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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DERRICK POWELL, | ) | |
| | ) | |
| Defendant Below, | ) | |
| Appellant, | ) | Case No. 310, 2016 |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF DELAWARE, | ) | |
| | ) | |
| Plaintiff Below, | ) | |
| Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

# STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: April 19, 2017

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## NATURE AND STAGE OF THE PROCEEDINGS

On November 23, 2009, a Sussex County Grand Jury indicted Appellant Derrick Powell with two counts of first degree murder, one count each of second degree burglary, resisting arrest, second degree assault, attempted robbery first degree, first degree reckless endangering, and seven counts of possession of a firearm during the commission of a felony (PFDCF). A1, 78-82. The charges stemmed from the murder of Georgetown Police Officer Chad Spicer. A78-79.

After a nine-day trial, on February 8, 2011, a jury found Powell guilty of first degree murder, resisting arrest, attempted robbery in the first degree, reckless endangering first degree, and four counts of PFDCF. A1557-59. The jury found Powell not guilty of one count of first-degree murder, of first-degree assault, and of the related PFDCF charges. *Id.* The court conducted a penalty hearing from February 14 to 23, 2011, after which the jury unanimously found the existence of two statutory aggravating factors, and recommended by a vote of seven to five that the aggravating circumstances outweighed the mitigating circumstances. A27. On May 20, 2011, the Superior Court sentenced Powell to death, plus a total of 82 years of imprisonment.[1] A30. Powell appealed and this Court affirmed his conviction and sentences on August 9, 2012.[2]

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[1] *State v. Powell*, 2011 WL 2041183 (Del. Super. Ct. May 20, 2011).

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

Powell filed a timely *pro se* motion for postconviction relief on September 28, 2012. A37. Counsel were appointed to represent Powell, and on October 1, 2013, they filed an amended motion for postconviction relief (Amended PCR Mot.). A39-40, 2906-3067. The State filed an answer and Powell submitted a reply. A41, 42. Powell's former trial counsel, Dean C. Johnson, Esquire and Stephanie A. Tsantes, Esquire, and his appellate counsel, Bernard J. O'Donnell, Esquire, Nicole M. Walker, Esquire and Santino Ceccotti, Esquire, all responded to the factual allegations of ineffective assistance of counsel contained in the 2013 amended petition by separate Affidavits. A40-41, 3068-3107.

The Superior Court held an evidentiary hearing over eight days in January, February and March, 2015. A43-45. In addition, counsel conducted depositions of a number of witnesses in Cumberland, Maryland in February, 2015. *See* A46-47. On April 9, 2015, Powell filed a motion to stay his postconviction proceedings pending the United States Supreme Court's decision in *Hurst v. Florida*.[3] A45. The court denied the motion. A46. Thereafter, Powell filed a motion seeking recusal of the judge. A47. The court denied that motion as well. A48. Powell and the State filed posthearing briefs and the court heard oral argument. A48-49.

[3] 136 S. Ct. 616 (2016).

After the United States Supreme Court rendered its decision in *Hurst* in January, 2016, Powell filed a motion to vacate his death sentence or to certify a question of law to this Court. A49. The Superior Court denied the motion, noting that the issue of whether Delaware's death penalty statute was constitutional in light of the *Hurst* decision had already been certified to this Court in *Rauf v. State*, No. 39, 2016. A49-50. On May 24, 2016, the Superior Court denied Powell's motion for postconviction relief.[4] A50; Ex. A to Op. Br. Powell appealed.

This Court stayed briefing in Powell's case pending its resolution of certified questions in *Rauf*. After *Rauf* was decided,[5] Powell filed a motion to vacate his death sentence, which this Court heard on an expedited basis. On December 15, 2016, this Court issued its decision granting Powell's motion to vacate his death sentence.[6] Thereafter, Powell filed his opening brief, addressing the remaining issues on appeal. This is the State's Answering Brief.

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[4] *State v. Powell*, 2016 WL 3023740 (Del. Super. Ct. May 24, 2016).

[5] 145 A.3d 430 (2016).

[6] *Powell v. State*, 2016 WL 7243546 (Del. Dec. 15, 2016).

## SUMMARY OF THE ARGUMENT

I. Appellant's claims are DENIED. As a preliminary matter, consideration of his *Brady* claim is barred from consideration under Superior Court Criminal Rule 61(i)(4). The Superior Court addressed his claim during trial, therefore, it was adjudicated in the proceedings leading to the judgment of conviction. Powell has not shown reconsideration is warranted in the interests of justice. If, however, this Court finds Powell's claim was not properly considered during trial, his claim is therefore barred under Rule 61(i)(3). Powell has not shown cause for the default and actual prejudice therefrom, nor has he shown that the Rule 61(i)(5) exception to the procedural bar would apply.

