

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
(302) 255-0664

John Williams, Esquire
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
Attorney for the State

Jeffrey Fogg, *Pro Se*
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, Delaware 19977

Re: State of Delaware v. Jeffrey Fogg
I.D. No. 9504002666
In the Supreme Court: No. 506, 2010

Submitted: April 20, 2012
Decided: June 6, 2012

Decision of the Superior Court pursuant to the Order of Remand from the
Delaware Supreme Court dated February 13, 2012.

On Defendant's Motion for Postconviction Relief. ("black boot" issue)
DENIED.

On Defendant's Motion to Expand the Record.
GRANTED IN PART AND DENIED IN PART.

Dear Mr. Williams and Mr. Fogg:

On remand from the Delaware Supreme Court regarding Defendant's appeal from this Court's order denying Defendant's *pro se* Motion for Postconviction Relief, this Court must determine whether the State's alleged failure to disclose evidence regarding a single black boot during Defendant's 1996 murder trial constituted a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Defendant's

Motion is procedurally barred and substantively lacking. Were Defendant's Motion not procedurally barred, it would fail substantively because no *Brady* violation occurred. The State did not suppress the boot evidence and Defendant was not prejudiced. Defendant's Motion for Postconviction Relief is **DENIED**.

I. FACTUAL AND PROCEDURAL HISTORY

On direct appeal, the Delaware Supreme Court adopted the facts provided and included these facts in the opinion reviewing Defendant's conviction.¹ Those facts are reproduced at length herein:

On April 4, 1995, there was a party at 407 7th Street, Holloway Terrace, the residence of Daryl "Babe" Andrus. John "Dwayne" Cathell brought over a case of beer around noon and sat on the porch drinking with Andrus and two other men. Fogg arrived around 2:30 p.m. with a 12-pack of beer and Cheryl Adams. James "JD" Dilley ("Dilley") was there also. Dilley and Andrus had been friends for years, although two weeks earlier Andrus had severely beaten Dilley on the face. Dilley was a small man, weighing about 150 pounds and five feet three inches tall. He had a clawed right hand.

The party migrated from the front porch to the back where Fogg provoked Cathell into fighting by kicking Cathell's leg and knocking his hat off. Subsequently, the party moved down to the basement where Cathell and Fogg fought again. Dilley got between the two men, but Andrus hit Dilley out of the way and broke up the fight.

Around 8:00 p.m., Andrus, Fogg and Adams went to a tavern. They stayed there for about an hour and a half. According to Adams, Fogg and Andrus were rowdy and excited from the drinking and earlier fighting.

On their way back to Andrus's residence, they stopped at a liquor store. They arrived at Holloway Terrace at approximately 10:00 or 10:30 p.m. Dilley was there. When Adams left approximately 20 minutes later, only three people remained in the dwelling: Dilley, who was in the living room trying to get a fire started in a wood stove, and Andrus and Fogg, who were in the kitchen pouring glasses of black sambuca.

The next morning at approximately 7:30 a.m., an ambulance from the local fire company responded to 407 7th Street. When they arrived on the scene, Fogg directed them inside where they found a body wearing boxer shorts and socks. There was blood all over the walls and carpets of the house. Fogg started mouth-to-mouth resuscitation while the emergency medical technicians began CPR

¹ *Fogg v. State*, 719 A.2d 947 (Del. 1998) (TABLE).

compressions. Fogg told them, "I don't understand what happened, we were talking to him this morning."

A short time later, paramedics arrived. Andrus directed them to the victim. Examining Dilley, the paramedics found signs of rigor mortis in the jaw and finger and no pulse. CPR was discontinued and Dilley was pronounced dead at 7:42 a.m.

When Officer Romi Allen of the New Castle County Police Department arrived, the paramedics informed Allen that this was a crime scene. The victim's face was a bloody pulp. As described by the medical examiner at trial, Dilley had suffered multiple severe injuries caused by "kicking, punching, stomping and striking or being struck with blunt objects as well as hands and shod feet," to the extent that some of these actions left imprints on his body. The injuries to his face were so severe that his nose was torn away from his cheek and his ears were torn away from the back of his head. A false plate inside his mouth was broken into multiple pieces because he had been kicked. The hyoid bone underneath his chin was fractured. According to the medical examiner, Dilley died as a result of extreme blood loss complicated by the inhalation of blood and vomit into his airway.

