IN THE SUPREME COURT OF FLORIDA

CASE NO. 08-655

THOMAS ANTHONY WYATT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE NINETEENTH JUDICIAL CIRCUIT, IN AN FOR INDIAN RIVER COUNTY (Case No. 88-748CF)

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

Seth E. Miller
Bobbi Madonna
Melissa Montle
INNOCENCE PROJECT OF FLORIDA, INC.
1100 East Park Avenue
Tallahassee, FL 32301
Telephone: (850) 561-6767
Facsimile: (850) 561-5077

Attorneys for Amici Curiae: Innocence Project of Florida, Inc., and The Innocence Network.

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INDENTITY AND INTEREST OF THE AMICI CURIAE

Amici curiae submitting this brief ("Amici") are a non-partisan, 501(c)(3) organization performing litigation and policy work relating to innocent individuals in Florida prisons, and a consortium of similar organizations throughout the United States.[1] Amici have a strong interest in this proceeding because a determination by this Court that the window for raising any newly discovered evidence claim relating to Comparative Bullet Lead Analysis ("CBLA") began upon the release of the 2004 National Research Council report on CBLA would irreparably harm already-identified individuals whose trials contained tainted CBLA testimony. Additionally, such a ruling would frustrate the unprecedented collaborative effort of Amici, other diverse organizations, and the Federal Bureau of Investigation ("FBI") to identify and review the entire universe of CBLA cases in Florida and nationwide for inappropriate and prejudicial testimony.

Amici urge this Court to treat as newly discovered evidence any FBI letter received by an individual, including the instant Appellant, regarding specific CBLA trial testimony against that individual.

SUMMARY OF ARGUMENT

For over forty years, the FBI provided testimony regarding Comparative Bullet Lead Analysis, convincing juries that spent bullets found in a victim or at a

[1] Amici are the Innocence Project of Florida and The Innocence Network.

crime scene could be matched to bullets found in the possession of criminal defendants. This testimony was provided in at least 1,500 cases nationwide, including numerous Florida cases. After continuing to defend the use of CBLA, despite indications that it was a flawed analysis not based in science, the FBI agreed in 2007 to identify and review every case in which it provided CBLA testimony. This process, although not complete, has yielded case-specific letters from the FBI detailing the nature of the testimony given and, where the FBI so determines, its flaws.

These letters are the product of an unusual and unprecedented collaboration between the preeminent law enforcement agency in the United States, justice-minded organizations, defense organizations, journalists, law professors, and attorneys in private practice. The sole purpose of this collaboration is to identify tainted trial testimony and give prosecutors, defense attorneys, courts, and criminal defendants an opportunity to take a new look at cases if such testimony undermined confidence in the outcome of the trial.

While these CBLA cases will take many forms and only some will present courts with the necessity of granting a new trial, it is imperative that the date on which the window opens for raising a CBLA claim as newly discovered evidence be construed to allow circuit courts to make such determinations on the merits. Specifically, Amici urge this Court to begin the period for presenting newly

discovered CBLA claims on the date when the case-specific FBI letter regarding the trial testimony was received by the defendant, regardless of what other indications of problems with CBLA might have been previously present.

ARGUMENT

I. The FBI Has Been Providing Misleading or Even False Testimony Regarding Comparative Bullet Lead Analysis and is Now Collaborating with a Task Force of Diverse Entities to Right These Wrongs.

A. Process and History of Comparative Bullet Lead Analysis.

CBLA was a technique used by the FBI to link defendants to bullets, or fragments thereof, recovered from victims' bodies or from crime scenes. Most bullets sold in the United States are composed of lead. They also contain trace amounts of various other elements (e.g., tin, antimony, bismuth, etc.). CBLA involved comparing the presence and amount of these trace elements to determine whether the composition of a bullet found at a crime scene matched the composition of a bullet that could be associated in some way with a defendant. *See* Tobin, William, *Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics*, Champion, July 2004, at 12.

At its most basic level, CBLA followed a three-step process:

- **Analytical phase**: Bullet samples were analyzed to determine the presence and amount of various elements using sophisticated, high-tech instruments.
- **Comparison phase**: The compositions of the bullets recovered from the crime scene were compared to bullets that could be linked to the

defendant in some way to determine whether they were "analytically indistinguishable" from one another.

- **Inference phase**: If the bullet compositions were determined to be analytically indistinguishable, a conclusion was then reached regarding the significance of the match.

