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9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

10 IN AND FOR THE COUNTY OF PIMA

11 THE STATE OF ARIZONA,

12 Respondent/Plaintiff,

13 vs.

14 BRYAN PETER FOSHAY,

15 Petitioner/Defendant.

16 ) CR-20124578-001

17 ) **STIPULATED FINDINGS OF FACT**  
18 ) **AND CONCLUSIONS OF LAW AND**  
19 ) **JOINT REQUEST FOR ORDERS TO**  
20 ) **VACATE DEFENDANT'S**  
21 ) **CONVICTION, JUDGMENT OF**  
22 ) **GUILT AND SENTENCE, TO**  
23 ) **RELIEVE HIM OF ALL RESULTING**  
24 ) **PENALTIES, TO DISMISS THE**  
25 ) **INDICTMENT AND TO RELEASE**  
26 ) **DEFENDANT FROM**  
27 ) **INCARCERATION**

28 ) Before Honorable Judge Wayne E.  
Yehling

) Division 11

20 Petitioner, Bryan Peter Foshay, through his attorneys, Erin M. Carrillo and F.  
21 Michael Carrillo, and Respondent, State of Arizona, through Deputy County Attorney  
22 Brad Roach, pursuant to Arizona Rules of Criminal Procedure, Rule 32, the Fifth and  
23 Sixth Amendments to the United States Constitution, and Article II Section 24 of the  
24 Arizona Constitution, hereby submit for the Court's consideration and approval, their  
25 Stipulated Findings of Fact and Conclusions of Law which set forth the basis for their  
26 request for relief.

27 The parties request for the Court to accept these Findings of Fact and Conclusions  
28 of Law and conclude that Mr. Foshay is entitled to post-conviction relief for the reason

1 that his conviction was obtained in violation of the Constitutions of the United States  
2 and Arizona.

3 The parties request that the Court enter orders to vacate Mr. Foshay's conviction,  
4 judgment of guilt and sentence, to vacate any previously imposed fines, fees, restitution,  
5 or other penalties as a result of his conviction and to dismiss the indictment without  
6 prejudice. The parties further request that the Court enter an order for the immediate  
7 release of Mr. Foshay from the Arizona Department of Corrections Rehabilitation and  
8 Reentry.

9 **I.**

10 **INTRODUCTION**

11 Before the Court is Mr. Foshay's petition for post-conviction relief. He has been  
12 convicted of first degree murder and has been sentenced to a term of life in prison. He  
13 seeks relief, pursuant to Arizona Rules of Criminal Procedure, Rule 32, on the grounds  
14 that his conviction and sentence was obtained in violation of his federal and state  
15 constitutional rights.

16 The core of the claims presented in Mr. Foshay's petition concern the forensic  
17 firearm and toolmark evidence, which consists of a single bullet removed from the  
18 victim during his autopsy and a Ruger pistol seized from Mr. Foshay's home.

19 The State's firearm and toolmark examiner testified conclusively that the autopsy  
20 bullet was fired through the Ruger pistol.

21 The parties agree this evidence was paramount to his conviction.

22 The State has carefully reviewed the evidence in this case and the findings of  
23 firearm and toolmark experts, John Murdock, Christopher Coleman and Lucien Haag,  
24 submitted in support of Mr. Foshay's petition for post-conviction relief.

25 The State has concluded that the bullet removed from the victim was not fired  
26 through Mr. Foshay's Ruger pistol.

27 The parties hereby agree Mr. Foshay is entitled to relief.  
28

1 Mr. Foshay has presented colorable claims of: (1) actual innocence, (2) newly  
2 discovered firearms evidence, and (3) ineffective assistance of trial counsel. An  
3 evidentiary hearing was set for the week of August 29, 2023.

4 As a result of the parties' agreement, the evidentiary hearing has been vacated  
5 and relief will be ordered.

## 6 II.

### 7 PROCEDURAL HISTORY

8 Mr. Foshay, on December 13, 2012, was charged with first degree murder for the  
9 death of the victim, Brian Blackwell. After spending 42 days in pretrial detention, he  
10 was released without bond pending the outcome of his trial.

11 Trial began on April 29, 2014. After several hours over the course of two days of  
12 deliberations, a jury found Mr. Foshay guilty of first degree murder. Mr. Foshay was  
13 remanded into custody and has been in the custody of the State of Arizona since May 7,  
14 2014. He was sentenced on June 23, 2014, to the Arizona Department of Corrections for  
15 a term of life, not to be released on any basis until having served 25 calendar years.

16 His conviction was upheld on appeal.

## 17 III.

### 18 UNCONTESTED FACTS

19 At the time of his death, the victim, Brian Blackwell, lived alone in a  
20 condominium complex in Tucson. He was shot in his head and died at his home on  
21 January 29, 2012.

22 Mr. Blackwell was believed to have been a confidential informant for the Bureau  
23 of Alcohol Tobacco and Firearms and had been worried that individuals with ties to a  
24 criminal enterprise were out to get him. His work for the ATF was believed to have led  
25 to the arrests of three individuals. Those individuals were not incarcerated at the time of  
26 his death.

27 Mr. Blackwell had drug problem and had many conflicts with many of his peers.  
28 He had been assaulted by a man bearing a baseball bat days before his death and several

1 people had threatened to kill him; one admitted to “taking care of” him. Mr. Foshay was  
2 not one of those individuals.

3 Mr. Blackwell and Mr. Foshay had known each other since junior high school.  
4 For a short period, well before Mr. Blackwell’s death, they had attempted to engage in a  
5 medical marijuana business venture. They ended their engagement several months  
6 before Mr. Blackwell’s death.