After inspecting the residence, Officer Allen separated Fogg and Andrus since they were possible witnesses. Allen asked Fogg to have a seat in the police vehicle. When a second officer arrived at the scene, Andrus was placed in the second vehicle.

Detective Quinton Watson of the New Castle County Police Department arrived at approximately 8:30 a.m. He spoke with Fogg who was seated in the back seat of the patrol vehicle. Fogg told Watson that the previous evening, after Adams had brought the women back to Andrus's residence, he had come inside and "crashed on the couch." He was awakened in the morning by Andrus calling his name from the hallway outside the bathroom. He went to the bathroom and saw Dilley lying face up in the bathtub, cold and bloody. Fogg and Andrus pulled him out of the tub and dragged him by the arms to Andrus' bedroom. They put blankets and a heater next to him. Andrus started mouth-to-mouth resuscitation. Then Andrus went across the street to call for an ambulance. Fogg continued to perform mouth-to-mouth breathing on Dilley who was making gurgling sounds.

Shortly thereafter, the police then transported Andrus and Fogg to police headquarters for more questioning. Andrus was arrested and charged with hindering prosecution. In his final interview which started at 8:40 p.m., Fogg admitted to the police that he had struck Dilley with his hand. Fogg was arrested and charged with first degree murder and hindering prosecution. On May 1, 1995, Andrus and Fogg were jointly indicted on charges of Murder in the First Degree and Conspiracy in the First Degree.

While Andrus and Fogg were at police headquarters being questioned, other police officers were gathering evidence inside the Andrus residence. The living room wall facing the front door had what the police described as an enormous amount of blood on it. The floor was stained with apparent blood, as were the hallway and walls leading to the back of the residence. Similar stains were found on the refrigerator door in the kitchen and on the venetian blinds, sink, and shower in the bathroom. The bathtub was three-quarters filled with red-brown water and numerous items were floating in it, including a pillow, beer can, and shampoo containers. A pair of black boots was discovered in the living room and a pair of cowboy boots and a single black boot were located in the bedroom a few feet away from the body. The police found pieces of broken denture in the bathtub, on the living room floor, and on the bedroom floor next to the victim's body. A tooth was located in the hallway. A pair of wet and bloody jeans was found on the door handle of a second bedroom, and a wet shirt and sock were discovered outside the basement on the ground. On the back deck, the police found a t-shirt, lamp base, and a comforter stained with blood that DNA analysis later matched to Dilley.

The day following the defendant's arrests, the Medical Examiner's Office called the police to ask whether any jewelry had been seized at the scene or from the defendants. The police provided the Medical Examiner with a wizard ring belonging to Andrus, Fogg's ring that had on it a skull's face wearing a Viking helmet, and also several pairs of boots. At trial, the Assistant Medical Examiner, Dr. Adrienne Perlman, testified that Dilley had very distinct "patterned injuries" on his body. She ultimately identified four distinct "patterned injuries" that were caused by the defendants' rings, and the cowboy boots and single black boot recovered from Andrus's bedroom. The cowboy boots, State's Exhibit No. 74, were later identified by a podiatrist as matching casts of Andrus's feet. Dr. Perlman also stated that one ring had to have had a stone in it to have caused the "patterned injuries" she saw on Dilley's body, even though when she saw the ring, the stone was missing.

On April 5, 1995, the police had observed fingerprints, smears and palm prints in reddish-brown stains on the south wall of the living room. Corporal Ronald Webb lifted several palm prints off that wall, the east wall at the corner of the hallway and from the outside of the door of the master bedroom. At trial, he testified that the ten palm prints that were of value for identification purposes belonged to Andrus and Fogg.

Robert Richmond, an inmate at the Delaware Correctional Center, was called as a witness by the State. Richmond testified that he had met Andrus at Gander Hill. Andrus had told Richmond about his crime, stating that the victim, who lived with Andrus, had slapped Andrus in the face and that Andrus had started fighting. The victim fell to the floor, and Andrus and the co-defendant, who was staying there at the time, kicked and stomped the victim. Andrus said that he had hit the man in the face and apparently was concerned that his ring, which was taken from him by

the police, would match 17 cuts to the man's face. According to Richmond, Andrus had claimed that his co-defendant, whose name Richmond did not remember, had gotten carried away with the beating and went too far. The incident took place in the living room and afterward, they dragged the victim to the bathroom to clean him up. Their main concern was to clean up the house. They had plans of getting rid of the body, but too many people knew that Dilley had been there and that they had been fighting. Andrus told Richmond that he went to bed and, the next morning after sobering up, he called 911.

