Circuit Court for Baltimore County
Case No. 03-K-93-000530

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0204

September Term, 2018

JAMES ALLEN KULBICKI

V.

STATE OF MARYLAND

Fader, C.J.,
Arthur,
Leahy,

JJ.

Opinion by Arthur, J.

Filed: January 2, 2020

In 1995 a Baltimore County jury convicted appellant James Kulbicki of first-degree murder and of using a handgun in the commission of a felony. He was sentenced to life imprisonment without parole for the murder conviction, with a consecutive term of 20 years for the handgun conviction. He appealed, and we affirmed in an unreported opinion. The Court of Appeals declined to issue a writ of certiorari. *Kulbicki v. State*, 345 Md. 236 (1997).[1]

Kulbicki's conviction was based, in part, on expert testimony concerning comparative bullet lead analysis, or "CBLA," a "process that involves the comparison of the elemental composition of bullets in an effort to determine whether different bullets originated from the same vat of lead." *Clemons v. State*, 392 Md. 339, 347 (2006). CBLA was premised on the dubious assumptions that "bullets produced from different sources of lead would have a unique chemical composition" (*Kulbicki v. State*, 440 Md. 33, 49 (2014), *rev'd*, 136 S. Ct. 2 (2015)), and that "no two sources of lead would ever produce bullets with the same chemical composition." *Id.* at 51. Years after Kulbicki's conviction became final, the Court of Appeals held that CBLA is invalid, unreliable, and inadmissible. *Clemons v. State*, 392 Md. at 372.

Kulbicki's conviction was also based, in part, on expert testimony from the State's ballistic expert, Joseph Kopera. Years after Kulbicki's conviction became final, it was discovered that Kopera had lied about his academic credentials in hundreds of cases (*see*,

[1] This was actually Kulbicki's second conviction for those offenses. This Court reversed the first conviction and remanded the case for the second trial (*Kulbicki v. State*, 102 Md. App. 376 (1994)), at which Kulbicki was convicted again.

e.g., *McGhie v. State*, 449 Md. 494, 505 (2016); *State v. Hunt*, 443 Md. 238, 240 (2015)), including Kulbicki's. *Kulbicki v. State*, 207 Md. App. 412, 426-28 (2012), *aff'd*, 445 Md. 451 (2015).

Kulbicki filed an application for post-conviction relief. As amended, the petition complained, among other things, that his conviction was premised on inadmissible CBLA evidence and on Kopera's perjured testimony. The circuit court denied the petition, and this Court affirmed. *Kulbicki v. State*, 207 Md. App. 412 (2012).

In a 4-3 opinion, the Court of Appeals reversed. *Kulbicki v. State*, 440 Md. 33 (2014). Although Kulbicki had not pursued an allegation of ineffective assistance of counsel on appeal, the majority reasoned that Kulbicki had been denied his Sixth Amendment right to effective assistance of counsel (*see generally Strickland v. Washington*, 466 U.S. 668 (1984)) because his trial counsel had not uncovered a 1991 study that "presaged the flaws in CBLA evidence" (*Kulbicki v. State*, 440 Md. at 40) and had not used the study in cross-examining the State's expert on that topic. *Id.* at 49-53. "Given the State's rigorous reliance on CBLA evidence" (*id*. at 56), the majority concluded that Kulbicki had shown a "substantial possibility" that the outcome of his trial would have been different had trial counsel explored that line of questioning. *Id.*

The Supreme Court reversed. *Maryland v. Kulbicki*, 136 U.S. 2 (2015) (per curiam). The Court reasoned that "Kulbicki's trial counsel did not provide deficient performance when they failed to uncover the 1991 report and to use the report's so-called methodological flaw against [the State's expert] on cross-examination." *Id*. at 5. In light

of that conclusion, the Court did not "decide whether the supposed error prejudiced Kulbicki." *Id*.

On remand, the Court of Appeals issued a per curiam order in which it summarily affirmed the denial of Kulbicki's application for post-conviction relief for the reasons that this Court had previously expressed. *Kulbicki v. State*, 444 Md. 451 (2015). The Court of Appeals' order specifically stated that it was without prejudice to Kulbicki's ability to pursue a petition for a writ of actual innocence (*id.*) under Maryland Code (2001, 2008 Repl. Vol., 2013 Supp.), § 8-301 of the Criminal Procedure Article.

The present appeal concerns Kulbicki's petition for a writ of actual innocence. In general, to prevail on such a petition, a person must come forward with newly-discovered evidence that "creates a substantial or significant possibility that the result may have been different" and "could not have been discovered in time to move for a new trial" within one year after his conviction became final. *See id.* § 8-301(a).

Kulbicki based his petition on evidence of the invalidity of CBLA and of Kopera's perjury. Although that evidence unquestionably could not have been discovered in time for Kulbicki to move for a new trial, and although a majority of the Court of Appeals saw a "substantial possibility" that "the outcome would have been different" (*Kulbicki v. State*, 440 Md. at 56) had Kulbicki's trial counsel merely explored a putative flaw in CBLA that was ascertainable in 1995, the Circuit Court for Baltimore County denied Kulbicki's petition. The circuit court did not discuss the substance or the implications of the Court of Appeals' earlier decision.

Kulbicki appealed. For the reasons stated herein, we shall reverse and remand the case with directions to issue a writ of actual innocence. On remand, the court should conduct further proceedings under CP § 8-301(f)(1) to determine how the matter should progress.[2]

BACKGROUND

A. The Discovery of Gina Nueslein's Body

On the morning of Sunday, January 10, 1993, Gina Nueslein's body was found near the archery range in Gunpowder State Park in Middle River. Under her jacket, she was dressed in her work clothes: a blouse from a Royal Farms convenience store, with her nametag attached. Based on the position of her arms and the state of her clothing, a Baltimore County detective concluded that she had been dragged to the place where her body was found. It appeared that she had been shot in the back of the head.

The medical examiner determined that Ms. Nueslein had been shot at close range. The examiner observed a "keyhole fracture," which indicated that the bullet had entered at a sharp angle (not directly perpendicular to the skull), driven a portion of the skull into the brain, and expelled another portion of the skull from the body. An exit wound, just behind the entrance wound, indicated that a piece of the skull or a bullet fragment had been ejected from the scalp. Burn marks at the edge of the entrance wound suggested

[2] CP 8-301(f)(1) states: "If the conviction resulted from a trial, in ruling on a petition filed under this section, the court may set aside the verdict, resentence, grant a new trial, or correct the sentence, as the court considers appropriate."

that the barrel of the gun had been placed against her head. A bullet fragment was recovered from her brain.

A few hours after the body was found, Barbara Clay saw a television news report about the killing. The report prompted her to inform the police that she had seen a white man in his mid-thirties driving a black, Ford longbed pickup truck in the parking lot by the archery range at Gunpowder State Park at around 4:40 p.m. the previous day.

Around the same time, one of Ms. Nueslein's relatives gave the detectives reason to believe that they might want to speak to Baltimore City Police Sergeant James Kulbicki.

B. The Investigation of James Kulbicki

Kulbicki had met Gina Nueslein in the late 1980s, when she was a waitress at a restaurant that he frequented during his patrol shifts. In 1989 Ms. Nueslein began working at a Royal Farms store on Bowleys Lane in East Baltimore, and the two would converse when Kulbicki would stop to get coffee. Although Kulbicki was married and in his early thirties, he began a sexual relationship with Ms. Nueslein, who was then 19.

Kulbicki claimed that the affair continued until sometime in late 1990, when Ms. Nueslein revealed that she was pregnant. By contrast, Ms. Nueslein's mother and sister said that the affair continued until April 1991, when Ms. Nueslein was four months' pregnant. Ms. Nueslein's mother and sister also said that the relationship resumed in May 1992 and that Kulbicki would often pick up Ms. Nueslein and drop her off at her place of employment. According to Ms. Nueslein's family members, Kulbicki began

visiting her once a week at the Nueslein home in the fall of 1992, a year after the birth of Ms. Nueslein's child.