7 Mr. Blackwell’s condominium had been under renovation, and he had been trying  
8 to sell his marijuana growing equipment. One of the items he had wanted to get rid of  
9 was a freezer that he had sold previously to Mr. Foshay.

10 On the afternoon of his death, Mr. Blackwell sent Mr. Foshay a series of instant  
11 messages directing him to, among other things, pick up the freezer.

12 Sometime between 5:00 and 5:30 p.m. on January 29, 2012, Mr. Foshay, by text  
13 message, told Mr. Blackwell to open his door.

14 Mr. Blackwell died at his home on the night of January 29, 2012, as the result of a  
15 single gunshot wound. A single .40 S&W caliber bullet was removed from his head  
16 during his autopsy. It was lodged as evidence item OME1 and hereinafter is referred to  
17 as “the autopsy bullet.” No firearm or spent cartridge case was recovered from the scene.

18 On the night of his death, his neighbors heard what sounded like a single gunshot  
19 come from the direction of Mr. Blackwell’s condominium, sometime between 8:00 p.m.  
20 and 8:30 p.m.

21 No evidence has demonstrated that Mr. Foshay was at Mr. Blackwell’s front door  
22 any time after 5:30 p.m. that day. Nor has any evidence demonstrated that Mr. Foshay  
23 entered Mr. Blackwell’s residence that day.

24 The evidence has demonstrated that on the night of Mr. Blackwell’s death, Mr.  
25 Foshay was home with his two children. They drank root beer floats and watched his  
26 daughter’s favorite movie, *Soul Surfer*, before they went to bed.

27 About a week later, on February 6, 2012, the Tucson Police Department obtained  
28 a search warrant and the next day they searched Mr. Foshay’s home. During the search

1 they found a Ruger model P-94, 40 S&W caliber, semiautomatic pistol, in its holster  
2 underneath Mr. Foshay's mattress. The pistol was collected and lodged into evidence as  
3 item 5JW. They also collected .40 S&W caliber Winchester PDX ammunition from Mr.  
4 Foshay's home.

5 Criminalist Bongi Bishop, from the Tucson Police Department, performed an  
6 initial analysis of the pistol and ammunition found in Mr. Foshay's home. She took  
7 measurements and tested the functionality of the Ruger pistol. She also test fired six .40  
8 S&W caliber bullets from the pistol for comparison purposes.

9 Using a comparison microscope, Ms. Bishop examined the autopsy bullet and the  
10 test fired bullets. She noted that the test fired bullets "reproduced well" and "marked  
11 beautifully" finding that the marks on the test fired bullets "lined up nicely."

12 As for the autopsy bullet, she observed, "OME1 (autopsy bullet) has a lot of  
13 missing stria detail in comparison to the test fired bullets" from Mr. Foshay's Ruger  
14 pistol. She also observed and noted that the autopsy bullet had very limited and shallow  
15 striations compared to the test fired bullets fired from the Ruger pistol.

16 As a result, Ms. Bishop searched the FBI's General Rifling Characteristics (GRC)  
17 database for a list of possible firearms that could have been used to fire the autopsy  
18 bullet noting the probability that the autopsy bullet was not fired from the Ruger pistol.

19 After discussion with her supervisor who also performed the technical review of  
20 her analysis, Ms. Bishop concluded in a written report, "...there was insufficient  
21 agreement of the individual characteristics to render a conclusion. It is therefore  
22 inconclusive as to whether or not the [autopsy] bullet, Item OME1, was fired in the  
23 submitted firearm Item 5JW. . . Any suspected firearm should be submitted to the  
24 laboratory for analysis."

25 Ms. Bishop made and maintained contemporaneous case notes of her  
26 observations and conclusions.

27 The Tucson Police Department next retained Rocky Edwards, a firearms  
28 examiner from the Santa Ana Police Department, to conduct an analysis using a

1 confocal microscope which utilized 3-D imaging. The firearms evidence, Ms. Bishop's  
2 report and her case notes were sent to Mr. Edwards.

3 Mr. Edwards reviewed Ms. Bishop's report and case notes and examined the  
4 evidence under a comparison microscope. At trial he testified that he had seen similarities  
5 but at that point he "would not have made an identification." He also testified that, to  
6 provide himself with another way of looking at the bullet, he made two barrel casts of the  
7 Ruger pistol.

8 He next conducted twenty more test-fires and obtained twenty additional test fired  
9 bullets. Because all the test-fires were easily identifiable to each other, he took a  
10 representative sample of test fired bullets, the barrel casts and the autopsy bullet to a  
11 laboratory in Montreal, Canada, which utilized an Integrated Ballistic Identification  
12 System, HD3D<sup>1</sup> system. Two of Ms. Bishop's test fired bullets, two of Mr. Edwards' test  
13 fired bullets, the two barrel casts, and the autopsy bullet were scanned by the 3D system.

14 According to his report, Mr. Edwards conducted microscopic and 3D  
15 comparisons of the evidence from October 23, 2012, through December 18, 2012.  
16 However, on November 15, 2012, he reported to the Tucson Police Department that the  
17 bullet removed from Mr. Blackwell was fired through Mr. Foshay's gun. A few days  
18 later and before December 18, 2012, based on Mr. Edwards' verbal report to Tucson  
19 police, Mr. Foshay was arrested and then indicted for first degree murder. These facts  
20 were not presented to the jury at trial.

21 Thirteen months prior to the commencement of his trial, Mr. Foshay's counsel<sup>2</sup>  
22 retained former firearms examiner, James Serpa, to re-examine the firearms evidence.  
23 From the onset, counsel and Mr. Serpa appeared to have a tense relationship and a fee  
24 dispute beset their relationship. Mr. Serpa did not author a written report.

