**IN THE COURT OF APPEALS**
**OF THE STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>JASON DEREK KRAUSE,<br><br>Petitioner. | ) | Arizona Court of Appeals<br>No. 1 CA-CR 14-0108 PRPC<br><br>Yavapai County Superior Court<br>No. P1300CR940374 |

# BRIEF OF *AMICI CURIAE* THE INNOCENCE NETWORK AND THE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER JASON DEREK KRAUSE


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## INTRODUCTION

> *When scientific methodologies once considered sacrosanct are modified or discredited, the judicial system must accommodate the changed scientific landscape.*[1]

Charles Thurman's death was tragic. The jury in Jason Krause's trial should have had the opportunity to consider two plausible theories explaining that tragedy: (1) the theory, advanced by the prosecution, that Mr. Krause, while hunting outside his home, somehow fired the fatal shot from as far as fifty yards away into a car driving past him at up to thirty miles per hour, and (2) the theory that the bullet came from one of the teenaged passengers in the back seat of the victim's open-top Jeep. The latter theory is consistent with witness statements indicating that teenagers were shooting from the Jeep as it drove recklessly down the road; the police department's discovery of .22 caliber shell casings in the Jeep's back seat; the entry and exit wounds in the victim's skull, indicating that the bullet took a downward trajectory; and a prosecution expert's testimony that the shot could have been fired from as close as two feet away. However, because false "scientific" testimony was introduced at trial, the jury was never given the opportunity to consider the possibility that someone other than Mr. Krause fired the fatal shot.

The Comparative Bullet Lead Analysis ("CBLA") evidence presented by the prosecution was so highly regarded at the time of trial, that everyone—the police,

[1] Hon. Harry T. Edwards, *The National Academy of Sciences Report on Forensic Sciences: What It Means for the Bench and Bar*, 51 Jurimetrics J. 1, 9 (2010).

the prosecutors, the court, defense counsel, and the defendant himself—accepted as fact that a bullet from Mr. Krause's rifle struck the victim. In light of this seemingly infallible evidence, defense counsel—now a magistrate judge of the Chino Valley Municipal Court—made the reasonable decision not to forcefully argue that the shot came from a second shooter.[2] The only argument he could credibly make was that the shooting was accidental. Thus, instead of being presented with compelling evidence that a passenger fired the shot, the jury was told by an impressively credentialed FBI expert that CBLA conclusively proved that the bullet was fired by Mr. Krause. The *actus reus* issue was precluded from jury consideration, and, as a result, the jury convicted Mr. Krause of manslaughter.

We now know, however, that CBLA is junk science incapable of linking the fatal bullet to Mr. Krause. Mr. Krause is therefore entitled to a new trial at which substantial evidence would be presented demonstrating that the fatal bullet did not originate from Mr. Krause's gun, including:

1. Statements from twelve disinterested witnesses who heard or saw, from different locations and at different times over an extended period, gunfire that appeared to come from the victim's open-top Jeep.

2. The report of a crime-scene investigator who saw several .22 caliber casings in the back seat of the victim's Jeep, which inexplicably went missing once the vehicle was impounded.

[2] As part of a later ineffective assistance of counsel claim, the superior court itself agreed that this "tactical decision," made before CBLA was discredited, was reasonable in light of that evidence. *See State v. Krause*, No. CR 940374, at 2 (Ariz. Super. Ct. Aug. 29, 2000).

3. The fact that the .22 caliber bullet recovered from the victim was among the most common type of ammunition sold at the time of the incident, and that a .22 firearm was routinely carried in the victim's Jeep.

4. Crime scene reconstructions that prove it was impossible for Mr. Krause to have fired the fatal shot unless he was suspended twenty-five feet in the air, and that the shot likely came from the back seat of the Jeep instead.

At the very least, this evidence would raise reasonable doubt in jurors' minds as to Mr. Krause's guilt.