Id. It appears that, if properly conducted, the Analytical and Comparison phases of the CBLA process produced meaningful data.[2] However, the FBI agents drew certain improper inferences from CBLA during this third phase. In its most serious and now thoroughly discredited form, CBLA was used to establish that a bullet retrieved from a victim's body or crime scene originated from one specific box of bullets[3] that could be tied to the defendant (e.g., the box of bullets found in the defendant's home, etc.). *Id.* CBLA was also used to establish that two or more bullets originated from the same "melt"[4] of lead at a manufacturing plant. In most

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[2] There continues to be great concern regarding the second step—the statistical comparison phase—in which analysts used statistical tests to determine when the set of elemental concentrations from two samples were close enough to say that the bullets could not be distinguished from each other. The FBI's written protocol used a statistical method called "chaining" in which the CBLA analyst sequentially compared crime scene bullets to a set of reference bullets, assembling them into groups of compositionally indistinguishable bullets. As reports have shown, this type of chaining procedure can lead to the formation of artificially large sets of matching bullets because two bullets that are distinguishable from each other, but both fall close to a third group, can be put into the same "indistinguishable group." National Research Council, *Forensic Analysis: Weighing Bullet Lead Analysis*, 32-34 (2004).

[3] The instant case is one where the FBI agent gave such "bullet-to-box" testimony. *See* Wyatt FBI Letter, August 7, 2008 (Attached as Appendix "A")

[4] A melt is a molten source of lead that is sold to bullet manufacturers and ultimately cut into bullets. Depending on the manufacturer, a melt can contain anywhere from 12,000 to 35 million bullets. NRC Report, *supra* note 2.

cases, however, vital statistics were omitted from the FBI trial testimony that would have provided the proper context for this conclusion, such as the fact that millions of other bullets may have come from that same source of lead. *Id.*

CBLA was first used in 1964 after the assassination of President Kennedy in order to link trace elements found on the body of Lee Harvey Oswald to guns found in his possession. *See* Press Release, 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). The FBI has performed CBLA in roughly 2,500 cases and provided CBLA-based testimony in about 1,500 identified cases. Presentation by Dave Koropp, Partner, Winston and Strawn, at 2009 Innocence Network Conference, Houston, TX (Mar. 21, 2009). The FBI is the only law enforcement entity in the United States that performed CBLA and testified to its purported findings.

B. Indications of the Problems with CBLA.

For over forty years, CBLA in general and CBLA-based testimony in individual criminal trials had gone without significant challenge.

1. National Research Council Report.

In February 2004, the National Research Council ("NRC") of the National Academy of Sciences released a report, at the request of the FBI, that discussed non-case-specific limitations of the extrapolation of trace metal analyses for the

purpose of stating, under oath, the likelihood that a bullet found at a crime scene "matched" other bullets linked to a criminal defendant. NRC Report, *supra* note 2.

Specifically, the NRC report found that the methods of statistical analysis used during the second step of the CBLA were not the best available. *Id.* at 35, 46, 61-64. The NRC report recommended that the FBI replace its then currently used statistical analysis with a better quantitative analysis and use a pool standard deviation to remedy this concern. *Id.* at 111. The report also recommended that FBI expert witnesses limit interpretations of findings to refer to "compositionally indistinguishable volumes of lead" instead of melts or boxes when discussing origin and acknowledge uncertainties in the CBLA statistical analysis. *Id.* at 112.

While the NRC report thoroughly discussed these general limitations and recommendations, the NRC report still concluded that "CBLA was a reasonably accurate way of determining whether two bullets came from the same compositionally indistinguishable volume of lead" and it could, "in appropriate cases, provide additional evidence that ties a suspect to a crime." *Id.* at 109. The NRC report claimed that recognition of the limitations and implementation of the recommendations would enhance the value and reliability of CBLA evidence presented in criminal trials. *Id.*

Thus, the NRC report did not provide determinations as to whether trial testimony in individual cases was inappropriate.

2. FBI Press Release Discontinuing the Use of CBLA.

After the release of the NRC report in February 2004, the FBI embarked on a 14-month study of the recommendations within the NRC report. *See* Press Release, Federal Bureau of Investigation, FBI Laboratory Announces Discontinuation of Bullet Lead Examinations (Sept. 1, 2005), *available at* http://www.fbi.gov/pressrel/pressrel05/bullet_lead_analysis.htm (last visited Mar. 31, 2009). It then issued a press release discontinuing the use of CBLA. In this release, while recognizing that "neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination," the FBI stated explicitly that the NRC report found that the FBI's "instrumentation was appropriate" and that it "did not need to suspend bullet lead investigations." *Id.* The release continued that the FBI "still firmly supports the scientific foundation of bullet lead analysis," that the FBI had "not determined that previously issued bullet lead reports were in error," and that it was discontinuing the analysis because of the costs of maintaining equipment and the examinations. *Id.*

The FBI then sent letters to the roughly 300 agencies that had retained the FBI to perform and testify about CBLA. These letters, however, "glossed over" the problems with CBLA and "did little to alert prosecutors and defense lawyers

that erroneous testimony could have helped convict defendants." Solomon, John, *FBI's Forensic Test Full of Holes*, Wash. Post, Nov. 18, 2007, at A01.

Thus, as of September 1, 2005, the FBI was still downplaying criticisms of CBLA and refusing to appropriately acknowledge the flaws in their analysis and the prejudicial effect of their conclusions. Additionally, no case-specific determinations regarding the propriety of CBLA trial testimony were made available at the time of this press release.

