

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

CRAIG A. KARSNITZ,  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 THE CIRCLE, SUITE 2  
GEORGETOWN, DE 19947  
TELEPHONE (302) 856-5263

October 11, 2021

Wilmer L. Milton, Jr.  
SBI# 00337177  
James T. Vaughn Correctional Center  
1181 Paddock Road  
Smyrna, DE 19977

Re: *State of Delaware v. Wilmer L. Milton, Jr.*, Cr. No. 1103018831 (R-2)

Dear Mr. Milton:

On September 17, 2021, I received your second *pro se* Motion for Postconviction Relief under Delaware Superior Court Rule Criminal Rule 61, dated September 13, 2021 (the “Motion”) with respect to the above-referenced matter. The sole ground that you state for relief is a recantation by Treyman Atkins, another person involved in the crime for which you were convicted by a jury. You assert that this recantation constitutes new evidence of your actual innocence in fact under *Purnell v. State*,<sup>1</sup> a recent Delaware Supreme Court decision on which you rely.

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<sup>1</sup> \_\_ A.3d \_\_, 2021 WL 2470511 (Del. June 17, 2021).

Your Motion also requests that I appoint postconviction counsel for you due to what you perceive as the complexity of your case.

On March 21, 2012, you were found guilty by a jury after a trial of attempted first degree murder, first degree robbery, first degree burglary, wearing a disguise during the commission of a felony, second degree conspiracy, and three counts of possession of a firearm during the commission of a felony.<sup>2</sup> On May 25, 2012, the Superior Court sentenced you as follows: (1) for attempted first degree murder, to prison for the balance of your natural life; and (2) for the remaining charges, to a total of 62 years at Level V, suspended after 25 years for lesser levels of supervision, with credit for 258 days' time served. Your direct appeal to the Delaware Supreme Court was denied on June 11, 2013. On September 10, 2013, you filed your first Rule 61 Motion with this Court, which contained a recantation from another co-conspirator in your case. On June 30, 2014, you filed a Motion for a New Trial. Both the Rule 61 Motion and the Motion for a New Trial were denied by this Court on February 24, 2016. By a letter Order dated March 24, 2016, this Court stated that it would not consider any further recantations in this case, nor would it take any actions on any such recantations. On September 27, 2016, the Supreme Court of

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<sup>2</sup> The prosecutor later filed a *nolle prosequi* on one count of possession of a deadly weapon by a person prohibited.

Delaware affirmed this Court's denial of your Rule 61 Motion. This is my ruling on your second *pro se* Rule 61 Motion.

I first address the four procedural bars of Rule 61.<sup>3</sup> If a procedural bar exists, as a general rule I will not address the merits of the postconviction claim.<sup>4</sup> A Rule 61 Motion can be barred for time limitations, successive motions, failure to raise claims below, or former adjudication.<sup>5</sup>

First, a motion for postconviction relief exceeds time limitations if it is filed more than one year after the conviction becomes final.<sup>6</sup> In this case, your conviction became final well more than a year ago. Therefore, consideration of the Motion would normally be barred by the one-year limitation.

Second, second or subsequent motions for postconviction relief are not permitted unless certain conditions are satisfied.<sup>7</sup> Since this is your second motion for postconviction relief, consideration of the Motion would normally be barred.

Third, grounds for relief "not asserted in the proceedings leading to the judgment of conviction" are barred unless certain conditions are satisfied.<sup>8</sup> You assert new claims, which were not raised at trial, based on the recantation by Treyman

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<sup>3</sup> *Ayers v. State*, 802 A.2d 278, 281 (Del.2002) (citing *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>4</sup> *Bradley v. State*, 135 A.3d 748 (Del 2016); *State v. Page*, 2009 WL 1141738, at\*13 (Del. Super. April 28, 2009).

<sup>5</sup> Super. Ct. Crim. R. 61(i).

<sup>6</sup> Super. Ct. Crim. R. 61(i)(1).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(2).

<sup>8</sup> Super. Ct. Crim. R. 61(i)(3).

Atkins. Therefore, consideration of the Motion would normally be barred for “matters not asserted” below.

