IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	Case No. B 926287
	:	
Plaintiff,	:	Judge Christian A. Jenkins
	:	
v.	:	**POST HEARING BRIEF**
	:	
JEFFREY A. WOGENSTAHL,	:	**Death Penalty Case**
	:	
Defendant.	:	

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Table of Contents

Table of Authorities

Cases

Other Authorities

I. Introduction

Since 1963, the law has recognized that due process is only achieved when a defendant has all the information available to the prosecution. This encompasses the police – the same constitutional injury is inflicted when the police withhold information, whether willfully or inadvertently. The prosecutor is responsible for seeking out exculpatory information in the hands of any agent working on the government's behalf. The prosecutor is deemed to have constructive possession of exculpatory evidence that is known to any part of the government that is involved in the investigation.

Here, many agencies worked on behalf of the prosecution: the Harrison Police Department, Hamilton County Coroner, the FBI, and the Indiana State Police, to name a few. The prosecutors working on this case were obligated by law to find exculpatory information in the possession of these agencies to disclose to the defense. Whether willfully or inadvertently, the prosecutors in this case failed to do so. The government's nondisclosure of exculpatory evidence resulted in a violation of Wogenstahl's right to due process.

II. Legal Standard for *Brady* Claims asserted in a Motion for New Trial

Wogenstahl filed his Motion for New Trial on June 24, 2022, with amendments on November 13, 2023 and October 7, 2024.[1]

Generally, newly discovered evidence warrants a new trial if the evidence meets the following six criteria: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely

[1] Wogenstahl's Second Amendment to his Motion for New Trial was initially filed on October 4, 2024, and was refiled on October 7, 2024 with the accompanying exhibits.

cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505 (1947), syllabus.

However, when the newly discovered evidence in question is alleged to be suppressed by the prosecution, the proper standard when considering a motion for a new trial is whether there was a due process violation. *State v. Johnston*, 39 Ohio St.3d 48, 60 (1988). A defendant's right to due process is violated when the State withholds favorable, material evidence from the defense. *Brady v. Maryland*, 373 U.S. 83 (1963).

a. Legal standard for *Brady* claims

A prosecutor is more than just an adversary in a criminal case; the prosecutor's interest is not to win a case, but to ensure that "justice shall be done." *United States v. Bagley*, 473 U.S. 667, 675 (1985), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935). The focus is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*.

The three prongs of a *Brady* violation require a defendant to show: (1) the evidence was suppressed by the State, either willfully or inadvertently; (2) the evidence is favorable to the accused, because it is either exculpatory or impeaching; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263 (1999).

i. Suppressed by the State

As an initial matter, when referenced in this brief, the term "the State" encompasses both the prosecutors and police.

It is well settled that knowledge of favorable evidence held by the police is imputed to the prosecution. "The individual prosecutor has a duty to learn of **any favorable evidence** known to the others **acting on the government's behalf** in the case, including the police." *Kyles* at 437; *see also Strickler v. Greene*, 527 U.S. at 280-81; *Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002); *United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995) ("The individual prosecutor is presumed to have knowledge of **all information** gathered **in connection with the government's investigation**"). "The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure." *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964).

The prosecutor is ultimately responsible for the nondisclosure of evidence. *Giglio v. United States*, 405 U.S. 150, 154 (1972). This extends to information in the hands of other government agencies involved in the investigation. Prosecutors are deemed to have constructive possession of evidence held by any government agents working on its behalf. "There is no question that the government's duty to disclose under *Brady* reaches **beyond** evidence in the prosecutor's **actual possession**." *United States v. Risha*, 445 F.3d 298, 303 (3rd Cir. 2006).

There is no requirement of bad faith on the part of the prosecutor. Regardless of whether the suppression was inadvertent, a prosecutor has a duty to find this evidence and disclose it to the defense. *State v. McNeal*, 2022-Ohio-2703, ¶ 22, citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also United States v. Agurs*, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

Files maintained by branches of government "closely aligned with the prosecution" must be searched by the prosecution to determine whether there is exculpatory information possessed

by the government. *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C.Cir. 1992), citing *United States ex rel. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985).

In terms of cross-jurisdictional investigations, the Fifth Circuit adopted "a case-by-case analysis of the extent of interaction and cooperation between the two governments." *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979). The issue turns on whether the officers of a separate sovereign were part of "the prosecution team." *Id*. In that case, because of the extensive cooperation between the state and federal government, "the state investigators functioned as agents of the federal government under the principles of agency law utilized in *Giglio*." *Id*.

Expanding on that, the Third Circuit enumerated three factors that determine whether knowledge is imputed to a prosecutor in a different jurisdiction:

> (1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are part of a "team," are participating in a "joint investigation" or are sharing resources; and (3) whether the entity charged with constructive possession has "ready access" to the evidence.

United States v. Risha, 445 F.3d at 304.

ii. Favorable and Material

Favorable evidence encompasses information that is either exculpatory or impeaching. *Giglio*, 405 U.S. at 154; *Bagley* at 676.

The standard for prevailing on a *Brady* claim is lower than the typical standard for newly discovered evidence. *Agurs*, 427 U.S. at 111. Because the prosecution has a responsibility to disclose the evidence, "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Id*.

Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. That does **not** require a showing that it is more likely than not that the defendant would

have been acquitted. *Id*. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434, citing *Bagley* at 678. If the favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," reversal is required. *Kyles* at 435.

Thus, if there is a reasonable chance that one juror might have had reasonable doubt, there is constitutional error.

Brady material that undermines the investigation must be disclosed, regardless of admissibility. For example, information may be material if "it would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." *Kyles* at 445; *see also Mendez v. Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) ("The defendant could also have used the suppressed information to challenge the thoroughness and adequacy of the police investigation"); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) (trial counsel could have used suppressed material to "raise[] serious questions about the manner, quality, and thoroughness of the investigation").

While the prosecutor is the gatekeeper for such material, prosecutors must resolve doubtful questions in favor of disclosure. *Zanders v. United States*, 999 A.2d 149, 164 (D.C.Cir. 2010) ("It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder"); *Lindsey v. King*, 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible…").

Materiality must be considered as a whole, not item-by-item. *Kyles* at 436. Critically, as *United States v. Bagley* explains, *Brady* is to be considered in the cumulative and not in isolation. *See Bagley*, 473 U.S. at 675 (1985). The materiality of suppressed evidence must be viewed "in the context of the entire record." *State v. Bethel*, 2022-Ohio-783, ¶ 34, citing *Agurs*, 427 U.S. at 112.

III. ***Brady*** **Evidence in Wogenstahl's Case**

a. Indiana State Police Records

Postconviction counsel submitted public records requests to the Indiana State Police ("ISP") at different junctures during this case. ISP indicated that it would only release records with a subpoena or court order. Upon order of this Court, ISP released a 34-page document, labelled as Exhibit 116, consisting of police reports and a list of evidence that was already in possession of postconviction counsel.

The information contained in the police reports were suppressed by the State because the prosecutors had constructive possession of the records. The information was also favorable to Wogenstahl and material to the conviction.

i. The evidence was suppressed by the State.

The defense never received the ISP record prior to trial. Postconviction counsel had not seen the ISP police reports prior to September of 2024. 9/26/2024 Pretrial Hrg. Tr. 23. Additionally, trial counsel Mark Krumbein did not recall receiving the ISP records, testifying that "it doesn't seem like it would be possible for me to forget something that significant." Evid. Hrg. Tr. 355. The State stipulated that the records were not in their file. Evid. Hrg. Tr. 354.

