IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of	)	No. 65393-8-I
	)	DIVISION ONE
NORM JOHN TRAPP,	)	UNPUBLISHED OPINION
Petitioner.	)	FILED: November 28, 2011

Per Curiam. Norm Trapp filed a motion for a new trial under CrR 7.8 based on newly discovered evidence, and the trial court transferred his motion to this court for treatment as a personal restraint petition.[1] In his petition, Trapp challenges his first degree murder conviction and argues that newly discovered evidence invalidates much of the scientific testimony offered against him at trial.[2] He submits a letter from the Federal Bureau of Investigation (FBI) indicating that the comparative bullet lead analysis (CBLA) testimony its expert offered against him at trial was potentially "misleading" and "not supported by science."[3] Trapp also contends that a National Research Council report discredits other evidence that connected him to the crime scene bullets.[4] Because Trapp has not shown that the recanted CBLA testimony would change the result of the trial or that the National

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[1] Order Transferring Motion from Relief from Judgment, State v. Trapp, No. 94-1-00999-5 (May 12, 2010). See CrR 7.8(c)(2).

[2] Br. of Pet'r at 1.

[3] Br. of Pet'r at 1, 16; Def. Motion & Memorandum for a New Trial, Ex. 1, Letter from D. Christian Hassell, Ph.D., Director, FBI Laboratory, to Tricia Stemler, Snohomish County Prosecutor's Office (May 15, 2009).

[4] Br. of Pet'r at 1-2, 18. See Nat'l Research Council of the Nat'l Academies, Strengthening Forensic Science in the United States: A Path Forward (2009).

Research Council report provides more than mere impeachment material, he cannot meet the requisite standard for relief. Accordingly, his petition is denied.

FACTS

On April 19, 1994, a manager of the Brentwood Apartments complex in Everett discovered Charles Kent's body lying face down in a pool of blood just inside the door of Kent's apartment.[5] Police interviewed several witnesses, including neighbors who stated they heard strange sounds and possible gunshots coming from Kent's apartment around 6 a.m. that morning.[6] They also interviewed DeAnn Beech, Kent's ex-wife.[7]

Autopsy results showed that Kent died from four gunshot wounds to the head and neck.[8] Medical examiners removed three partial bullet fragments and one intact bullet from Kent's body, and estimated the time of death at approximately 6 a.m. on April 19.[9] Inside the apartment, investigators found additional bullet fragments in the door jamb and in the entryway. Forensic examiners later determined that the four bullets were .22 caliber long rifle "Dominion"-brand bullets and had been fired from the same gun.[1]

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[5] 3 Verbatim Report of Proceedings (VRP) at 127.

[6] 2 VRP at 100-02, 104, 106-07; 3 VRP at 118.

[7] 4 VRP at 293.

[8] 4 VRP at 347-48, 362.

[9] 4 VRP at 352.

Police also lifted numerous fingerprints from the crime scene, including a palm print on the inside of Kent's front door.[11] Fingerprint experts matched the palm print to Norm Trapp, DeAnn Beech's former boyfriend.[12] Trapp had been in a serious relationship with Beech, but she ended it a few days before Kent's murder when her daughter accused Trapp of abuse.[13] Authorities searched the residence Trapp had shared with Beech, but could not locate him.[14]

One day after the murder, police found a blue Chevette registered to Trapp abandoned in a parking lot near Kent's apartment.[15] Parked there since the day of the murder,[16] the Chevette matched the description of the vehicle that witnesses saw driving out of the apartment complex moments after the shots were fired.[17] Several months later, in July, a deputy sheriff on routine patrol stopped a pickup truck with a partially obscured license plate.[18] Trapp, the driver, introduced himself as Dale Beech and produced a temporary Washington driver's license listing the same

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[1] 5 VRP at 450-51, 455, 480.

[11] 3 VRP at 194-95.

[12] 3 VRP at 198, 203, 206-08.

[13] 4 VRP 276-77.

[14] 5 VRP at 407, 409.

[15] 3 VRP at 184.

[16] 2 VRP at 96.

[17] 3 VRP at 119.