Around the time when she and Kulbicki resumed their relationship, Ms. Nueslein filed a petition to establish that he was the father and to require him to pay child support. In response, Kulbicki requested a paternity test. The test indicated a 99.8 percent probability that Kulbicki was the child's father.

According to the Assistant State's Attorney who was assigned to prosecute the paternity case, Kulbicki denied that he was the father, claimed that he had never had sex with Ms. Nueslein, and demanded a second paternity test. On October 29, 1992, the court postponed the paternity case to allow Kulbicki to get a second blood test. At the same time, the court ordered Kulbicki to make a lump-sum payment to cover his support obligation for the months since the child's birth. The amount of the payment was to be determined at the next hearing, which was set for January 13, 1993. Meanwhile, Kulbicki paid for a second paternity test, which also showed a 99.8% probability that he was the father.

In late December 1992, Ms. Nueslein began a friendship with another Baltimore City Police officer, Andy Staib. Officer Staib would visit Ms. Nueslein at the Royal Farms store where she worked and drive her home after work.

At about 8:00 p.m. on Friday, January 8, 1993, while Ms. Nueslein was leaving the Royal Farms parking lot with Officer Staib, she pointed towards a black Ford pickup truck and said, "There's Jimmy," referring to Kulbicki. Her demeanor drastically changed. "[S]he was taken aback," froze, and "didn't say anything else after that."

At about 8:45 p.m. that evening, after Officer Staib and Ms. Nueslein had arrived at her house, her mother and sister returned home and saw Kulbicki's truck sitting in the alley across the street. Once sighted, the driver "sped off down the alley." After hearing about what they saw, Ms. Nueslein "became white as a ghost" and seemed "very afraid."

Ms. Nueslein was scheduled to work at Royal Farms on the following day, Saturday, January 9, 1993, starting at 4:00 p.m. She left home on foot at 3:30 p.m., but never arrived at the store, which was about half a mile away. Her mother called the police at 11:30 p.m. to report that she was missing.

At 3:00 p.m. on January 10, 1993, after Ms. Nueslein's body had been found, two Baltimore County detectives visited Kulbicki's house in Baltimore City. The detectives informed Kulbicki that they were in search of information about a missing person, Gina Nueslein. According to one of the detectives, Kulbicki stated that he had known Ms. Nueslein for about four years and that they were "very good friends," but he volunteered that they "never had a sexual relationship." He said that he had last seen Ms. Nueslein on January 8, 1993, when he drove her to work, but that he did not pick her up that night. He thought that "another officer in the Northeast, a newer officer by the name of Andy" may have driven her home.

The detectives inquired about the paternity hearing that was scheduled for the following week and informed Kulbicki that they knew of the genetic testing that indicated that he was the child's father. According to the detectives, Kulbicki denied being the father.

Later that afternoon, the police executed a search and seizure warrant on Kulbicki's residence. They seized a denim jacket, Kulbicki's off-duty weapon (a fully loaded, .38 caliber, snub-nose Smith & Wesson revolver), a holster, and Kulbicki's black Ford pickup truck.

The police towed Kulbicki's truck to the crime lab. Upon opening the cab, the crime lab technician noticed the smell of a household cleaner. There was no surface dust on the dashboard or steering column, and the driver's side floorboard was wet even though the floormat above it was "completely dry." In contrast to the interior of the truck, the exterior was "dirty" from "rock salt from the road."

Inside the cab, there was a piece of broken molding on the window behind the front passenger's seat. The passenger's seat belt was missing a piece of plastic. A "metal fragment" was found on the bench seat in the back, behind the driver's side of the truck.

The crime lab technician used an ultraviolet light and vacuum cleaner to inspect the truck's interior. Using the ultraviolet light, the technician identified several potential blood stains. Using the vacuum cleaner, he collected two "head fragment[s]" from the rear of the truck, one of which fell out of the device when he turned it off. He found a third "head fragment" underneath the rear seat.

The police arrested Kulbicki on January 12, 1993, three days after Ms. Nueslein disappeared.

C. Trial Testimony

At trial, the State introduced the evidence outlined above, including evidence of Kulbicki's extramarital relationship with Ms. Nueslein; her pending claim against him for

past and future child support and the likelihood that he was the child's father; the fear that she exhibited when she thought that she had seen him; and his false statements to the police about his relationship with her.

The State also introduced the testimony of Barbara Clay, who had reported seeing a white man in his thirties in a black Ford pickup truck near the archery range in Gunpowder State Park late in the afternoon on which Ms. Nueslein disappeared. At trial, Ms. Clay added that she had seen Kulbicki on television after his arrest and that, because of his "distinctive profile," she recognized him as the man whom she had seen in the park.

In addition, the State introduced expert testimony, including expert testimony concerning the manner of Ms. Nueslein's death, expert testimony concerning evidence that was found in Kulbicki's truck and on his clothing, and expert testimony concerning his off-duty weapon.

Matthew Abbott testified as an expert in forensic serology. Abbott tested the suspected blood stains from the cab of Kulbicki's truck and from Kulbicki's denim jacket and holster. His testing confirmed that the stains were in fact blood. He determined that blood stains on several parts of the seatbelt, on the rear bench seat, under the rear bench seat, on the vinyl floor mat, and on the left sleeve of Kulbicki's denim jacket were consistent with Ms. Nueslein's genetic markers and inconsistent with Kulbicki's.

Linda Watson testified as an expert in DNA profiling. She opined that the "DNA type obtained from the blood stain on [Kulbicki's denim] jacket matches the DNA profile developed from the blood of Gina Marie N[ue]slein." The match indicated a

99.99999986% likelihood that the blood on the jacket was Ms. Nueslein's. Only one in seven million people in the "Caucasian" population would have the DNA profile that Watson found on the jacket.

Karen Quandt also testified as an expert in DNA profiling. Quandt tested the bone chips that were found in Kulbicki's truck and confirmed that they were from a human or "higher primate." She obtained a partial DNA banding pattern, of only four of the seven bands, from the largest fragment. Although the four bands matched four of the seven DNA bands in Ms. Nueslein's blood, Quandt could not identify or exclude her as the source of the DNA. Quandt, however, could exclude Kulbicki as the source.

Quandt also tested the two, smaller bone fragments that were found in Kulbicki's truck. As a result of the testing, she could not exclude Ms. Nueslein as the source of the fragments. She testified that one in 640 people in the "Caucasian" population would have that DNA profile.

Agent Ernest Roger Peele of the Federal Bureau of Investigation testified as an expert "in the area of bullet and lead pellet composition analysis," i.e., CBLA, an analytic technique that purported to prove that two or more bullets came from a common source because of their similar chemical composition. Agent Peele compared the quantity of various trace elements (copper, arsenic, bismuth, silver, tin, and antimony) in the bullet fragment from Ms. Nueslein's head with the quantity of those same elements in the bullet fragment from Kulbicki's truck. On the basis of that comparison, he found that the two fragments had "the same amounts of each and every element that [he] detected." Agent Peele concluded that fragments were "analytically indistinguishable." According to

Agent Peele, these are the results that one would expect in examining "two pieces of the same bullet."

Agent Peele also compared the bullet fragment in Ms. Nueslein's brain and the fragment in Kulbicki's truck to the bullets in Kulbicki's .38 caliber revolver. One of the bullets had a composition that, the agent said, was "unusually close" to that of the bullet fragments. Although some of the bullets did not have "exactly the same" composition as the bullet fragments, Agent Peele testified that their makeup was similar enough that the similarity would not be expected "unless there's some association, such as being made by the same manufacturer on or about the same time."

