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

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

BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL)
IN SUPPORT OF PETITIONER JASON DEREK KRAUSE

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INTRODUCTION

The Constitution requires a fair trial. One element of fairness is the prosecution's obligation to turn over exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 674–75 (1985); *Brady v. Maryland* 373 U.S. 83 (1963). Where the State has obtained "a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception," such "a contrivance by a State to procure the conviction and imprisonment of a defendant is inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

Unfortunately, prosecutors do not always comply with their constitutional obligation. *See e.g.*, *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2014) (Kozinski, J. dissenting from denial of en banc review) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."). Sometimes prosecutors disclose exculpatory evidence too late and sometimes not at all.

When a *Brady* violation has been established, a reviewing court should take into account the effect of the suppressed evidence on the trial preparation, not just the specific hours spent before a jury. "The real harm is done before the trial and it is to that period rather than to the trial and the highly speculative impact on the

jury that courts should look. If the question asked by the court is to correspond to the real needs of the defendant out of which these cases grew, and to the factor which gives these cases constitutional dimensions, it must be, what effect did the suppression have on defendant's preparation for trial?" Comment, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 14 Yale L.J. 136, 145 (1964). Indeed, an important purpose of the prosecutor's obligations under *Brady* is to "allow[] defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense." *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009).

The State's failure to comply with its *Brady* obligation had an obvious effect on defense trial preparation in this case: Faced with evidence from a purported scientific expert that the bullet that killed Charles Thurman belonged to the Defendant, Jason Krause—and without the withheld evidence that the "science" was invalid and unreliable—Krause and his trial counsel abandoned investigation and presentation of defense theories inconsistent with the State's "science." Focusing on a theory that was consistent with the State's expert, *i.e.*, that it was indeed Krause's shot but it was accidental, Krause and his lawyer never learned that real scientific proof was and is available to prove that Krause could not possibly have killed Charles Thurman. Had the State disclosed the unreliability and invalidity of the expert's "science" pre-trial, the investigation and trial would

have been entirely different. As a result, this Court should conclude that there is a reasonable probability of a different outcome and reverse.

INTERESTS OF AMICI CURIAE

NACDL is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. NACDL is recognized by the American Bar Association as an affiliate organization, and has full representation in the ABA's House of Delegates. As part of its mission, NACDL strives to defend individual liberties guaranteed by the Bill of Rights.

ARGUMENT

I. When Exculpatory Evidence is First Revealed After Trial, a Reviewing Court's Prejudice Analysis Must Include an Assessment of How the Defense Strategy Would Have Differed If the State Had Timely Disclosed the Information.

D. The Prosecutor's Duty to Disclose Exculpatory Evidence

Due process imposes an "inescapable" duty on the prosecutor "to disclose known, favorable evidence rising to a material level of importance." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). This duty of disclosure is based on the most fundamental notions of fairness, which bear repeating here:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.

Brady, 373 U.S. at 87–88.

A *Brady* violation occurs when (1) evidence is favorable to the accused because it is exculpatory or impeaches a prosecution witness; (2) the prosecution fails to disclose such evidence, either intentionally or inadvertently; and (3) the defendant is prejudiced because the undisclosed evidence is material.

It is well established that *Brady* information need not be admissible to trigger the prosecution's disclosure obligation. *See, e.g., Ellsworth v. Warden*, 333 F.3d 1 (1st Cir. 2003) (*Brady* violation where prosecution withheld double-hearsay note that complainant had made false allegations in the past because, even though inadmissible, it might have led to admissible evidence); *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (*Brady* information includes competent evidence, material that could lead to competent evidence, or any information that "would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise"); *United States v. Bowie*, 198 F.3d 905, 909 (D.C.