The Superior Court correctly held that the State's delayed disclosure of the eyewitness Damian Coleman did not violate *Brady*. To the extent Coleman's information was exculpatory or impeaching, it was only marginally so, and it was cumulative. Thus the court did not err in finding his statements were not *Brady* material. In addition, the court correctly held that Coleman's existence was not suppressed and that Powell did not prove prejudice from the delayed disclosure.

Finally, the Superior Court acted within its discretion in finding appellate counsel not ineffective for failing to raise the issue on appeal. The claim lacks merit and would not have succeeded.

## STATEMENT OF FACTS

The State adopts generally the Appellant's Statement of the Facts to the extent he cited this Court's recitation of the facts in its direct appeal opinion.[7] The State adds the following facts relevant to the issue raised in this appeal:

The jury was selected in Powell's case on January 18, 2011. A23. Trial began with opening statements on January 20th. A305-34. On Friday, January 28, 2011, Lieutenant Robert Hudson was contacted by Damian Coleman, a previously unknown eyewitness to Officer Spicer's shooting. A3183-84. Lieutenant Hudson interviewed Coleman on Sunday, January 30th, in the presence of Martin Cosgrove, one of the prosecutors. A2391, 3183-84.

According to Lieutenant Hudson's notes and supplemental police report, Coleman told him that he had been seated on the porch of a house at around 6:45 p.m. on September 1, 2009, when a car being chased by police went by. A2391-92, 3184, 3200. The cars stopped, and the driver, who was wearing a gray hoody and red baseball cap, had trouble getting out and had to jump over the police car to escape. *Id.* Then, a light-skinned black male got out of the passenger side, pointed a handgun over the car at the police car, and ran off behind a blue house. *Id.* Coleman could provide no further description of the second man. *Id.* After he saw the man with the gun, Coleman went into his house and called 911. *Id.* Coleman

[7] *See Powell*, 49 A.3d at 1093-95.

also told Lieutenant Hudson about a second witness who was riding by on a bike at the time, and who he thought might work at Boulevard Ford. *Id.* The next day, Lieutenant Hudson tried, without success, to find the second witness. A3199.

The State and defense both rested their cases in Powell's trial on Thursday, February 3, 2011. A2161, 2287. The next day, Powell made a motion for judgment of acquittal and the Superior Court held the prayer conference. A2309-60. The State also hand-delivered to trial counsel Lieutenant Hudson's supplemental report and notes from his interview with Damian Coleman.[8] A3181.

On Monday, February 7th, during an office conference, trial counsel informed the court about the recent discovery of Damian Coleman. A2390-92. The court, upset that the State had waited almost a week and until after both sides had rested to inform trial counsel of Coleman's existence, ordered the State to bring Coleman to the courthouse so trial counsel could interview him. A2392-95. The court was prepared to reopen the case should trial counsel decide to call Coleman as a witness. A2396. After interviewing Coleman, trial counsel opted not to reopen the case. A2395-96. That same day, Stephanie Tsantes noted in the Public Defender's Office

[8] It is not clear whether the police report provided to trial counsel was missing the second page. *See* A3530-31. During the postconviction hearing, trial counsel could not recall whether the second page had been provided or not. A3535. In any case, Lieutenant Hudson's notes contained much of the same information that was included on the second page, and Deputy Attorney General Martin Cosgrove also described his recollection of the interview during the office conference on Monday, February 7th. A2391-92.

Log: "After meeting with [Coleman], neither Dean nor I thought he was particularly helpful as he put the shooter outside the car when the shot was fired which is not consistent with the physical evidence." A3296-97.

## ARGUMENT

## I. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION IN FINDING THE STATE DID NOT VIOLATE *BRADY* WITH ITS DELAYED DISCLOSURE OF AN EYEWITNESS AND IN FINDING APPELLATE COUNSEL NOT INEFFECTIVE FOR FAILING TO RAISE THE ISSUE ON APPEAL.

### Question Presented

Whether consideration of Powell's *Brady* claim is procedurally barred under Superior Court Criminal Rule 61(i)(4), or, in the alternative, under Rule 61(i)(3).

Whether the Superior Court erred in finding the State's delayed disclosure of Damian Coleman did not violate *Brady.*

Whether the Superior Court abused its discretion in finding appellate counsel not ineffective for failing to raise the *Brady* claim on appeal.

### Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[9] "[F]actual determinations will not be disturbed on appeal if they are based upon competent evidence and are not clearly erroneous."[10] Questions of law are reviewed *de novo.*[11] Similarly, this Court reviews whether a Rule 61

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[9] *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (citation omitted).

[10] *Burrell v. State*, 953 A.2d 957, 960 (Del. 2008).

[11] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013); *Gattis,* 955 A.2d at1280-81.

motion presents a colorable claim that a miscarriage of justice has occurred *de novo*.[12]

**Merits of the Argument**

During trial, the State presented the theory that Powell was seated in the back passenger seat on the driver's side of the Sebring when he fired the shot that killed Officer Spicer. A308. Luis Flores and Christopher Reeves both testified that that was where Powell was sitting. A1374-75, 2055-58. Flores also testified that, after firing the shot, Powell got out of the car from the driver's side back door. A2059. Several eyewitnesses testified that the second man, who the evidence overwhelmingly indicated was Powell, exited the car from the passenger side before running off. A422, 455-56, 493-94, 521-22. Trial counsel presented the theory in closing that Flores, not Powell, must have been the shooter because, *inter alia*, it would have been virtually impossible for Powell to jump over the 300-pound Flores in order to exit out of the passenger side of the car. A2489-90, 2503-04. Thus, he must have been sitting on the passenger side, while Flores was sitting on the driver's side. A2504.

In his Amended Motion for Postconviction Relief, Powell claimed the State violated due process in failing to timely disclose Damian Coleman's existence.[13]

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[12] *Webster v. State*, 604 A.2d 1364, 1366 (Del. 1992).

[13] Citing *Brady v. Maryland*, 373 U.S. 83 (1963).

A2945, 2953-56. He argued Coleman presented exculpatory evidence because he placed the shooter on the passenger side, "the side where the State claimed Flores was seated," and his statement called into question the credibility of the State's witnesses who testified differently. A2955-56. He asserted, "[t]here is no way the information could be anything other than exculpatory to the defense as it calls into question the State's theory that Mr. Powell was the shooter." *Id.* Powell also claimed his appellate counsel were ineffective for failing to raise the issue on appeal. A2956

The State argued that Powell's claim was barred from consideration by Superior Court Criminal Rule 61(i)(4) and that appellate counsel were not ineffective for failing to raise the issue on appeal. B8-9. The State also claimed that, to the extent Coleman's statement was *Brady* material, the court correctly and effectively addressed the issue as a delayed disclosure. B14-16. Moreover, Powell had failed to meet his burden of establishing he was prejudiced by the delayed disclosure because the record and trial counsel's testimony showed otherwise. B16-17.

During the postconviction hearing, Dean Johnson testified that, after speaking with Coleman, trial counsel were concerned that he was going to identify Powell as the shooter. A3538. In addition, Coleman's statement that the unidentified shooter had run behind a blue house was consistent with other eyewitnesses' accounts that

the second man out of the car, the man with the gun, had run in the same direction. A3635. Although Johnson agreed with postconviction counsel that he would have wanted more time to interview Coleman (A3537), he also acknowledged that the Court placed no limitation on the amount of time trial counsel had to decide whether to reopen the case and present him (A3534).

Stephanie Tsantes agreed that she and Johnson felt Coleman was not a particularly helpful witness, but stated other factors went into her decision, such as whether they wanted him to be the last witness the jury saw, the jurors were waiting, and she was focused on preparing her closing statement. A3297-99. Tsantes pointed out that "it 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." A3298. And she went on to say:

> He did tell a different version of events and he seemed very credible in his memory of that, but it was not the slam dunk: Hey, we need to re-open the case, Judge because this witness is so critical. But certainly in terms of the inconsistencies of the eyewitness testimony, it would have been helpful.

A3299-3300.

The Superior Court denied Powell's claim, finding first that the State's last minute disclosure was not technically a *Brady* violation because the information was

not suppressed, nor did Coleman's statement impeach evidence favorable to the State.[14] The court noted:

> [T]he eye witnesses' testimony varied as to from which doer [sic] the man with the gun exited. Muddying the waters further on the door issue, together with additional testimony indicating the shooter ran in the direction where Powell was captured would not have advanced Powell's case.[15]

Nevertheless, the court also conducted a *Brady* analysis, finding first that the potential testimony was not exculpatory.[16] Second, the court reiterated that the evidence was not technically suppressed because, although the State waited five days before informing trial counsel about it, the court ensured that the witness was located and that trial counsel had the opportunity to interview him and decide whether they wanted to use the evidence.[17] Third, the court, noting that postconviction counsel had not called Coleman as a witness during the evidentiary hearing, held that Powell could not show prejudice: "the evidence was not material in the sense that its inclusion would have undermined confidence in the jury's verdict. . . . The witness' testimony may have served to bolster the State's case, not undermine it."[18] The

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[14] *Powell*, 2016 WL 3023740, at *42.

