he said the woman resembled the composite sketch. Exhibit 17, Atkins Report Excerpt (9/18/1984). Another Spencer Gift worker, Tina Reidel, told investigators that while she did not observe a woman or subject, she did hear a child screaming around the

[9] Identifying the female suspect as a frequent Mervyn's customer is significant in light of Koger's recollection that the woman she encountered carried a bag from Mervyn's. *See* Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984).

same time Jackson made his observation, leading her to remark "My gosh, what is she doing to that girl." *Id.*

b. Identification of Fries

At 11:00 a.m. on September 18, police interviewed a woman named Rosa Togias, who worked at Valley National Bank. Exhibit 18 at 1, Clark Report (9/20/1984). Togias told police that she recognized the woman in the composite drawing as a bank customer named Annette Fries. *Id.* Comparing the composite drawing with a contemporary picture of Fries, it is not difficult to understand how Togias made that connection, as the similarity is striking:

Compare Exhibit 12, Composite Drawing of Suspect, *with* Exhibit 19, Annette Fries Mugshot.

Togias gave further information about Fries which corresponded with the women observed by Koger. Said that Fries frequently wore dangling earrings. Like Koger, Togias

also described Fries' appearance as extremely unkempt. Exhibit 18 at 1, Clark Report (9/20/1984). Regarding Fries' demeanor, Togias described her as "a mean bitch" who could become verbally abusive without provocation. *Id.* Togias also reported that Fries "hates cops." *Id.*

Police obtained a photograph of Fries, which Togias confirmed was the customer she had talked about. Exhibit 18 at 1, Clark Report (9/20/1984); Exhibit 19, Annette Fries Mugshot. The same photo was shown to the manager of the Circle K at Wetmore and Romero. The manager recognized Fries as customer who frequented the store, made small purchases, and would talk with school children there. *Id.* Earlier that day, the manager of that Circle K, another employee of the store, and a customer all recognized Fries as a woman who had frequented the store in the recent past. Exhibit 20, Excerpt of Cramer Report (9/18/1984).

The same day, the photo of Fries was shown to Koger. Koger told police that the photo resembled the woman she saw the previous night in the mall, specifically noting that the eyes and nose were the same, but felt the hair was not exactly the same. Nonetheless, she concluded that the photo "looks like her." Exhibit 21, Pederson Report re: Koger (3/1/1985). Later that evening, police arranged for Konnie Koger to be driven by Fries' trailer while Fries stood outside. Koger told police "it looks like her." *Id.*

Also that day, Fries allowed investigators to look through her trailer at 3152 N. Shawnee Ave., which did not turn up any evidence. Exhibit 18 at 2, Clark Report (9/20/1984). However, at the time, Fries owned at least one other property, at 5722 N. Trisha Ln. *See e.g.* Exhibit 22, Superior Court Clerk Letter (8/20/1982) (letter from court clerk to Annette Fries addressed to 5722 N. Trisha). There is no indication that property was ever investigated by police.

2. Fries' Police Interview

Detective Gary Dhaemers interviewed Annette Fries at the sheriff's department on the morning of September 19. Exhibit 23, Annette Fries Interview (9/19/1984). Fries told Dhaemers that she spent the morning of September 17 at the home of Sharon Moon, an elderly woman she helped care for. *Id.* at 1-2. She also stated that she spent the afternoon of September 17 at home, and that one of her boarders, Juan, could verify that fact. *Id.* at 3-4. Police told Fries they had spoken to Juan, who had reported that she was not at home that afternoon, and in fact did not return home until 8 p.m. *Id.* at 8, 12. Fries then changed her story, now saying she was at Moon's in the afternoon. *Id.* at 8.

The interview Dhaemers conducted with Fries' boarder, Juan Flores, is consistent with Dhaemers' account of what Flores said. Exhibit 24, Juan Flores Interview (9/19/1984). Flores, who had lived with Fries for about a month, told Dhaemers that Fries was not at home in the afternoon or evening of September 17. *Id.* at 1. He stated she did not return home until 8:30 or 9:00 in the evening. *Id.* When asked to describe

Fries' character, Flores said that she was "eccentric." *Id.* at 2. At Mr. Atwood's trial, Dhaemers would later testify that Flores' story contradicted the alibi given by Fries. RT2/24/1987 at 122.

Elsewhere in her interview, Fries told Dhaemers that on the evening of the 17th she stayed with her boyfriend, a man named Jim Bonjour, at the Stagecoach Motel, meeting him around 11 p.m. Exhibit 23 at 5-7, Annette Fries Interview (9/19/1984). She further described Bonjour as being "very, very affectionate," and as a hard worker *Id.* at 6, 9.

In fact, however, Bonjour wanted nothing to do with Fries. Bonjour was not Fries' boyfriend, but rather only a former boarder at one of her properties. Exhibit 2, Tucson Citizen Article (3/21/1985).[10] For months, Fries had followed Bonjour and appeared at his worksites, insisting that he loved her and should marry her. *Id.* "The harassment spilled over onto his son-in-law, daughter and grandson, whom she would 'pump' for information[.]" *Id.* Fries' harassment was so persistent that on September 14, 1984, Bonjour along with his daughter and son-in-law, Linda and John Rechtin, sought and obtained a restraining order against Fries. Exhibit 25, Bonjour Injunction Petition.

[10] Bonjour's name is not provided in this exhibit, but the context establishes his identity. The exhibit states that the man Fries considered to be her boyfriend, his daughter, and his son-in-law obtained an order of protection against Fries, as Bonjour, his daughter, and son-in-law did, discussed below.

The petition seeking the injunction alleged that over a series of days Fries was continually appearing, unwanted, at their home and work to harass Bonjour. It alleged that Fries "can't take no for [an] answer" and that she was calling their pager so frequently that they had to change pager companies because the cost of her calls was too high. *Id.* John Rechtin wrote of Fries in the petition "I really don't know if she would try to do anything else. My son gets very upset when he sees her and so do we… We can't have this any longer something has to be done, we just can't take this any longer." *Id.*

Given the fear Bonjour and his family had of Fries, the notion that just three days later he would invite her to spend the night with him, as Fries claimed, is implausible, and indeed this, too, proved to be a lie Fries told to police. Dhaemers testified that after the interview he went to the Stagecoach motel to inquire if Fries had been a guest there on the night of September 17, but no such record could be found. RT2/24/1987 at 122.

Fries also told Dhaemers that on September 17 her son Todd stopped by the house around lunchtime, complaining that "he ate my lunch. That kind of ticked me off." Exhibit 23 at 2, Annette Fries Interview (9/19/1984). Fries gave an address for Todd, but there is no indication police made any efforts to contact him.

3. Fries' Criminal History and Mental Health

Fries' involvement in the Hoskinson case was not her first run in with the legal system. For example, as discussed above, Jim Bonjour and his relatives obtained a restraining order against Fries because of her repeated harassment. Exhibit 25, Bonjour

Injunction Petition. Additionally, in 1970, Fries was arrested by Tucson police on a prostitution charge. Exhibit 26, Fries FBI Record.

By far most the most notable of Fries' run-ins with the law came in 1982, when she was charged with three felonies: conspiracy, attempted fraud, and attempted arson. In July of that year, Fries asked a man named Edward Cole if he would burn down a trailer she owned so she could collect insurance money. Cole went to the police with this information the following August. Exhibit 27, Edward Cole Interview (8/24/1982). Cole told police he initially met Fries at the First Interstate Bank at Stone and Speedway. Cole was separated from his wife and formed a quasi-relationship with Fries. They went on one date. Fries soon brought up the idea of burning down the trailer for the insurance money to Cole. She stated that she wanted the money so she could purchase a trailer owned by someone near the ARASCO Silver Bell copper mine and move it to a different location. *Id.* She offered to pay Cole in sex and "other things" and said she would use the money to take him on a trip to Las Vegas. *Id.*

Fries contacted Cole again after she took out the insurance policy, which is when Cole went to the police. He said he wanted to get her out of his life because she was "hounding me something terrible." Exhibit 27, Edward Cole Interview (8/24/1982). Fries evidently continued harassing Cole even after he went to authorities, as a January 1983 letter from the police to Cole reflects that Fries had somehow obtained his address and sent him a card the previous month. Cole was disturbed enough by this that he

wrote a letter to the police asking what her present location was, which the police said was unknown. Exhibit 28, TPD Letter to Cole (1/3/1983).

Based on Cole's information, Fries was arrested and charged with conspiracy, attempted fraud, and attempted arson. Exhibit 29, Indictment. In January 1983, Fries' attorney filed a Rule 11 motion, asking for a competency evaluations of his client. As cause, the motion stated:

> Defendant has come in contact with numerous people in this case, all of whom are of the opinion defendant is mentally ill; counsel for defendant has had several conversations with defendant and is unable to communicate with defendant because her train of thought is such as to indicate her thinking is perhaps psychotic.

Exhibit 30, Rule 11 Motion (1/7/1983). Following numerous continuances and several expert evaluations, the court found Fries not competent to stand trial but potentially restorable, and Fries was ordered committed to Kino Community Hospital for up to 90 days to be treated and evaluated. Exhibit 31, Under Advisement Ruling (10/4/1983)

In August of 1984, Fries' counsel filed a motion to dismiss the case against Fries on the grounds that she was not competent and could not be restored to competency. Exhibit 32, Motion to Dismiss (8/16/1984). In support of the motion, counsel submitted a letter from Donald Garland, Fries' attending psychiatrist at Kino Community Hospital. Exhibit 33, Garland Letter (10/1/1984). Noting that he had treated Fries in November of 1983, Garland wrote:

> Ms. Fries at the time of my evaluation, was best diagnosed as Schizoaffective Disorder, Hypomanic.[11] This is a severe and chronic mental disorder, and it is my opinion that Ms. Fries is unlikely to regain her competence.
>
> I would like to recommend Ms. Fries to outpatient psychotherapy on an ongoing basis with the recommendation that the patient be tried on Navane which she tolerated fairly well back in November of 1983 as well as a trial of Lithium, which the patient at least initially expressed great disinterest in.

Id. Finding Fries not competent, the Court dismissed the indictment against her without prejudice on November 11, 1984. Exhibit 34, Minute Entry (11/11/1984).

4. Brown Car Sightings

The prosecution relied on reports placing a black Datsun 280Z with blue and gold California plates—that is, a car resembling Mr. Atwood's—in the area of Root and Pocito around the time Vicki Lynne went missing. However, numerous witnesses associated Vicki Lynne's abductor with a *brown* car, not a black one. Annette Fries was known to own and drive a brown Datsun station wagon. Moreover, substantial evidence

[11] "Current U.S. diagnostic criteria for schizoaffective disorder are complicated, but in essence they require: (1) a one-month period in which the individual has a combination of delusions, hallucinations, disordered thinking, or 'negative' symptoms typical of schizophrenia; (2) the individual must have experienced episodes of affective illness for a substantial portion of the time he or she has been ill; (3) at some point, the individual had delusions or hallucinations for at least two weeks without prominent mood symptoms; (4) the disturbance is not caused by a substance of abuse, a medication, or another medical condition." Douglas Mossman et. al, *Incompetence to Maintain a Divorce Action: When Breaking Up is Odd to Do*, 84 St. John's L. Rev. 117, 151 n.184 (2010). Notably, schizoaffective disorder was one of four mental illnesses deemed sufficiently serious to disqualify a defendant from eligibility for the death penalty under an Ohio statute adopted in 2021. *See* Ohio Rev. Code § 2929.025.

indicates that Fries likely also drove a brown Datsun 280Z with blue and gold California plates.

a. Annette Fries' Brown Datsun Station Wagon

Annette Fries drove a 1978 brown Datsun 810 station wagon. She was pulled over and ticketed for failure to yield while driving this vehicle on September 11, 1984. The ticket reflected that the car had an Arizona license plate. Exhibit 35, Fries Traffic Ticket. Juan Flores, Fries' boarder at the time, reported that she was driving her brown Datsun station wagon when she left home midday on September 17, 1984. Exhibit 24 at 1, Juan Flores Interview (9/19/1984).

b. Annette Fries and the Brown 280Z

On September 19, 1984, a man named Abraham Rodriguez contacted police to let them know about a suspicious woman he had recently observed. Exhibit 36, Clark Report re: Rodriguez (9/20/1984). Rodriguez was a mail clerk for St. Mary's hospital who frequently carried cash on his person in connection with his work, and as a matter of habit he was very aware of his surroundings. On September 14, 1984, he noticed a woman on the sidewalk near the First Interstate Bank in downtown Tucson[12] who he

[12] This sighting outside of First Interstate Bank is significant, as Edward Cole, the man Fries propositioned to commit an arson, initially met her at a First Interstate branch. Exhibit 27 at 1, Edward Cole Interview (8/24/1982). Additionally, Konnie Koger reported that the woman she saw at the mall with Vicki Lynne paid for the Garfield doll she purchased with cash taken from a First Interstate envelope. RT3/9/1987 Koger Excerpt, at 38.

believed was watching him. The woman was standing next to a "root beer brown" Datsun 280Z with blue and gold California plates ending in the digits 198, tinted windows, and "spoke-type wheels." The car was very dirty with a scratch on the rear passenger side. He described the woman as approximately 30 years old with brown shoulder length hair and that she was overall "dirty" in appearance. *Id.* He also noted that the woman was wearing a brown woven sunhat with a brim, the exact same kind of hat Konnie Koger described as the suspect she saw at the mall was wearing. *Compare id. with* Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984).

Rodriguez further reported that later that same day, around 11 a.m., he observed the same woman with the same car near Howell Elementary School. He stated that the car was "cruising" near the school, and that the woman inside appeared to be watching the school children on the playground. Exhibit 36, Clark Report re: Rodriguez (9/20/1984).