Cir. 1999) ("[T]o refute [Defendant]'s contention that the undisclosed information was 'material' in the *Brady* sense, it is not enough to show that the [suppressed information] would be inadmissible."). [1]

B. Exculpatory Evidence Can Significantly Impact Trial Strategy

"Exculpatory" information is information "of a[ny] kind that would suggest to any prosecutor that the defense would want to know about it." *Miller v. United States*, 14 A.3d 1094, 1110 (D.C. 2011) (internal quotation and citation omitted) (endorsing this "eminently sensible standard"). In part because an important purpose of the prosecutor's obligations under *Brady* is to allow trial counsel to investigate and develop an appropriate defense, *Perez*, 968 A.2d at 66, it has been "well settled" for more than a decade that "'the prosecution must disclose exculpatory material 'at such a time as to allow the defense to use the favorable material effectively in the presentation of its case,'" even when that requires pretrial disclosure, *Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993)

[1] *Brady* also encompasses information relevant to the admissibility of evidence, including any information relevant to evidentiary questions or important pretrial constitutional motions, such as motions to suppress. *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (*Brady* violated in pretrial context by suppression of report that would have demonstrated that defendants had Fourth Amendment standing to challenge search); *Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000) (*Brady* violation when government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a *Miranda* violation had occurred—and thus, crucial to the admissibility of the confession).

(quoting *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir.), *cert. denied*, 429 U.S. 924 (1976)).

Brady encompasses all favorable information, whether or not it is admissible at trial or even previously documented. Although *Brady* itself uses the term "evidence," the *Brady* doctrine encompasses any information, directly admissible *or not*, that would be favorable to the accused in preparing her defense, including information useful to preparation or investigation that may have some meaningful impact on defense strategy. *Wood v. Bartholomew*, 516 U.S. 1 (1995) (polygraph results showing possible deception not *Brady* because they were inadmissible and defense counsel admitted they would not have affected trial strategy or preparation).

As *Bartholomew* illustrates, an essential aspect of *Brady* has always been the determination of whether the undisclosed evidence would have made a significant difference in the preparation of the case. *Id.* at 7. Unlike the facts reviewed in *Bartholomew*, where the favorable evidence was neither admissible nor capable of affecting trial strategy, in Krause's case, the withheld evidence was both admissible and demonstrated to have had a material effect on trial preparation and defense strategy. *Bartholomew* confirms that such situations must be material *Brady* violations. *Id.*

Evidence is "material" if there is a reasonable probability that its disclosure

would have changed the outcome of the proceedings. *Kyles*, 514 U.S. at 434. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court explained that "evidence is material, only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. The test is *not* whether there is sufficient other evidence to support a verdict, but whether a reviewing court can be confident that the jury would have returned the same verdict had the *Brady* violation not occurred. *Lindsey v. King*, 769 F.2d 1034, 1042–43 (5th Cir. 1985) (holding that the failure to disclose evidence impeaching one of the two eyewitnesses caused sufficient prejudice to undermine confidence in the outcome, even though the other witness's testimony supported the verdict by itself).

In *United States v. Kennedy*, 890 F.2d 1056, 1059 (9th Cir. 1989), the court held "in determining the materiality of undisclosed information, a reviewing court may consider 'any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.'" *Id.* (quoting *Bagley*, 473 U.S. at 683). However, because the suppressed documents had a "fairly insignificant impeachment effect," the court concluded that Kennedy was not prejudiced. Contrast that to the case at bar, where a purported scientific expert had himself previously admitted his "science" was fatally flawed, and the result is

clear: the withheld evidence was material.

C. Prejudice from Belated Discovery Is Evaluated In Terms of Its Effect on Defense Preparation and Strategy.

Similar to *Strickland* prejudice[2], *Brady* materiality takes into account not only the prosecution's indiscretions but also the rest of the trial, including defense counsel's performance. The Supreme Court stressed in *Bagley* that the materiality inquiry concerns not only what the jury heard, but also how defense counsel's preparation and strategy would have been altered. *Compare Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5 (1st Cir. 2003) (assuming without deciding that inadmissible evidence "could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it"), *with United States v. Romero*, 54 F.3d 56, 61 (2d Cir. 1995) (no new trial though government did not disclose accomplice's repudiation of admissions before trial because recantation lacked credibility, was presented to jury, and earlier disclosure would not have changed defense strategy).