Regardless of whether the prosecutors had the ISP reports in their file, the prosecutors are responsible for any exculpatory information in the reports. *Risha*, 445 F.3d at 303 ("There is no question that the government's duty to disclose under *Brady* reaches beyond evidence in the

prosecutor's actual possession."). Knowledge of "**all information** gathered in connection with the government's investigation" is imputed to the prosecutor. *Payne*, 63 F.3d at 1208 (emphasis added). It does not matter whether the suppression was inadvertent. *Kyles* at 437.

The prosecutors had constructive possession of the information because the Indiana officers worked closely with the Ohio authorities. As stated above, there are three factors to be considered when determining whether there is constructive possession of *Brady* material by the state: (1) whether ISP is acting on the prosecutors' "behalf" or is under their "control"; (2) the extent to which the agencies are part of a "team," are participating in a "joint investigation" or are sharing resources; and (3) whether the prosecutors have "ready access" to the evidence. *Risha*, 445 F.3d at 304.

1. The Indiana State Police officers were working on the behalf of the prosecutors.

The Indiana State Police was working on behalf of the Hamilton County Prosecutors Office, at least through the prosecutors' agents. ISP officers worked at the direction of the Harrison Police Department ("HPD"). HPD initiated and coordinated the search for Amber. Ex. 116, p. 3, 11. ISP officers viewed the autopsy at the Hamilton County Coroner, observed the processing of the vehicle, and were present at the lineup where a witness identified Wogenstahl. Ex. 116, p. 7-8, 20-21. ISP turned over the evidence collected at the scene to HPD. Ex. 116, p. 9-10.

On November 29, 1991, a meeting to review the investigation took place at the Harrison Fire and Police Departments. Ex. 116, p. 22; Ex. 94. Officer Lewis noted that HPD would be taking over the case and that "we would assist where needed." Ex. 116, p. 8.

Even after the investigation was handed over to HPD, Indiana officers were involved at least in one instance, according to HPD records. In December of 1991, ISP Officer Ken Greeves

reported to HPD about a tip concerning Troy Russell, who "knows all about the murder." Ex. 16-2; Ex. 99.

2. The agencies were working as a team, participating in a joint investigation.

The Indiana State Police were inextricably intertwined with the investigation in this case. The Hamilton County Coroner records list the investigating agencies as the Harrison Police Department, Indiana State Police, Dearborn County [Indiana] Sheriff's Office, the FBI, Dearborn County [Indiana] Coroner's Office, Cincinnati Police Violent Crimes and the Hamilton County Coroner's Office. Ex. 135.

Numerous ISP officers were involved in the investigation. Many officers helped search for Amber before her body was discovered. *See, e.g.*, Ex. 116, p. 3, 11; Ex. 21-2; 21-3. ISP Officer Kenneth Greves discovered the victim's body and testified at trial. Trial Tr. 1669; Ex. 116, p. 2. ISP collected evidence from the scene. Ex. 116; 126; 127.

ISP Officer Lewis initially managed the scene. He listed the "other agencies" involved at the crime scene as the FBI team, Harrison Ohio Police Department, other members of the Indiana State Police, Dearborn County [Indiana] Sheriff's Department, and Hamilton County Ohio Sheriff's Department. Ex. 116, p. 7. Officer Lewis reported that "All of these officers followed my directions…I remained at the scene and maintained control." *Id*.

ISP Officer Kreinop was also involved from the beginning. He interviewed trial witnesses Harold Borgman, Kathy Roth, Brian Noel, and Fred Harms – all ***before*** the Harrison Police Department interviewed them. He also interviewed Wogenstahl and attended both the autopsy and the lineup where Mr. Noel selected Wogenstahl. Ex. 116, p. 18, 20-21.

Both ISP Officers Lewis and Kreinop attended a meeting on November 29, 1991 "to review the investigation" with "all investigating agencies, including the Hamilton County, Ohio and

Dearborn County [Indiana] prosecutors." Ex. 116, p. 22; *see also* Ex. 116, p. 8; Ex. 94. Their reports reflect that they were in the investigation: Officer Kreinop noted in his report that "No ***further*** investigation is required by this department." Ex. 116, p. 22 (emphasis added), *see also* Ex. 116, p. 8 ("At that time I was told that we could ***transfer all evidence to the Harrison Police Dept.*** that they would be taking care of the case from this point on" (emphasis added)).

3. The prosecutors had ready access to the evidence.

The Hamilton County prosecutors certainly had easier access to these records than the defense. Prosecutor Gibson stated that defense counsel "has got every statement we have got." Trial Tr. 1579. If true, there is still a *Brady* violation – prosecutors must seek out exculpatory information from police files. *Jamison v. Collins*, 291 F.3d at 385, citing *Kyles v. Whitley*, 514 U.S. at 437-38. And "a prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case." *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984).

Though it is not required, trial counsel was diligent in requesting the Indiana records. At trial, counsel specifically requested the prosecutors to "check with the police" for additional statements from Kathy Roth – who testified that she first spoke to Indiana officers. Trial Tr. 1565. Prosecutor Deters called this request a "fishing expedition." Trial Tr. 1582. Yet, the very reports that defense counsel requested contained impeaching information about key eyewitnesses. The law requires that the prosecutors are responsible for obtaining this information and disclosing it to the defense.

Wogenstahl was not asking the government to conduct additional investigation to find exculpatory information – he was merely asking for disclosure of exculpatory evidence that already existed in the form of a police report accessible by the Hamilton County Prosecutor's Office. Defendants have no duty to "scavenge for hints of undisclosed *Brady* material." *Banks v.*

Dretke, 540 U.S. 668, 695 (2004). Mr. Krumbein was diligent in asking for records; he trusted the prosecutors to comply with the law, to "go out of their way to find – ask the police, hey, do we have everything?" Evid. Hrg. Tr. 403. He testified that he would have expected the ISP records to be provided by Hamilton County. Evid. Hrg. Tr. 413. Mr. Krumbein relied on the prosecutors giving him all of the evidence; that was their job. Evid. Hrg. Tr. 419.

While the prosecutor stipulated that its file did not contain the ISP records (Evid. Hrg. Tr. 354), it is undeniable that the trial prosecutors ***should have*** sought out this information in accordance with the *Brady* line of cases.[2] The prosecutors knew that ISP conducted the initial investigation and collected evidence. Brian Noel testified that he initially spoke to an Indiana State detective and a Dearborn County, Indiana detective, and said that the Indiana officers "took down a bunch of notes." Trial Tr. 1519; 1542-1543. Kathy Roth testified that she spoke to a Dearborn County, Indiana officer first before talking to a member of the Indiana State Police. Suppression Hearing Tr. 176; Trial Tr. 1564-65. Evidence was transferred from ISP to Hamilton County officials. Ex. 126; 116, p. 9-10. At any time, the prosecutors could have asked ISP for their records or communicated to HPD or the FBI (who worked closely with the investigation, *see* section III.d *infra*) that the ISP records needed prosecutorial review, as required by *Brady*.

ii. The evidence is both favorable and material.

[2] This case is similar to the multi-county investigation in *Smith v. Secy. of New Mexico Dept. of Corr.*, 50 F.3d 801 (10th Cir.1995). There, evidence relating to the defense theory that someone else committed the crimes were suppressed. *Id*. at 810-11. The State stipulated that one of the police reports was not in the file reviewed during preparation for an evidentiary hearing six years after trial. *Id*. at 816. The appellate court found that "this fact tends to support a finding of nondisclosure, especially in light of the other evidence" – the trial attorney testified that he never received a copy of the report, and "perhaps the most highly probative evidence" was the fact that there was no cross-examination on the report that contained matters "extremely relevant" to the defense. *Id*. at 829.