3. Investigative News Reports.

A November 2007 investigative report by CBS News' *60 Minutes* and the Washington Post revealed that thousands of convictions nationwide may have been secured based on false FBI testimony about the ability to "match" bullets used in one crime to a small number of other bullets manufactured at the same time.[5] *See* Solomon, *supra*; 60 Minutes, *Evidence of Injustice*, CBS News, Nov. 18, 2007. These news reports, for the first time, identified a small number of cases by name where CBLA testimony was provided. However, no case-specific determinations regarding the appropriateness of CBLA trial testimony were made.

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[5] The September 2005 FBI press release had incorrectly stated that, while CBLA was performed in roughly 2,500 cases, testimony regarding CBLA was provided in only 20% or 500 of those cases. This investigative report demonstrated that the true number of cases in which the FBI testified regarding CBLA was as much as three times as large. 60 Minutes, *supra.*

As a result of the investigative report, the FBI admitted that its agents may have provided misleading testimony in thousands of cases. The FBI agreed to take concrete steps, in consultation with independent experts, to identify potential wrongful convictions resulting from bullet lead analysis and to prevent misleading testimony in future cases.

C. Collaboration Between the FBI and Diverse Criminal Justice Actors.

In 2007, in the wake of the aforementioned news reports, the FBI agreed to collaborate with a newly-formed Joint CBLA Task Force ("Task Force") of criminal justice actors to identify those cases where the introduction of CBLA evidence may have resulted in a wrongful conviction. *See* NACDL Press Release, *supra.* This task force consists of The Innocence Network,[6] The Innocence Project, the National Association of Criminal Defense Lawyers, private attorneys from the law firm of Winston and Strawn, law professors, and journalists, among others. *Id.* The Task Force has three main objectives:

1. Assist the FBI in Gathering Necessary Documents to Determine the Propriety of CBLA Testimony in Individual Cases.

The FBI has identified roughly 1,500 cases in which CBLA testimony was offered by an FBI agent against a criminal defendant. Thus, the FBI is working

[6] A full description of The Innocence Network and a list of its members is attached as Appendix "B".

with the Task Force, prosecutors, and defense attorneys in individual cases to obtain copies of CBLA trial testimony to determine whether the testimony given was appropriate.

2. Review the FBI's Case-Specific Determinations for Accuracy.

After the FBI's review of CBLA testimony given in a specific case, it will send out a letter to the court of conviction and the prosecutor detailing its determination about the propriety of the trial testimony.[7] The letter will provide one of four determinations: that the CBLA testimony given at trial (1) was appropriate; (2) exceeded the limits of the available science because the conclusion was that the crime scene bullet was from the same box of bullets as a bullet linked to the defendant ("bullet-to-box"); (3) overstated the significance of the results possibly leading the jury to misunderstand the probative value of the evidence; or (4) lacked context by not providing statistics of the number of bullets in each melt, allowing the jury to misunderstand the probative value of the results. In the instant

[7] The FBI has chosen not to directly notify defense attorneys or defendants about these determinations, instead choosing to notify courts and prosecutors. In some cases, prosecutors have then failed to provide these case-specific letters to the defendant in a timely manner or even at all. Instead, the FBI provides these letters to the Task Force as they make case-specific determinations and the Task Force must attempt to partner with local attorneys to identify and distribute these letters to defendants and/or their attorneys. In the instant case, the State Attorney's Office received the FBI letter shortly after August 7, 2008, and waited until December 10, 2008, to provide it to defense counsel.

case, the FBI sent out a "bullet-to-box" letter, indicating the highly prejudicial nature of the CBLA trial testimony against the Appellant.

The FBI will then send a copy of the letter and the trial testimony to Winston and Strawn, who will then discuss disagreements about determinations and urge the FBI to clarify or adjust their initial determinations, if necessary.

To date, the FBI and Winston and Strawn have reviewed 156 cases. Of these, the FBI determined in sixty cases that the testimony was appropriate, while in ninety-six cases, the FBI determined that the testimony was inappropriate in one the aforementioned ways. *See* Koropp Presentation, *supra*. **Twenty of these ninety-six cases containing inappropriate testimony are from Florida**, and as the FBI continues its review process, Amici expect this list of Florida cases to grow. *Id.* Florida thus far leads the nation in the number of CBLA cases and this Court's determination of when the newly discovered evidence window opens for CBLA claims will directly impact this growing class of litigants.

3. Identify Individuals in Each State to Notify Defendants About Case-Specific FBI Letters and Determine What Role the CBLA Testimony Played in Obtaining Convictions.

In December 2008, the Task Force appointed Amicus, the Innocence Project of Florida, as the "point" office for CBLA cases in Florida. In this role, Amicus is responsible for notifying defendants and defense counsel that the FBI has issued a case-specific determination in their case. Additionally, Amicus is obtaining trial

transcripts in every Florida case where the FBI has already issued a case-specific letter to determine whether the inappropriate CBLA testimony had a prejudicial effect on individual trials. If such a prejudicial effect exists, Amicus will either represent that individual or seek *pro bono* counsel to file a motion to vacate the conviction based on this newly discovered evidence.