25 <sup>1</sup> At trial Mr. Edwards described the technology as set forth above. At a previous hearing,  
26 he described the technology used as ICM 3D System.

27 <sup>2</sup> Mr. Foshay, at that time, was represented by Assistant Pima County Public Defenders  
28 Julie Tolleson and Elena Kay. At trial, Mr. Foshay was represented by Assistant Pima  
County Public Defenders Walter Palser and Elena Kay.

1 According to Mr. Serpa's communications log which have been obtained and  
2 reviewed by counsel for the parties, on June 18, 2013, Mr. Serpa advised attorney  
3 Tolleson, that he concurred with Mr. Edwards' conclusion. Although his logs do not  
4 provide that he had any communications with either of Mr. Foshay's trial counsel, they  
5 recall otherwise.

6 Counsel for the parties together have spoken with each of Mr. Foshay's trial  
7 counsel. They each recall that together, they had one brief telephone call with Mr. Serpa  
8 wherein Mr. Serpa advised them of his conclusion; that he concurred with Mr. Edwards'  
9 opinion. Nothing further was discussed. No notes or records of this conversation were  
10 maintained.

11 No other experts in forensic firearm and toolmark comparisons were consulted by  
12 trial counsel prior to Mr. Foshay's trial.

13 Mr. Foshay's trial began on April 29, 2014. In its opening statement without  
14 objection, the State forecasted that its firearms examiner would "say conclusively that  
15 the bullet found in Brian Blackwell's head matched the gun found in Bryan Foshay's  
16 mattress." Adding, "[t]his is going to be a case where the forensics tell you where you  
17 need to go. The forensics give you the answers . . . [a]nd at the end of the day, the match  
18 between the bullet in Mr. Blackwell's head and the gun in Bryan Foshay's home, that  
19 match will convince you beyond a reasonable doubt that Bryan Foshay is guilty."

20 Mr. Edwards testified that he had been employed by the Santa Ana Police  
21 Department for 18 years as forensic firearm and toolmark examiner. He testified that he  
22 did not have any contemporaneous case notes and explained that the practice of taking  
23 written case notes was archaic and no longer necessary given the advancements of  
24 digital photography.<sup>3</sup>

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27 <sup>3</sup> In closing argument, the State argued that Mr. Edwards kept careful notes of his  
28 examination.

1 Forensic scientists and laboratory managers working at accredited forensic  
2 laboratories in 2011-2012, were required to make and retain full, contemporaneous, clear  
3 and accurate records of all examinations and tests conducted and conclusions drawn in  
4 sufficient detail to allow meaningful review and assessment of the conclusions by an  
5 independent person competent in the field. This fact was not offered to the jury at trial.

6 Mr. Edwards testified conclusively that “the autopsy bullet was fired by the Ruger  
7 pistol.” Trial counsel did not object or seek to limit this testimony.

8 At trial, Mr. Edwards’s report which concluded, “the likelihood that another  
9 firearm could have produced these marks is so remote as to be considered a practical  
10 impossibility” was admitted into evidence. Although trial counsel objected to its  
11 admission as “cumulative” they did not object that it was hearsay (offered to show the  
12 truth of Mr. Edward’s opinion) and contained an elevated and inadmissible level of  
13 certainty of his conclusion.

14 After a few days of testimony and several hours of deliberations, Mr. Foshay was  
15 convicted.

16 **IV.**  
17 **UNCONTESTED FACTS DEVELOPED DURING**  
18 **POST CONVICTION INVESTIGATION**

19 Mr. Foshay retained firearm and toolmark expert, John Murdock, to evaluate the  
20 examinations previously conducted by Bongi Bishop and by Rocky Edwards, and to re-  
21 examine the firearms evidence, if it was determined to be appropriate.

22 Mr. Murdock retained certified Senior Forensic Scientist/Firearms Examiner,  
23 Christopher Coleman, to review the firearms reports and any available bench notes from  
24 previous examinations, and to review and verify his own work.

25 John Murdock is a criminalist<sup>4</sup> and firearm and toolmark examiner. He is an  
26 author of numerous articles on firearm and toolmark examination and has taught and

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27 <sup>4</sup> Mr. Murdock received a Master of Criminology degree from the University of  
28 California, Berkeley, California, School of Criminology in 1977.



1 lectured hundreds of times nationally and internationally. He is a past president of the  
2 California Association of Criminalists, an emeritus member of the American Society of  
3 Crime Laboratory Directors and has served as a distinguished member of the  
4 Association of Firearm and Toolmark Examiners (“AFTE”). He has also served as a co-  
5 chairman for the AFTE Certification Committee, whose efforts resulted in the creation  
6 of a certification program for firearm and toolmark examiners.

7 He has been a firearm and toolmark examiner since 1967, has performed over  
8 1,000 firearm and toolmark examinations and has been qualified as an expert witness of  
9 firearm and toolmark identifications in state and federal courts approximately 100 times.  
10 Mr. Murdock’s CV is attached hereto as Exhibit 1.

11 Mr. Murdock has authored two reports in this matter. In collaboration with  
12 criminalists and firearm and toolmark examiners, Chris Coleman and Luke Haag, he has  
13 concluded that the autopsy bullet was not fired from Mr. Foshay’s Ruger pistol.

14 His opinion is supported by high-quality digital images of the surface of the test  
15 fired bullets and the autopsy bullet and is supported by 117 pages of his  
16 contemporaneous case notes which set forth his hypothesis, methodology and  
17 conclusions. Mr. Murdock’s reports and attachments thereto have been provided to the  
18 State and have been previously submitted to the Court. His report dated November 20,  
19 2018, with attachments one through ten, is attached hereto as Exhibit 2; his case notes  
20 are attached as Exhibit 3; and his report dated December 11, 2020, with attachments one  
21 and two, is attached as Exhibit 4. An overview of his examination is set forth below.

