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Case Number 113,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK PURNELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 113, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S SUPPLEMENTAL ANSWERING BRIEF

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Date: December 16, 2020

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I. POST-2014 RULE 61'S PROCEDURAL BARS PRECLUDE CONSIDERATION OF PURNELL'S CONFLICT-OF-INTEREST CLAIMS IN HIS SECOND POSTCONVICTION MOTION.

Purnell argues this Court can consider Purnell's conflict-of-interest claims because trial counsel, who also represented him on appeal, had a disabling conflict, which constitutes constructive abandonment under *Maples v. Thomas*[1] and *Jamison v. Lockhart*.[2] (Suppl. at 1-9). Purnell's reliance on federal habeas case law is misplaced; *Maples* and *Jamison* are inapposite, and his claim is otherwise unavailing.

To establish ineffective assistance, Purnell must show that trial counsel's performance was deficient and the deficiencies caused actual prejudice.[3] When defendant alleges that trial counsel's ineffective assistance resulted from a conflict-of-interest, prejudice is presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' *and that* 'an actual conflict of interest adversely affected his lawyer's performance.'"[4] Should the Court find trial counsel had an actual conflict, Purnell does not merit relief.

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

[2] 975 F.2d 1377 (8th Cir. 1992).

[3] *Lewis v. State*, 757 A.2d 709, 718 (Del. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

[4] *Id.* (emphasis added).

Maples recognized that defense counsel's constructive abandonment can establish the cause necessary to allow review of a federal habeas petitioner's state postconviction claim that otherwise could have been raised earlier in state court.[5] Noting that cause for a procedural default exists where "something *external* to the petitioner, something that cannot fairly be attributed to him[,]... 'impeded [his] efforts to comply with the State's procedural rule,'" the United States Supreme Court held that a habeas petitioner showed external cause excusing his procedural default under state law when petitioner's postconviction attorneys had severed the principal-agent relationship unbeknownst to petitioner, thereby occasioning the default.[6] In ruling, the Supreme Court cited the Eighth Circuit's holding in *Jamison*, another federal habeas case, that attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict-of-interest, postconviction counsel "ceased to be [petitioner's] agent."[7]

Maples and *Jamison* do not provide a basis for this Court to consider Purnell's conflict-of-interest claims. Both decisions addressed whether a federal habeas petitioner established cause for a procedural default of a federal habeas claim in state court when the default was the result of petitioner's attorney's undisclosed conduct.

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[5] *Maples*, 565 U.S. 266.

[6] *Id.* at 280-90.

[7] *Id.*

These cases did not address the situation here—whether a defendant in state court has established an exception to excuse a procedural default of a *state postconviction procedural rule* where the procedural default itself cannot be attributed to undisclosed conduct by defendant's postconviction counsel.

Furthermore, Purnell misconstrues *Jamison's* holding. Jamison filed a habeas corpus petition claiming ineffective assistance because trial counsel had a conflict-of-interest.[8] The district court found the conflict issue had not been raised in state court and was therefore procedurally barred because petitioner failed to establish cause for his default.[9] On appeal, Jamison argued his procedural default on the conflict-of-interest claims was caused by the conflict-of-interest violation itself.[10] Jamison alleged trial counsel had a business connection with two key witnesses that might have prevented counsel from making a vigorous cross-examination.[11] Jamison claimed he instructed trial counsel to file a direct appeal and relied on counsel's agreement to do so when, in fact, trial counsel did not.[12] The Eighth Circuit found petitioner's allegations "raise[d] the specter of a very serious conflict of interest, and allow[ed] an inference that, perhaps as a result of the conflict, [trial

[8] *Jamison*, 975 F.2d at 1378-79.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

counsel] may have acted in a manner contrary to [petitioner's] interests."[13] The court concluded that trial counsel's "alleged conflict of interest *could* constitute sufficient cause for [petitioner's] procedural default," and remanded the case to explore trial counsel's alleged conflict as cause for default and consider whether the delay in presenting the claims was attributable to petitioner or to counsel's conflict.[14] The court noted the record below failed to substantiate a conflict-of-interest and Jamison must establish this predicate on remand, including when he became aware of the conflict, evidence of trial counsel's actions regarding the conflict and his representation of petitioner, and whether petitioner relied to his detriment on any promises counsel made to him.[15]

