IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK PURNELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	No. 113, 2020
	)	
v.	)	Court Below - Superior Court
	)	of the State of Delaware in and for
STATE OF DELAWARE,	)	New Castle County
	)	
Plaintiff Below,	)	Cr. ID No. 0701018040
Appellee.	)	

APPELLANT MARK PURNELL'S SUPPLEMENTAL BRIEF

Tiffani D. Hurst, Esq. (PA 328208)
Hurst Legal Services
1515 Market Street, Suite 1200-645
Philadelphia, PA 19102-1901
(610) 653-3033
Counsel for Mark Purnell
Defendant Below-Appellant

Herbert W. Mondros, Esq. (No. 3308)
Margolis Edelstein
300 Delaware Ave., Suite 800
Wilmington, DE 19801
(302) 888-1112
Counsel for Mark Purnell
Defendant Below-Appellant

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I. This Court can consider Purnell's Opening Brief arguments II(B)(2)(3)(4), because Purnell's trial counsel had a disabling conflict which constitutes constructive abandonment under *Maples v. Thomas*.

This Court can reach Purnell's Opening Brief arguments II(B)(2)-(4) by following the rationale applied by the Supreme Court of the United States (High Court) in *Maples v. Thomas* regarding abandonment by counsel.[1] The High Court in *Maples* recognized that there are a few extraordinary circumstances beyond a petitioner's control that supersede the dictates of finality. One such circumstance is when an attorney actually or constructively abandons his client, which is what occurred in Maples's case. Similarly, this also occurred in Purnell's case.

Maples involves an Alabama defendant who sought state postconviction relief from a death penalty verdict in the lower courts but failed to file a timely notice of appeal upon the denial of his petition. The Assistant Attorney General for the State mailed a letter to Maples informing him of the missed deadline for appealing, and notifying him that four weeks remained for him to file a federal

[1] 565 U.S. 266 (2012).

habeas petition.[2] Subsequent attempts to convince the state courts to overlook the missed deadline were unsuccessful, and Maples filed a federal habeas petition.[3]

Maples had three state post-conviction attorneys, two from out of state admitted *pro hac vice* upon the request of his third state licensed attorney. The Court in *Maples* ruled that because all three attorneys abandoned Maples, this creates the extraordinary circumstance required to overcome the state procedural default.

Two of the attorneys failed to notify Maples that they had left their firm, taken employment elsewhere, and were no longer performing services on his behalf. Maple's third attorney, state licensed counsel, had an arrangement with the two *pro hac vice* attorneys that he would not provide any actual legal services for Maples. As a result, all three attorneys missed the deadline for filing a notice of appeal. The High Court in Maples ruled that this was not mere attorney negligence; postconviction counsel had broken their contract to represent Maples by ceasing to perform their contracted services.[4]

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[2] *Maples*, 565 U.S. at 277.
[3] *Id.*, 565 U.S. at 278.
[4] *Id.*, 565 U.S. at 281.

The High Court explained that although in post-conviction proceedings where there is no right to counsel, a client bares the risk of negligent errors made by counsel,[5] the client does not bear the risk of attorney abandonment. In reaching this conclusion, the High Court cited *Jamison v. Lockhart*,[6] where the court ruled that "attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney 'ceased to be [petitioner's] agent'" as contemplated under principles of agency law.[7] The rationale in *Jamison* directly applies here.

In *Jamison*, the petitioner had a colorable claim that his confession should have been suppressed. The petitioner was privately represented before and during trial by an attorney who also worked for the City of Blytheville, Arkansas. Two of the primary witnesses against Jamison were the Blytheville Chief of Police and a Detective from the Blytheville Police Department. Had Jamison's attorney pursued the motion to suppress, he would have had to undermine the credibility of these officers, the attorney's fellow city employees. After Jamison's conviction,

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[5] *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991)
[6] 975 F.2d 1377, 1380 (8th Cir. 1992).
[7] 565 U.S. at 281 (citing 1 Restatement (Third) of Law Governing Lawyers §31, Comment 1 (1998) ("Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client.").

conflicted counsel failed to comply with Jamison's request to appeal. Eventually, Jamison filed a pro se direct appeal raising only a sufficiency of evidence claim, and the Arkansas Supreme Court affirmed his conviction.[8] Ten years later, Jamison filed a federal habeas petition.

