No. 15-99002

CAPITAL CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL LEWIS BROWNING,

Appellant,

versus

RENEE BAKER, Warden

Respondent.

On Appeal From the United States District Court
for the District of Nevada
Case No. 3:05-cv-00087-RCJ-WGC
The Honorable Robert C. Jones

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT AND FOR REVERSAL

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STATEMENT OF CORPORATE DISCLOSURE

Pursuant to Federal Rules of Appellate Procedure 26.1, *amicus curiae* the Innocence Network has no parent corporation and no publicly held corporation owns stock in the Innocence Network.

INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Innocence Network respectfully submits this brief in support of appellant Paul Browning.

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 can provide conclusive proof of innocence. The Innocence Network currently has 67 members, who 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.[2] 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 lessons learned from cases in which the system has convicted innocent individuals, the Innocence Network promotes further study and advocates reform to improve the

[1] Pursuant to Federal Rules of Appellate Procedure 29(a) *amicus curiae* represents that appellant Browning consents to the filing of this brief, while the respondent has not responded to a request for consent. A Motion for Leave to File Brief as *Amicus Curiae* is filed with this brief. Pursuant to Federal Rules of Appellate Procedure 29(c)(5), *amicus curiae* certifies that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. Federal Rules of Appellate Procedure 29(c)(5). No person other than *amicus curiae*, its members, or their counsel has made such a monetary contribution. *Id*.

[2] For the complete list of member organizations, see www.innocencenetwork.org/members.

truth-seeking functions of the criminal justice system in an effort to prevent future wrongful conviction.

The Innocence Network works to ensure that innocent persons are not wrongfully convicted, incarcerated, or sentenced to death and thus has an interest in enforcement of obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and a specific interest in the innocence-related claims that Paul Browning raises here in an effort to overturn his conviction and death sentence. In particular, the Innocence Network has an interest in ensuring that judicial review of criminal convictions is appropriately informed by an understanding of how the known causes of wrongful conviction, and how *Brady* violations in particular, undermine the truth-seeking function of the adversarial process and the reliability of trial outcomes.

SUMMARY OF ARGUMENT

Paul Browning claims he was wrongfully denied the opportunity to present exculpatory evidence at his trial. These claims required the state court to evaluate the possible effect of exculpatory evidence in the context of a trial record that bears familiar hallmarks of wrongful conviction: incentivized testimony from criminal informants, cross-racial identification testimony, and misleading forensic evidence. The state court nonetheless characterized the case against Browning as "overwhelming" and Respondents-Appellees make the same argument on this

appeal. Decades of study of proven wrongful convictions teach that, to the contrary, Browning's conviction rested on types of evidence recognized to be highly unreliable and known to cause wrongful conviction. Moreover, that inherent unreliability was compounded here by *Brady* errors and by ineffective assistance of counsel—further familiar hallmarks of wrongful conviction—which deprived Browning of the ability to subject the state's evidence to adequate adversarial testing. The lessons learned from wrongful conviction cases underscore why Browning's inability to present his exculpatory evidence undermines confidence in the jury's verdict, and why habeas corpus relief should be granted.

FACTUAL BACKGROUND

In reviewing Browning's application for post-conviction relief, the Nevada Supreme Court found a number of errors at the trial court level, including errors that deprived Browning of access to exculpatory evidence. (1ER 193-94, 219.)[3] We agree with Browning that the state court overlooked still more significant and injurious errors, in particular concerning the bloody footprints at the crime scene.

The errors committed at trial, both acknowledged and unacknowledged by the state court, prevented Browning from presenting substantial evidence that he was not Hugo Elsen's assailant. That evidence would have established: (a)

[3] We incorporate the facts as summarized in Browning's opening brief to the extent relevant to the issues argued here.