Maples and *Jamison* are further distinguishable. The petitioner in *Maples* lacked knowledge that his postconviction attorneys were in fact still representing him and was thus unable to timely raise his underlying claim in state court, resulting in the state court procedural default. Similarly, the undeveloped allegations of cause in *Jamison* related to trial counsel's allegedly undisclosed conflict-of-interest and the case was remanded to determine when petitioner became aware of trial counsel's purported conflict-of-interest and whether trial counsel's concealment of the conflict

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[13] *Id.*

[14] *Id.* at 1380-81 (emphasis added).

[15] *Id.*

had prevented him from raising a timely ineffectiveness claim in state court. Neither of those situations happened here.

Unlike in *Jamison* and *Maples*, Purnell cannot establish that his postconviction procedural default was attributed to trial/appellate counsel's undisclosed conduct. First, Purnell fails to substantiate his claim that trial/appellate counsel's alleged conflict actually adversely affected his performance. As discussed below, Purnell's argument that Dawan and Mitchell were the "true culprits" is simply conclusory, with no basis in fact. Furthermore, while Purnell disputes trial counsel's assertion that he was aware of counsel's prior representation of Dawan when he began representing him in May 2007 and did not object then (A41),[16] the record reflects that Purnell actively participated in his defense (A331-32) and knew a potential conflict existed before his direct appeal. (A840, A902). Nevertheless, he cannot dispute he had actual knowledge of the alleged conflict-of-interest at the time he filed his timely *pro se* first postconviction motion in 2010.

Purnell's *pro se* first postconviction motion establishes that Purnell believed that trial counsel had a conflict and asserted actual-innocence. (A893-1026). After filing his *pro se* motion, Purnell requested that the Superior Court appoint counsel to assist him in postconviction. (A12). While his motion was pending, he requested

[16] Trial counsel was appointed to represent Dawan on the PDWBPP charge in February 2006, and Dawan pled guilty and was sentenced in June 2006. (Suppl. Exhibits A-D). Purnell was not arrested until January 23, 2007. (A219).

a stay to hire counsel. (A12). The Superior Court granted a stay, and Purnell retained new counsel, who was quite experienced and undisputedly unconflicted, rendering the motion to appoint counsel moot. (A12-13). Postconviction counsel requested leave to amend Purnell's *pro se* motion. (Exhibit A). After having the opportunity to consult with Purnell and review the file, Purnell's unconflicted, experienced postconviction counsel chose not to pursue Purnell's conflict and actual-innocence claims, thereby occasioning the procedural default. (A1028-33). There is nothing in the record to show that postconviction counsel's decision not to raise such claims was unreasonable or that Purnell disagreed with the decision or instructed postconviction counsel differently.[17]

Purnell nevertheless asserts that this Court "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." (Suppl. at 6-7). Neither *Maples* nor *Jamison* support this proposition. Indeed, the Eighth Circuit later noted that it "did not suggest in *Jamison* that ineffectiveness on the part of post-conviction counsel could serve as cause. Rather, the undeveloped allegations of

[17] Because he passed away in June 2014, Purnell's postconviction counsel was unable to provide an affidavit responding to the ineffectiveness allegations.

cause in *Jamison* related to a conflict of interest on the part of trial counsel [and whether trial counsel's actions had caused the procedural default]."[18] There is no support for Purnell's conclusory claim that his privately-retained postconviction counsel, who was experienced and undisputedly unconflicted, "inexplicably abandoned Purnell's conflict claim without Purnell's knowledge or permission." (*Id.*). Moreover, Purnell's separate e-signature on the amended postconviction motion provides evidence that Purnell had knowledge that the conflict claims were not included in the amended motion and agreed to its filing without those claims. (A1033).