The defense for Andrus presented evidence that he had sustained a gunshot wound in 1994 that had left him partially paralyzed on his right side and in his left leg. He would not have been able to kick with any force, although he could have performed some of the injuries described in the autopsy such as punching and striking with blunt objects or hands. Neither Andrus nor Fogg testified at trial. The jury subsequently found them both guilty as charged.

The Supreme Court upheld both Defendants' convictions in 1998.² Defendant first filed a motion for postconviction relief in 1999, which the Court denied in 2000.³ In 2001, the Delaware Supreme Court remanded that matter to the trial court for an evidentiary hearing regarding Fogg's ineffective assistance of counsel claim. Again, at the hearing's conclusion, postconviction relief was denied.⁴ (During the evidentiary hearing, a necessary witness, Robert Richmond was incarcerated in another state and unavailable to testify). The Supreme Court affirmed.⁵

In 2009, when the Court learned Richmond was in Delaware, Richmond testified at a reconvened evidentiary hearing.⁶ After the hearing, Fogg's counsel withdrew from representation because counsel contended Fogg's *Brady* claim regarding Richmond's testimony was meritless and made ethical advocacy impossible.⁷ The Superior Court again denied postconviction relief.⁸ Fogg appealed and new counsel was appointed to handle the appeal. Appellate counsel also withdrew from representation.⁹

² *Id.*

³ *State v. Fogg*, 2000 WL 1211510 (Del. Super. Aug., 1, 2000).

⁴ *State v. Fogg*, 2002 WL 31053868 (Del. Super. Sept. 10, 2002).

⁵ *Fogg v. State*, 2002 WL 31873705 (Del. Dec. 23, 2002).

⁶ *State v. Andrus*, 2010 WL 2878871 *1 (Del. Super. July 22, 2010).

⁷ *State v. Fogg*, 2010 WL 2653328 (Del. Super. June 28, 2010).

⁸ *State v. Fogg*, 2010 WL 2891500 (Del. Super. July 22, 2010).

⁹ *Fogg v. State*, Del., No. 506, 2010, (Sept. 26, 2011).

In this October 2011 *pro se* filing, Fogg argues that a colorable *Brady* claim exists. Fogg contends that a single black boot introduced at the 1996 joint trial was not possibly worn by him because his feet are too large. The Supreme Court remanded this matter to the Superior Court to consider Fogg's new black boot *Brady* argument.¹⁰

Defendant's *Brady* claim relates to five boots in evidence. The five boots included two pairs of boots worn by Defendants and a single black boot found at the scene. When taken into custody, Andrus wore cowboy boots and Fogg wore brown boots; neither Defendant wore the single black boot. A podiatrist completed foot impressions for both defendants in June 1995. In April 1996, four days before trial, Fogg's counsel filed a motion in *limine* asserting the State failed to provide either the podiatrist's impressions or a report regarding the podiatrist's boot examination. In response, the State advised counsel that the podiatrist examined the boots, created both Defendants' foot impressions, and disclosed to defense counsel that Fogg's feet fit one set of boots. The State's disclosure never mentioned the single black boot that is this Motion's focus. The podiatrist never specifically mentioned the single black boot and only referenced the two different pairs of boots worn by Defendants. The State informed defense counsel that the impression and the boots were available for defense inspection. Before trial, the State explained it only intended to argue that the brown boots were worn by Fogg. Other boots in evidence, including the single black boot, were never directly attributed to Fogg. Defense counsel's motion in *limine* regarding the boots was thus resolved and withdrawn at the pretrial conference in April 1996.

Through the instant Motion, Defendant unequivocally does not seek a new trial, but rather requests the first-degree intentional murder conviction pursuant to 11 Del. C. § 636(a)(1), be downgraded to the supposed lesser included offense of "intentional" manslaughter pursuant to 11 Del C. § 632(b)."¹¹ Defendant contends

¹⁰ *Fogg v. State*, Del. No. 506, 2010, (Feb. 13, 2012).