The ISP reports in question impeached several eyewitnesses who claimed to see either Wogenstahl or his vehicle at the scene of the crime the night Amber went missing, which is fully discussed in Wogenstahl's Second Amendment to his Motion for New Trial and Fifth Amendment to Successive Postconviction Petition, both filed October 7, 2024

Eyewitness Kathy Roth pointed to Wogenstahl at trial and said that there was no doubt in her mind that Wogenstahl was the man she saw at the crime scene the night Amber disappeared. Trial Tr. 1571. The prosecutor even emphasized her certainty in closing arguments:

> "Did she show you any hesitation, did she show you any doubt about that identification? She was certain. Again, did Kathy Roth look to you who would make that kind of statement unless she was absolutely positive that she was right and come in here and say yeah, that's him? She is not and she didn't do that."

Trial Tr. 2442.

Yet, the very first time Ms. Roth spoke with police, she said that she was ***unable to observe the man's face***. Ex. 116, p. 18. When Mr. Krumbein heard that Ms. Roth did not actually see the man's face, he said, "that's an amazing contradiction," and it "absolutely" would have been useful in cross-examination. Evid. Hrg. Tr. 359.

This kind of impeaching information has been held as "plainly material" by the Supreme Court in an exceedingly similar situation. *Smith v. Cain*, 565 U.S. 73, 76 (2012). In *Smith*, an eyewitness testified at trial that he had "no doubt" that the defendant was the gunman; yet, in the police notes, the eyewitness "could not ID anyone because [he] couldn't see faces." *Id*.; *see also Lindsey v. King*, 769 F.2d at 1040 (eyewitness told police eight days after the crime that he did not see the assailant's face, contrary to his trial testimony where he said that he did see the assailant's face and identified him as the defendant; the prosecutor's conduct in attempting to cover this up "would be reprehensible in an ordinary case; where a man's life is at stake, it is beyond reprehension").

Here, just as in *Smith*, Ms. Roth's undisclosed statements directly contradict her testimony.

The records revealed inconsistencies in other testimony as well. Shortly after the offense, Brian Noel told ISP that he saw a man on the side of the road near where the body was found, and that this man had a scraggly beard. Ex. 116. After the police lineup where Noel said that "sure looked like him," Noel said that the man had a "beard + mustache (not a full beard)." Ex. 114. At trial, his statement evolved to say that the man's facial hair was "three or four days growth," (Trial Tr. 1516), and then changed to "like two or three days growth." Trial Tr. 1533.

This is significant because the State's witness, Lynn Williams, who had seen Wogenstahl that very night prior to the crime, testified at trial that Wogenstahl was clean-shaven. Trial Tr. 1056.

"The evolution over time of a given eyewitness's description can be fatal to its reliability." *Kyles*, 514 U.S. at 444. Noel's account is not only unreliable for its changing character, but because it initially could not have matched Wogenstahl. Noel's initial statement to ISP described a man with a "scraggly beard" – starkly inconsistent with not only his trial testimony, but the appearance of Wogenstahl on the night of the crime.

Other impeaching information was within the ISP records: Kathy Roth told officers that the vehicle that she saw that night had a "light colored wide door guard strip" (Ex. 116, p. 18), though her later statements and testimony do not mention this wide door guard strip. This also does not match the description of Wogenstahl's car, which has a thin door guard strip. State's Trial Ex. 50. Brian Noel's father was present at the lineup along with several other law enforcement officers from both Ohio and Indiana (Ex. 116, p. 20), which "possess the potential for influence." Ex. 137.1. After Noel viewed Wogenstahl's car in HPD custody, Noel conveniently recalled seeing a front license plate bracket on the vehicle that he saw on the side of the road. Ex. 116, p. 21. Fred

Harms told the Indiana officers that the vehicle he saw was "possibly a two door" (Ex. 116, p. 22), though he testified at trial that it was a four door. Trial Tr. 1549.

Eric Horn's testimony is also contradicted by the records. The report states that "Eric looks into the bedroom, but **does not check each child individually**, and closes the door." Ex. 116, p. 13. At trial, when asked what he saw when he went into the bedroom at 3:30 a.m., he testified that he "saw Matt and Shayna, and **Amber wasn't there**." Trial Tr. 972.

The reports also included information about the physical evidence collected by the ISP officers, indicating a lack of proper crime scene investigation. *See generally* Ex. 136.1. A missing sketch was referenced, as well as missing photographs of the scene. Evid. Hrg. Tr. 440-41; Ex. 116, p. 2, 6-10. A beer can was collected by ISP that was never tested or even mentioned in any other reports. Evid. Hrg. Tr. 442; Ex. 116, p. 2.

When considered together, along with all of the suppressed information from each agency involved with the case, it is undeniable that there was a reasonable chance that at least one juror might have had reasonable doubt.

iii. Conclusion

The defense was entitled to the exculpatory information in the possession of the Indiana State Police, and the Hamilton County Prosecutor's Office was obligated to search the existing records and disclose it. Trial counsel requested this information multiple times and relied on the prosecutors to turn it over. Evid. Hrg. Tr. 422-23. Regardless of which entity wrote the report, the impact on Wogenstahl's constitutional right to this exculpatory evidence remains the same.

There is no question that this was both favorable and material. And as laid out above, the prosecutors had constructive possession of this information, and it was never disclosed to the defense. The jury never heard this crucial impeaching information, which undoubtedly undermines

the confidence in the verdict. Thus, Wogenstahl has proved the three *Brady* prongs with respect to the Indiana State Police records.

b. Harrison Police Department Records

i. The evidence was suppressed by the State.

Even without the ISP records, there is a massive amount of *Brady* evidence that was suppressed in this case. As detailed in previous filings, the records from the Harrison Police Department were suppressed.[3] Postconviction counsel Beth Arrick testified that she did not review the HPD records until 2016. Evid. Hrg. Tr. 496; Ex. 112. It was only after the Ohio Public Defender filed a Complaint for Writ of Mandamus that HPD agreed to allow access to the records. Evid. Hrg. Tr. 494; Ex. 112.

Trial counsel Mark Krumbein also testified about several key pieces of evidence that he would have used at trial, had he been provided with the information:

- Mr. Krumbein testified that he did not recall receiving information that Amber Beard saw Amber alive after Wogenstahl was already in custody. Evid. Hrg. Tr. 337, 350; Ex. 68-69. He testified that this would have been critical information, and he and his co-counsel (a former investigator) "would have been all over that situation." Evid. Hrg. Tr. 352.
- He does not remember receiving information about Amber's school life or journals. Evid. Hrg. Tr. 362.
- He does not remember receiving reports about Amber talking about running away, which he would have utilized in his defense. Evid. Hrg. Tr. 362-63.
- Mr. Krumbein remembered that the condition of Wogenstahl's jacket was "a big deal." Evid. Hrg. Tr. 363. He did not recall getting any information about Peggy Garrett being hypnotized. Evid. Hrg. Tr. 368; Ex. 13. Mr. Krumbein testified that it was "very unusual" when a witness is hypnotized, "so it's not the kind of thing I would think I would forget." Evid. Hrg. Tr. 368. It would have been significant to him to know that Peggy Garrett said, under hypnosis, that the jacket was damaged prior to the alleged offense. Evid. Hrg. Tr. 369. If he had known this information, he would have questioned her about it. Evid. Hrg. Tr. 370.
- Mr. Krumbein did not recall hearing about Peggy Garrett panicking with a dark-haired man at the Waffle House the night that Amber disappeared. Evid. Hrg. Tr. 372; Ex. 24; 96-97.

[3] *See* Postconviction Petition filed 4/26/2017 and amendments; Motion for New Trial filed 6/24/2022 and amendments; Wogenstahl's Response to the State's Amended Motion to Dismiss Postconviction Petition filed 5/29/2024; Wogenstahl's Response to the State's Motion to Set Aside Leave to File Motion for New Trial filed 5/29/2024.