Delaware courts must apply the version of Rule 61's procedural requirements in effect when the postconviction motion was filed *before* addressing the merits of the underlying claims.[19] As discussed in the State's answering brief, Purnell's second postconviction motion, which was filed well over one year after his convictions were final, is barred as untimely and successive by Rule 61(i)(1) and (i)(2). Even if trial counsel had a "disabling and prejudicial conflict" that constituted cause and prejudice under Rule 61(i)(3), that exception is inapplicable to Rule 61(i)(1) and (i)(2)'s bars. Under Rule 61's plain language, to avoid summary dismissal, Purnell was required to "plead[] with particularity that new evidence

[18] *Wooten v. Norris*, 578 F.3d 767, 780 (8th Cir. 2009).

[19] *State v. Page*, 2009 WL 1141738, at *3 (Del. Super. Ct. Apr. 28, 2009).

exists that creates a strong inference that [he] is actually innocent in fact of the [underlying] acts" that led to his convictions.[20] As the State's answering brief discusses and herein, Purnell's proffered "new" evidence does not satisfy Rule 61(d)(2)'s actual-innocence test set forth in *Taylor v. State*.[21]

Furthermore, any finding by the Court that trial counsel was "subject to a disabling and prejudicial conflict during Purnell's trial," does not satisfy the actual-innocence exception. The alleged conflict does not constitute "new [factual] evidence that a person other than the petitioner committed the crime."[22] Such claim was clearly available to him at the time of his 2010 first counseled postconviction proceedings.

In addition, Purnell's conclusory claim that the "real culprit" was Dawan does not satisfy the actual-innocence exception. The record does not support Purnell's conjecture, and none of the newly proffered evidence constitutes new evidence that Dawan committed the murder. The record reflects that trial counsel had no basis at the time of trial to claim that Dawan was the "real culprit." When asked by the court prior to trial whether he was "going to try to pin this murder on [Dawan], [because] … that changes things," trial counsel responded "No, I'm arguing reasonable doubt.

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[20] Super. Ct. Crim. R. 61(d)(2)(i).

[21] 2018 WL 655627, at *1 (Del. Jan. 31, 2018).

[22] *State v. Taylor*, 2018 WL 3199537, at *7 (Del. Super. Ct. June 28, 2018).

I'm trying to create reasonable doubt. The reasonable doubt is that either Kellee Mitchell was involved and did the murder, was the shooter, or potentially [Dawan], and that's the bottom line." (A44-45). Neither did the State have any reason to believe that Dawan had any knowledge of the crime. (A41). Trial counsel also represented to the court that he did not have any knowledge from his prior representation that would lead him to believe that Dawan's seized .38-firearm might have been involved in the homicide. (A40). Trial counsel had a professional and ethical obligation to not present evidence known to be false.[23] Nor does trial counsel's affidavit evidence that he has any factual basis to assert that Dawan was the "real culprit." (A1398-1407). Furthermore, the proffered affidavits, none of which are from Dawan, do not allege or provide new evidence that Dawan committed the murder.

Relying on *Martinez v. Ryan*,[24] *Buck v. Davis*,[25] and *Guy v. State*,[26] Purnell also argues that postconviction counsel's ineffectiveness establishes "cause" to overcome the procedural bars. (Suppl. at 8). Purnell is wrong. As this Court has

[23] Del. R. of Prof. C. 3.3(a).

[24] 566 U.S. 1 (2012).

[25] 137 S. Ct. 759 (2017).

[26] 82 A.3d 710 (Del. 2013).

repeatedly recognized, *Martinez* only applies in federal habeas actions.[27] And, *Guy* has no applicability to Rule 61 motions filed after the Rule's June 2014 amendments, even where defendant claims that postconviction counsel was ineffective in failing to raise the claims in defendant's first Rule 61 proceeding.[28] Purnell is also wrong that *Guy* established a right to effective initial postconviction counsel. As this Court has recognized, *Martinez* does not provide a federal or state constitutional right to the assistance of counsel in a first postconviction proceeding,[29] and a person convicted of a crime has no constitutional right to postconviction relief.[30]

[27] *Garner v. State*, 2014 WL 5099647, at *1 (Del. Oct. 9, 2014); *Roten v. State*, 2013 WL 5808236, at *1 (Del. Oct. 28, 2013).