The Eighth Circuit concluded that when the defaulted claim is that counsel was burdened by an actual conflict of interest, the "prejudice" element is presumed," and the conflict overcomes procedural bars.[9] In so doing, the court noted the strength of Jamison's suppression claim, and the nature of the conflict of interest.[10] The fact that Jamison could have raised the conflict claim on direct appeal to the Supreme Court of Alabama, who denied Jamison's insufficiency of the evidence claim on the merits, did not remove the taint of trial counsel's conflict.

As explained in Purnell's Opening Brief, Rule 61 Motion and in § II below, a similar situation exists before this Court: Purnell's trial attorney had an actual conflict of interest that prevented him from investigating the real culprit because the real culprit was his former client to whom he owed an ethical duty of loyalty.[11]

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[8] *Maples*, 975 F.2d 1378.
[9] *Id.*, 975 F.2d at 1379.
[10] *Id.*, 975 F.3d at 1378-79.
[11] *See* § II below.

After the trial judge improperly denied trial counsel's eve of trial request to withdraw due to this conflict, trial counsel failed to raise his conflict of interest when he represented Purnell on direct appeal. Thus, trial counsel's representation of Purnell on appeal created a second conflict: it was not in counsel's best interest to blame himself for failing to properly argue to the trial court that he had an actual non-waivable conflict and for failing to notify the trial court of the conflict in a timely manner.[12]

However, Purnell's situation does differ from Jamison's in that Purnell filed a timely pro se petition in state court on March 16, 2010,[13] and on March 25, 2010, a motion to appoint counsel along with a 133-page memorandum containing nine claims;[14] Purnell's first claim was that trial counsel operated under a conflict of interest.[15] On June 30, 2011, the court set a September 8, 2011, hearing on Purnell's motions, which was postponed on August 18, 2011, per Purnell's request, to give Purnell time to hire counsel.[16] On August 22, 2011, attorney Joseph Bernstein entered an appearance on behalf of Purnell.[17] On August 29, 2011,

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[12] *Id.*
[13] A883 (D.I. 84).
[14] A883 (D.I. 85); A893-1026.
[15] A893, A899-904, A916-23.
[16] A883 (D.I. 88, D.I. 90).
[17] A884 (D.I. 93).

Bernstein requested leave to amend Purnell's motion for post-conviction relief.[18] Bernstein was granted until October 10, 2011 to amend.[19] On October 11, 2011, Bernstein replaced Purnell's 133-page memorandum with a six-page amended Rule 61motion which inexplicably abandoned Purnell's conflict claim without Purnell's knowledge or permission.[20]

In *Maples*, the attorneys who committed the extraordinary error were the last attorneys to represent Maples before he raised his claims in federal court; this happened to be his postconviction attorneys. In *Jamison*, the attorney who committed the extraordinary error of not filing a notice of appeal, where he would have had to raise his own conflict, was the last attorney to represent Jamison before he raised his claims in federal court; this was his conflicted trial attorney. But in Purnell's case, the conflicted trial attorney, who committed the extraordinary error of representing Purnell at trial and on direct appeal, despite his conflict was not the last attorney to represent him. Purnell was represented in his state postconviction proceedings by new counsel.

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[18] A884 (D.I. 93).
[19] A884 (D.I. 94).
[20] A1028-1033.

This Court, however, can rely on *Maples*, to conclude in Purnell's case that because counsel had an actual conflict at trial and on appeal, which arose to the level of constructive denial of counsel, initial postconviction counsel's failure to raise/abandonment of this claim was so extraordinary that postconviction counsel no longer functioned as Purnell's agent.

This Court should also note that it is because of situations like this one that the High Court in *Martinez v. Ryan*,[21] provides that the ineffective assistance of initial state post-conviction counsel for failing to raise a substantial constitutional claim establishes cause for federal courts to consider trial counsel error on the merits:

> Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review

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[21] 566 U.S. 1 (2012).

> collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*.[22]

The High Court's rationale is that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."[23] In *Buck v. Davis,* the High Court recently reaffirmed that, in *Martinez,* it held that where (1) state counsel is ineffective under *Strickland* during initial state postconviction proceedings; and (2) "the underlying . . . claim is a substantial one, which is to say that . . . the claim has some merit," the state court default will be excused and the federal courts will consider the claim on the merits.[24] Thus, where states do not provide a mechanism for review of initial postconviction proceedings, they defer these claims to the federal court.

This Court does not have to overrule its decisions in *Coles v. State*[25] and *Durham v. State*,[26] which acknowledges that the 2014 Amendment to Rule 61, on its face, forecloses stand-alone ineffective assistance claims under *State v. Guy* (which had established a right to effective initial post-conviction counsel). [27]

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[22] 466 U.S. 668 (1985).
[23] *Martinez*, 566 U.S. at 10.
[24] *Bucks*, 137 S. Ct. 759, 771 (2017).
[25] 2017 Del. LEXIS 323 (Del. Jul. 31, 2017).
[26] 2017 Del. LEXIS 483 (Del. Nov. 13, 2017).
[27] 82 A.3d 710, 715 (2013).

Instead, like the High Court in *Martinez*, this Court can rule that where a petitioner can show that (1) state counsel is ineffective under *Strickland* during initial state postconviction proceedings; and (2) "the underlying . . . claim is a substantial one, which is to say that . . . the claim has some merit," this Court will excuse the default and consider the claim on the merits. Or, if this Court would rather limit this exception to extraordinary claims, then it can limit the second condition to when the underlying claim is *extraordinary* rather than *substantial*. The result will be that federal courts will still hear the ordinary claims, but this Court will be able to grant relief in extraordinary cases like Purnell's.

II. Trial counsel was unable to discover the majority of Mr. Purnell's "new evidence" because his conflicted status prevented him from investigating, developing and presenting evidence that Dawan Harris and Kellee Mitchell were the true culprits.

Trial counsel's actual conflict prevented him from investigating, developing and presenting *any* evidence that implicated his former client, Dawan Harris, and by association Harris's co-conspirator, Kellee Mitchell, in the crime. Therefore, none of the new evidence before this Court which implicates Dawan Harris and Kellee Mitchell was discoverable before trial by the exercise of due diligence by trial counsel.

Delaware Rules of Professional Conduct, Rule 1.7(a)(2) & (b)(3) state:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a **former client** or a third person or by **a personal interest of the lawyer.**
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

However, Note 10 of Rule 1.7 provides that the lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if

the lawyer's own conduct is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Thus, trial counsel's representation of Purnell on direct appeal presents an actual conflict.

Further, Note 15 of Rule 1.7 provides under paragraph (b)(1), that representation is prohibited if the lawyer cannot reasonably conclude that he will be able to provide competent and diligent representation. For reasons addressed under Rule 1.9(a) below, such was the case here.

Delaware Rules of Professional Conduct, Rule 1.9(a) provides that:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent, confirmed in writing.

Note 2 of Rule 1.9(a) is directly on point that "[w]hen a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited." Rule 1.9(a), Note 3 provides that a matter is substantially related when it involves "the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the [current] client's position in the subsequent matter."

The High Court in *Cuyler v. Sullivan*,[28] held that "an actual, relevant conflict of interest [exists] if, during the course of representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action."

An example of this includes the witness that Detective Gary Tabor spoke with on June 1, 2006, who stated that Dawan Harris (who the witness knew as "Oatmeal") told him "you should have seen the way she fell," in reference to the victim's murder.[29] Another example involves the witness who implicated Dawan Harris to Detectives on July 5, 2006.[30] The conflict prevented trial counsel and his investigator from speaking to Dawan Harris about the murder. It further prevented counsel from investigating Dawan Harris's girlfriend (Aqueshia Williams)[31], Dawan Harris's roommate (Kellee Mitchell), and Mitchell's girlfriend (Etienne Williams)[32] about the murder given that Mitchell was Dawan Harris's codefendant in connection with the gun that likely killed the victim in Purnell's case. And the conflict prevented counsel from hiring a firearms expert to demonstrate why the gun possessed by his former client, Dawan Harris, was far more likely to have

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[28] 446 U.S. 335, 356 (1980).
[29] A707.
[30] A708.
[31] A194 (p. 177-78).
[32] A176 (p. 106).

been used in the shooting than the gun that the State claimed had been seen in Purnell's possession.