22 Mr. Murdock first evaluated the examinations of TPD senior criminalist, Bongi  
23 Bishop and of Santa Ana Police Department examiner, Rocky Edwards. He then also  
24 examined the firearms evidence for the purpose of determining if the autopsy bullet was  
25 fired through the barrel of Mr. Foshay’s Ruger pistol.

26 Mr. Murdock took particular interest in Ms. Bishop’s observation: “OME 1 bullet  
27 (from autopsy) has a lot of missing striae detail in comparison to the test fired bullets  
28 from the firearm in Item 5JW (the submitted Ruger pistol).” This was of particular

1 interest to him because: 1) the Ruger pistol was recovered shortly after the homicide;  
2 and 2) at least some of the test fired cartridges were the same type and construction as  
3 the OME 1 bullet recovered at autopsy.

4 Mr. Murdock next conducted an evaluation of every comparison photograph  
5 illustrated in Mr. Edward's report. After a detailed visual evaluation of the photographs  
6 purporting to illustrate the basis for Mr. Edward's conclusion, he concluded that they  
7 revealed "no significant microscopic agreement for identification purposes." Criminalist  
8 Coleman concluded the same, as documented on page 4 of Mr. Murdock's case notes.  
9 (See, Exhibit 3.)

10 Next, Mr. Murdock conducted detailed microscopic comparisons of the test fired  
11 bullets created by Ms. Bishop and by Mr. Edwards using an optical comparison  
12 microscope. This test-fire to test-fire comparison resulted in easily observing sufficient  
13 microscopic agreement at the base of each land impression to determine that all the test  
14 fired bullets were easy to identify to each other. These identifications also were verified  
15 by Criminalist Coleman as documented on page 26 of Mr. Murdock's case notes. (See,  
16 Exhibit 3.)

17 Mr. Murdock next conducted detailed microscopic comparisons of two of Mr.  
18 Edwards' test fired bullets to the autopsy bullet. Each of these comparisons resulted in no  
19 significant microscopic agreement being found between the test fired bullets and the  
20 autopsy bullet. These results were verified by Criminalist Coleman and documented on  
21 page 26 of Mr. Murdock's case notes. (See, Exhibit 3.)

22 Next, Mr. Murdock, collaborated with Criminalist Luke Haag, to scan the  
23 toolmark surfaces of bullets test fired through the Ruger pistol and the autopsy bullet  
24 using an Evofinder brand, 3D Digital Database Acquisition Station which Mr. Haag had  
25 in his laboratory. In a series of high-quality digital scans taken from the Evofinder, Mr.  
26 Murdock has provided clear 2D and 3D digital images of the evidence comparisons in  
27 this case.<sup>5</sup>

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<sup>5</sup> See attachments seven through ten of Mr. Murdock's report dated November 20, 2018,

1 At attachment seven of his report dated November 20, 2018, Mr. Murdock has  
2 provided digital images of the land impressions from: (1) test fired bullets created by Ms.  
3 Bishop compared to her own test fired bullets, (2) test fired bullets created by Mr.  
4 Edwards compared to his own test fired bullets, (3) Mr. Edwards' test fired bullet #20  
5 compared to Ms. Bishop's test fired bullet #5, and (4) Ms. Bishop's test fired bullet #3  
6 compared to Mr. Edwards' test fired bullet #20. These images show the good striae  
7 matches at the heel of all six land-engraved areas on the test fired bullets from the Ruger  
8 pistol.

9 He has concluded that the Ruger pistol produces copious arrays of striae in each of  
10 the six land engraved areas of the bullet at the heel.

11 At attachment ten of his report, Mr. Murdock has provided digital images of all six  
12 land impressions from Edwards' test fired bullet #20 compared to all six land impressions  
13 of the autopsy bullet. These images show the well-striated areas at the heel of the land  
14 impressions on Mr. Edward's test fired bullet #20 and the corresponding heel areas of the  
15 OME 1 bullet which is virtually devoid of any such well-defined striae.

16 He has concluded there is virtually no matching agreement between Mr. Edwards'  
17 test fired bullet #20 and the bullet recovered from the victim's body.

18 The absence of striae on the autopsy bullet is not the result of an undersized bullet  
19 having been fired from the Ruger pistol or from excessive lubrication of the pistol's bore  
20 prior to its firing. This finding has been documented on page eight of Mr. Murdock's  
21 report dated November 20, 2018. (See, Exhibit 2.)

22 Mr. Murdock, additionally, has established the source of the well-defined striated  
23 toolmarks at the heel of all land impressions on the test fired bullets that are not on the  
24 autopsy bullet. The source is the "small, irregular, and raised toolmarks found at the  
25 crown/land edge of the muzzle" of the Ruger pistol. This irregularity most likely  
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28 at Exhibit 2.

1 occurred during the firearm's manufacturing process. (See Exhibit 2, p.9; Exhibit 3,  
2 p.48.)

3 This is not a case where examiners have compared two well-defined patterns of  
4 striae, some at the base/heel of land impressions on test fired bullets, and some at the  
5 base/heel of a questioned bullet and reach different conclusions because they have  
6 different interpretations of the significance of the striae being compared. This is a case  
7 where numerous, well-defined reproducible striae are present at the base/heel of the land  
8 impressions on each of the test fired bullets, but the land impressions at the base/heel of  
9 the autopsy bullet is virtually devoid of these striae.