Browning's afro hair-style did not resemble Mr. Elsen's strikingly detailed description of his assailant's hair as "loose curled," "shoulder length," and "wet"; and (b) bloody footprints at the crime scene, which were not Browning's, were most likely made by Mr. Elsen's assailant, not by first-responders—as the state told Browning's jury—and not by Mrs. Elsen or her neighbor Debra Coe. (*See* Browning's Opening Br. at 6, 19-21, 24-25; Reply Br. at 53.) Trial court errors also deprived the defense of impeachment material and thereby hampered its efforts to impeach the state's principal witnesses—two incentivized serial informants who testified that Browning had confessed to them but who, according to Browning, had framed him for Mr. Elsen's murder. (*See* Browning's Opening Br. at 16-17, 70-72, 81-84.)

The state court also acknowledged that the record presented to Browning's jury was distorted by forensic evidence that falsely incriminated Browning. (1ER 213-14, 219.) In its closing argument, the state used blood-type evidence collected from a jacket seized at the scene of Browning's arrest to dramatic and powerful effect. Because this was the only physical evidence that connected Browning directly to the crime, it provided critical corroboration for the informant testimony on which the state's case primarily rested. The prosecutor's closing argument that "[t]he jacket [ ] had Mr. Hugo Elsen's blood on it" and "you don't need to spend five minutes in the deliberation room" to convict based on that evidence, reflects

the significance of the blood-type evidence at trial. (3ER 899-900.) However, more discriminating forensic techniques later established that the blood on the jacket did not in fact belong to the victim. (1ER 213-14.) The value the state placed on this evidence at trial to establish Browning's guilt was thus entirely misplaced and misleading.

Notwithstanding the significant errors that infected Browning's trial, the Nevada Supreme Court expressed confidence that "the evidence of Browning's guilt remains overwhelming" and found it unnecessary to disturb his conviction. (1ER 219.) The state court's summary of this ostensibly overwhelming evidentiary record includes: "admissions of guilt to the Wolfes" (based on the testimony of incentivized, serial informants with lengthy criminal records, who were probable accomplices to the crime); "identifications by three witnesses placing him at or near the crimes" (cross-racial identifications, the most salient of which had unusually strong indicia of unreliability); and Browning's "presence in a hotel room surrounded by the stolen jewelry" (the Wolfes' hotel room, to which Randall Wolfe led the police immediately after accusing Browning of the robbery and murder, where a handful of the jewelry items that were actually stolen were located; the Wolfes later turned over 65 pieces of jewelry to the police and admitted to stealing others). (*See* Browning's Opening Br. at 7-9, 11-12, 16-18.)

For the reasons discussed, below, the evidence of Browning's guilt is anything but "overwhelming."

ARGUMENT

I. EXCULPATORY EVIDENCE WITHHELD BY THE STATE UNDERMINES CONFIDENCE IN A VERDICT BASED ON EVIDENCE OF KNOWN UNRELIABILITY AND ON FALSE CORROBORATION.

The National Registry of Exonerations, maintained by the University of Michigan Law School, records over 1830 individual exonerations since 1989, of which 736 were homicide cases.[4] As Judge Kozinski recently noted, given the great practical and legal challenges involved in establishing post-conviction innocence, it would be extraordinary if these numbers did not very substantially understate the true number of wrongful convictions.[5]

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[4] *See* www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited July 19, 2016). The Registry database excludes the defendants (unknown in number but well over 1000) who were exonerated through the discovery of large scale patterns of official perjury and corruption. *See* Samuel Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, Report by the National Registry of Exonerations (June 2012) (hereinafter "Exonerations in the United States, 1989-2012") at 80-90, www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

[5] Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. iii, xv-xvi (2015) (hereinafter "Kozinski, Criminal Law 2.0) ("I think it's fair to assume—though there is no way of knowing—that the number of exculpations in recent years understates the actual number of innocent prisoners by an order, and probably two orders, of magnitude.").