Several other witnesses placed a woman matching Fries' description with a brown Datsun 280Z. For example, Gerrie Cornett worked at a Circle K on E. Tanque Verde Tucson's east side. Exhibit 37, Miranda Report re: Cornett (9/19/1984) On September 18, 1984, Cornett saw the composite drawing made from Koger's description in the newspaper, and she recognized the woman in the drawing as a customer who had visited her store two days prior, which led her to contact the police. She described the woman as approximately 35 years old with a tan complexion, brown hair, and features similar to

the ones in the composite drawing. Consistent with Rodriguez's description, Cornett described the woman's car as being a dark brown Datsun 280Z with tinted windows, "fancy wheels," and California plates. *Id.*

Lorenzo Monarrez was the mailman for Vicki Lynne's neighborhood. On September 18, 1984, he told police that around 2 p.m. the previous day, he saw a woman matching the composite drawing at the Wetmore/Romero Circle K. The woman was acting strangely and was driving a large, "root beer brown" car, the same color description for the vehicle that Rodriguez gave. Exhibit 38, Van Skiver Report re: Monarrez (10/15/1984). Thus, Monarrez reported seeing, approximately one hour before Vicki Lynne's disappearance, a woman resembling Annette Fries in a brown car at the Circle K from which Vicki Lynne mailed a letter shortly before she disappeared.

A caller to the information hotline set up for the investigation reported being cut-off in traffic in the area of Ina Rd. and Oracle by a brown 280Z with California plates driven by a woman matching the suspect's description. Two other callers reported seeing a woman matching the composite driving "a brownish tan full size car" in the area of West Massingale. Exhibit 39, Lead Cards re: Brown Car. Another caller, Leon Rivera, called the hotline with information that on September 17 he had seen a brown Datsun 280Z with California license plate 3EA-748 in the area of Wetmore and Romero. Exhibit 40, Hall Report re: Rivera. The plate number Rivera provided was not a valid California license number, as the initial digit should have been a letter rather than a number, and a

search of using letters A through Z in place of the initial 3 did not find any plates assigned to a 280Z. *Id.* Notably, however, the final three digits Rivera remembered, 748, are visually similar to the final three digits Abraham Rodriguez reported seeing on Fries' brown Datsun, 198. Exhibit 36, Clark Report re: Rodriguez (9/20/1984).

c. Witnesses Identifying a Brown Car in Connection with the Disappearance

In the aftermath of Vicki Lynne's disappearance, numerous witnesses told investigators that they had seen a suspicious brown car in the area of Root and Pocito on September 17.

Perhaps the only direct witness to Vicki Lynne's abduction was four-year-old Jonathan Atkinson, who lived with his family on Romero Rd. not far from the intersection of Root and Pocito. Shortly after 6:00 p.m. on September 17, a sheriff's deputy canvassing the neighborhood went by the Atkinson home and was told that Jonathan had information to share. Exhibit 41 at 2, Aubry Report (9/18/1984). Jonathan told the deputy that earlier that day he had seen a girl on a bike hit by a car. He described the car as a "race car, brownish-orange in color" and said that it was driven by a woman. *Id.*

Other children in the neighborhood also reported seeing a suspicious brown car shortly before the disappearance. Bryon Curry, who testified for the prosecution about a suspicious Datsun 280Z he saw in the neighborhood, stated that the car he saw may

have been dark brown. RT2/17/1987 at 166. Nine-year-old Chris Beckley and Travis Spencer decided to walk to Travis' house after school on September 17. Beckley reported that while he and Travis were walking to Travis's house they saw Vicki Lynne being followed by a brown car that was driving "real slow." Exhibit 42 at 3-4, Christopher Beckley Interview. When they came back out of the house 20 minutes later, Vicki and the brown car were both gone. *Id.* at 4. The car was a "lightish-dark" brown and had Arizona license plates and four doors. *Id.* at 4-5, 8. Travis likewise told investigators that he had seen a brown, four-door car driving very slowly by Vicki Lynne. Travis additionally reported that the driver of the car was female. Exhibit 43, FBI Report re: Spencer (9/19/1984).

Another nine-year-old boy, Eric Ziegler, lived in a small apartment complex approximately 100 feet from Root and Pocito. He told investigators that on September 17 around 2:30 p.m. as well as on the previous Thursday, he had encountered a dark brown, medium sized car with tinted windows. Eric said the car drove around him in a suspicious manner. One encounter occurred at a trailer park on Romero Rd., the other at the Wetmore and Romero Circle K. Exhibit 44, Handwritten Notes re: Ziegler.[13]

[13] Information about the suspicious car following Eric Ziegler comes from the handwritten notes reflected in the exhibit. Undersigned have been unable to locate what are presumably the remainder of those notes. However, a separate police report that documenting a canvass of the Park-El-Monte apartments at 4213 N. Romero shows that the Zieglers lived in apartment #216, next to the Bondis in #215. Exhibit 69 at 6, Barkman Report re: Apartments (9/20/1984). This is consistent with the information contained in the handwritten notes.

Members of the community also contacted investigators with information seeming to connect Fries, Vicki Lynne, and a brown car. For example, On September 24, a man called into the information hotline to report that he had seen an "orangish brown Datsun," and inside was a woman who resembled the composite drawing and a girl who looked like Vicki Lynne. Exhibit 45, Lead Cards re: Car. Another caller phoned in a tip that she had seen a woman resembling the composite wearing a "floppy hat" and driving a brown station wagon with a girl inside around the intersection of La Cholla and Omar, on the northwest side. *Id.*

Other witnesses reported a woman driving a station wagon who acted suspiciously around children on the northwest side around the time Vicki Lynne disappeared. A woman named Nettie Saint, for example, told police that around 2:30 p.m. on September 17, she saw an unknown woman at Acacia Gardens Mobile Home Park[14] who was watching children playing. Saint said the woman seemed nervous and was acting suspicious. When Saint began to approach her, the woman sped away in her vehicle, a brown station wagon. Exhibit 46, Longoria Report re: Saint (9/18/1984). Similarly, a girl named Gail Murphy reported on September 19 that a white man and

[14] The Acacia Gardens are located at 5505 N. Shannon Rd., approximately three miles from Root and Pocito.

white woman in a tan station wagon had followed her as she walked home from school earlier that day. Exhibit 47, Brennan Report re: Murphy (9/19/1984).[15]

5. Other Contemporaneous Kidnap Attempts Linked to Fries

In the days both before and after Vicki Lynne disappeared, numerous other people reported attempts to kidnap children, either by Fries herself or by a woman closely matching her description.

On the evening of September 17, in the first few hours after Vicki Lynne was reported missing, two men approached a sheriff's deputy working near the Root/Pocito location. The men informed the deputy that someone had tried to kidnap their nephew from the laundry room of their nearby Park-El-Monte apartment, 4213 N. Romero. Exhibit 41 at 3, Aubry Report (9/18/1984). That location is approximately 100 feet from the location where the bike was discovered.[16]

The following day, detectives interview the nephew's mother, Charlene Nanez. Exhibit 48, Nanez Interview (9/18/1984). Nanez stated that approximately eight days before, she was doing laundry in the communal laundry room of the Park-El-Monte between 8:00 and 8:30 in the evening. She had her young son, Joseph, with her, and they

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[15] Murphy's home at 5332 N Royal Palm Dr. was less than a half mile from the Acacia Gardens Mobile Home Park where Nettie Saint made a similar sighting two days prior. *See* n.14, *supra.*

[16] The Park-El-Monte was also the home of nine-year-old Eric Ziegler, who reported being followed by a suspicious brown car. *See* n.13 and accompanying text, *supra.*

were alone in the laundry room. *Id.* at 1-2. While Nanez was doing laundry, she said that a "crazy lady" came into the laundry room, picked up Joseph, and began to walk away with him. Nanez had to tear the woman's arms off of Joseph to keep her from walking away with him. *Id.* at 2, 4. When Nanez confronted her, the woman "started screaming that that was her little boy and that her little boy didn't get run over by a police officer, a month before that." *Id.* at 4. Nanez said the woman was "real crazy." *Id.* Nanez described the woman as having a tan complexion with an average build and shoulder length hair, and that she was drunk, with Nanez saying she "could smell that from a mile away." *Id.* a 2-3. She noted that the woman was wearing a turquoise watch. *Id.* at 3.[17]

Nanez reported that she had noticed the woman 20 minutes earlier when she got out of a vehicle and walked across the laundry room, but she had otherwise not seen her before or since. Exhibit 48 at 3-4, Nanez Interview (9/18/1984). Nanez described the vehicle the woman was driving as a "one of the Datsuns, the 910's, the longer ones." *Id.* at 3. As noted above, Fries was known to drive a Datsun 810 station wagon. *See* §(C)(4)(a), *supra*. Nanez stated that she would definitely recognize the woman if she saw her again, but there is no indication police ever showed her the composite drawing, a

[17] Compare this turquoise watch with the turquoise earrings Konnie Koger observed the suspect woman wearing. Exhibit 11 at 3-4, Barkman Report re: Koger (9/20/1984). In her police interview, Fries told police she liked to wear jewelry that matches if she's "wearing an Indian outfit." Exhibit 23 at 14, Annette Fries Interview (9/19/1984)

photo of Fries, or followed up with her in any other way. Exhibit 48 at 6, Nanez Interview (9/18/1984).

Similar kidnapping attempts were reported elsewhere on the northwest side around the time of Vicki Lynne's disappearance. For example, a woman named Sue Stair contacted the 88-Crime hotline with information about a suspicious woman approaching her child. The lead card memorializing her call states: "Approached Monday A.M. by woman matching description – Woman met Ms. Stair @ car and asked to watch her little boy at @ K-Mart @ Orange Grove/Thornydale." Exhibit 49, Sue Stair Lead Card.[18] On September 20, another woman, Starlene Kalinski, reported that while she was in a Lucky Supermarket at Ina and Thornydale, a woman approached and began talking to her two young children, who she had left in her car. Reportedly, the woman told the children "I want to take you home with me, I have a very nice house." Exhibit 50, Aubry Report re: Kalinski (9/20/1984). She opened the door and began to grab Kalinski's seven-year-old son, but fled after he struck her in the nose. The woman was reported as having dark, curly, shoulder length hair, and was driving a brown car. *Id.*

At least one kidnapping attempt was indisputably linked to Fries. John Rechtin, the son-in-law of the man Fries believed to be her boyfriend (Jim Bonjour), told a

[18] The lead card was not dated, but it is reasonable to assume the "Monday A.M." is refers to was the morning of September 17, 1984. That day was a Monday.

reporter that on one occasion, Fries attempted to force Rechtin's mentally disabled son into her car. The boy escaped and ran home. Exhibit 2, Tucson Citizen Article (3/21/1985). Rechtin's son's distress whenever he saw Fries was one of the stated reasons Rechtin and Bonjour sought a restraining order against Fries. Exhibit 25, Bonjour Injunction Petition.

6. Other Witnesses Identifying Fries

Numerous witnesses made positive identifications of Fries, either linking her to the composite drawing based on Koger's description or otherwise identifying her in ways connected to Vicki Lynne's disappearance. For example, as noted above, a manager, other employee, and customer of the Wetmore and Romero Circle K—the location where Vicki Lynne had mailed a card prior to her disappearance—all recognized the composite drawing as being a customer they had seen at the store recently. Exhibit 20, Excerpt of Cramer Report (9/18/1984). When shown a photograph of Fries, the same manager identified her as a woman who had frequented the store in recent days and regularly talked to children while she was there. Exhibit 18 at 1, Clark Report (9/20/1984).

Police also interviewed a woman named Susan Carlton, a resident of the Flying H trailer park adjacent to Homer Davis Elementary. Carlton reported that although she was legally blind, one of her children had told her that the composite drawing looked like a friend of her child's named Annette. Carlton was told that this Annette was an

alcoholic who belonged to the V.I.P. Club and COPE rehab center on Broadway. Exhibit 51, Van Skiver Report re: Flying H (10/24/1984).

Numerous tips phoned into the investigation's information hotline identified the composite drawing as being Annette Fries. For example, one person called in with a tip recorded as "Caller states that picture is Annette Fries," providing a short description and address information for Fries. The identity of the caller was not recorded. Exhibit 52, Lead Cards re: Fries. Another tip called into the hotline by a caller named Juanita Moreno also directed investigators to Annette Fries. The card reflected that Moreno worked with Fries at Skill Center and that Fries "got very upset with people around her." *Id.* Another caller said she recognized the composite drawing as a regular shopper at the K-Mart store on Miracle Mile where she worked, and that the woman was "very weird, even security keeps an eye on her." *Id.* Fries told Detective Dhaemers that she was a K-Mart shopper, and Rosa Togias told investigators that Fries lived "in the area of the K-Mart Store, Miracle Mile and Flowing Wells." Exhibit 23 at 5, Annette Fries Interview (9/19/1984); Exhibit 18 at 1, Clark Report (9/20/1984). Moreover, the home address Fries supplied Dhaemers, 3152 North Shawnee (spelled phonetically "Charlene" in the

transcript) is mere blocks away from 1310 W. Miracle Mile, the former site of a K-Mart store.[19]

Still another caller reported "Ann Fries, answers description of lady in composite." Exhibit 52, Lead Cards re: Fries. The caller was employed by the Motor Vehicle Department and recognized Fries as someone who "Used to sell newspaper subscriptions to people getting licenses. Very strange acting." *Id.* This was echoed by another called, who said the composite drawing was a woman at the Motor Vehicle Department named "Annie Fries" who lived on Trisha Lane. *Id.*

D. Recent Investigation into Annette Fries

Mr. Atwood's current defense team has conducted additional investigation into Annette Fries. That investigation identified several witnesses with information about Fries' erratic, at times criminal conduct, particularly towards children. Additionally, recent investigation has also uncovered information about Annette Fries' son, Todd Fries, which implicates him in the disappearance of Vicki Lynne Hoskinson.