III. The relevant facts of this case support that Purnell is actually innocent and trial counsel had an actual conflict.

The relevant facts in this case, including the date ranges of counsel's representation of Mark Purnell and Dawan Harris, involve a hodgepodge of finger pointing and misdirection by State trial witnesses and interviewees, which led to the conviction of the only person who has real evidence, as well as circumstantial evidence of his actual innocence. The most concise way to consider these facts is in primarily date order with a few exceptions. The following is a summary:

- January 21, 2006 — Purnell is shot in the back of the knee.
- January 22, 2006 — Purnell has serious surgery to remove the bullet from his knee.[33] It takes two surgeons, a Vascular Surgeon and Orthopedic Surgeon, to "dissect down through nerves, through the blood vessels to get to the bullet."[34] But then the bullet moved to the front of the knee, so they also had to make three holes in the front of his knee to remove the bullet.[35] The long incision created in the back of the knee required ten staples, and was the

[33] A333 (p. 24).
[34] *Id.*
[35] *Id.*

priority of the Vascular Surgeon, not the testifying Orthopedic surgeon who had only participated in one of these types of surgeries before Purnell's.[36] In his career, the Orthopedic Surgeon has done 3,000 to 3,500 orthopedic surgeries, but only three vascular surgeries, which are unusual; Purnell's was the second.[37] Thus, the Orthopedic surgeon was unable to provide an opinion on whether the surgery rendered Purnell unable to walk or run.[38] However, the problem with Purnell's leg was that the bullet was around his joint.[39] Retractors were used to pull back his skin, the blood vessels and the nerves, to try to grab the bullet; but two surgeons had to move to the front and make more incisions.[40] The surgery took two hours and 20 minutes.[41]

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[36] A334 (p. 25); A336 (p. 43); A337 (p. 40).
[37] A336 (p. 34-35); A337 (p. 40).
[38] A336 (p. 36).
[39] A336 (p. 38).
[40] A338 (p. 41).
[41] A807 (¶ 5).

There were many suspects in this case including several of the witnesses. But none of the other suspects had a reason as extraordinary as Purnell's to support actual innocence; in fact, none of their reasons withstood general scrutiny. Whatever Purnell did or did not say that may have been in bad taste: he knew that unlike the real culprits he had actual evidence supporting his innocence.

- January 23, 2006 Purnell is discharged from the hospital
- January 30, 2006 Victim is shot during an attempted robbery by two men while she walks with her husband, Ernest Giles.[42] The two men fled.[43]
- January 30, 2006 A single shell casing is found in the 500 block of Willing Street approximately 50 feet north of W 5th Street.[44] The murder occurred on W 5th Street.[45]
- January 30, 2006 Detective Tabor interviews Mr. Giles.[46] Mr. Giles does not think he can identify the suspects.[47]

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[42] A23; A494 (¶ 2).
[43] A494 (¶ 3, 5).
[44] A717.
[45] A675.
[46] A494 (¶ 3).
[47] A680.

- January 31, 2006 — The victim's family suspects Mr. Giles as being responsible due to the victim's recently received tax money, prior abuse, and his failure to appear at the funeral home to make arrangements.[48] The victim's co-worker also reports abuse.[49] Giles' could not be found living at the address he provided to police.[50] Mr. Giles' father believed he was involved in the murder.[51]
- February 2, 2006 — Detective Tabor interviews Mr. Giles who admits to prior problems with his wife, and spending time with a woman after his wife's murder.[52] He also states that a week prior, he purchased marijuana from three youth who attempted to rob him.[53] He thinks one of the youth was involved in the murder.[54] His is unable to identify a youth who had been arrested for robberies.[55]

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[48] A681.
[49] A681.
[50] A682.
[51] A683.
[52] A684.
[53] A684.
[54] A684.
[55] A684.