Analysis of the exoneration cases—supported by the scientific investigation of eyewitness misidentification, false confession, "junk science," and juror behavior, among other issues—has provided increasing insight into the types of evidence that have most regularly contributed to wrongful convictions. These studies not only provide a basis for systemic reforms of investigatory and pre-trial procedures, but can and should inform post-conviction review. For example, when a reviewing court is aware of the error rates and inherent hazards in cross-racial identification testimony—and the human cost of the wrongful convictions that such testimony has regularly produced—it should be markedly less likely to view a cross-racial eyewitness identification as strong evidence of guilt, particularly in the face of proffered exculpatory evidence.

Here, Browning's conviction and the state court affirmance were predicated on evidence of highly questionable reliability, that was never tested at trial against the exculpatory evidence the state had withheld, and that was bolstered by false forensic corroboration. The exoneration studies confirm that in case after case, and in homicide cases in particular, these same types of evidence have led to wrongful convictions, especially when they are not subjected to full evidentiary testing at trial.[6] Once these proven problems of evidentiary reliability are taken seriously, a

[6] *See* Kozinski, Criminal Law 2.0 at xxxiii ("[i]n case after case where an innocent person is exonerated after many years in prison, it turns out that the prosecution

reviewing court could not reasonably have confidence that the jury would have convicted if it had heard the exculpatory evidence Browning was unable to present.

A. Incentivized Informant Testimony Is Inherently Unreliable and Is the Leading Cause of Wrongful Conviction in Capital Cases.

It is not news that the testimony of police informants and cooperating witnesses is a problematic foundation on which to rest a criminal conviction. For many years courts have acknowledged that informant testimony should be viewed with substantial skepticism. *Banks v. Dretke*, 540 U.S. 668, 701 (2004) ("This Court has long recognized the 'serious questions of credibility' informers pose."); *Lee v. United States*, 343 U.S. 747, 757 (1952) ("The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility.") This Court has gone so far as to describe the use of informants in criminal prosecutions as a process "fraught with peril." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). The new era of exoneration only underscores the appropriateness of that characterization.

Systematic study of exoneration cases has provided new insight into the extent to which the outcome of criminal cases, and of capital cases in particular, is skewed by incentivized informant perjury. A comprehensive 2005 study of death

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failed to disclose or actively concealed exculpatory evidence."). *See also* Sections A-D, *infra*.

row exonerations, conducted by the Center for Wrongful Conviction at Northwestern University School of Law, found that the testimony of informants who had incentive to lie was responsible for 49.5% of the wrongful convictions studied, making informant perjury "the leading cause" of sentencing innocent people to death.[7] Current data from the National Registry of Exonerations finds "false accusation/perjury" to be a contributing factor in 68% of wrongful homicide convictions.[8] As Professor Samuel Gross has concluded: "[f]or murder, the leading cause of the false convictions we know about is perjury—including perjury by supposed participants or eyewitnesses to the crime who knew the innocent defendants in advance."[9]

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[7] Rob Warden, N.W. Univ. Sch. of Law Ctr. on Wrongful Convictions, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (2004-05) at 3 (widely available online and at www.law.northwestern.edu/legalclinic/wrongfulconvictions); *see also* Barry Scheck *et al.*, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* 246, 361 (2001) (finding informants were involved in 21% of the 62 exonerations examined and noting that, out of the first 74 DNA exonerations, 19% of the convictions involved "informants/snitches"); Samuel R. Gross *et al.*, *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. & CRIMINOLOGY 523, 543-44 (2005) (hereinafter "Exonerations in the United States, 1989-2003") (noting that out of 340 exonerations studied, at least 97 cases involved perjury by a "jailhouse snitch" or another witness who stood to gain from the false testimony); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76, 86 (2008) (false informant testimony was involved in 18% of the first 200 DNA exonerations).

[8] www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx; s*ee also* n.4, *supra*.

[9] Exonerations in the United States, 1989-2003 at 551.