II. The Case-Specific FBI Letters Determining the Inappropriate Nature of the CBLA Testimony at Trial Constitute Newly Discovered Evidence as Defined by Fla. R. Crim. P. 3.850, 3.851 and *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991).

Before determining whether newly discovered evidence would have produced an acquittal had it been available to the jury, a defendant must first demonstrate that the new facts were "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence." *Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991).

At the time of trial in virtually all cases where CBLA testimony was used against a defendant to obtain a conviction, the flaws in CBLA were unknown to the court and the parties.[8] Indeed, the FBI began providing CBLA testimony in

[8] To the extent that an agent of the State knew of information impeaching the reliability of CBLA testimony and the prosecutor failed to learn of the impeaching information and disclose it to the defense, due process was violated. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A postconviction claim based on such a violation is cognizable in a Fla. R. Crim. P. 3.851 motion.

criminal cases nationwide in the early 1980s and still vouched for the propriety of that testimony, even after the release of the NRC report in 2004 and its decision to discontinue CBLA in 2005, until it agreed to review every CBLA case in 2007.

The case-specific FBI letters determining the propriety of CBLA testimony mark the very first time in the over forty-year history of CBLA that the purveyor of flawed CBLA testimony, the FBI, admitted that testimony in individual cases was improper and that it may have caused innocent people to be wrongly convicted. The information in the case-specific FBI letters, therefore, represents the very best newly discovered evidence available to courts to determine the prejudicial value of CBLA testimony given at trial.[9] Indeed, these letters are essentially an expert recantation, likely rendering them *per se* newly discovered evidence.[10]

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[9] Similarly, the very existence and availability of DNA testing generally is not itself newly discovered evidence. Rather, it is favorable results of DNA testing in a specific case that constitute the newly discovered evidence and the date that those results are made available to the defense begins the due diligence period to raise a postconviction claim based on those results. Thus, it is the recognition by the FBI that it provided unsound and prejudicial trial testimony in a specific case, not generalized, non-case-specific criticisms of CBLA, that provide the optimal basis for a newly discovered evidence claim. The date the defense received the case-specific FBI letter, therefore, must be the date upon which his time to file a newly discovered evidence claim based on that letter begins.

[10] By issuing the case-specific letters, the FBI is officially recanting or correcting its agents' erroneous or misleading trial testimony. Regardless of whether the general challenge to CBLA existed with the NRC report in 2004, the recantation/correction by the FBI is independent newly discovered evidence. *See Souter v. Jones*, 395 F.3d 577, 593 (6th Cir. 2005) (holding that the testimony of an expert who changes his opinion after a trial is not only *per se* new, because the

Defendants could not have discovered this information at anytime before they received the letter because the FBI was not even aware of the extent of their errors in individual cases until it began its review of all CBLA cases and sent its first batch of case-specific letters to courts and prosecutors in 2008. Thus these letters, because they were not known at the time of trial and could not have been discovered until they were received by defendants, constitute newly discovered evidence pursuant to Fla. R. Crim. P. 3.850, 3.851, and *Jones*.

Additionally, numerous other reasons exist for this Court to deem the date of receipt by defendants of the case-specific FBI letter as the beginning of a due diligence window for bringing a CBLA-based newly discovered evidence claim based on that letter:

A. Despite Previous Indications of General Problems with CBLA, the Collaborative Effort Between the Task Force and the FBI has Yielded Letters Indicating that the CBLA Testimony Given in at Least Sixty Trials was Still Appropriate.

Despite the indications that there were problems with CBLA before the FBI began sending letters, the identification of these generalized flaws would not necessarily render inappropriate every instance of CBLA trial testimony. In fact, as part of the current collaboration between the Task Force and the FBI, the FBI has thus far determined that the CBLA testimony was appropriate in sixty

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evidence—that expert's opinion—has changed, but that it is also *per se* more reliable, as "it is a result of his increased education, training, and experience").

particular cases nationwide despite the blanket criticisms of CBLA in the 2004 NRC Report. Thus, the case-specific FBI letters are a form of newly discovered evidence superior to previous indications of generalized problems with CBLA, and the letters leave little question about the propriety of the CBLA testimony given in individual trials.

B. In One Florida Case Thus Far, a Circuit Court Determined That the Case-Specific FBI Letter Was Newly Discovered Evidence and Vacated the Conviction Based on the Letter, Without Regard for the Previous Indications of the General Problems with CBLA.