On redirect examination, Agent Peele testified that the bullet fragment from the victim's brain, the bullet fragment that was found in the truck, and the bullet from Kulbicki's gun were sufficiently similar that "all" of them "at one time could have been in the same box."

Agent Peele also testified that he performed electron microscopy on one of the three skull fragments that had been found in the truck. The examination revealed that the major components of the item were calcium and phosphorus, the primary components of bone. The item contained lead as a minor component.

Joseph Kopera, a firearms examiner for the Maryland State Police, testified as a firearms identification expert. He introduced himself as the recipient of engineering degrees from both the Rochester Institute of Technology and the University of Maryland.

Kopera offered several conclusions regarding the State's ballistic evidence. Because the bullet fragments were mutilated, Kopera was unable to determine whether

they came from Kulbicki's .38 caliber revolver. Nonetheless, he said that the markings on the fragments, called "cannelures," were consistent with those on a bullet fired from a large caliber gun no smaller than a .38. He also said that Kulbicki's .38 had been cleaned since its last firing. In addition, he said that a bullet fragment had punctured the beaded area of the truck's rubber stripping, a finding "consistent with the bullet having been fired in [Kulbicki's] truck." According to Kopera, the bullet fragment had been "slowed down by hitting something else prior to hitting the rubber piece."

Dr. Douglas Owsley of the Smithsonian Institution testified as an expert in forensic anthropology. He examined the bone fragments that were found in Kulbicki's truck and concluded that they came from a human skull. He explained that the fragments had many "fractured edges," meaning that they had been "cleaved off normal bone." He testified that the fragments had "been traumatically evulsed with a lot of force" and that there were "no signs of any sort of healing, [and] no signs of any sort of repair." He determined that the evidence indicated "a perimortem injury," i.e., an injury that occurred "at or around the time of death."

Dr. Owsley went on to testify that the bone fragments had "soot carbon deposits" and lead "embedded" into their surfaces. He explained that the embedded metal and the soot deposits indicated a "contact or near contact gunshot wound" in which the foreign materials had not only been deposited on the scalp, but had actually penetrated to the bone. Dr. Owsley concluded that, "[g]iven the information contained within these bone fragments . . . they show a traumatic evulsion with a tremendous amount of force of the

type that would be produced . . . by a gunshot wound . . . at close range and involving a projectile that's lead."

Several alibi witnesses testified for the defense as to Kulbicki's whereabouts on January 9, 1993, from shortly before 3:00 p.m. until at or around 4:00 p.m., the time when Gina Nueslein disappeared. The owner of a shoe repair business testified that Kulbicki stopped by in a black truck and dropped off a pair of shoes just before 3:00 p.m. The manager of a dry-cleaning business in Canton testified that Kulbicki came into her store between 3:00 and 3:15 p.m. and stayed for about ten minutes. An electrical contractor testified that at some point shortly after 3:00 p.m. Kulbicki stopped by a house just north of Patterson Park where he and Kulbicki were doing some work and that Kulbicki stayed for 20 or 30 minutes. Similarly, the contractor's son testified that Kulbicki stopped by the house near Patterson Park between 3:00 and 4:00 p.m. The owner of a hardware store testified that Kulbicki was in his store "in the neighborhood of 3:15 to 4 o'clock" and that he stayed for 20 to 30 minutes."

Kulbicki's wife testified in her husband's defense. She said that on the night of Friday, January 8, 1993, Kulbicki had been with her from at least 7:30 p.m. until 11:00 p.m., when he left for work on the midnight shift; that he returned home from work at 8:30 a.m. the next morning; that he slept until about 2:00 p.m.; that he went out to run some errands and returned at 4:30 p.m.; and that, until he left for work late that evening, he was with her and their young son. Ms. Kulbicki also said that her husband had confessed his affair with Ms. Nueslein to her "around the holidays of 1990" because he thought that she might be pregnant.

Kulbicki testified in his own defense. On direct examination, much of his testimony involved an accounting of his whereabouts on the evening of January 8, 1993, and the afternoon of January 9, 1993. His testimony corresponded with that of his alibi witnesses.

Kulbicki testified that, after he had completed his errands, he went home, picked up his nine-year-old son, and drove out to Eastpoint Mall in Baltimore County. On the way to the mall, Kulbicki said, they stopped at a home improvement store near Dundalk. The defense introduced a sales receipt, dated January 9, 1993, to corroborate Kulbicki's testimony about his visit to the store. Kulbicki's son testified, similarly, that his father had taken him to Eastpoint Mall and to the home improvement store in the late afternoon or early evening of Saturday, January 9, 1993.

Kulbicki initially claimed to have ended the sexual relationship with Ms. Nueslein "sometime in 1990," when she told him that she was pregnant and that he might be the father. He said that he disclosed the affair to his wife. He thought it was "a possibility" that the child was his. He said that he was skeptical of the first blood test because he and Ms. Nueslein did not have their blood drawn at the same time, so he was concerned that the samples might have been mishandled.

Kulbicki testified that he continued to speak with Ms. Nueslein after she became pregnant and after the child was born, but he asserted that they no longer had a sexual relationship. On cross-examination, however, he admitted that he continued to have sexual contact, although not sexual intercourse, with her after the child was born.

Kulbicki's testimony sometimes conflicted with the accounts of other witnesses. In discussing the child support case, he denied that he had disputed paternity or that he had claimed to have barely known Gina Nueslein. He denied that he drove by the Royal Farms store or by Ms. Nueslein's home on the night of January 8, 1993. He also denied telling the detectives that he had never had a sexual relationship with Ms. Nueslein and that he was not the father of Ms. Nueslein's child.

Some aspects of Kulbicki's testimony seem to have been calculated to engender an inference that the murder was committed by his stepson (his wife's son from an earlier marriage). Kulbicki denied that he was driving his Ford truck on the evening of January 8, 1993, when it was reportedly seen near Ms. Nueslein's workplace and home, but he suggested that his stepson had access to the keys. He also suggested that everyone in his house, including his stepson, had access to the denim jacket on which Ms. Nueslein's blood was found. Similarly, Kulbicki's wife testified that her son was "angry" at Ms. Nueslein when he learned that Kulbicki had cheated on his mother with her and when he learned that she was suing Kulbicki to establish paternity, and that his anger did not subside. Ms. Kulbicki also testified that her son was not together with her and her husband on the evening of January 8, 1993; that her son was not at home during the afternoon and early evening of January 9, 1993, when Ms. Nueslein disappeared; and that both she and her son would sometimes wear the denim jacket on which Ms. Nueslein's blood was found.[3]

[3] In her opening statement, defense counsel seemed to concede that the murder had (. . . continued)

D. Closing Argument and Verdict

In closing argument, the State reviewed the inculpatory evidence, including Barbara Clay's eyewitness testimony, which put Kulbicki at the place where Gina Nueslein's body was found at a time shortly after she had disappeared; the sightings of Kulbicki (or his truck) outside Ms. Nueslein's place of employment and residence on January 8, 1993, the evening before she disappeared; the blood stains, bone chips, and bullet fragments found in Kulbicki's truck; the blood on his jacket and holster; the forensic evidence that linked Ms. Nueslein to the blood stains and bone fragments; and Kulbicki's motive – the paternity dispute, and perhaps resentment at Ms. Nueslein's new relationship with Officer Staib.

Because the State had no direct evidence of Kulbicki's involvement in Ms. Nueslein's death, the State stressed the significance of the forensic science, which it said would "fill in the gaps." For example, the State cited Agent Peele's analysis of the bullet fragments as a "major link" between Kulbicki and the murder. The State declared that the bullet fragment in Ms. Nueslein's body was "indistinguishable" from the bullet fragment that was found in the truck. The State also declared that a bullet from Kulbicki's gun was "very nearly identical" to the fragment in the victim. The State

(. . . continued)
occurred in Kulbicki's truck, even as she disputed that Kulbicki had committed the crime. In closing argument, defense counsel made what could be interpreted as suggestions that Kulbicki's stepson, or perhaps even Kulbicki's wife, had committed the murder. The stepson's possible culpability was an issue in Kulbicki's first trial and in the reversal of his conviction in that trial. *See Kulbicki v. State*, 102 Md. App. 376 (1994).

argued that it was not "just a coincidence" that, "[o]ut of all the billions of bullets in this world, that bullet end[ed] up in Kulbicki's off-duty weapon."