- Mr. Krumbein had no knowledge that Eric Horn even took a polygraph test, let alone that he failed one. Evid. Hrg. Tr. 378-79. While Mr. Krumbein's co-counsel was certainly suspicious of Eric Horn, Mr. Krumbein does not recall being told by the police or prosecutors that Horn was a suspect. Evid. Hrg. Tr. 380.
- Mr. Krumbein did not recall hearing that Peggy sold her daughter to a drug dealer to settle a drug debt. Evid. Hrg. Tr. 392-93, 395; Ex. 50-54. "That doesn't seem like the kind of thing that I would forget if there was an allegation here that the mother of the decedent sold her for a drug debt. That is not the kind of thing I think I would even forget over time."

Mr. Krumbein was "dumbfounded" by the lack of disclosure of critical information by the prosecutors. Evid. Hrg. Tr. 382. "I mean, some of these things I clearly know I didn't get…I'm concerned because I never had a problem with Mark Piepmeier not giving me anything." *Id*.

The prosecutors had an obligation to seek out exculpatory information in the police file, even if those police notes were not physically in the prosecutors' possession. *Strickler v. Greene*, 527 U.S. at 280-81. Courts "have found it improper for a prosecutor's office to remain ignorant about certain aspects of a case or to compartmentalize information so that only investigating officers, and not the prosecutors themselves, would be aware of it." *United States v. Morris*, 80 F.3d 1151 (7th Cir. 1996).

Regrettably, this was the normal practice of the Hamilton County Prosecutor's Office at the time of Wogenstahl's trial. Prosecutor Piepmeier testified at a federal court hearing in *Jamison v. Collins*, stating that the prosecution did not receive the full file from the Cincinnati Police Department – that department would typically prepare a file called a "Homicide Book," where the police decide what information to submit to prosecutors. Ex. 1, p. 6. The Homicide Book would only contain inculpatory information, and prosecutors remained unaware of exculpatory information. *Jamison v. Collins*, 291 F.3d at 383; *see also Bies v. Sheldon,* 775 F.3d 386, 393 (6th Cir. 2014).

ii. The evidence is both favorable and material.

The favorable and material nature of this evidence is detailed in full in the filings referenced in footnote 1. Trial counsel testified that he would have used this information in defending the case. *See* section III.b.i. The Sixth Circuit agreed that there was, at the very least, "a prima facie showing that he can establish by clear and convincing evidence that no reasonable factfinder would have found him guilty" – a far higher standard than the one before this Court. *In re Wogenstahl*, 902 F.3d 621, 629 (6th Cir. 2018). The standard here is whether there is a reasonable probability that at least one juror might have had reasonable doubt, and that has been satisfied.

Evidence of another perpetrator has been found to be *Brady* material in other courts. *See, e.g., Mendez v. Artuz*, 303 F.3d at 413 (suppressed evidence of information that another person placed a contract on the victim's life would have allowed the defendant to challenge the state's motive theory, especially when the state's theory was "weak and unlikely"); *Smith v. Secy. of New Mexico Dept. of Corr.*, 50 F.3d 801 (10th Cir.1995) (police reports concerning potential guilt of state's witness "would have provided important investigative leads and impeachment evidence").

iii. Conclusion

The wealth of evidence contained in the HPD records was favorable to Wogenstahl, yet never disclosed to trial counsel. The prosecutors failed in their legal obligation to find any exculpatory evidence collected by the police department and disclose it to the defense. *Kyles v. Whitley*, 514 U.S. at 437. The evidence puts the entire case in such a different light that it undermines the confidence in the verdict. Wogenstahl has satisfied the three *Brady* factors with respect to the Harrison Police Department records.

c. Hamilton County Coroner and Crime Lab Records

i. The evidence was suppressed by the State.

Postconviction counsel Beth Arrick affied that defense counsel did not have any of the records from the Hamilton County Coroner and Crime Lab ("HCCL") prior to a public records

request that the Office of the Ohio Public Defender made after the public records law changed in 2016. Ex. 112. As detailed above in section II.a.i, the prosecutor is responsible for disclosing exculpatory material in the possession of any agent working on the government's behalf. *Kyles v. Whitley*, 514 U.S. at 437. As the coroner and crime lab was deeply involved in evidence collection and testing, HCCL was clearly working on behalf of the prosecution. Criminalists Jeff Schaefer and Bill Dean testified for the State, as well as coroner Dr. Michael Kenny.

ii. The evidence is both favorable and material.

As an initial matter, the materials from HCCL contained no record of confirmatory tests – meaning that any of the few presumptive positive tests for blood were not confirmed to be blood at all. Evid. Hrg. Tr. 438.

The information in the reports is material because the State's entire theory was that Amber was killed in Wogenstahl's car, and that he cleaned his car afterward. However, there was no distinct evidence of any cleanup – nothing describing the car being wet or frozen, no smell of bleach or other materials. Evid. Hrg. Tr. 447-49; 456. The carpet, the seats, the foam behind the seats were all tested for blood, and all negative. Evid. Hrg. Tr. 449-450; Ex. 136. It is virtually impossible to clean out the foam behind the car upholstery. Evid. Hrg. Tr. 450. The laboratory conducted 242 tests for blood from the vehicle – all negative. Evid. Hrg. Tr. 460-61; Ex. 104.

Combined with the FBI's findings in regard to the debris in the vehicle (*see* section III.d.ii *infra*), there is more evidence to show that the car was dirty than clean, despite the prosecution's repeated claims.

There was no written report of the search of the car. Evid. Hrg. Tr. 444. Very few photographs were taken, but no photographic log that documents when and where the photos were taken. Evid. Hrg. Tr. 445. There were no photographs of the speck of blood in the car – the only mention of this critical evidence was found in Jeff Schaefer's trial testimony. Evid. Hrg. Tr. 446.

The prosecution misled the jury about the state of Wogenstahl's jacket. When questioned about the fact that his jacket was wet and somewhat discolored, he said that he had rinsed the jacket after his cat urinated on it. Trial Tr. 2294; 2354. Prosecutor Gibson claimed in closing arguments: "I will tell you what did this. The Clorox. That is what did it." Trial Tr. 2461. Prosecutor Deters reiterated: "So he takes Clorox and dumps it all over [the jacket]." Trial Tr. 2603. Prosecutor Deters also falsely represented that Jeff Schaefer testified that Clorox "destroys [blood]. It's ruined, gone." Tr. 2592.

The prosecutors were plainly incorrect. "**Bleach will not prevent forensic scientists from locating or preclude a subsequent examination of blood**." Ex. 136. There was no blood found on the jacket, despite 43 tests. Evid. Hrg. Tr. 453; Ex. 86. With no evidence of blood on the jacket, there was no possible reason for Wogenstahl to bleach the jacket. The prosecution made it out to look like Wogenstahl had not only bleached the jacket, but lied about why the jacket was wet, further feeding into its narrative that Wogenstahl was not to be trusted.

With no supporting evidence, the State told the jury that Amber was killed inside of Wogenstahl's car, that Wogenstahl had thoroughly cleaned out his car, and that Wogenstahl had bleached his jacket. The records actually provide evidence to the contrary. Even alone, there is a reasonable probability that this information would cause at least one juror to have reasonable doubt. Considered in combination with the other suppressed evidence, this information is material.

iii. Conclusion

Wogenstahl did not have access to this exculpatory information at trial. These records contained evidence that directly contradicted the State's arguments against him. This certainly undermines the confidence in the verdict. Thus, Wogenstahl has shown each prong of a *Brady* violation with regard to the HCCL records.

d. FBI Records

i. The evidence was suppressed by the State.