The Perry Cobb case has salient similarities to Browning's case in regard to the informant evidence presented. Cobb and his co-defendant Darby Tillis were convicted and sentenced to death for the murder and armed robbery of the owner and an employee of a Chicago restaurant. Their accuser, Phyllis Santini, claimed to have been an unknowing accomplice to the crimes. Her accusations even appeared to be corroborated when police found Cobb in possession of a watch taken from one of the victims. Cobb said that he had bought the watch from Santini's boyfriend for $10. While Cobb and Tillis protested their innocence, their ultimate exoneration turned on a lucky coincidence. A law student and aspiring prosecutor happened to read an article about the case, and recalled Santini. He had once done factory work with her and she had confided to him that she and her boyfriend had robbed a restaurant and shot someone—statements he discounted at the time, but that years later were the final straw that led to Cobb's and Tillis's exoneration and gubernatorial pardon.[10]

John Thompson was also convicted based in part on informant testimony. Thompson was convicted and sentenced to death in Louisiana for murder and robbery based on the testimony of a co-accused, Kevin Freeman, and admissions purportedly made to another informant. Freeman testified that he and Thompson

[10] *See* www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/perry-cobb.html (summarizing details of Perry Cobb's and Darby Tillis's prosecutions and exonerations).

committed the robbery together and that Thompson shot the victim. Freeman was contradicted by eyewitnesses who saw only one person running from the crime scene, but his accusations appeared to be corroborated by evidence that, after the killings occurred, Thompson had sold the gun used in the shooting and a ring that had belonged to the victim.[11]

After fourteen years of unsuccessful challenges to his conviction, the case against Thompson finally fell apart. The defense discovered that the prosecution withheld exculpatory forensic evidence on an unrelated armed robbery charge for which Thompson was wrongfully convicted shortly before his capital murder trial. The armed robbery conviction had prevented Thompson from taking the stand at the murder trial to explain he had bought the gun from his principal accuser Freeman. The second informant's allegations were discredited by evidence that he was motivated by a $15,000 reward offered by the victim's family. At Thompson's 2002 retrial, multiple witnesses testified that only one man ran from the crime scene and Thompson explained that he had bought the gun from Freeman after the victim was murdered. The jury acquitted Thompson within minutes.[12]

[11] *See* www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3684 (summarizing details of Thompson's trial and exoneration).
[12] *See id.*

Here, the Wolfes' credibility is in question for two specific reasons beyond their past history of crime, drug addiction, and serial informing.[13] First, they were rewarded for their testimony with benefits including quashed charges and reduced sentences in other cases. (*See* Browning's Opening Br. at 16-17.) That in itself provides a substantial and well-recognized motive for perjury.[14] Second, the Wolfes' relationship to the crimes and to Browning indicates another substantial reason to accuse him falsely. Browning and the items of stolen jewelry recovered at his arrest were found in the Wolfes' room, not in Browning's room. (*See id.* at 8-9.) And the Wolfes retained most of the stolen jewelry until well after Browning was arrested, claiming that Browning had hidden the jewelry in their kitchen, even though the searches conducted at the time of his arrest had not turned up the additional items. (*See id.* at 11-12.) That evidence implicates the Wolfes, at least as much as it does Browning, as probable accomplices to the robbery that resulted

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[13] *See* Kozinski, Criminal Law 2.0 at xxx ("Serial informants are exceedingly dangerous because they have strong incentives to lie or embellish, they have learned to be persuasive to juries and there is no way to verify whether what they say is true.").

[14] *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. Rev. 1375, 1379-90 (2014) (explaining that informants "face overwhelming temptations to commit perjury" to obtain any of a range of benefits including "release or reduction of jail sentences," and that "[e]ven in cases where leniency or immunity is *not* at stake, the prospect of receiving some tangible reward for false testimony can be irresistible") (emphasis added).

in Mr. Elsen's death, and provides a motive for them to deflect knowledge and culpability onto another.