[18] 5 VRP at 396.

name.[19] Suspecting that the driver's license had been altered, the officer searched recent police bulletins and noticed that the driver matched Trapp's description, who was the registered owner of the truck and was also wanted in connection with Kent's murder.[2] He arrested Trapp and impounded the vehicle.[21]

Officers searched the truck and recovered a partially empty box of .22 caliber long rifle "Dominion"-brand ammunition.[22] Later, detectives searched a trailer in Poulsbo where Trapp had been living since his break-up with Beech.[23] They found three booklets, entitled, "Reborn in the USA," "The Heavy-Duty New Identity" and "How to Disappear."[24]

The State charged Trapp with first degree murder. During a post-arrest interview with detectives, Trapp admitted that he tried to conceal his identity, but denied any involvement in Kent's death.[25] Trapp said that he tried to contact Kent a few times during the days before the murder, but had last been to Kent's apartment complex on April 17.[26] He said that he never went inside Kent's apartment.[27]

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[19] 5 VRP at 399.

[2] 5 VRP at 400-01.

[21] 5 VRP at 401-02.

[22] 5 VRP at 425-26.

[23] 5 VRP at 430.

[24] 5 VRP at 430.

[25] 6 VRP at 535-36.

[26] 6 VRP at 537-38.

[27] 6 VRP at 540, 546-47.

At trial, Beech testified that Kent blamed Trapp for breaking up their marriage, and that Kent and Trapp exchanged angry words on several occasions.[28] But, she said that Trapp never entered Kent's apartment.[29] Beech also told jurors that Trapp owned several .22 caliber weapons and described him as "an expert marksman."[3]

Kent's fiancée, Karen Curtis, told jurors that on April 16, Trapp ran away after frantically knocking on Kent's apartment door.[31] Later, Curtis and Kent saw Trapp driving his blue Chevette behind their vehicle.[32] Several witnesses saw a man resembling Trapp drive a blue Chevette through Kent's apartment complex parking lot several times on April 17 and 18.[33] Kent's neighbor testified that he saw a man matching Trapp's description pounding on Kent's door the night before the murder, and saw a blue Chevette parked in a nearby stall.[34] Another neighbor testified that after he heard gunshots on April 19, he looked out the window and saw a blue Chevette, just like Trapp's, "speeding out of the complex."[35]

For the defense, Trapp's employer and long-time acquaintance, Philip Zerr,

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[28] 4 VRP at 250-53.

[29] 4 VRP at 275.

[3] 4 VRP at 264-65.

[31] 5 VRP at 513-14.

[32] 5 VRP at 516-17.

[33] 3 VRP at 127-131.

[34] 2 VRP 55-110.

[35] 3 VRP at 118-19.

testified that Trapp was at work at the time of the murder.[36] After Trapp's arrest in July, Zerr told police that he checked on Trapp at his worksite in Poulsbo between 5 a.m. and 5:45 a.m. the day of the murder.[37] Thus, Trapp could not have been in Everett at the time of Kent's murder. Police made several attempts to follow up with Zerr over the next several months to obtain additional information.[38] Zerr declined and told detectives that he did not have any records to show the time he saw Trapp on the date of the murder.[39] On the day of his trial testimony, more than a year after Kent's murder, Zerr brought a day planner with him to court.[4] Notations in the day planner indicated he was with Trapp from approximately 5 a.m. to 7 a.m. on the day of the murder at the worksite in Poulsbo.[41] Although Zerr claimed that he used this day planner to record Trapp's work and all his other appointments, he never provided it to police and it appeared to be "hardly used."[42]

Comparative Bullet Lead Analysis and Toolmark Evidence Presented at Trial

FBI Special Agent Ernest Peele provided comparative bullet lead analysis (CBLA) testimony for the prosecution.[43] Peele told jurors that certain metallic impurities

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[36] 7 VRP at 719-766.

[37] 7 VRP at 734, 751.

[38] 7 VRP at 761-63.

[39] 7 VRP at 761-63, 773.

[4] 7 VRP at 745.

[41] 7 VRP at 730, 738.

