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Case Number 310,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DERRICK POWELL,	)	No. 310, 2016
	)	
Appellant	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE IN
	)	ID No. 0909000858
STATE OF DELAWARE,	)	
	)	
	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

APPELLANT'S OPENING BRIEF

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Dated: February 16, 2017

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NATURE OF THE PROCEEDINGS

Arrest, Trial, and Sentence

Police arrested Derrick Powell on September 1, 2009 for the murder of law enforcement officer Chad Spicer. A grand jury indicted him on two counts of Murder First Degree and other charges.[1] The Court appointed Stephanie Tsantes, Esquire and Dean C. Johnson, Esquire ("trial counsel") to represent Mr. Powell.

Capital jury selection began on January 4, 2011, and trial began on January 20, 2011. On February 8, 2011, the jury returned guilty verdicts for one count of Murder First Degree, four counts of Possession of a Firearm During the Commission of a Felony, Resisting Arrest, Attempted Robbery First Degree, and one count of Reckless Endangering First Degree.[2] He was found not guilty of Count I, recklessly causing the death of a police officer in the line of duty, but found guilty of Count III, recklessly causing the death of Mr. Spicer during flight from a robbery. The penalty phase began on February 14, 2011 and concluded on February 23, 2011.

The jury recommended a death sentence by a vote of 7-5. The Court sentenced Mr. Powell to death on May 20, 2011.[3]

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[1] A78-82.

[2] A2556-2564.

[3] *State v. Powell,* 2011 WL 2041183 (Del. Super. Ct.); A133-204.

Direct Appeal

On July 5, 2012, Mr. Powell filed a timely Notice of Appeal to this Court. He was represented by different counsel on appeal. On August 9, 2012, this Court affirmed Mr. Powell's convictions and death sentence.[4]

The Postconviction Case

Mr. Powell filed a Motion for Postconviction Relief on September 28, 2012.[5] The undersigned attorneys were appointed and filed an Amended Motion on October 1, 2013.[6] Trial and appellate counsel filed affidavits.[7] Many witnesses testified, either by in-court testimony or by deposition. On April 23, 2015, postconviction counsel filed a Motion for Recusal, asserting that the judge's questioning of the witnesses revealed a lack of impartiality about the postconviction claims.[8] The judge denied the motion.[9] On June 5, 2015,

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[4] *Powell v. State,* 49 A.3d 1090 (Del. 2012).

[5] A37; D.I. 371.

[6] A2906-3067.

[7] Stephanie Tsantes, Esquire: A3068-3089; Dean Johnson, Esquire: A3090-3098; Joint Affidavit of Bernard O'Donnell, Esquire, Nicole Walker, Esquire, and Santino Ceccotti, Esquire: A3099-3107.

[8] A4136-4261.

[9] *State v. Powell,* 2015 WL 10767325 (Del. Super. Ct.).

postconviction counsel filed a Brief Following Evidentiary Hearing.[10] The court held an oral argument on December 4, 2015.[11]

On May 24, 2016, the Superior Court denied Mr. Powell's Amended Motion for Postconviction Relief.[12]

This Appeal

Mr. Powell filed a timely Notice of Appeal on June 20, 2016. On June 29, 2016, this Court issued a stay of this appeal pending the litigation regarding the constitutionality of Delaware's death penalty.[13] After this Court's decision in *Rauf v. State,*[14] Mr. Powell filed a Motion to Vacate a Death Sentence. That motion was granted and Mr. Powell's sentence was commuted to life.[15] The granting of the motion mooted all Mr. Powell's penalty phase related claims on this appeal. The stay was then lifted and this Court issued a briefing schedule. This is Mr. Powell's Opening Brief.

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[10] A3738-4056.

[11] A4057-4135.

[12] *State v. Powell,* 2016 WL 3023740 (Del. Super. Ct.); Exhibit A.

[13] *See, Rauf v. State,* 145 A.3d 430 (Del. 2016).

[14] *Id.*

[15] *Powell v. State,* --- A.3d ---, 2016 WL 7243546 (Del. 2016).

SUMMARY OF THE ARGUMENT

CLAIM I: THE SUPERIOR COURT ERRED IN FINDING THAT THE STATE DID NOT COMMIT A *BRADY* VIOLATION WHEN IT DELIBERATELY DELAYED DISCLOSURE OF AN EYEWITNESS UNTIL AFTER CLOSE OF EVIDENCE AND THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE ISSUE ON APPEAL.

An eyewitness to the shooting, Damion Coleman, contacted the police on January 28, 2011, while the State was still presenting its case-in-chief. The prosecutor and detective interviewed Coleman on January 30, 2011. The detective authored a police report on February 2, 2011. Yet the State did not disclose the witness to the defense until the late afternoon of February 4, 2011—after both the State and the defense had rested.