Defense counsel were not in possession of the FBI records. Mr. Krumbein had no knowledge of any other hairs in the victim's clothing that were found by either the Hamilton County Crime Lab or the FBI. Evid. Hrg. Tr. 376. He also testified that he did not receive other pertinent information, such as the reports about Amber's school life (Evid. Hrg. Tr. 362; Ex. 17) or the reports regarding the veterinary examination of Wogenstahl's cat. Evid. Hrg. Tr. 391; Ex. 73. It was only when postconviction counsel Beth Arrick attempted to get Freedom of Information Act ("FOIA") records that the records were received, though the records were heavily redacted. Evid. Hrg. Tr. 497-98; Ex. 112.

As with the records from the Indiana State Police, the FBI records are also subject to consideration of the three *Risha* factors: (1) whether the FBI acting on the prosecutors' "behalf" or is under their "control"; (2) the extent to which agencies are part of a "team," are participating in a "joint investigation" or are sharing resources; and (3) whether the prosecution has "ready access" to the evidence. *United States v. Risha*, 445 F.3d at 304.

1. The FBI was working on the Hamilton County prosecutors' behalf.

It is undeniable that the FBI agents were working on the prosecutor's behalf. FBI agent Doug Knight transported evidence, helped brief Hamilton County Coroner lab tech Bill Dean on the case, and discussed evidence with HPD Det. Bettinger. Ex. 126. Evidence logs read: "FBI assisting Harrison in this case." Ex. 73-1.

Agents from the Behavioral Science Unit ("BSU") of the FBI assisted with the initial interview and "furnished support to the investigating agents, Harrison, Ohio Police Department, and the local prosecutor's office." Ex. 127. BSU agents also met with the prosecutors in December of 1992 to discuss a prosecution strategy. *Id*.

After the conviction, the Special Agent in Charge of the Cincinnati Division of the FBI commended the Hamilton County Prosecutors for leading "the prosecutorial team which secured the conviction." Ex. 144. The Hamilton County Prosecutors noted that the FBI agents, laboratory, and BSU were instrumental in the prosecution. Ex. 127.

Special Agents Douglas Deedrick and Douglas Knight testified for the State, as did FBI consultant and research botanist Dr. Robert Webster.

2. The FBI participated in a joint investigation with the State agencies.

Similarly, it is apparent that the FBI participated in a joint investigation with the Harrison Police Department. "The Cincinnati Division [of the FBI] initiated a kidnapping investigation on November 25, 1991…Extensive investigation at the crime scene, neighborhood and other areas was conducted and prosecution was turned over to the Hamilton County Prosecutor's Office….Wogenstahl was initially developed as a suspect by FBI and local authorities…" Ex. 127; *see also* Ex. 116, p. 22; Ex. 94.

HPD Officer Lowry wrote that he was assigned to assist Special Agent Richard Rybolt with the search for Amber before her body was discovered. Ex. 13-4. Special Agents Mark S. Rogers and Richard W. Lunn worked with HPD Officer Steven Mathews when searching for Amber, collecting a pair of shoes as evidence and submitting to the HPD. Ex. 21-2; 21-3. Special Agent Mark Rogers also investigated door-to-door with an HPD officer. Ex. 31-2. Special Agent Edward P. Woods collected a blood sample from Wogenstahl's kitten and delivered it to the Hamilton County Coroner. Ex. 73-1; 126. Special Agent Mike Murphy processed Wogenstahl's apartment. Ex. 166.

FBI agents interviewed trial witnesses including Michelle Hunt (Ex. 39), Peggy Garrett (Ex. 123), and Brian Noel (Ex. 124.1). FBI agents interviewed other witnesses as well, such as

Amber's teacher Kim Bischoff (Ex. 49) and Amber's grandmother Loretta Garrett (along with HPD Officer Matthews, Ex. 48-1). The FBI reported that it was conducting background investigation on Wogenstahl (and another suspect), and that the investigation was continuing. Ex. 120.

The FBI also assisted with testing physical evidence in the case. *See* Ex. 143; 148; 149.

3. The Hamilton County prosecutors had ready access to the FBI records.

The Hamilton County prosecutors worked closely with the FBI, as described *supra*. They worked with BSU to coordinate a strategy, used the FBI lab for testing, and met with FBI agents. The prosecutors could have simply asked the FBI for the reports.

Many unredacted FBI reports were found in the Harrison Police Department's file when it was accessed by postconviction counsel in 2016. At minimum, HPD had copies of the reports, and the Hamilton County prosecutors could have accessed the reports through HPD.

ii. The evidence is both favorable and material.

The information found in the FBI records both impeached the State's expert witnesses and raised serious questions about the physical evidence underlying the conviction.

At trial, the State's crime lab expert Bill Dean testified that he did not find any type of hairs in the victim's underwear. Trial Tr. 1176. However, FBI records reveal that a black hair fragment, possibly head hair, were recovered from the victim's underwear ***by the Hamilton County Crime Lab***. Ex. 139.1; 149.

Another State's witness, FBI Agent Doug Deedrick, testified that he recovered "fibers as well as a single light brown Caucasian pubic hair." Trial Tr. 1267. Deedrick failed to mention in either his testimony or his report that he found ***two additional hairs*** in the victim's underwear. Ex. 139.1; 148.

The hairs could have been used to create reasonable doubt in an almost entirely circumstantial case. *See, e.g., DiLosa v. Cain*, 279 F.3d 259, 265 (5th Cir. 2002) (affirming relief on a *Brady* claim where the state withheld evidence of unknown hair at the crime scene and even emphasized in closing arguments that there was no hairs found that point to another suspect).

Mark Krumbein testified that he and his co-counsel had concerns about the FBI finding Wogenstahl's hair on the victim's underwear after the county crime lab came up short. Evid. Hrg. Tr. 373-74 ("I was dumbfounded that in a case of this magnitude that the county coroner couldn't find hairs on such small articles of clothing that like a ten-year-old-girl would wear…I was surprised. So that is always troublesome to me."). He said that it was "rather disturbing to us that months later, you know, a hair or hairs were found on her clothing" because the police had access to Wogenstahl's apartment and belongings. *Id*. at 376. And without the knowledge of alternate suspects from other suppressed records (*see* section III.b), Mr. Krumbein could not have asked for comparison to other suspects. Evid. Hrg. Tr. 377.

The FBI lab also removed the carpet from Wogenstahl's vehicle and tested for blood on both the front and back – none was found. Ex. 136.1. There was a note that a large amount of sandy dirt came out of the carpet; the floor mats were vacuumed, revealing "quite a bit of debris," which indicates that any cleanup was cursory and would leave any potential trace evidence behind. Evid. Hrg. Tr. 451; Ex. 149. Yet there was no trace evidence found.

iii. Conclusion

The presence of additional hairs in the victim's underwear alone is extremely relevant information, made all the more essential by two state actors lying about that on the stand. The evidence was suppressed, as it was derived from a joint investigation where the FBI was working at the behest of the prosecutors who had ready access to the information. This would certainly raise

doubts about the confidence of the verdict. Thus, Wogenstahl has established a *Brady* claim with regard to the FBI records.

e. Previous *Brady*

A cumulative analysis encompasses the entire case, including *Brady* material that has already been litigated. *State v. Bethel*, 2022-Ohio-783, ¶ 34, citing *Agurs*, 427 U.S. at 112.

i. Eric Horn

Wogenstahl testified that he went to the Garrett apartment the night that Amber disappeared to buy weed from Eric Horn. Trial Tr. 2301-02. He initially told the police that he was playing a prank on Horn because purchasing weed would violate his parole. *Id*.

When trial counsel tried to develop this defense, Horn testified that he had never sold drugs. Trial Tr. 986-87. Trial counsel did not have the information that Horn was adjudicated delinquent for trafficking in drugs just two days before Wogenstahl was indicted in this case.