[15] *Id.*

[16] *Id.* at *43.

[17] *Id.*

[18] *Id.*

Superior Court also found appellate counsel not ineffective for failing to raise any of Powell's *Brady* claims on direct appeal.[19]

In this appeal Powell claims the Superior Court erred in holding that the late disclosure of Coleman was not a *Brady* violation and that appellate counsel was not ineffective. Op. Br. at 5. He claims Coleman's statement was *Brady* material because his account that the person with the gun got out of the passenger side directly contradicts Flores's version. *Id.* at 30. In addition, he asserts the court erred in finding the State did not suppress Coleman's existence because it waited five days, until the evidence was closed, before informing trial counsel about him. *Id.* at 31. He also claims the Superior Court erred in finding appellate counsel not ineffective for failing to raise the issue on appeal. *Id.* at 34. Powell's claims are unavailing.

[19] *Id.* at *44.

### A. Powell's *Brady* Claim is Barred From Consideration Under Superior Court Criminal Rule 61(i)(4) or, in the Alternative, Under Rule 61(i)(3).[20]

When considering a motion under Del. Super. Ct. Crim. R. 61,[21] courts must first apply the procedural requirements of the rule before reaching the merits of a claim.[22] Rule 61(i)(4) provides: "Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice." The rule bars consideration of formerly adjudicated claims based upon principles of the "law of the case" doctrine.[23] A defendant is not entitled to have a

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[20] Although the Superior Court did not consider whether Powell's *Brady* claim was procedurally barred, "this Court may affirm on the basis of a different rationale than that which was articulated by the trial court." *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995). *See also Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006) ("While the judge articulated a different rationale for his ruling in this case, we may affirm on grounds other than those relied upon by the judge." (citations omitted)).

[21] Because Powell filed his motion for postconviction relief on September 28, 2012, the "old" version of Rule 61, which was in place prior to the June 4, 2014 amendments, applies to his case.

[22] *Ayers v. State*, 802 A.2d 278, 281 (Del. 2002).

[23] *See Weedon v. State*, 750 A.2d 521, 527 (Del. 2000) ("In our view, Rule 61(i)(4)'s bar on previously litigated claims is based on the 'law of the case' doctrine.").

previously adjudicated claim reexamined "simply because the claim is refined or restated."[24]

Although trial counsel did not specifically object to the State's disclosure of Coleman's existence as a *Brady* violation, they did bring the late disclosure to the court's attention. A2390-92. In discussing Coleman's statement, the State argued, and the court agreed, that it was not in the nature of *Brady*. A2394. The court noted that it was not *Brady* because other witnesses had Powell coming out of different doors of the car, too. *Id.* Nonetheless, the court addressed Coleman just as it would have addressed a delayed *Brady* disclosure, giving trial counsel time to speak with him and to call him as a witness if they so desired. A2394-96.

Powell's claim was adjudicated in the proceedings leading to the judgment of conviction and it is, thus, procedurally barred by Rule 61(i)(4) unless Powell can show that reconsideration of the claim is warranted in the interest of justice.[25] "The 'interest of justice' exception requires the defendant show that subsequent legal developments have revealed that the trial court lacked the authority to convict or

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[24] *Riley v. State*, 585 A.2d 719, 721 (Del. 1990). *See Duhadaway v. State*, 2005 WL 1469365, at *6 (Del. June 20, 2005).

[25] *See Wright v. State*, 91 A.3d 972, 986 (Del. 2014) ("Rule 61(i)(5)'s miscarriage of justice exception does not apply to the bar on formerly adjudicated claims under Rule 61(i)(4). Claims barred by Rule 61(i)(4) may only be overcome in the interest of justice, a distinct standard.").

punish the accused."[26] Powell has not alleged, nor can he show, that any subsequent legal developments exist to reveal the trial court lacked authority to convict him.