[19] The location is now a Tucson Police Department substation. *See* "Then and Now in Tucson," Tucson.com (9/2/2016), available at https://tucson.com/then-and-now-in-tucson/image_f64470dc-f2ed-11e5-90ff-c3c6b536770e.html (last accessed 5/2/2022).

1. Annette Fries' Pattern of Disturbing Behavior

Witnesses who know Fries well describe her as demonstrating patterns of disturbing, often violent behavior. This pattern includes allegations that Fries sexually abused children.

Fries' grandson, Josh Slagle, first met Annette in 1996, when he was approximately 13-years-old. Previously, Josh did not know the identity of his biological father (Fries' son Todd) or his family. *See* §(D)(2)(b), *infra*. Over the years, Josh spent time around Annette, including periods where he lived at properties owned by her. Exhibit 53 at ¶8, Joshua Slagle Declaration (4/20/2022). During a recent period living at one of Fries' properties, she did not even allow Josh and his girlfriend to live inside the property, instead requiring them to sleep outside on a patio, where they also had to shower. *Id.* at ¶31. Josh describes his grandmother as "selfish and vindictive" and "the living incarnation of Cruella Deville," calling her a "mean person who cares only for herself." *Id.* at ¶27. When someone has upset her, Josh states, "her first reaction is to threaten to call the police on you." *Id.* He recalls several instances of bizarre behavior by Fries' including an incident where she threatened the employees at a phone store that she would have Josh come and beat them up, and other instances when she would walk straight into an occupied rental unit she owned and yell at the tenants. *Id.* at ¶¶27-28. Fries former daughter in law, Julie Lainhart, similarly recalls incidents where Fries would

barge directly into the home of her tenants with no regard for their privacy or feelings. Exhibit 54 at ¶57, Julie Ann Lainhart Declaration (7/22/2021).

Fries' strange behavior could also become violent. Josh remembers a recent incident in which he was looking for something in an ice chest that belonged to Fries. For unknown reasons, this enraged Fries, causing her to lunge at and attempt to stab Josh with a pair of scissors, nearly falling down in the process. Exhibit 53 at ¶32, Joshua Slagle Declaration (4/20/2022). Josh's girlfriend, Crystal, was present during this incident, which she recalls as being very dramatic and dangerous to Josh and Fries herself. Exhibit 55 at ¶6, Crystal Blakely Declaration (1/26/2022). Crystal believes that Fries "has serious mental health problems." *Id.* at ¶2.

Disturbingly, Josh has also heard reports of his grandmother molesting children. In the mid-2000s, Josh was dating a woman named Natasha, the mother of his three children whom he would later marry. Exhibit 53 at ¶¶29-30, Joshua Slagle Declaration (4/20/2022).At the time, Natasha was in beauty school, and Fries would come by to have her hair done by Natasha at a discount. One day after Fries had come by, a fellow student pulled Natasha aside and told her Fries had molested her and a sibling when they were small children. *Id.* at ¶30; Exhibit 56 at ¶4, Natasha Hernandez Declaration (4/21/2022). The student told Natasha that Fries was "a horrible person. Don't you know who she is? Stay away from her!" *Id.* Afterwards, Natasha asked that the school never book another appointment for her with Fries. When she told Josh what the

student had told her, Josh did not seem surprised, saying that he thought his grandmother was "a weirdo." *Id.* at ¶¶6, 8. Even before learning about this molestation accusation, Natasha and Josh agreed that they never wanted Fries to supervise their children alone. After learning about the accusation, they became even more on guard and did not want their children around Fries at all. *Id.* at ¶10; Exhibit 53 at ¶30, Joshua Slagle Declaration (4/20/2022).

Fries former daughter-in-law and the mother of one of her grandchildren, Julie Lainhart, observes that "Annette would often dress inappropriately, wearing low-cut blouses and short shorts with her butt hanging out. This was a 50-year-old woman! She sought and attracted the attention of men. She was very flirtatious." Exhibit 54 at ¶57, Julie Ann Lainhart Declaration (7/22/2021). Josh's girlfriend Crystal recalled a recent incident in which Fries' introduced her boyfriend to Fries. Crystal recalled that Fries responded by walking suggestively and inappropriately in front of the man, who was perplexed by her actions. Exhibit 55 at ¶8, Crystal Blakely Declaration (1/26/2022).

After Julie divorced Fries' son Todd, she gained custody of their daughter and moved to Sierra Vista. Julie wanted nothing to do with either of them, but agreed that they could visit their daughter on supervised visits in Sierra Vista. Exhibit 54 at ¶47, Julie Ann Lainhart Declaration (7/22/2021). Annette, however, would often show up unannounced and say she was there to visit her granddaughter. *Id.* at ¶49. On one occasion, when Julie's daughter was in elementary school, she came home and asked why

Fries had been in her classroom. Julie inquired at the school and learned that Fries had showed up at the school unannounced and was allowed to sit in her daughter's classroom. Julie's daughter reported that Fries was dressed inappropriately and was disruptive while she was there. *Id.* at ¶51. After this incident, Julie told the school no one but her was to have contact with her daughter, and she told Fries that she could never do that again and that she could no longer show up unannounced. *Id.* Julie never heard from Fries after that, which surprised her because of Fries' enthusiasm for seeing her daughter. Julie believed fries "surely would have taken [her daughter] as her own." *Id.* at ¶¶51-52.

In general, Julie believes Fries has "serious mental problems" and "would not put anything past her, including kidnapping or murder." Exhibit 54 at ¶6. Julie Ann Lainhart Declaration (7/22/2021). To this day, she remains fearful of and wants nothing to do with either Fries or her son, Julie's ex-husband, Todd. *Id.* at ¶60.

2. Todd Fries

Konnie Koger told police that after Annette Fries and Vicki Lynne left the toy store, she observed them in the lower level of the mall meeting with a white man she appeared to know. Exhibit 11 at 7, Barkman Report re: Koger (9/20/1984). Fries has a son, Todd Fries, who at the time of Vicki Lynne's disappearance was 21 years old and living in Tucson. *See* Exhibit 23 at 2, Annette Fries Interview (9/19/1984). Currently incarcerated, Todd, like his mother, has a substantial history of erratic, criminal, and

sexually transgressive behavior. The events which gave rise to Todd's current incarceration bear a striking resemblance to experiences reported by one of the principle witnesses against Annette Fries in the Atwood case, Konnie Koger.

a. Todd's Background

Todd was born in 1963, the son of Annette and her husband, Trevor Burns. Todd's ex-wife, Julie, says that Todd had "a horrible childhood," stating that he was abused by Burns and feared him to the degree that he slept outside in a doghouse to get away. Exhibit 54 at ¶35, Julie Ann Lainhart Declaration (7/22/2021). Annette told Julie that Todd had been the victim of sexual abuse, but never disclosed who the perpetrator was. *Id.* Burns, however, had a history of sexual transgressions. Julie recalls that during her marriage to Todd, they took in Burns, who was elderly and ailing. After he had moved in, Julie was told by Burns' daughter that Burns had molested her when she was a child, information that disturbed Julie because she had her own young daughter living at home. *Id.* at ¶40. On another occasion, police came to Lainhart's home and told her that Burns had exposed himself to a disabled teenage girl while both were en route to an adult daycare service on the Handi-Car, a paratransit service. No charges were filed, but Burns was banned from the Handi-Car and the adult daycare. *Id.* at ¶41. Julie recalls that Burns laughed about the incident to both her and the police. *Id.*

Annette and Burns divorced in 1970s. In 1974, Annette married a man named Francis Fries. Exhibit 57, Daily Star Marriage Licenses (2/5/1974). At some point, Todd

change his last name from Burns to Fries. In 1979, Annette reported Francis to police for hitting Todd, who told the investigating officer Todd has struck him in the face, neck, and mouth. The cause of the fight was a problem between Todd and Francis's 16-year-old daughter, who lived with them, which prompted Francis to throw Todd out of the house and threaten to kill him. Exhibit 58, Stover Report re: Fries (8/25/1979).

At one point, Todd was enlisted in the Marine Corps. When his then-wife Julie attempted to apply for a VA loan to buy a home she discovered he had been dishonorably discharged. Exhibit 54 at ¶23, Julie Ann Lainhart Declaration (7/22/2021). Julie was told by Todd that the discharge was for smoking marijuana, while Annette told her it was due to a dispute with a superior officer. *Id. See also* Exhibit 59 at ¶14, Tammy Watson Declaration (12/16/2021).

Todd and Annette's relationship was fractious but close. People who knew them both report that they frequently fought and treated one another with disrespect. Exhibit 53 at ¶23, Joshua Slagle Declaration (4/20/2022); Exhibit 54 at ¶¶6-7, Julie Ann Lainhart Declaration (7/22/2021). Despite this disharmony, however, Todd's ex-wife Julie recalls that they "were also absolutely devoted to one another. If either of them needed something, the other would drop everything and immediately come to the aid of the other one." Exhibit 54 at ¶7, Julie Ann Lainhart Declaration (7/22/2021). Julie states that if something "was significant to one of them, they did it with the other," including possible criminal activity, and recalls that Annette would often refuse to answer

questions about her or Todd's past. *Id.* at ¶¶6-7. Josh has noticed that Annette and Todd have grown even closer in the years following Todd's arrest and imprisonment. Exhibit 53 at ¶24, Joshua Slagle Declaration (4/20/2022).

People who have known Todd and Annette for years "think[] both of them are crazy." Exhibit 59 at ¶25, Tammy Watson Declaration (12/16/2021). This is an observation of longstanding, as in 1982 one of Annette's tenants made identical observation, that mother and son are both "crazy." Exhibit 60, Fries Lewd Call Reports (1982). Todd's son and Annette's grandson, Josh Slagle, thinks they "are both odd, toxic people who have been negative influences. They are both just very mean people. I consider them to be soulless." Exhibit 53 at ¶8, Joshua Slagle Declaration (4/20/2022). From his interactions with them, Josh believes both Annette and Todd "have serious mental health issues." *Id.*

On September 17, 1984, Todd was 21-years-old, living in Tucson, and in regular contact with Annette. Exhibit 23 at 2, Annette Fries Interview (9/19/1984).

b. Todd Fries' Pattern of Disturbing Behavior

Multiple witnesses who knew Todd Fries as an adult have described him as being narcissistic, violent, sexually transgressive, and vengeful.

Tammy Watson met Todd in 1982, when she was 16 and he was 19. Tammy became pregnant with Todd's child and gave birth to their son, Josh, the following year. Exhibit 59 at ¶1, Tammy Watson Declaration (12/16/2021). Todd did not want Tammy

to have the baby, and he "dragged [her] all over Tucson trying to find a place that would provide an abortion," even though Tammy wanted to keep the pregnancy. *Id.* at ¶5. Todd insisted to staff at clinics that Tammy's pregnancy would be terminated, but because she did not want an abortion and lacked her parents' consent, they were turned away. *Id.* at ¶¶5-6. Tammy briefly lived with Annette and Todd after she became pregnant, but following this incident she left and moved back in with her mother. *Id.* at ¶¶4, 7. After these experiences, Tammy did her "best to avoid having anything to do with Todd or Annette Fries again." *Id.* at ¶8. Todd did not pay child support, show an interest in a relationship with Josh, or otherwise provide any help raising his and Tammy's son. *Id.* at ¶10.

Todd and Tammy's son, Josh Slagle, did not know that Todd was his biological father until he was 13 years old. Exhibit 53 at ¶2, Joshua Slagle Declaration (4/20/2022). Todd's wife at the time, Julie Lainhart, had found out about Josh and tried to include him in their family activities. However, as he got to know Todd and spend time around him, Josh found Todd's behavior to be "very disturbing" and that the time spent with his father "was often dangerous, demeaning, and confusing to me." *Id.* at ¶¶3, 5.

For example, not long after he met Josh, Todd dropped him off alone on Speedway with a sign reading—falsely— "Help, Sister Needs a Transplant" and ordered him to panhandle. After two hours of this, someone contacted the police, who picked Josh up and returned him to his mother, who was furious with Todd. Exhibit 53 at ¶14,

Joshua Slagle Declaration (4/20/2022); Exhibit 59 at ¶12, Tammy Watson Declaration (12/16/2021). On other occasions, Todd would pay Josh cash in exchange for committing petty crimes, which Todd referred to as "subsidized income." On one occasion Todd paid Josh to vandalize someone's house, including instructions on how to spray paint swastikas. Exhibit 53 at ¶¶11, 13, Joshua Slagle Declaration (4/20/2022).

On other occasions, Todd would have Josh bare-knuckle box other children who lived in Todd's neighborhood. Exhibit 53 at ¶16, Joshua Slagle Declaration (4/20/2022). Josh recalls that these other kids "were disadvantaged and had nobody in their lives to tell them this was wrong." *Id.* Todd videotaped the fights "and enjoyed watching us kids pound on each other." *Id.* Josh would see Todd intermittently, but he was never a constant presence in his life. He has "tried and hoped over the year to have a positive and cordial relationship with Todd and Annette. But that hasn't occurred," and after getting to know Todd he "was not a good guy." *Id.* at ¶¶ at 6, 34.

