

No. 67387-4-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

IN RE THE PERSONAL RESTRAINT PETITION OF:

LESLIE POUNDS,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 10 AM 10:40

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A. INTRODUCTION

Leslie A. Pounds challenges his Aggravated Murder conviction and life sentence arguing that a recent letter written by the FBI admitting that an FBI examiner testified to an opinion that the “evidentiary specimen(s) could be associated to a single box of ammunition”—an opinion which the FBI now admits exceeded the “limits of science and cannot be supported by the FBI.” *See Hassell Letter* attached to PRP. After reviewing this new information, trial counsel for Mr. Pounds has stated that his trial strategy would have changed, if he had known the expert testimony was unfounded in science. *See Declaration of Walter Peale* attached to PRP. In short, the defense theory would have only attempted to raise doubts about who shot the victim, instead of offering jurors the additional inconsistent theory that Pounds shot the victim, but was unable to form the requisite intent. *Id*

In response, the State argues that Mr. Pounds brings this claim too late, although the State does not even suggest that it has been prejudiced by the delay. The State also argues that the testimony in this case was scientifically reliable, despite the undisputed statement by the FBI repudiating its agent’s testimony. Finally, the State argues that the testimony was not all that important to the outcome of the trial, failing to respond to Pounds’ claim that his trial strategy would have changed.

B. ARGUMENT

1. The State Does Not Dispute Pounds' Extra-Record Facts.

Generally speaking, this court has three options regarding issues raised in a personal restraint petition:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the Personal Restraint Petition without remanding the cause for further hearing.

In evaluating these options, the Court must evaluate how to treat the new or extra-record facts contained in a PRP. RAP 16.9 provides: Respondent should also identify in the response all material disputed questions of fact. The Washington Supreme Court further explained that the "State's response must answer the allegations of the petition and identify all material disputed questions of fact. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence. If the parties' materials establish the existence of material disputed issues of fact, then the superior court will be directed to hold a reference hearing in order to resolve the factual questions. *In re Rice*, 118 Wash.2d 876, 887, 828 P.2d 1086 (1992).

In this case, the State has not identified any factual disputes and has not presented its own competing declarations. As a result, this Court should treat Mr. Pounds' new facts as verities. To be clear, Pounds is willing to accept remand for an evidentiary hearing. However, based on the State's failure to contest his new evidence, he is entitled to relief if this Court finds those facts merit relief.

2. This Petition Was Brought Within a Reasonable Amount of Time from Discovery of the New Information. The State Does Not Claim Prejudice from Delay.

RCW 10.73.090 bars any personal restraint petition not filed within a year after final judgment. This one-year time limit, however, does not apply to a petition based solely on newly discovered evidence, so long as the defendant acted with reasonable diligence in discovering the evidence and filing the petition. RCW 10.73.100 (1). That exception could have, but does not, specify that a PRP must be brought within one year of discovering the new evidence. Instead, it simply requires "reasonable diligence."

Nevertheless, the State contends that Pounds' petition should be dismissed as untimely because a report questioning the validity of CBLA testimony was available as early as 2004. The State also contends that Pounds' delay in filing the petition after he received the FBI letter went beyond the bounds of reasonable diligence.

No Washington case defines "reasonable diligence" in discovering new evidence or in filing a petition. Division Two's opinion in *State v. Scott*, however,

is instructive. *State v. Scott*, 150 Wn.App. 281, 207 P.3d 495 (2009). In that case, five years after he pled guilty to a sex offense, Scott asked to withdraw his plea and submitted an affidavit from the victim recanting his statement against him. 150 Wn.App. at 286–87. In deciding whether Scott's motion was time-barred, the court noted that during the five years since his plea, Scott was indigent and incarcerated, a no-contact order prevented him from contacting the victim, and neither the State nor Scott had known of the victim's whereabouts for quite some time. 150 Wn.App. at 291. Considering these facts and that Scott only obtained the new evidence after he convinced a trial court to appoint a lawyer to investigate, the court held that Scott acted with reasonable diligence in discovering the new evidence. 150 Wn.App. at 286, 292–93.