[42] 7 VRP at 742-746.

in bullet lead could be used to distinguish one bullet from another, and that the FBI could compare trace elements in different samples of lead to identify similarities or differences.[44] Thus, he could distinguish or match a bullet found at a crime scene with bullets "that might be associated with a suspect."[45]

Peele examined four bullet fragments, two removed from Kent's body and two found at the crime scene.[46] He also examined each of the 36 cartridges in the cartridge box recovered from Trapp's vehicle.[47] All 40 specimens had very close composition, and he declared that some were "analytically indistinguishable" from one another.[48] He concluded that the specimens "[all] could have originated from the same larger piece," and that, "[e]very piece up there is what I'd expect to happen if they all came out of the same box… ."[49] According to Peele, the minute differences in the bullets' composition indicated that the crime scene bullets could only have come from a different box (other than the one recovered from Trapp's vehicle) if it was the "same type and the same manufacturer packaged on or about the same date" or "at the same time."[5]

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[43] 6 VRP 561-596.

[44] 6 VRP at 563.

[45] 6 VRP at 563.

[46] 6 VRP at 568-69. Police recovered one fragment from the door jamb of Kent's apartment and the other fragment from the ground near the entryway. See Testimony of Detective Raymond Neibert, 3 VRP at 152.

[47] 6 VRP at 570.

[48] 6 VRP at 575.

[49] 6 VRP at 581.

Forensic scientist Raymond Kusumi also testified for the prosecution. He compared the head stamp (a logo created by a die and "bunter" tool) on the crime scene casings with the head stamp on the cartridges found in Trapp's vehicle to determine if the same manufacturing toolmarks and die imperfections appeared on both.[51] Of the four crime scene casings, he matched two to several unused cartridges in the box, and concluded that the matching specimens had been stamped by the same bunter during the manufacturing process.[52] When asked about the significance of finding a match, Kusumi told the jury that bunters could stamp up to a million rounds of ammunition but "it is possible that these cartridges could come from this box of ammunition[.]"[53] Another witness, ballistics expert George Kass, told jurors that the "D" head stamp was unique to Dominion bullets sold at Coast to Coast stores before 1978.[54] No longer available in retail stores at the time of the murder, the Coast to Coast Dominion bullets were difficult to find.[55]

The jury convicted Trapp on April 5, 1995.[56] This court previously affirmed Trapp's conviction on direct appeal.[57]

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[5] 6 VRP at 582.

[51] 5 VRP at 444, 456, 463, 480.

[52] 5 VRP at 457.

[53] 5 VRP at 457-58.

[54] 5 VRP at 480-85.

[55] 5 VRP at 484-85.

[56] VRP (Apr. 13, 1995) at 2.

Summary of Newly Discovered Evidence

A. Comparative Bullet Lead Analysis

On May 15, 2009, Trapp received a copy of a letter from the FBI to Snohomish County prosecutors asserting the invalidity of scientific testimony offered against Trapp at trial.[58] In 2004, facing rising criticism over CBLA evidence, the FBI had commissioned a National Research Council report to determine CBLA's reliability and use in criminal trials.[59] The report found that FBI expert witnesses commonly overstated the conclusions that could be drawn from CBLA evidence, and cautioned that available data does "not support any statement that a crime bullet came from, or is likely to have come from, a particular box of ammunition, and references to 'boxes' of ammunition in any form is seriously misleading[.]"[6] As a result of the study, the FBI ceased using CBLA evidence, stopped providing CBLA testimony in trials, and issued letters to prosecutors that identified cases like Trapp's in which expert testimony may have been misleading.[61]

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[57] See State v. Trapp, noted at 88 Wn. App. 1058, 1997 WL 785666 (1997).

[58] Reply Br. of Pet'r at 11. Def. Motion & Memorandum for a New Trial, Ex. 1, Letter from D. Christian Hassell, Ph.D., Director, FBI Laboratory, to Tricia Stemler, Snohomish County Prosecutor's Office (May 15, 2009).

[59] Kenneth O. MacFadden, *Preface* to Nat'l Research Council of the Nat'l Academies, Forensic Analysis: Weighing Bullet Lead Evidence, at ix (2004).

[6] Nat'l Research Council of the Nat'l Academies, Forensic Analysis: Weighing Bullet Lead Evidence, at 107. (2004).