In the alternative, if this Court were to find Powell's *Brady* claim was not formerly adjudicated,[27] it would thus be procedurally barred under Rule 61(i)(3). Under Rule 61(i)(3), a defendant who fails to raise any claim in the proceedings leading to conviction is barred from later bringing such a new claim for relief unless he can show: (A) cause for the default; and (B) actual prejudice.[28] To establish cause sufficient to overcome the procedural default bar of Rule 61(i)(3)(A), Powell must show that an external impediment prevented him from constructing or raising the claim either at trial or on direct appeal.[29] In order to meet the second prong of Rule 61(i)(3)(B), Powell must demonstrate actual prejudice resulting from the alleged and previously unasserted error.[30]

Although Powell claims his appellate counsel were ineffective for failing to raise the claim on appeal,[31] he cannot establish actual prejudice because his *Brady*

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[26] *Id.* at 994, n.31 (internal quotations omitted).

[27] Powell asserts his *Brady* claim was not raised at trial. Op. Br. at 11.

[28] *Outten v. State*, 720 A.2d 547, 556 (Del. 1998); *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[29] *Younger*, 580 A.2d at 556.

[30] *Id.* at 555-56.

[31] *See Flamer v. State*, 585 A.2d 736, 758 (Del. 1990) (noting that counsel's failure to pursue a reasonably available claim on appeal can amount to cause sufficient to

claim lacks merit. Similarly, Powell cannot overcome the Rule 61(i)(3) procedural bar under Rule 61(i)(5). Rule 61(i)(5) provides that postconviction claims barred by Rule 61(i)(3) may still be considered if the claim alleges that the trial court lacked jurisdiction, or the movant can show "a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction." Although this Court has recognized that *Brady* claims fall within the ambit of the Rule 61(i)(5) exception, such claims must still be colorable to trigger it.[32] Powell's claim does not fall under the exception because it lacks merit.

### B. The Superior Court Correctly Held that the State Did Not Violate *Brady*.

According to *Brady*, the due process clause of the Fourteenth Amendment mandates that the State must disclose evidence favorable to an accused "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[33] The State's obligation under *Brady* to disclose

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excuse procedural default, but only if such failure amounts to constitutionally ineffective assistance of counsel).

[32] *See Starling v. State*, 130 A.3d 316, 332 (Del. 2015) ("When considering a *Brady* claim, which is a constitutional claim, '[a] *colorable* claim of a [*Brady* ] violation falls within this exception.'" (quoting *State v. Wright*, 67 A.3d 319, 324 (Del. 2013) (emphasis added))).

[33] *Brady*, 373 U.S. at 87. *Accord Starling*, 882 A.2d at 759 n.23 (quoting *Brady*).

exculpatory evidence includes evidence that the defense might use to impeach a government witness by showing bias or interest.[34] The three components to a *Brady* violation are 1) the evidence must be favorable to the accused because it is exculpatory or impeaching; 2) the evidence was suppressed by the State (either willfully or inadvertently); and 3) there must be prejudice to the defendant as a result.[35] "[T]here is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[36] Reasonable probability of a different result is shown when the absence of the undisclosed evidence "undermines confidence in the outcome of the trial."[37]

### 1. Coleman's Information Was Not *Brady* Material.

To the extent Coleman's information was exculpatory or impeaching, it was only marginally so, and it was cumulative. Powell's placement in the back seat of the car was not going to tip the scales for guilt or innocence much one way or

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[34] *United States v. Bagley*, 473 U.S. 667, 676 (1985); *accord Giglio v. United States*, 405 U.S. 150 (1972) (*quoted in Michael v. State,* 529 A.2d 752, 756 (Del. 1987)).

[35] *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (*quoted in Starling*, 882 A.2d at 756).

[36] *Strickler*, 527 U.S. at 281. *See also Bagley*, 473 U.S. at 68 ("The evidence is material only 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] *Jackson v. State*, 770 A.2d 506 (Del. 2001) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

another. No matter how Powell exited the car, the evidence consistently showed that he exited the car with the gun, fled, and was arrested with the gun, and the great weight of the evidence pointed to Powell as the shooter at McDonald's.

Christopher Reeves and Luis Flores both testified at trial that when they arrived at McDonald's, intending to rob a dealer of marijuana, it was Powell who got out of the car to meet Adkins. A1371-72, 2047. Reeves and Flores saw Powell shoot at Adkins. A1373-74, 2049. When Powell jumped back into the car, he got into the back seat behind the driver (Reeves). A1374-75, 2050-51. A number of other witnesses corroborated Reeves' and Flores's testimony that Powell was the shooter at McDonald's and that he was seated in the back seat behind Reeves when they drove off.

Mark Gillespie, the assistant manager at McDonald's, saw two men arguing outside, in front of the restaurant. A1741. Then he heard a gunshot and saw a black male, wearing a black t-shirt and baggy jeans run to a silver Sebring and get into the rear driver's side passenger seat. A1741, 1743-44. Robert Givens, a McDonald's employee, was at the back door of the restaurant when he heard a gunshot. A1752-55. He saw a black male wearing a black shirt run towards a gray car and jump into the backseat on the driver's side of the car. A1755-56.