Although Coleman had value for the defense's reasonable doubt argument, the defense made a rushed decision not to move to reopen its case. Although one of the defense attorneys stated it was because of concern that Coleman would identify Powell, the other attorney testified that the decision not to reopen was because of the timing of the disclosure, with a jury waiting and a judge who wanted to move forward with closing arguments. Counsel also testified Coleman was helpful but not a "slam dunk" witness; given the fact that the defense had rested, it was a difficult decision whether to reopen. Finally, counsel's decision took place in an environment in which a jury was being kept waiting for closing arguments to start.

The trial court erred in holding that the late disclosure of Coleman was not a *Brady* violation and that appellate counsel was not ineffective for failing to raise the Coleman issue on appeal.

STATEMENT OF FACTS

In its direct appeal opinion, this Court found the following facts:

On the evening of September 1, 2009, Derrick Powell, Luis Flores ("Flores") and Christopher Reeves ("Reeves") drove to a McDonald's restaurant in Georgetown, planning to rob a drug dealer. An acquaintance of Reeves, Thomas Bundick ("Bundick"), had arranged for Darshon Adkins ("Adkins") to sell Reeves marijuana. Bundick did not know that Powell, Flores and Reeves were actually planning to take the drugs by force, specifically by robbing the dealer while he was sitting inside Flores' Chrysler Sebring.

Because Bundick knew only Reeves, Reeves was chosen to drive the Sebring. The front passenger seat was left empty for either Bundick or Adkins to occupy. Powell sat in the rear seat behind Reeves, and was carrying a gun. Flores sat in the rear seat behind the seat reserved for Bundick or Adkins. The three men parked the car in the McDonald's parking lot and waited for Bundick and Adkins, who arrived separately.

The robbery plan went awry because Adkins refused to get into the Sebring. Bundick soon fled the scene. Adkins remained and walked towards the McDonald's, followed by Powell. Outside the restaurant, Powell pulled his gun and fired the weapon at Adkins, while Adkins was fleeing. Reeves, meanwhile, began to drive off in the Sebring, but at Flores' insistence, Reeves stopped so that Powell could get back into the car. Flores remained seated in the rear passenger's side seat. Powell returned to the same rear driver's side seat he had occupied before leaving the car in search of Adkins.

After Powell re-entered the car, Flores and Powell began to argue about Powell's decision to confront and shoot at Adkins. At 6:42 p.m., a call was made to 911 reporting the gunshot fired outside the McDonald's. The police responded promptly, but by then Powell, Flores and Reeves had driven away. As the three men drove past a school in Georgetown, Reeves told his companions that he wanted to stop the car. Powell ordered Reeves to continue driving. Reeves complied. By the time the three men reached The Circle in Georgetown, they were being followed by a police car which was

attempting to pull them over. At that point, Powell threatened out loud that if Reeves stopped the car, he (Powell) would shoot at the pursuing police, who (it later developed) were Officers Shawn Brittingham and Chad Spicer.

After turning on North King Street, Reeves decided to pull his car over—despite Powell's earlier threat. Reeves stopped abruptly and opened his driver's side door to leave the car. That, in turn, caused the police cruiser to stop quickly and strike Reeves' door as it opened. The two cars then came to a halt about two feet apart. Reeves jumped out of the Sebring, climbed over the hood of the police cruiser, and fled. As Officer Brittingham got out of the police car to chase Reeves, he heard a gunshot. Flores testified that he saw Powell fire his gun at the stopped police car. The bullet struck Officer Spicer and fatally wounded him. At 6:46 p.m., only four minutes after the first 911 call from McDonald's, Officer Brittingham, who was then pursuing Reeves, reported that he and Officer Spicer had been fired at. After hearing the shot, witnesses reported seeing Powell get out of the Sebring holding a gun, and then flee. Flores also exited the car, but remained at the scene and expressed immediate shock, exclaiming, "Why did you do that?" Flores then approached the police cruiser and tried to help Officer Spicer out of the car. Flores had to move the Sebring several feet so that the door on Officer Spicer's side could open fully. Officer Spicer, who by then was immobile, was laid down on the sidewalk, and died of his gunshot wound shortly thereafter, despite efforts to revive him.

Less than 20 minutes later, Powell was found with the gun used to kill Officer Spicer, and was taken into custody. Powell had been inside a nearby house, having just persuaded the owner to allow him to use the bathroom. Flores was also detained by the police, but later was released. Reeves escaped, but eventually turned himself in.