[61] Press Release, Federal Bureau of Investigation, FBI Laboratory Announces Discontinuation of Bullet Lead Examinations (September 1, 2005) (available at http://www.fbi.gov/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-

In 2009, after examining Special Agent Peele's testimony from Trapp's trial, the FBI determined that the recent scientific study implicated Trapp's case.[62] The FBI letter warned that Peele's statements linking the crime scene bullets to the box of bullets recovered from Trapp's vehicle were "potentially misleading," exceeded the scope of science, and could not be supported by the FBI.[63] The letter also stated that the FBI would communicate with the Innocence Project, Trapp's pro bono counsel, for evaluation and "to ensure appropriate remedial actions are taken."[64]

In light of this new evidence, the Innocence Project Northwest (IPNW) reviewed trial transcripts, ordered police and forensic science reports, consulted with experts, and evaluated the merits of Trapp's case.[65] On March 18, 2010, IPNW filed a CrR 7.8 motion for a new trial on Trapp's behalf in Snohomish County Superior Court.[66]

B. Toolmark Evidence

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bullet-lead-examinations); Press Release, Federal Bureau of Investigation, FBI Laboratory to Increase Outreach in Bullet Lead Cases (November 17, 2007) (available at http://www2.fbi.gov/pressrel/pressrel07/bulletlead111707.htm).

[62] Letter from D. Christian Hassell, Ph.D., Director, FBI Laboratory, to Tricia Stemler, Snohomish County Prosecutor's Office (May 15, 2009).

[63] Letter from D. Christian Hassell, Ph.D., Director, FBI Laboratory, to Tricia Stemler, Snohomish County Prosecutor's Office (May 15, 2009).

[64] Letter from D. Christian Hassell, Ph.D., Director, FBI Laboratory, to Tricia Stemler, Snohomish County Prosecutor's Office (May 15, 2009).

[65] Reply Br. of Pet'r at 11.

[66] Def. Motion & Memorandum for New Trial.

Trapp also claims that a National Research Council report (hereinafter "NAS report") published in 2009 illustrates recent scientific developments that constitute newly discovered evidence.[67] The NAS report criticized the current state of forensic sciences in this country and identified weaknesses in several fields.[68] The report also questioned the reliability of toolmark evidence, an area the authors targeted for needed improvement.[69]

"Toolmarks" result when a hard object (tool) comes into contact with a relatively softer object.[7] Toolmark examiners identify individual and microscopic characteristics left by a tool, and determine if those characteristics match an object associated with a crime suspect.[71] For example, "when the internal parts of a firearm make contact with the brass and lead that comprise ammunition[,]"[72] examiners commonly analyze the resulting striation marks to match spent ammunition to a particular gun.[73] When "sufficient agreement" exists in the patterns of two sets of marks, an examiner may conclude that a specific tool was the source of those

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[67] Br. of Pet'r at 1, 21, 27.

[68] Nat'l Research Council of the Nat'l Academy of Science, Forensic Science in the United States: A Path Forward, 129-183 (2009) [hereinafter NAS Report].

[69] NAS Report at 150.

[7] NAS Report at 150.

[71] NAS Report at 150, 153.

[72] NAS Report at 150.

[73] NAS Report at 151.

toolmarks.[74]

The NAS report identifies several drawbacks to toolmark identification.[75] Particularly, the authors claim that "not enough is known about the variabilities among individuals tools and guns," so that it remains unknown how many "points of similarity are necessary for a given level of confidence in the result."[76] The authors conclude that "individual patterns…might….be distinctive enough to suggest one particular source, but additional studies should be performed to make the process of individualization more precise and repeatable."[77] Without the setting of national standards, a toolmark examiner's decision remains subjective, "based on unarticulated standards and no statistical foundation for estimation of error rates."[78]

The NAS report does not mention or specifically address bunter or head stamp evidence, point to misleading toolmark evidence testimony in particular cases, or evaluate the admissibility of toolmark evidence under evidentiary rules. On the contrary, the report merely presents a general picture of the current processes and pitfalls of toolmark identification and identifies possible methods of improvement.[79]

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[74] NAS Report at 153.

[75] NAS Report at 150-154.

[76] NAS Report at 154.

[77] NAS Report at 154.

[78] NAS Report at 153-54.

[79] See NAS Report at 154-55.