In 1987, Todd was living in Sierra Vista, Arizona, when he met a 21-year-old woman named Julie Lainhart. Exhibit 54 at ¶¶8-9, Julie Ann Lainhart Declaration (7/22/2021). Not long after meeting, Julie agreed to accompany Todd on a road trip to San Diego. Julie recalled that Todd became odd and controlling when the left on the trip, insisting on driving her car, refusing to stop to let her used the restroom, and watching her every move when he finally agreed to stop at a convenience store. He also stripped down to his underwear during the drive, saying he was hot. *Id.* at ¶10. They

eventually stopped at the home of a friend of Todd's, where they stopped to spend the night. After Julie took a shower, she discovered that Todd had been watching her as she bathed and had taken her clothes and towel. *Id.* at ¶12. Julie recalls:

> I was naked. The homeowner was not home. Todd took me into a bedroom, threw me on a bed and viciously raped me. I was a virgin. I screamed for him to stop, but he merely laughed. I passed out. When I awoke, the homeowner had returned to the house. I was in a lot of pain. I thought I was dying. I asked Todd to take me to a hospital, but he laughed and said, "It's just sex."

Id. The following day they left for San Diego, where rather than sightsee they spent the week finding customers for Todd's family photography business. Todd raped Julie repeatedly throughout the tip. *Id.* at ¶13. He also maintained tight control over her, keeping her purse and car keys in his possession and never letting her out of his sight, even insisting she keep the door open when using the bathroom. *Id.* at ¶14.

Despite this horrific experience, Julie was young, inexperienced, and confused. She did not realize until later that what Todd had done, kidnapping and raping her, was a crime, and she told no one about what had happened. Exhibit 54 at ¶16, Julie Ann Lainhart Declaration (7/22/2021). Although she wanted to break away from Todd, he persisted in pursuing her. As the trauma of the California trip faded, Julie agreed to marry Todd, and they wed in 1988. *Id.* They moved back and forth between Tucson and Sierraa Vista before returning to Tucson permanently in 1994, where they moved into a trailer owned by Annette. *Id.* at ¶¶18, 21.

Todd was violent and controlling with Julie during their marriage. Julie recalls that Todd would throw her across the room if she said anything he took offense at. Exhibit 54 at ¶19, Julie Ann Lainhart Declaration (7/22/2021). She recalls one time when they had dinner with friends. On the way home, Todd complained about something she had said at dinner and back handed her across the face, bloodying her nose. When Julie and Todd met up with their friends at their home, the friend were so shocked at what they saw they called the police, who came to the house but did not arrest Todd. *Id.* at ¶22. Another time, Julie recalls Todd throwing a full can of spray paint at her. The can missed, but it struck the side of their house so hard that is broke through the stucco to the chicken wire below. *Id.* at ¶25. When Todd was angry with Julie, he would violently shove her out of bed and make her lie on the floor without blankets. *Id.* at ¶20.

Todd would control Julie by taking the cord to the phone and Julie's shoes with him and disabling her car when he left for work so that she would be "marooned" at home until he returned. Exhibit 54 at ¶26, Julie Ann Lainhart Declaration (7/22/2021).. When he suspected Julie might leave him, he slept outside their bedroom with a loaded shotgun to keep her from doing so. *Id.* at ¶43.

Julie also observed Todd being abusive to others. On one occasion, Todd put a lit firecracker between the toes of a frail, elderly neighbor who was sleeping in his yard. The man woke before the firecracker exploded and the neighbor was not harmed, but Todd "enjoyed being mean to him. Exhibit 54 at ¶24, Julie Ann Lainhart Declaration

(7/22/2021). After her eventual divorce from Todd, Julie received three separate calls from women Todd had dated subsequently. One said Todd had tried to kill her by pinning her against a wall with his truck. Another said he fired a gun at her and missed. The third stated Todd threatened to harm the woman's children. None of these calls surprised Julie. *Id.* at ¶45.

Julie recalls one occasion where Todd drove her to an elementary school. Once they arrived, she remained in the car while Todd got out, spoke to a man she had never met, and then watched as the two began to fight one another. Exhibit 54 at ¶37, Julie Ann Lainhart Declaration (7/22/2021). He refused to explain what provoked the fight. Later that evening, Todd left the house without explanation. When he returned late at night, "he was clammy, out of breath and white as a sheet." *Id.* While she never learned what happened, Julie states "I wondered then and I still wonder whether he killed that guy." *Id.*

Life with Todd became "unbearable" and Julie was determined to leave him. Exhibit 54 at ¶43, Julie Ann Lainhart Declaration (7/22/2021). After she finally succeeded in breaking away, moving in with her parents in Sierra Vista, she returned the next day to retrieve belongings she discovered that Todd had already moved a new woman into their house. *Id.* Julie thinks Todd is a "lifelong conman" who "seemed to have no empathy. He seemed to be addicted to using and hurting others. His behavior was sadistic. I believe he was a narcissist and a sociopath." *Id.* at ¶64.

Both Josh and Julie report Todd's frequent sexual transgressions. In addition to being repeatedly raped by Todd early in their relationship, Julie recalls another incident where Todd offered a ride to the sister of one of their neighbors, who was visiting from out of town. Todd then drove the woman up A Mountain, exposed himself to her, and demanded sex. The woman refused and later told Julie what happened. Exhibit 54 at ¶33, Julie Ann Lainhart Declaration (7/22/2021). Julie suspected that Todd was unfaithful but pretended it was not happening. *Id.* at ¶34.

Josh has similar memories of Todd. Todd bragged to Josh about having a sex tape of one of his girlfriends, and once told Josh he had a similar video of Josh's mother. Exhibit 53 at ¶18, Joshua Slagle Declaration (4/20/2022). Another time, when Josh was in his late teens or early 20s, Todd asked Josh if he could have sex with Josh's girlfriend. *Id.* at ¶19. Josh's ex-wife Natasha recalls Todd as "an extremely vulgar man" who would make extraordinarily sexually profane comments in her presence. Todd once told Josh that Natasha had "nice tits" and said to Josh of her, in her presence, "Imagine all the ways you could fuck that." Exhibit 56 at ¶11, Natasha Hernandez Declaration (4/21/2022). She and Josh wanted neither Annette nor Todd to be anywhere near their children. *Id.* at ¶10.

Josh describes Todd as "the most vindictive person I've ever known" and "an intelligent man but he's also very cunning, methodical and vengeful." Exhibit 53 at ¶¶8, 25, Joshua Slagle Declaration (4/20/2022). Todd's obsession with vengeance is well

attested to. For example, Josh recalled one night where Todd drove him to a home and had him crawl under a car to drain its oil, claiming it was revenge for the owner's failure to fully pay him for the car. *Id.* at ¶12. As explained below, Todd is currently incarcerated on federal charges (and awaiting to serve state charges) based upon an elaborate and terroristic revenge plot carried out against for customer of his business who he felt had wronged him. A search of Todd's home in that case turned up numerous "revenge books," including one titled *The Encyclopedia of Revenge*, which gave instructions on how to exact revenge against those who have wronged you. Exhibit 61 at 9, U.S. v. Fries Transcript Excerpt (10/4/2012).

Todd also had a significant history of cruelty to animals. Julie Lainhart recalls once catching Todd cornering Annette's small dog in a bathroom and spraying it in the face with perfume for his own amusement. Exhibit 54 at ¶29, Julie Ann Lainhart Declaration (7/22/2021). On another occasion, Todd bought a kitten for his and Julie's daughter, but drove home with the kitten loose and in danger in the back of his truck. Later, Julie regularly caught Todd tormenting the kitten by pinning it against the wall as he laughed. *Id.* at ¶30. The incident with the kitten disturbed Julie enough that afterwards she never let Todd take her daughter anywhere alone. *Id.* at ¶38. Josh similarly recalled that "Todd had an obsession with killing birds," and that he hung up bird feeders in his yard just to shoot the bird that came to feed. Exhibit 53 at ¶15, Joshua Slagle

Declaration (4/20/2022). Todd bragged to Josh that if his shot merely injured a bird, he would finish it off by blowing it up with an M-80 firecracker. *Id.*

Todd also had a habit of stockpiling dead animal carcasses. Josh recalls that Todd would hang the carcasses of the birds he had shot, mostly woodpeckers, upside down in his backyard, like "grotesque trophies." Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). Testimony at Todd's federal trial, discussed below, established that Todd had accumulated road kill, a dead coyote, and other animal carcasses for his use, and a confidential source told investigators that Todd had been "stockpiling" dead animals at his home. *U.S. v. Fries*, 781 F.3d 1137, 1142, 1145 (9th Cir. 2015).

c. Todd's Criminal History

Todd Fries "had no regard of laws." Exhibit 54 at ¶28, Julie Ann Lainhart Declaration (7/22/2021). Todd's history, described above, includes an extensive pattern of criminal behavior, much of which went unprosecuted and unreported to authorities. However, over the years Todd has had several encounters with the criminal justice system, the most recent of which being a spectacular series of crimes that resulted in his current incarceration.

In 1986, Todd pled guilty to theft by control and theft by representation in connection with his theft of a woman's car and use of a stolen credit card. Exhibit 62, Todd Fries Plea (12/23/1986). This conviction resulted in Todd losing his right to own firearms, but Todd continued to own a shotgun and "always had weapons." Exhibit 54

at ¶38, Julie Ann Lainhart Declaration (7/22/2021). On one occasion, he had his then-wife Julie buy a Glock handgun for him in her name because he could not legally make the purchase. *Id.* After their divorce, Julie asked what had become of that gun. Todd denied still having it but refused to tell her where the gun was. *Id.* at ¶46.

In 1993, FBI agents came to Todd and Julie's house and asked Julie if she knew anything about Todd building bombs. Julie said she did not and allowed the agents to look around the premises. When she asked Todd about it later, he downplayed it and said someone was trying to set him up. Exhibit 54 at ¶3, Julie Ann Lainhart Declaration (7/22/2021). Todd's son Josh, however, recalls that Todd "had a fixation for explosives, and would often talk about building bombs or making Molotov cocktails." Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). On another occasion, police came by the home to inquire about graffiti and vandalism that had occurred at a nearby construction site. Julie knew Todd was responsible because after the police left, he came into the house "laughing, with spray paint all over his hands." Exhibit 54 at ¶32, Julie Ann Lainhart Declaration (7/22/2021)

Todd's most serious encounter with the criminal justice system to date stemmed from a series of attacks he perpetrated beginning in 2008, which resulted in numerous state and federal charges and convictions. *State v. Fries*, Pima Cty. No. CR-20140556; *U.S. v. Fries*, No. 4:11–cr–01751–CKJ–CRP (D. Ariz).

On November 1, 2008, a married couple, the Levines, returned to their home in Marana to discover the front of their home had been extensively vandalized. Motor oil, paint, feces, and foam packing peanuts were strewn across the driveway leading to the front of their house, and numerous dead animal carcasses were piled near the front door. Swastikas and anti-Semitic graffiti written in German had been painted on their garage door. A wallet containing a woman's driver's license was found at the scene, but investigators confirmed that the license had been stolen several years prior. A latent print later identified as belonging to Todd was located on the wallet. *Fries*, 781 F.3d at 1141-42; Exhibit 63 at 1, *State v. Fries* Presentence Report (6/13/2016).

Following the attack on their home, the Levines moved to another community in the Tucson area. Ten months later, however, on August 2, 2009, they were attacked again. Early that evening, Mr. Levine noticed a chemical smell, saw something burning in his backyard, and felt a burning in his eyes and throat. He tried to escape through the front of his house but discovered that the front and garage doors had been sealed with an adhesive. Deputies responded to the scene and helped evacuate Mr. Levine and his wife. A large cloud of what was later determined to be chlorine gas was emanating from two devices left on the Levines' property. The cloud grew to a size of 1,000 feet long, 100 feet high, and 200 feet deep, and required evacuation of the entire neighborhood. Investigators discovered sexually graphic and gang related graffiti on the scene, as well as numerous dead rabbits and birds. They also found a day planner which contained the

driver's license of a woman named Michele Fuentes and a check from Fuentes made out to Karen Levine with a notation "refund customer unhappy." Investigators determined that Fuentes' license had been stolen two years earlier, and a fingerprint belonging to Todd was later found on the day planner. *Fries*, 781 F.3d at 1143-45; Exhibit 63 at 1, *State v. Fries* Presentence Report (6/13/2016).

Three days later, on August 4, 2009, the FBI's Tucson office "received an 'unusual phone call' from 'a male trying to impersonate a female voice.'" The caller identified himself as Michele Fuentes and "stated that he had information concerning the incident at the Levines' residence. The caller stated that Mr. Levine had approached Fuentes in 'a sexual manner,' and Mrs. Levine 'threatened to call Immigration' when Fuentes reported Mr. Levine's conduct to her." *Fries*, 781 F.3d at 1144. The caller stated that a cousin of Fuentes was responsible for the chlorine attack. *Id.* at 1144-45. The FBI traced the call to a Tucson hospital. A nurse there reported that an unauthorized person had been noticed on the floor where the call was made, and when shown a picture she positively identified that person as Todd. A latent fingerprint collected from the hospital telephone also matched Todd. *Id.*

On May 31, 2010, a woman named Marguerite Brown contacted police to report a large amount of damage to her driveway and vehicle, which had been covered in glue and acid. A year later, on April 28, 2011, Brown again reported vandalism to her property, including motor oil, feces, and dead lizards being strewn on her property. The

drivers' license of an unknown woman was also recovered at the scene. Exhibit 63 at 1-2, *State v. Fries* Presentence Report (6/13/2016).

Both Brown and the Levines suspected Todd was responsible for the attacks and vandalism, as both had had arguments with him regarding alleged poor work his power washing company had done on their property. Employees of Todd's later testified that Todd became upset when the Levines cancelled a check they had issued him, and he began to collect motor oil and dead animal carcasses as part of a plot to get revenge against the Levines. Todd later told his employees that he had painted anti-Semitic graffiti to create the impression of a hate crime and left people's IDs at the scene, all in an effort to divert attention from himself. *Fries*, 781 F.3d at 1145; Exhibit 53 at 2, *State v. Fries* Presentence Report (6/13/2016).