This Court should grant review, reverse the superior court's denial of Mr. Krause's petition, and vacate his conviction for the reasons stated herein: (1) DNA exonerations prove that flawed forensics is the second-leading cause of wrongful convictions, (2) CBLA evidence is the type of seemingly sophisticated, yet wholly invalid, science that is likely to cause wrongful convictions—which is why many CBLA-tainted convictions have been vacated—and (3) the CBLA evidence presented in Mr. Krause's case so corrupted the truth-seeking function of the trial that there can be no confidence in his conviction.

## INTERESTS OF *AMICI CURIAE*

The Innocence Network is an association of organizations dedicated to providing *pro bono* legal and investigative services to prisoners for whom evidence discovered post-conviction provides proof of innocence. The fifty-eight current members of The Innocence Network represent hundreds of prisoners with innocence claims in all fifty states as well as abroad. The Innocence Network

advocates study and reform to enhance the truth-seeking functions of the criminal justice system and to prevent future wrongful convictions. In that regard, it works to rectify the key causes of wrongful convictions, which include flawed science such as CBLA. In fact, The Innocence Network joined forces with the FBI and other organizations in 2007 as part of an ongoing effort to identify those cases in which CBLA evidence may have resulted in wrongful convictions.

Arizona Attorneys for Criminal Justice ("AACJ") is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

*Amici* have strong interests in this proceeding because convictions that are based on flawed forensics implicate the core of their shared mission to protect the rights of criminal defendants, ensure that all defendants receive fair and impartial trials, and safeguard the integrity of the criminal justice system.

## ARGUMENT

### I. FLAWED FORENSIC EVIDENCE, INCLUDING CBLA, RESULTS IN WRONGFUL CONVICTIONS

#### A. DNA Exonerations Prove That Innocent People Have Been Convicted Based On Flawed Forensics

To date, DNA evidence has exonerated 316 people convicted of crimes they did not commit.[3] Many of these exonerees were wrongfully convicted based, in part, on flawed forensic evidence. In approximately "50% of the DNA exonerations nationwide, unvalidated or improper forensic science contributed to the underlying wrongful conviction."[4] The forensic evidence presented in these cases is oftentimes predicated on techniques that are not subject to rigorous scientific evaluation or testing that is improperly conducted. A 2009 study of 137 DNA-exoneree convictions confirmed the broad impact of flawed forensic evidence, finding that in 60% of the cases studied, 72 forensic analysts from across the country provided flawed testimony in favor of the prosecution.[5] The DNA exonerations prove that flawed forensics is devastating to the truth-seeking

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[3] *DNA Exoneree Case Profiles*, Innocence Project, http://www.innocenceproject.org/know/ (last visited May 5, 2014).

[4] *Forensic Oversight*, Innocence Project, http://www.innocenceproject.org/fix/Crime-Lab-Oversight.php (last visited May 5, 2014); *see also Unreliable or Improper Forensic Science*, Innocence Project, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (last visited May 5, 2014) (noting that flawed forensics is the second-leading cause of wrongful convictions).

[5] Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 9 (2009).

function of the criminal justice system and indicate that what appears to be conclusive evidence of guilt is not always reliable. In fact, the DNA exonerations show that flawed forensics is so convincing that it has caused defendants to plead guilty and/or confess to crimes they did not commit.[6]

While DNA exonerations prove beyond doubt that flawed forensics has led to numerous wrongful convictions, they are but a small subset of cases where (1) DNA happened to be available, (2) the crimes were serious enough to merit close scrutiny, and (3) those convicted were fortunate enough to receive support from organizations able to obtain analysis of the available DNA. Other individuals have almost certainly been wrongfully convicted based on flawed forensics but do not have the benefit of DNA evidence, which is available in only 5% to 10% of criminal cases.[7] Thus, although DNA exonerations show that a significant percentage of wrongful convictions result from flawed forensics, the actual number of innocent people convicted due to such evidence is undoubtedly much higher.

The scientific community, the legislature, and the judiciary have all acknowledged the danger that flawed forensics poses to the judicial system. Recognizing "that significant improvements are needed in forensic science,"

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[6] *See When the Innocent Plead Guilty*, Innocence Project, http://www.innocence project.org/Content/When_the_Innocent_Plead_Guilty.php (last visited May 5, 2014) (linking to case studies of exonerees who pled guilty to crimes they did not commit because of, for example, flawed forensics).