[28] *Durham v. State*, 2017 WL 5450746 (Del. Nov. 13, 2017).

[29] *Garner*, 2014 WL 5099647, at *1; *Roten*, 2013 WL 5808236, at *1.

[30] *Turnage v. State*, 2015 WL 6746644, at *1 (Del. Nov. 4, 2015); *Ploof v. State*, 2018 WL 4600814, at *1 (Del. Sept. 18, 2018); *Taylor*, 2018 WL 3199537, at *3.

II. EVEN IF THE COURT FINDS TRIAL COUNSEL WAS CONFLICTED, PURNELL CANNOT SHOW THE CONFLICT WAS THE BASIS FOR THE PROCEDURAL DEFAULT.

Purnell argues that "none of the new evidence before this Court which implicates Dawan and Mitchell was discoverable before trial by the exercise of due diligence by trial counsel" because counsel's conflicted status prevented him from investigating, developing, and presenting evidence that Dawan and Mitchell were the "true culprits." (Suppl. at 10-13). Purnell is incorrect. Even if this Court concludes that trial counsel was conflicted, there is no evidence in the record that counsel's conflicted status adversely affected his performance by preventing him from investigating, developing, and presenting Purnell's supposed evidence that Dawan and Mitchell were the "true culprits."

Purnell claims that a conflict prevented trial counsel from investigating Mitchell and Mitchell's and Dawan's girlfriends (Etienne and Aqueshia Williams) "about the murder given that Mitchell was Dawan's codefendant in connection with the gun that likely killed the victim in Purnell's case." (*Id.*). Purnell's claim is baseless. The record does not support Purnell's conclusory claim that trial counsel did not investigate Mitchell, Etienne, and Aqueshia or that the .38-firearm "likely killed" the victim. (A1398-1407). In fact, trial counsel stated that he hired an investigator to locate and interview potential witnesses. (A1399).

Trial counsel also never represented Mitchell, whose charges were *nolle prossed*, and acknowledged he had no conflict preventing him from cross-examining Mitchell about his involvement in the murder. (A40, A835). Indeed, trial counsel presented an identity/alibi/physical condition defense at trial, arguing Mitchell and/or his associate Ronald Harris ("Harris") committed the murder and Purnell had an alibi. (A1398-1407). Trial counsel diligently cross-examined Mitchell, who the jury was aware fit the description of the second assailant, was once a suspect, and did not have an alibi, about his motivations for providing his recorded statement to police. (A96, A99, A115, A126, A179, A189-92, A224, A229, A360). And, counsel argued during closing that Mitchell implicated Purnell in his statement because Mitchell actually committed the crimes and did not want to serve a life sentence:

> Why would Kellee Mitchell give his statement that my client admitted to him that he was involved in this?... because [Mitchell] did it... He's got a lifetime of motivation to come in here and say it was my client.

(A360). Although trial counsel did not have any knowledge from his prior representation leading him to believe that Dawan's seized .38-firearm might have been involved in the homicide (A40), and there was no evidence supporting this theory (A37-38, A43), he nevertheless brought it in through Detective Tabor and argued at trial that the .38-revolver found in the ceiling outside of Mitchell's and Dawan's girlfriends' apartment could have been the murder weapon. (A43, A156, A360).

Nor does the record, including trial counsel's affidavit, support Purnell's claim that the conflict prevented counsel from hiring a firearms expert to demonstrate why the gun possessed by his former client, Dawan, was far more likely to have been used in the shooting than the gun seen in Purnell's possession. Because the murder slug was not recovered, an expert would not have been able to render an opinion whether the .38-caliber was in fact the murder weapon. (A37-38, A43, A214). Moreover, as discussed, trial counsel refuted any connection between the 9-mm gun seen in Purnell's possession and the murder and argued the .38-caliber could have been the murder weapon.