The Pima County Sheriff's Office and FBI obtained a search warrant for Todd's residence. Materials were seized during the search linking him with the crimes. Notably, this included "the bodies of dead animals including woodpeckers that appeared to have been abused." Exhibit 53 at 2, *State v. Fries* Presentence Report (6/13/2016). The search also uncovered numerous "revenge books" giving advice on how to exact revenge on an enemy. One piece of advice they contained was to let time pass before seeking revenge. As the prosecutor in Todd's eventual federal trial explained, "it's right out of the revenge books that he had, the advice to let time pass. There's no better insulation than time. The longer amount of time you let pass before you take your revenge, the more

bewildered the target will be." Exhibit 61 at 9, U.S. v. Fries Transcript Excerpt (10/4/2012).

Notably, during the federal proceedings against him, Todd sought to suppress the fruits of this search on the grounds that they were impermissibly stale, as the first incident occurred in 2009 but the search warrant was not sought until 2011. *Fries*, 781 F.3d at 1141. The district court rejected this argument, and the Ninth Circuit affirmed that result on appeal. In rejecting this claim, the Ninth Circuit placed particularly emphasis on the fact that "the alleged *modus operandi* for each of the incidents was nearly identical. In particular, each incident involved the use of motor oil, animal carcasses, and other substances to vandalize the former customers' residences, as well as attempts to divert blame to uninvolved individuals." *Id.* at 1150.

While Todd was being investigated, FBI agents spoke to Julie Lainhart about her ex-husband. When they asked her if she thought Todd was capable of murder, Julie told them "yes." Exhibit 54 at ¶5, Julie Ann Lainhart Declaration (7/22/2021). During this period, Todd called Julie. He told her that he knew where their daughter was living and working, including her work schedule. He then told her "Now would not be a good time to do anything dumb," which Julie interpreted as a threat not to cooperate with the investigation. *Id.* at ¶59.

Following a trial in state court, Todd was found guilty of 21 felony and misdemeanor offenses—including attempted murder, kidnapping, and other offenses—

and was sentenced to a combination of consecutive and concurrent sentences totaling 24.25 years. *State v. Fries*, No. 2 CA–CR 2016–0244, 2017 WL 6547378, *1 ¶5 (Ariz. App. 2017). In federal court, charges against Todd were severed into two separate trials. Following both trials, he was found guilty of multiple counts, including making false statements, use of a chemical weapon, and possession of an unregistered explosive device. *Fries*, 781 F.3d at 1139-40. He is currently serving time on his federal convictions at a federal prison in Texas. When released, he will begin serving time on his consecutive state convictions.

d. Parallels with Konnie Koger's Experiences

The specifics of Todd's crimes are noteworthy in relation to Mr. Atwood's case because of their striking similarities to threats and harassment experienced by a crucial defense witness, Konnie Koger, following her participation in Mr. Atwood's trial. As discussed above, Koger was the toy store worker who reporting seeing Vicki Lynne Hoskinson in company of an unknown woman at the Tucson Mall on the evening of September 17, 1987. Koger positively identified the clothes Vicki Lynne was wearing. She provided police a description of the woman seen with Vicki Lynne, which was used to create the composite suspect drawing that ultimately led to Annette Fries' identification. Multiple informants independently contacted investigators saying the composite drawing resembled Fries. *See* §(C)(6), *supra.*

Koger's sighting and later testimony was widely publicized, and she began to receive substantial attention from the community. She was well known enough that members of the public began coming to the toy store "and asked for Konnie just so they could say mean things about the little girl or why didn't you take that little girl by the hand, but I didn't know." RT3/9/1987 Koger Excerpt at 11-12. Koger first tried changing her nametag at the store and eventually was forced to stop working there altogether because of the overwhelming attention she was receiving. *Id.* at 12. The day after she testified for the defense at Mr. Atwood's trial, the Tucson Citizen ran a story devoted to her testimony and including a picture of her on the witness stand. Exhibit 64, Tucson Citizen, "Woman, girl seen in store" (3/10/1987). Anyone paying close attention to Mr. Atwood's case would have been aware of Koger and her role in pointing to Annette Fries as an alternate culpability suspect.

In 2019 and again in 2021, defense investigators interviewed Koger regarding her experiences in connection with Mr. Atwood's case. In these interviews, Koger for the first time disclosed that she experienced harassment following Mr. Atwood's trial which parallels the conduct leading to Todd Fries' current incarceration. Specifically, Koger stated that after testifying for the defense in Mr. Atwood's case, an unknown party began harassing her at both her home and the office where she worked. She received anonymous, threatening phone calls at her home, accusing her of trying to set a child molester free. Exhibit 65 at ¶6, Stuart Keating Declaration (4/25/2022). Her family kept

horses on their property where Koger lived on the far west side of Tucson, and on more than one occasion they discovered that an unknown attacker had harmed the horses by slashing them. Most notably, on at least one occasion, she discovered that a dead animal carcass had been left on her car, which she interpreted as a threat. *Id.*; Exhibit 66 at ¶¶4-5, Jeremy Voas Declaration (5/4/2022). In a separate interview, Koger's sister, who lived with her at the time in question, also recalled that Koger had been the target of harassment following her role in the Atwood case. *Id* at ¶2.

Koger reported that the harassment began after her role in the trial and continued in the years that followed. Exhibit 66 at ¶6, Jeremy Voas Declaration (5/4/2022). The harassment caused Koger and her family considerable distress. Koger's father, who she lived with, was sufficiently concerned that he began to wait outside with a gun at night, looking for intruders on the property he shared with Koger. The harassment stopped only after she moved away from Arizona around 1991, and she stated that escaping the harassment was a contributing factor in her decision to make that move. Exhibit 65 at ¶¶6-7, Stuart Keating Declaration (4/25/2022). The investigator who spoke with Koger in 2019 observed Koger's continued anxiety about her safety, noting that she was armed for the duration of the interview, expressed general concerns about her personal safety, and statements reflecting her continued anxiety about the harassment she experienced in the late 1980s and early 1990s. *Id.* at ¶¶3, 8.

The parallels between Koger's experience and the behavior which led to Todd Fries' current incarceration are striking. Both sets of acts involved prolonged series of anonymous harassment unfolding over several years. Most distinctively, both sets of acts involved the threatening display of dead animal carcasses, with the collection, mutilation, and display of dead animals, conduct identified with Todd even apart from these cases. *See* Exhibit 53 at ¶15, Joshua Slagle Declaration (4/20/2022). Assuming that Todd Fries was behind the harassment of Konnie Koger, his motive—revenge for a perceived wrong, in this case implicating Todd's mother in a murder—is consistent with both his 2008-11 Tucson area crimes, evidence seized from his home documenting his obsession with the art of revenge, and his documented character. *Id.* at at ¶¶8, 25 (discussing Todd's vindictive and vengeful personality). Even the similarity of these incidents is in keeping with Todd's known patterns. *Fries*, 781 F.3d at 1150 (noting the "nearly identical" *modus operandi* of Todd's crimes).

E. The Withheld Memorandum

In the summer of 2021, the Arizona Attorney General's Office allowed Mr. Atwood's counsel to examine its case file. In the course of this review, undersigned identified a document that had not previously been disclosed to Mr. Atwood or any previous defense counsel which implicates Annette and possibly Todd Fries in the disappearance of Vicki Lynne.

The document is a brief, intra-office memorandum sent from FBI Special Agent David Lincoln Small to the Special Agent in Charge, Phoenix. It provides in pertinent part: "At 10:27 a.m., 9/19/84, PXPD advised via their Chase Channel they had received an anonymous phone call from a female who stated that she saw captioned victim [i.e. Vicki Lynne Hoskinson] in a vehicle bearing Arizona license 3AM618." Exhibit 67, FBI Memo re: Anonymous Call ("Small memorandum"). Appended to the memo was a vehicle registration document corresponding to the cited license plate. It reflected that the license plate was registered to a 1980 Toyota owned by Richard Rhoads of 5742 N. Trisha Ln, Tucson. *Id.* Richard Rhoads was Annette Fries' next door neighbor. Exhibit 68, Memorandum re: Richard Rhoads (4/7/1986).

Undersigned have conducted a thorough review of their complete case file and have been unable locate the Small memorandum or any indication that it was ever disclosed. Undersigned also conferred with a member of Mr. Atwood's trial defense team, paralegal Debbie Gaynes, who confirmed that although she and trial counsel sought out and extensively reviewed disclosure related to exculpatory tips, she had never previously seen the Small memorandum. Exhibit 72 at ¶14, Declaration of Debbie Gaynes (6/1/2022).

Unlike many other items in the Attorney General's file, the Small memorandum is not marked as being disclosed. The summer 2021 file review uncovered other memoranda by Small which also did not appear to be disclosed. The nature of those

memoranda—intra-office correspondence of the FBI's Phoenix field office—perhaps explains why that separate tranche of investigative documents was overlooked for disclosure. For whatever reason, however, they were unknown to Mr. Atwood's defense team until they were uncovered during the recent file review.

The failure to disclose the Small memorandum had significant consequences for Mr. Atwood's defense. Mr. Atwood's trial counsel was aware of Rhoads, as a defense investigator interviewed him and other neighbors near Fries' Trisha Lane property. Exhibit 68, Memorandum re: Richard Rhoads (4/7/1986). Rhoads told the investigator that Fries was "crazy" and that he would not be surprised if she was involved in Vicki Lynne's disappearance. *Id.* He also stated that Fries brings "really strange looking men" to clean her property, and that he is afraid to home when those men are working next door. *Id.*

But the defense interviewed Rhoads only as a neighbor. They did not know—and had no way of knowing—that an anonymous woman had phoned in a tip directly implicating Rhoads and were thus unable to question him around that subject. By identifying a neighbor of Fries as someone involved in Vicki Lynne's disappearance, the anonymous tip would have constituted a new and distinct reason to believe that Fries had something to do with the crime. It could have provided independent verification of the sightings made by Koger and the other witnesses who saw Fries with Vicki Lynne, making the defense's third party culpability theory significantly more credible. Without

the Small memorandum, the defense lacked this powerful corroboration of its theory of the case.

The Small memorandum is also striking because the anonymous female informant calling in a tip casting suspicion onto a third party it describes is similar to the known prior conduct of Todd Fries. As noted above, Todd proactively sought to throw investigators off his tracks by leaving evidence—specifically stolen drivers' licenses—of other individuals at the crime scenes. Even more strikingly, following the chlorine gas attack on the Levines, Todd called in a false tip to the FBI, pretending to be a woman. *Fries*, 781 F.3d at 1144-45. Todd possessed a high regard for his ability to outsmart police and get away with crimes. In 2008, when Todd found out his son Josh was trafficking marijuana, rather than counseling him to stop, he mocked him, saying that Josh was sure to get caught, whereas "he was smart enough to get away with something like that[.]" Exhibit 53 at ¶10, Joshua Slagle Declaration (4/20/2022).

Indeed, Todd had a history of making bizarre, anonymous calls even before the Hoskinson case. In 1982, Annette Fries contacted police to report that she had been receiving anonymous, unwanted calls in the wee hours of the morning. The caller would breathe heavily into the phone and whisper things like "hey baby" or call her an "ignorant bitch." Annette suspected the caller was one of her tenants who resides adjacent to her on Trisha Lane. Following up with the investigation, however, police discovered the lewd late night caller was not the tenant, but Todd. The tenant reported

that she allowed Todd to use her phone and witnessed him placing the bizarre calls to his own mother. The tenant commented that both Todd and Annette "impress her as being crazy." Exhibit 60, Fries Lewd Call Reports (1982). The Small memorandum lends new significance to this strange prior incident.

IV. CLAIMS FOR RELIEF

The foregoing information establishes that Mr. Atwood is likely innocent of this crime, and indisputably is not guilty beyond a reasonable doubt, such that no reasonable juror could find him guilty. Accordingly, he is entitled to relief from his conviction. Nonetheless, he remains sentenced to death, and his execution is imminent. This Court has jurisdiction to correct that miscarriage of justice for the reasons set forth below.

A. Rule 32.1(a) - *Brady*

A petitioner is entitled to relief when his "conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions." Ariz. R. Crim. P. 32.1(a). "Under *Brady*, the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith*, 565 U.S. at 75 (citing *Brady*, 373 U.S. at 87).

Here, the State withheld material, favorable evidence—the Small memorandum. As a result, Mr. Atwood's conviction was obtained in violation of his due process rights under the United States and Arizona constitutions, entitling him to relief. *Brady*; U.S. Const. Amend. V, XIV; Ariz. Const. Art. 2. §4.

1. Preclusion

Claims arising under Rule 32.1(a) are precluded if they may still be raised on direct appeal or in a post-trial motion; have been previously adjudicated on the merits in a prior post-conviction proceeding; or were waived at trial, on appeal, or in a prior post-conviction hearing, "except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." Ariz. R. Crim. P. 32.2(a). Regarding the first two prongs, Mr. Atwood's *Brady* claim may no longer be raised on appeal or in a post-trial motion, nor has it previously been adjudicated on the merits in a prior post-conviction proceeding.

