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7 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
8 DIVISION II

9 IN RE PERSONAL RESTRAINT PETITION No.: 49767-1-II
10 OF:

11 ROBERT E. JAMES,

**SUPPLEMENTAL RESPONSE
TO PERSONAL
RESTRAINT PETITION**

12
13 **1. SUPPLEMENTAL GROUNDS FOR RELIEF AND ARGUMENT.**

14 The State hereby supplements its original response to this personal restraint petition. As this is a
15 supplemental filing, the State will not re-state the authority for relief already provided.

16
17 **A. Ineffective Assistance of Counsel—Alleged Failure to Investigate DNA Report**

18 The Petitioner alleges that defense counsel failed to “investigate the results of the DNA
19 report” which he argues resulted “...in erroneous conclusions being included in the defense summary
20 brief...and which affected petitioners decision to refuse the plea deal...” PRP at 31-32. First and
21 foremost, the Petitioner does not provide any declaration from defense counsel that confirms this
22 allegation. The record does not support his allegation.

23
24 During the sexual assault exam, Miriam Thompson took swabs of S.J.C.’s vaginal area,
25 peroneal area and anus. 3/27 RP at 60. A DNA sample was also obtained from the Petitioner. 3/27 RP
26 at 37-38. A protein commonly found in semen (P30) was detected in the anal swab taken from S.J.C.
27 3/27 RP at 79. A swab from S.J.C.’s neck revealed a mixed DNA profile; this profile was consistent

1 as coming from S.J.C. and the appellant. 3/17 RP at 80. It is seven quadrillion times more likely that
2 the mixture occurred as a result of S.J.C. and the appellant's DNA versus a mixture of S.J.C. and a
3 random individual. 3/27 RP at 80 and 82.

4 S.J.C.'s underwear from the scene had staining consistent with blood. 3/26 RP at 79; 3/27 RP
5 at 81. Male underwear found at the scene had staining consistent with blood and the unstained portion
6 provided a DNA profile consistent with the Petitioner. 3/26 RP at 79; 3/27 RP at 82.

7
8 In the Defense Trial Brief, counsel stated this about the DNA testing: "The DNA exam found
9 this defendant's DNA on both sides of her neck and another, unidentified male's DNA elsewhere on
10 her body." Petitioner's Attachment 6. This is a fair statement of the evidence that was later produced
11 at trial. It is incorrect in one minor detail. There was no unidentified male DNA found on the victim;
12 however, there was P30 that was found on the anal swab that could not be identified. Therefore, it is a
13 reasonable inference that it could belong to a contributor other than the Petitioner.

14
15 The Petitioner does not allege that any further pre-trial investigation would have cast doubt on
16 the DNA examination. In fact, the only actual DNA recovered was located on the victim's neck,
17 which is consistent with the conduct admitted by the Petitioner during his testimony. "We stopped to
18 use the bathroom in a wooded road and sat there and...began just kind of making out..." 3/27 RP 96.
19 The Petitioner rented a motel room and in the parking lot, he and the victim "...sat in the car...and
20 we were making out at that time." 3/27 RP at 98-99.

21
22 The defense in this case was that the Petitioner had consensual physical contact with the
23 victim, but did not have sexual intercourse with her. The DNA examination is arguably consistent
24 with that theory. So, the Petitioner cannot show any prejudice to his right to a fair trial, even if there
25 was a failure to conduct further pre-trial investigation. Because the DNA examination could be
26
27

1 argued to support the defense theory, it is a legitimate trial tactic to focus pre-trial resources on other
2 areas of the case.

3 The Petitioner relies on inapplicable cases in support of this argument. *State v. A.N.J.* deals
4 with whether or not counsel rendered ineffective counsel based on a failure to conduct meaningful
5 investigation before the guilty plea. *State v. A.N.J.*, 168 Wash.2d 91, 225 P.3d 956 (2010). The
6 Petitioner did not plead guilty and he had the benefit of a full jury trial. *A.N.J.* simply does not apply.
7

8 *In re Brett*, involved a defendant convicted of aggravated first degree murder and sentenced to
9 death. *In re Brett*, 142 Wash.2d 868, 16 P.3d 601 (2001). Defense counsel in the *Brett* case allegedly
10 was ineffective due to:

11
12 (1) not promptly seeking the appointment of co-counsel; (2) failing to present a
13 mitigation package to the prosecutor before filing of the death penalty notice; (3)
14 failing to promptly investigate mental health issues; (4) failing to seek the earlier
15 appointment of investigators; (5) failing to seek the earlier appointment of mental
16 health experts; (6) failing to seek the appointment of qualified mental health experts,
17 and failing to request a continuance to locate such experts; and (7) discussing fetal
18 alcohol issues in the penalty phase of Brett's trial without calling a qualified expert.

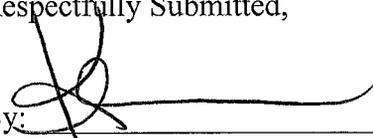
19 *In re Brett*, 142 Wash. 2d 868, 880, 16 P.3d 601, 607.

20 In the case at bar, the Petitioner makes no argument that there is any defect in the DNA
21 evidence as presented. Therefore, it is difficult to divine what difference further investigation by
22 counsel would have affected.

23 The Petitioner's main complaint with the DNA examination is that he claims it affected his
24 decision of whether or not to take a plea bargain. The truth of the matter is that the Petitioner, having
25 been convicted, now regrets his decision to take his case to trial. This "buyer's remorse" is not a
26 viable ground for overturning the verdict of the jury. "A defendant does not have a constitutional
27 right to plea bargain." *State v. Wheeler*, 95 Wash.2d 799, 804, 631 P.2d 376 (1981) (citing

1 *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977)). Therefore, this non-
2 constitutional issue is not an issue that he can raise in this petition.

3
4 DATED this 29th day of May, 2017.

5 Respectfully Submitted,
6
7 By: 
8 KATHERINE L. SVOBODA
9 Prosecuting Attorney
10 for Grays Harbor County
11 WSBA #34097

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Appellate Court Case Title: Personal Restraint Petition of: Robert Edward James
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT
PETITION OF:

No.: 49767-1-II

ROBERT E. JAMES,

DECLARATION OF MAILING

Appellant.

DECLARATION

I, Lisa Reed, hereby declare as follows:

On the 30 day of May, 2017, I mailed a copy of the State's Supplemental Response to Robert E. James; DOC no. 365127, MCC/TRU/C-403-2; PO Box 888; Monroe, WA 98272, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 30 day of May, 2017, in Montesano, Washington.

Lisa Reed

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