ANALYSIS

I. Timeliness of Trapp's Petition

Generally, RCW 10.73.090 bars any personal restraint petition not filed within a year after final judgment.[8] 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.[81]

The State contends that Trapp's petition should be dismissed as untimely because a report questioning the validity of CBLA testimony was available as early as 2004.[82] The State also contends that Trapp's 10-month delay in filing the petition after he received the FBI letter went "well beyond the bounds of reasonable diligence."[83] We disagree, and hold that the one-year time limit does not bar Trapp's petition.

No Washington case defines "reasonable diligence" in discovering new evidence or in filing a petition.[84] Division Two's opinion in State v. Scott, however, informs our analysis.[85] In that case, five years after he pled guilty to a sex offense,

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[8] RCW 10.73.090(1). This court issued the mandate on Trapp's direct appeal (No. 36460-0-I) on December 3, 1998.

[81] RCW 10.73.100(1).

[82] Br. in Opposition at 16-18.

[83] Br. in Opposition at 18.

[84] The State suggests several sources of persuasive authority to support its argument, but none of those cases are on point. See Br. in Opposition at 17-18.

[85] State v. Scott, 150 Wn. App. 281, 207 P.3d 495 (2009).

Scott asked to withdraw his plea and submitted an affidavit from the victim recanting his statement against him.[86] 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.[87] 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.[88]

Here, like Scott, Trapp 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 Trapp's 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 …."[89]

Furthermore, much like Scott, Trapp did not have counsel to investigate the

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[86] Scott, 150 Wn. App. at 286-87.

[87] Scott, 150 Wn. App. at 291.

[88] Scott, 150 Wn. App. at 286, 292-93.

[89] Scott, 150 Wn. App. at 292.

validity of a newly discovered evidence claim until after IPNW actually received notification from the FBI, sometime after May 15, 2009. Then, before filing the petition in March 2010, counsel had to review trial transcripts, order police and forensic reports, consult with experts, and research the evolving science to determine whether a claim of newly discovered evidence would have any merit in Trapp's case.[9] Indeed, counsel's ethical obligations under RPC 3.1 required as much.[91] Considering the technical and highly specialized testimony at issue here, we conclude that Trapp acted with reasonable diligence in discovering the evidence and in filing his motion.

II. Newly Discovered Evidence

Trapp alleges that the FBI letter recanting the expert testimony at his trial and the recently issued NAS report constitute newly discovered evidence and each entitle him to relief.[92] In a personal restraint petition, material facts that have not been previously presented and heard may be grounds for relief when "the interests of justice" require vacation of the conviction or sentence.[93] The same standard

[9] Reply Br. of Pet'r at 11. Def. Memorandum in Response to State's Motion to Transfer Jurisdiction at 7.

[91] RPC 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous…."

[92] Reply Br. of Pet'r at 1-2.

[93] RAP 16.4(c)(3).

applies in a personal restraint petition as that applied to a motion for a new trial based on newly discovered evidence.[94] Consequently, Trapp must demonstrate that the new evidence: "(1) will probably change the result of the trial; (2) was discovered since 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."[95] The absence of any one of these circumstances justifies the denial of a new proceeding.[96]

A. Comparative Bullet Lead Analysis (CBLA)

We find it necessary to first provide a brief background of CBLA.[97] CBLA involves a process in which forensic investigators identify the elemental composition and characteristics of a bullet and compare it to that found in another bullet.[98] For more than 35 years, FBI expert witnesses testified that they could determine the box from which a bullet originated, "all based on an analysis of the composition of the lead."[99] These

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[94] In re Pers. Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994).

[95] In re Pers. Restraint of Stenson, 150 Wn.2d 207, 217, 76 P.3d 241 (2003); In re Pers. Restraint of Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (quoting State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)).

[96] In re Stenson, 150 Wn.2d at 217.

[97] No Washington case has directly addressed CBLA evidence. For a comprehensive discussion of CBLA, see United States v. Berry, 624 F.3d 1031, 1035 n.3, 1037 (9th Cir. 2010).