Fourth, grounds for relief formerly adjudicated in the case, including “proceedings leading to the judgment of conviction, in an appeal, in a post-conviction proceeding, or in a federal *habeas corpus* hearing” are barred.<sup>9</sup> Your claim that you are being unlawfully held in a “miscarriage of justice” was formerly adjudicated in your prior Rule 61 Motion. Therefore, consideration of the Motion would normally be barred for “matters formerly adjudicated.”

Under Rule 61, however, none of these four procedural bars applies to a claim that pleads “*with particularity* that new evidence exists that creates a strong inference that the movant is *actually innocent in fact* of the acts underlying the charges of which he was convicted.” [Emphasis supplied.]<sup>10</sup>

Similarly, Rule 61 provides in pertinent part:

“A second or subsequent motion under this rule shall be summarily dismissed, unless the movant was *convicted after a trial* and the motion ... pleads with particularity that new evidence exists that creates a strong inference that the movant is *actually innocent in fact* of the acts underlying the charges of which he was convicted.” [Emphasis supplied.]<sup>11</sup>

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<sup>9</sup> Super. Ct. Crim. R. 61(i)(4).

<sup>10</sup> Super. Ct. Crim. R. 61(i)(5).

<sup>11</sup> Super. Ct. Crim. R. 61(d)(2)(i). This is the section on which you base your Motion.

Generally, the law favors the finality of criminal judgments after the exhaustion of applicable post-trial motions, appeals and collateral proceedings. In this case, you have exhausted your remedies of a direct appeal to the Delaware Supreme Court, a motion for postconviction relief in this Court, and petition for a writ of *habeas corpus* in the United States District Court for the District of Delaware. There is an exception, however, on public policy grounds where there is particular new evidence that creates a strong inference that you are actually innocent in fact of the acts underlying the charges of which you were convicted. You should not be denied the right to prove your actual innocence based on new facts. That being said, the bar for creating a strong inference in my mind that you are actually innocent of the offenses of which you were convicted by a jury is quite high. A mere assertion of actual innocence will not suffice. Innocence of the “acts underlying the charges” requires “more than innocence of intent; it requires new evidence that a person other than the petitioner committed the crime.”<sup>12</sup>

### **ACTUAL INNOCENCE IN FACT**

The most recent Delaware Supreme Court case addressing actual innocence in fact is *Purnell v. State*,<sup>13</sup> which you cite as authority for my granting your Rule 61 Motion. In *Purnell*, the Supreme Court found that certain critical evidence was not

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<sup>12</sup> *State v. Taylor*, 2018 WL 3199537, at \*7 (Del. Super. June 28, 2018), *aff'd*, 206 A.3d 825 (Del. 2019) (Table).

<sup>13</sup> \_\_\_ A.3d \_\_\_, 2021 WL 2470511 (Del. June 17, 2021).

obtained or presented by trial counsel at trial. The Supreme Court found that this evidence was “new” under the language of Rule 61 and included: ballistic evidence that favored the defendant; a recantation of a statement by a fellow inmate of the defendant that the defendant had confessed to the offense while they were both in jail; evidence inculcating two witnesses who testified against the defendant at trial (including a former client of trial counsel and the defendant’s fellow inmate who recanted); impeachment evidence from the parents of the co-defendant who testified against the defendant at trial; and, impeachment evidence that was not raised on cross-examination of a key government witness due to trial counsel’s conflict of interest. The Court stated:

We observe that legitimate claims of actual innocence are exceedingly rare. Indeed, this is the first case where a defendant has satisfied the actual innocence exception to the procedural bars in Rule 61. Because they are so rare, the actual innocence exception, in our view, poses no threat to our State's interest in finality. We believe the result in this case strikes the appropriate balance between our justice system's interests in “finality, comity and conservation of judicial resources, and the overriding individual interest in doing justice in the ‘extraordinary case.’”<sup>14</sup>

The United States Supreme Court has also stated that findings of actual innocence in federal *habeas corpus* cases are reserved for the “rare” or “extraordinary” case.<sup>15</sup>

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<sup>14</sup> 2021 WL 2470511, at \*55. [Footnotes and Citations Omitted]

<sup>15</sup> *Schlup v. Delo*, 513 U.S. 298, 321 (1995).

## The Applicable Persuasive Burden

In *Purnell*, the Delaware Supreme Court analyzed the applicable persuasive burden for a claim of actual innocence in fact and concluded that the defendant must satisfy a two-pronged test: he must establish that his evidence is both (1) new and (2) sufficiently persuasive.

