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

In re Personal Restraint Petition of

LESLIE POUNDS,

Petitioner.

NO. 67387-4-i

RESPONSE TO
PERSONAL RESTRAINT
PETITION

I. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner is restrained pursuant to a judgment and sentence convicting him of aggravated first degree murder. Ex. 4.

II. RESPONSE TO FACTUAL ALLEGATIONS

The facts are set out in the accompanying Brief in Opposition to Personal Restraint Petition. Except insofar as admitted therein, the respondent denies the allegations set out in the petition.

III. RESPONSE TO LEGAL CLAIMS

The State's response to the petitioner's claims is set out in the accompanying Brief in Opposition to Personal Restraint Petition.

IV. EXHIBITS

The following exhibits are incorporated in this response:

Exhibit 1 – Information (9/27/83)

Exhibit 2 – Amended Information (9/27/83)

Exhibit 3 – Second Amended Information (10/25/83)

Exhibit 4 – Judgment and Sentence (12/29/83)

Exhibit 5 – Mandate (5/18/87)

Exhibit 6 – Certificate of Seth Fine

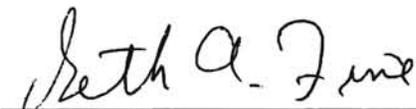
Exhibit 7 – Excerpts from report of proceedings

VI. CONCLUSION

The personal restraint petition should be dismissed.

Respectfully submitted this 22nd day of November, 2011

FOR MARK ROE
Snohomish County Prosecutor



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Deputy Prosecuting Attorney
Attorney for Respondent

NO. 67387-4-I

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

In re Personal
Restraint Petition of

LESLIE POUNDS,

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BRIEF IN OPPOSITION TO
PERSONAL RESTRAINT PETITION

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DIVISION ONE

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I. ISSUES

(1) The key evidence on which this petition is based was publicly available for seven years before the petition was filed. Has the petitioner demonstrated that he exercised reasonable diligence in discovering the evidence and filing the petition, so as to bring this case within an exception to the statutory time limit on personal restraint petitions?

(2) If the petition is timely, has the petitioner established that he is entitled to a new trial based on newly discovered evidence, where (a) the expert testimony at trial was generally within the limits suggested by later studies and (b) that expert testimony was incidental to the issues at trial?

(3) Has the petitioner demonstrated that the State violated constitutional standards by withholding evidence questioning the validity of scientific testing, when such evidence did not exist until several years after trial?

II. STATEMENT OF THE CASE

A. EVIDENCE AT TRIAL.

In this court's decision on direct appeal, it summarized the evidence as follows:¹

On September 13, 1983, Chris Vaughn and John Heazlett visited a tavern. Upon leaving, Heazlett saw Leslie Pounds's truck in the parking lot and slashed the tires. Vaughn then dropped Heazlett off at his residence.

Vaughn returned to the tavern and told Pounds that Heazlett had slashed his tires. Apparently, in the past, Pounds and Vaughn had a fight and Vaughn did not want Pounds to blame him for the slashed tires. Vaughn and Pounds then went to Heazlett's house. Vaughn enticed Heazlett out of the house by offering him some beer and marijuana. Pounds drew a gun from his pocket and ordered Heazlett into the car.

Pounds then directed Vaughn to drive to the home of his brother, Harwood Pounds, in Snohomish. Pounds held the gun pointed at Heazlett in the back seat. Upon arriving, Pounds asked Harwood if he could borrow Harwood's car. Harwood agreed on the condition that he drive. The four men got into Harwood's car. Pounds moved Heazlett at gunpoint. Harwood then drove east towards Index at Pounds' direction, with the defendant in the backseat pointing the gun at Heazlett. Heazlett was scared and crying and offering to pay back Pounds. Sometime during this ride, Pounds told Heazlett to empty his pockets

¹ A more detailed summary was set out in the Statement of the Case in the Brief of Appellant. Ex. 6. The State accepted this statement, supplemented with some additional facts relating to the cross-examination of Chris Vaughn (which was a central issue on appeal).

and put his wallet and other personal items onto the rear shelf. Upon reaching Index, they turned down a gravel road which came to a dead end. The four men got out of the car. Pounds ordered Heazlett to lie on the ground. At Pounds' request, Vaughn tied Heazlett's hands behind his back with Heazlett's bootlaces.