Rebecca Steele, another McDonald's employee, saw two black men arguing outside the front window. A1763-65. One of the men, who was wearing a black t-

shirt and jeans that did not go all the way down to his ankles, pulled out a gun and shot at the other man. A1767, 1769. Both men then ran off. A1769. Samuel Smith, who had finished his shift at McDonald's that day, was talking to a friend outside. A1877-79. He saw a man wearing a black t-shirt and jeans that came down almost to the middle of his calves shoot at another guy. A1880, 1882. The shooter then ran to a car and jumped in the back driver's side door, which had been opened for him by someone inside the car. A1882-83. Smith identified Powell from surveillance video and in court as the man who shot the gun. A1891, 1894.

Darshon Adkins testified that the man who shot at him wore a black t-shirt and long shorts. A1807. He identified Powell in the courtroom as that man. *Id.* Surveillance video from McDonald's showed a black male wearing a black t-shirt and jeans that did not go all the way down to his ankles walking around outside just before the shooting. A1857; State's Ex. 121. Powell looked like the man on the video and he was wearing the same clothes when he was arrested. A1857-58.

The McDonald's shooting was first reported to 911 at 6:42 p.m.[38] At 6:45 p.m., Officers Spicer and Brittingham were in pursuit of the Sebring on Market Street in Georgetown, just minutes from the McDonald's. A344-45, 358-59. Two minutes later, Officer Brittingham reported that Officer Spicer had been shot. A346, 381.

[38] *Powell*, 49 A.3d at 1093.

Reeves testified that as he fled from the McDonald's shooting scene, with Powell in the back seat behind him and Flores in the passenger side back seat, Powell told him that if he stopped, he (Powell) would shoot at the police car. A1374-75, 1378. When he did stop, Reeves jumped out of the car and fled before hearing the shot. A1378-80.

Flores testified that when Reeves stopped the car, Powell, who was still sitting in the back seat on the driver's side, shot at the police car through the window. A2055-58. Powell then got out of the car through the driver's side back door and took off running. A2059. Flores got out of the passenger side and tried to help Officer Spicer. A2060-62. Officer Brittingham returned and took Flores into custody. A2063.

Other eyewitnesses to Officer Spicer's shooting all agreed that the first man to exit the Sebring got out of the driver's door and jumped over the police car. A419, 452-53, 492, 519. All eyewitnesses also agreed that the second man out of the car took off running. A422, 457-58, 496-97, 521-23. They did not agree, however, on from which door the second man exited the car. Those of the eyewitnesses who saw the third man get out of the car all agreed that he stayed at the scene and tried to help Officer Spicer. A460, 463-65, 498-99, 503, 508, 525-27.

Jacquelyne LaForge-Sanders only saw the first two men get out of the Sebring. A419-22. She testified that the second man got out from the passenger side of the car. A422. He ran off towards the Perdue plant. *Id.*

Ricardo Ventura-Sanchez testified that he saw the second person get out of the front, passenger side door. A455-56. That person had a gun and was pulling the slide back like he was getting ready to fire it. A457-58. The person ran into a nearby empty lot. A458. The third man got out from the passenger-side back door. A460. He was short and fat and moved the Sebring forward so that he could help Officer Spicer out of the police car. A460, 463. The third man tried to help Officer Spicer but the other officer came back and took him into custody. A463-65.

Juan Gonzalez saw the second person get out of the car from the back seat.[39] A493-94. Gonzalez testified that the second person was holding something black in his hand, and he ran off. A496-97. The third person was fat, got out of the front passenger door of the car, and stayed at the scene. A498-99, 503, 508.

Udibel Venchura-Sanchez testified that the second man out of the car had a gun in his hand and exited from the back, passenger side of the car. A521-22. The man ran from the scene, and as he did so it looked as if he was trying to put something in the gun. A522-23. Udibel then realized a third man was still sitting in the front

[39] It is not clear from the record which side of the back seat Gonzalez said the second man exited. Gonzalez pointed out the side on a photograph. A494. Presumably, he pointed to the passenger side.

passenger seat of the car. A525. The third man got out of the car and told Officer Spicer he would help him. *Id.* He was fat. A526. The man moved the car forward and tried to help Officer Spicer out of the car, but the other officer returned and told the fat guy to leave Officer Spicer alone and to get on the ground. A526-27.