At the crime scene, the police gathered samples from Flores' hands to be tested for gunshot residue. Later that evening, while Powell was in a holding cell, the police also gathered samples from Powell's hands for testing. The test results were positive for gunshot residue. While Powell was in custody, the police also gathered his clothing and later sent Powell's shirt, together with ballistic evidence from the crime scene, to a State Police firearms

> examiner. The examiner tested one section of Powell's shirt—the left shoulder area—for gunshot residue, to determine the angle or position from which the gun had been fired. No gunshot residue was found on that portion of Powell's shirt. The police also collected DNA samples from the gun that was used in the shooting, and took DNA samples from Powell, Flores and Reeves. State officials found Powell's DNA to be consistent with the DNA found on the gun in "every comparison area." Those officials also determined that "there was not enough consistency between Flores' [and] Reeves' DNA and [the DNA found] on the gun to draw any conclusions definitively linking the gun to Reeves or Flores."[16]

This Court's recitation of facts does not mention that gunshot residue was also found on Luis Flores' right palm, left palm, and right back.[17] Moreover, while the opinion discusses the findings of the State's DNA expert, the defense expert's findings are mentioned in a footnote.[18] The different findings of the two experts are explained by the methodology used. The State's expert decided to combine the DNA samples from the firearm's grip, trigger, and slide into one sample for analysis "to bring all the potential DNA together."[19] The expert sought and received the approval of the prosecutor before combining the DNA .[20] The defense

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[16] *Powell,* 49 A.3d at 1093-1095.

[17] A1430-1431; A2729-2732.

[18] *Powell,* 49 A.3d at 1095, n4.

[19] A2197-2199.

[20] A2703.

expert analyzed the three samples separately. That expert's analysis revealed that Luis Flores was the major contributor to the DNA swabbed from the trigger of the gun.[21] So while the defense expert opined that while Mr. Powell and Reeves also possibly left DNA on the trigger as minor contributors,[22] the major contributor to the DNA on the trigger was Flores. The State's expert could not opine about the trigger, having decided to combine all three swabbings into one sample.[23] As such, this Court's reference to "every comparison area" in its opinion does not acknowledge that all comparison areas were combined into one sample.

Reeves was charged only with Resisting Arrest and Failure to Stop at a Police Signal. Flores was not charged at all.[24]

The facts related to the State's delayed disclosure of the eyewitness Damion Coleman until after the State and defense rested their cases are set forth fully in Claim I.

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[21] A2262-2263; A2586-2587.

[22] A2266.

[23] A2230-2231.

[24] *Powell,* 49 A.3d at 1095.

ARGUMENT

CLAIM I: THE SUPERIOR COURT ERRED IN FINDING THAT THE STATE DID NOT COMMIT A *BRADY* VIOLATION WHEN IT DELIBERATELY DELAYED DISCLOSURE OF AN EYEWITNESS UNTIL AFTER CLOSE OF EVIDENCE AND THAT APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE THE ISSUE ON APPEAL.

A. Question Presented.

Did the Superior Court err in denying postconviction relief by finding that the State did not commit a *Brady* violation regarding eyewitness Damion Coleman and that appellate counsel was not ineffective for failing to raise this issue on appeal? Mr. Powell preserved this issue in his Amended Motion for Postconviction Relief[25] as well as in the Brief Following Evidentiary Hearing.[26]

[25] A2945-2949; A2953-2956.

[26] A3776-3780; A3785-3790.

B. Scope of Review.

This Court reviews for abuse of discretion the Superior Court's decision on an application for postconviction relief.[27] Questions of law and constitutional issues, such as *Brady* violations, are reviewed *de novo*.[28]

The claims are eligible for postconviction review and relief under the version of Rule 61 applicable to Mr. Powell's case.

Both the *Brady* claim and the ineffective assistance of counsel claims are eligible for review in this postconviction case.

The *Brady* claim raised in the postconviction case was not raised at trial or on direct appeal. However, the *Brady* claim is ripe for postconviction review under the version Rule 61 applicable to Mr. Powell's case.[29]

Although Mr. Powell's *Brady* claim, not raised below, would be subject to the procedural bar of Rule 61(i)(3), it is exempted from this bar by operation of Rule 61(i)(5). That rule provides exempts "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the

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[27] *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citing *Dawson v. State*, 673 A.2d 1186, 1190 (Del. 1996)).

[28] *Wright v. State,* 91 A.3d 972, 982 (Del. 2014).

[29] *See, Collins v. State,* 2014 WL 2609107 at *2 (Del.)(the applicable version of Rule 61 is the one in effect at the time the petitioner filed his first postconviction motion).

fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgement of conviction."[30] This Court has consistently held that *Brady* claims fall within the ambit of the Rule 61(i)(5) exception.[31] This Court has held that "when the *Brady* rule is violated, postconviction relief cannot be barred by Rule 61(i)(3) because a *Brady* violation undermines the fairness of the proceeding leading to the judgment of conviction."[32]

Mr. Powell alternatively asserts that appellate counsel were ineffective for failing to raise the *Brady* claim on direct appeal. Ineffective assistance of counsel claims are governed by *Strickland v. Washington*,[33] which entitles a petitioner to relief if counsel performed deficiently and prejudice resulted. Counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," and performs deficiently when his performance falls below "an objective standard of reasonableness."[34]

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[30] Super. Ct. Crim. R. 61(i)(5).