At this point, the men walked into the woods. When they reached a cliff, Pounds placed the gun against Heazlett's head and fired, killing Heazlett. On the way back to Snohomish, Pounds threw Heazlett's wallet and some other belongings off a bridge.

The next day, Vaughn contacted the police and told them he had witnessed a murder. Through his attorney, he made an agreement with the prosecutor to avoid prosecution for Heazlett's death. He then led the police to Heazlett's body.

On September 27, 1983, the Pounds brothers were charged with first degree murder and first degree kidnapping. The information was later amended to accuse Leslie Pounds of aggravated first degree murder with first and second degree robbery and first degree kidnapping as the aggravating factors. Harwood Pounds pled guilty to kidnapping and agreed to testify against his brother.

After a jury trial in which both Vaughn and Harwood Pounds testified for the State, Leslie Pounds was found guilty of aggravated first degree murder and sentenced to life imprisonment without possibility of parole.

Ex. 5 at 1 -3.

At trial, three witnesses testified to the events surrounding the murder: Chris Vaughn, Harwood Pounds, and the petitioner.

The State's response to the personal restraint petition includes the full testimony of these three witnesses to the murder:²

The petitioner testified that on the evening of the murder, he ate approximately 35 to 40 grams of psilocybin mushrooms. 10 RP 1891. He also smoked marijuana. 10 RP 1902. These drugs altered his perception of events. 10 RP 1897. He remembered talking to his brother Harwood and to Vaughn. He remembered driving somewhere. He testified that he remembered very little else. 10 RP 1909-37.

A psychologist testified that the petitioner's testimony was consistent with the effects of psilocybin. 12 RP 2314. In response to a hypothetical question based on the petitioner's testimony, the psychologist testified that his capacity to form an intent would be substantially impaired. 12 RP 2314-20.

B. TESTIMONY CONCERNING BULLET LEAD ANALYSIS.

Following the murder, police found a .357 magnum revolver in a bedroom used by the petitioner. 6 RP 1105-06, 1130. The gun

² The response also includes the full testimony of the FBI expert and the full closing arguments. Any additional portions of the trial transcript will be submitted if requested by the court. The complete transcript covers 2501 pages.

was loaded with five live bullets and an empty cartridge case. 6 RP 1135-36.

In his testimony, the petitioner admitted that this gun was his. He testified that he usually kept it in his car. He had not removed it from there. According to the petitioner, Vaughn knew that he kept a gun in his truck. 10 RP 1922-24.

An FBI expert compared the bullets found in this gun with bullet fragments recovered from Heazlett's head. He found that the chemical composition of some of these bullets was similar. 3 RP 581. Based on this, he concluded that the bullets could have come from the same box. 3 RP 602.

III. ARGUMENT

A. BECAUSE THE PETITIONER DELAYED FILING HIS PETITION FOR SEVEN YEARS AFTER PUBLICATION OF THE FACTS ON WHICH HE RELIES, HE HAS FAILED TO DEMONSTRATE REASONABLE DILIGENCE.

Under RCW 10.73.090, a personal restraint petition must be filed within one year after the judgment becomes final. This deadline applies to petitions filed more than one year after July 23, 1989. RCW 10.73.130. Since the judgment in the present case became final prior to that date, the effective deadline was July 23, 1990. The personal restraint petition was filed in June, 2011. It is over 20 years past the deadline.

The petitioner seeks to rely on the exception set out in RCW

10.73.100(1):

The time limit specified in RCW 10.73.090 does not apply to a petition ... that is based solely on one or more of the following grounds:

(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition. . .

The petitioner claims that this exception is satisfied by information criticizing Comparable Bullet Lead Analysis (CBLA). Whether this satisfies the requirements of "newly discovered evidence" is discussed below. Even if it does, however, that is not sufficient to invoke the statutory exception. The petitioner must further demonstrate that he "acted with reasonable diligence in discovering the evidence and filing the petition." A review of the relevant dates will show that the petitioner cannot satisfy this requirement:

1. Problems with CBLA were documented in a report from the National Academy of Sciences that was published in 2004. P.R.P at 4-6.