¹¹ The relief Defendant seeks is a reduction of his first degree murder charge to the lesser included offense "intentional manslaughter pursuant to 11 Del C. § 632(b)." Def's Opening Br. at 3. However, there is no subpart (b) included in §632. The Court assumes Defendant is seeking a reduction to the lesser included offense of manslaughter, which is found in §632. §632 provides, in *toto*, "A person is guilty of manslaughter when: (1) The person recklessly causes the death of another person; or (2) With intent to cause serious physical injury to another person the person causes the death of such person, employing means which would to a reasonable person in the defendant's situation, knowing the facts known to the defendant, seem likely to cause death; or (3) The person intentionally causes the death of another person under circumstances which do not constitute murder because the person acts under the influence of extreme emotional disturbance; or (4) The person commits upon a female an abortion which causes her death, unless

that a modification is merited if the Court finds the State violated *Brady*. In addition, Defendant filed a “Motion for Expansion of the Record” on March 16, 2012 and the State Responded on March 30, 2012; as explained in footnote 57, *infra*, that Motion is **GRANTED** in part and **DENIED** in part.

II. Defendant’s Contentions

Defendant argues that this Motion for Postconviction Relief is not procedurally barred because it qualifies under Superior Court Criminal Rule 61(i)(5) for the “miscarriage of justice” exception.¹² Substantively, Defendant asserts that the State relied upon Richmond’s testimony that Defendant wore the single black boot. Defendant argues that the black boot was held out by the medical examiner as delivering the fatal blow to the victim. Defendant contends the State asserted the murder was intentional in part because Defendant wore the boot with intent to use it to kick the victim to death. Defendant asserts the State failed to provide Defendant with testing results comparing the single black boot against Defendant’s feet, and that the failure to provide the testing results constituted a *Brady* violation. Defendant contends that comparing the boot’s size against Defendant’s foot impression would have been exculpatory because testing would have demonstrated Defendant could not wear the boot.

Defendant asserts that before trial, defense counsel attempted to ascertain the boot’s size and objected to various State evidence nondisclosures, including foot analysis for each codefendant and the black boot. Defendant argues that the undisclosed evidence constituted a *Brady* violation that would have negated the intent element required for first degree intentional murder. Defendant contends the State’s failure to disclose the boot and testing results compels an alternative manslaughter conviction and requisite sentence reduction.

III. The State’s Contentions

The State argues that Defendant’s *Brady* claim is meritless and procedurally barred by Delaware Superior Court Criminal Rule 61(i) (1, 2 and 3). The State asserts Defendant’s claims do not constitute a miscarriage of justice pursuant to

such abortion is a therapeutic abortion and the death is not the result of reckless conduct; or (5) The person intentionally causes another person to commit suicide. Manslaughter is a class B felony.” 11 Del. C. § 632.

¹² Super. Ct. Crim. R. 61(i)(5).

Delaware Superior Court Criminal Rule 61(i)(5). The State contends that Defendant overstates the black boot's import to the State's case. Contrary to Defendant's assertion, the State argues that the medical examiner did not conclude the boot delivered the fatal blow, but rather that the black boot left a pattern injury, causing some of the victim's many physical injuries. Furthermore, the State contends the single black boot was not used to establish Defendant's intent.

The State also argues that no *Brady* violation occurred because the State did not withhold either the boot or Defendant's plaster foot impression from defense inspection. The State asserts that the alleged undisclosed evidence was available for defense inspection at police headquarters and that defense counsel had the opportunity to compare the boots against Defendant's plaster foot impression at any time. According to the State, *Brady* prevents the suppression of and forbids any State failure to reveal favorable evidence to Defendant. The State asserts the black boot and foot impression were neither suppressed nor unrevealed. The State contends the prosecutor only argued the black boot represented an instrument used to harm the victim and never concluded the boot was worn by either codefendant.

IV. DISCUSSION

A. DEFENDANT'S POSTCONVICTION CLAIM IS PROCEDURALLY BARRED AND DOES NOT FALL WITHIN THE MANIFEST INJUSTICE EXCEPTION PROVIDED BY SUPERIOR COURT CRIMINAL RULE 61(i)(5).

The Court must first apply Delaware Superior Court Criminal Rule 61's procedural requirements before reaching Defendant's *Brady* claim regarding the black boot.¹³ Those procedural requirements first include a three year limit for filing a postconviction motion.¹⁴ Secondly, there is a procedural bar against repetitive postconviction motions.¹⁵ If a defendant does not assert a ground for

¹³ *Richardson v. State*, 3 A.3d 233, 237 (2010); *Cropper v. State*, 2005 WL 850423*1 (Del. Apr. 1, 2005) (“[T]his Court first will apply the rules governing the procedural requirements of Rule 61 before giving consideration to the merits of any underlying claims for post-conviction relief.”); *State v. Brooks*, 2007 WL 3105883 *2 (Del. 2009) (“To protect the integrity of the procedural rules, this Court will not address the substantive aspects of the defendant's claims if they [are] procedurally barred.”).