To date, at least one Florida Court has granted a Defendant's Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.850 based on newly discovered CBLA-related evidence, to wit: the case-specific FBI letter disavowing the CBLA testimony in the Defendant's particular case. In *Ates v. State*, within three weeks of its receipt, the Defendant amended a pending motion for postconviction relief to include as newly discovered evidence a copy of a letter from the acting director of the FBI Laboratory stating the jury in Ates' case "could have misunderstood the probative value" of the CBLA testimony presented at his trial. *See* Ates FBI Letter, May 30, 2008 (Attached as Appendix "C"). The Court, without regard to whether Mr. Ates had timely raised the CBLA issue after the NRC report, concluded that the FBI letter qualified as newly discovered evidence under Fla. R. Crim. P 3.850. *See Ates v. State*, Case No. 97-CF-945 (Okaloosa County), Order Granting Defendant's Motion for Postconviction Relief (Attached

as Appendix "D"). The Court then granted Ates a new trial based on this newly discovered FBI letter. *Id.*

C. To Construe the Newly Discovered Evidence Due Diligence Period as Beginning Earlier than the Date of Receipt by a Defendant of the Case-Specific FBI Letter Would be Detrimental to the Already-Identified CBLA Cases in Florida and Would Likely Render Useless the Ongoing Collaboration Between the Task Force and the FBI.

To date, the FBI has identified twenty cases in Florida in which it provided inappropriate testimony regarding CBLA that may have undermined confidence in the outcome of those trials. Thus far, a conviction has been vacated in one of those twenty cases, *Jimmy Ates v. State*, based on the case-specific letter that was sent by the FBI. Each of these cases present different procedural postures: (1) some have been litigating the CBLA issue since before the NRC report, updating the circuit court as each new revelation became available; (2) some, like the instant case, began litigating the CBLA issue after the NRC report, but have been diligent to update the circuit court upon each new revelation; (3) some, like Jimmy Ates, began litigating the CBLA issue upon receipt of the case-specific FBI letter; and (4) the majority, mostly non-death-row inmates without the benefit of counsel, have not begun litigation, hearing for the first time about the case-specific FBI letter when Amicus provided it to them.

Despite the diverse procedural postures of these cases, their common thread is that they received the case-specific FBI letter detailing the inappropriate nature

of the CBLA testimony given at trial. Thus, it is not only reasonable but practical to use the date of receipt by a Defendant of the case-specific FBI letter as the date upon which their window for bringing a CBLA claim begins. To rule otherwise would irreparably harm the already-identified individuals who wish to bring CBLA claims of newly discovered evidence based on these letters to the court's attention in a timely manner.

Moreover, it would create an illogical outcome were this Court to rule that the date of the release of the NRC report instead of the date of receipt of the case-specific FBI letter began the newly discovered evidence due diligence window in all CBLA cases. Specifically, the courts would favor litigants of CBLA claims who began their litigation based on the generalized NRC report as newly discovered evidence, despite the fact that the current collaboration between the Task Force and the FBI may eventually determine in those cases that the case-specific CBLA testimony was appropriate. In contrast, such a ruling would disfavor as procedurally barred those individuals who timely challenged their convictions based on a case-specific FBI letter stating that the CBLA testimony at trial was inappropriate and could have prejudiced the outcome of their trial.

Such a construction of the newly discovered evidence due diligence period would favor speed in filing over the accuracy of outcome and waste precious judicial resources.

Additionally, the FBI and Winston and Strawn have only presently reviewed roughly ten percent of the total number of CBLA cases nationwide. Florida currently leads the nation in identified CBLA cases, and Amici and the Task Force fully expect the list of Florida CBLA cases to grow. To require all CBLA-based newly discovered evidence claims to be brought forward at a time earlier than the date of receipt by the defendant of the case-specific FBI letter would severely diminish the value of the ongoing, fluid collaboration between the Task Force and the FBI. Such a narrow procedural interpretation would create an absurd result where the preeminent law enforcement agency in the United States has taken the unprecedented step to admit that it provided misleading or even false trial testimony against a particular defendant, yet that defendant is foreclosed from challenging the conviction in a timely, diligent manner based on that admission.

III. This Court Should Grant Appellant's Motion to Relinquish In Order for Appellant to Present the Case-Specific Letter to the Circuit Court as Newly Discovered Evidence and Allow the Circuit Court to Hold an Evidentiary Hearing and Determine the Material Effect of the CBLA Testimony on the Outcome of Appellant's Trial.

In the instant case, the Defendant first raised a CBLA-based claim after the FBI issued its press release on September 1, 2005 discontinuing the use of CBLA. *See Wyatt v. State*, Case No. 88-748CF, Third Amended Motion to Vacate, filed March 28, 2006. After holding an evidentiary hearing on, among other things, the propriety of the CBLA testimony given at trial, the Circuit Court denied the

Appellant's CBLA-based claim as procedurally barred, finding that the 2005 FBI press release was merely premised on the findings of the 2004 National Research Council ("NRC") report, thus the defense should have raised the CBLA claim within one year of the release of the NRC report. The Appellant filed the instant appeal. *Wyatt v. State*, Notice of Appeal, Case No. 08-655, filed Apr. 4, 2008.