Given the widely recognized unreliability of incentivized informant testimony and the even more acute incentives for potential accomplices in a murder case to provide perjured testimony, the Wolfes' testimony merits minimal weight in an evaluation of the strength of the state's case. The stolen property recovered at Browning's arrest does not change that equation, because it was more closely associated with the Wolfes than with Browning. The Cobb and Thompson cases exemplify the ease with which incentivized informants can create the appearance of corroborating evidence to support false accusations.

B. Eyewitness Identifications Are Often Wrong, Even When They Appear To Be Corroborated, and Are a Leading Cause of Wrongful Conviction.

Decades of social scientific research has resulted in a robust body of research findings on eyewitness identification. As Judge Kozinski of this Court recently observed, the research literature establishes that, contrary to popular belief, eyewitness identification testimony is "highly unreliable."[15] Studies of actual line-up identifications have consistently found that eyewitnesses affirmatively misidentified a line-up "filler"—someone who was *not* suspected of

[15] Kozinski, Criminal Law 2.0 at iii-iv.

the crime—in approximately 20 to 25 percent of cases.[16] Cross-racial identification, as in this case, is especially unreliable.[17] And factors common to disputed identifications in criminal cases, such as the stress of a violent crime, have been shown to further compromise the reliability of identifications.[18] (Ironically, those same factors are frequently and misleadingly cited to juries to bolster the reliability of an identification—exactly as the state did here in arguing that Mrs. Elsen would "never forget the face" of her husband's killer. (3ER 868.))

Much of the social scientific literature predates the era of DNA exoneration, and anticipated what the exoneration cases have now confirmed. Professor Gross's analysis of exonerations between 1989 and 2012 found that mistaken identification was a contributing cause in 43 percent of all known wrongful convictions and in 27 percent of wrongful convictions for murder.[19] Forty-four percent of misidentifications in murder cases and 58 percent of misidentifications in robbery cases also involved mistaken identifications by multiple eyewitnesses.[20]

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[16] *See* Gary L. Wells *et al.*, *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychological Science in the Public Interest 45, 50-51 (2006).

[17] *See* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211-15 (2001).

[18] *See* Kozinski, Criminal Law 2.0 at iii-iv.

[19] Exonerations in the United States, 1989–2012 at 52. The statistics reported are for cases of pure mistaken identification, in contrast to cases in which a witness lies and deliberately misidentifies an uninvolved person as a participant in the crime.

[20] Exonerations in the United States, 1989-2012 at 46.

The exoneration cases underscore the unreliability of even seemingly strong and corroborated identifications. For example, Charles Dabbs was convicted of rape and sentenced to twelve-and-a-half to 25 years imprisonment. The victim had an opportunity to view her attacker and said she was certain of her identification because Dabbs was a distant cousin, whom she had known since childhood and had seen only months before the attack. She also recognized the attacker's hat as similar to one that Dabbs often wore. Antigen testing of blood on the victim's clothing matched Dabbs, further corroborating her testimony. But subsequent DNA testing showed that, despite significant corroboration and an apparently sound basis for an identification, the victim was mistaken and Dabbs was innocent.[21]

Drew Whitley's case involved another seemingly strong and corroborated identification that was conclusively refuted by DNA testing. Whitley was sentenced to life in prison for the murder of the night manager of a McDonald's restaurant in Pennsylvania. Whitley was identified by his neighbor, who worked at the McDonald's, had seen the shooter from only a few feet away, and had heard the shooter's voice. He was also identified by other eyewitnesses. The witnesses' identification of Whitley was corroborated by evidence that blood on Whitley's shoe matched the victim's blood-type, that hair from a stocking mask abandoned at

[21] *See People v. Dabbs*, 587 N.Y.S.2d 90 (N.Y. Sup. Ct. 1991).

the scene was similar to Whitley's hair, and that Whitley confessed to a fellow inmate while incarcerated pre-trial. After eighteen years in prison, DNA testing excluded Whitley and proved his innocence.[22]