As discussed in detail above in section III.a, an individual prosecutor is responsible for knowing all information relating to the case. *Kyles v. Whitley*, 514 U.S. at 437. Regardless of whether the prosecutors had actual knowledge of Horn's adjudication, the police knew – which is imputed to the prosecution under *Brady*. *See, e.g., Smith v. Secy. of New Mexico Dept. of Corr.*, 50 F.3d at 831 (information about the alternate suspect's false identity "possessed by an investigative arm of the state that the prosecution knew was involved in investigating this case" is imputed to the prosecution).

This is material because the State's case rested on characterizing Wogenstahl as a liar at every step of the way. *See generally* State's closing arguments, Trial Tr. 2418. Prosecutor Gibson stated in his closing argument that "There is no evidence in this case that anybody else ever had any marijuana. Those are all the stories he told." Trial Tr. 2451. Yet mere weeks before the trial, Eric Horn's probation for trafficking in marijuana was terminated. Ex. 34. HPD officers personally

informed the prosecutors of Horn's arrest, knowing that he was a key witness in the Wogenstahl case. Ex. 158, p. 31-32; Ex. 155, p. 22.

The First District even agreed that "the evidence of Horn's drug arrest and delinquency adjudication undeniably contradicted his testimony at trial." *State v. Wogenstahl*, 2004-Ohio-5994, ¶ 29 (1st Dist.).

Pair this with the other instances the State accused Wogenstahl of fabrication:

- They claimed that Wogenstahl lied when he denied bleaching his jacket, when there was no evidence of that whatsoever. *See* section III.c.ii.
- They accused Wogenstahl of "thoroughly washing" his car (Trial Tr. 2459) when the evidence actually contradicted that fact. *See* sections III.c.ii and III.d.ii.
- They mocked Wogenstahl for his "psychopathic cat" (Trial Tr. 2592) even though they knew that the cat actually did have a chipped tooth. *See* section III.b.i; Trial Tr. 2592 ("I think **the story of the cat epitomizes the ludicrousness of this defendant**. It is almost insulting as a juror to sit in this courtroom and for this defendant to say a cat did this.").
- In bolstering the testimony of their hair expert (by falsely claiming that the hair was a match to Wogenstahl, despite that exceeding the limits of science, Ex. 87 and 139), ridiculed Wogenstahl: "Who are we to believe, Agent Deedrick or the other hair expert in the room, Jeffrey Wogenstahl?" Trial Tr. 2458.

All of these instances of Wogenstahl's supposed "lies" have been proven wrong, and the State knew it. The State has attempted to paint Wogenstahl as a liar, but in reality, it is the prosecutors who lied.

ii. Bruce Wheeler

Prosecutor Gibson represented to the jury that "Bruce Wheeler got nothing for his appearance in this courtroom" – but this was not the truth. Trial Tr. 2464.

Wheeler had contacted the prosecutor's office before he entered a plea in his own case. He affied that "the prosecutors promised if I testified they would write a letter to the parole board on my behalf." Ex. 35. The prosecution wrote a letter to the parole board on May 24, 1993, commending Wheeler for his testimony – "we believe this information will be relevant when Bruce Wheeler is considered for parole." Ex. 36. This letter was sent again to the parole board in 1995.

Wheeler swore in his affidavit that "it was implied that I would do less time in prison if I testified." Ex. 35. This implicit agreement significantly undermines Wheeler's credibility.

Pursuant to *Brady*, both tacit and explicit agreements must be disclosed, because both bear on a witness's credibility. *United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986). In fact, tacit agreements are more likely to be problematic. "The more uncertain the inducement, the greater the witness's incentive to tailor his testimony to please the government, precisely because the witness does not know exactly what he will get for his cooperation, and hopes for the very best." Cassidy, "Soft Words of Hope:" *Giglio*, Accomplice Witnesses, & the Problem of Implied Inducements, 98 Nw. U.L. Rev. 1129, 1154 (2004).

The questioning at trial was delicate – Prosecutor Gibson asked Wheeler if, up to the time of his sentencing, "did anybody intervene on your behalf or did any law enforcement officials ask for leniency on your behalf?" Trial Tr. 2136. Wheeler said no. Wheeler testified that he was never promised the reduction of charges. Trial Tr. 2152.

Even without inducement, Wheeler was less than credible, and the prosecution knew it. In the grand jury presentation for Wheeler's case, Prosecutor Gibson says that Wheeler's explanation for the crime "stretches the bounds of credibility. Quite frankly, I just don't believe it." Ex. 37, p. 3.

At Wogenstahl's trial, Wheeler testified that Wogenstahl "grabbed the girl out of bed" – but Amber was found in her church dress, not her pajamas. Trial Tr. 2144. There was no evidence of sexual assault, and no charges for sexual assault. Ex. 135.

Wheeler testified that Wogenstahl transported the victim in his car and later cleaned the car (Trial Tr. 2148, 2150) – again, this was not borne out by the evidence. *See* sections III.c.ii and III.d.ii, *supra*.

Wheeler also stated that Wogenstahl told him there was not a lot of blood. Trial Tr. 2148. This is contrary to the injuries sustained by the victim; "there would have been a lot of blood loss." Evid. Hrg. Tr. 455. Crime scene expert Brian Clark said that "I would have expected bloodstains to be in a lot more places, which would have been extremely difficult to – to clean out – to clean up." Evid. Hrg. Tr. 455-56.

Yet, Prosecutor Gibson vouched for Wheeler in closing arguments: "I will tell you again you should believe him," "he was telling you the truth." Trial Tr. 2464, 2469. He even told the jury that any potential deal would have been struck prior to Wheeler's sentencing:

> "Now if we were going to cut him some sweetheart deal and help Bruce Wheeler out, why wouldn't we have done it before sentencing and something to keep him here so he could not get sent up to Ross to prison where people could get to him? That is because he didn't get anything."

Trial Tr. 2465. That obviously was not the case.

f. Conclusion as to the *Brady* evidence

Prosecutor Gibson posed the hypothetical question to the jury: Is Wogenstahl's explanation "supported by any testimony that you heard other than him and other than his own statement other than what happened?" Trial Tr. 2435. Of course it was not – because several witnesses offered testimony that was downright deceitful. The evidence was cherry-picked to frame Wogenstahl as the perpetrator despite a number of other potential suspects, primarily Peggy Garrett and Eric Horn.

It does not matter what the "custom" for discovery was in 1992. It does not need to be "open file discovery" in order for prosecutors to fulfill their constitutional obligation to disclose exculpatory evidence. *Kyles*, 514 U.S. at 437.

The prosecutors' actions during trial, even before the new *Brady* material was discovered, have been condemned by courts before, though there has never been any repercussions. "The

prosecutorial misconduct here was plain and plentiful." *Wogenstahl v. Mitchell*, 668 F.3d 307, 344 (6th Cir. 2012) (Moore, J. concurring in judgment) (finding that AEDPA procedural standards bar habeas relief). The Ohio Supreme Court agreed "that the prosecutor's final closing argument was riddled with improper comments regarding the nature and circumstances of the offense." *State v. Wogenstahl*, 75 Ohio St.3d 344, 360 (1996) (holding that prosecutor's arguments should not have been made, but did not rise to the level of plain error). Regarding the prosecutors' knowledge of Horn's drug arrest and adjudication, the First District said "[i]f the accounts contained in the [federal court] depositions are true, they raise serious questions." *State v. Wogenstahl*, 2004-Ohio-5994, ¶ 44 (1st Dist.).

But again, the prosecutors' good or bad faith is irrelevant – it only matters that the favorable, material evidence in the possession of any government agency involved in the investigation was not disclosed to the defense. Without a doubt, that happened in this case, and Wogenstahl has been prejudiced by spending 33 years in prison, awaiting execution.