Regarding the third prong of Rule 32.2(a), the *Brady* claim alleged here concerns the violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant. Ariz. R. Crim. P. 32.2(a)(3). The Arizona Supreme Court distinguishes between rights waivable by counsel and rights which require a knowing, voluntary, and personal waiver by the defendant. *Stewart v. Smith*, 202 Ariz. 446, 449-50 (2002), citing *Brown v. Artuz*, 124 F.3d 73, 77 (2nd Cir. 1997). The former category "primarily involve trial strategy and tactics, such as what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *Brown*, *supra*, at 77 (citation and quotation omitted). The latter category involved more "fundamental" and structural questions about the trial process itself, including the right to counsel or a jury trial. *Id.* at 78

The present claim implicates the latter category of rights. The State's failure to disclose material, exculpatory evidence results in a fundamental violation of due process. The withholding of material, exculpatory evidence results in a violation of due process so great that the remedy for a successful *Brady* claim is "a new trial at which the [withheld] evidence is available[.]" *State v. Youngblood*, 173 Ariz. 502, 506 (1993). Accordingly, the right to disclosure of exculpatory evidence is a fundamental right that requires a knowing waiver by the defendant. Such waiver was not made here. By its very nature, a defendant cannot "knowingly" waive a *Brady* claim until the basis for the claim—the withheld evidence—is uncovered. Moreover, as explained in greater detail below, Mr. Atwood vigorously sought disclosure of exculpatory information at trial, and even absent those efforts he had a constitutional expectation that such evidence will be disclosed. Accordingly, because Mr. Atwood did not knowing, voluntarily, and personally waive this claim during an earlier proceeding, it is not subject to preclusion under Rule 32.2(a)(3).

Allowing a petitioner to bring a *Brady* under Rule 32.1(a) in a successive petition is consistent with the overall scheme of Rule 32. Rule 32.4(b)(3)(A) generally requires a petitioner to file a notice alleging a Rule 32.1(a) claim "within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later." However, Rule 32.4(b)(3)(D) establishes an exception to this requirement, providing "The court must excuse an untimely notice requesting

post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Thus, the rules do contemplate circumstances when a 32.1(a) claim may be brought in a later proceeding—such as the situation here, where a *Brady* claim was discovered by a defendant only after filing a their initial post-conviction petition.

Precluding this claim from being raised under Rule 32.1(a) would also violate due process. To prevail on a *Brady* claim, a defendant need only show that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Smith*, 565 U.S. at 75-76, quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (alteration original).

If Mr. Atwood is precluded from raising this claim under Rule 32.1(a), his alternative for raising this *Brady* claim would be the newly discovered evidence and actual innocence vehicles provided by Rules 32.1(e) and (h). Both of those provisions impose a more exacting standard of review than do *Brady* and its progeny. The former requires a showing that the newly discovered facts "*probably* would have changed the judgment." Ariz. R. Crim. P. 32.1(e) (emphasis supplied). The latter requires a showing "*by clear and convincing evidence* that the facts underlying the claim would be sufficient to establish that

no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt." *Id.* 32.1(h) (emphasis supplied). While Mr. Atwood would prevail under either of these standards, discussed *infra*, they require greater showings than the "undermine[ ] confidence in the outcome of the trial" standard governing *Brady* claims. *Kyles*, 514 U.S. at 434.

When federal law establishes constitutional grounds for granting relief (as with *Brady*), state law may provide relief that is *more* expansive. *Danforth v. Minnesota*, 552 U.S. 264, 287-88 (2008). However, due process commands that "under no circumstances may [a state] confine petitioners to a *lesser* remedy." *Id.*, quoting *Harper v. Virginia Dep't Taxation*, 509 U.S. 86, 102 (1993) (emphasis supplied). Precluding petitioners from raising newly discovered *Brady* claims under Rule 32.1(a) and thus restricting them to more demanding provisions of Rule 32.1 confines defendants to a lesser remedy, in violation of due process. U.S. Const. amend. V, XIV. Accordingly, this Court must find that the *Brady* claim can be raised under Rule 32.1(a), without being precluded because of the State's continued withholding of the *Brady* material.

2. Timeliness

For claims arising under Rules 32.1(b) through (h) brought in a successive post-conviction petition, "the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner." Ariz. R.

Crim. P. 32.2(b). This provision does not apply to a claim arising under Rule 32.1(a). Nonetheless, for the reasons explained below, this claim is timely.

First, as noted above, the Small memorandum was uncovered during review of the Attorney General's file during the summer of 2021. The mere discovery of the memo was not sufficient, however. Mr. Atwood additionally had to confirm that it has not been disclosed (a significant task in this nearly 40 year old case) and conduct necessary investigation to demonstrate that the information it contained was exculpatory and material—prerequisites to bringing a *Brady* claim. 373 U.S. at 87. Mr. Atwood timely raised this claim after determining the Small memorandum established a colorable *Brady* violation entitling him to relief.

Additionally, Mr. Atwood diligently sought disclosure of exculpatory information from the State, as required by the constitution and disclosure rules. When it appeared the State may have been withholding such information before trial, he pressed the issue—resulting in the disclosure of additional information, but not, we now know, the Small memorandum, which the State continued to withhold.[20] Mr. Atwood is entitled to rely

[20] As early as November 25, 1985 (approximately six months post-indictment and over a year before trial), Mr. Atwood's counsel specifically asked the State to disclose tips it had received that could either implicate or exculpate Mr. Atwood, explicitly invoking *Brady*. The State disclaimed a duty to identify tips implicating alternate suspects, but ultimately, it agreed to provide the file of tips it had received, including those it considered to be "cuckoo." RT11/25/85 at 73-81.

on the State's own representations that it was satisfying its disclosure obligations. *Amado v. Gonzalez,* 758 F.3d 1119, 1136 (9th Cir. 2014) ("[D]efense counsel may rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce."); *see also Brown v. Muniz,* 889 F.3d 661, 674 (9th Cir. 2018) (State conceded diligence where it disclosed withheld files a decade later). Accordingly, Mr. Atwood has brought this claim in a timely manner.

Even if this claim is deemed untimely, however, that fact alone is not dispositive. Dismissal of an untimely claim is not mandatory; rather, the rules provide that this Court "may" dismiss an untimely claim. Ariz. R. Crim. P. 32.2(b). Here, Mr. Atwood alleges that not he but a third party is responsible for a crime that resulted in his death sentence. Constitutional considerations requiring greater scrutiny and certainty in capital cases disfavor a discretionary dismissal of this claim as untimely. *Caldwell v. Mississippi,* 472 U.S. 320, 329 (1985); *Woodson v. North Carolina,* 428 U.S. 280, 305 (1976); U.S. Const. amend. VIII. This is particularly true where the basis of this claim was exculpatory evidence that was unconstitutionally withheld by the State in the first place.

3. Merits

To prevail on a *Brady* claim, a petitioner must show (1) that the State withheld evidence, (2) that the withheld evidence is favorable to the defense, and (3) that the withheld evidence is material to the defendant's guilt or punishment. *Smith*, 565 U.S. at 75, citing *Brady*, 373 U.S. at 87. When assessing whether withheld evidence is material,

the U.S. Supreme Court has "explained that 'evidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Id.*, quoting *Cone*, 556 U.S. at 469. "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Id.* at 75-76, quoting *Kyles*, 514 U.S. at 434 (alteration original).

Here, the Small memorandum constitutes favorable, material evidence that was withheld from the defense at trial. Failure to disclose that document therefore constitutes a violation of due process under *Brady*, and Mr. Atwood is therefore entitled to relief.

a. The Small Memorandum was Withheld

Regarding the first prong, the Small memorandum was withheld. Although it appears to have been generated on September 19, 1984, Mr. Atwood was not aware of the memorandum's existence until defense counsel were permitted to review the Attorney General's case file in 2021, approximately 37 years later. Thorough review of the defense case file did not turn up the Small memorandum, nor was the document marked as having been disclosed, unlike similar investigative documents. *See e.g.* Exhibit 14, Doyle Report re: Mall Witnesses (9/18/1984) (red "disclosure made" stamp visible in bottom right corner). And a member of the trial defense team avows that she never

saw the Small memorandum, despite her thorough review of the State's trial disclosure and the defense's interest in precisely the kind of exculpatory materials the memorandum contained. Exhibit 72 at ¶14, Declaration of Debbie Gaynes (6/1/2022). Given the considerable material, exculpatory value of the memorandum, discussed *infra*, it stands to reason that if it had been disclosed to the defense, they would have acted on the information it contained.

As noted above, the same file review identified other, similarly generated memoranda by Small that did not appear to have been disclosed, either, suggesting the document at issue here was one of several that, for whatever reason, were not previously disclosed to defendants. Notably, *Brady* does not distinguish between evidence purposefully and inadvertently withheld; due process is violated whenever material, exculpatory evidence is withheld, whatever the State's motive for failing to make the required disclosure. 373 U.S. at 87-88. *See also Youngblood*, 173 Ariz. at 506; *State v. Lukezic*, 143 Ariz. 60, 64 (1984). The prosecutor "has a duty to learn of any favorable evidence known to ... others acting on the government's behalf in the case, including the police," and to disclose such evidence to the defense. *Kyles*, 514 U.S. at 437-38.

b. The Small Memorandum was Favorable to the Defense

Regarding the second prong, the Small memorandum is clearly helpful to Mr. Atwood. Mr. Atwood maintained his innocence at trial (and maintains it to this day) and argued a third-party was responsible for the murder. At its most basic level, the Small

memorandum supports this theory, as it memorializes a tip that the victim was seen in a car that had no connection Mr. Atwood. While the significance of the Small memorandum extends far beyond that simple point, as discussed *infra*, the simple fact that a tip suggested that someone other than Mr. Atwood had kidnapped Vicki Lynne Hoskinson is enough to make it favorable to the defense, which is all that the second *Brady* prong requires.

c. The Small Memorandum was Material

Regarding the third prong, the Small memorandum is material, as there is a reasonable probability that, had it been disclosed, the result of Mr. Atwood's trial would have been different. *Cone*, 556 U.S. at 469. The Small memorandum would have provided powerful independent corroboration of the defense's third-party culpability theory, in a case where the evidence against Mr. Atwood was already highly dubious.

Mr. Atwood's trial counsel was aware that Annette Fries was the original suspect, and he put on witnesses—the mall workers who saw Fries with Vicki Lynne the night of her disappearance—in support of that theory. That fact alone, however, does not render the Small memorandum immaterial. Even when a defendant is aware of some evidence pointing to a third party suspect, withheld evidence is still material if it prevents "the defense [from] wholly tak[ing] advantage of" the known evidence. *Harrington v. State*, 659 N.W.2d 509, 522-23 (Iowa 2003). This is particularly true when the withheld evidence

"for the first time provided a concrete link between an alternative suspect" and the crime. *Id.* at 524.

The Small memorandum provided precisely such a concrete link. The spontaneous introduction of a license plate number linked to Annette Fries strongly suggests she was connected to the tip, and thus the disappearance itself. In the absence of any suggestion that her neighbor was actually spotted driving his own car with Hoskinson in it, the logical implication is that someone who knew Rhoads called in his car for some reason. Annette Fries was such a person, and she had a good reason to do that. By the time the anonymous tip was made, a drawing of Fries identifying her as a suspect had appeared in local media, and she had already been contacted by investigators and summoned for an interview. She was motivated to try to divert police attention. That license plate number randomly ending up in the report, completely unconnected to the fact that the owner's next-door neighbor was a prime suspect under investigation by police, is unlikely, to put it mildly. And an attempt to direct police attention towards an innocent third party, Rhoads, was itself evidence of guilt.

The Small memorandum significantly bolsters the defense's third party culpability theory. While jurors could perhaps be unsure whether the woman seen by the mall witnesses was in fact Fries, her independent reappearance in the case would be strongly confirmatory, thus magnifying the power of the existing evidence and "put[ting] the whole case in such a different light in such a different light as to undermine confidence

in the verdict." *Kyles*, 514 U.S. at 435. Without the independent verification the Small memorandum could have provided, the mall sightings were much more vulnerable to attack as cases of mistaken identity, and indeed the prosecutor argued as much to the jury. RT3/24/1987 at 170-71 (arguing the unreliability of the testimony of the mall witnesses compared to witnesses for the prosecution; dismissing witness Koger as someone who "wishes she could be the person that says Vicki's here, she's alive, she's in the mall buying Garfield dolls").[21]

To be sure, this evidence is circumstantial. But the entire case against Mr. Atwood was circumstantial. *Atwood*, 171 Ariz. at 595 (noting the prosecution was forced to prove its case through circumstantial evidence due to the paucity of direct evidence implicating Mr. Atwood). And the prosecutor took advantage of the lack of independent confirmatory evidence to Fries' involvement to attack the credibility of defense witnesses supporting that theory. RT3/24/1987 at 170. Given the large volume of other circumstantial evidence implicating *Fries*, the Small memorandum's importance for the defense would have been great.

[21] In addition to corroborating the evidence presented at trial, the Small memorandum is also strongly confirmatory of a link between Fries and her son, Todd, and the crime based upon evidence developed subsequent to trial demonstrating consistency between the memorandum and Todd's known criminal M.O. *See* §IV(C)(2), *infra.*

The foregoing is all the more significant given the weakness of the State's case against Mr. Atwood. *See Kyles,* 514 U.S. at 439 ("[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record."). As discussed above, the evidence against Mr. Atwood was circumstantial, contested, and unreliable, and the State's overall theory of the case was implausible. The testimony of expert prosecution witnesses was contested by defense experts, and the State's theory of the origin of the pink paint on Mr. Atwood's bumper is belied by the appearance of blue paint *on top of* the pink paint, as well as witnesses—including an accident investigator with the sheriff's department—who testified that the bicycle itself did not appear to have been in an accident. *See* §III(B)(3)(a), *supra*. Given testimony that established Mr. Atwood's location no later than 4:40 p.m., approximately one hour after Vicki Lynne's disappearance, the State's theory of the crime relies on a timeline that is, charitably, implausible under even circumstances most favorable to the prosecution. Evidence suggesting that the victim was buried makes the timeline impossible. *See* §III(B)(3)(b), *supra*. Prosecution witnesses purporting to link Mr. Atwood to the girl's disappearance gave unreliable testimony that contradicted earlier statements to investigators which were exculpatory to Mr. Atwood. *See* §III(B)(3)(c), *supra*. Perhaps most significantly, testimony established an alibi for Mr. Atwood immediately *after* Vicki Lynne was abducted. *See* §III(B)(3)(d), *supra*.