- February 1-3, 2006 Purnell is seen by medical staff on at least three separate occasions for wound care. He is observed using crutches by several staff members. The youth rehabilitation counselor responsible for taking Purnell to his medical appointments never saw Purnell without crutches; he still had his leg wrapped in a bandage that needed to be changed daily.[56]
- February 3, 2006 Purnell's staples are removed from his knee.[57]
- February 2006 Detective Tabor conducts multiple interviews where many people are accused of having committed the crime and of bragging about the murder.[58]
- February 15, 2006 Kellee Mitchell and Dawan Mitchell were at the apartment of Kellee's girlfriend, Aya (Etienne) Williams when the police arrived regarding a complaint about a

[56] A807; A813-14.
[57] A817.
[58] A696-709.

man with a gun.[59] Kellee Mitchell had been arrested earlier that day on a Family Court capias return.[60]

- February 16, 2006 — Detective Tabor provides a photo-lineup to Mr. Giles which includes Ronald Harris. Mr. Giles could not identify Ronald Harris. Mr. Giles is shown a second lineup and he identifies Kellee Mitchell as the shooter, although he states that he could be mistaken.[61]
- February 16, 2006 — Angela Rayne ($500 a day crack addict) meets with Detective Tabor and states that she saw the incident while under the influence of crack. She states that one of the males involved had been stopped earlier that day.[62] Detective Tabor learns that Ronald Harris (who looks very similar to his brother Dawan Harris) had been stopped earlier that day.[63] Rayne selects Ronald Harris from a lineup.[64]

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[59] A496 (¶ 11).
[60] A496 (¶ 10).
[61] A687.
[62] A495 (¶ 5).
[63] A495 (¶ 6).
[64] A494 (¶ 7).

- February 16, 2006 — Detective Tabor determines that Ronald Harris had been previously arrested in a stolen car with his brother Dejuan (AKA) Dawan Harris. Dawan Harris had recently been arrested with Kellee Mitchell; Dawan Harris looks similar to the culprit described by eyewitness Giles.[65]
- February 16, 2006 — A videotaped interview of Ronald Harris is conducted where he denies involvement in the murder: the statement reveals that he is significantly intellectually disabled.[66]
- May 16, 2017 — Shawn Harris (Ronald Harris's Mother) and Melvin Murphy (Ronald Harris's Step-Father) provide declarations that Ronald Harris recanted; They confirm Ronald Harris's intellectual disability, including his IEP (Individualized Educational Plan).[67]

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[65] A495 (¶ 8).
[66] A518, A520.
[67] A512-13; A515-16.

- February 17, 2006 Detective Talbort applies for a search warrant for the apartment of Kellee Mitchell's girlfriend, Aya[Etienne] Williams, where both Kellee Mitchell and Dawan Harris had been during a telephone call complaint regarding a man with a gun.[68]
- February 17, 2006 Search warrant and return for Kellee Mitchell.[69]
- February 18, 2006 An arrest warrant executed and a complaint and warrant issued for Dawan Harris charging him with possessing a deadly weapon after having been convicted of a third degree burglary in 2005.[70]
- February 18, 2006 Dawan Harris questioned about his role in the murder.[71] Harris states he stole the firearm after the murder[72] from his cousin who he only knows as Cameron.[73] He offered to sell the gun to Kellee Mitchell for $200: Mitchell paid Harris $20 with an agreement to pay the remainder later,

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[68] A493-96.
[69] A492.
[70] A828-31.
[71] A830.
[72] A1380
[73] A830.

so they agreed to share the weapon.[74] However, Cameron Johnson stated the gun was stolen "like two maybe three weeks" before the murder.[75]

- February 18, 2006 — Dawan Harris's February 18, 2006, Bail and Disposition Sheet reports that Dawan Harris is a "poss suspect in a murder," and orders "no contact with Co-def Kelle Mitchell."[76] The case number for this arrest is No: 0602015362.[77]
- February 22, 2006 — Mr. Giles, the only eyewitness to the shooting, is shown a photo lineup with Purnell and does not identify Purnell.[78]
- February 27, 2006 — The State Public Defender's Office declares that it can't represent Dawan Harris due to a conflict of interest created by its representation of his codefendant, Kellee Mitchell.[79]

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[74] A830.
[75] A791-92.
[76] A833.
[77] A828-31.
[78] A705.
[79] Ex. A.