Finally, there is no evidence that the alleged conflict prevented trial counsel and his investigator from speaking to Dawan about the murder or that trial counsel did not call Dawan to testify because of the conflict. (A37-50; A1398-1407). Rather, the record supports that trial counsel's decision not to call Dawan was strategic. Specifically, when asked by the court whether he was going to call Dawan, trial counsel indicated he was "grappling with" the "best way to proceed on this line of defense" (A45), and the court responded that it would address the conflict issue if trial counsel decided it was necessary or appropriate to call Dawan. (A50). Further, while trial counsel indicated in his 2018 affidavit that he did not recall arguing or investigating Dawan as being involved in the murder ten years prior, the record indicates the State had no reason to believe Dawan had any knowledge of the

crime (A41-42), and trial counsel had a professional and ethical obligation to not present evidence known to be false. (A44-45).

Even if Purnell could show that trial counsel's conflicted status prevented trial counsel from investigating and presenting evidence that Dawan and Mitchell were the "true culprits," trial counsel's conflicted status is not relevant for purposes of the Rule 61 procedural bars analysis because Purnell cannot establish that his procedural defaults were attributed to trial counsel's alleged conflict-of-interest. As discussed, Purnell's *pro se* first postconviction motion raised the conflict-of-interest and associated ineffectiveness issue, claimed he was actually innocent and could not have committed the crime because of his medical condition, and alleged that Mitchell and Dawan "more-than-likely committed this crime."[31] (A899-903, 916-22, A977-79, A1015-16, A1018-20, A1024). Thus, Purnell and postconviction counsel had actual knowledge of these issues at the time of Purnell's first postconviction proceedings and had the opportunity to timely raise them. Because Purnell's procedural defaults are attributable to postconviction counsel's decision to omit these claims, any lack of due diligence attributable to trial counsel's conflicted status is not relevant.

[31] Purnell's *pro se* motion also raised other "new" evidence, including Harris's alleged intellectual disabilities and Hammond's self-interest. (A893-1026).

Finally, even if the Court finds that trial counsel's conflicted status prevented him from investigating and presenting evidence that Dawan and Mitchell were the "true culprits," Purnell still cannot satisfy the actual-innocence exception's other two prongs. As discussed in the State's answering brief and herein, Purnell cannot show that any of the proffered evidence will probably change the result if a new trial is granted and is not merely cumulative and/or impeaching.[32]

[32] *Taylor*, 2018 WL 655627.

III. THE FACTS DO NOT SUPPORT PURNELL'S ACTUAL-INNOCENCE CLAIM.

At about 8:00 p.m. on January 30, 2006, as Ernest and Tameka Giles walked along the sidewalk near Fifth and Willing Streets in Wilmington, two young black males approached them and demanded money. (A240). After Mrs. Giles refused and kept walking, one man fatally shot her in the back. (A209). Both men fled. (A80-81). Police responded quickly and retrieved a 9-mm shell casing about 40 feet north of the intersection; no bullet was recovered. (A75, A214-16, A716-17).

Angela Rayne, who was smoking crack cocaine, witnessed the murder/attempted robbery. (A78-79). Rayne saw two teenage boys walk past her, turn around, and pass her again. (A79-80). She then saw a man and woman coming up the hill and the two pairs walk past each other. (A80). Rayne heard one gunshot and then saw the two teenagers running away. (A80-81). Rayne remembered having seen one of the teenagers with the Wilmington police earlier that day at Fifth and Jefferson Streets. (A82). Using that information, police developed a suspect, Harris, and included his picture in a photo array. (A87). On February 16, 2006, Rayne immediately identified Harris from the array as one of the teenagers, stating she was "100 percent" certain. (A82, A87-88).

Shortly after the shooting, police discovered facts that led them to believe that Giles might have been involved and he became a person of interest in the investigation. (A27-36). Giles knew police viewed him as a suspect. (A28). On

February 16, 2006, during his third interview, Giles tentatively identified Mitchell, stating, "it might have been him." (A28).

On February 16, 2006, police interviewed Harris. (A517-20). During Harris's lengthy interview, Harris repeatedly stated that neither he nor Purnell had any involvement with the murder/attempted robbery and claimed he had mental problems for which he took medicine and he could not read. (*Id.*).