¹⁴ Del. Super. Ct. Crim. R. 61(i)(1). Although the three year time limit has been shortened to one year, the three year limit may still be applicable to Defendant's case since it was tried in 1996.

¹⁵ Del. Super. Ct. Crim R. 61(i)(2).

relief, “in a prior postconviction proceeding . . . [it] is thereafter barred, unless consideration of the claim is warranted in the interest of justice.”¹⁶ Third, a Defendant procedurally defaults any ground for relief when the ground was not previously asserted “in the proceedings leading to the judgment of conviction,” unless good cause is shown for the procedural defect or prejudice is established.¹⁷

A procedural bar exception exists where procedurally barring Defendant’s claim constitutes a “miscarriage of justice.”¹⁸ If a miscarriage of justice is found, the procedural defects are overcome. Pursuant to Rule 61(i)(5), the miscarriage of justice exception, “is a general default provision” and permits a defendant to seek relief even where relief is otherwise procedurally barred.¹⁹ Where a defendant makes a “colorable claim,” Rule 61(i)(5) becomes available and the court must determine whether the claim constitutes a miscarriage of justice.²⁰ The Supreme Court has held that, “*Brady* violations strike at the core of a fair trial, [and that] the consequences of a failure to comply with *Brady* must be examined carefully.”²¹ Therefore, when a *Brady* violation is found, “postconviction relief cannot be barred by Rule (i)(3) because a *Brady* violation undermines the fairness of the proceeding leading to the judgment of conviction.”²²

Defendant’s claims are procedurally barred. First, the current claim is procedurally untimely.²³ Denial is required for the Motion’s tardiness because Defendant’s current postconviction claim is asserted over a dozen years after Defendant’s direct appeal concluded in October 1998.²⁴ The Motion is also procedurally flawed because it is repetitive under Superior Court Rule 61(i)(2); the Court denied Fogg’s two previous postconviction motions and the interests of justice do not require fresh consideration. The Court denied Fogg’s first motion for postconviction relief in August 2000.²⁵ After the evidentiary hearing, the Court

¹⁶ *Id.*

¹⁷ Del. Super. Ct. Crim R. 61(i)(3).

¹⁸ Del. Super. Ct. Crim. R. 61(i)(5).

¹⁹ *Bailey v. State*, 588 A.2d 1121, 1129 (Del. 1991).

²⁰ *Webster v. State*, 604 A. 2d 1364, 1366 (Del. 1992) (citing cf. *Younger v. State*, 580 A. 2d 552, 555 (Del. 1990)).

²¹ *Jackson III v. State*, 770 A.2d 506, 515-16 (Del. 2001).

²² *Id.* at 515.

²³ *State v. Dickens*, 602 A.2d 95, 98 (Del. Super. 1989) (“the time bar was imposed to prevent the bringing of stale claims. This is a legitimate procedural goal and, therefore, justified the adoption of the time limitation in Rule 61.”), citing *United States Ex Rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir.1982).

²⁴ *Fogg v. State*, 1998 WL 736331 (Del. Oct. 1, 1998).

²⁵ *State v. Fogg*, 2000 WL 1211510 (Del. Super. Aug. 1, 2000).

denied Defendant's second motion for postconviction relief in September 2002.²⁶ Repetitive motions are barred unless a defendant demonstrates that the new, currently proffered assertion must be considered "in the interest of justice."²⁷ Defendant's present *Brady* assertion is a new postconviction contention, but remains procedurally barred. The claim was never proffered in Defendant's prior motions and because the black boot claim is substantively meritless, Defendant cannot escape the procedural bar. A conclusory claim cannot justify the interest of justice exception.²⁸ Defendant's *Brady* claim is also procedurally defaulted because it was not asserted during Defendant's prior motions, at trial, or on direct appeal. To overcome the failure to raise these issues, Defendant has failed to adduce good cause or prejudice for the default.