Here, like the Petitioner in *Scott*, Pounds had limited access (if any) to technical, scientific research or to the expert FBI witness who testified against him at trial. And while a report generally calling CBLA evidence into question may have been published in 2004, the extent of the FBI's "misleading" testimony in Pounds' case only became apparent after a detailed review of the trial record by specialists at the FBI laboratory sometime in 2009. As the *Scott* court aptly noted, we find it "unlikely that these witnesses would have changed their stories earlier...." *Scott*, 150 Wn.App. at 292.

Furthermore, much like Scott, Pounds did not have counsel to investigate the validity of a newly discovered evidence claim until after his former attorneys

actually received notification from the FBI, sometime after May 15, 2009. Pounds' former attorneys did not attempt to assist him. Instead, they simply wrote and told him he would need to arrange for counsel on his own.

Before filing a petition, undersigned counsel attempted to negotiate a settlement. After that failed, but before filing the petition, counsel had to review trial transcripts, consult with trial counsel, and research the evolving science to determine whether a claim of newly discovered evidence would have any merit in Pounds' case. Indeed, counsel's ethical obligations under RPC 3.1 required as much.

It is important to note that the FBI's May 19, 2009, letter was sent to the Prosecutor and Judge, but not Mr. Pounds or his trial counsel. On June 8, 2009, Bill Jaquette, the Snohomish County Public Defender, wrote to Pounds with the FBI letter included. However, Mr. Jaquette told Pounds he was not entitled to a lawyer at public expense. Undersigned counsel was later retained. Current counsel first tried unsuccessfully to settle the case. See documents attached as *Appendix A*. When that failed, he provided materials to Mr. Peale, trial counsel, who signed a declaration on May 2, 2011. This PRP was filed on June 14, 2011.

As a result, it is clear that Pounds acted with reasonable diligence both when he was unrepresented and with the assistance of counsel.

It is important to point out that the State never claims prejudice as a result on any alleged lack of diligence. This Court should decide this case on the merits.

3. The FBI Has Repudiated Its Agent's Opinion

The State argues that Pounds' case was not infected with error because the FBI agent did not render an opinion unsupported by science. The FBI disagrees, writing in its letter that its agent offered an opinion that exceeded the "limits of science and cannot be supported by the FBI." *See Hassell Letter* attached to PRP.

The State is correct that analyzing the chemical composition of bullet lead has not been called into question, the inferences drawn from that analysis—that the bullets likely originated from the same box—are no longer supported by the scientific community. Appropriately, the FBI has stopped CBLA testing and no longer offers CBLA expert testimony.

However, FBI Special Agent Roger Asbury's testimony went much further. He testified that it would be "quite uncommon" to find bullets with similar composition to have originated from "different boxes." RP 569. More specifically, Special Agent Asbury testified that four received bullet fragments had a "very close compositional association" to an unfired bullet and that any differences "are the type that I would find within the same box among the cartridges." RP 579.

In any event, the FBI has now repudiated its agent's testimony—even if the State still defends it. This recantation is newly discovered evidence. Pounds now turns to the heart of the matter: the materiality question.

4. The State Failed to Respond to Mr. Pounds' Specific Claim of Prejudice. Pounds Was Prejudiced Because His Defense Theory Would Have Changed.

The State ignores Mr. Pounds' claim of prejudice and instead focuses on the relative importance of the CBLA testimony to the issues at trial. However, Pounds claimed he was prejudiced not because CBLA was a major focus at trial, but because the CBLA expert opinion was integral to trial counsel's strategy decision. As a result of this evidence, counsel decided to put on two conflicting defenses. Counsel argued that Pounds did not shoot the victim and, even if he did, Pounds did not form the requisite *mens rea*. Trial counsel did so because he feared that the CBLA testimony put the murder weapon in Pounds' possession. Trial counsel now states his trial strategy would have changed if he knew then what he knows now. Mr. Peales' declaration is clear on this point.

It is also undisputed by the State. As a result, this Court's review should focus on whether Pounds was prejudiced because trial counsel's strategy would have shifted and significantly improved as a result of the new evidence.