In sum, at least two non-accomplice eyewitnesses testified that the second person out of the car carried a gun. All eyewitnesses testified that the second man out ran away from the scene. The third man stayed at the scene and attempted to help Officer Spicer. Powell was found at a nearby house with the gun that ballistics confirmed was used to shoot Officer Spicer. *See* A898-99, 910-11, 940-41, 966-67, 983, 993, 1957-58. Powell was identified by Darshon Adkins (in addition to Reeves and Flores) and by the clothing he wore on the surveillance tape as the shooter at McDonald's. *See* A1373-74, 2049, 1807, 1857-58. In spite of the conflicting DNA and gunshot residue evidence, both of which still placed the gun in Powell's hands, the evidence implicating Powell as the shooter of Officer Spicer was very strong.

Whether or not the second person exited from the passenger side of the vehicle, as the eyewitnesses testified, or from the driver's side, as Flores testified, most of the eyewitnesses stated that the second person to exit the vehicle held a gun and all of them stated that he ran. All of the eyewitnesses who saw the third man exit stated that he was the one who remained at the scene and tried to help Officer Spicer. Flores was the only person taken into custody at the scene.

Coleman witnessed something that no other non-accomplice witness had seen – a man pointing a gun at the police car. A2391-92, 3184, 3200. That man then ran behind a blue house. *Id.* Coleman's testimony corroborated the others' in that he agreed that the second man out held a gun and ran away from the scene. His testimony might have impeached Flores's statement that Powell exited the car from the driver's side, but so did the other eyewitnesses' statements. Any impeachment benefit to be gained from Coleman's cumulative testimony was greatly outweighed by the fact that his statement hurt the defense theory that Flores fired the gun inside the car and then gave it to Powell. Coleman had the second person out of the car not only holding the gun, but also pointing it at the police car. The Superior Court acted within its discretion in finding Coleman's evidence neither exculpatory nor impeaching of evidence favorable to the State.

**2. The State's Delayed Disclosure of Coleman Did Not Violate *Brady*.**

Police first discovered that Coleman had potential *Brady* information on January 30, 2011, the Sunday before the last week of trial. A2391, 3183-84. The State informed trial counsel about Coleman five days later, on February 4, 2011, after both the State and defense had rested. A3181. The Court delayed proceedings on February 7, 2011 to allow trial counsel to speak with Coleman. A2392-95. Counsel opted not to reopen the case. A2395-96. At the time, Tsantes noted in the Case Activity Log that neither she nor Johnson felt Coleman was helpful because he

put the shooter outside of the car, which was not consistent with the physical evidence. A3296-97.

To the extent the material here was withheld by the State, it was only temporarily. Thus, for *Brady* purposes, it is not considered "suppressed" material, but rather a delayed disclosure.[40] "When a defendant is confronted with delayed disclosure of Brady material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively."[41] Here, the court gave trial counsel ample time to interview Coleman. If they needed more time and chose not to take advantage of the time provided by the court, Powell cannot establish prejudice.[42] Indeed, Johnson acknowledged during the postconviction hearing that the court did not limit the amount of time he and Tsantes had to interview and assess

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[40] *Cf. Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988) ("Assuming for the moment that the Alcohol Influence Report did contain exculpatory or impeaching evidence (i.e. *Brady* material), the State did not suppress the evidence but rather delayed its disclosure."); *United States v. Johnston*, 784 F.2d 416, 425 (1st Cir. 1986) ("Even assuming this evidence was exculpatory and was initially withheld by the government, we deal here with delayed disclosure, rather than nondisclosure. This information was not suppressed by the government, but was produced at trial.") (*cited in Rose*, 542 A.2d at 1199).

[41] *Rose*, 542 A.2d at 1199.

[42] *Cf. Moore v. State*, 1995 WL 67104, at *3 (Del. Feb. 17, 1995) (finding that since defendant did not take advantage of opportunity provided by court to remedy the delayed disclosure, trial court was correct in finding that delay did not prejudice defendant).

Coleman's value to their case. A3534. And, at the time of trial, neither counsel seemed to think Coleman would help their case. A2396, 3296-97.

Despite Powell's assertions that Coleman was a critical witness, Powell has provided no evidence to contradict trial counsel's reasoned conclusion that Coleman was not helpful. Although postconviction counsel initially stated that they intended to call Coleman as a witness during the hearing, they later chose not to do so. In *Outten v. State*, the Delaware Supreme Court held that a defendant who challenges a trial counsel's decision not to call a witness "has the burden of supplying precisely what information 'would have been obtained had [counsel] undertaken the desired investigation' and how this information would have changed the result."[43] Although *Outten* addressed a claim of ineffective assistance of counsel, the rule holds true here.