- February 27, 2006 — Attorney Veith appears on behalf of Dawan Harris and waives Harris's right to a preliminary hearing.[80]
- April 3, 2006 — Attorney Veith acknowledges receipt of discovery regarding Dawan Harris.
- June 1, 2006 — Detective Gary Tabor speaks with a witness who tells him that Dawan Harris (who the witness knew as "Oatmeal")[81] told him "you should have seen the way she fell" in reference to the murder.[82]
- June 5, 2006 — Attorney Veith represents Dawan Harris in his guilty plea and sentencing.[83] Dawan Harris is sentenced to two years, suspended after 90 days for 21 months at level four and suspended after six months for one year at level three.[84]
- July 5, 2006 — Detectives speak with a second witness who implicates Dawan in the shooting.[85]

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[80] Ex. B.
[81] A156 (p. 28).
[82] A707.
[83] Ex. C.
[84] Ex. D.
[85] A835.

- September 19, 2006 Interview of Cory Hammond before his arrest; Hammond denies having heard about Purnell being involved in the murder.[86]
- January 4, 2007 Interview of Cory Hammond after his arrest; Hammond states that he is giving the statement for his "seed [child]" on the way.[87] He says that Purnell "he had the gun and I mean Little Ron (Ronald Harris) pulled the trigger.[88] Cory Hammond claims in his interview to have been in the area when the murder occurred along with Ronald Harris's little brother (who he calls Oatmeal, which is Dawan Harris's alias), and an hour later he heard Purnell bragging about the shooting.[89] Then he changes his story and says he did not see them until "a week or two afterwards").[90]

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[86] A621.
[87] A624-63.
[88] A625.
[89] A627-29.
[90] A629.

- May 25, 2017 — Cory Hammond's brother, Troy Hammond, provides and Affidavit that in fact it was him Troy was in the area when the murder occurred and that his brother, Corey [Hammond], was not.[91] Cory Hammond states that "Lots of people including the girls who were with me that night talked about what happened that night and what we saw at the scene of the shooting. It's possible my brother, Corey, heard us all talking when we got back to my house."[92]
- June 22, 2017 — Alfred M. Lewis, Jr. was in jail from June 10, 2007, to December 26, 2007. During this time, he had a conversation with Corey Hammond's father, Cory Johnson, who had him pass a message to Corey Hammond that his father was going to help him.[93] This is confirmed by the exchange between Detective Tabor and Corey Hammond where Detective Tabor says that

[91] A672-73.
[92] A673.
[93] A665.

		he thinks Corey Hammond's father "knows a lot more than you think."[94] Alfred Lewis, Jr. speaks with Corey Hammond after his testimony and Corey told him that the police: "kept coming at me to say something on Mark Mark. I only told them what everyone had heard." Cory stated that "Mark never actually told him anything."[95]
•	June 6, 2017	Naco Hammond's Affidavit confirms that Cory Johnson was a police informant who would work with the police whenever he or his son Corey Hammond was arrested.[96] She reports that Corey Johnson told the police that Corey Hammond knew something about the murder, but she believes that Hammond's father told Corey what to say.[97]
•	January 19, 2007	Detective Tabor interviews Anya (Etienne) Williams who state that she, Laquisha and her cousin, Tookie

[94] A647.
[95] A666.
[96] A668-70.
[97] A669.

spoke with Purnell on the phone, and Tookie asked Purnell to tell them the truth that Purnell had nothing to do with the murder.[98] Anya (Etienne) states that she had been very upset because she had thought Kellee Mitchell had committed the murder, but then she recalled that Kellee Mitchell had been at her house when the murder occurred although she testified to the opposite.[99] Purnell began to tease Anya by stating that he committed the murder, but then Purnell kept saying "pysch, I ain't going to kill nobody" so she did not take him seriously.[100]

- January 22, 2007 — Detective Tabor interviews Kellee Mitchell who states that Purnell was bragging about committing the murder in front of FNU Brown and Terrance LNU while they

[98] A712.
[99] A711.
[100] A712; 713.

were at the Ferris Detention Center.[101] Dawan Brown states that this never happened.[102]