10 In addition to the absence of individual characteristics on the autopsy bullet, Mr.  
11 Murdock has described that his elimination (exclusion) was also based on what would be  
12 present at the base/heel of the land impressions on the autopsy evidence bullet if it were  
13 fired from the Ruger pistol. He explained, that both Ms. Bishop and Mr. Edwards  
14 thoughtfully selected bullets to test fire that were the same size and design as the autopsy  
15 bullet. Mr. Murdock has demonstrated what should be present at the base/heel of the land  
16 impressions of the autopsy evidence bullet if it had been fired from the submitted Ruger  
17 pistol. What should be present are the numerous well-defined striae that are present on  
18 every one of the numerous test fired bullets at the base/heel of the land impressions,  
19 allowing them to be easily identified with each other as having been fired from the Ruger  
20 pistol.

## 21 V.

### 22 FINDINGS OF FACT

23 This was not a case of overwhelming evidence of Mr. Foshay's guilt.

24 The firearms evidence presented to the jury was paramount to Mr. Foshay's  
25 conviction.

26 The only forensic evidence offered at trial which connected Mr. Foshay to the  
27 victim's death was the purported toolmark "match."

28 The autopsy bullet has been examined by multiple firearms examiners.

1 Each examiner has concluded that the autopsy bullet is virtually devoid of any  
2 well-defined striae at the base of its land impressions.

3 These same examiners have also examined Mr. Foshay's Ruger pistol.

4 Collectively, the examiners have produced 29 test fired bullets (Bishop-6;  
5 Edwards-20; and Murdock-3) from this Ruger pistol.

6 Each examiner has concluded that this pistol produces well-defined striae at the  
7 base of all six of the land-engraved areas on each of the test fires produced. None of the  
8 test fired bullets are devoid of these well-defined striae.

9 The source of the very reproducible, very well-defined striae on each of the land  
10 impressions of each bullet test fired from the pistol is the "small, irregular, raised  
11 toolmarks at rifling crown/land edge at the muzzle," which likely occurred during the  
12 firearm's manufacturing process and were not caused nefariously.

13 These small irregular raised toolmarks on this Ruger pistol cause it to leave a  
14 unique identifying signature on each bullet fired through it.

15 The bullet that killed Mr. Blackwell was not fired from Mr. Foshay's Ruger  
16 pistol. Had it been it would contain the signature well-defined striae at the heel/base of  
17 the land impressions. The bullet that killed Mr. Blackwell does not have the unique  
18 signature produced by Mr. Foshay's pistol.<sup>6</sup>

19 The State has thoroughly reviewed the evidence in this case and has carefully  
20 reviewed the findings and supporting documents of forensic firearm and toolmark  
21 examiner, John Murdock.

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22  
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25 <sup>6</sup> Mr. Murdock has observed that the "bearing surface" of the autopsy bullet sustained  
26 virtually no damage because of perforating the victim's skull. He noted, "this is  
27 especially true for the heel area (at the base of the bullet) of the six land impressions. This  
28 was likely due to the protection caused by the uniformly mushroomed nose." This  
particular type of bullet is designed to mushroom.

1 The State, after careful review and consideration, agrees with the conclusions of  
2 Mr. Murdock and has concluded that the bullet removed from the victim at autopsy was  
3 not fired through Mr. Foshay's Ruger pistol.

4 The bullet that killed Mr. Blackwell was not fired through Mr. Foshay's pistol.

## 5 VI.

### 6 CONCLUSIONS OF LAW

#### 7 A. Actual Innocence

8 Mr. Foshay has asserted a claim of actual innocence and has offered facts in  
9 support of that claim. Rule 32.1(h), of the Arizona Rules of Criminal Procedure, requires  
10 a defendant to demonstrate by clear and convincing evidence that the facts underlying  
11 his claim sufficiently establish that no reasonable fact finder would find the defendant  
12 guilty of this offense beyond a reasonable doubt. A petitioner asserting his actual  
13 innocence of the underlying crime must show "it is more likely than not that no  
14 reasonable juror would have convicted him in light of the newly discovered evidence  
15 presented in his petition. *Hess v. Ryan*, 651 F. Supp.2d 2004, 1034 (2009).

16 The parties have hereby stipulated that Mr. Foshay's conviction was obtained in  
17 violation of the Fifth and Sixth Amendments to the United States Constitution and  
18 Article II Section 24 of the Arizona Constitution, and that he is entitled to relief. For this  
19 reason, the Court hereby declines to reach specific findings of fact and express  
20 conclusions of law related to his actual innocence claim.

#### 21 B. Newly Discovered Evidence

22 During post-conviction investigation, firearm and toolmark expert examiner, John  
23 Murdock, in collaboration with criminalist, Luke Haag, conducted an independent  
24 examination of the firearms evidence collected in this case and have reviewed the  
25 findings from examiners Bongi Bishop, Rocky Edwards and James Serpa.

26 Rule 32.1(e), Arizona Rules of Criminal Procedure, sets forth the requirements  
27 for obtaining post-conviction relief based on newly discovered evidence. Newly  
28 discovered material facts exist if:

- 1 (1) The newly discovered material facts were discovered after the trial;
- 2 (2) The defendant exercised due diligence in securing the newly discovered
- 3 material facts; and
- 4 (3) The newly discovered material facts are not merely cumulative or used
- 5 solely for impeachment, unless the impeachment evidence substantially
- 6 undermines testimony which was of critical significance at trial such
- 7 that the evidence probably would have changed the verdict or sentence.

8 The parties have stipulated that Mr. Foshay's conviction was obtained in violation  
9 of the Fifth and Sixth Amendments to the United States Constitution and Article II  
10 Section 24 of the Arizona Constitution, and that he is entitled to relief. For this reason,  
11 the Court hereby declines to reach specific findings of fact and express conclusions of  
12 law related to his newly discovered evidence claim.