[98] Edward J. Imwinkelried & William A. Tobin, *Comparative Bullet Lead Analysis (CBLA) Evidence: Valid Inference or Ipse Dixit?*, 28 Okla. City U.L.Rev. 43 (2003).

experts declared bullets with statistically significant similarities "analytically indistinguishable," and could then testify "to a reasonable scientific certainty" that a crime scene bullet "came from the same manufacturer, molten source, batch, or box as the bullet traceable to the suspect."[1] Of course, this testimony led to the inference that the person who owned or possessed the box of bullets was the same person who fired the deadly shot.[101]

While the underlying science analyzing the chemical composition 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.[102] Appropriately, the FBI has stopped CBLA testing and no longer offers CBLA expert testimony.[103] As a result, some courts in other jurisdictions have overturned convictions

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[99] An understanding of CBLA also requires a general awareness of the bullet manufacturing process. First, lead refiners obtain lead, primarily from old car batteries, and smelt the lead into a "molten source" that can weigh up to 100 tons. The refiners ensure the presence of appropriate levels of alloying and trace elements according to a bullet manufacturer's specifications. For example, "molten source" must have a copper level below a specified ceiling and an antimony level within a minimum and maximum range. These requirements give rise to the major underlying premise of CBLA that each molten source of lead is "unique in composition, establishing, in essence, a chemical and metallurgical 'fingerprint.'" Edward J. Imwinkelried & William A. Tobin, *How Probative is Comparative Bullet Lead Analysis?*, 17 Crim. Just. 26, 27 (2002).

[1] Imwinkelried, *How Probative is Comparative Bullet Lead Analysis?,* at 27.

[101] See Higgs v. United States, 711 F.Supp.2d 479, 494 (2010).

[102] Nat'l Research Council of the Nat'l Academies, Report in Brief, Forensic Analysis: Weighing Bullet Lead Evidence, 1 (2004).

[103] For purposes of our analysis here, we assume that CBLA evidence would not (and could not) be presented at all upon retrial. Thus, it is unnecessary to delve into whether the FBI letter recanting Peele's CBLA testimony would actually be admissible at trial.

based entirely or in part on CBLA testimony.[104]

Trapp contends, and we agree, that the FBI letter constitutes newly discovered evidence in the form of recanted trial testimony.[105] Recanted testimony, however, "does not necessarily, or as a matter of law, entitle the defendant to a new trial."[106] To obtain relief, newly discovered evidence must be "of such significance and cogency that it will probably change the result of the trial."[107] This is an exacting standard, one which requires more than the mere possibility of a different outcome.[108]

Trapp argues that absent Special Agent Peele's CBLA testimony, a jury would have acquitted him.[109] But because significant evidence connected Trapp to Kent's murder, we disagree. The absence of CBLA testimony would not have changed the result of the trial.

Circumstantial evidence, separate and distinct from Peele's CBLA testimony, linked the four crime scene bullets to the box of 36 cartridges from Trapp's vehicle. The crime scene bullets and the cartridges were all .22 caliber long rifle "Dominion"-brand

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[104] No Washington court has addressed recanted CBLA testimony in the context of a newly discovered evidence claim.

[105] See State v. Macon, 128 Wn.2d 784, 799-800, 911 P.2d 1004 (1996) (Recantation of trial testimony is generally considered newly discovered evidence).

[106] Macon, 128 Wn.2d at 801.

[107] State v. Peele, 67 Wn.2d 724, 732, 409 P.2d 663 (1966).

[108] See State v. Gassman, 160 Wn. App. 600, 609, 248 P.3d 155, review denied, 172 Wn. App. 1002 (2011).

[109] Br. in Support of Pers. Restraint Petition at 23.

bullets.[11] Several prosecution witnesses testified that this particular brand of ammunition was difficult to find in 1997 and had not been available for retail purchase since 1978.[111]

Other significant evidence also pointed strongly to Trapp's guilt. Investigators found his palm print on the inside of Kent's apartment door, even though both Trapp and DeAnn Beech denied that Trapp ever went inside the apartment.[112] Several witnesses saw a man matching Trapp's description looking for Kent in the days prior to the murder, driving a blue Chevette, like Trapp's.[113] Kent's neighbor saw a blue Chevette quickly leave the parking lot immediately after the fatal gunshots.[114] Police found the same car, registered to Trapp, abandoned after the murder in a nearby parking lot.[115] Trapp also went to great lengths to conceal his identity immediately after Kent's murder. He moved to Poulsbo, obtained false identification, changed his physical appearance, and possessed booklets explaining how to change his identity.[116]

Significantly, the recantation of Peele's testimony does nothing to exonerate Trapp. The FBI letter does not point to the real possibility of a different perpetrator, nor

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[11] 5 VRP at 485.