[7] *See Unreliable or Improper Forensic Science*, *supra* note 4.

Congress tasked the National Academy of Sciences ("NAS") with examining ways to improve the quality of forensics. NAS summarized its findings in a 2009 report, which noted that "[w]ith the exception of nuclear DNA analysis, . . . no forensic method has been rigorously shown to have the capacity to consistently . . . demonstrate a connection between evidence and a specific individual or source," and recommended sweeping reforms to improve the reliability, accuracy, and presentation of forensic evidence.[8] This year, the Supreme Court itself recognized "the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts." *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014).

### B. CBLA Evidence Likely Caused Wrongful Convictions

#### *1. CBLA Dominated Criminal Prosecutions for Forty Years*

Although CBLA is now universally regarded as junk science, it was, for forty years, presented to juries as being capable of irrefutably matching a bullet from a crime to a particular defendant. The FBI performed CBLA in roughly 2,500 cases and testified in approximately 1,500 of those cases,[9] asserting that

[8] Comm. on Identifying the Needs of the Forensic Scis. Cmty. et al., Nat'l Research Council of the Nat'l Academies, Strengthening Forensic Science in the United States: A Path Forward 7 (2009) (hereinafter "NAS Report").

[9] *See* Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 968 (2008); Press Release, Innocence Project of Fla., IPF Urges Court to Allow Defendants to File for New Trial Based on FBI Junk Science (Apr. 2, 2009), *available at* http://florida

bullets have "unique chemical signatures" that can be matched "not only to a single batch of ammunition coming out of a factory, but to a single box of bullets."[10] In its most serious and now thoroughly discredited form, CBLA was used to establish that a bullet retrieved from a crime scene originated from one specific box of bullets, for example, found in the defendant's home. ***This is precisely the type of misleading testimony that was presented at Mr. Krause's trial***.

*2. CBLA Is Junk Science That Has Been Renounced by the FBI*

In 1991, Ernest R. Peele, the FBI agent who would later testify at Mr. Krause's trial, authored an internal article ("Peele Article") raising serious doubts about the probative value of CBLA.[11] The Peele Article revealed that (1) the lead composition of bullets manufactured seven months apart were found to "match"—i.e., have precisely the same chemical composition—(2) the lead composition of bullets from different manufacturers were found to match, and (3) compositional elements in ammunition varied greatly within each box of ammunition. While these findings cast great doubt on CBLA, and were known to—and yet concealed by—Agent Peele when he testified in Mr. Krause's 1994 trial, they were not made publicly available until at least 1999.

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innocence.org/content/?p=515.

[10] *60 Minutes: Evidence of Injustice* (CBS News Broadcast Sept. 12, 2008), *available at* http://www.cbsnews.com/news/evidence-of-injustice/.

[11] *See* Ernest R. Peele et al., *Comparison of Bullets Using the Elemental Composition of the Lead Component*, Proc. Int'l Symp. on Forensic Aspects Trace Evidence, Quantico, VA (June 24–28, 1991).

More than a decade after Agent Peele's article was written, the National Research Council scrutinized the science underlying CBLA. Its 2004 report ("CBLA Report") found, among other things, that "[t]he available data do not support any statement that a crime bullet came from, or is likely to have come from, a particular box of ammunition, and references to 'boxes' of ammunition in any form are seriously misleading."[12] Based in part on the CBLA Report, the FBI announced in 2005 that it would no longer use CBLA given that neither scientists nor bullet manufacturers were able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination.[13]

In the wake of the FBI's disavowal of CBLA, and in response to criticism in the media regarding convictions secured using such evidence, the FBI agreed in 2007 to commission a Joint CBLA Task Force of criminal justice actors, including The Innocence Network, to identify those cases where the introduction of CBLA evidence may have resulted in wrongful convictions.[14] The task force continues to

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[12] Comm. on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Nat'l Research Council of the Nat'l Academies, Forensic Analysis: Weighing Bullet Lead Evidence 113 (2004).