Kirk Bloodsworth, the first death row prisoner to be exonerated by DNA, was convicted and sentenced to death in Maryland for the rape and murder of nine-year-old Dawn Hamilton. Five eyewitnesses identified Bloodsworth as either with the victim or near the scene of the crime at around the time the crime occurred. The prosecution also offered corroborating forensic evidence that supposedly connected Bloodsworth's shoes to marks found on the victim's body. Nearly ten years after he was convicted, DNA evidence conclusively established Bloodsworth's innocence.[23]

In contrast to cases where seemingly persuasive identification testimony was shown to have been mistaken, the identification testimony in Browning's case is not even superficially credible. Only one witness, Mrs. Elsen, identified Browning as the assailant. She had only a brief, limited side-view of the perpetrator, under

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[22] *See* www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3739 (summarizing the details of Whitley's trial and exoneration).

[23] *See* www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3032 (summarizing the details of Bloodsworth's trial and exoneration). For additional examples of wrongful conviction based on eyewitness identification supported by corroborating evidence *see* E. Connors *et al.*, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* at 43-59 (U.S. Dept. of Justice, National Institute of Justice) (1996) (discussing the DNA exonerations of Ronald Cotton, Frederick Rene Daye, Ricky Hammond, and Edward Honaker).

highly stressful circumstances. (3ER 663-65.) She had told police she would be unable to make any identification. (4ER 997.) She selected other individuals and not Browning out of a photographic line-up. (4ER 997-98.) Her identification of Browning at trial was tentative and equivocal, stressing repeatedly that she had a limited opportunity to observe the perpetrator and only saw him from the side. (3ER 663-65.) And her identification was made only after she had seen Browning at approximately eighteen separate pre-trial proceedings. (*See* Browning's Opening Br. at 17.) The capacity to make eyewitness identifications does not improve over time—to the contrary, studies show that memory for identifying information degrades quickly.[24] It is overwhelmingly likely that Mrs. Elsen's tentative identification was the product of her repeated viewings of Browning in pre-trial proceedings and other post-observation psychological factors.

C. Misleading or False Scientific Evidence Is a Contributing Cause in Nearly One Quarter of Wrongful Convictions.

Misleading forensic evidence is another well-recognized cause of wrongful conviction, as exemplified in cases already discussed above and many others. According to the National Registry of Exonerations, misleading or false forensic evidence was presented in 23% of all identified exoneration cases and 23% of

[24] *See* M. P. Gerrie *et al.*, *False Memories, in Psychology and Law: An Empirical Perspective* 222, 226 (Brewer and Williams eds. 2005) ("We have known for over 100 years that memories fade, sometimes rapidly in a function known as the forgetting curve . . . [and] that as memories fade, they also become more susceptible to suggestion.").

exonerations for murder.[25] Misleading or false scientific evidence is particularly problematic when paired with unreliable informant testimony or false eyewitness identification. In Dabbs, Whitley, Bloodsworth, and myriad other cases, the prosecution persuaded the jury in part by presenting forensic evidence that appeared to corroborate informant testimony and eyewitness identifications but that was later shown to be false corroboration.

Browning's jury labored under a similar false impression as to the blood found on Browning's jacket. Notably, the evidence that the blood on the jacket matched Mr. Elsen's blood-type was the only physical evidence that connected Browning directly to Mr. Elsen's murder. If credited by the jury, it corroborated the Wolfes' accusations and Mrs. Elsen's identification. But as DNA testing has now established, the blood on the jacket did not belong to Mr. Elsen. (1ER 213-14.)

D. *Brady* Violations Are Strongly Correlated with Wrongful Conviction.

As Judge Kozinski summarizes: "[i]n case after case where an innocent person is exonerated after many years in prison, it turns out that the prosecution failed to disclose or actively concealed exculpatory evidence."[26] The National Registry of Exonerations reports that serious official misconduct, including *Brady*

[25]www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.