There is significant support in the law for this type of prejudice inquiry, in both new evidence and *Brady* cases. The focus of the prejudice or materiality requirement is whether, with the full use of the exculpatory information at trial, there was "a reasonable probability of a different result." *United States v. Jackson*, 345 F.3d 59, 73 (2d Cir.2003) (internal citations and quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in

the outcome.’ ” *Disimone v. Phillips*, 461 F.3d 181, 196 (2d Cir.2006) (quoting *United States v. Madori*, 419 F.3d 159, 169 (2d Cir.2005)). “ ‘[T]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.’ ” *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 434, (1995)). See also *Disimone*, 461 F.3d at 197 (stating that *Brady* requirements met when information near the close of prosecution's case “would likely have altered the defense’s cross examination of [a key witness] and it could even have completely changed the nature of the defense strategy”). In evaluating materiality, a reviewing court must consider two general, and somewhat overlapping, aspects of the value of the evidence. The Court must assess the statement's “utility to the defense as well as its potentially damaging impact on the prosecution's case.” *Kyles*, 514 U.S. at 434–40. In fact, the entire tenor of the Supreme Court's decision in *Kyles* compels the conclusion that an assessment of the materiality of any given piece of evidence requires a holistic assessment of the entire trial, including the defense's trial strategy.

Materiality is shown by demonstrating “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435. The Supreme Court explained that the “touchstone of materiality” under *Brady* “is not whether the defendant would more likely than not have received a different verdict with the evidence, but

whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 434. In *Kyles* itself, the Supreme Court assessed how the suppressed evidence would have affected the proceedings as a whole, including in its analysis an assessment of how the suppressed evidence might have changed the defense’s trial strategy. 514 U.S. at 445–46.

The Court in *Kyles* cited Tenth Circuit case law for the proposition that *Brady* permits an analysis into how the defense might have utilized the suppressed evidence. *Id.* at 446 (citing *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir.1986) for the proposition that a “common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and [courts] may consider such use in assessing a possible *Brady* violation”).

In evaluating a piece of evidence’s “utility to the defense,” a court must evaluate how the suppressed evidence would have affected the entire proceeding, including the defense’s trial strategy. *See, e.g., Bowen*, 799 F.2d at 613 (court may consider how suppressed evidence may have opened door to different trial tactics); *Trammell v. McKune*, 485 F.3d 546, 551 (10th Cir.2007) (recognizing that suppressed evidence may have been used to support defense theory that another person committed the offense).

It is hard to understate how damaging Pounds’ conflicting defenses must have been. It is simply unreasonable to expect a jury to conclude that Pounds did not shoot the victim when his defense included acclaim that, if he did, he must

have done so without the requisite intent. Such a theory is on a par with the post-trial "If I Did It" book supposedly written by O.J. Simpson.

On the other hand, trial counsel's declaration notes important observations from trial unlikely to be readily apparent from a cold reading of the transcript. Counsel states that the witnesses who directly implicated Pounds in the homicide were very much suspect. Counsel states that he is "confident" a different result would have been returned, but for the CBLA evidence and the tactical choices in light of that evidence.

This Court does not need to fully embrace trial counsel's confidence. Instead, this Court's confidence in the outcome only needs to be undermined as a result of this new evidence. Pounds clearly has made that showing.

C. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial. In the alternative, this Court should remand for an evidentiary hearing.

DATED this 4th day of January, 2012.

/s/ Jeffrey E. Ellis
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U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please refer to
File No

May 15, 2009

Tricia Stemler
Snohomish Co. Prosecutor's Office
3000 Rockefeller Ave
M/S 504
Everett, WA 98201

Re: Case Name: Leslie A. Pounds; 83-1-00599-4
FBI File Number: 95-257507

Dear Sir or Madam:

This letter follows up on our previous communication regarding bullet lead analysis conducted by the FBI Laboratory. Thank you for providing the information requested from the above-referenced case.

A review of the testimony provided by an FBI Laboratory examiner on the subject of compositional analysis of bullet lead was conducted on the transcript that you provided. The goal of the review was to determine if there was a suggestion by the examiner that a bullet fragment or shot pellet was linked to a single box of ammunition without clarification that there would be a large number of other bullets or boxes of bullets that could also match those fragments or shot pellet. Science does not support the statement or inference that bullets, shot pellets, or bullet fragments can be linked to a particular box of bullets. Further, any testimony stating bullets came from the same source of lead is potentially misleading without additional information regarding approximate numbers of other "analytically indistinguishable" bullets that also originated from that same source. Finally, any testimony regarding the geographical distribution of analytically indistinguishable bullets exceeds the data currently available.