[111] 5 VRP at 432, 484-85.

[112] 4 VRP at 275; 6 VRP at 540, 546-47.

[113] 3 VRP at 128-31.

[114] 3 VRP at 127-131.

[115] 3 VRP at 184.

[116] 5 VRP at 430. Several witnesses testified that Trapp shaved his beard after the murder.

does it consist of actual evidence that Trapp may not have been the shooter.[117] While it may be entirely possible that in a different case, one resting primarily or solely on CBLA evidence, a corresponding recantation from the FBI may meet the requisite standard for relief, such is not the case here. Other overwhelming evidence points to Trapp's guilt, and absent Peele's testimony, the result of the trial would not have been different.

B. Toolmark Evidence

Trapp also contends that recent developments in the scientific community surrounding forensic evidence amount to newly discovered evidence. He claims that these developments, outlined in the NAS report, reveal that Kusumi's toolmark testimony was "scientifically false."[118] But while the NAS report criticizes the current practice of individualizing toolmarks, Trapp overstates the significance and applicability of this report to his case. He fails to support his claim that the report actually constitutes newly discovered evidence and is more than merely cumulative or impeaching.[119] And relief

[117] See Riofta v. State, 134 Wn. App. 669, 142 P.3d 193 (2006), aff'd, 166 Wn.2d 358, 209 P.3d 467 (2009) (Affirming a trial court's denial of a request for post-conviction DNA testing of hat found in a stolen car associated with a shooting, because two or three people occupied the car at some point and the DNA test would not reveal who wore the hat at the time of the shooting). Compare State v. Bradford, 140 Wn. App. 124, 131-32, 165 P.3d 31 (2007) (personal restraint petition granted when newly discovered evidence showed that an unidentified male's DNA found on a mask placed over a rape victim's eyes made it possible that someone other than defendant committed the rape, when considered in the context of other evidence at trial).

[118] Reply Br. of Pet'r at 2.

[119] Reply Br. of Pet'r at 15. Trapp points to several cases in other jurisdictions where toolmark or other forensic evidence has been discredited. But those cases do not address the NAS report and only address the admissibility of toolmark evidence under Daubert v. Merrell Dow Pharm., Inc. (509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)) and

cannot be granted when the only purpose of new evidence is to impeach or discredit evidence produced at trial.[12]

Trapp's claim that the NAS report constitutes "substantive evidence"[121] is misguided. The report does not call for a reassessment of toolmark evidence presented in cases that have already been tried, nor does it address the specific type of toolmark evidence presented in Trapp's case—head stamps created from a bunter. And, while the report points to the subjectivity of toolmark identification and lack of a statistical basis for analysis, this information is not new and was available at the time of Trapp's trial. Any "new" information contained in the report merely provides a general basis for challenging the admissibility of evidence in future trials or possible avenues for impeachment.

Furthermore, Trapp does not identify any authority that requires or persuades us to overturn a conviction simply because general scientific studies contradict prior opinion proffered at trial by expert witnesses.[122] Cases from other jurisdictions provide little

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Kumho Tire Co., Ltd. v. Carmichael (526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)) in federal courts.

[12] State v. Sellers, 39 Wn. App. 799, 807, 695 P.3d 1014 (1985).

[121] Br. of Pet'r at 37.

[122] Trapp cites Melendez-Diaz v. Massachusetts, 577 U.S. __, 129 S. Ct. 2527, 2536, 174 L. Ed. 2d 314 (2009). In that case, the United States Supreme Court references the NAS report, but only in the context of a Confrontation Clause analysis and only for the proposition that forensic evidence "is not uniquely immune from the risk of manipulation," and thus, Sixth Amendment guarantees the right to confrontation of forensic analysts. Trapp also cites two cases (United States v. Glynn, 578 F.Supp.2d 567, 574 (S.D.N.Y. 2008) and United States v. Green, 405 F.Supp.2d 104 (D. Mass. 2005) where federal