[13] *See* Press Release, Fed. Bureau of Investigation, FBI Laboratory Announces Discontinuation of Bullet Lead Examinations (Sept. 1, 2005), *available at* http://www.fbi.gov/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-bullet-lead-examinations.

[14] *See* News Release, Nat'l Ass'n Crim. Def. Lawyers, Innocence Network and National Association of Criminal Defense Lawyers Announce Joint Task Force to Review Cases Impacted by Discredited FBI Bullet Analysis (Nov. 19, 2007), *available at* http://www.nacdl.org/NewsReleases.aspx?id=19299.

review CBLA testimony and send letters to prosecutors and courts informing them of instances where potentially misleading CBLA testimony was given. In fact, such a letter was sent to the Yavapai County Attorney's Office in relation to the present case in 2008 ("CBLA Letter"). *See* Orig. Pet., Ex. A.

Today, CBLA evidence is no longer used in criminal trials and would be inadmissible if offered. *See, e.g.*, *United States v. McClure*, Crim. No. DKC 01-0367, at 8 (D. Md. Nov. 29, 2004) (excluding CBLA evidence).[15]

*3. CBLA Had a Powerful Impact on Juries, and, as a Result, CBLA-Tainted Convictions Have Been Overturned*

Although the deeply flawed nature of CBLA is now universally accepted, CBLA dominated criminal trials for four decades. During that time, CBLA evidence carried "with it the imprimatur of great learning, advanced technology, and scientific validity in the mind of the trier of facts," *United States v. Mikos*, No. 02 CR 137, 2003 WL 22922197, at *5 (N.D. Ill. 2003), and managed "to confuse and . . . mislead" not only juries, but also "defendants, defense counsel, prosecutors, judges, and law enforcement agents" alike.[16]

Juries, in particular, are likely to have given great weight to CBLA. As the Supreme Court has recognized, "[e]xpert evidence can be both powerful and quite

[15] Courtesy copies of unpublished decisions are included in the Appendix accompanying this Brief.
[16] J. Vincent Aprile II, *FBI Abandons Bullet Lead Analysis: Who Will Undo This Travesty of Justice?*, Crim. Just., Winter 2006, at 42, 43.

misleading." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). And, although most forensic disciplines, with the exception of DNA analysis, are based on experts' "subjective guestimations,"[17] juries are likely to accept forensic evidence as inconvertible fact and give "undue weight to evidence and testimony derived from imperfect testing and analysis."[18] Scholars have identified several reasons why juries are deceived by flawed forensics such as CBLA:

- **Difficulty Detecting Flaws in Forensic Evidence**: Studies and experiments have found that jurors are unable to differentiate between valid research and junk science.[19] In the case of CBLA, it would have been nearly impossible for laypersons serving on juries to detect flaws in the evidence given the widespread, but misplaced, confidence in the forensic method. After all, without an expertise in chemical analysis or firearms, or an appreciation for how many bullets of a particular type existed in a relevant geographic area (a statistic that is not available), juries could not "possibly consider [CBLA] testimony and give it accurate probative value."[20]

- **Aura of Infallibility**: The "esoteric nature of an expert's opinions, together with the jargon and the expert's scholarly credentials, may cast an aura of infallibility over his or her testimony."[21] When experts testify that "evidence

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[17] *See* Dawn McQuiston-Surrett & Michael J. Saks, *Communicating Opinion Evidence in the Forensic Identification Sciences*: *Accuracy and Impact*, 59 Hastings L.J. 1159, 1189 (2008).
[18] NAS Report, *supra* note 8, at 4.
[19] *See, e.g.*, Bradley D. McAuliff et al., *Can Jurors Recognize Missing Control Groups, Confounds, and Experimenter Bias in Psychological Science?* , 33 L. & Hum. Behav. 247, 247 (2009); N.J. Schweitzer & Michael J. Saks, *Jurors and Scientific Causation: What Don't They Know, and What Can Be Done About It?* , 52 Jurimetrics J. 433, 450 (2012).
[20] Edward J. Imwinkelried & William A. Tobin, *Comparative Bullet Lead Analysis (CBLA) Evidence: Valid Inference or Ipse Dixit?*, 28 Okla. City U. L. Rev. 43, 65 (2003).
[21] Peter J. Neufeld & Neville Colman, *When Science Takes the Witness Stand*, 262 Sci. Am. 46, 48 (1990).