Any competent trial lawyer knows that a theory of the case must either incorporate all indisputable facts, or at least be neutral to them. *See* Pozner, Larry S & Dodd, Roger J., *Cross Examination: Science and Techniques* (1993). Belated disclosures, as the Second Circuit acknowledged in *Leka v. Portunondo*, 257 F.3d 89, 100 (2d Cir.2001), may "throw existing strategies and [trial] preparation into

[2] *Strickland v. Washington*, 466 U.S. 668 (1984).

disarray … when a trial already has been prepared on the basis of the best opportunities and choices then available." As a result, *Brady* caselaw recognizes that "the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use." *Leka*, 257 F.3d at 100; *see also Perez v. United States*, 870 F.2d 1222 (7th Cir. 1989) ("the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.").

Precisely because of the materiality of evidence that affects trial strategy, it would "eviscerate the purpose of the *Brady* rule and encourage gamesmanship were courts to allow the government to postpone disclosures to the last minute, during trial." *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009). *Burke* continued:

> If a defendant could never make out a *Brady* violation on the basis of the effect of delay on his trial preparation and strategy, this would create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statements or until it is too late for the defense to effectively use the disclosed information. *It is not hard to imagine the many circumstances in which the belated revelation of* Brady *material might meaningfully alter a defendant's choices before and during trial: how to apportion time and resources to various theories when investigating the case, whether the defendant should testify, whether to focus the jury's attention on this or that defense, and so on.* ***To force the***

> ***defendant to bear these costs without recourse would offend the notion of fair trial that underlies the* Brady *principle.***

Id.(emphases added); *see also United States v. Washington*, 263 F.Supp.2d 413, 422 (D. Conn. 2003) (because of belated *Brady* disclosure, "there was no opportunity for the defense to weave [the prosecution witness'] conviction into its overall trial strategy.").

In conducting the retrospective review made necessary by the State's constitutional violation, a reviewing court must keep in mind the need of defense counsel to explore a range of alternatives in developing and shaping a defense. Further, "[t]he more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use,'" *DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006), *i.e.*, "the opportunity for a responsible lawyer to use the information with some degree of forethought." *Leka*, 257 F.3d at 103; *Miller*, 14 A.3d at 1111–12. Due to late disclosure a criminal defense lawyer may have "abandon[ed] lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley*, 473 U.S. at 682; *see also United States v. Washington*, 263 F.Supp.2d 413, 422 (D. Conn. 2003) (Because of belated *Brady* disclosure, "there was no opportunity for the defense to weave [prosecution witness'] conviction into its overall trial strategy.").

II. Mr. Krause Was Harmed by the State's Failure to Timely Disclose the Flaws In the Forensic Science

Faulty forensic science has the potential to contaminate more than just the scientific portion of the evidence — it is capable of contaminating the entire case. As a result, a reviewing court must attempt to discern how a case would have proceeded differently, if the State had made timely disclosure of exculpatory evidence.

The case of William O'Dell Harris, who was wrongly convicted of rape, demonstrates this point. Harris was originally eliminated as a suspect when the victim viewed a photo lineup and said she knew him and he did not rape her. However, the victim testified at trial that she was certain he was her rapist. Between the victim's elimination of Harris as a suspect and her testimony in the trial, what later proved to be faulty scientific serology "evidence" was shared with non-scientific witnesses, including the investigating deputies and the victim. The exposure to faulty scientific evidence reinforced the investigators' and victim's belief that the eyewitness elimination of Harris must be wrong. Years later, Harris was exonerated when DNA evidence proved his innocence after a report by the American Society of Crime Laboratory Directors concluded that the police serologist who testified at Harris's trial had engaged in numerous acts of misconduct. *See* Ravenell, Teressa, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 Temple L. Rev. 689, 689–92 (2008);

http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3285. So, too, here, the evidence shows that investigators and even Krause himself were misled by faulty scientific evidence shared with them pretrial.