After reviewing the testimony of the FBI's examiner, it is the opinion of the Federal Bureau of Investigation Laboratory that the examiner did state or imply that the evidentiary specimen(s) could be associated to a single box of ammunition. This type of testimony exceeds the limits of the science and cannot be supported by the FBI.

Your office is encouraged to consult appellate specialists in your jurisdiction to determine whether you have any discovery obligations with respect to the finding stated above. As directed by the Department of Justice, we are notifying the Chief Judge of the court in which this case was tried of the results of our review by copying him or her on this letter.

Comparative Bullet Lead Analysis Review Process
May 15, 2009

Additionally, you should be aware that the FBI is cooperating with the Innocence Project. The Innocence Project is interested in determining whether improper bullet lead analysis testimony was material to the conviction of any defendant, and, if so, to ensure appropriate remedial actions are taken. In order to fully assist them in their evaluation, the FBI will provide the Innocence Project information from our files, including a copy of the FBI expert's trial testimony in this case and our assessment of that testimony.

Further questions regarding our review of your case or the general issue of bullet lead examinations may be addressed to Marc LeBeau at: FBI Laboratory Division, 2501 Investigation Parkway, Room 4220, Quantico, VA 22135 (703-632-7408). General legal questions should be directed to Assistant General Counsel James Landon, Office of the General Counsel, FBI Headquarters, Washington, DC 20535 (202-324-1724).

Sincerely,



D. Christian Hassell, Ph.D.
Director
FBI Laboratory

cc: Larry E. McKeeman
Snohomish County Superior Court
Snohomish County Courthouse
3000 Rockefeller Ave M/S 502
Everett, WA 98201



SNOHOMISH COUNTY
PUBLIC DEFENDER ASSOCIATION

1721 HEWITT AVENUE, SUITE 200
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PHONE (425) 339-6300 • FAX (425) 339-6363

June 8, 2009

Leslie Pounds
DOC # 244545
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

Dear Mr. Pounds:

Enclosed with this letter is a letter from the Federal Bureau of Investigation regarding testimony they presented at your trial.

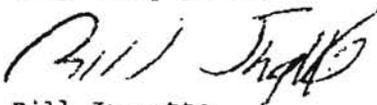
Apparently, a witness from the FBI Laboratory offered the opinion that shells relevant to your case could be traced to a particular box of ammunition. The enclosed letter advises that that witness's testimony exceeded the limits of science.

Your case is far beyond the time limit for an appeal. However, while there are limitations that must be considered, you may be able to collaterally attack your conviction on the basis of what the FBI has disclosed. A writ of habeas corpus could be filed in the superior court in the county where you are being held; you may be able to file a personal restraint petition in the Washington State Court of Appeals; and you may be able to petition for a writ of habeas corpus in the Western District of the Federal District Court.

Unfortunately, you are not entitled at this point to the appointment of counsel at public expense. You could hire an attorney to represent you or petition the court yourself, asking them to appoint counsel.

The attorney that represented you at trial, Walter Peale no longer works for the Snohomish County Public Defender Association. He works for a public defender office in Seattle. Although we cannot represent you in further proceedings, we will cooperate with you and any attorney representing you. Mr. Peale has indicated that he will cooperate as well.

Very truly yours,



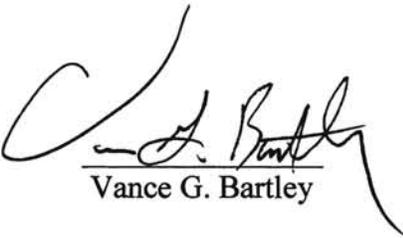
Bill Jaquette

CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Alsept & Ellis, LLC, certify that on January 9, 2012 I served the parties listed below with a copy of Petitioner's Reply Brief as follows:

Seth Fine
Snohomish County Prosecutor
Snohomish County Prosecuting Attorney's Office
3000 Rockefeller Ave.,
Everett, WA 98201

1-9-12, Sea, WA
Date and Place


Vance G. Bartley