[31] *Starling v. State,* 130 A.3d 316, 332 (Del. 2015); *State v. Wright,* 67 A.3d 319, 324 (Del. 2013).

[32] *Jackson v. State,* 770 A.2d 506, 515 (Del. 2001).

[33] 466 U.S. 668, 694 (1984).

[34] *Id*.

To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[35] This standard has been termed as one that is lower than "more likely than not."[36] Moreover, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[37]

C. Merits of Argument.

The defense argued there was reasonable doubt that Mr. Powell, and not Luis Flores, was the shooter.

The clear theme of the defense closing argument was that the State failed to prove beyond a reasonable doubt that Mr. Powell was the shooter—in fact, the evidence demonstrated it was more likely that Flores was the shooter.

Counsel also focused on the fact that the State's witnesses established that the individual carrying the gun got out the passenger side, followed by the shorter,

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[35] *Strickland*, 466 U.S. at 694.

[36] *Neal v. State,* 80 A.3d 935, 942 (Del. 2013).

[37] *Cooke v. State*, 977 A.2d 803, 840 (Del. 2009) (quoting *Strickland*, 466 U.S. at 686).

fatter person who can only be Flores.[38] Ms. Tsantes highlighted the implausible logistical proposition of Mr. Powell firing a shot from the driver's side and then somehow climbing over the 300-pound Flores, who was wedged in the rear passenger seat.[39]

Then counsel reviewed the evidence implicating Flores as a gun aficionado and drug dealer.[40] Counsel argued that the forensic evidence, namely the DNA and gunshot residue demonstrated Flores' culpability in the shooting of Officer Spicer.[41]

Counsel's closing argument challenged the jurors to ask: did the right person get arrested for shooting Officer Spicer? Does it make any sense that Flores was never charged with anything? Given the overlapping implications of the forensic evidence, is there proof beyond a reasonable doubt that Mr. Powell and not Flores fired the weapon?[42]

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[38] A2488.

[39] A2490.

[40] A2492.

[41] A2493-98.

[42]In contrast, the attorney giving the opening statement endorsed the State's assertions of where the individuals were seated in the car: "Luis Flores, as you recall, is the man that was in the backseat on the passenger's side." A324. Moreover, he told the jury that Flores "appears to be some sort of hero." A331. The Superior Court found that although the opening and closing arguments did not

The trial witnesses gave inconsistent accounts of the shooting and its aftermath.

The witnesses essentially agree that Reeves got out of the driver's position of the Sebring after the collision and ran away. More relevant is what happened with Flores and Mr. Powell. The witness testimony was inconsistent.

Jaquelyn LaForge-Sanders was at the intersection of Cedar Street and North King Street when she heard the sirens. She was trying to get through the intersection and get out of the way.[43] She saw the driver of the silver car get out and run. She described him as young, dark-skinned and not very tall.[44] Ms. Sanders testified that after the shot, the "other side" door opened and a dark skinned (but lighter than the driver) male got out on that side. He ran in the direction of the Perdue plant. He was about the same size and shape as the driver.[45] Ms. Sanders was trying to get out of the way of police officers and did not see a third person exit the car.

Ricardo Ventura-Sanchez agreed as to that sequence of events and the description of the driver and the second person out. The second person out of the

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align, the overall defense theory of the case was not inconsistent. *State v. Powell,* 2016 WL 3023740 at *32 (Del. Super. Ct.).

[43] A420.

[44] A421.

[45] A420, 422.

car was dark-skinned but had lighter skin than the driver.[46] This person had the firearm. Ricardo Ventura-Sanchez had the second person getting out of the front passenger door.[47] The third person out was short and fat, and got out the passenger side as well, but from the rear door.[48]

Juan Gonzales also testified that the second person out of the car got out of the backseat passenger door and ran.[49] The third person out got out of the front passenger door. He was average height and fat.[50]

Udibel Ventura-Sanchez testified that the person with the gun got out of the rear passenger side door.[51] The third person referred to as the "fat guy," stayed in the car at first, then got out the front passenger door and tried to assist Officer Spicer.[52]

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[46] A459.

[47] A456.

[48] A460.

[49] A494.

[50] A499.

[51] A521.

[52] A526, 546.

Luis Flores testified that he was in the backseat on the passenger side at all relevant times.[53] Flores testified that although he is 5'8" and weighs 300 pounds, he was comfortable in the back passenger seat with the seat pushed all the way back and maximally reclined.[54] The purpose for this arrangement was, according to Flores, so that Flores could hold the drug dealer down and "strong-arm" him in the course of the robbery at McDonalds.[55]

Flores testified that he was in the rear passenger-side seat and that Mr. Powell was in the rear driver-side seat. He testified he saw Mr. Powell shoot out the window.[56] Flores, alone among witnesses, testified that Mr. Powell got out on the rear driver's side.[57] Flores said that Mr. Powell left that door partially open and he remembered shutting it.[58] Flores eventually moved the Sebring away from the

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[53] A2051.