Citing Kopera's testimony about the cannelures on the bullet fragments, the State argued that the fragments "came from a .38 caliber bullet," the same caliber as Kulbicki's off-duty weapon. Similarly, the State argued in rebuttal that it was "no coincidence" that Kulbicki's gun "happened to be of the same caliber of gun used to commit the murder." The State also argued in rebuttal that Kulbicki had cleaned the gun, as Kopera testified.

Following the closing arguments, the jury convicted Kulbicki of all counts.

E. Newly-Discovered Evidence After Kulbicki's Conviction

In 1998 William Tobin retired from the FBI after more than 20 years as a forensic metallurgist. Because he had "noticed a 'contradiction between metallurgic [principles] and the [principles] required to accept the practice of [CBLA]'" (*Clemons v. State*, 392 Md. at 354), Tobin, in collaboration with other metallurgists, began to investigate the validity of the assumptions underlying CBLA.

Tobin and his co-authors published their findings in 2002. E. Randich, Wayne Duerfeldt, Wade McLendon & William Tobin, *A Metallurgical Review of the Interpretation of Bullet Lead Compositional Analysis*, 127 Forensic Sci. Int'l 174 (2002). In summary, their findings thoroughly refuted the assumptions underlying CBLA. For example, CBLA assumed that all bullets produced from a single source of lead would have the same chemical composition; the researchers demonstrated, however, that samples drawn from the same source do not always match and thus that the sources of lead are not necessarily uniform. CBLA also assumed that each source of lead was

unique; the researchers demonstrated, however, that different sources of lead often have a very similar chemical composition, because a great deal of bullet lead comes from recycled automotive batteries, which have "relatively tight [chemical] compositions." William A. Tobin & Wayne Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?*, 17 Crim. Just. 26, 28 (Fall 2002). According to Tobin and his co-authors, an analyst could not validly conclude that two matching bullets must have come from the "same source." *Id.* at 33.

Furthermore, the researchers discovered that bullets from one source might be "intermingled" with bullets from another source before packaging. The researchers also discovered that a manufacturer might use a single source of lead to make bullets on different dates. For those reasons, Tobin and his co-authors concluded that an analyst should not opine that two matching bullets "were manufactured on or about the same day" or were sold in the "same box."

As a result of Tobin's work, the FBI asked the National Research Council to review CBLA.[4] The Council issued its report in 2004. Among other things, the report concluded that experts should acknowledge that bullets from different sources may be analytically indistinguishable; that experts should not state that a "bullet came from a particular box of ammunition," because such statements are "misleading"; and that

[4] The National Research Council "is the working arm of the United States National Academies, which produces reports that shape policies, inform public opinion, and advance the pursuit of science, engineering, and medicine." https://tethys.pnnl.gov/institution/national-research-council-national-academies-nrc (last viewed Nov. 29, 2019). The National Academies include the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. *Id.*

experts should not make "any definitive statement concerning the date" on which a bullet was manufactured.

In response to the National Research Council's report, the FBI discontinued the use of CBLA. The agency explained that "neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of bullet lead examination."

In 2006 the Court of Appeals followed suit when it held that CBLA is not generally accepted by the scientific community and is, therefore, inadmissible under the *Frye-Reed* standard for expert testimony about scientific processes. *Clemons v. State*, 392 Md. 339, 371 (2006). The Court's opinion painstakingly exposed the fallacious assumptions that underlie the now-discredited field of CBLA. *Id*. at 364-71. As a result of the opinion, CBLA was relegated to the status of junk science in Maryland.

On May 30, 2008, the Acting Director of the FBI Laboratory wrote to the Assistant State's Attorney who prosecuted Kulbicki's case. The letter stated: "After reviewing the testimony of [Agent Peele], it is the opinion of the FBI Laboratory that the [agent] overstated the significance of the results of the examinations conducted, possibly leading the jury to misunderstand the probative value of the evidence."

Meanwhile, in 2007 an assistant public defender noticed that in Kopera's many court appearances he had given various accounts of his academic qualifications, some of which conflicted with the information on his résumé. Upon further investigation, the public defender discovered that Kopera did not have degrees from either of the colleges that he claimed to have attended. When confronted with this discovery, Kopera produced

an academic transcript that, he said, was part of his personnel file. When the transcript was determined to be a forgery, Kopera committed suicide. The Maryland State Police later confirmed that Kopera had lied about his education.

F. Petition for Post-Conviction Relief

In 2007 Kulbicki filed an amended petition for post-conviction relief. In his petition, he claimed that he had been deprived of due process of law because the State had relied on Kopera's perjured testimony[5] and on Agent Peele's testimony about CBLA, which had been determined to be unreliable. He also claimed that he had been deprived of the effective assistance of counsel, because, he said, his attorneys did not do enough to challenge the legitimacy of CBLA.

After a hearing, the circuit court denied relief. The court agreed that Kopera had committed perjury, but reasoned that his lies would not have influenced the jury because he did not need an academic degree to testify in his field of expertise – ballistics. The court acknowledged that CBLA was no longer admissible because of the challenges to its reliability that postdated Kulbicki's conviction, but the court concluded that the law did not afford a right to post-conviction relief on the basis of newly-discovered evidence.[6]

[5] In addition to Kopera's perjured testimony about his academic background, Kulbicki's attorneys discovered Kopera's "bench notes," which can be read to contradict some of his testimony at trial, including his testimony that Kulbicki's gun had recently been cleaned and his testimony about the caliber of the fatal bullet. In the present appeal, Kulbicki does not make an issue of the bench notes.

[6] Nonetheless, the court opined that if Kulbicki had been able to raise the invalidity of CBLA in a timely motion for a new trial, "it is likely that [he] would have been entitled to relief."

Lastly, the court concluded that Kulbicki had not received ineffective assistance of counsel, because the reliability of CBLA did not become an issue until several years after the conviction.

Kulbicki appealed, and this Court affirmed. *Kulbicki v. State*, 207 Md. App. 412, 418 (2012).

G. Proceedings in the Court of Appeals and the Supreme Court

The Court of Appeals granted Kulbicki's petition for a writ of certiorari and reversed this Court's judgment. *Kulbicki v. State*, 440 Md. 33, 56 (2014). Although Kulbicki had abandoned his claim of ineffective assistance of counsel in his appeal to this Court, the Court of Appeals exercised its discretion to consider that claim. *Id.* at 40 & n.7.

Applying the familiar, two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), a four-member majority held that the performance of Kulbicki's trial counsel had been constitutionally deficient because the attorneys failed to investigate a 1991 report that was authored by Agent Peele and others. In that report, "Agent Peele and his colleagues analyzed the elemental composition of cartridges contained within full boxes of four different brands of .38 caliber cartridges." *Kulbicki v. State*, 440 Md. at 49. The report disclosed that the cartridges in one box had "overlapping compositions" with the cartridges in two other boxes even though the first box had been packaged 15 months earlier. *Id.* According to the majority, the report "presaged the very flaw that ultimately lead [sic] us to conclude in *Clemons* that CBLA evidence was invalid and unreliable – the faulty assumption that bullets produced from different sources of lead would have a

unique chemical composition." *Id.* "Had Kulbicki's attorneys investigated and discovered the 1991 Peele Report," the majority reasoned, "they would have had a potent challenge to Agent Peele's conclusion that the bullet fragment taken from the victim's autopsy and the fragment found in Kulbicki's truck was 'what you'd expect if you were examining two pieces of the same bullet . . . two pieces of the same source,' as well as the conclusion that a bullet taken from Kulbicki's handgun and the bullet taken from the autopsy were similar enough, so that 'there's some association between the two groups.'" *Id.* at 52. Because trial counsel failed to find the 1991 report and failed to cross-examine Agent Peele about its methodological flaws, the majority held that their performance was constitutionally inadequate. *Id.* at 53.