- January 24, 2007 — Detective Simmon questions of Ronald Harris who again denies involvement in the murder.[103]
- May 22, 2017 — Kellee Mitchell tells Andrew Moore that he pointed police in Purnell's direction because he had been hearing rumors and he "was young and scared," and "didn't know what else to do" because someone had picked him out in a lineup as being the shooter.[104]
- May 25, 2017 — Dawan Brown, was the only Brown in Purnell's and Mitchell's pod at Bridge House; Brown denies by Affidavit that Purnell ever spoke about killing anyone.[105] He and Purnell were moved to Ferris School and Purnell never made statements there either.[106]

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[101] A499-501
[102] A506-07.
[103] A522-614.
[104] A509.
[105] A506.
[106] A507

- February 5, 2007 — Eight months after Attorney Veith's representation of Dawan Harris ends, Purnell is arraigned for the murder.[107] Attorney Veith appears on behalf of Purnell on May 2, 2007.
- August 30, 2007 — Attorney Veith informs the State that after investigating the case, it appears that Purnell was shot in the knee around January 19, 2006, and required "15 staples," physical therapy, and was discharged on January 26, 2006.[108]
- January 10, 2008 — Attorney Veith notifies the State he might have a conflict because he represented Dawan [sic] Harris, Kelle Mitchell's codefendant, who was arrested as part of Detective Tabor's investigation of the Giles murder.[109]
- February 11, 2008 — State responds to Veith's inquiry by stating that "as of this date, the State has no plans to call Dawann [sic]

[107] A872.
[108] A821.
[109] A835.

Harris as a witness in this matter. Of course, as is true in any important case, our investigation is continuing and so it is possible that we could learn things in the future that would change our current plans about Dawann [sic] Harris."[110]

- April 3, 2008 — Jury selection begins three months later. [111]
- April 7, 2008 — Attorney Veith notifies the trial court that he has an actual conflict.[112]
- April 14, 2008 — Trial testimony begins.[113]
- April 25, 2008 — Purnell is convicted of a Second Degree Murder and related gun charges.[114]
- April 27, 2009 — Attorney Veith files an opening brief on direct appeal, in which he does not raise that he had an actual conflict of interest; relief is denied.[115]

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[110] A837.
[111] A877 (D.I. 52).
[112] A36 (Transcript p.51).
[113] A879 (D.I. 50).
[114] A879 (D.I. 50).
[115] A846-70.

- March 16, 2010 Purnell files a pro se motion for post-conviction relief[116]
- March 25, 2010 Purnell files a request that counsel be appointed,[117] and a 132-page Opening Memorandum for Post-conviction relief[118] citing as Ground One that Veith had a conflict of interest,[119] with an Attached Affidavit stating that he was never asked about whether he would waive Veith's conflict, nor was he told that Veith had previously represented Dawan Harris.[120]
- September 29, 2011 Post-conviction counsels files a 6-page Amended Motion for Post-Conviction Relief on September 29, 2011, in which he abandons the conflict claim.

As 2021 approaches, Purnell will have spent approximately 14 years of a 21-year mandatory, 77-year sentence for a crime he did not commit.

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[116] A883 (D.I. 84); A843.
[117] A883 (D.I. 85).
[118] A883 (D.I. 85); A892-1026.
[119] A893, A916-23
[120] A839-44.

IV. Caselaw support's Mr. Purnell's claim of actual innocence; most of Purnell's new evidence can be considered under *Sawyer v. Whitley* and related cases.

In *McQuiggin v. Perkins*,[121] the High Court considers *Sawyer v. Whitley*[122] and several other death penalty and non-death penalty actual innocence cases to conclude that a common law actual innocence claim can serve as a gateway through which a petitioner may pass that is separate and apart from the actual innocence requirements in the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

Thus, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural and timeliness bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[123] The High Court explains in *Perkins*: "Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations."[124]

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[121] 569 U.S. 383, 387 (2013).
[122] 505 U.S. 333 (1992).
[123] *Perkins*, 569 U.S. at 392 (quoting *Herrera* v. Collins, 506 U.S. 390, 404 (1993).
[124] *Perkins*, 569 U.S. at 393.