from the crime scene can be matched in the laboratory to the defendant, even—as such experts sometimes claim—to the exclusion of all other persons in the world, that testimony is . . . likely to be accepted as conclusive."[22] For example, because CBLA was offered in the "form of an opinion from an expert in chemical analysis," a jury was "quite likely to [have] believe[d] that his opinion as to the source of the bullets also [came] from the application of rigorous scientific standards." *Mikos*, 2003 WL 22922197, at *4.

- **The Reverse CSI Effect**: Scholars have found that as a result of "CSI-type shows, [jurors] often place too much weight on forensic evidence . . . , resulting in convictions in cases where the defendant probably should have been acquitted."[23] This phenomenon, known as the "Reverse CSI Effect," may be due, in part, to the media's incorrect portrayal of forensic evidence as capable of conclusively linking evidence to a particular weapon or perpetrator. Although most forensic disciplines are not capable of such accuracy, this "perception of 'uniqueness'"—e.g., a bullet's supposed unique "chemical signature"—has become accepted as fact.[24]

- **The Gatekeeper Effect**: Jurors assume judges review expert evidence before trial and are therefore more likely to find the evidence credible.[25]

- **Difficulty Understanding Terminology and Testimony**: Jurors often have difficulty parsing the complex terminology used by expert witnesses. In the case of CBLA, jurors are unlikely to have understood or questioned the intractable terminology of the CBLA lexicon (e.g., "inductively coupled plasma," "atomic emission spectroscopy," etc.). They were also likely to have misinterpreted FBI testimony that bullets found at crime scenes were "analytically indistinguishable" from bullets belonging to defendants as

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[22] Findley, *supra* note 9, at 943.

[23] Mark A. Godsey & Marie Alou, *She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI-Effect,"* 17 Tex. Wesleyan L. Rev. 481, 483 (2011).

[24] William A. Tobin & Peter J. Blau, *Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in Firearms-Toolmarks Forensic Practice*, 53 Jurimetrics J. 121, 123 (2013).

[25] *See* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 Psychol. Pub. Pol'y & L. 1, 15 (2009).

meaning that the bullets were ***exact*** matches.[26]

Because CBLA had such a powerful impact on juries, ***at least seven courts have vacated CBLA-tainted convictions***, finding that CBLA so undermined the integrity of the trials and the courts' confidence in the verdicts that the convictions could not stand: *State v. Bryan*, Crim. No. CT950240X (Prince George's Cnty. Md. Cir. Ct. Sept. 27, 2013); *Cannon v. Belleque*, No. 04C-10127 (Marion Cnty. Or. Cir. Ct. Sept. 1, 2009); *People v. Kennedy*, No. 95CR4541, at 10–11 (El Paso Cnty. Colo. Dist. Ct. Apr. 21, 2009); *State v. Ates*, No. 97-CF-945, at 3 (Okaloosa Cnty. Fla. Cir. Ct. Dec. 17, 2008); *Ragland v. Commonwealth*, 191 S.W.3d 569, 580–82 (Ky. 2006); *Clemons v. State*, 896 A.2d 1059, 1061–62 (Md. 2006); and *State v. Behn*, 868 A.2d 329, 331, 434 (N.J. Super. Ct. App. Div. 2005).

## II. MR. KRAUSE WOULD HAVE LIKELY BEEN ACQUITTED IN THE ABSENCE OF THE DISCREDITED CBLA EVIDENCE

For the reasons discussed above, the jury in Mr. Krause's trial believed that CBLA conclusively proved that he fired the fatal shot. However, we now know that CBLA is incapable of making such a determination. For this reason alone, confidence in the verdict is so undermined that the conviction must be vacated. However, perhaps even more destructive to the truth-seeking process than the CBLA testimony that was heard by the jury is the evidence that was ***not*** heard by the jury as a result of CBLA.