The miscarriage of justice exception under Rule 61(i)(5) does not save Defendant's present motion from summary dismissal. Referencing *Jackson*, Defendant asserts that Defendant's Motion cannot be procedurally barred because a *Brady* violation occurred which undermined Defendant's original conviction's fairness. However, Defendant's reasoning presupposes the Court finding a colorable *Brady* violation. Moreover, the *Jackson* standard does not stand for the legal proposition that a defendant may simply assert a *Brady* violation to avoid procedural default under Rule 61(i)(3).²⁹ A defendant must do more than merely assert a conclusory *Brady* claim, a *Brady* violation must be valid to overcome Rule 61(i)(3). Since the Court concludes *infra*, that the *Brady* claim is meritless, *Jackson* is inapposite. Furthermore, Rule 61(i)(3) is not Defendant's only procedural flaw. Even assuming Defendant's *Brady* claim were valid, *Jackson* would explicitly not rescue Defendant's Motion from the procedural bars of Delaware Superior Court Criminal Rule 61(i)(1) or Rule 61(i)(2).³⁰

²⁶ *State v. Fogg*, 2002 WL 31053868 (Del. Super. Sept. 10, 2002).

²⁷ Del. Super. Ct. Crim R. 61(i)(2).

²⁸ See *Younger v. State*, 580 A.2d 552, 555 (Del. 1990) ("[Defendant] is required to show that consideration of the claim is warranted in the interests of justice, or that a constitutional violation has occurred. [Defendant] has merely made a conclusory statement regarding his allegations []." Therefore, the Court denied defendant's motion.).

²⁹ *Brooks v. State*, 2010 WL 2197622 (Del. June 2, 2010); *Epperson v. State*, 2009 WL 4043557 (Del. Dec. 7, 2009); *Laws v. State*, 2009 WL 4892531 (Del. Dec. 17, 2009).

³⁰ Defendant mischaracterizes the holding of *Jackson* in his brief by misquoting the opinion for the proposition that if a *Brady* violation is found, postconviction relief cannot be barred by Rule 61(i)(1,2,or 3). Defendant's Br. at 16. *Jackson* explicitly only refers to Rule 61(i)(3) being overcome by a colorable *Brady* claim, and does not refer to Rule 61(i)(1) or Rule 61(i)(2) as being similarly overcome.

B. THE STATE DID NOT VIOLATE THE REQUIREMENTS OF *BRADY V. MARYLAND*, 373 U.S. 83, 87 (1963), REGARDING THE SINGLE BLACK BOOT SEIZED BY THE POLICE AT THE HOMICIDE SCENE.

Although the Court has determined that the Motion (relating to the black boot) is procedurally barred, under the circumstances, the Court will also address the merits of the claim.

“[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”³¹ Three elements each must be established to prove a *Brady* violation: “(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.”³² Necessary disclosures under *Brady* include exculpatory evidence, and material possibly used for witness impeachment.³³ While *Brady* material can include both impeachment and exculpatory evidence, the evidence must be material and favorable to the defendant.³⁴ The duty to disclose material evidence is applicable even if Defendant makes no request.³⁵

Materiality analysis rests upon four factors.³⁶ 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.”³⁷ A different result is established with reasonable probability when the evidentiary suppression “undermines confidence in the outcome of the trial.”³⁸ The touchstone is whether defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence, without the suppressed evidence.³⁹ Importantly, materiality does not

³¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

³² *Norman v. State*, 968 A.2d 27, 29-30 (Del. 2009); *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

³³ *Strickler*, 527 U.S. 263, 282 n. 1 (1999), citing *U.S. v. Bagley*, 473 U.S. 667, 676 (1985).

³⁴ *Atkinson v. State*, 778 A.2d 1058, 1062 (Del. 2001).

³⁵ *U.S. v. Argus*, 427 U.S. 97, 107 (1976).

³⁶ See *Kyles v. Whitley*, 514 U.S. 419 (1995) (Court extracted four factors for materiality analysis from *Bagley*).

³⁷ *Bagley*, 437 U.S. at 682.

³⁸ *Kyles*, 514 U.S. at 434.