### Federal *Habeas Corpus*

Federal courts employ an analogous doctrine for “actual innocence” in analyzing *habeas corpus* claims. In those cases, *Schlup v. Delo*<sup>16</sup> and its progeny, “actual innocence” constitutes an equitable exception to procedural barriers to a *habeas* petition set forth in federal statute that are analogous to Rule 61’s procedural bars.<sup>17</sup> *Schlup* was concerned with cases where “a constitutional violation has probably resulted in the conviction of one who is actually innocent.”<sup>18</sup> Envisioning a test in which a petitioner is “required to make a stronger showing than that needed to establish prejudice,” the *Schlup* Court established this formulation: “it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.”<sup>19</sup> Federal *habeas* petitions are “gateway innocence claims” because satisfying *Schlup* permits a federal court to review the petitioner’s

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<sup>16</sup> *Id.*

<sup>17</sup> *McQuiggin v. Perkins*, 569 U.S. 383, 394–95 (2013).

<sup>18</sup> *Schlup*, 513 U.S. at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

<sup>19</sup> *Id.*

grounds for relief despite an unexcused procedural default, even though the Supreme Court has “strongly suggested” that proof of actual innocence is not itself a ground for relief.<sup>20</sup> As the *Schlup* Court explained:

[I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.<sup>21</sup>

### Delaware Rule 61

After the 2014 amendments to Rule 61, the Superior Court in *Sykes v. State*<sup>22</sup> noted a dearth of Delaware authorities on what constitutes “new” evidence for purposes of the Delaware postconviction remedy, and so it relied on federal cases analyzing *Schlup*'s actual innocence test for the “newness” prong.<sup>23</sup> In subsequent cases, the Superior Court has relied on *Schlup*'s formulation for the “persuasiveness” prong as well,<sup>24</sup> or for both prongs of the actual innocence inquiry.<sup>25</sup>

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<sup>20</sup> *Buckner v. Polk*, 453 F.3d 195, 199 (4th Cir. 2006) (citing *Herrera v. Collins*, 506 U.S. 390, 400 (1993)); see also *House v. Bell*, 547 U.S. 518, 555 (2006).

<sup>21</sup> *Schlup*, 513 U.S. at 316.

<sup>22</sup> 2017 WL 6205776 (Del. Super. Dec. 7, 2017), *aff'd*, 195 A.3d 780 (Del. 2018) (Table).

<sup>23</sup> 2017 WL 6205776, at \*5 (“Nonetheless, the federal standard is helpful under these circumstances, as the Court has found little guidance for interpreting the precise meaning of new evidence in relation to a claim of actual innocence pursuant to Rule 61(d)(2)(i).”), *aff'd*, 195 A.3d 780 (Del. 2018) (Table).

<sup>24</sup> *State v. Abbatiello*, 2020 WL 1847477, at \*3 (Del. Super. Apr. 8, 2020), *aff'd*, 244 A.3d 682 (Del. 2020) (Table); *State v. Windsor*, 2018 WL 3492764, at \*2 (Del. Super. Jul. 19, 2018), *aff'd*, 202 A.3d 1126 (Del. 2019) (Table), *cert. denied*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 201, 205 L.Ed.2d 103 (2019).

<sup>25</sup> *State v. White*, 2018 WL 6131897, at \*4 (Del. Super. Nov. 21, 2018), *aff'd*, 208 A.3d 731 (Del. 2019) (Table); *State v. Flowers*, 2018 WL 1169644, at \*1 (Del. Super. Mar. 6, 2018), *aff'd*, 191 A.3d 291 (Del.) (Table); *White v. State*, 208 A.3d 731, 2019 WL 1529654, at \*1 (Del. Apr. 8,

In *Purnell*, both the State and the defendant argued for a three-prong test to govern both the newness and persuasiveness prongs of the actual innocence exception, requiring a showing: (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; and (3) that it is not merely cumulative or impeaching. This three-part test is the standard for a new trial based on newly discovered evidence under Superior Court Criminal Rule 33 established by the Delaware Supreme Court in *Lloyd v. State*.<sup>26</sup> Another Delaware Supreme Court case, *Downes v. State*,<sup>27</sup> held that the *Lloyd* standard for obtaining a new trial on the basis of new evidence showing actual innocence was an available form of postconviction relief under Rule 61.<sup>28</sup>

*Purnell* adopts the *Lloyd* line of cases to analyze actual innocence claims based on new evidence under Rule 61, but telescopes the three *Lloyd* standards down to two. It states that, of the three elements of a *Lloyd* claim, the second relates to newness, while the first and third relate to persuasiveness. On both newness and persuasiveness, *Purnell* states that the *Lloyd* line of cases in Delaware substantially aligns with *Schlup* and its progeny at the federal level.