Exculpatory evidence is more likely to be material when, as here, the prosecution's overall case is already weak. *Conley v. United States*, 415 F.3d 183, 190-91 (1st Cir. 2005). Further, as the Supreme Court has explained,

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Strickler v. Greene, 527 U.S. 263, 290 (1999), quoting *Kyles*, 514 U.S. at 435. To demonstrate materiality, Mr. Atwood need not prove beyond a reasonable doubt that Fries is guilty; rather, he need only demonstrate a reasonable probability that one or more jurors have a reasonable double about *his* guilt. *Kyles*, *supra*, at 434; *Harrington*, 659 N.W.3d at 525.

Independent of the weakness of the State's evidence, there is strong evidence that this was a close case and that at least some jurors who convicted Mr. Atwood harbored doubts about their verdict even without the Small memorandum. During deliberation, shouting could be heard from the jury room. Exhibit 72 at ¶7, Declaration of Debbie Gaynes (6/1/2022). During interviews with a defense team member following the verdict, numerous jurors reported one particularly vocal juror who favored guilt browbeat other members of the jury until they changed their vote to guilty. *Id.* at ¶8. One juror in particular even commented that she was not sure of how she and her fellow

jurors had convicted Frank of kidnapping, a significant admission in a case where the first degree murder conviction was based on a felony murder theory. *Id.* at ¶9. The same defense team member recalls a comment by the prosecutor just before the verdict was read which suggested that the prosecutor himself believed Mr. Atwood would be found not guilty, as well as a comment by the trial judge reflecting his belief that the case was a close one. *Id.* at ¶¶4, 6.

In short, the Small memorandum would have dramatically corroborated Mr. Atwood's primary trial defense, in a case where the evidence against him was universally circumstantial and highly contested. There is a reasonable probability (and again, that is all that is required) that, had it been disclosed, the outcome of Mr. Atwood's trial would have been different. *Cone*, 556 U.S. at 469. The memorandum is therefore material, and its nondisclosure violated Mr. Atwood's right to due process. *Brady*.

4. Conclusion

The Small memorandum was improperly withheld by the State at trial and discovered by Mr. Atwood only recently, decades after it was created. This late discovery occurred despite trial counsel's express request that such information be disclosed and the State's constitutional obligation to turn over such evidence. The contents of the memorandum are favorable to Mr. Atwood and material, as they provide independent and dramatic confirmation of his third party culpability theory—confirmation he was denied at trial. Given the weakness of the State's case—including a timeline of the crime

that is virtually impossible and a witness establishing an alibi for Mr. Atwood shortly after the victim was abducted—there is a reasonable probability Mr. Atwood would not have been found guilty had the memo been disclosed. This Court must rule on the merits of this claim, and the merits entitle Mr. Atwood to relief. *Brady*; *Kyles*; U.S. Const. amend. V, XIV; Ariz. Const. Art. 2. §4.

Accordingly, Mr. Atwood's conviction and sentence must be vacated, and he is entitled to a new trial in which his right to due process is not violated. *Youngblood*, 173 Ariz. at 506. At a minimum, he has established a colorable claim and is entitled to an evidentiary hearing and other evidentiary development on this claim. *State v. Amaral*, 239 Ariz. 217, 220 ¶11 (2016); Ariz. R. Crim. P. 32.13(a).

B. Rule 32.1(e)

A defendant is entitled to relief when he demonstrates that "newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence." Ariz. R. Crim. P. 32.1(e). Here, the Small memorandum constitutes not only a *Brady* violation, but also newly discovered material facts entitling Mr. Atwood to relief.

1. Timeliness and Preclusion

Because this claim arises under Rule 32.1(e), has not been previously adjudicated on the merits, and cannot be raised on appeal or in a post-trial motion, it is not subject

to preclusion. Ariz. R. Crim. P. 32.2(b). Additionally, it is timely for the reasons discussed in §IV(A)(2), *supra*.

2. Merits

The Arizona Supreme Court has explained a five-prong test for determining whether a claim of newly discovered evidence is colorable:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
> (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
> (3) the evidence must not simply be cumulative or impeaching;
> (4) the evidence must be relevant to the case;
> (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Amaral, 239 Ariz. at 219 ¶9 (2016), citing *State v. Bilke*, 162 Ariz. 51, 52-53 (1989). Here, the Small memorandum satisfies each of these criteria.

a. The Evidence Existed at the Time of Trial

It is plain from the face of the evidence that the Small memorandum existed at the time of trial. The memorandum is dated September 19, 1984. Exhibit 67, FBI Memo re: Anonymous Call. Mr. Atwood's trial would not begin until 1987, more than two years later. Thus, the evidence existed at the time of trial.

b. Diligence

As Mr. Atwood as explained above, he was diligent in obtaining this evidence and bringing it to the Court's attention. *See* §IV(A)(2), *supra*. Mr. Atwood sought specific

disclosure of this exact kind of evidence—tips phoned into law enforcement containing exculpatory information—well before his trial even began. *See* RT11/25/85 at 73-81. The State's failure to produce this document when specifically requested thus cannot be attributed to a lack of diligence by Mr. Atwood. Further, diligence does not even require such a specific request, as a defendant may rely on the prosecutor's constitutional duty to disclose exculpatory material. *Amado,* 758 F.3d at 1136; *Brown,* 889 F.3d at 674. Mr. Atwood was diligent in obtaining the Small memorandum.

Additionally, after the Small memorandum was discovered, Mr. Atwood was diligent in bringing it to the Court's attention. After identifying the memo, Mr. Atwood first had to conduct a thorough review of the massive defense file to determine whether it was in fact "newly discovered." He then was required to conduct investigation to determine whether the memorandum would be likely to change the verdict, as required to present a colorable claim under Rule 32.1(e)(3). Mr. Atwood was diligent in presenting this evidence to this Court.

c. The Evidence is not Merely Cumulative or Impeaching

As explained above, the Small memorandum is not merely cumulative or impeaching. Rather, it is material to Mr. Atwood's conviction and sentence. *See* §IV(A)(3)(c), *supra*. Specifically, the memorandum constitutes a powerful, independent source of information which corroborates the third-party culpability evidence presented at trial. It was unlike any evidence known and available to Mr. Atwood at trial—a

concrete link between the prime third-party suspect and this case. Indeed, the notion that the license plate number of the next-door neighbor of the police's prime suspect would appear in an anonymous tip absent some agency by Fries strains credulity. As such, the Small memorandum constituted not just a novel piece and kind of evidence. Rather, it "put[s] the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

d. Relevance

For similar reasons, the Small memorandum is plainly relevant to Mr. Atwood's case. It is a tip which points to a person other than Mr. Atwood as the true culprit, and it does so in a way that directly implicates Annette Fires, the police's first prime suspect and the central figure in Mr. Atwood's defense case.

e. The Evidence is Likely to have Altered the Verdict

Finally, had it been known to the defense at the time of trial, the Small memorandum would likely have altered Mr. Atwood's verdict. The State's case against Mr. Atwood was weak, and "the jury convicted [him] based on circumstantial evidence and, perhaps in part, based on the testimony of alcohol abusers and drug users[.]" *Atwood*, 171 Ariz. at 653. Strong circumstantial evidence tended to exculpate Mr. Atwood, including the implausibility of the State's proffered timeline and witnesses who provided Mr. Atwood an alibi during the period immediately after the victim was abducted. It is thus unsurprising that, notwithstanding the ultimate outcome, jurors

harbored doubts about their verdict, and even the trial prosecutor believed that a not guilty verdict was likely. *See* §IV(A)(3)(c), *supra*; Exhibit 72 at ¶¶4, 7-9, Declaration of Debbie Gaynes (6/1/2022). This was a close case from the start.

Mr. Atwood presented a third-party defense, and numerous witness called at trial reported seeing the victim in the company of an unknown woman matching the description of Annette Fries in the company of a girl matching the description of the victim, including her red, white, and blue dress. *See* §III(C)(1)(a), *supra*. But these sightings lacked one element—independent corroboration that Fries was involved in the case. The Small memorandum provides such corroboration. Indeed, the only reasonable reading of the memorandum is that Fries or someone connected to her called in the tip the memorandum records. The odds of her next-door neighbor's car being the subject of the tip by chance are simply too remote. The attempt to throw investigators off Fries' trail implied by the Small memorandum is itself powerful evidence, but it also is strongly confirmatory of the third-party evidence the defense was able to present. Under such circumstances, the Small memorandum would likely have changed the verdict had it been known at the time of trial.

3. Conclusion

Mr. Atwood was diligent in uncovering, investigating, and presenting the Small memorandum to this Court. The memorandum provides both substantial new evidence of Annette Fries' guilt and powerful corroboration of the evidence that had been

presented at trial. Given the significant limitations of the State's evidence against Mr. Atwood, the Small memorandum would likely have changed the result at trial. This newly discovered material evidence entitles Mr. Atwood to relief. His conviction must be vacated, and he must be given a new trial. At a minimum, he has established a colorable claim and is entitled to an evidentiary hearing and other evidentiary development on this claim. *Amaral*, 239 Ariz. at 220 ¶11; Ariz. R. Crim. P. 32.13(a).

C. Rule 32.1(h)

A petitioner is entitled to relief when he "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt[.]" Ariz. R. Crim. P. 32.1(h). Given the overall weakness of the prosecution's case against Mr. Atwood, the substantial evidence pointing to a third party as the true culprit, and newly developed information which further ties that third party to the case, no reasonable juror would find Mr. Atwood guilty beyond a reasonable doubt.

1. Timeliness and Preclusion

Because this claim arises under Rule 32.1(h), has not been previously adjudicated on the merits, and cannot be raised on appeal or in a post-trial motion, it is not subject to preclusion. Ariz. R. Crim. P. 32.2(b). Additionally, it is timely for the reasons discussed in §IV(A)(2), *supra*.

2. Merits

A petitioner is entitled to relief when he demonstrates that no reasonable fact-finder would have found him guilty of the offense beyond a reasonable doubt. Ariz. R. Crim. P. 32.1(h). Generally, such claims must be supported by evidence beyond the trial record itself. *State v. Evans*, 252 Ariz. 590, ¶28 (App. 2022). Such evidence must do "more than contradict some of the evidence presented at trial." *State v. Denz*, 232 Ariz. 441, 448 ¶22 (App. 2013).

Here, the evidence produced at trial supporting Mr. Atwood's guilt it already circumstantial and contested. Evidence outside of the trial record, including evidence that has only recently been developed, strongly demonstrates that a third party and not Mr. Atwood is guilty of this offense. In light of the totality of this evidence, no reasonable juror would have found Mr. Atwood guilty beyond a reasonable doubt.

Initially, the weakness of the trial evidence must be noted. Given the lack of direct evidence, the State was forced to rely on circumstantial evidence and the testimony of unreliable witnesses, which were vigorously contested by the defense. *Atwood*, 171 Ariz. at 595, 653; §§III(B)(3)(a) & (c), *supra*. Mr. Atwood presented exculpatory evidence, including a demonstration that the State's timeline of the offense was implausible and a witness who provided an alibi for him at a time when, under the State's theory, he should have already abducted the victim. §§III(B)(3)(b) & (c), *supra*. And Mr. Atwood presented multiple witnesses who testified that they saw the victim in the company of a

woman matching the description of Annette Fries at the Tucson mall long after Mr. Atwood supposedly committed the crime. §III(C)(1)(a), *supra.* No wonder, then, that the trial prosecutor believed Mr. Atwood would be found not guilty and jurors harbored doubts about their verdict. Exhibit 72 at ¶¶4, 7-9, Declaration of Debbie Gaynes (6/1/2022).

It is in the context of this already very close case that evidence beyond the trial record must be evaluated. Taken together, this additional evidence establishes that no reasonable juror would have found Mr. Atwood guilty beyond a reasonable doubt. For example, the jury did not hear from Abe Rodriguez, the man who saw Annette Fries with a brown Datsun 280Z days before the crime, once outside a bank and a second time staring at children on an elementary school playground. Nor did they hear from other witnesses who placed Fries, a brown car, or both nearby the site of Vicki Lynne's disappearance on the afternoon of September 17, 1984. §III(C)(4), *supra.* The jury was not presented with evidence other kidnapping attempts occurring within days of Vicki Lynne's disappearance that were attributed either to a woman matching Fries' description or directly to Fries herself, nor did the jury know about the multiple other witnesses who independently identified the drawing based on Konnie Koger's description as being Annette Fries. §§III(C)(5) & (6), *supra.* The jury did not know about Fries' criminal record and poor mental health, including a diagnosis of schizoaffective disorder and an adjudication that she was not competent to stand trial contemporaneous

with Vicki Lynne's disappearance. §III(C)(1)(3), *supra*. And they certainly were not aware of the accusation that Fries had molested a child, or of her pattern of bizarre and disturbing behavior that persists to this day. §III(D)(1), *supra*.

Also outside of the trial record, because it was withheld by the State, was the Small memorandum. As discussed in greater detail above, the Small memorandum provides powerful evidence of Fries' involvement in the case, as it directly demonstrates an awareness of guilt (trying to throw the police off her trail) and strongly and independently confirms the third party culpability evidence that *was* presented at trial, namely the multiple witnesses who saw Fries with Vicki Lynne at the mall. §IV(A)(3), s*upra*.