³⁹ *Id.*

test evidentiary sufficiency.⁴⁰ Rather, the defendant must demonstrate that the “favorable evidence [withheld] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”⁴¹ Materiality analysis is considered collectively.⁴² A prosecutor is best positioned to gauge the net effect of all such evidence and is most aware when “reasonable probability” is reached.⁴³ A “prudent prosecutor will resolve doubtful questions of [materiality] in favor of disclosure.”⁴⁴

Where a *Brady* violation is found, “*Brady* violations are subject to a harmless error analysis.”⁴⁵ The harmless error standard provides that “a conviction may be set aside only if the error ‘had a substantial or injurious effect or influence in determining the jury’s verdict.’”⁴⁶ However, the *Bagley* standard requiring “reasonable probability” that the undisclosed evidence would have resulted in a different outcome is more arduous than the mere harmless error standard.⁴⁷ Therefore, once a ‘reasonable probability’ of a different outcome is found under *Bagley*, no further harmless error review is necessary.⁴⁸ In short, evidence is material when there is a “reasonable probability that the withheld evidence would have altered at least one juror’s assessment.”⁴⁹ However, “there is . . . no obligation on the part of the government to disclose purely speculative and preliminary information.”⁵⁰

Defendant cannot establish the required elements for a *Brady* claim. First, it is unclear whether the boot is exculpatory or useful impeachment evidence as Defendant asserts. What is clear from the record is that Defendant has overstated the boot’s role in the State’s case. However, the Court need not reach the first *Brady* element because Defendant’s claim explicitly fails on *Brady*’s second and third elements. Regarding the second *Brady* element, the State never suppressed the

⁴⁰ *Id.*

⁴¹ *Id.* at 435.

⁴² *Id.* at 436.

⁴³ *Id.* at 437.

⁴⁴ *Id.* at 439 (quoting *Argus*, 427 U.S. at 108).

⁴⁵ *Bretch v. Abrahamson*, 507 U.S. 619, 623 (1993); *Johnson v. State*, 607 A.2d 1173, 1176 (Del. 1992) (citing *Michael v. State*, 529 A.2d 752, 755-56 (Del. 1987)).

⁴⁶ *Kyles*, 514 U.S. at 435-36 (Governing harmless error standard under *Bretch*, modifying harmless error standard used in *Argus*) (citing *Bretch v. Abrahamson*, 507 U.S. 619, 623 (1993), quoting *Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946)).

⁴⁷ *Kyles*, 514 U.S. at 435 (quoting citations omitted).

⁴⁸ *Id.*

⁴⁹ *Cone v. Bell*, 556 U.S. 449, 452 (2009).

⁵⁰ *Burke v. State*, 1997 WL 139813 *7 (Del. Mar. 19, 1997).

boots or the plaster impressions. The evidence was available for defense inspection prior to trial and defense counsel acknowledged its availability during the motion in *limine*. Not only was the evidence not suppressed, it was available for jury review during deliberations. The jury simply could have compared the single black boot's size against Defendant's foot impression. Lay juror comparison would have easily revealed what Fogg argues is significant—that his feet are larger than the single black boot.

While Defendant's failure to fulfill *Brady*'s second element is fatal to Defendant's claim, the third element is also unfulfilled because Defendant cannot adduce prejudice. The single black boot, although not suppressed, is only partially favorable to Defendant. Assuming the evidence were unavailable to Defendant it would not amount to prejudice. During its opening statement, the prosecution argued that the single black boot, along with other footwear at the scene, belonged to codefendant, Daryl Andrus. During trial, the State never argued that the single black boot was worn by Defendant. Furthermore, during closing argument, the prosecutor stated “[w]e do not know and we haven’t presented any evidence [regarding] where that boot came from.”⁵¹

Defendant's claim that the State asserted he wore the single black boot apparently evolves from the Court's 2002 order and Robert Richmond's out of court statement. The Court's 2002 Order provided in part:

Although that single black boot was never positively identified as having been worn by Fogg, an inference could be made that Fogg in fact wore the boot while kicking and stomping Dilley to death, particularly in light of the fact that Andrus was partially paralyzed and possibly would not have been able to kick with any real force.⁵²

This inference, mentioned by this Court in its 2002 order, is a possible inference drawn from Andrus' medical condition; however, it is rebuttable by Fogg's foot size disparity. According to expert testimony, Fogg's feet were “noticeably smaller” than Andrus'.⁵³ Defendant's further argument is that Richmond's out of court statement indicated Fogg wore the single black boot. However, Richmond's statement does not specifically mention the single black boot. Richmond was called as a trial witness but was not asked on direct examination whether Fogg wore the single black boot during the attack. This question was first raised by

⁵¹ Appendix to State's Answering Br. at B-134.