IV. Successive Postconviction Petition

Also before this Court is the successive postconviction petition filed April 26, 2017 (with Amendments filed May 21, 2019; July 27, 2021; June 24, 2022; and October 7, 2024). To prevail on a successive postconviction petition, Wogenstahl must show that (1) he was unavoidably prevented from discovering the facts upon which the claim relies and (2) no reasonable factfinder would have found him guilty but for the constitutional error. R.C. 2953.23(A)(1); *State v. Bethel*, 2022-Ohio-783, ¶ 20.

a. Wogenstahl was unavoidably prevented from discovering the facts before trial because the evidence was suppressed by the State.

A petitioner satisfies the first prong of R.C. 2953.23(A)(1) "by establishing that the prosecution suppressed the evidence on which the defendant relies." *Bethel* at ¶ 25. As detailed in section III *supra*, Wogenstahl has established that the evidence was suppressed by the prosecution.

b. No reasonable factfinder would have found Wogenstahl guilty but for the suppression of the evidence.

The second prong of R.C. 2953.23(A)(1) must be proven by clear and convincing evidence. The question of whether no reasonable fact-finder would have found him guilty "goes to the heart of *Brady*'s third prong," requiring a showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bethel* at ¶ 31, citing *Kyles* at 433 and *Bagley* at 682. This does not require Wogenstahl to show that he would have been acquitted at the trial; he must only show that the suppression "undermines confidence in the outcome of the trial." *Id*. at ¶ 32. The evidence must be considered collectively in the context of the entire record. *Id*. at ¶ 34.

In considering this prong, the *Bethel* court examined how the defendant would have benefitted from the information at trial. *Id*.

Here, trial counsel Mark Krumbein testified several times that he would have used this information at trial. *See*, *e.g.*, Evid. Hrg. Tr. 352, 359, 361. Several important State's witnesses could have been impeached by the new evidence, including Peggy Garrett, Eric Horn, Bruce Wheeler, Kathy Roth, Brian Noel, Fred Harms, Lynn Williams, Michelle Hunt, Douglas Deedrick, and William Dean.

Trial counsel did not have any opportunity to investigate the leads that could have exculpated their client. There was no way for trial counsel to know to talk to Amanda Beard, the classmate who saw Amber the day after her disappearance, after Wogenstahl's arrest. Ex. 68-69. With the information from the Ellises, trial counsel could have attempted to find the man with the

dark hair who was with Peggy the night at Waffle House. Ex. 96-97. Trial counsel could have questioned the "odd" bus driver Chuck Pennington. Evid. Hrg. Tr. 189-94; Ex. 43. None of the evidence about previous attacks on Amber were disclosed to the defense. *See* Ex. 13b; 17; 41-45; 54-55. Likewise, none of the alternate suspects were disclosed, and trial counsel had no opportunity to conduct their own investigation. *See* Ex. 68; 99-102.

The withheld evidence could have undermined the investigation, at the very least, and is thus material. *Kyles* at 445.

Combined with the inconsistencies in testimony of the State's lay witnesses, the overreaching and sometimes even inaccurate testimony from the State's experts, and the lack of any substantial forensic evidence connecting Wogenstahl to the crime, there is certainly a reasonable probability that the result would have been different had the evidence not been suppressed.

In the context of the entire record, Wogenstahl has proven that no reasonable factfinder would have found him guilty had this evidence been presented at trial.

V. Newly Discovered Evidence

Should this Court decide that the *Brady* standard has not been met, Wogenstahl believes that the evidence outlined in section III is still new evidence that warrants a new trial under Crim.R. 33(A)(6) under the *Petro* analysis.

A new trial is justified if the new evidence: "(1) discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." *State v. Petro*, 148 Ohio St. 505 (1947), syllabus.

a. Prongs (1) and (4): There is a strong probability that there would be a different result if a new trial is granted because the evidence is material to the issues.

As explained in greater detail in section III *supra*, the new evidence is material to the issues in this case. The ISP records impeach the eyewitnesses that alleged to see Wogenstahl and his car near the crime scene in the middle of the night. The HPD records provided a wealth of information, including a classmate that saw Amber alive after Wogenstahl was arrested, Amber's diary entries that talked about running away, and hypnosis of Peggy Garrett and Eric Horn. The records also contained information about numerous alternate suspects, primarily Amber's mother and brother. Several notes in the police file discussed Peggy Garrett's drug debts, and even that Peggy sold her daughter to a drug dealer. The HHCL records revealed the magnitude of testing that was done on Wogenstahl's car and jacket, which directly contradicted the State's theory of the case. And the FBI records showed that two of the State's witnesses lied on the stand about finding additional hairs in the victim's underwear.

b. Prongs (2) and (3): Trial counsel exercised due diligence in attempting to obtain the records before trial, and the evidence has been discovered since trial.

Trial counsel's diligence is apparent in the record. Eight documents were filed prior to trial requesting exculpatory information. Ex. 2-9. The State refused to comply. Ex. 10-12. Mr. Krumbein testified to the diligence with which he approached this case. Evid. Hrg. Tr. 322-33.

The evidence was suppressed by the State. There is nothing more that Mr. Krumbein and Mr. Schmidt could have done to access these records. It was not until a mandamus action was filed in the Ohio Supreme Court that the Harrison Police Department was forced to allow postconviction counsel to view its file. Evid. Hrg. Tr. 496; Ex. 112.

At trial, Mr. Schmidt asked for the prosecutors to "check with the police" for additional information from the Indiana agencies. Trial Tr. 1582. It was not until this Court issued an order

that the Indiana State Police responded with records mere weeks before the evidentiary hearing in this case. 9/26/2024 Pretrial Hrg. Tr. 23.

The HCCL records were only revealed after a public records request made by postconviction counsel. Ex. 112. The FBI records were not discovered until 2014 after postconviction counsel made a Freedom of Information Act request. Evid. Hrg. Tr. 497-98; Ex. 112.

c. Prongs (5) and (6): The new evidence is not merely cumulative to former evidence and it does not merely impeach or contradict former evidence.

None of this information is "merely cumulative" to former evidence. It is certainly impeaching, and it contradicts former evidence, but it is a drastic divergence from the evidence that was presented by the State at trial.

At trial, Wogenstahl supported his position with only his testimony. None of the exculpatory evidence was provided by the State, and the court refused to allow the defense to hire an investigator. Trial Tr. 29; Evid. Hrg. Tr. 318.

Piece by piece, important information began to trickle out: first, Eric Horn's testimony was impeached, supporting Wogenstahl's explanation for why he was at the Garrett apartment that night. *See* section III.e.ii *supra*.

Second, the Department of Justice reviewed the case and found that the FBI examiner overstated the significance of the evidence. The prosecutors stood up and told the jury that their expert proclaimed "this was Wogenstahl's hair" (Trial Tr. 2458) – but that testimony was beyond the limits of the science, even then. *See* Ex. 87; 139; 139.1.

More scientific evidence followed with the release of the FBI FOIA records and public records from the HCCL. New revelations came from these records, such as the additional hairs

found in the victim's underwear and the stark lack of cleanup of the vehicle, despite the State's representations at trial. *See* sections III.c and d *supra*.

Next, Bruce Wheeler signed an affidavit admitting to the favorable treatment by the prosecutor's office, impeaching his own testimony. *See* section III.e.ii *supra*.

HPD was eventually forced to allow postconviction counsel to review the dozens of suppressed tips and reports its file. The mass of evidence called into question the stories of Peggy Garrett and Eric Horn, identified a witness who said that she saw Amber alive after Wogenstahl was arrested, and pointed to other suspects who had motive. *See* section III.b *supra*.