On August 7, 2008, the FBI sent the State Attorney's Office a case-specific letter as part of the ongoing collaboration between the Task Force and the FBI indicating that an FBI agent at trial "implied that the evidentiary specimens [crime scene and defendant bullets] could be associated with a single box of ammunition." *See* Wyatt FBI Letter, *supra* note 3. The letter concluded that this testimony "exceed[ed] the limits of the science and cannot be supported by the FBI." *Id.* Such a conclusion is explosive evidence that would render the CBLA testimony not generally accepted within the scientific community and, therefore, inadmissible *ab initio* under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).[11]

A copy of this letter was not disclosed by the prosecution to defense counsel until December 10, 2008, when the instant appeal was already underway. Defense

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[11] *See, e.g.*, *Ramirez v. State*, 810 So. 2d 836, 853 (Fla. 2001) (holding that a subjective, untested, unverifiable identification procedure that purported to be able to identify the murder weapon to the exclusion of every other knife in the world—even if there were two million identical knives manufactured at the same time—was not generally accepted within the scientific community and, therefore inadmissible under *Frye*).

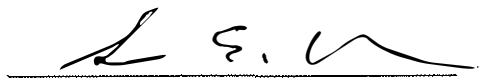
counsel promptly filed with this Court a motion to relinquish jurisdiction based on this case-specific letter, which is also currently pending in this Court.

Because of the unprecedented collaboration between the Task Force and the FBI that led to the issuance of this case-specific letter, the determination by the FBI in that letter that it provided false testimony not supported by the FBI or the scientific community, and for all of the aforementioned reasons in this brief, Amici urge this Court to deem this case-specific letter newly discovered evidence and relinquish jurisdiction to the Circuit Court to allow for an evidentiary hearing and a merits determination whether a jury "probably would have acquitted" the Appellant had the CBLA evidence been inadmissible at trial. *See Jones v. State*, 591 So. 2d 911, 915-16 (Fla. 1991).

CONCLUSION

Amici respectfully urge this Court to hold that individuals are not procedurally barred from raising postconviction claims based on a case-specific FBI letter regarding CBLA testimony at trial within the time period for doing so, set forth in Fla. R. Crim. P. 3.850, from the date of the defendants' receipt of that letter. Additionally, Amici request that this Court relinquish jurisdiction to allow the Circuit Court to hold an evidentiary hearing and make a merits determination on whether the Appellant probably would have been acquitted, in light of the case-specific FBI letter rendering the CBLA trial testimony inadmissible.

Respectfully Submitted,



Seth E. Miller
Florida Bar No. 806471
Bobbi Madonna
Florida Bar No. 056265
Melissa Montle
Florida Bar No. 659444
INNOCENCE PROJECT OF FLORIDA
1100 East Park Avenue
Tallahassee, FL 32301
Phone: 850-561-6767
Fax: 850-561-5077

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served by U.S. mail on this 1st day of April, 2009, to the following persons:

Rachel Day
Counsel for Appellant
Capital Collateral Regional Counsel South
101 NE 3rd Ave
Suite 400
Fort Lauderdale, Florida 33301-1100

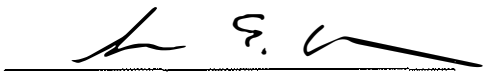
Leslie T. Campbell
Office of the Attorney General
1515 N. Flagler Dr.
Ninth Floor
West Palm Beach, Florida 33401-3428

Keith Findley
President
The Innocence Network
c/o Wisconsin Innocence Project
University of Wisconsin- Madison
975 Bascom Mall
Madison, WI 53706

Seth E. Miller

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) inasmuch as the brief is printed in Times New Roman, 14 point and otherwise meets the requirements of the rule.



Seth E. Miller

Appendix A

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please refer to
File No.

August 7, 2008

Office of the State's Attorney
19th Judicial Circuit
2000 16th Avenue
Vero Beach, FL 32960

Re: Case Name: Michael Lovette; Thomas Wyatt; Cathy Nydegger - Victim
FBI File Number: 95-283381

Dear Sir or Madam:

This letter follows up on our previous communication regarding bullet lead analysis conducted by the FBI Laboratory. Thank you for providing the information requested from the above-referenced case.

After reviewing the testimony of the FBI's examiner, it is the opinion of the Federal Bureau of Investigation Laboratory that the examiner stated or implied that the evidentiary specimen(s) could be associated to a single box of ammunition. This type of testimony exceeds the limits of the science and cannot be supported by the FBI.

Your office is encouraged to consult appellate specialists in your jurisdiction to determine whether you have any discovery obligations with respect to the finding stated above. As directed by the Department of Justice, we are notifying the Chief Judge of the court in which this case was tried of the results of our review by copying him or her on this letter.

Additionally, you should be aware that the FBI is cooperating with the Innocence Project. The Innocence Project is interested in determining whether improper bullet lead analysis testimony was material to the conviction of any defendant, and, if so, to ensure appropriate remedial actions are taken. In order to fully assist them in their evaluation, the FBI will provide the Innocence Project information from our files, including a copy of the FBI expert's trial testimony in this case and our assessment of that testimony.