⁵² *State v. Fogg*, 2002 WL 31053868 *31 (Del. Super. Sept. 10, 2002).

⁵³ Appendix to State's Answering Br. at B-112.

defense counsel on cross examination. At the conclusion of Richmond's testimony, the State introduced Richmond's entire out of court statement to provide the jury with complete disclosure. As noted in rebuttal, regarding the single black boot, the State explained, "[w]e do not know and haven't presented any evidence where that boot came from."⁵⁴

There is no basis in the record for Defendant's assertion that the State argued Fogg's intent to kill was predicated upon Fogg's wearing the single black boot. The State never made that argument. Nothing within Richmond's trial testimony or his out of court statement specifically identifies the single black boot. Finally, Fogg's argument that the State was obligated to determine each boot's size, compare them to Fogg's foot, and prepare a report, is meritless. Delaware law provides that, the State's obligation is to collect and preserve evidence potentially favorable to an accused.⁵⁵ This duty does not also require the State to test the evidence in a defendant's preferred manner.⁵⁶ The State's expert was never obligated to examine the single black boot to Defendant's preference.

Defendant makes much in his briefing arguing about the black boot's materiality, pursuant to *Bagley* and *Kyles*. However, the Court need not reach whether the evidence is material, considering no evidence was suppressed or withheld from Defendant. Assuming the boots were in fact suppressed or unrevealed, the evidence's materiality is obvious. However, materiality analysis is unnecessary because the black boot and the foot impressions were available to Defendant and defense counsel.

Even assuming Defendant's ability to overcome the procedural bars, Defendant has failed to fulfill each of the three elements required for a valid *Brady* claim. Since Defendant cannot overcome the procedural bars and because Defendant's *Brady* claim is lacking, Defendant's Motion for Postconviction Relief fails both procedurally and substantively. For all the reasons provided, Defendant's renewed Motion for Postconviction Relief on Order of Remand from the Delaware Supreme Court is **DENIED**.⁵⁷

⁵⁴ Appendix to State's Answering Br. at B-134.

⁵⁵ *Cook v. State*, 728 A.2d 1173, 1175 (Del. 1999). ("The State is required to preserve evidence that may be material to a defendant's guilt or innocence.").

⁵⁶ See *Anderson v. State*, 1999 WL 504332 *3 (Del. Mar. 18, 1999) (State not required to conduct additional alternative type of DNA testing).

⁵⁷ Defendant has moved to expand the record pursuant to Super Ct. Criminal Rule 61(g). Defendant seeks to incorporate eight items. Those eight items are: (1) J.P. Court "defendant history" page dated 4/13/95 (A 32); (2) Search Warrants: two dated April 7, 1995 (A 33-39) and

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary

one dated April 12, 1995 (A 41-48); (3) Affidavits: one dated 8/12/05, Affidavit 3 (A 54-55) and one (same date) Affidavit 17, authenticating five letters predating the filing of the Rule 61 motion dated 5/16/95, 5/25/95, 7/17/95 and 2/27/96 (A 56-62); (4) A 2/5/96 letter from my counsel to prosecution (A 67-68); (5) A 10/11/95 letter from Fogg's counsel to prosecution (A 75-76); (6) A 4/12/96 letter from prosecution to my counsel (A 77-78); (7) A 4/15/96 Report on Reconstruction (A 104-105); and (8) An undated 3/3/98 letter from Daryl Andrus to this court (A 255-258).

The State objected to Defendant's sought inclusion of four of the eight requested items on grounds that each are inadmissible written hearsay and because the State has had no opportunity to question the declarants. Specifically, the State first objects to the two August 12, 2005 affidavits authored by Defendant regarding communications between Defendant and his former defense trial counsel during a prior federal habeas corpus action. The State argues that the documents are irrelevant because they pertain to Defendant's previous ineffective assistance of counsel claim and not the current Brady violation claim. Secondly, the state objects to including portions of a Scene Reconstruction Report because the author of the report is not identified, not introduced at trial and the proposed supplemental record exhibit is incomplete. Thirdly, the State objects to the 1998 letter from co-defendant Daryl Andrus because Andrus did not testify at the original trial or at any postconviction evidentiary hearing. The State contends that no such letter should be considered as evidence without the State first having the opportunity to question the writer about its contents. The Court will exclude those items according to the State's objections but has expanded the record to include all those items sought by Defendant without state objection.