[26] Kozinski, Criminal Law 2.0 at xxxiii.

violations, was a contributing factor in 67% of identified wrongful convictions for homicide.[27] This correlation between *Brady* violations and wrongful conviction should not be surprising. By denying defendants material evidence that would enable them to advocate effectively for their innocence, *Brady* violations undermine the truth-seeking function of the adversarial process and compound systemic reliability problems such as eyewitness misidentification and the use of incentivized informants.

E. Browning Should Have the Opportunity to Present His Exculpatory Evidence at a New Trial.

Browning contends he was prejudiced by the state's failure to turn over exculpatory evidence in violation of *Brady*. (*See* Browning Opening Br. at 46-62, 74-75.) Relatedly, he contends he was prejudiced under *Strickland* by his trial counsel's professionally deficient performance—which the state court recognized, albeit only in part—in failing to discover that exculpatory evidence. (*See id.* at 77, 84-85.)

Browning is entitled to a new trial on his *Brady* claims if the evidence withheld creates "a 'reasonable probability' of a different result." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the

[27]www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.

evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, __ U.S. __, 132 S. Ct. 627, 630 (2012) (quoting *Kyles*, 514 U.S. at 434). *Strickland* prejudice is subject to essentially the same "reasonable probability" standard. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). A defendant is entitled to reversal under *Strickland* if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The reasonable probability standard is satisfied here, on any objectively reasonable review of the record.

Apart from the Wolfes' compromised testimony and Mrs. Elsen's tentative and equivocal identification of Browning, the principal evidence of Browning's possible guilt was the recovery of latent prints at the crime scene.[28] Browning points out that the prints were lifted from a location that was unenclosed and within the reach of the public, that he had visited the store, and that there is no evidence to show when the prints were deposited. He also points to the absence of forensic evidence connecting him to the blood-spattered crime scene, and the lack of any testimony from the two bystander witnesses-who believed that they saw

[28] As Judge Kozinski observes, the supposed infallibility of fingerprint identification is one of many myths that lead to significant overconfidence in the reliability of criminal trial outcomes. Kozinski, Criminal Law 2.0 at iv.

Browning pass by the Elsens' store, suggesting that he was bloodied or was carrying items taken in the robbery.

At a new trial Browning would present the new exculpatory evidence that his afro hairstyle did not remotely resemble the victim's detailed description of the perpetrator's hair as "loosely curled," "shoulder length," and "wet," and that he did not create the trail of bloody footprints left at the crime scene by the perpetrator. That evidence would have given evidentiary substance to an otherwise barebones trial defense based principally on impeachment, and thus provided Browning's jury with substantial new reasons to doubt the reliability and credibility of the state's principal witnesses.

A reviewing court cannot reasonably say, on that very different record, that there is not even a "reasonable probability" that Browning's defense would have swayed the jury. Whether Browning's inability to present exculpatory evidence is viewed from the perspective of *Brady* or of *Strickland*, Browning was prejudiced and a new trial is warranted.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to reverse the district court's order and grant a writ of habeas corpus.

Dated: July 20, 2016

COOLEY LLP

By: /s/ Maureen P. Alger

Maureen P. Alger
Attorneys for Amicus Curiae
The Innocence Network

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because the brief contains 4,678 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rules of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in Microsoft Word 2007 in Times New Roman, size 14.

CERTIFICATE OF SERVICE

I, Brandie Giovannoni, hereby certify pursuant to Federal Rule of Appellate Procedure 25-5(g) that I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT AND FOR REVERSAL** with the Clerk of the Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 20, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 20, 2016 By: */s/ Brandie Giovanoni*

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RENEE BAKER, Warden

Respondent.