### 12 **C. Ineffective Assistance of Counsel**

13 Mr. Foshay has raised numerous colorable claims of ineffective assistance of  
14 counsel. The Arizona Rules of Criminal Procedure, Rule 32.1(a) provides for post-  
15 conviction relief if a conviction was obtained in violation of the United States or Arizona  
16 Constitutions.

17 The Sixth Amendment affords criminal defendants a right to effective counsel. It  
18 recognizes that right "because it envisions counsel's playing a role that is critical to the  
19 ability of the adversarial system to produce just results." *Strickland v. Washington*, 466  
20 U.S. 668, 685 (1984). Counsel's role is to ensure that the trial is fair. *Id.* Counsel "can  
21 deprive a defendant of the right to effective assistance" by "failing to render 'adequate  
22 legal assistance.'" *Id.* at 686. "The benchmark for judging any claim of ineffectiveness  
23 must be whether counsel's conduct so undermined the proper functioning of the  
24 adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

25 To prove a claim of ineffective assistance of counsel, a petitioner must show that  
26 counsel's representation fell below an objective standard of reasonableness and that the  
27 deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687–88. For deficiency, a  
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1 defendant “must identify the acts or omissions of counsel that are alleged not to have  
2 been the result of reasonable professional judgment.” *Id.* at 690.

3 With respect to *Strickland’s* second prong, when a petitioner challenges a  
4 conviction, the court considers “the totality of the evidence” before the jury and “the  
5 question is whether there is a reasonable probability that, absent the errors, the factfinder  
6 would have had a reasonable doubt respecting guilt.” *Id.* at 695. In other words,  
7 contrasting the evidence presented to the jury with that which could have been presented,  
8 the Court asks whether the omitted evidence would have created reasonable doubt in the  
9 mind of at least one reasonable juror. *Hernandez v. Chappell*, 878 F.3d 843, 852 (9th  
10 Cir. 2017), quoting *Daniels v. Woodford*, 428 F.3d 1181, 1201 (9th Cir. 2005); *Rios v.*  
11 *Rocha*, 299 F.3d 796, 813 (9th Cir. 2002). A reasonable probability is one that is  
12 “sufficient to undermine confidence in the outcome,” *Strickland*, 466 U.S. at 694, but is  
13 “less than the preponderance more-likely-than-not standard.” *Summerlin v. Schriro*, 427  
14 F.3d at 643. The prejudice inquiry weighs the cumulative effect of counsel’s errors.  
15 *Strickland*, 466 U.S. at 695-96. The proper measure of attorney performance is  
16 reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688.

17 The Supreme Court has consistently relied upon the Model Rules of Professional  
18 Conduct American Bar Association (“ABA Guidelines”)<sup>7</sup> when reviewing attorney  
19 conduct and examining reasonableness. See, e.g., *Rompilla v. Beard*, 545 U.S. 374, 387  
20 (2005) (referencing ABA Guidelines when considering ineffective assistance of counsel  
21 claim); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (referring to ABA Guidelines as  
22 “well-defined norms,” and “standards to which we long have referred as ‘guides to  
23 determining what is reasonable’”).

24 ER 1.1 provides:

25 Competence. A lawyer shall provide competent representation to a client.  
26 Competent representation requires the legal knowledge, skill, thoroughness  
and preparation reasonably necessary for the representation.

27  
28 <sup>7</sup> The ABA Guidelines were adopted in 1983 and have been accepted by the Arizona  
Supreme Court as the Arizona Rules of Professional Conduct Rule 42.



1 AZ ST S CT RULE 42 RPC ER 1.1

2 Comment 5 to ER 1.1 states, “Competent handling of a particular matter  
3 includes inquiry into and analysis of the factual and legal elements of the  
4 problem, and use of methods and procedures meeting the standards of  
5 competent practitioners. It also includes adequate preparation. The required  
6 attention and preparation are determined in part by what is at stake; major  
7 litigation and complex transactions ordinarily require more extensive  
8 treatment than matters of lesser complexity and consequence.”

9 *Id.*

10 ER 1.3 provides:

11 Diligence. A lawyer shall act with reasonable diligence and promptness in  
12 representing a client.

13 AZ ST S CT RULE 42 RPC ER 1.3.

14 Additionally, the ABA Standards for Criminal Justice describe trial counsel’s  
15 obligations. It is the duty of the lawyer to “investigate in all cases” and to “explore  
16 appropriate avenues that reasonably might lead to information relevant to the merits of  
17 the matter, consequences of the criminal proceedings, and potential dispositions and  
18 penalties.” 1 ABA Standards for Criminal Justice 4-4.1(a), (c) (3d ed. 1993). Defense  
19 counsel’s investigations of the merits of the criminal charges should include an  
20 evaluation of the prosecution’s evidence, including re-evaluation of physical, forensic,  
21 and expert evidence, and consideration of inconsistencies, potential avenues of  
22 impeachment of prosecution witnesses, and other possible suspects and alternative  
23 theories that the evidence may raise. *Id.* Defense counsel should evaluate all expert  
24 advice, opinions or testimony independently and not simply accept the opinion of an  
25 expert . . .” 1 ABA Standards for Criminal Justice 4-4.4(b) (3d ed. 1993).

26 Deference to counsel’s strategic decisions is owed only when made after  
27 “thorough investigation of law and facts relevant to plausible options.” *Strickland*, 466  
28 U.S. at 690. Strategic decisions made after less than complete investigation may still be  
reasonable “to the extent that reasonable professional judgments support the limitations  
on investigation.” *Id.* at 691. Stated differently, counsel’s investigation must determine

1 strategy, not the other way around.” *Weeden v. Johnson*, 854 F.3d 1063, 1070 (9th Cir.  
2 2017).