[26] *See* McQuiston-Surrett & Saks, *supra* note 17, at 1164–70.

The jury was deprived of ample evidence that someone else, likely a passenger in the victim's Jeep, fired the fatal shot. That theory is equally, if not more plausible than the theory that Mr. Krause recklessly fired his rifle and somehow managed to strike the head of a driver of a vehicle traveling at 15–30 miles per hour from 100–150 feet away. The FBI's concealment of information discrediting CBLA deprived the jury of the opportunity to consider the second-shooter theory.[27] However, as defense counsel testified under oath, if CBLA had been discredited at the time of trial, the defense would have vigorously pursued the theory, which is supported by the substantial evidence detailed below and which would have raised reasonable doubt in the jurors' minds as to Mr. Krause's guilt.

The lower court found that most of the elements of Mr. Krause's legal claims are satisfied—i.e., that the Peele Article qualifies as *Brady* material, and the CBLA Letter "constitutes newly discovered evidence." *See* Op. at 5, 9. However, the court did not vacate the conviction because, employing the incorrect legal framework, it concluded that even if CBLA had been discredited at the time of trial, the prosecution's remaining circumstantial evidence supported the conviction. *See id.* at 6, 8–9. The issue now before this Court is whether the verdict would

[27] Agent Peele, as author of the Peele Article, knew about the serious doubts as to the probative value of CBLA, and yet presented the evidence as if it were unassailable. False testimony with regard to flawed forensics is especially prejudicial and forms an independent basis for a due process claim. *See Napue v. Illinois*, 360 U.S. 264 (1959); *see also Ragland*, 191 S.W.3d 569 (granting new trial where FBI expert falsely testified with regard to CBLA).

likely have been different in a trial untainted by CBLA, considering not only the remaining prosecution evidence, but also the evidence that ***would have been proffered*** by defense counsel once CBLA was discredited. The record clearly shows that it would.

### A. The Lower Court Erred By Failing To Analyze The Theories And Evidence That Mr. Krause Would Have Presented At Trial If The CBLA Evidence Had Been Discredited

In finding that the outcome of the case would not have changed, the lower court improperly limited its analysis to the strength of the prosecution's remaining evidence at the original trial, relying exclusively on "the significant circumstantial evidence" presented to the jury. *Id.* at 5–6. Such an analysis is legally improper.

The law is clear that when evaluating *Brady* claims, courts are required to consider not just the evidence actually presented at trial, but also the evidence, theories, and arguments that would have been presented had the exculpatory evidence been available. In other words, courts must examine the ***derivative effects*** of the new evidence. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 683 (1985) (courts should consider "any adverse effect that the prosecutor's failure . . . might have had on the preparation or presentation of the defendant's case" and "the course that the defense and the trial would have taken had the defense not been misled by the" *Brady* violation).[28] Under this framework, courts have found

[28] *See also United States v. Spagnoulo*, 960 F.2d 990, 995 (11th Cir. 1992);

evidence that "would have provided [a defendant] with plausible and persuasive evidence to support his theory of innocence by implicating" a different perpetrator sufficient to warrant post-conviction relief. *Duly v. State*, 304 S.W.3d 158, 165 (Mo. Ct. App. 2009).[29] Arizona courts employ a similar standard under Arizona Rule of Criminal Procedure 32.1 in cases involving newly discovered evidence. *See, e.g.*, *State v. Gutierrez*, 229 Ariz. 573, 578–79 ¶¶ 28–29, 278 P.3d 1276, 1281–82 (2012); *State v. Fisher*, 176 Ariz. 69, 75–76, 859 P.2d 179, 185–86 (1993).

While the lower court stated that it would consider evidence related to a second shooter, Op. at 4, its subsequent analysis entirely disregards such evidence. The court improperly focused solely on evidence favorable to the prosecution and failed to consider whether the CBLA-discrediting evidence "would have enabled [Mr. Krause] to present a plausible, different theory of innocence." *Duly*, 304 S.W.3d at 163. Such one-sided analysis is legally improper, and had the court considered the evidence that would have been proffered in a trial untainted by CBLA, it would have concluded that the verdict would have likely been different.