On February 18, 2006, police executed search warrants to locate Harris and Mitchell. (A96, A224, A228-29). Harris was found in Latoya Moody's sixth-floor Compton Towers apartment, five blocks from the murder; Purnell was also there. (A96). Police located Mitchell and Dawan, Harris's brother, in their girlfriends' Aqueshia and Etienne's ninth-floor apartment and discovered a .38-caliber revolver in the hallway ceiling outside that apartment. (A96-97, A224). Dawan and Mitchell, both juveniles, were arrested for PDWBPP. (A97, A828-31). Harris was arrested and charged with attempted first-degree robbery, PDWDCF, and conspiracy. (A100). Investigators interviewed Dawan, and Mitchell; neither identified Purnell as one of the assailants or admitted any involvement or knowledge of the crime. (A230, A762, A830).

On February 22, 2006, police showed Giles and Rayne photo arrays containing Purnell's picture, but neither identified Purnell as one of the assailants. (A33, A226).

On February 21, 2006, investigators interviewed Purnell; he admitted knowing Harris and referenced "running" from police the night before. (A345-47, State's Exhibit 38). He stated that "if robbing someone and they run away, they're gone, ain[']t nothing you could do but rob somebody and they run and you shoot them." (*Id.*). He admitted knowing the location of the .38-revolver. (*Id.*).

On February 27, 2006, trial counsel was appointed to represent Dawan on the PDWBPP charge; Dawan pled guilty and was sentenced on June 5, 2006. (*See* Suppl. Exhibits A-D).

Purnell was not identified as a suspect until Corey Hammond, arrested on January 4, 2007 for drug charges, told police he saw Purnell and Harris together the day of the shooting. (A156-67). Hammond, who had previously denied knowing anything about the crime, told investigators that Purnell had complained about being "broke" and was carrying a semi-automatic handgun on the day of the shooting, and Purnell had later bragged, "I told the [Bitch] give it up, she didn't want to give it up, so I popped her." (A156-64, A624-63).

On January 18, 2007, Aqueshia and Etienne told investigators that, in January 2006, they heard Purnell say he "kill[ed] the lady" and Dawan and Mitchell were in jail for the murder. (A177-78, A195-97). On cross-examination, Aqueshia acknowledged that Purnell said "sike" afterwards. (A197).

On January 22, 2007, Mitchell told investigators that, in April 2006, Purnell confessed to him that he shot Mrs. Giles, because she recognized him and called him "Mark," when he tried to rob her. (A499-504, A111). Purnell told Mitchell he intended to rob Mrs. Giles because it was "tax time."[33] (A499-504, A111).

Police then arrested Purnell and Harris for murder/attempted robbery. (A219). On January 24, 2007, Harris repeatedly told investigators he did not associate or socialize with Purnell and Purnell was not involved with the murder/attempted robbery. (A247, A522-614).

On May 2, 2007, trial counsel was appointed to represent Purnell. (A1). On April 7, 2008, after jury selection, Harris accepted a plea reducing his exposure from life to three years' incarceration in exchange for his truthful testimony, and provided a proffer implicating Purnell in the murder/attempted robbery. (A247-49).

After Harris pled guilty, trial counsel informed the court that he may have a conflict-of-interest if Purnell needed to call Dawan as a witness. (A37-45). The court reserved decision and indicated it would address if trial counsel determined it was necessary or appropriate for Dawan to testify. (A49-50). The court never ruled on the conflict because ultimately, Purnell's counsel decided not to call Dawan.

On the first day of trial, the Superior Court ruled Giles' statements tentatively identifying Mitchell as the shooter and failing to identify Purnell were inadmissible

[33] Mrs. Giles cashed a $1,748 tax refund check the day she was murdered. (A218).

hearsay, because Giles had died four months prior (A218), and his statements lacked sufficient circumstantial guarantees of trustworthiness for admission under D.R.E. 807. (A48-49, A330-31). This Court affirmed.[34]

Harris testified that he and Purnell agreed to commit a purse-snatching on the morning Mrs. Giles was killed. (A239). Later that day, Harris and Purnell met at Compton Towers and walked up Fifth Street towards Willing. (A240). Harris saw Mr. and Mrs. Giles exit a bus holding bags. (A240-41). Harris testified that he and Purnell approached them, and Purnell said, "Can I get y'all stuff?" (A241). Purnell then "pulled out a gun," and pointed it at Mrs. Giles. (A241). Harris stated he started to run in the opposite direction and "heard a shot" about five seconds later, when he was 20-25 feet away. (A241-42). Harris testified he had been convicted of two felonies for participating in these crimes. (A238). On cross-examination, Harris stated that he did not know Purnell until the day of the murder, and he was offered a plea deal that he could not refuse. (A247-48). Testimony also suggested that Harris had a learning disability. (A247-49).