Turning to *Strickland*'s second prong, the majority held that, but for counsel's error, there was a "substantial possibility" that the result of the trial would have been different. *Id*. at 54. In reaching that decision, the majority cited the Court's frequent recognition of "the significance jurors afford to forensic evidence in assessing a defendant's guilt or innocence." *Id.* at 55. Quoting Agent Peele's testimony that the bullet fragment in the truck and the bullet fragment from Ms. Nueslein's body were "what you'd expect if you were examining two pieces of the same bullet," as well as the agent's testimony that the bullet in Kulbicki's handgun was "unusually close" in composition to the fragments, the majority added that "[t]he importance of the CBLA evidence" in this case "cannot be overstated." *Id.* The majority went on to cite the State's closing argument, in which it asserted that the bullet fragments were "the same"; that "[y]ou can't tell" one fragment from the other; and that it was not a "coincidence"

that, "[o]ut of all the billions of bullets in this world," a bullet with a similar composition was found in Kulbicki's gun. *Id.* at 55-56. "Given the State's rigorous reliance on CBLA evidence to connect Kulbicki to the crime," the majority concluded that there was a "'substantial possibility' that the outcome would have been different had Kulbicki's counsel questioned Agent Peele regarding the possibility of having compositionally similar bullets exist in different batches." *Id.* at 56.[7]

In dissent, Judge McDonald, joined by two other judges, acknowledged at the outset that the case was "troubling," in part because "[t]he analysis that supported one part of the prosecution's forensic evidence at trial was determined, many years later, not to meet the standard for the use of scientific evidence at trial." *Id.* at 57 (McDonald, J., dissenting). According to the dissent, "There is no question that, as developments subsequent to Mr. Kulbicki's trial revealed, some inferences that had been drawn by FBI examiners from lead compositional analysis were seriously flawed." *Id.* at 65. "Whether an individual convicted at a trial at which such evidence was introduced should receive a new trial on the ground of newly-discovered evidence under the standards governing a writ of actual innocence (CP § 8-301) is a serious question," Judge McDonald wrote. *Id.* at 65-66. The dissent, however, disagreed with both aspects of the majority's analysis of the question of ineffective assistance of counsel. On the question of whether the performance of Kulbicki's trial counsel was constitutionally deficient, the dissent

[7] The Court did not even mention the State's assertion, in closing argument, that the bullet fragments and the bullet in Kulbicki's gun could have come from "the same box."

reasoned that the 1991 report was "an obscure research paper" that "actually endorsed the use of CBLA," and that it was unreasonable to require Kulbicki's trial counsel to discover the paper and use it to unravel the flaws in CBLA "before anyone else did." *Id.* at 66. On the question of prejudice, the dissent argued that the State had a great deal of circumstantial evidence, other than CBLA evidence, to support the conviction.

The Supreme Court of the United States granted the State's petition for a writ of certiorari and summarily reversed the judgment of the Court of Appeals. *Maryland v. Kulbicki*, 136 S. Ct. 2, 5 (2015) (per curiam). Echoing Judge McDonald's comments about the quality of counsel's performance, the Court reasoned that, "[a]t the time of Kulbicki's trial in 1995, the validity of CBLA was widely accepted, and courts regularly admitted CBLA evidence until 2003." *Id.* at 4. Similarly, the Court added that, "even the 1991 report itself did not question the validity of CBLA, concluding that it was a valid and useful forensic tool to match suspect to victim." *Id.* "Counsel," the Court concluded, "did not perform deficiently by dedicating their time and focus to elements of the defense that did not involve poking methodological holes in a then-uncontroversial mode of ballistics analysis." *Id.* The Court did not consider "whether the supposed error prejudiced Kulbicki." *Id.* at 5.

On remand, the Court of Appeals summarily affirmed the judgment of the Court of Special Appeals for the reasons explained in its opinion. *Kulbicki v. State*, 445 Md. 451, 451-52 (2015). The Court denied Kulbicki's motion to remand or, in the alternative, for a stay or supplemental briefing and oral argument, "without prejudice" to his right to "file a petition for writ of actual innocence." *Id.* at 452.

H. Petition for a Writ of Actual Innocence

While Kulbicki's post-conviction case was on appeal, the General Assembly enacted CP § 8-301, which allows a person convicted of a crime to file a petition for a writ of actual innocence based on newly-discovered evidence that (1) "creates a substantial or significant possibility that the [trial] result may have been different" and (2) "could not have been discovered in time to move for a new trial."[8] On July 1, 2016, Kulbicki filed a petition for a writ of actual innocence in the Circuit Court for Baltimore County based on the discrediting of CBLA and the discovery of Kopera's perjury.

After a hearing, the circuit court denied Kulbicki's petition.[9] The court agreed with Kulbicki that the studies debunking CBLA and the revelation that Kopera lied about his

[8] At the time the circuit court ruled on Kulbicki's petition, CP § 8-301 provided, in pertinent part:

> (a) A person charged by indictment or criminal information with a crime triable in circuit court and convicted of that crime may, at any time, file a petition for writ of actual innocence in the circuit court for the county in which the conviction was imposed if the person claims that there is newly discovered evidence that:
>
> (1) creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; and
>
> (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331.

[9] At the hearing, Tobin testified for Kulbicki. Tobin asserted, among other things, that, under the FBI protocols that were in place in 1995, Agent Peele should have testified that the bullet fragment from Kulbicki's truck was distinguishable from the bullet fragment from Ms. Nueslein's body because they contained different levels of arsenic. Additionally, Tobin criticized Agent Peele for offering "meaningless" commentary that the bullet fragment from Ms. Nueslein's body had "some association"

(. . . continued)

academic credentials were newly-discovered evidence under § 8-301. The court also agreed that the rejection of CBLA and the discovery of Kopera's perjury could support a claim of actual innocence. The court agreed, as well, that if the newly-discovered evidence about CBLA had been available in 1995, the trial court would have excluded that evidence altogether; and that if the jurors had known that Kopera had lied about his academic qualifications, they would have discredited his testimony in its entirety. Citing the other evidence against Kulbicki, however, the court disagreed that there was "a substantial or significant possibility that the result may have been different" if the CBLA evidence had been excluded and if the jury had been informed of Kopera's perjury. The court did not address the Court of Appeals' conclusion that "there was a 'substantial possibility' that the outcome would have been different had Kulbicki's counsel [merely] questioned Agent Peele regarding the possibility of having compositionally similar bullets exist in different batches" (*Kulbicki v. State*, 440 Md. at 56), except to say that it was not bound by the earlier decision. The court made no substantive effort to reconcile its conclusion with the contrary conclusion that the Court of Appeals had reached.

QUESTION PRESENTED

Kulbicki presents one question for our review: "Did the circuit court abuse its discretion in denying Petitioner's Section 8-301 petition, where the Court of Appeals previously held that merely cross-examining Agent Peele about the flaws in CBLA would have created a 'substantial possibility' of a different result?"

(. . . continued)
with the bullet in Kulbicki's gun.

We answer in the affirmative. Consequently, we shall reverse the judgment below.