3 As to the determination of the adequacy of trial counsels’ investigation of the  
4 firearms evidence in this case, the parties and the Court are guided by *Richey v.*  
5 *Bradshaw*, 498 F3d 344 (6th Cir. 2007).

6 In *Richey*, the Sixth Circuit Court of Appeals on a habeas remand from the United  
7 States Supreme Court held that Mr. Richey was denied effective counsel as guaranteed  
8 by the Sixth and Fourteenth Amendments as a result of counsel’s mishandling of  
9 scientific evidence. At trial, the state argued that Richey intentionally set fire to an  
10 apartment belonging to a woman who lived above the apartment of his ex-lover in a  
11 jealous rage. *Richey*, 498 F.3d at 346. The state argued that Richey set the fire by  
12 igniting accelerants, gasoline and paint thinner poured on the living room carpet and  
13 patio wood. *Id.* The state presented two expert witnesses – an arson investigator and a  
14 forensic chemist. The arson investigator testified that the speed and intensity of the fire  
15 as well as the burn patterns, established that the fire was caused by accelerants. *Id.* He  
16 further testified, “[i]t was very definite that an accelerant was poured in the living room  
17 on the carpeting.” *Id.* Then the forensic chemist testified that he used a method called  
18 gas chromatography to identify the presence of accelerants in samples taken from the  
19 living room carpet and from the patio wood. He further testified that he found paint  
20 thinner and gasoline on the carpet and paint thinner on the wood samples.” *Id.*

21 Prior to Richey’s trial, his counsel had retained an expert to investigate the cause  
22 of the fire and test the conclusions of the state’s experts.<sup>8</sup> *Id.* The defense expert met  
23 with the state’s forensic chemist and subsequently informed Richey’s trial counsel that  
24 he agreed with the state’s conclusion that the fire was caused by arson. Trial counsel did  
25 not ask the defense expert about the nature of his investigation or ask him to explain why

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26  
27 <sup>8</sup> While the expert retained by Richey’s trial counsel had little specialized expertise in  
28 arson investigations the analysis does not center around the qualifications of the expert,  
rather the focus is on counsel’s mishandling of the scientific evidence.

1 he concurred with the state.” *Id.* at 348. In post-conviction proceedings, Richey  
2 presented new forensic evidence by way of two fire experts who opined that the state  
3 used flawed scientific methods which had not been accepted in the fire-investigation  
4 community to determine that arson caused the fire and that the samples of the evidence  
5 collected did not contain evidence of accelerants. *Id.*

6 The hiring of an expert is “meaningless if counsel does not consult with that  
7 expert to make an informed decision about whether further investigations were  
8 necessary.” *Richey v. Bradshaw*, 498 F.3d at 362 (citing *Strickland*, 466 U.S. at 691).

9 In this case, as in *Richey*, the scientific evidence was fundamental to the State’s  
10 case and adequately challenging it was paramount to mounting any possible defense.  
11 Here, as in *Richey*, trial counsel retained a forensic expert, Mr. Serpa, who purportedly  
12 reached the same conclusion as the State’s expert. Here, as in *Richey*, trial counsel did  
13 not inquire about the nature of their expert’s investigation or ask him to explain how he  
14 reached his conclusion. Here, as in *Richey*, a reasonably competent attorney would have  
15 known what his expert had done to test the State’s forensics conclusions and how his  
16 expert reached his conclusions. *Id.* “A lawyer cannot be deemed effective where he hires  
17 an expert consultant and then either willfully or negligently keeps himself in the dark  
18 about what that expert is doing, and what the basis for the expert’s opinion is.” *Id.*

19 In this case, trial counsel was ineffective for failing to conduct a reasonably  
20 adequate investigation of the firearms evidence. Based on the facts stipulated above, it  
21 has been established that but for trial counsels’ deficient investigation, there is a  
22 reasonable likelihood that the outcome of Mr. Foshay’s trial would have been different.

23 Additionally, based on the stipulated facts, it has been established that had trial  
24 counsel subjected the State’s firearms examiner to the rigors of adversarial process, there  
25 is a reasonable likelihood that the outcome of this trial would have been different.  
26 According to the State’s experts own report, he conducted comparisons of the evidence  
27 from October 23, 2012, through December 18, 2012. However, on November 15, 2012,  
28 the expert reported to the Tucson Police Department that the autopsy bullet was fired

1 from Mr. Foshay's gun. Based on that opinion and prior to December 18, 2012, Mr.  
2 Foshay was arrested and indicted. The jury was not presented with this chronology. The  
3 jury also did not hear, contrary to the State's expert's testimony that maintaining case  
4 notes was an antiquated practice, forensic scientists working at accredited crime  
5 laboratories, were and continue to be required to make and maintain full,  
6 contemporaneous, clear and accurate case records. Furthermore, the jury retired for  
7 deliberations with Mr. Edwards' report which contained hearsay and expressed, "the  
8 likelihood that another firearm could have produced these marks is so remote as to be  
9 considered a practical impossibility." (See, Exhibit 2, p.69.)