Further questions regarding our review of your case or the general issue of bullet lead examinations may be addressed to Marc LeBeau at: FBI Laboratory Division, 2501 Investigation Parkway, Room 4220, Quantico, VA 22135 (703-632-7408). General legal questions should be directed to Assistant General Counsel James Landon, Office of the General Counsel, FBI Headquarters, Washington, DC 20535 (202-324-1724).

Sincerely,

D. Christian Hassell, Ph.D.
Director
FBI Laboratory

cc: Dan L. Vaughn
19th Judicial Circuit Court
2000 16th Ave
Suite 383
Vero Beach, FL 32960

Appendix
B

AS OF 03.31.09

DESCRIPTION OF *AMICUS CURIAE*

The Innocence Network (the Network) is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The forty-nine current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.[1] The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

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[1] The member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Griffith University Innocence Project (Australia), Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project at UVA School of Law, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Pace Post Conviction Project (New York), Pennsylvania Innocence Project, Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), The Sellenger Centre (Australia), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), the Wesleyan Innocence Project, and the Wisconsin Innocence Project.

Appendix C

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please refer to
File No.

May 30, 2008

William P. Cervone
State Attorney's Office - 8th Circuit
120 W. University Avenue
Gainesville, FL 32601

Re: Case Name: Jimmy Ates 1997-CF-000945-A
FBI File Number: 95D-HQ-1155006

Dear Mr. Cervone:

This letter follows up on our previous communication regarding bullet lead analysis conducted by the Federal Bureau of Investigation (FBI) Laboratory. Thank you for providing the information requested from the above-referenced case.

After reviewing the testimony of the FBI's examiner, it is the opinion of the FBI Laboratory that the examiner properly testified that the examination revealed that the evidentiary specimen(s) probably came from the same melt of lead. However, the reviewers felt that the examiner did not provide sufficient information to the jury to allow them to understand the number of bullets made from the melt. Without having evidence concerning the approximate number of bullets produced from a single melt, the jury could have misunderstood the probative value of this evidence.

Your office is encouraged to consult appellate specialists in your jurisdiction to determine whether you have any discovery obligations with respect to the finding stated above. As directed by the Department of Justice, we are notifying the Chief Judge of the court in which this case was tried of the results of our review by copying him or her on this letter.

Additionally, you should be aware that the FBI is cooperating with the Innocence Project. The Innocence Project is interested in determining whether improper bullet lead analysis testimony was material to the conviction of any defendant, and, if so, to ensure appropriate remedial actions are taken. In order to fully assist them in their evaluation, the FBI will provide the Innocence Project information from our files, including a copy of the FBI expert's trial testimony in this case and our assessment of that testimony.

Comparative Bullet Lead Analysis Review Process
May 30, 2008

Further questions regarding our review of your case or the general issue of bullet lead examinations may be addressed to Marc LeBeau at: FBI Laboratory Division, 2501 Investigation Parkway, Room 4220, Quantico, VA 22135 (703-632-7408). General legal questions should be directed to Assistant General Counsel James Landon, Office of the General Counsel, FBI Headquarters, Washington, DC 20535 (202-324-1724).

Sincerely,

Melissa Anne Smrz
Acting Director
FBI Laboratory

cc: Frederick D. Smith
8th Circuit Court
Family and Justice Center
201 East University Ave, Room 415
Gainesville, FL 32601

Appendix D

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

CERTIFIED A TRUE
AND CORRECT COPY
DON W. HOWARD
CLERK CIRCUIT COURT
BY B. Adcock
DEPUTY CLERK
DATE 12/18/08

Case No. 97-CF-945

DIV 003

JIMMY L. ATES,

Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION

FOR POSTCONVICTION RELIEF

THIS CAUSE having come before the Court on the Defendant's pro se Motion for Postconviction Relief filed on March 20, 2008 pursuant to Florida Rule of Criminal Procedure 3.850 and subsequent amendments, and the Court having reviewed same, the state's written response filed November 3, 2008 and the Defendant's reply filed November 14, 2008, finds as follows:

The Defendant was indicted by a grand jury on June 25, 1997 and charged with the first degree murder of Norma Jean Ates. According to the state, the Defendant shot and killed his wife with a .22 caliber pistol on June 2, 1991. The Defendant proceeded to trial and was ultimately found guilty by a jury of first degree murder on September 23, 1998. He was sentenced to life in prison without possibility of parole for 25 years on February 2, 1999. The conviction and sentence were upheld on direct appeal without comment.

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OGRANT

1997 CF 000945 A
B. ADCOCK, DEPUTY CLERK
12/17/2008 Ref # 29

Following his direct appeal, the Defendant sought postconviction relief alleging ineffective assistance of counsel on July 31, 2001. This motion, following an evidentiary hearing, was also denied. The Defendant has now filed another Rule 3.850 motion.

A motion filed pursuant to Rule 3.850 must be filed within two years after the judgment and sentence become final. There is, however, an exception to this time limit when a defendant alleges the discovery of new evidence. In ground twelve of his most recent motion, the Defendant points to newly discovered evidence which, he maintains, requires a new trial. Specifically, the Defendant claims that new evidence shows that the ballistics evidence used to support his conviction has been determined to be unreliable. In addition, the Defendant also claims a new trial is warranted because the state withheld exculpatory Brady evidence.