2. In 2005, the FBI discontinued examination of bullet lead. The agency announced this decision publicly and identified experts who could provide further information. P.R.P at 7-8.

3. As early as 2005, courts overturned convictions based on the admission of such evidence. State v. Behn, 375 N.J. Super. 409, 868 A.2d 329 (A.D. 2005); Clemons v. State, 896 A.2d 1059 (Md. 2006); Ragland v. Commonwealth, 191 S.W.3d 569 (Ky. 2006).

4. In May, 2009, the FBI sent a letter to the Snohomish County Superior Court and the Prosecutor relating to this specific case.³ The letter was promptly forwarded to the Snohomish County Public Defender and the attorney who represented the petitioner at trial. Ex. 6.

5. In September, 2009, the prosecutor was contacted by an attorney who was representing the petitioner in connection with this matter. Ex. 6.

While no Washington case explains what constitutes reasonable diligence in filing a collateral attack, several other jurisdictions have found a 30- to 60-day period to be reasonable for discovery and filing of post-conviction motions. See, e.g., Evans v. Chavis, 546 U.S. 189, 210, 126 S. Ct. 846, 163 L Ed. 2d 684 (2006) (using 30 to 60 days as general measurement for reasonableness

³ The personal restraint petition incorrectly states that this letter was sent in November 2009.

based on other states' rules governing time to appeal to the state supreme court); Carey v. Saffold, 536 U.S. 214, 219, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (same); Chaffer v. Prosper, 592 F.3d 1046 (9th Cir. 2010) (same). Federal courts have found that diligence was not displayed when petitioners waited more than 60 days. See, e.g., Chaffer (delays of 115 and 101 days); Ragan v. Horn, 598 F. Supp. 2d 677 (E. D. Pa. 2009) (delay of 102 days); Beards v. Dailey, 38 Ore. App. 309, 589 P.2d 1207 (1979) (delay of 82 days).

The defendant bears the burden of establishing the facts showing due diligence. See State v. Fackrell, 44 Wn.2d 874, 880, 271 P.2d 679 (1954) (discussing "due diligence" as requirement for new trial based on newly discovered evidence). Here, the petition was filed: (a) seven years after the publication of a report describing problems with CBLA; (b) six years after the FBI publicly identified experts who could provide further details about this problems; (c) six years after the publication of judicial opinions reversing convictions on the basis of these problems; (d) two years after a letter identifying problems in this specific case was sent to the petitioner's former attorneys; and (e) 21 months after the petitioner retained an attorney to investigate this matter. The

petitioner has not explained why such lengthy delays are consistent with the statutory requirement of “reasonable diligence.” As a result, his case does not fall within the exception to the time limit set out in RCW 10.73.100(1). The petition is therefore barred by RCW 10.73.090 and .130.

B. IF THE PETITION IS CONSIDERED ON THE MERITS, THE PETITIONER HAS FAILED TO MEET THE STANDARDS FOR GRANTING A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE.

1. The Expert’s Testimony In This Case Is Generally Consistent With The Standards Set By Later Reports.

If the petition is considered timely, the petitioner’s claims should be rejected on the merits. Before considering the standards for newly discovered evidence, it is first necessary to clarify the nature of the evidence on which the petitioner relies. The petitioner primarily relies on a report from the National Academy of Sciences (NAS) concerning CBLA. He claims that this report shows that CBLA is “junk science.” P.R.P at 2. This characterization is unwarranted.

The findings set out in the NAS report are summarized in detail in an affidavit attached to the personal restraint petition. Affidavit of Diana Wright, filed in Kulbicki v. Maryland. According to this affidavit:

a) Findings included the assessment that the current technology was appropriate and the best available for the exam.

b) It was also reported that the examination was sufficiently reliable to support testimony that bullets produced from the same molten source of lead were more likely to be indistinguishable than bullets produced from different sources. This finding also stated that an examiner could appropriately testify that two (or more) bullets which could not be differentiated would have an increased probability of resulting from the same source as opposed to having no probative association

...

g) The committee further reported that available data does not support a statement concerning the likelihood that an expended bullet originated from a particular box of ammunition and that references to boxes of ammunition should not be made in testimony. The objection to such references appears to stem from the concern that such testimony might lead one to infer that there is a substantial probability that a given bullet originated from a specific box associated with the subject.