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2019) (Table); *Phlipot v. State*, 169 A.3d 351, 2017 WL 3014434, at \*1 (Del. July 14, 2017) (Table).

<sup>26</sup> 534 A.2d 1262, 1267 (Del. 1987) (citing *State v. Lynch*, 128 A. 565, 568 (Del. Oyer & Term. 1925)).

<sup>27</sup> 771 A.2d 289 (Del 2001).

<sup>28</sup> 771 A.2d at 292.

## Newness

Regarding the newness prong, *Lloyd* holds that evidence is new where it was “discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence.”<sup>29</sup> Such evidence is “new” in federal courts applying *Schlup* as well.<sup>30</sup>

## Persuasiveness

Regarding the persuasiveness prong, *Lloyd* and *Schlup* articulate the same standard although they use somewhat different language. As the *Schlup* Court explained, the persuasiveness of an innocence claim requires the Court to make “a probabilistic determination about what reasonable, properly instructed jurors would do.”<sup>31</sup> It stressed that the *Schlup* inquiry is about what a reasonable trier of fact is likely to do, not merely what it was empowered to do.<sup>32</sup> *Schlup* requires a petitioner to show that the lack of the new evidence caused more than mere prejudice, meaning more than simply “a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”<sup>33</sup>

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<sup>29</sup> *Lloyd*, 534 A.2d at 1267.

<sup>30</sup> *Carter v. Pierce*, 196 F.Supp.3d 447, 454–55 (D. Del. 2016); *Houck v. Stickman*, 625 F.3d 88, 93–94 (3d Cir. 2010)); *Reeves v. Fayette SCI*, 897 F.3d 154, 164 (3d Cir. 2018), *cert. denied*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2713, 204 L.Ed.2d 1123 (2019).

<sup>31</sup> 513 U.S. at 329.

<sup>32</sup> *Id.* at 330.

<sup>33</sup> *Schlup*, 513 U.S. at 332–33 (O'Connor, J., concurring).

*Lloyd's* burden of persuasiveness is that the new evidence “*would have probably* changed the result if presented to the jury,”<sup>34</sup> and in *Downes* and subsequently the burden of persuasiveness is the new evidence “*will probably* change the result if a new trial is granted.”<sup>35</sup> The *Lloyd* line of cases consistently requires a movant to show that the evidence will *probably* change the result -- meaning that the necessary showing is substantially more than the mere “reasonable probability” necessary to show prejudice. Thus, the *Schlup* and *Lloyd* standards are substantively the same.

The third element of the *Lloyd* test, specifying that actual innocence cannot be satisfied by evidence which is “merely cumulative or impeaching,” is also similar to *Schlup's* test.<sup>36</sup> This element embodies the principle that a body of new evidence that goes only to the weight or credibility of that which was presented to the jury is almost never adequate to meet the demanding bar for being granted a new trial.<sup>37</sup> Generally, to be more than “merely” impeaching or cumulative, new evidence attacking the weight or credibility of a witness's trial evidence attacks the credibility of the witness in the case at bar specifically, rather than impeaching the witness's

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<sup>34</sup> 534 A.2d at 1267 (emphasis added).

<sup>35</sup> 771 A.2d at 291 (emphasis added); *Gattis v. State*, 955 A.2d 1276, 1291 (Del. 2008).

<sup>36</sup> 534 A.2d at 1267.