[54] A2099.

[55] A2082.

[56] A2057.

[57] A2059-60.

[58] A2060.

police car in order to assist Officer Spicer.[59] He testified that he got out the rear passenger door and went around the back of the car to the driver's side of the car.[60]

The Superior Court also provided a summary of these witness statements in its Opinion Denying Postconviction Relief.[61]

In its sentencing opinion, the Superior Court found that "the defense's composition of the murder's commission is contrary to human nature and common sense."[62] That is to say, the judge found it highly improbable that Mr. Powell would shoot the gun at McDonalds and then give Flores the gun, then Flores would shoot the victim and get the gun back to Mr. Powell.[63] In making its reasonable doubt argument in closing, however, the defense argued that it was implausible that Powell shot Officer Spicer from the driver's side and then somehow climbed over the rotund Flores to exit the passenger side of the Sebring. The defense bolstered that argument with forensic evidence establishing that Flores was the major contributor to the trigger DNA and also had gunshot residue on his hands.

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[59] A2104-05.

[60] A2061.

[61] *State v. Powell,* 2016 WL 3023740 at *30 (Del. Super. Ct.).

[62] *State v. Powell,* 2011 WL 2041183 at *8 (Del. Super. Ct.).

[63] *Id.*

The State delays disclosure of an eyewitness, Damion Coleman, until the defense had rested its case.

On January 28, 2011, the trial was still ongoing; the State would not rest its case until February 3, 2011. Meanwhile, on January 28, 2011, Detective Hudson and Damion Coleman spoke by phone.[64] Coleman was a college student who witnessed the incident. He mentioned this to his college professor, who encouraged him to call the Attorney General's office.[65] Hudson would eventually interview Coleman on January 30, 2011. He took contemporaneous notes.[66] Then on February 2, 2011, Hudson drafted a supplemental report, which was approved the same day.[67]

All this while, the State was still presenting its case. The State rested on February 3, 2011. So did the defense. At the end of that day, all counsel and the Court were together for a pre-meeting about the jury instructions. They were all

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[64] A3201. The materials sent by trial counsel to postconviction counsel regarding Coleman are at 3181-3190. But a page was missing from the police report, so the State sent the complete materials, including the missing page, to postconviction counsel on January 6, 2015. A3196-3259. The citations to the officer's report and notes are from the postconviction documents, which appear to differ only in that one missing page of the police report.

[65] A3199.

[66] A3201-02.

[67] A3197-3200.

together again at length all day on February 4, 2011 for the prayer conference.[68] Yet the State still did not mention the newly found witness.

On Friday, February 4, 2011, the State sent a letter to the defense disclosing the existence of Coleman and attaching the report and notes.[69] Ms. Tsantes testified that it was dropped off at the end of the day Friday, while she was leaving for a colleague's retirement party at the Brick.[70]

Finally, on Monday, February 7, 2011, just prior to closing arguments, the issue was brought before the Court. In that discussion, Mr. Cosgrove revealed that he had even been on a call with Hudson and Coleman "last Sunday" (presumably the January 30, 2011 phone call) and had not disclosed it.[71] The prosecutor stated that the State decided to wait until the detective completed his report and gave copies of his notes before drafting a cover letter and gave it to the defense on Friday, February 4, 2011.[72]

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[68] A2162-2173.

[69] A5875.

[70] A3296.

[71] A2391.

[72] A2393.

The judge responded:

> Paula, that is after the case and evidence is closed. But you know it on Sunday, Monday, Tuesday, Wednesday, Thursday. There is no communication to the defense about there may be another potential eyewitness. I don't know how you can wait to the end of the evidence to give it to them. What is the point of giving it to them? How can they use it?[73]

The prosecutor responded that she provided the information upon receiving documentation of it. This statement was untrue, because the detective's report was approved by a supervisor on February 2, 2011—while the State was still presenting its case. As the judge noted, "The State knew it. He [prosecutor] is participating in the phone call. He said he and Hudson on Sunday."[74] The judge went on to say, "I don't know what you all are thinking. I don't know what you all are thinking. I am disappointed that they get this evidence and after they closed."[75]

The prosecutor asserted that Coleman was "not in the nature of *Brady*." The judge stated, "I understand it may not be in the nature of *Brady* because you have four witnesses and you have Powell coming out of three different doors."[76]

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[73] A2393.

[74] A2394.

[75] *Id.*

[76] A2394.

Trial counsel interviews Mr. Coleman and decides not to re-open its case.