Most of Mitchell's testimony came into evidence through his section 3507 statement because, while he remembered talking to Purnell about a robbery, he claimed to not remember Purnell talking about a murder. (A108-14). The State

[34] *Purnell v. State*, 979 A.2d 1102, 1106-08 (Del. 2009).

introduced evidence that Mitchell was not cooperating because Purnell had threatened him for being a "snitch," including a message Purnell wrote on his bed-board after his arrest:

> Kellee Mitch, snitching on me like that, d*mn, N**ga, you ratting, I got something for you and your child. I'm going after baby's moms, grandmoms. I'm going to make him pay for this sh*t. I can see if it was for something else, this is for a body. He got to pay.

(State's Exhibit 14; A94-98, A134-48). Etienne and Aqueshia recounted that Purnell wrote a letter encouraging Mitchell to "run, run, run as fast as he can." (A180-81, A197).

The State played a recorded telephone call between Purnell and Mitchell's brother, in which Purnell bragged that he had "a lot" to do with the murder. (State's Exhibit 13; A219-22, A228). The State also played Aqueshia's video statement, in which she claimed that Purnell warned her and her sister to keep quiet about his involvement in the murder, stating "I shot one bitch, I'll kill another." (A201; Court's Exhibit 5). Purnell also told Etienne that she "better keep … his name out of [her] mouth." (A181).

Hammond's testimony was consistent with his January 2007 statement, and he testified about his agreement with the State to reduce his remaining prison time for his drug convictions to probation in exchange for his truthful testimony. (A150-75).

The defense attacked the lack of physical evidence and eyewitness identification linking Purnell to the murder. The defense presented an identity/alibi/physical condition defense asserting that Purnell did not associate with Harris and could not have been one of the assailants Rayne saw run away because he had knee surgery on January 22, 2006 to remove a bullet, requiring 13 staples, left the hospital the next day in a wheelchair, was dependent on crutches, and was recovering at his grandmother's apartment when the murder occurred. (A260-62, A266-71, A274-75, A287-88, A319, A333-337, A342-43, A363-64). Purnell's medical records were introduced into evidence (A334; State's Exhibit 36), and his orthopedic surgeon testified that he could not give an opinion whether Purnell could walk or run on the day of the murder. (A336).

The defense vigorously tried to persuade the jury that witnesses implicating Purnell were doing so to save themselves and should not be believed. Trial counsel cross-examined Hammond about the fact he initially denied knowing anything about the crime and argued that Hammond only implicated Purnell after his arrest on drug-related charges because the State agreed to reduce his sentence in exchange for his testimony. (A169-75, A360-61). Trial counsel focused on Rayne's identification of Harris and argued Harris was trying to protect himself by shifting responsibility for the murder from himself to Purnell. (A247-48, A361-62).

Trial counsel elicited testimony that Mitchell and Dawan were once suspects

and shared the .38-revolver police found. (A98-99, A115, A122-26, A224-25, A229-31). Trial counsel cross-examined Mitchell on his potential motivations for testifying falsely and questioned Mitchell about his acquisition of the .38-revolver. (A121-126). Trial counsel argued Mitchell gave his statement implicating Purnell because Mitchell fit the second assailant's description and was the actual perpetrator. (A126; A360). Trial counsel asserted the 9-mm casing could not be linked to the crime and suggested the .38-revolver could have been the murder weapon. (A156, A360).