Important to this Court's inquiry, is that the High Court ruled that the common law miscarriage of justice actual innocence exception summarized in *McQuiggin*, does not require a petitioner to prove "due diligence" or meet the AEDPA statute of limitations requirements. To invoke this common law miscarriage of justice standard, the petitioner need only show that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[125]

This Court can rely on *McQuiggins* to rule that the 2014 amendment to Rule 61 does not supplant this Court's ability to apply the common law miscarriage of justice actual innocence gateway. Thus, while the Rule 61(eff. 2014) standard of actual innocence requires a movant to provide new evidence that (a) will probably change the result if a new trial is granted; (b) was discovered since the trial and could not have been discovered before by the exercise of due diligence; and (c) is not merely cumulative or impeaching,[126] the common law miscarriage of justice actual innocence standard only requires a movant to show "it is more likely than not that no reasonable juror would have convicted him in light of the new

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[125] *Id.* at 399.
[126] *Taylor v. State*, 2018 Del. LEXIS 53 (Jan. 31, 2018).

evidence." This common law standard does not require the extra burden of due diligence and the exclusion of impeachment evidence.

Thus, under the *Sawyer/McQuigginn* common law actual innocence standard, Purnell's strongest evidence is as follows:

- **Defense Expert Medical Opinion:** "I believe with reasonable medical probability that Mr. Purnell would have likely been unable to run unimpeded on January 30, 2006, seven days after being discharged from the hospital for knee surgery."[127]
- **Follow-up Care**: From February 1-3, 2016, Purnell was seen by medical staff on at least three separate occasions for wound care, during which it was noted that his staples were intact.[128]
- **Firearm Expert**: The Declaration from Purnell's firearm expert indicating "to a reasonable degree of scientific certainty that the 9mm Luger cartridge case that the police recovered forty-five (40-50) feet north of the intersection was **unrelated to the shooting of Ms. Giles**."[129]

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[127] A807-08.
[128] A806.
[129] A727; *see also* A723-59.

- **William Davis - Rehabilitation Counselor, New Castle County Detention Center**: Purnell was on crutches the entire time he was there from February 1-3, 2006.[130]
- **Ferris School Progress Note**: On February 2, 2006, officials viewed Purnell's staples. The staples were intact. Nurse called Dr. Rubano (Purnell's Surgeon) on February 3, 2006.[131]
- **Ferris School Progress Note**: On February 3, 2006, the staples were removed.[132]
- **Alfred Lewis, Jr**. **Affidavit**: Corey Hammond tells Lewis why he testified falsely.
- **Andrew Moore Affidavit**: Mitchell tells Moore why he testified falsely.
- **Kellee Mitchell Affidavit**: "Mark never bragged to me about killing her. I don't know if he did it, but he never told me he did."[133]
- **Dawan Harris Recantation:** to his parents, Shawn Harris & Melvin Murphy; Dawan has a severe intellectual disability.[134]

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[130] A813-14.
[131] A816.
[132] A816.
[133] A489 (¶ 4).
[134] A762.

- **Dawon Brown**: Kellee Mitchell lied when he told Detective Tabor that Purnell bragged about committing the murder in front of Brown while the three were incarcerated together.
- **Troy Hammond Affidavit**: Corey Hammond lied about being near the crime scene.
- **Naco Hammond**: Corey Hammond's father was a police informant who arranged for Corey Hammond to testify falsely to get out of prison

CONCLUSION

For the reasons stated herein, in Purnell's Opening Brief, and in all of the pleadings in this case, this Court should reverse the Superior Court's dismissal of Purnell's Rule 61 motion.

Dated November 16, 2020

/s/ Tiffani D. Hurst
Tiffani D. Hurst, Esq. (PA 328208)
Hurst Legal Services
1515 Market Street, Suite 1200-645
Philadelphia, PA 19102-1901
(610) 653-3033
Counsel for Mark Purnell
Defendant Below-Appellant

/s/ Herbert W. Mondros
Herbert W. Mondros, Esq. (No. 3308)
Margolis Edelstein
300 Delaware Ave., Suite 800
Wilmington, DE 19801
(302) 888-1112
Counsel for Mark Purnell
Defendant Below-Appellant