Similarly, in *Flamer v. State*, this Court found no prejudice to Flamer in his trial counsel's cross-examination of the medical examiner because Flamer failed to provide any evidence as to what the witness's answers would have been under a "proper" cross-examination.[44] The Court refused to speculate that the medical examiner's responses would have been beneficial to Flamer's defense.[45]

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[43] 720 A.2d 547, 557 (Del. 1998) (Citing *United States v. Rodriguez*, 53 F.3d 1439, 1449 (7th Cir. 1995)).

[44] 585 A.2d at 755.

[45] *Id.*

Here, trial counsel made a reasoned decision not to call Coleman because they felt he was not helpful and might identify Powell as the shooter. Powell has provided no evidence to contradict trial counsel's (and the Superior Court's) assessment of Coleman's value to the case.[46] Powell failed to establish that he was prejudiced by the delayed disclosure. The Superior Court correctly held that Coleman was not suppressed and that Powell had not shown prejudice.

### C. The Superior Court Acted Within its Discretion in Finding Appellate Counsel Not Ineffective.

On direct appeal, Powell's appellate counsel raised six claims: (1) the trial court's denial of Powell's motion for a change of venue prevented him from receiving a fair and impartial jury trial; (2) the court erred in declining to instruct the jury on the lesser included offenses of murder second degree and violated Powell's due process rights by taking the issue of *mens rea* away from the jury; (3) the court erred in not giving a *Deberry* instruction regarding a witness's (Luis Flores's) uncollected shirt; (4) imposition of the death penalty for a reckless killing violated the Eighth Amendment; (5) the court erred in finding it must give "great weight" to the jury recommendation of death; and (6) the death sentence was disproportionate

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[46] *Cf. Outten*, 720 A.2d at 553 ("Because Outten has failed to both identify the witnesses and indicate what their potential testimony might be, and because this Court will not speculate concerning that evidence, Outten has failed to show the actual prejudice he allegedly has suffered by his counsel's failure to investigate and present these witnesses.").

to other sentences recommended or imposed in similar cases. Appellate counsel did not raise a claim that the State's delayed disclosure of Coleman violated *Brady*. Powell asserts appellate counsel were ineffective for failing to raise this claim on direct appeal. Op. Br. at 34-35.

The Superior Court did not directly address whether appellate counsel was ineffective in failing to raise the Coleman *Brady* claim. Instead the court generally found appellate counsel not ineffective for failing to raise any of the *Brady* violations on appeal, stating: "Not knowing that any information had been withheld, appellate counsel cannot be faulted for failing to raise alleged *Brady* violations on appeal."[47] The Superior Court did not err in finding appellate counsel not ineffective despite the fact that it did not specifically address the Coleman claim.[48]

"Appellate counsel is not constitutionally required to raise all non-frivolous claims on direct appeal."[49] Effective counsel is expected to confine the appeal to presenting those claims, which in his professional judgment, appear to be the strongest.[50] "A defendant can only show that his appellate counsel ineffectively represented him where the attorney omits issues that are clearly stronger than those

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[47] *Powell*, 2016 WL 3023740, at *44.

[48] *See Unitrin, Inc.*, 651 A.2d at1390; *Colon*, 900 A.2d at 638 n.12.

[49] *Watson v. State*, 1991 WL 181468, *2 (Del. Aug. 22, 1991) (citations omitted).

[50] *Id.*

the attorney presented."[51] To determine prejudice, the court analyses the issue on the merits.[52]

Powell's claim of ineffectiveness of appellate counsel fails because, had counsel raised the Coleman *Brady* claim on appeal, it would not have been successful.[53] As discussed above, the court considered the alleged violation and trial counsel were given the opportunity to reopen the case. They opted not to do so and noted at the time that they did not feel Coleman was a helpful witness. Moreover, given that the information Coleman possessed was, at the most, only marginally exculpatory or impeaching, appellate counsel would not have been able to show prejudice from the delayed disclosure.

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[51] *Ploof v. State*, 75 A.3d 811, 832 (Del. 2013).

[52] *Id.*

[53] *See Shelton v. State*, 744 A.2d 465, 503 n.183 (Del. 2000) ("[T]he Sixth Amendment does not require counsel to pursue meritless arguments before a court.").

## CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to find Powell's postconviction *Brady* claim procedurally barred and to affirm the Superior Court's denial of his Amended Motion for Postconviction Relief.

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## CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on April 19, 2017, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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