Beyond the incredible fact that it identifies a car belonging to Fries' next-door neighbor, the Small memorandum implicates Fries in at least two other ways. First, the tip recorded in the memorandum was made on September 19, the day after the composite drawing strongly resembling Fries first appeared in local media, and after Fries had been initially contacted by investigators in connection with the case. This creates a clear implication that tip was placed because Fries was aware she was a suspect and took action to try to protect herself. A similar inference can be made regarding the discovery of the victim's remains. March 21, 1985, a major investigative story ran in the Tucson Citizen strongly suggesting that police had overlooked evidence of Fries' guilt. While she was assigned a pseudonym in the story, it included information that would

leave no doubt that she was the subject, including the composite drawing and quotes from the family of her would be boyfriend, Jim Bounour. Exhibit 2, Tucson Citizen Article (3/21/1985). The victim's skeletal remains were found in the desert just three weeks later, in an area that had previously been searched. §III(A), *supra*. The discovery of the victim's remains following attention being again brought to bear on Fries strongly suggests a consistent pattern of conduct meant to protect her from criminal liability.

Second, the Small memorandum also reflects conduct consistent with the known M.O. of Fries' adult son. In September 1984, Annette Fries' son, Todd, was 21 years old. Todd has his own years-long pattern of troubling and criminal behavior, including a history of sexual violence, revenge, and other criminal activity, and he is currently incarcerated for waging a campaign of terror against former customers of his business. Todd was arrested on the latter charges after investigators determined that he had made multiple clumsy attempts to frame innocent third parties for his own crimes. Most notably, this included him faking a woman's voice and calling in a fake tip naming an innocent third party to investigators—the exact conduct documented in the Small memorandum. §§III(D)(2)(a-c), s*upra*. Thus, the Small memorandum records not only a false tip pointing to Annette Fries' neighbor—which can only reasonably be viewed as being placed by Fries or someone close to her—but it also reflects conduct consistent with Todd Fries' known modus operandi.

The Small memorandum was not the only piece of new evidence implicating Todd Fries. The actions leading to Todd's current incarceration included major acts of vandalism including, notably, dead animal carcasses being placed in front of his victims' homes. Indeed, following his arrest, investigators found a stockpile of carcasses at his home, presumably for use in future attacks. This distinctive form of attack mirrors harassment experienced by the key defense witness at trial, Konnie Koger, in the years after she testified. Like Todd's known victims, Koger also was threatened with dead animal carcasses left on her property, his trademark style of attack. §§III(D)(2)(c-d), s*upra*. Of course, if Annette Fries were the true killer, it would make sense that her son would go after the primary witness implicating her, particularly given their close relationship and his documented history of seeking revenge against his perceived enemies. *See* Exhibit 54 at ¶7, Julie Ann Lainhart Declaration (7/22/2021) (noting that Todd and Annette were "absolutely devoted to one another. If either of them needed something, the other would drop everything and immediately come to the aid of the other one.").

In short, the evidence above, largely absent from trial, powerfully demonstrates that Annette Fries was involved in Vicki Lynne Hoskinson's disappearance and death. It is particularly powerful when placed against the State's weak evidence of Mr. Atwood's guilt, which was circumstantial, unreliable, contested, and impossible to square with compelling defense evidence that Mr. Atwood could not have committed this crime.

Under these circumstances, no reasonable juror could find Mr. Atwood guilty beyond a reasonable doubt.

3. Conclusion

Because no reasonable juror could find Mr. Atwood guilty beyond a reasonable doubt in light of the evidence presented here, he is entitled to relief. Ariz. R. Crim. P. 32.1(h). His conviction must be vacated, and he is entitled to a new trial. At a minimum, he has established a colorable claim and is entitled to an evidentiary hearing and other evidentiary development on this claim. *Amaral*, 239 Ariz. at 220 ¶11; Ariz. R. Crim. P. 32.13(a).

V. EVIDENTIARY DEVELOPMENT

Evidentiary development is necessary for Mr. Atwood to have the opportunity to present the claims raised in this petition fairly, as required by his state and federal rights to due process and equal protection. *Montgomery v. Superior Court*, 178 Ariz. 84, 87 (App. 1993) ("[A]t a minimum, the United States Constitution requires that the states provide every [postconviction] litigant an 'adequate opportunity to present his claims fairly.'"), *quoting Ross v. Moffitt,* 417 U.S. 600, 616 (1974); *Ross, supra,* at 612 (equal protection prohibits "unreasoned distinctions" between similarly situated defendants and requires the state to provide "an adequate opportunity to present their claims fairly within the adversary system") (quotation omitted).

Additionally, because this is a capital case, the Eighth Amendment requires that Mr. Atwood's conviction—and by extension, his death sentence—be subjected to heightened standards of reliability. *Caldwell,* 472 U.S. at 323; *Woodson,* 428 U.S. at 305.

Mr. Atwood is accordingly entitled, at a minimum, to evidentiary development as follows.

A. Discovery

After filing a petition, a post-conviction petitioner is entitled to discovery upon a showing of good cause. Ariz. R. Crim. P. 32.6(b)(2). To establish good cause under the rule, "the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim." *Id.* "Generally, evidence is 'material' if it has 'some logical connection with the facts of the case or the legal issues presented.'" *State v. Hernandez*, 250 Ariz. 28, ¶12 (2020), *quoting Material Evidence*, Black's Law Dictionary (11th ed. 2019).

Here, Mr. Atwood has alleged that the State has improperly withheld material, exculpatory evidence in violation of due process and *Brady*. While Mr. Atwood's counsel has been permitted to review the Attorney General's file, the existence of the Small memorandum suggests that other material but non-disclosed evidence may exist in the file. Given the State's failure to disclose at least one item improperly withheld under *Brady*, good cause exists for a discovery order compelling disclosure of similar material

evidence. Such evidence would be relevant to all three claims for relief alleged above, as all three claims relate to Mr. Atwood's factual innocence, and all three claims rely on the improperly withheld Small memorandum.

B. Evidentiary Hearing

Arizona Rule of Criminal Procedure 32.13(a) provides that a defendant is entitled to an evidentiary hearing "to determine issues of material fact." "The relevant inquiry for determining whether the [defendant] is entitled to an evidentiary hearing is whether he has alleged facts which, if true, would *probably* have changed the verdict or sentence." *Amaral*, 239 Ariz. at 220 ¶11.

As discussed in greater detail above, Mr. Atwood has established a colorable claim on all three of his alleged claims for relief. His claims depend heavily on the facts, and the facts alleged, if true, would very likely have changed the verdict and sentence, as detailed in the discussion of the merits of each claim. He has backed up his allegations by declarations, affidavits, and other exhibits. Accordingly, he is entitled to an evidentiary hearing to present the full range of evidence supporting those claims.

VI. CONCLUSION

For the reasons explained above, Mr. Atwood is entitled to relief from his unconstitutional convictions and death sentence. At minimum, his claims are colorable and warrant evidentiary development, including discovery, an evidentiary hearing, oral argument, and any other relief this Court deems necessary and just.

RESPECTFULLY SUBMITTED this 1st day of June, 2022.

/s/ Sam Kooistra
David Lane
Sam Kooistra
Counsel for Petitioner Frank Atwood

Copy of the forgoing was emailed/delivered/mailed
on June 1, 2022, to:

Hon. Catherine Woods
Pima County Superior Court

Laura Chiasson
Jeffrey Sparks
Arizona Attorney General's Office

Mr. Frank Atwood

APPENDIX B

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Counsel for Petitioner Frank Jarvis Atwood

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Respondent/Plaintiff, vs. FRANK JARVIS ATWOOD, Petitioner/Defendant.	Pima County Nos. CR14065 & CR15397 **EXHIBITS TO PETITION FOR POST-CONVICTION RELIEF** Hon. Catherine Woods, Div. 17

EXHIBIT LIST

Exhibit 1 Zobenica Report re Stephanie Hoskinson (9/19/1984)

Exhibit 2 Tucson Citizen Article (3/21/1985)

Exhibit 3 Van Skiver Report re Bone Discovery (4/12/1985)

Exhibit 4 Supplement to Search Report (10/29/1984)

Exhibit 5 Gosting Report re: Hall (9/19/1984)

Exhibit 6 Clark Report re Egger (9/20/1984)

Exhibit 7 Latent Print Report (12/20/1984)

Exhibit 8 Post-Mortem Report (4/13/1985)

Exhibit 9 Sperry Affidavit (8/14/1996)

Exhibit 10 Luis Garcia Affidavit (8/8/1996)

Exhibit 11 Barkman Report re Koger (9/20/1984)

Exhibit 12 Composite Drawing of Suspect

Exhibit 13 Van Skiver Report re Hilbert, Graham, and Pongratz (10/17/1984)

Exhibit 14 Doyle Report re Mall Witnesses (9/18/1984)

Exhibit 15 Declaration of Kimberly Ann Sampson (8/27/2021)

Exhibit 16 Bullock Notes re Cherne (9/19/1984)

Exhibit 17 Atkins Report Excerpt (9/18/1984)

Exhibit 18 Clark Report (9/20/1984)

Exhibit 19 Annette Fries Mugshot

Exhibit 20 Excerpt of Cramer Report (9/18/1984)

Exhibit 21 Pederson Report re Koger (3/1/1985)

Exhibit 22 Superior Court Clerk Letter (8/20/1982)

Exhibit 23 Annette Fries Interview (9/19/1984)

Exhibit 24 Juan Flores Interview (9/19/1984)

Exhibit 25 Bonjour Injunction Petition

Exhibit 26 Fries FBI Record

Exhibit 27 Edward Cole Interview (8/24/1982)

Exhibit 28 TPD Letter to Cole (1/3/1983)

Exhibit 29 Indictment (9/14/1982)

Exhibit 30 Motion (1/7/1983)

Exhibit 31 Under Advisement Ruling (10/4/1983)

Exhibit 32 Motion to Dismiss (8/16/1984)

Exhibit 33 Garland Letter (10/1/1984)

Exhibit 34 Minute Entry (11/13/1984)

Exhibit 35 Fries Traffic Ticket (9/11/1984)

Exhibit 36 Clark Report re Rodriguez (9/20/1984)

Exhibit 37 Miranda Report re Cornett (9/19/1984)

Exhibit 38 Van Skiver Report re Monarrez (10/15/1984)

Exhibit 39 Lead Cards re Brown Car

Exhibit 40 Hall Report re Rivera

Exhibit 41 Aubry Report (9/18/1984)

Exhibit 42 Christopher Beckley Interview

Exhibit 43 FBI Report re Spencer (9/19/1984)

Exhibit 44 Handwritten Notes re Ziegler

Exhibit 45 Lead Cards re Car

Exhibit 46 Longoria Report re Saint (9/18/1984)

Exhibit 47 Brennan Report re Murphy (9/19/1984)

Exhibit 48 Nanez Interview (9/18/1984)

Exhibit 49 Sue Stair Lead Card

Exhibit 50 Aubry Report re Kalinski (9/20/1984)

Exhibit 51 Van Skiver Report re Flying H (10/24/1984)

Exhibit 52 Lead Cards re Fries

Exhibit 53 Joshua Slagle Declaration (4/20/2022)

Exhibit 54 Julie Ann Lainhart Declaration (7/22/2021)

Exhibit 55 Crystal Blakely Declaration (1/26/2022)

Exhibit 56 Natasha Hernandez Declaration (4/21/2022)

Exhibit 57 Daily Star Marriage Licenses (2/5/1974)

Exhibit 58 Stover Report re Fries (8/25/1979)

Exhibit 59 Tammy Watson Declaration (12/16/2021)

Exhibit 60 Fries Lewd Call Reports (1982)

Exhibit 61 U.S. v. Fries Transcript Excerpt (10/4/2012)

Exhibit 62 Todd Fries Plea (12/23/1986)

Exhibit 63 State v. Fries Presentence Report (6/13/2016)

Exhibit 64 Tucson Citizen, "Woman, girl seen in store" (3/10/1987)

Exhibit 65 Stuart Keating Declaration (4/25/2022)

Exhibit 66 Jeremy Voas Declaration (5/4/2022)

Exhibit 67 FBI Memo re Anonymous Call

Exhibit 68 Memorandum re Richard Rhoads (4/7/1986)

Exhibit 69 Barkman Report re Apartments (9/20/1984)

Exhibit 70 Curry Interview (9/20/1984)

Exhibit 71 Vario Interview (9/20/1984)

Exhibit 72 Declaration of Debbie Gaynes (6/1/2022)

APPENDIX C

FILED
GARY L. HARRISON
CLERK, SUPERIOR COURT
6/2/2022 2:59:13 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. JEFFREY T. BERGIN

CASE NO. CR014065
CR015397

DATE: June 02, 2022

STATE OF ARIZONA
Plaintiff,
vs.

FRANK JARVIS ATWOOD
Defendant.

O R D E R

IN CHAMBERS ORDER: NOTICE OF POST-CONVICTION RELIEF

The Defendant having filed a Notice for Post-Conviction Relief,

IT IS ORDERED that **Sam Kooistra, Esq., and David Lane, Esq.,** are appointed to represent the Defendant in this Rule 32 proceeding.

The record and transcripts having been prepared on appeal,

IT IS ORDERED that the request for preparation of the record and transcripts is DENIED.

IT IS FURTHER ORDERED the Defendant's petition be filed within **sixty (60) days** of this date. **Pursuant to Rule 32.5, a Certification is required to be filed with the Petition.**

IT IS FURTHER ORDERED permanently assigning CR014054 and CR015397 to Hon. Catherine Woods, Div. 17, for all further proceedings.

If the Court, in its discretion decides to set a hearing on the Post-Conviction Petition, notice will be given to the parties at a later point. Any other requests for additional records or transcripts shall be directed by the parties to the assigned judge.

/s/
HON. JEFFREY T. BERGIN
(ID: ad75e3c7-275a-440f-8585-dcc03743ce6a)

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Joyce Burbridge
Judicial Administrative Assistant

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Attorney General - Criminal - Tucson
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Clerk of Court - Criminal Supervisor
Clerk of Court - Criminal Unit
Office of Court-Appointed Counsel

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