As part of its case in chief, the state elicited expert testimony from FBI analyst Kathleen Lundy.[1] Although the state could not produce the actual murder weapon, it attempted to link the Defendant to the ammunition that was used in the shooting. Ms. Lundy stated her opinion that the bullets used to shoot the victim were from the same "batch" of bullets found in the Defendant's home and car.[2] During closing arguments, the state explicitly relied on Ms. Lundy's testimony to demonstrate the Defendant's guilt.

> Kathleen Lundy says I examined five Federal rounds from the body of Norma Jean and I compared those to the two Federal rounds that were taken from the box that was found at that house...and what does that tell us? She says that I found that those five bullets are from the same batch...of the two that were out in the box in the laundry room.
>
> Now what does that really mean to us? I'll tell you. It means of all the millions and billions of bullets that are made...the bullets that killed

[1] Transcript (T.) 807-16, attached as Exhibit A.
[2] T. at 813-16.

Norma Jean were manufactured from the same batch that were found in the box in the back room [3]

In support of his claim attacking the reliability of Ms. Lundy's expert testimony, the Defendant has attached a letter from the general counsel's office of the United States Department of Justice addressed to the Office of the State Attorney in Gainesville, Florida.[4] In the letter, the general counsel's office acknowledged that the type of "bullet lead analysis" used at the Defendant's trial has been discontinued by the FBI. Another letter from the acting director of the FBI Laboratory reads that the jury in the Defendant's case "could have misunderstood the probative value" of the ballistics evidence.[5]

In order to prevail on a claim of newly discovered evidence, a defendant must first show that the evidence is "new" in that was unknown by counsel at the time of trial and that defendant or his counsel could not have known about such evidence by the use of due diligence. Second, the newly discovered evidence must also be of such nature that it would probably produce an acquittal on retrial.[6]

In its written response to the Defendant's motion, the state has conceded that the evidence that calls into question the bullet analysis provided by Ms. Lundy is both new and material. Consequently, the state writes, the Defendant must be granted a new trial. The Court, although not bound by the state's position, agrees.

It is clear that Ms. Lundy's testimony was one of the key pieces of evidence connecting the Defendant to the murder of Ms. Ates. Since the validity of that analysis is now in dispute by both the defense and the state, the jury's verdict of first degree murder cannot stand. Absent Ms. Lundy's testimony that the bullets used to kill Ms. Ates were

[3] T. at 1577-79, attached as Exhibit B.
[4] Exhibit C.
[5] Exhibit D.
[6] Jones v. State, 709 So.2d 512 (1998).

from the same box of bullets found in their home, the Court has serious doubts that the jury's verdict would have been the same.

In addition, the Defendant alleges in ground seven that exculpatory evidence was withheld which, had it been presented to the jury, would also have changed the outcome of the trial. According to the Defendant, an unidentified fingerprint was lifted from a plastic .22 cartridge container that police found inside a pistol box located on a shelf in the utility room of the Defendant's home. This unidentified print was referenced in internal reports[7] which, the state concedes, were never disclosed to the Defendant.

As the state writes in its response, the significance of this evidence is obvious and requires that the Defendant's conviction be vacated. The discovery of a fingerprint not belonging to the Defendant or the victim reveals that an unknown party had access to the utility room where the box of bullets that the state claimed were from the same batch used to shoot the victim were found. Had this information been available to the Defendant, he could have credibly argued that the unidentified print belonged to the murderer. Since the state did not disclose this evidence to the Defendant, he was denied the opportunity to present this defense. Due to the state's failure to disclose this evidence, especially when viewed in combination with the FBI's report discrediting the bullet analysis, the Court again finds that the jury's verdict cannot stand.[8]

Therefore, it is:

ORDERED AND ADJUDGED that Defendant's motion is **GRANTED** and he is entitled to a new trial. His judgment and sentence for first degree murder are hereby **REVERSED and VACATED.**

---

[7] Exhibit E.

[8] Although the Defendant has raised other grounds in his motion, the Court need not address them since it is granting relief based on grounds 7 and 12.

The Clerk of this Court shall immediately furnish the Defendant with a certified copy of this Order, by certified mail, showing on the face thereof the date and time when the original hereof was filed in the Office of the Clerk of this Court and shall note on the original hereof the date of service by an appropriate certificate of service.

DONE AND ORDERED in Okaloosa County, Shalimar, Florida, this 17 day of December, 2008.

WILLIAM F. STONE
CIRCUIT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I hereby certify a true copy of the foregoing has been furnished to the following this 18th day of December, 2008:

Gregory Fleck, Assistant State Attorney
120 West University Ave.
Gainesville, FL 32602-1437

Seth E. Miller, Esq.
Innocence Project of Florida
1100 East Park Ave.
Tallahassee, FL 32301

DON W. HOWARD
CLERK OF THE CIRCUIT COURT

By: B. Adcock
Deputy Clerk