The Court ordered a temporary recess to give defense counsel a chance to speak with Coleman and decide if they wanted to move to reopen. The judge ordered Coleman brought to the courthouse. The defense declined to reopen.[77] Both trial attorneys testified about this decision at the evidentiary hearing.

Ms. Tsantes testified that while her case note indicated Coleman was not called as a witness because he put the shooter outside the car when the shot was fired, she also said there were other factors.[78] She was "incredibly focused on closing arguments since I was giving them for the defense and I know the importance of those."[79] She also knew the jury was waiting and "I had a very impatient judge who wanted to get this case going and to the jury."[80]

Ms. Tsantes testified there was not as much to the police report as there was to the officer's handwritten notes, which "seemed incredibly helpful to the defense case."[81] She had to consider whether it was worth reopening the case, since it

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[77] A2394-2395.

[78] A3297.

[79] A3298.

[80] *Id.*

[81] *Id.*

"wasn't a slam dunk helpful witness to us, but it was another version of an eyewitness seeing something different than the State's witnesses, Reeves and Flores, supposedly said."[82] Ms. Tsantes was also aware that Coleman was brought to the courthouse by a police car, and did not know what was said to him. All in all, she said, "the timing was horrific."[83]

Mr. Johnson took the lead on interviewing Coleman, because Ms. Tsantes was preparing for closing arguments.[84] Mr. Johnson was concerned that Coleman was going to identify Mr. Powell, if he was going to identify anyone at all.[85] This concern was held despite the police report stating that Coleman could not describe the subject with the gun.[86] Mr. Johnson had very little recall of the timing of the Damion Coleman events.[87] When the State questioned him about the potential positive and negative outcomes of Coleman's testimony, the Court intervened: "I don't know, quite frankly, where we are going with it because Mr. Johnson

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[82] *Id.*

[83] A3299.

[84] A3536.

[85] A3538.

[86] A3201.

[87] A3630-31.

testified yesterday that he was not going to call this witness because of the risk that the witness was going to identify his client. The State has stepped into it with this."[88] The prosecutor responded, "I will move on," and no further questions were asked. [89]

Appellate counsel's affidavit stated that under the circumstances as they knew them, they did not consider raising the *Brady* claim on appeal.[90] Ms. Walker testified on behalf of appellate counsel. She did not recall any communications with trial counsel about the Coleman issue.[91] She was aware that the record indicated that the defense decided not to reopen the case. But she was not aware of the scenario of reopening the case for one defense witness, the fact that a jury was waiting for closing arguments, or anything else pertaining to counsel's decision about Coleman.[92] Had she been aware of the surrounding issues, she would have considered a *Brady* claim on appeal.[93]

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[88] A3636.

[89] *Id.*

[90] A3103-04.

[91] A3487.

[92] A3488-89.

[93] A3489.

Damion Coleman's eyewitness account would have helped the defense's assertion of reasonable doubt that Mr. Powell was the shooter.

All that survives of Mr. Coleman's interview with the detective and prosecutor are the detective's handwritten notes and a supplemental police report. The relevant notes are:

- Engines roaring B4
- Happened fast
- Guy on Pass side had a gun
- Driver had trouble getting out
- Jumped over police car
- Driver ran to thrift store
- No description of Guy w/gun
- Handgun
- Light skin
- Guy on bike w/Ford, Lincoln, Merc shift was there
- Went in house Called 911[94]

The police report narrative contains different information than the notes:

Mr. Coleman advised that he was seated on the porch of 302 Cedar Street at app 6:45 PM when he heard engines roaring. He advised that a car being chased by a police car went by and then stopped. He advised that he saw the driver of the car get out and run. He stated that guy had trouble getting out and had to jump over the

[94] A3201.

police car. He stated that guy was a BM wearing a gray hoody and a red baseball cap. He stated that another BM (light skinned) got out and pointed a handgun over the car at the police car. He could not describe the subject with the gun. He stated everything happened very fast. Mr. Coleman did state that the subject with the gun ran behind a blue house. He stated there was a guy who works at Boulevard Ford on a bike that was riding by and would be a better witness.

Mr. Coleman stated that after he saw the guy run with the gun he called 911 and never saw anything else.[95]

The Department of Justice advised postconviction counsel that no recording of a 911 call from Mr. Coleman could be located and that recordings are kept for two years only.[96]

Because Coleman was disclosed after the close of the evidence, trial counsel had only a short time to interview him. They were unable to determine his vantage point and what he was able to see. It is not clear from the somewhat contradictory notes and report whether Coleman said the person who pointed the gun fired it, or if the shooting had already taken place. It is clear, at minimum, that his testimony would have contradicted Flores' testimony that Mr. Powell exited the driver's side of the car with the gun,[97] since Coleman saw the person with the gun get out of the passenger side.

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[95] A3200.

[96] A3196.

[97] A2059-60.