STANDARD OF REVIEW

"When an appellate court reviews a circuit court's decision to deny a petition for writ of actual innocence, we limit our review 'to whether the trial court abused its discretion.'" *Smith v. State*, 233 Md. App. 372, 411 (2017) (quoting *Smallwood v. State*, 451 Md. 290, 308-09 (2017)). "'Under that standard, this Court will not disturb the circuit court's ruling, unless it is well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Id*. (quoting *Patterson v. State*, 229 Md. App. 630, 639 (2016)). "A trial court must, however, 'exercise its discretion in accordance with correct legal standards.'" *Id.* (quoting *Jackson v. Sollie*, 449 Md. 165, 196 (2016), *which quoted Alston v. Alston*, 331 Md. 496, 504 (1993)).

DISCUSSION

A.

In Kulbicki's view, the Court of Appeals' earlier decision "logically compels the conclusion" that he is entitled to a new trial. In view of the newly-discovered evidence about the unreliability of CBLA, he correctly observes that "the trial court would have been obligated to totally exclude the incriminating CBLA evidence." *Ward v. State*, 221 Md. App. 146, 169 (2015). Yet, if merely cross-examining Agent Peele about the methodological flaws in CBLA would have created a substantial possibility of a different outcome, as the Court of Appeals held in 2014, "it follows with even greater force,"

Kulbicki argues, that there would be a substantial possibility of a different outcome if the CBLA evidence were excluded altogether.

Kulbicki recognizes that the Court of Appeals' decision is no longer binding in the form of stare decisis, because the Supreme Court reversed the Court of Appeals on the issue of whether the performance of his trial attorneys was constitutionally deficient. The Supreme Court, however, did not disturb the Court of Appeals' conclusion concerning prejudice. Hence, the Court of Appeals' opinion remains persuasive authority. *See, e.g.*, *Cosby v. State Dep't of Human Resources*, 425 Md. 629, 652 (2012); *McDaniel v. American Honda Fin. Corp.*, 400 Md. 75, 81 n.8 (2007); *West v. State*, 369 Md. 150, 157 (2002).

Although the Court of Appeals' decision no longer *legally* compels the conclusion that there would be a substantial possibility of a different outcome at Kulbicki's trial if the CBLA evidence were excluded altogether, we agree with Kulbicki that the decision *logically* compels that conclusion. The decision represents the considered judgment of a majority of the judges on the State's highest court, that Kulbicki's trial might well have ended in an acquittal had his defense counsel merely exposed some of the methodological flaws in CBLA. It stands to reason that the likelihood of an acquittal would only have increased, and would have increased materially, had Kulbicki's defense counsel been able to prevent the State from introducing any evidence at all about CBLA. Indeed, we have already said as much in *Ward v. State*, 221 Md. App. 146, 170 (2015), another actual innocence case involving CBLA: "If mere cross-examination of Agent Peele would have created a substantial possibility of a different outcome," as a majority of the

Court of Appeals held in *Kulbicki*, "it follows that total exclusion of Agent Peele's testimony (pursuant to *Clemons* as a result of the 2002 and 2004 studies) would also have created a possibility of a different outcome."

The circuit court was not required to follow the Court of Appeals' decision, but it was at least required to explain why it chose not to follow the Court of Appeals' decision, as well as this Court's decision in *Ward*. *See Smith v. State*, 233 Md. App. at 432 (observing that CP § 8-301 "provides . . . that the court 'shall state the reasons for its ruling on the record[]'"). This the court did not do. The court dismissed the Court of Appeals' opinion on the ground that it was "not binding," but the court did not explain why the Court of Appeals' opinion was not persuasive. One could infer that the court omitted any such explanation because it was unable to articulate how there could have been a substantial possibility of a different outcome if defense counsel had merely posed some questions about the flaws in CBLA, but not if the State was entirely precluded from making any mention whatsoever of the subject of CBLA.

In his petition for a writ of actual innocence, Kulbicki's central contention was that in 2014 the Court of Appeals had effectively decided that there was a substantial or significant possibility that the result may have been different, when it ruled that he had suffered prejudiced because of his trial counsel's failure to expose the flaws in CBLA. The circuit court's opinion does not address that central contention. In our view, it would not be unfair to say that the circuit court's opinion disregards Kulbicki's central

contention. In these circumstances, we hold that the circuit court abused its discretion in denying the petition.[10]

B.

In an effort to uphold the circuit court's conclusion, the State argues, first, that the Court of Appeals' *Kulbicki* opinion is unpersuasive because, the State says, the question of "prejudice" in an ineffective assistance of counsel claim is different from the question of whether there is a "substantial or significant possibility that the result may have been different" in a petition for actual innocence. To this end, the State argues that, although a petitioner may prove prejudice in an ineffective assistance of counsel claim by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland v. Washington*, 466 U.S. at 694), the analysis "should not focus solely on an outcome determination, but should consider 'whether the result of the proceeding was fundamentally unfair or unreliable.'" *See, e.g.*, *Oken v. State*, 343 Md. 256, 284 (1996) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)); *accord Kulbicki v. State*, 440 Md. at 55. According to the State, a petition for a

[10] The State argues, briefly, that when Kulbicki's case came back from the Supreme Court, the Court of Appeals "abandoned" the *Kulbicki* majority's conclusion regarding prejudice by summarily affirming this Court's 2012 decision. We disagree. The 2012 decision did not discuss whether Kulbicki had suffered prejudice because of his counsel's alleged error in not exploring the flaws in CBLA, as Kulbicki had not pursued that argument in this Court. Thus, because the Court of Appeals affirmed on the basis of this Court's 2012 decision, it was unnecessary for the Court of Appeals to reconsider the issue of prejudice. The Court did not abandon a ruling that it was unnecessary for it to reconsider.

writ of actual innocence is not concerned with fairness and reliability, but only with "actual factual innocence." We disagree with the State in two respects.

First, in ineffective assistance of counsel cases, the question of whether the result was unfair or unreliable derives from *Lockhart v. Fretwell*, 506 U.S. 364 (1993), a case of limited applicability. The *Fretwell* decision reflects a concern that in some circumstances a focus on outcome-determination alone "may grant the defendant a windfall to which the law does not entitle him." *Lockhart v. Fretwell*, 506 U.S. at 369-70. In *Fretwell*, for example, trial counsel had erred in failing to cite a favorable judicial decision, which had been overruled by the time the defendant asserted his claim for ineffective assistance of counsel. In those unusual circumstances, the Supreme Court held that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Id.* at 369. In the Court's view, the result at trial was neither unfair nor unreliable, because counsel's error merely "'deprived [the defendant] of the chance to have the state court make an error in his favor.'" *Id*. at 371 (quoting Brief for United States as Amicus Curiae 10).

The *Fretwell* Court based its decision, in part, on *Nix v. Whiteside*, 475 U.S. 157, 175 (1986), in which it had held that a defendant could not prevail on a claim for ineffective assistance of counsel based on his counsel's refusal to cooperate in presenting perjured testimony. "Obviously, had the respondent presented false testimony to the jury, there might have been a reasonable probability that the jury would not have returned a verdict of guilty." *Lockhart v. Fretwell*, 506 U.S. at 370. "Sheer outcome determination, however, was not sufficient to make out a claim under the Sixth Amendment." *Id.*

In a concurring opinion, Justice O'Connor, the author of *Strickland v. Washington*, predicted that the "narrow holding" in *Fretwell* (*id.* at 374 (O'Connor, J., concurring)) "w[ould], in the vast majority of cases, have no effect on the prejudice inquiry under" *Strickland*. *Id*. at 373. According to Justice O'Connor, *Fretwell* "concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Id.* As she explained, a "court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." *Id*. at 374.

Since *Fretwell*, the Supreme Court has confirmed that "the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims." *Williams v. Taylor*, 529 U.S. 362, 391 (2000). The considerations of *Fretwell* apply only in "situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice'" (*id.* at 392-93), such as when the alleged error involves the refusal to introduce exculpatory evidence that is perjured. By contrast, when the ineffectiveness of counsel deprives defendants of a substantive or procedural right to which the law entitles them, a court should not depart "from a straightforward application of *Strickland*." *Id.* at 393; *accord Redman v. State*, 363 Md. 298, 309 n.10 (2001) (citing *Williams v. Taylor* for the proposition that cases such as *Nix v. Whiteside* and *Lockhart v. Fretwell* "do not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him") (emphasis in original).