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*Levin v. Clark*, 408 F.2d 1209, 1212 (D.C. Cir. 1967).

[29] *See also House v. Bell*, 547 U.S. 518, 554 (2006) (reversing denial of habeas petition, noting that forensic proof connecting petitioner to crime was called into question and that petitioner put forth "substantial evidence pointing to a different suspect"); *State v. Machado*, 224 Ariz. 343, 364 ¶¶ 66–67, 230 P.3d 1158, 1179 (App. 2010) (reversing murder conviction where court excluded exculpatory evidence that might have led a jury to conclude there was a reasonable possibility that a third party killed the victim), *aff'd*, 226 Ariz. 281, 246 P.3d 632 (2011).

### B. The Jury Would Have Reached A Different Verdict But For CBLA, Which Corrupted The Truth-Seeking Function Of The Trial

The CBLA evidence presented at Mr. Krause's trial convinced everyone, including Mr. Krause and his attorney, now-Judge Walker, that the fatal bullet came from Mr. Krause's rifle. Because of the overpowering evidence, Judge Walker made the strategic decision not to forcefully contest the fact that Mr. Krause's bullet struck the victim, and instead argued that the shooting was accidental. However, Judge Walker has since testified under oath that, if the evidence discrediting CBLA had been available at the time of Mr. Krause's trial, he would have vigorously argued that someone other than Mr. Krause fired the fatal shot. *See* 2013-10-07 Evid. Hr'g Tr., Dir. Exam. of John Walker, at 73–76, 82–105. In fact, a plethora of evidence supports the second-shooter theory:

- **Statements from Twelve Witnesses Who Heard or Saw Other Gunfire in the Vicinity, Including from the Victim's Vehicle**[30]: For example, one witness stated that he saw a "flame fly from" somebody's hand in the vehicle, Orig. Pet., Ex. G, at 2, and another stated that "it was apparent that the shots were moving as if coming from a vehicle," *id.*, Ex. D, at 4. In total, twelve witnesses reported that they saw or heard a series of shots coming from the road at different locations and different times throughout the evening. In fact, one witness even called the police to report juveniles driving around "shooting at random." *Id.* at 6.

- **Testimony That .22 Caliber Casings Were Found in the Victim's Jeep**: A crime-scene investigator reported seeing .22 caliber casings in the back seat of the vehicle, which inexplicably went missing once the vehicle was impounded. *See* Trial Tr., Cross-Exam. of Roger Williamson, at 2069–77;

[30] *See* Orig. Pet. at 13–15 & Exs. D–G.

*id.*, Cross-Exam. of Scott Mascher, at 1726–27. This is particularly noteworthy in light of the victim's father's testimony that a .22 caliber firearm was commonly kept in the vehicle. *See id.*, Dir. Exam. of Thomas C. Thurman, at 438:18–440:9. Judge Walker testified that, absent CBLA, he would have requested jury instructions regarding the missing casings. *See* 2013-10-07 Evid. Hr'g Tr., Dir. Exam. of John Walker, at 106:18–109:3.

- **The Fact That .22 Caliber Bullets Are Extremely Common**: Absent CBLA, the only link between the fatal bullet and bullets belonging to Mr. Krause is that they are both of the .22 caliber variety. In contesting that Mr. Krause fired the fatal shot, Judge Walker would have emphasized that this connection has very little probative value given that .22 caliber bullets were among the most common types of ammunition manufactured in 1994.[31]

- **Reconstructions Proving It Was Impossible for Mr. Krause to Have Fired the Fatal Shot**: A post-conviction reconstruction completed in 2011 after CBLA was thoroughly discredited shows that Mr. Krause would have had to be suspended 25.7 feet in the air to fire the fatal shot based on the downward trajectory of the bullet. Orig. Pet., Ex. B., at 8. This report convincingly demonstrates "that it was not possible for Mr. Krause to have fired the [fatal] shot," *id.* at 3, and that the shot was instead "fired from the back seat of the 1983 Jeep," *id.* at 10.