It is for this reason that the prejudice from the failure to timely disclose exculpatory evidence must carefully evaluate how the trial strategy would have changed if the prosecution had met its constitutional obligations.

In *Scurr v. Niccum*, 620 F.2d 186 (8th Cir. 1980), a federal habeas court held that the failure by prosecution to provide defense with exculpatory evidence in advance of a state court murder trial denied defendant his right to fair trial. Evidence adduced at Niccum's murder trial established that the victim died from repeated blows to the head. The state's case against Niccum rested primarily on the testimony of a man named Thomas Logsdon, a personal friend and supposed accomplice of the defendant. Although not purporting to be an eyewitness to the incident, Logsdon testified that Niccum killed the victim. Niccum, in turn, offered testimony strongly implicating Logsdon as the perpetrator of the crime. After trial, Niccum first learned that the police had investigated a third person, dropping him as a suspect apparently only because Niccum had been arrested.

The State argued that the undisclosed investigation of this potential third-party perpetrator was not material because Niccum implicated only Logsdon in the crime. The court disagreed:

> Much emphasis has been placed on this aspect of the case, the state urging that a new trial is not warranted here because the *theory of defense actually used, as reflected in the trial testimony of the defendant, is hopelessly inconsistent with the possibility of a third party perpetrator*. The state would thus have the court evaluate the potential impact of the undisclosed evidence in the context of the entire record, the standard of review required by the more stringent test of materiality applied in situations where only a general request for disclosure had been made. We reject this suggestion. For it amounts, in effect, to a claim that evidence wrongfully suppressed by the prosecution in advance of trial can be considered material only if it supports the particular defense strategy actually employed by the defendant, a strategy which, of necessity, would have been selected without the benefit of evidence the defendant was entitled to consider and use. We decline to decide whether the evidence suppressed in this case is irreconcilable with the defendant's trial testimony, or whether that evidence would create a reasonable doubt on the record as a whole. Instead, it will suffice to observe that the withheld information need only be, and is, significantly supportive of a claim of innocence on the part of the defendant. ***Having said this, we refuse to bind the defendant to a trial strategy selected in the partial vacuum created by the state's wrongful suppression of material evidence.***

620 F.2d at 191, n.3 (emphases added).

The case at bar vividly demonstrates this type of harm. The court below measured the harm flowing from the withheld evidence only by its effect at the trial as it happened. When properly stepping back, and looking at the harm to Krause's entire defense, especially pretrial, in investigation and case development, it is clear that Krause's defense theory and trial would have been completely different had this critical, exculpatory information been shared. There can be no confidence in a verdict obtained at a trial at which defense counsel was wrongly dissuaded from investigating, let alone presenting, evidence of his client's actual

innocence. *Bagley*, 473 U.S. at 682. The Constitution demands Krause receive a new and fair trial.

CONCLUSION

For the foregoing reasons, the National Association of Criminal Defense Lawyers (NACDL) respectfully request that the Court grant review in this case, reverse the superior court's denial of Mr. Krause's petition for post-conviction relief, and vacate his conviction.

RESPECTFULLY SUBMITTED this 7th day of May 2014.

/s/ Stephen R. Glazer

Stephen R. Glazer
Counsel for *Amici* NACDL

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Criminal Procedure 31.13 and 31.25, I certify that the foregoing Brief of *Amici Curiae* NACDL in Support of Petitioner Jason Derek Krause uses proportionately spaced type of 14 points, is double-spaced using Times New Roman font, and contains 3355 words.

Dated this 7th day of May, 2014.

/s/ Stephen R. Glazer
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