Kulbicki's claim of ineffective assistance of counsel did not implicate the concerns of *Fretwell*. His claim concerned counsel's allegedly inadequate investigation of the bases for an expert's opinion and, as a result, counsel's allegedly inadequate cross-examination of the expert at trial. In other words, his claim concerned whether counsel's alleged errors deprived him of a substantive or procedural right to which the law entitles him. *Williams v. Taylor*, 529 U.S. at 393. Consequently, the analysis of prejudice in Kulbicki's post-conviction case involved a routine application of *Strickland*'s inquiry into whether the alleged errors might have been outcome-determinative. Indeed, in the Court of Appeals' opinion in Kulbicki's post-conviction case, both the majority and the dissent looked exclusively to whether the outcome might have been different but for counsel's alleged errors. *See Kulbicki v. State*, 440 Md. at 55-56; *id*. at 66-69 (McDonald, J., dissenting). Moreover, when it announced its conclusion on the issue of prejudice, the majority expressly referred only to the effect of the alleged errors on the outcome at trial: "Given the State's rigorous reliance on CBLA evidence to connect Kulbicki to the crime, we conclude that there was a 'substantial possibility' that the outcome would have been different had Kulbicki's counsel questioned Agent Peele regarding the possibility of having compositionally similar bullets exist in different batches." *Id.* at 56.

In short, in Kulbicki's case, as in nearly every other ineffective assistance of counsel case, the Court was not concerned with whether the result of the proceeding was "fundamentally unfair or unreliable." Instead, the Court was concerned only with whether "there was a 'substantial possibility' that the outcome would have been different." *Id.* at 56. That standard sounds a great deal like the standard in CP § 8-

301(a): "whether there is a substantial or significant possibility that the result may have been different." In numerous Maryland cases involving claims of ineffective assistance of counsel, the Court of Appeals has used almost those exact words. *See*, *e.g.*, *Bowers v. State*, 320 Md. 416, 426 (1990); *accord State v. Mann*, ___ Md. ___, 2019 WL 6907266, at *8 (Dec. 19, 2019) (same); *Ramirez v. State*, 464 Md. 532, 561-62 (2019) (same); *State v. Syed*, 463 Md. 60, 86-87 (2019), *cert. denied*, ___ S. Ct. ___, 2019 WL 6257419 (Nov. 25, 2019) (same); *Coleman v. State*, 430 Md. 320, 331 (2013) (same). In fact, the legislative history of CP § 8-301 indicates that the drafters used the phrase "substantial or significant possibility that the result may have been different" precisely because that is the standard employed in, among other things, ineffective assistance of counsel cases. *See* Letter from Suzanne Drouet, Assistant Public Defender, to Senator Delores Goodwin Kelley, dated February 18, 2009.[11] For that reason, we reject the State's contention that the *Kulbicki* majority's conclusion is not persuasive in evaluating a petition for a writ of actual innocence under CP § 8-301(a).

In a second attempt to explain why the *Kulbicki* majority opinion is not persuasive in this case, the State asserts that a finding of ineffective assistance of counsel "has nothing to do with actual, factual innocence," which, the State says, is the subject of a petition for a writ of actual innocence. The State bases its assertion on some pronouncements in this Court's opinion in *Yonga v. State*, 221 Md. App. 45 (2015), *aff'd*,

[11] A copy of the letter is included in the appendix to this opinion. Senator Kelley was a sponsor of SB 486, the legislation that became CP § 8-301(a). Suzanne Drouet is the attorney who discovered Kopera's misrepresentations.

446 Md. 183 (2016),[12] and on the dissenting opinion in *McGhie v. State*, 449 Md. 494 (2016). This Court has previously rejected the State's assertion.

Broadly speaking, it is true that "[r]elief under CP § 8-301 is limited to situations where the petitioner shows newly discovered evidence that supports a claim that the petitioner is innocent of the crime of which he or she was convicted." *Smith v. State*, 233 Md. App. at 410. Under a procedural rule that the Court of Appeals adopted to implement CP § 8-301, a petition for a writ of actual innocence must state, among other things, "that the conviction sought to be vacated is based on an offense that the petitioner did not commit." Md. Rule 4-332(d)(9). Thus, "[o]nly defendants who can allege that they are 'actually innocent,' meaning they did not commit the crimes for which they are convicted, may bring a petition for relief under [CP] § 8-301." *Smallwood v. State*, 451 Md. at 320.

This Court has interpreted that requirement to mean that the newly-discovered evidence must "speak[] to" the petitioner's actual innocence. *Smith v. State*, 233 Md. App. at 411; *accord Douglas v. State*, 423 Md. 156, 176 (2011) (stating that "C.P. § 8-301 provides a defendant an opportunity to seek a new trial based on newly discovered evidence that speaks to his or her actual innocence, as evident from the title of the statute itself"); *Patterson v. State*, 229 Md. App. 630, 637 (2016) (same). Evidence "speaks to" actual innocence if it could support "a claim that the petitioner did not commit the crime for which he or she was convicted." *Smith v. State*, 233 Md. App. at 413. For example,

[12] *Yonga* held that defendants cannot pursue a writ of actual innocence if they pleaded guilty. *Id.* at 64. That holding has been overruled by statute. CP § 8-301(f)(2).

evidence may "speak[] to" the petitioner's actual innocence if it shows that someone other than the petitioner committed the crime or if it shows that an important witness lied. *Id.* at 414-15.

This Court has implicitly recognized that the scientific studies that cast doubt upon the validity and admissibility of CBLA evidence could support a claim that the petitioner did not commit the crime for which he or she was convicted. *See Ward v. State*, 221 Md. App. at 163-70 (vacating and remanding for further consideration where the court denied a petition for a writ of actual innocence based on newly-discovered evidence about the invalidity and inadmissibility of CBLA evidence). Furthermore, in discussing the legislative history of CP § 8-301, the Court of Appeals has made it abundantly clear that a petition for a writ of actual innocence was intended to lie when a convicted person comes forward with newly-discovered scientific evidence that undermines the reliability of the scientific evidence at the trial, including the reliability of CBLA. *Smallwood v. State*, 451 Md. at 318-19.

It follows that petitioners need not prove their innocence to obtain relief under the actual innocence statute. *Smith v. State*, 233 Md. App. at 413. "That the newly discovered evidence does not definitively exonerate the [petitioner], or may be countered by other evidence, goes to the weight of the evidence," which is considered in evaluating whether the evidence creates a substantial or significant possibility that the result may have been different. *Id.* The State, therefore, is simply wrong in arguing that ineffective assistance of counsel claims differ from petitions for a writ of actual innocence in that the latter are somehow limited to claims of "actual, factual innocence," in the sense of

evidence that exonerates the petitioner. Accordingly, we are unpersuaded by the State's effort to show that the *Kulbicki* majority's conclusion regarding prejudice does not inform the analysis of Kulbicki's petition for a writ of actual innocence.

C.

The State goes on to argue that the *Kulbicki* majority opinion is unpersuasive because, the State says, its analysis was "cursory," and it "failed to consider" other evidence against Kulbicki. Again, we are unpersuaded.