<sup>37</sup> *Mason v. State*, 2020 WL 7392348, at \*1 n.2, 244 A.3d 681 (Del. Dec. 16, 2020); *Taylor v. State*, 180 A.3d 41, 2018 WL 655627, at \*1 (Del. Jan. 31, 2018) (Table); *State v. Brathwaite*, 2017 WL 5054263, at \*2 (Del. Super. Oct. 23, 2017) *aff'd*, 186 A.3d 1240 (Del. 2018).

credibility in general.<sup>38</sup> Where impeachment evidence is submitted along with other material evidence, both can operate together to justify relief.<sup>39</sup> Federal courts applying *Schlup* consider the issue similarly: “Mere impeachment evidence is generally not sufficient to satisfy the actual innocence gateway standard.”<sup>40</sup>

Because the Delaware Supreme Court found the language of the *Schlup* standard confusing, in *Purnell* it chose to rely on its own standard as set forth in *Lloyd* and *Downes*. Nevertheless, the Supreme Court continues to find the reasoning of the federal cases applying *Schlup* useful and persuasive guidance in examining Rule 61 actual innocence claims.

Satisfying the actual innocence test is, by design, a heavy burden, and such meritorious claims are exceedingly rare. Under both *Lloyd* and *Schlup*, a defendant must present additional evidence that was not available at trial and would not have been despite the defendant's exercise of due diligence, thus making it “new.”<sup>41</sup> That new evidence must speak with such persuasive force as to convince the reviewing court that, when considered in the context of all the relevant evidence by a properly

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<sup>38</sup> *State v. Young*, 1982 Del. Super. LEXIS 1062 (Del. Super. Oct. 4, 1982); *Hicks v. State*, 913 A.2d 1149, 1195 (Del. 2008); *Blankenship v. State*, 447 A.2d 428, 433 (Del. 1982).

<sup>39</sup> *Fowler v. State*, 194 A.3d 16, 17, 26–27 (Del. 2018).

<sup>40</sup> *Reeves*, 897 F.3d at 161 (alterations omitted) (quoting *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012)).

<sup>41</sup> *See Schlup*, 513 U.S. at 324 (“To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.”).

instructed jury, it is such as will probably change the result if a new trial were granted.

Although findings of actual innocence are reserved for the “rare” or “extraordinary” case, the Delaware Supreme Court, for the first and only time, found *Purnell* to be such a case. However, in my view, your case is not such a rare or extraordinary case. The Motion presents no credible “new” evidence under the “newness” prong of *Purnell*. Nor does it satisfy the “persuasiveness” prong of *Purnell*.

The gravamen of your Motion is that your co-conspirator Treyman Atkins actually shot the victim, as reflected by the sworn affidavit attached to the Motion. Your “evidence” from Atkins may be new since your trial, but I find it is completely self-serving, not credible, and not supported by any other evidence whatsoever. Even assuming *arguendo* that the new “evidence” from Atkins were credible, you have not shown a reasonable probability that, had they had the information from Atkins, the jury would have had a reasonable doubt respecting your guilt. The other evidence of your guilt is significant.

Finally, and as discussed above, I note that you have previously filed recantations by co-conspirators other than Treyman Atkins. In a letter Order dated March 24, 2016, this Court stated that it would not consider any further recantations in this case, nor would it take any actions on any such recantations. You have

ignored this Order and submitted Atkins' recantation anyway. Nonetheless I have considered your Motion, but your actions strain the patience of the Court.

### **APPOINTMENT OF POSTCONVICTION COUNSEL**

Under Rule 61, for your second Rule 61 Motion, I may appoint postconviction counsel for you only if I determine that the second Rule 61 Motion satisfies the pleading requirements of Rule 61d)(2)(i)<sup>42</sup> (actual innocence in fact). Since I have determined that your Rule 61 Motion does not satisfy those leading requirements, I deny your request for postconviction counsel.

As discussed above, you have not demonstrated with particularity that new evidence exists that creates a strong inference that you are actually innocent in fact of the acts underlying the charges of which you were convicted. Thus, the four procedural bars to relief under Rule 61 apply, and you have failed to overcome those procedural bars. Therefore, your Rule 61 Motion is summarily **DENIED**.

In addition, you have failed to meet the requirements for the appointment of postconviction counsel. Therefore, your request for the appointment of postconviction counsel is **DENIED**.

**IT IS SO ORDERED.**

Very truly yours,

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<sup>42</sup> Super. Ct. Crim. R. 61(e)(5).

/s/ Craig A. Karsnitz

cc: Prothonotary's Office  
Department of Justice