On Appeal From the United States District Court
for the District of Nevada
Case No. 3:05-cv-00087-RCJ-WGC
The Honorable Robert C. Jones

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* ON BEHALF OF THE INNOCENCE NETWORK IN SUPPORT OF APPELLANT AND FOR REVERSAL

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I. INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 29, the Innocence Network respectfully moves this Court for leave to file the accompanying brief of *amicus curiae*.[1] The brief supports the Appellant Paul Browning and reversal of the district court's order denying habeas corpus relief.

The Innocence Network meets the requirements of Rule 29 because it is interested in the outcome of this case due to the nature of its work on behalf of the wrongfully convicted. The Innocence Network's experience with the causes of wrongful conviction furnishes it with an important perspective that is relevant to the Court's analysis.

II. ARGUMENT

Browning's habeas petition primarily challenges the denial of his petition for post-conviction relief by the Nevada Supreme Court. Among other matters, Browning's state court petition raised claims of error under *Brady v. Maryland* and *Strickland v. Washington*, relating to his inability to present certain exculpatory evidence at trial.

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[1] Appellant consents to the Innocence Network filing a brief as *amicus curiae* in this matter. Counsel for *amicus* contacted the Nevada Attorney General on July 18, 2016 to seek consent to file, but has not received a response.

The state court identified several errors at the trial court level, including errors that deprived Browning of access to exculpatory evidence. (*See* Excerpts of Record 193-94, 219 (Opinion of the Nevada Supreme Court, dated June 10, 2004).)

Nevertheless, the state court refused to overturn Browning's conviction. According to the state court, irrespective of these errors, Browning's conviction was supported by "overwhelming" evidence. (ER 219). The evidence cited by the state court as "overwhelming" consisted primarily of the testimony of serial informants with obvious incentives to lie and cross-racial eyewitness identifications. These types of evidence are widely recognized to be inherently unreliable and are strongly correlated with wrongful conviction. In Browning's case this inherently unreliable evidence was not substantially corroborated by objective evidence and, indeed, was misleadingly bolstered by false forensic corroboration—another classic hallmark of wrongful conviction. This is not a record on which a defendant should be denied the opportunity to present exculpatory evidence at a new trial. Therefore, the Innocence Network supports Appellant's request that a writ of habeas corpus be granted.

The Innocence Network is an association of 67 member organizations that provide pro bono legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. These member organizations collectively represent hundreds of prisoners with innocence

claims across the United States, District of Columbia, and internationally. 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 lessons learned from cases in which the system convicted innocent individuals, the Innocence Network promotes further study and advocates reform to improve the truth-seeking functions of the criminal justice system in an effort to prevent future wrongful convictions.

The Innocence Network has a substantial interest in the Court's resolution of this case. Given its work to ensure that innocent persons are not wrongfully convicted, the Innocence Network has an interest in enforcement of obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and a specific interest in the innocence-related claims raised here.

This *amicus curiae* brief is desirable within the meaning of Rule 29 because it provides perspective on the relevance of known causes of wrongful conviction to post-conviction review, and on how *Brady* violations in particular compound the problem of wrongful conviction by undermining the truth-seeking function of the adversarial process and the reliability of trial outcomes. The perspective of the Innocence Network and its member organizations, given their broad experience representing those who have been wrongly convicted, is relevant to the court's analysis of this appeal.

III. CONCLUSION

Amicus curiae satisfy all the criteria set forth in Federal Rule of Appellate Procedure 29(b). The Innocence Network has a concrete interest in the outcome of this appeal, and this brief presents the useful perspective of an organization and attorneys who, every day, work with prisoners whose claims of wrongful conviction will be directly affected by this Court's decision.

For these reasons, *amicus curiae* respectfully requests that the Court grant this Motion for Leave to File Brief as *Amicus Curiae* in Support of Appellant and for reversal.

Respectfully submitted,

Dated: July 20, 2016

COOLEY LLP

By: */s/ Maureen P. Alger*
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Attorneys for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 20, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Brandie Giovannoni

Brandie Giovannoni

Dated: July 20, 2016