The State's failure to disclose the existence of Coleman on January 30, 2011 was a* Brady *violation.

The prosecutor's obligations under *Brady v. Maryland*[98] are crucial components in ensuring a fair trial. As the United States Supreme Court has held, "society wins not only when the guilty are convicted by when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[99] This Court recently set forth the longstanding rubric of evaluating *Brady* violations:

> Under *Brady* ..., the State's failure to disclose exculpatory and impeachment evidence material to the case violates a defendant's due process rights. The reviewing court may also consider any adverse effect from nondisclosure on the preparation or presentation of the defendant's case. There are three components of a *Brady* violation: (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that evidence is suppressed by the State; and (3) its suppression prejudices the defendant. In order for the State to discharge its responsibility under *Brady,* the prosecutor must disclose all relevant information obtained by the police or others in the Attorney General's Office to the defense. That entails a duty on the part of the individual prosecutor to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.[100]

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[98] 373 U.S. 83 (1963).

[99] *Id.* at 87.

[100] *Starling v. State,* 130 A.3d 316, 332-33 (Del. 2015).

Exculpatory evidence is "material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[101] Impeachment evidence falls in this category because it can be used to establish bias or interest.[102] To establish prejudice under *Brady*, a defendant must demonstrate that the evidence the State suppressed "creates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[103] The suppression, in other words, must undermine confidence in the outcome of the trial.[104]

This Court has had recent occasion to review *Brady* violations. In *Starling*, this Court found a violation when a prosecutor informed defense counsel that a key witness had a capias and violation of probation pending when in fact the State had caused the withdrawal of the capias and the dismissal of the VOP.[105]

In *Wright,* three *Brady* violations pertained. The first involved a prison informant—a surprise witness called by the State in rebuttal to testify that Wright

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[101] *Brady* at 87.

[102] *Michael v. State,* 529 A.2d 752, 756 (Del. 1987).

[103] *Wright v. State,* 91 A.3d 972, 987-88 (Del. 2014).

[104] *Id.*

[105] *Starling* at 334-335.

had confessed to him. The State failed to disclose that just six months before the trial, this witness had cooperated with the State in another trial in order to obtain a better deal for himself.[106]

The second violation involved a defense witness, Kevin Jamison. Wright wanted to establish that Jamison and his cousin Norman Curtis were the actual perpetrators. On direct examination, Jamison minimized his relationship with Curtis. But the State knew that Jamison and Curtis were charged as codefendants in a robbery. The State delayed Jamison's arrest for a month—and arrested him two days after he testified at Wright's trial.[107]

The third violation was the State's failure to disclose nonpublic facts about an attempted robbery at the Brandywine Village Liquor Store, an event which occurred 30-40 minutes prior to the robbery of which Wright was accused, and only a mile and a half away. The descriptions of the perpetrators of the first robbery did not match Wright or his codefendant.[108] This information could have raised doubts about the identity of the perpetrators of the incident of which Wright was accused.[109]

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[106] *Wright* at 989.

[107] *Id.* at 990.

[108] *Id.* at 980-81.

[109] *Id.* at 993-994.

The State's late disclosure of Coleman is a violation of the same magnitude as those found in *Wright* and *Starling*. Coleman was an additional eyewitness favorable to Mr. Powell in the overall context of the trial. The defense, bolstered by forensic evidence, asked the jury to consider whether Mr. Powell was the triggerman beyond a reasonable doubt. In doing so, the defense brought out the inconsistencies in the eyewitness statements that challenged the State's theory that Mr. Powell sat behind the driver, shot the victim, then climbed over the corpulent Flores to get out of the passenger side before Flores did. Most importantly, the defense needed to challenge Flores' story: that Mr. Powell shot the victim then exited the car from the driver's side, leaving the door ajar. Flores was the State's most important witness because he was present for the action and was likely viewed favorably by the jury because he stayed behind to lend assistance.

Coleman's account, that the person with the gun got out of the passenger side, directly contradicts Flores' version. He would have been important to helping the defense establish reasonable doubt—especially when considering that Flores had gunshot residue on his palms and he was the major DNA contributor on the trigger of the firearm.

The judge's comment that Coleman may not be *Brady* "because you have four witnesses and you have Powell coming out of three different doors" actually supports a finding of a *Brady* violation. Coleman was an additional witness who

could have been woven into the tapestry of a reasonable doubt argument, had his existence not been suppressed by the State.

The notion developed by one of the defense attorneys—that Coleman may have identified Mr. Powell at trial—does not hold water. First, Coleman clearly stated he could not describe the person he saw getting out of the passenger side with the gun. Second, it was obvious that Coleman was following the trial; his discussion with his professor about it is what caused him to call the police. Given the heavy saturation of media coverage of the trial, there is little doubt that Coleman knew what Mr. Powell looked like when he gave his statement to the detective and the prosecutor. Or, he could have simply been shown a photograph. Ultimately, defense counsel's concern about an identification was completely unfounded. Surely, defense counsel would have been able to make more reasonable judgments about a potential identification had he not been placed in a position of having to make such an important decision so quickly.