The second-shooter theory is entirely plausible. In fact, police investigators initially believed that a passenger fired the fatal shot. *See, e.g.*, Trial Tr., Cross-Exam. of Scott Mascher, at 1384:20–22, 1682:21–25. Although the police ultimately abandoned the theory, it is, in many ways, ***more believable*** than the State's theory. After all, it would have been easier for a passenger in the vehicle to fire a bullet that entered above the victim's left ear in a downward trajectory ***from a few feet away*** than it would be for Mr. Krause to make the same shot, recklessly

[31] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Guns Used in Crime 3 (1995), *available at* http://www.bjs.gov/content/pub/pdf/GUIC.PDF.

or accidentally, from 100–150 feet away as the vehicle was moving at 15–30 miles per hour. In fact, a prosecution witness testified that the fatal shot could have been fired from as close as two feet away, *id.*, Cross-Exam. of Philip Keen, at 1290:14–1291:8, which would be consistent with witness statements indicating that shots were fired from inside the Jeep.

Furthermore, none of the evidence presented by the prosecution is capable of countering the second-shooter evidence that defense counsel would have presented at a trial untainted by CBLA, in contrast to cases in which post-conviction relief was denied. In those cases, there was significant evidence independent of CBLA that linked the crime scene bullets to the defendants. *See, e.g.*, *Dickens v. State*, 997 N.E.2d 56, 61–62 (Ind. Ct. App. 2013) (noting that "the unchallenged forensic evidence" and "eyewitness testimony," rather than CBLA evidence, established defendant's guilt); *Bowling v. Commonwealth*, No. 2006-SC-000034-MR, 2008 WL 4291670, at *2 (Ky. Sept. 18, 2008) (finding that "ballistics testing and other testimony linked the bullets from the crime scenes to the handgun").[32] Although the lower court stated that there was "significant circumstantial evidence" of guilt, Op. at 6, none of the cited evidence, nor any of the non-CBLA evidence in the record, linked Mr. Krause to the bullet. For example, Mr. Krause's statement to

[32] Furthermore, in many of the cases in which post-conviction relief was denied, there was no evidence "point[ing] to the real possibility of a different perpetrator." *In re Pers. Restraint of Trapp*, No. 65393-8-I, 2011 WL 5966266, at *7 (Wash. Ct. App. Nov. 28, 2011).

his wife shortly after the incident—"I think I shot the boy"—was not an admission of guilt, but simply an assumption of what must have happened given the circumstances. And Mr. Krause's expressed frustration with increased incidents of shooting and speeding in his community—a concern shared by his neighbors, *see* Trial Tr., Dir. Exam. of Betty Jean Kantautas, at 1932–40—is a far cry from a motive to actually shoot and kill teenagers suspected of engaging in such conduct.

In sum, the Peele Article and the CBLA Letter would have caused a "change in trial tactics [that] would probably change the outcome" of Mr. Krause's trial by allowing defense counsel to present a second-shooter theory to the jury. *In re Pounds*, No. 67387-4-I, 2012 WL 6098287, at *4 (Wash. Ct. App. Dec. 10, 2012).

## CONCLUSION

CBLA is junk science, and "the integrity of the criminal justice system is ill-served by allowing a conviction based on evidence of this quality, whether described as false, unproven or unreliable, to stand." *Behn*, 868 A.2d at 346. CBLA deprived the jury of the opportunity to hear evidence that would have demonstrated Mr. Krause's innocence or, at the very least, raised reasonable doubt about his guilt. As a result, there can be no confidence in Mr. Krause's conviction.

For the foregoing reasons, The Innocence Network and AACJ respectfully request that the Court grant review in this case, reverse the superior court's denial of Mr. Krause's petition for post-conviction relief, and vacate his conviction.

RESPECTFULLY SUBMITTED this 7th day of May 2014.

By */s/ Kathleen E. Brody*


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