Affidavit of Diana Wright at 14-15.

As the Pennsylvania Supreme Court has held, this study does *not* establish that CBLA is fundamentally flawed:

[T]he [NAS] article calls the technique the FBI uses for chemical analysis in CBLA cases accurate and reliable. Specifically, the article states that the FBI technique is the best currently available technology for analyzing bullet fragments, while making suggestions for even more precise results. The article concludes that CBLA is a reasonably accurate way of determining whether two bullets came from the

same compositionally indistinguishable volume of lead, although it states that the value and reliability of CBLA can be enhanced further if the report's recommendations are implemented.

This language hardly support's [the defendant's] claim that the NAS study establishes that the methods utilized by the FBI in CBLA cases were "imprecise and flawed." Thus, although we agree ... that this information only became available to [the defendant] in November of 2003 when it was reported, it does not provide a basis upon which he can predicate an untimely claim because the study does not support [the defendant's] contention that the methods utilized by [the FBI expert] were so imprecise and flawed as to render [his] expert opinion unreliable.

Commonwealth v. Fisher, 582 Pa. 276, 870 A.2d 864, 870 (2005).

Based on this reasoning, the court held that the 2004 report did not constitute "newly discovered evidence," so as to justify an otherwise-untimely petition for post-conviction relief.

The NAS report does *not* show that CBLA is "junk science." Rather, it is valid science, but it has sometimes been used to draw exaggerated conclusions. It is therefore necessary to examine the specific conclusions expressed by the expert in each specific case, to see if they exceeded the limits of valid science. Only then can the court determine whether any inaccurate testimony was significant enough to warrant a new trial.

In this case, the expert testified that there were "close compositional associations" between some of the bullet fragments

removed from the victim's head and some of the cartridges found in the petitioner's gun. 3 RP 581. It was "possible, but generally quite uncommon for us to find a match from a totally unrelated bullet." For "ammunition of the same type, of the same caliber, produced at the same factory on the same day, it's certainly more likely that you're going to find matching compositions between different boxes than if we are talking about ammunition made at a completely different time in the same factory or made in a completely different factory." 3 RP 569-70.

On cross-examination, the expert was asked whether it was more likely than not that the bullets came from the same box. He *repudiated* that suggestion:

No, I'm not saying that it's more likely than not that these all came from the same box because of these similarities. I'm saying that bullet lead composition is a way – it's a dimension of association. It's one of the ways that we can compare things. We can see if they're the same, we can see if they're very different, and from what I looked at here, it would be my opinion that the fragments very certainly could have come from – because of their close compositional association with the unfired cartridges, they certainly could have come from the same box as the unfired cartridges.

3 RP 602.

The expert acknowledged that he had no idea how many other bullets existed with a similar composition. It was possible that other boxes containing indistinguishable bullets had been sold in the same geographical area. 3 RP 603-05. When asked if this would influence the test, he answered:

It doesn't influence my test. I think it influences the degree of weight that you place on this test, but again, I'm not saying they came from the same box. I'm saying they certainly could have come from the same box.

3 RP 605.

This testimony was generally consistent with the limitations later suggested in the NAS report. The witness testified that the chemical similarity between the bullets increased the likelihood that they came from the same source. He acknowledged that other boxes of bullets made at the same time would be indistinguishable. He also acknowledged that bullets made at other times and other locations could be indistinguishable. Even under hindsight standards, such testimony is scientifically sound.

This testimony did refer to boxes of bullets – something that the NAS report disapproves of. As discussed above, this disapproval stems from “the concern that such testimony might lead one to infer that there is a substantial probability that a given bullet

originated from a specific box associated with the subject.” Affidavit of Diana Wright at 15 (attached to P.R.P.). In this case, the witness rejected that inference. He specifically said that he could *not* conclude that the bullets probably came from the same box. He would only say that they *could* have come from the same box. 3 RP 602.