guidance on that point. In Ragland v. Commonwealth,[123] the court overturned a conviction after a National Research Council report challenged CBLA reliability, but only after the FBI had already announced it would no longer pursue such evidence and only because CBLA evidence was the only evidence linking the defendant to the murder. In State v. Edmunds,[124] a court ordered a new trial because of a "shift in mainstream medical opinion" regarding shaken baby syndrome. In that case, while the new evidence did not completely dispel the old evidence, it created a fierce debate with credible but competing medical opinions on each side, and was specific to the victim's injuries.[125] In State v. McGuire,[126] a defendant relied on the same NAS report that Trapp cites here to contend that the toolmark identification was too unreliable to be admissible at his trial. But the court ruled that under Frye v. United States,[127] there was no error in the admission of the toolmark evidence because proof of general acceptance " 'does not mean there must be complete agreement in the scientific community about the techniques, methodology, or procedures that underlie the scientific evidence.' "[128]

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courts limited toolmark testimony under Daubert. Daubert does not apply in Washington, and Trapp provides no meaningful analysis as to how or why those cases should inform our inquiry here.

[123] 191 S.W.3d 569, 578-79 (Ky. 2006).

[124] 308 Wis.2d 374, 746 N.W.2d 590, 599 (2008).

[125] Edmunds, 746 N.W.2d at 599.

[126] 419 N.J.Super. 88, 16 A.3d 411, 436 (2011).

[127] 293 F. 1013 (1923).

[128] McGuire, 16 A.3d at 436-37, citing State v. Chun, 194 N.J. 54, 91-92, 943 A.2d 114, 136

Accordingly, when faced with a challenge to admissibility based on this particular NAS report's conclusions, many courts have continued to allow such evidence with appropriately tailored limitations.[129]

Trapp suggests that the report constitutes more than mere impeachment material because it shows the toolmark evidence would now be inadmissible or limited under Frye. He makes a general claim that, "[u]nder the rules of evidence at retrial . . . Kusumi would not be permitted to draw any conclusions that the bullets were made from the *same* bunter without an appropriate scientific foundation."[13] However, the admissibility of Kusumi's trial testimony is not at issue here.[131] Rather, we decide only whether the NAS report meets the requisite standard for relief for newly discovered evidence. But because the NAS report provides nothing more than mere impeachment material in this particular case, we hold that it does not.

III. Due Process Violation

(2008).

[129] See United States v. Willock, 696 F.Supp.2d 536, 568-570 (D. Md. 2010) (citing several federal courts' decisions to allow toolmark evidence even after the publication of the NAS report because it is still "sufficiently plausible, relevant, and helpful to the jury to be admitted in some form[,]" and noting that "[w]hile the future may bring greater scientific certainty to toolmark identification evidence… at present it appears to be…sufficiently reliable to be helpful to a jury."

[13] Br. of Pet'r at 36.

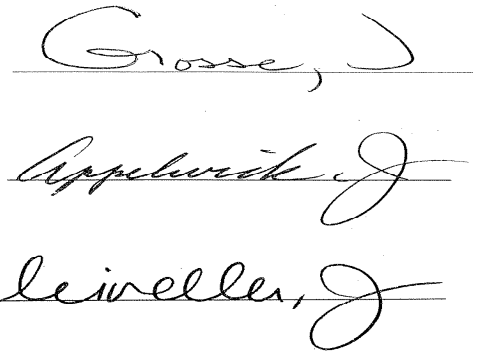
[131] In any event, a claim that the trial court erred in admitting Kusumi's testimony and violated Frye is time-barred by RCW 10.73.090.

Trapp also claims a due process violation under Giglio v. United States[132] because "the State failed to correct the material misrepresentations of its expert witnesses."[133] But due process analysis is triggered only when "there has been a 'knowing use of perjured testimony.'" [134] Trapp has not established that the State knowingly used perjured testimony, nor does he engage in any meaningful legal analysis to support his argument. Thus, we decline to address this issue. [135]

CONCLUSION

Petition denied.

For the court:



[132] 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)

[133] Br. of Pet'r at 37. Although Trapp's argument is unclear, we assume this claim refers to Special Agent Peele's CBLA testimony.

[134] In re Pers. Restraint of Benn, 134 Wn.2d 868, 937, 952 P.2d 116 (1998).

[135] RAP 16.10(d); RAP 10.3(a)(6).