The records from SERI were not available until the State agreed to obtain these records for postconviction counsel in 2022. A DNA expert was not able to review the case until these records were turned over, and that expert found that SERI handled the evidence in a way that has proven to increase the possibility of contamination. Ex. 141; Evid. Hrg. Tr. 792-95.

The ISP records were not available until this Court signed an order. At this point, several State's witnesses, including Peggy Garrett, Eric Horn, and Bruce Wheeler were discredited. The forensic evidence had collapsed. The only remaining evidence against Wogenstahl were the "eyewitnesses" who claimed to see him and/or car late at night on a dark road. While the reliability of the eyewitnesses was already in question due to various factors, the ISP records provided concrete evidence that would have impeached the witnesses.

d. Conclusion as to the *Petro* factors

The new evidence satisfies the *Petro* factors required for granting a motion for new trial pursuant to Crim.R. 33(A)(6).

VI. <u>Other constitutional rights implicated</u>

a. Due process

Any nondisclosure of exculpatory material constitutes a violation of due process. There was material, exculpatory information in the undisclosed records. "As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather than the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same." *Moldowan v. City of Warren*, 578 F.3d 351, 379 (6th Cir. 2009). Merely because the agency investigating the offense was across an invisible line does not reduce the impact on fundamental fairness.

With respect to the ISP and FBI records, Wogenstahl believes he has met the *Risha* test and proven that these agencies were, in fact, working together. With respect to all four agencies outlined above, Wogenstahl also believes the information, considered cumulatively, also meets the *Brady* standard, and has proven that it there is a reasonable probability that the outcome would have been different had he had this information.

Should this Court find that the *Brady* prongs have not been met, the fact that the defense was never able to review the records before trial is a clear violation of Wogenstahl's right to Due Process of law and right to present a defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006), quoting *Crane v. Kentucky*, 476 U.C. 683, 690 (1986).

b. Effective assistance of counsel

Wogenstahl's trial counsel, Mark Krumbein and Dale Schmidt, attempted to provide Wogenstahl with a defense. The attorneys were hamstrung in their efforts by the fact that these records were never revealed, and in fact misled to believe that the records did not even exist. At this evidentiary hearing, Wogenstahl has presented evidence that the State withheld evidence of

alternate perpetrators, and information that would have impeached key witnesses. Wogenstahl believes that all of this evidence supports his claims that he is innocent of this crime, or claims that his right to due process was violated under *Brady v. Maryland*. To the extent that any of the evidence supporting these claims is evidence that this Court concludes was known by trial counsel, could have been learned by trial counsel, and could have been used by trial counsel to assist in Wogenstahl's defense at trial, then Wogenstahl makes the alternative claim that trial counsel was ineffective for not having done so, and that this ineffectiveness entitles him to a new trial. Crim.R. 33(A)(1) & (5).

VII. Conclusion

The issue before this Court is whether the suppression of the evidence "undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434, citing *Bagley* at 678. It is not whether the defendant would more likely than not have received a different verdict; it is whether the trial resulted in a verdict worthy of confidence. *Id*.

There is no question that the evidence was suppressed by the State. It does not matter whether the prosecutors had actual possession of the records – the law requires them to seek out exculpatory information in the possession of all government actors that are working on their behalf. "The prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles* at 438.

The evidence was favorable to Wogenstahl, and it undeniably undermines confidence in the verdict.

The State continues to rely on its age-old remark that "all the judges and juries and magistrates and courts" have found that the evidence against Wogenstahl is "overwhelming." State's Closing Arg., Evid. Hrg. Tr. 833-34. But no other court has reviewed the entirety new evidence in detail before now. And in fact, in direct contrast to the State's characterization, the

only other court that reviewed a portion of the new evidence found that there was "a prima facie showing that he can establish by clear and convincing evidence that no reasonable factfinder would have found him guilty." *In re Wogenstahl*, 902 F.3d at 629.

The "overwhelming evidence" against Wogenstahl has been knocked down, piece by piece, over the course of thirty years.

The DNA evidence cannot be trusted because there is no documentation that it was collected, transported, and stored in a reliable manner – and the little documentary evidence that we do have shows that it was tested in a way that produces a dangerous risk of cross contamination.

The pubic hair found in the victim's underwear was suspect for a number of reasons: the fact that the county crime lab apparently "missed" it, only to be miraculously discovered by the FBI mere weeks before trial; other hairs were discovered in the underwear despite both the county crime lab expert and the FBI expert testifying otherwise; and the FBI expert massively overstating the worth of the evidence, that led the prosecutor to falsely represent to the jury that the hair in the underwear and Wogenstahl's hair were "identical in every respect" and that it "is Wogenstahl's hair." Trial Tr. 2457-58.

And the eyewitnesses who saw Wogenstahl at the scene were incredibly unreliable – one of them knew that it was Wogenstahl "without a doubt in her mind," even though she initially told officers that she could not see the man's face. The woman who said she saw him in a car with a young girl driving in the street at 3:15 that morning had no business testifying when the conditions were that poor: the distance was at best 100 feet away, which is well beyond a distance that can be reliably trusted; she observed the event from inside a brightly lit store, across the gas pumps; and she was interviewed by the police a week later, which impacts memory retrieval. Both of these

individuals also saw Wogenstahl in a previous setting (on television or as a customer in the store), which can also contaminate memory.

Another eyewitness, Brian Noel, claimed that he saw Wogenstahl for a few seconds while he came to a "rolling stop" on the unlit road in the middle of the night. Yet, the lineup where he chose Wogenstahl had several issues: it was not double blind, it was not a high confidence response at the time of the identification, there were not unbiased instructions, the identification took several minutes, he was given a confirming response, and his father was present at the lineup.

What other evidence remains against Wogenstahl – a few thorns that could be found anywhere across the country? Drops of blood in his apartment that was not even tested to confirm that it was human? A jailhouse snitch who wanted a shot at early release?

There is an abundance of evidence that actually exonerates Wogenstahl. The only blood in his car was a speck "smaller than the head of a pin," despite 242 tests for blood. There was no evidence of any sort of cleanup: there was sandy dirt in the mats of his car, the carpet was not wet or damp in the freezing winter weather, the lab actually pulled up the carpets to check the underside for blood – and there was nothing. His jacket was tested 42 times for blood, and again, nothing.

And finally, there is the evidence of alternate suspects: starting with Peggy Garrett, accused of selling her daughter for drugs. Eric Horn, initially suspected by police, who lied on the stand to undermine Wogenstahl's explanation for his presence at the scene. Chuck Pennington, the odd church bus driver who showed up late the day after Amber's disappearance in a different vehicle with a cut on his hand (not to mention the fact that Amber was found in her church dress – not her pajamas, as would be expected if the State's theory that she was snatched from her bed was correct). Troy Russell, who said he was "guilty as hell" of the murders. Jamie Wiemeyer and Bill

Elsbernd, who claimed to know more than they reported to police. Other men who allegedly sexually assaulted Amber in the past.

Wogenstahl easily proves the three *Brady* prongs: the evidence was suppressed by the State and certainly favorable to Wogenstahl. Consider all this evidence together, and there is no question that the evidence is material, and there would be a "reasonable probability" of a different result. There is absolutely no confidence in the verdict after this evidence has come to light. Wogenstahl would also prevail on the standard for granting a successive postconviction petition pursuant to R.C. 2953.23(A)(1) or granting a motion for new trial based on newly discovered evidence pursuant to Crim.R. 33(A)(6). Regardless of the procedural manner, Wogenstahl's constitutional rights were violated because he did not have access to this exculpatory evidence at trial. The only way to correct this injustice is to vacate his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January 2025, I have sent through email a copy of the foregoing to Philip Cummings [041497], Assistant Hamilton County Prosecutor at *Phil.Cummings@hcpros.org.*

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