This testimony is far weaker than the testimony in many other cases involving CBLA evidence. See Behn, 868 A.2d at 336 (witness testified that bullets “came from the same source of lead” and “were manufactured on or about the same date”); Clemmons, 896 A.2d at 1067 (witness testified that bullets “came from the same smelt of lead”). Such conclusions were not supported by valid science. The weaker conclusions in this case were supported. Consequently, the holdings in this other cases have little bearing on the present case.

2. Since the New Evidence Would At Most Provide Some Basis for Challenging Some Of The Expert’s Conclusions, It Is “Merely Impeaching” And Does Not Justify A New Trial.

Once the actual nature of the “newly discovered evidence” is clarified, it is possible to measure that evidence against the standards for granting a new trial.

To obtain a new trial based upon newly discovered evidence, a defendant must prove that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

State v. Macon, 128 Wn.2d 754, 800, 911 P.2d 1004 (2006). Here, the evidence fails at least two of these requirements: it is merely impeaching, and it would not probably change the result at trial.

As discussed above, the NAS report could at most provide a basis for challenging some of the conclusions drawn by the expert. In other words, it would serve to impeach his testimony. Merely identifying an expert who disagrees with a prior expert's conclusions does not justify a new trial based on newly discovered evidence. State v. Evans, 45 Wn. App. 611, 614, 726 P.2d 1009 (1986), review denied, 107 Wn.2d 1029 (1987).

In claiming that the evidence is not "merely impeaching," the petitioner cites State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002). There, it was discovered after trial that an expert witness had been stealing drugs from the crime laboratory for his own use. The court concluded that this evidence was "critical" with respect to the witness's credibility and the validity of his testing. Id. at 438. Indeed, under the prosecutor's policy, "the defendant *would not*

have been tried or sentenced at all if the newly discovered evidence had come to light before he was tried, convicted, or sentenced.” Id. at 440 (court’s emphasis). Under these circumstances, the evidence was not considered to be “merely impeaching.”

The situation in the present case is entirely different. The newly discovered evidence was not “critical” with respect to the expert’s credibility. It neither challenged his personal veracity nor the accuracy of his testing methods. At most, it provided a basis for questioning some of his conclusions. Nor is there any indication that the newly discovered evidence would have prevented the defendant’s prosecution. As discussed in more detail below, the CBLA evidence was only a minor portion of the case. Because the newly discovered evidence was merely impeaching, it cannot justify granting a new trial.

3. In View Of The Minor Role That CBLA Evidence Played At The Trial, There Is No Basis For Concluding That The New Reports Would Probably Change The Outcome Of The Trial.

To justify a new trial on the basis of newly discovered evidence, it is not sufficient to show that the evidence *may* lead to a different result. Rather, the court must conclude that the evidence *will probably* change the result at trial. State v. Peele, 67 Wn.2d

724, 731, 409 P.2d 663 (1966). In the present case, the record does not support such a conclusion.

The CBLA evidence in this case played a minor role. Neither counsel even mentioned this evidence in closing argument. 13 RP 2425-94. In his closing argument, the prosecutor specifically identified the evidence that he was relying on:

Two eyewitnesses said Leslie Pounds committed that murder, including his brother. That's the evidence suggested to you on who did it.

13 RP 2488.⁴

It is evident why neither counsel referred to the CBLA evidence: it resolved none of the key issues in the case. At most, it provided some circumstantial evidence that the murder was committed with the petitioner's gun. Even without that evidence, this fact was highly likely – his gun was the only one described by any witness as being available at the time of the murder. 2 RP 394-95; 3 RP 707.

⁴The personal restraint petition states: "One piece of evidence that 'pointed the finger' at Mr. Pounds, as the prosecutor phrased the argument, as [*sic*] comparative bullet lead analysis. RP 2488, 2494." P.R.P. at 11. Neither of the cited portions of the argument contains any reference to CBLA. The argument at RP 2488 is quoted above. At RP 2494, the prosecutor urged the jury to "consider all the evidence."