The existence of Coleman was clearly suppressed by the State. The lead detective knew about Coleman on January 28, 2011. The prosecutor and detective interviewed him on January 30, 2011. At the very latest, that was when the *Brady* obligation attached. The prosecutor's claim that the State was waiting until the detective's report was ready is a nonstarter: the report was written and approved by February 2, 2011. Nothing at all accounts for an additional two days of delay. In

that two days, the State rested, the defense put on its DNA expert and rested as well. The prosecutors, defense attorneys, and the judge were together cheek-to-jowl every single day that week—including two office conferences. The State at any time, especially before the defense rested, could have disclosed Coleman's existence. Instead, the State deliberately suppressed the evidence from January 30, 2011 until the late afternoon of February 4, 2011.

Finally, the *Brady* violation clearly prejudiced Mr. Powell. This was a jury that found Mr. Powell not guilty of recklessly killing Officer Spicer while he was in the line of duty. The eyewitness accounts and the forensic evidence left plenty of room for Flores to be the shooter. The law requires only that Mr. Powell establish a reasonable likelihood of a different outcome of the trial flowing from the violation, not the certainty of an acquittal. The testimony of Coleman, a disinterested witness, a college student with no criminal history, reasonably likely could have tipped the scales to a not guilty on the second murder charge as well.

The postconviction judge erred in finding no* Brady *violation.

The judge's assessment of the Coleman issue does not adhere to the fundamental fairness aspect of *Brady*. First, the judge held that the Coleman issue was not a *Brady* violation, because "although the information was provided late, it was not suppressed."[110] That holding demonstrates a lack of appreciation of the

[110] *State v. Powell,* 2016 WL 3023740 at *42 (Del. Super. Ct.).

dilemma in which the defense was placed by the State's nondisclosure. With a jury waiting, instructions being finalized, closing arguments being refined and rehearsed, the defense had to make a rushed and uninformed decision about whether to call Coleman. And not just whether to call him—whether to *reopen its case* to call him. Coleman was not a smoking gun witness. Coleman was an eyewitness who contradicted Flores and contributed to the reasonable doubt calculus. If Coleman had been disclosed on January 30 or 31, 2011, then the defense counsel could have taken the time to properly assess whether to call him *in the defense case.* Coleman's existence was surely suppressed.

The court also erred in holding that "Mr. Coleman's testimony was not valuable impeachment evidence, given the conflicting statements already in the record as to which door the shooter exited."[111] But the fact that conflicting statements were already in the record increases, not diminishes, Coleman's value. What is known is that Coleman could not describe the shooter but did see him exit the passenger side with gun in hand and run away. Also, Coleman directly contradicted Flores in key respects. His testimony would not have been mere surplusage, as the judge found, but rather, would have given the jury testimony from an additional independent eyewitness to consider during deliberations.

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[111] *Id.* at 43.

The fact that the jury found Mr. Powell not guilty of Count I is a strong indicator that it was willing to consider all the evidence as against the standard of proof of beyond a reasonable doubt. Because the State suppressed Coleman's existence until after the defense had rested, it is reasonably likely that the result of the trial was affected. Because confidence in the trial's outcome is undermined, Mr. Powell should have been granted postconviction relief.

The trial judge erred in finding that appellate counsel was not ineffective.

The postconviction judge held, "not knowing that any information had been withheld, appellate counsel cannot be faulted for failing to raise alleged *Brady* claims on appeal."[112] While it is true that appellate counsel could not have known of some of the other failures of the State to provide *Brady* material alleged in the Amended Motion, the Coleman issue is different. It was a unique enough chain of events to merit a discussion among appellate and trial counsel. The failure of appellate counsel to seek out further information from trial counsel about the Coleman *Brady* violation constituted deficient performance.

Mr. Powell was prejudiced by appellate counsel's ineffectiveness, because, as with the *Brady* violation, a reasonable probability of a different outcome existed had they raised the *Brady* issue on appeal. As this Court recently held, "the

[112] *Id.* at *44 (referring to multiple *Brady* claims made in the Amended Motion for Postconviction Relief).

touchstone of either test, *Strickland* or *Brady*, is the fairness of the trial.[113] Since the fairness of this trial was compromised by the State's *Brady* violation and appellate counsel's ineffectiveness, Mr. Powell respectfully seeks postconviction relief.

[113] *Starling v. State,* 130 A.3d 316, 336 (Del. 2015).

CONCLUSION

For the reasons stated, Derrick Powell respectfully asks this court to reverse the Superior Court's denial of his Amended Motion for Postconviction Relief.

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