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 AND FOR INDIAN RIVER COUNTY (Case No. 88-748CF)

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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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 connected to 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 general 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 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 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 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.*

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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. This 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." Nat'l 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.

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, at 2009 Innocence Network Conference, Houston, TX (Mar. 21, 2009). The FBI is the only 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 future 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 April 7, 2010). 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.

As a result of this 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.

[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*.

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 the FBI against a criminal defendant. Thus, the FBI is working 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

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

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 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 202 cases where CBLA testimony was presented at trial. Of these, the FBI determined in seventy-seven cases that the testimony was appropriate, while in 125 cases, the FBI determined that the testimony was inappropriate in one of the aforementioned

[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. 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.

ways. *See* Koropp Presentation, *supra*. **Twenty-one of these 125 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, seek *pro bono* counsel to file a motion to vacate the conviction based on this newly discovered evidence, or consult on cases of individuals already represented by counsel.

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 clearly existed but were unknown to the court and the parties.[8] Even after the release of the NRC report in 2004, and when announcing its decision to discontinue use of CBLA in 2005, the FBI did not disavow prior CBLA testimony;[9] not changing its position until it agreed to review every CBLA case in 2007.

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[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). Similarly, to the extent that the FBI agent provided false or misleading testimony regarding its analysis, conclusion, or studies that existed which prove its conclusions are reliable, such a violation imputes to the prosecutor and a due process violation has occurred unless the prosecution can demonstrate it was harmless. *See Giglio v. United States*, 405 U.S. 150 (1972); *Guzman v. State*, 868 So. 2d 498, 506-07 (Fla. 2003); *Tejada v. Dugger*, 941 F.2d 1551, 1556 (11th Cir. 1991). A postconviction claim based on such violations is cognizable in a Fla. R. Crim. P. 3.851 motion.

[9] The lower court erred when it determined that the 2008 FBI letter was essentially the same as the NRC report and the FBI press release. The court

The case-specific FBI letters determining the impropriety of CBLA testimony mark the very first time in the long 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. Indeed, these letters are essentially an expert recantation, likely rendering them *per se* newly discovered evidence.[10]

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

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was aided in this error by the prosecutor's mischaracterization of the content of the 2005 FBI press release. Despite the prosecutions description in questioning Mr. Tobin and Dr. Spiegelman, the FBI press release made no mention of, much less a conclusion regarding, the comparison of bullets and boxes of bullets. (2009 Evidentiary Hearing Transcript, at 2705, 2745).

[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 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").

discovered until they were received by defendants, constitute newly discovered evidence pursuant to Fla. R. Crim. P. 3.850, 3.851, and *Jones*.

As will be shown, the lower court applied a different, and incorrect, standard to determine whether the case-specific FBI letter that Wyatt received in December 2008 was in fact newly discovered evidence. Citing this Court's opinion in *Kearse v. State*, 969 So. 2d 976, 987 (Fla. 2007), the lower court stated that in order to qualify as newly discovered evidence, "the letter must have been ***in existence at the time of trial***, and unknown to the trial court, the defendant, or counsel." Order Denying Supplement to Amendment Motion to Vacate Judgments of Conviction and Sentence, *State v. Wyatt*, Case No. 311988CF000748A, at 5 (Oct. 22, 2009).

In *Kearse*, this Court cited to *Jones v. State*, 709 So. 2d 512, 521 (Fla. 1998), as authority for the newly discovered evidence standard. Significantly, however, *Jones* does not include any requirement that the evidence had to have been in existence at the time of trial, despite contrary language in *Kearse*. We respectfully suggest the added requirement in *Kearse* was not a deliberate attempt to alter the venerable *Jones* standard but a rule limited to *Kearse* and cases with similar facts.

In *Kearse*, the defendant was asserting that impeachment information regarding a state's mental health expert's misconduct that occurred after his trial should have been entertained as newly discovered. This Court correctly noted that because the mental health expert committed the misconduct after the trial and not

before, the misconduct could not have affected his trial testimony, could not have been used to impeach the expert at the trial and, therefore, was not newly discovered evidence.

The Second District Court of Appeal, considering a similar situation, distinguished *Kearse*, just as Amici would, noting that the facts in *Kearse*:

> differ[] substantially from the fingerprint identification situation in the present case. Here, the fingerprint match was not known at the time of the original trial because the analysis had not been performed, but this evidence does not equate to a future event that had not yet occurred, as in the *Kearse* case. It cannot be said that the match evidence did not exist at the time of the Schofield trial. In other words, if the fingerprints in the car can now be matched to Scott's fingerprints, then that was also true at the time of the Schofield trial.

Schofield v. State, --- So.3d ---- (Fla. 2d DCA 2009). The same logic for disregarding the "in existence at the time of trial" language in *Kearse* applies in the instant case.

This case does not involve some bad act by the FBI agent that occurred after Mr. Wyatt's trial. Like the recent fingerprint match in *Schofield*, which could not have been known until the state made the comparison to the database and released the result, the case-specific repudiation by the FBI of its own analyst's testimony in Mr. Wyatt's trial could not have been known until the FBI letter was given to Mr. Wyatt's counsel in December 2008. Moreover, while the FBI letter did not exist at the time of trial, it is merely a vehicle used by the FBI to, for the first time, admit a conclusion that did exist at the time of trial: that CBLA testimony provided

by the FBI was scientifically flawed and misleading. Thus, the lower court erred in determining that the 2008 FBI letter was not newly discovered evidence.

Additionally, 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 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 seventy-seven 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 Rule 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-one 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-one cases, *Jimmy Ates v. State*, based on the FBI's case-specific letter. 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, will not begin litigation until they receive the case-specific FBI letter from the prosecutor or Amicus.

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 the Defendant received 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.

A comparison of two CBLA cases in Florida is instructive. In the instant case, the lower court determined that Mr. Wyatt's CBLA claim is time barred because it was not raised within one year of the release of the NRC report. Had

Mr. Wyatt, however, done what the lower court had suggested, the lower court may have simply denied the claim as being a difference in opinion of one group of experts over another, which does not qualify as newly discovered evidence. *See Schwab v. State*, 969 So. 2d 318, 325-26 (Fla. Nov. 1, 2007) (holding that new opinions or new research studies are not newly discovered evidence)

This precise situation happened in the case of Derrick Smith, currently on appeal in this Court. Smith raised his CBLA claim within one year of the NRC report. The lower court denied the claim citing to *Schwab* and stating that the NRC report was merely a new opinion critiquing CBLA but that, based on he NRC report, CBLA was still a "reasonably accurate way of determining whether two bullets could have come from the same compositionally indistinguishable volume of lead." Order, *Smith v. State*, Case No. 83-02653 (Nov. 7, 2007).

This creates a no-win situation for defendants in CBLA cases—raise the claim prematurely based on the NRC report and be denied because the NRC report is not newly discovered evidence, or raise the claim based on the case-specific letter and be denied as untimely for failing to raise the claim within, in a capital case, one year from the release of the NRC report. This conundrum and uncertainty in treatment of CBLA cases among jurisdictions in Florida begs for this Court to deem the case-specific letter as the beginning of due diligence for newly discovered evidence in all CBLA cases.

Moreover, the FBI and Winston and Strawn have only presently reviewed roughly fourteen 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 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.

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, 3.851, from the date of the defendants' receipt of that letter.

Respectfully Submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served by U.S. mail on this _____ day of April, 2010, to the following persons:

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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.

_____
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