10 In *Driscoll v. Delo*, 71 F.3d 701 (8<sup>th</sup> Cir. 1995), the court held that the defendant  
11 was denied the effective counsel as guaranteed by the Sixth Amendment because (1)  
12 trial counsel allowed the jury to retire with factually inaccurate impressions of forensic  
13 (serology) evidence and (2) trial counsel failed to impeach a state's witness using the  
14 witness's prior inconsistent statements. Driscoll was a state prisoner in Missouri who  
15 was charged, convicted, and sentenced to death for stabbing to death a corrections  
16 officer during a period of uncontrolled fighting between prisoners and guards. *Driscoll v.*  
17 *Delo*, 71 F.3d at 705. At least thirty inmates were treated for their injuries, one officer  
18 died, and five other guards were injured. Driscoll's homemade knife and thirteen  
19 additional knives were collected during the investigation of the riot. *Id.* at 707. Also  
20 collected were the clothes worn by the deceased officer, clothes worn by Driscoll and  
21 clothing of various other inmates worn on the night of the riot. *Id.*

22 Before trial, the state disclosed a three-page lab report to Driscoll's counsel,  
23 summarizing latent fingerprint, serological, and chemical examinations performed on the  
24 knives and clothing. *Id.* at 707. According to the report, the blood found on Driscoll's  
25 clothing matched the deceased officer's blood type – type O blood. *Id.* at 707. All of the  
26 homemade knives, except for Driscoll's, tested negative for blood traces. *Id.* The blood  
27 traces found on Driscoll's knife was the same type as another officer– type A blood –  
28 but not the deceased victim. *Id.* At trial the state argued that Driscoll stabbed the

1 deceased officer three times, fatally penetrating his heart and lungs, and then stabbed the  
2 other officer in the shoulder as he tried to rescue the deceased officer. *Id.* at 705. The  
3 state advanced two separate theories to explain the lack of the victim’s blood on the  
4 alleged murder weapon: either that the type O blood on Driscoll’s knife got wiped off  
5 when Driscoll subsequently stabbed the officer in the shoulder or that type O blood was  
6 present on the knife but “masked” from detection because of the presence of type A  
7 blood. *Id.* at 707.

8 The state advanced their theories through expert testimony of the Chief Forensic  
9 Serologist from the Missouri Highway Patrol Crime Laboratory who offered a  
10 complicated explanation as to why the deceased officer’s blood type was not detected on  
11 Driscoll’s knife. The state’s expert failed to inform the jury that “masking” does not  
12 occur in the second type of test she used, and that test also showed that the deceased  
13 officer’s blood type was not detected on Driscoll’s knife. *Id.* at 707-708.

14 The court concluded “this combination of the prosecution’s presentation of the  
15 serology evidence and the defense’s lack of cross examination evidence left the jury  
16 with the impression that Driscoll’s knife likely had been exposed to both type A and  
17 type O blood.” *Id.* at 708. That was a factually inaccurate impression.

18 In this case, as in *Driscoll*, whether the alleged murder weapon, which was  
19 unquestionably linked to Mr. Foshay, fired the autopsy bullet, constituted an issue of the  
20 utmost importance. “Under these circumstances, a reasonable defense lawyer would take  
21 some measures to understand the laboratory tests performed and the inferences that one  
22 could logically draw from the results. At the very least, any reasonable attorney under  
23 the circumstances would study the state’s laboratory report with sufficient care so that if  
24 the prosecution advanced a theory at trial that was at odds with the evidence, the defense  
25 would be in a position to expose it on cross-examination.” *Id.* at 709.

26 Applying the analysis in *Driscoll* to the the facts of this case, trial counsel did not  
27 subject the State’s evidence to the rigors of the adversarial process which left the jury  
28 with the inaccurate impression that the autopsy bullet irrefutably was fired through Mr.

1 Foshay’s Ruger pistol. This performance falls short of reasonableness under the  
2 prevailing professional norms. *Driscoll v. Delo*, 71 F.3d at 709. “Absent competent  
3 counsel, ready and able to subject the prosecution’s case to the ‘crucible of meaningful  
4 adversarial testing,’ there can be no guarantee that the adversarial system will function  
5 properly to produce just and reliable results.” *Id.* at 706 (citing *Lockhart v. Fretwell*, 506  
6 U.S. 364, 377, (1993) (Stevens, J., dissenting) quoting *United States v. Cronin*, 466 U.S.  
7 648, 654 (1984)).

8 It has been determined that trial counsel’s handling of the firearms evidence at  
9 trial was deficient, prejudice has occurred and any confidence in the outcome of Mr.  
10 Foshay’s trial has been substantially undermined.

11 It therefore has been determined that Mr. Foshay is entitled to post-conviction  
12 relief.

## 13 V.

### 14 RELIEF REQUESTED

15 Mr. Foshay has set forth facts which support the claim that his conviction was  
16 obtained in violation of the Constitutions of the United States and Arizona, as required  
17 by Arizona Rules of Criminal Procedure, Rule 32.13(c).

18 The parties, after careful consideration of the evidence, stipulate to and request  
19 the Court to enter orders as follows:

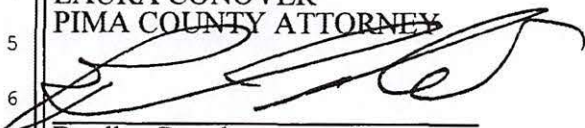
- 20 (1) That Mr. Foshay’s conviction, judgment of guilt and sentence shall be  
21 vacated;
- 22 (2) That Mr. Foshay shall be relieved from any fines, fees, or other penalties  
23 assessed as a result of this conviction;
- 24 (3) That in the interest of justice, the indictment in this matter shall be dismissed  
25 without prejudice;
- 26 (4) That all records related to the Mr. Foshay’s arrest, charges, conviction,  
27 judgment and sentence in this matter be sealed; and  
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(5) That Mr. Foshay be immediately released from the custody of the Arizona  
Department of Corrections.

RESPECTFULLY SUBMITTED this 25th day of August 2023.

LAURA CONOVER  
PIMA COUNTY ATTORNEY



Bradley Roach  
Deputy County Attorney

THE CARRILLO LAW FIRM, PLLC



Erin M. Carrillo  
F. Michael Carrillo  
Attorneys for Bryan P. Foshay