But identifying the murder weapon does not tell who fired it. The defense theory was that Vaughn shot the victim. The evidence showed that the petitioner's gun was available to Vaughn. Harwood Pounds testified that Vaughn had held the gun during the course of the kidnapping. 3 RP 708. (Vaughn denied this. 2 RP 688.) In closing argument, defense counsel suggested that the petitioner had put the gun in the trunk and Vaughn had taken it out. 13 RP 2476-77. The CBLA evidence sheds no light on whether this occurred. Furthermore, even if Vaughn had shot the victim, that would not necessarily exculpate the petitioner, who could have been an accomplice.

Even in perfect hindsight, CBLA evidence would not be eliminated. It remains a fact that the chemical composition of the bullet fragment removed from the victim's head was similar to that of bullets later found in the petitioner's gun. This fact provides some support for an inference that the bullet was fired from that gun. Under evidence now available, that inference might be somewhat weaker. Nevertheless, in view of all the evidence, it remains likely that the bullet was fired from that gun. There is no reason to believe that, based on the weakening of this minor item of evidence, a jury would *probably* acquit the petitioner.

The petitioner has presented his trial attorney's hindsight speculation about the outcome of the trial. The attorney does not, however, suggest any additional investigation that he would have conducted, or any additional argument that he would have raised. Rather, he claims that he would have *abandoned* the alternative theory of diminished capacity – a theory that was supported by his client's testimony and that of an expert witness. The attorney then speculates that this would have given more credibility to his argument that Vaughn was the real shooter. There is no logical reason why the abandonment of a potentially-valid argument would have led the jury to accept an unrelated argument. Counsel's speculation falls far short of establishing that the new evidence would *probably* have changed the result of the trial.

In a number of cases, courts have considered the impact of CBLA. When other substantial evidence supported a conviction, courts have concluded that criticisms of CBLA did not constitute newly discovered evidence justifying a new trial. Wyatt v. State, 71 So.3d 86, 100 (Fla. 2011); United States v. Berry, 624 F.3d 1031, 1042-43 (9th Cir. 2010), cert. denied, 2011 W.L. 3890372 (U.S. 2011); Higgs v. United States, 711 F. Supp. 2d 479, 500-01 (D. Md.

2010); Fisher, 870 A.2d at 870-71. The same should be true in the present case.

The expert here only opined that the fatal bullet *could* have come from the same box as the bullets in the petitioner's gun. He expressly rejected the suggestion that this was true more likely than not. 3 RP 602, 605. Given the weakness of these conclusions and the minor role that they played at the trial, there is no basis for concluding that a further weakening of those conclusions would probably change the outcome of the trial. Consequently, the requirements for granting a new trial have not been satisfied.

C. THE STATE DOES NOT VIOLATE CONSTITUTIONAL STANDARDS BY FAILING TO DISCLOSE EVIDENCE THAT DOES NOT YET EXIST.

The petitioner also raises an alternative argument: that non-disclosure of various studies concerning CBLA violated the State's obligations under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Under Brady, the prosecution is required to disclose "material evidence" that is favorable to the accused. Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

The petitioner claims that information casting doubt on CBLA was available “as early as 1991.” P.R.P. at 17. At least one court has held to the contrary: “The 1991 FBI Study ... actually did more to confirm the validity of CBLA processes than to discredit them.” Higgs, 711 F. Supp. 2d at 500. But ultimately it does not matter. The publication date of this study was eight years after the petitioner’s trial. The petitioner fails to explain how disclosure of information in 1991 could have changed the result of a trial that occurred in 1983. Because the allegedly exculpatory evidence did not exist at the time of trial, it was not “material” in the constitutional sense.

The petitioner claims that “[t]he Brady obligation continues beyond trial, to appeal and post-conviction cases.” P.R.P. at 17. He cites no authority for this proposition. The United States Supreme Court has held to the contrary: Brady establishes trial rights that do not apply post-conviction. District Attorney’s Office v. Osborne, 557 U.S. 52, 129 S. Ct. 2308, 2319-20, 174 L. Ed. 2d 38 (2009). There was no Brady violation.

IV. CONCLUSION

The personal restraint petition should be dismissed, either as untimely or on the merits.

Respectfully submitted on November 28, 2011.

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