The majority's analysis of prejudice cannot fairly be described as "cursory." As we have previously discussed, the Court accurately recounted the applicable legal standard under *Strickland v. Washington*. *Kulbicki v. State*, 440 Md. at 53-54. The Court recognized that CBLA was "central" to the State's case. *Id*. at 46. It also recognized the "the significance" that jurors attach to forensic evidence such as CBLA. *Id.* at 55. It cited Agent Peele's testimony, which we now know to be unfounded and unreliable, that the two bullet fragments were "what you'd expect if you were examining two pieces of the same bullet" and that the bullet in Kulbicki's handgun was "unusually close" in composition to the fragments. *Id.* It also cited the State's closing argument, in which the State made what we now know to be the equally unfounded assertions that the bullet fragments were "the same"; that "[y]ou can't tell" one fragment from the other; and that it was not a "coincidence" that, "[o]ut of all the billions of bullets in this world," a bullet with a similar composition was found in Kulbicki's gun. *Id.* at 55-56. On the basis of Agent Peele's testimony, the majority observed that "[t]he importance of the CBLA evidence" in this case "cannot be overstated." *Id.* at 55. On the basis of the exploitation

of his testimony, the majority cited the State's "rigorous reliance" on the fallacious CBLA evidence "to connect Kulbicki to the crime." *Id.* at 56. A "cursory" analysis is "hasty" or "superficial." WEBSTER'S ENCYLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 356 (1989). The *Kulbicki* majority's analysis was neither.

The State is chiefly concerned that the majority did not cite or discuss other evidence against Kulbicki. Yet, the failure to enumerate the other evidence does not mean that the majority failed to consider it. The majority undoubtedly knew of the other evidence, because it was discussed at length in the dissent and in the opinion of the Court of Special Appeals. Because of the importance of the CBLA evidence in tying Kulbicki to the commission of the crime, the majority was evidently unswayed by the dissent's contentions. Simply put, the majority was unwilling to discount the role of junk forensic science in filling the gaps in the State's circumstantial case.[13]

Finally, while it is certainly true that the State had other evidence against Kulbicki, including forensic evidence that Ms. Nueslein had been shot in the head, at close range, in Kulbicki's truck, that evidence did not rebut what appears to have been Kulbicki's defense. Kulbicki did little to dispute that the murder had occurred in his truck. *See supra* n.3. Instead, he suggested that he could not have committed the murder and that the perpetrator was someone else – someone, perhaps, like his stepson, who bore ill will toward Ms. Nueslein and had access to his truck (and to the blood-stained denim jacket).

[13] In any event, despite the other evidence against Kulbicki, the dissent expressly left open the possibility that he might successfully pursue a petition for a writ of actual innocence. *Kulbicki v. State*, 440 Md. at 65-66 (McDonald, J., dissenting).

In support of that suggestion, Kulbicki offered alibi evidence to the effect that he (though not his stepson) could not have been stalking Ms. Nueslein in his truck on the night before she disappeared, because he was with other family members; that he could not have abducted Ms. Nueslein, because he was running errands elsewhere in East Baltimore at 3:30 or 4:00 p.m., when she disappeared; and that he could not have killed Ms. Nueslein and dumped her body more than 10 miles away in Gunpowder State Park, because he was with his family from about 4:30 p.m. that afternoon until he left for work on the midnight shift. As the *Kulbicki* majority recognized, the CBLA evidence refuted Kulbicki's defense because it put the murder weapon in Kulbicki's hand and purported to prove that the fatal bullet came from his gun.[14]

[14] Kopera's testimony, that the bullet fragments came from a gun no smaller than a .38, also put the murder weapon in Kulbicki's hand.

D.

In its final argument, the State asserts that the circuit court had the discretion to find that the newly-discovered evidence did not create a substantial or significant possibility of a different result at trial. In the unique circumstances of this case, where a majority of the members of the highest Court of this State previously found a "substantial possibility" that the outcome at trial would have been different had Kulbicki's counsel merely questioned Agent Peele about the fallacious assumptions underlying CBLA, an appropriate exercise of discretion required the court to articulate why that conclusion was unpersuasive. Because the circuit court did not and evidently could not do so, we reverse the judgment below.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED; CASE REMANDED WITH DIRECTIONS TO ISSUE A WRIT OF ACTUAL INNOCENCE AND FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

APPENDIX

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February 18, 2009

Senator Delores Goodwin Kelley
James Senate Office Building, Room 302
11 Bladen St.
Annapolis, MD 21401

Re: SB486—Petition for Writ of Actual Innocence: Newly Discovered Evidence

Dear Senator Kelley:

On February 17, 2009, the House Judiciary Committee held a hearing on the related house bill, HB366. During that hearing, Delegate Luiz Simmons asked a question regarding the appropriateness of the standard set forth in the bill, "substantial or significant possibility that the result may have been different." Because you or other members of your committee may have similar concerns, we are providing you with the information that we provided to Delegate Simmons.

This language tracks the standard adopted by the Maryland Court of Appeals in a variety of situations involving the discovery of new evidence, including a motion for new trial pursuant to Rule 4-331(c), ineffective assistance of counsel claims, and *Brady* violations. In addition, this is the language adopted by the legislature when it made revisions in 2008 to the DNA testing statute, Maryland Code of Criminal Procedure, § 8-201i(1)(iii). For your convenience, we have attached numerous cases explicitly adopting this standard.

The following is a summary of the case law relevant to this specific question as well as to an additional objection raised by the representative from the Maryland State's Attorney's Association.

- Attachment A: *Yorke v. State*, 315 Md. 578, 556 A.2d 230 (1989). *Yorke* established the "substantial or significant possibility" test for Maryland. See pages 6-8 of the attachment (315 Md. at 586-588).

- Attachment B: *Jackson v. State*, 164 Md.App. 679, 884 A.2d 694 (2005). In a lengthy discussion, *Jackson* sets forth the history of the "substantial or significant possibility" language. As the Court stated regarding the language, "Judge Orth nonetheless set out for Maryland what has now for sixteen years been the standard for measuring the impact of newly discovered evidence." See pages 15-18 of the attachment (164 Md.App. at 706-711).

- Attachment C: *Campbell v. State*, 373 Md. 637, 821 A.2d 1 (2003). Applies the "substantial or significant possibility" test to motions for new trial.
- Attachment D: *Love v. State*, 95 Md.App. 420, 621 A.2d 910 (1993). Applies the "substantial or significant possibility" test to motions for new trial.
- Attachment E: *Bowers v. State*, 320 Md. 416, 578 A.2d 734 (1990). Applies the "substantial or significant possibility" test to an ineffective assistance of counsel claim.
- Attachment F: *Wilson v. State,* 363 Md. 333, 768 A.2d 675 (2001). Applies the "substantial or significant possibility" test to claim that State violated *Brady* by failing to disclose exculpatory evidence.
- Attachment G: *State v. Williams*, 392 Md. 194, 203 fn 4, 896 A.2d 973, 978 fn 4 (2006) and cases cited therein. Applies "reasonable possibility" test to claim of *Brady* violation.
- Attachment H: Maryland Code of Criminal Procedure, § 8-201. Utilizing "substantial possibility" test for claims relating to newly discovered DNA testing results.

As can be seen from this plethora of case law, the "substantial or significant possibility" test is one with which the Maryland courts are well familiar and well capable of interpreting.

In addition, the *Love* and *Campbell* cases reiterate the proposition that the time requirements of Rule 4-331 are absolute. See *Love*, 95 Md.App. at 428 (attachment D at pps. 7, 12) and *Campbell,* 373 Md. at 656-57 (attachment C at p. 13).

With respect to the contention that the one year time limit of Rule 4-331 is appropriate because after that period "memories fade," please see the lengthy discussion in *Jackson*, 164 Md.App. at 711-18, noting that trial courts ruling on motions for new trial are required to weigh the newly discovered evidence against the evidence produced at trial as well as make credibility determinations. Therefore, the Circuit Court judge is well positioned following a hearing to determine whether the witnesses are believable and persuasive.

Thank you for your consideration and attention to this matter. Please let us know if we can provide additional information to you.

Sincerely,

S. Drouet

Suzanne Drouet
Assistant Public Defender

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/0204s18cn.pdf