IV. PURNELL'S "NEW" EVIDENCE DOES NOT SATISFY RULE 61(d)(2)'s ACTUAL-INNOCENCE STANDARD.

Recognizing he cannot satisfy the due diligence and exclusion of impeachment evidence prongs of Rule 61(d)(2)'s actual-innocence test in *Taylor*, Purnell claims most of his new evidence can be considered under the "common law" actual-innocence exception to the one-year statute-of-limitations for federal habeas relief. (Suppl. at 32-36). Citing the United States Supreme Court's decisions in *McQuiggin v. Perkins*[35] and *Sawyer v. Whitley*,[36] Purnell claims that, unlike Rule 61(d)(2)'s test, the "common law standard does not require the extra burden of due diligence and the exclusion of impeachment evidence." (*Id.*). Without citing any authority, Purnell claims Rule 61's 2014 amendment does not supplant this Court's ability to apply the "common law" miscarriage-of-justice actual-innocence gateway. (*Id.*). Purnell's claims are unavailing.

There is no common law right to State collateral review of a criminal conviction, and the June 2014 amendment eliminated former Rule 61(i)(5)'s "miscarriage of justice" exception, applicable to former Rule 61(i)(1-3)'s procedural bars.

[35] 569 U.S. 383 (2013).

[36] 505 U.S. 333 (1992).

Purnell also overlooks that the actual-innocence exception applied by federal courts is consistent with Delaware's Rule 61(d)(2) actual-innocence test in requiring due diligence and excluding impeachment evidence. Specifically, the United States Supreme Court has recognized that new impeachment evidence rarely suffices when trying to invoke an actual-innocence exception: "[L]atter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the] account of petitioner's actions."[37] Furthermore, federal courts have recognized that new evidence is evidence that was "not available at trial and could not have been discovered earlier through the exercise of due diligence."[38]

Under either test, none of the "strongest evidence" Purnell identifies creates a strong inference of "actual-innocence":

[37] *Id.* at 349; *Calderon v. Thompson*, 523 U.S. 538, 563 (1998) ("This impeachment evidence provides no basis for finding a miscarriage of justice. As in *Sawyer*, the evidence is a step removed from evidence pertaining to the crime itself. It tends only to impeach the credibility of [two witnesses]."); *Mattis v. Vaughn*, 80 F. App'x 154, 159 (3d Cir. 2003) ("On this record, we cannot conclude that the impeachment of [witness's] trial testimony … would satisfy the *Schlup* [*v. Delo*, 513 U.S. 298 (1995)] standard that no reasonable juror would have found [petitioner] guilty beyond a reasonable doubt… The *Schlup* standard for proving actual innocence is far more demanding than establishing the existence of a reasonable doubt.").

[38] *Cf. McQuiggin*, 569 U.S. at 388-89 (noting federal statute requires petitioner to file claim within one year of time in which new evidence could have been discovered through exercise of due diligence).

- **Medical Opinion**, **Follow-up Care**, **William Davis**, **Ferris School Note**: Each piece of evidence: (1) is merely new in type, not kind, from the medical evidence admitted at trial, and is thus cumulative; (2) does not qualify as new because the nature of Purnell's injuries were known at trial and Purnell does not show he was unable to obtain such evidence despite his diligent efforts; and (3) does not lead to a strong inference that Purnell was actually innocent in fact because it does not conclusively show that Purnell was physically unable to run on January 30, 2006.
- **Firearm Expert**: The ballistic evidence was undisputedly available and known at time of trial. (A75-76, A445). The proffered evidence would not change the result if a new trial is granted. Ballistics were never an essential part of the State's case. Rather, as the defense conceded at trial (A357), the core issue was the shooter's identity. Harris and three others identified Purnell as the shooter, and other evidence, including Purnell's own statements, supported the jury's verdict. The jury heard arguments refuting the connection between the casing and murder.
- **Alfred Lewis, Jr., Troy Hammond, and Naco Hammond Affidavits**: Each piece of evidence is: (1) not new because it was available and/or known at the time of trial (Op. Br. at 45); (2) impeaching, attacking the credibility of Hammond's trial testimony; (3) cumulative because Hammond's credibility

was aggressively attacked on cross-examination by defense counsel; (4) not evidence that would probably change the result at trial because: (a) Hammond's favorable plea deal and prior denials to knowing anything about the crime were introduced at trial, and, based on the verdict, the jury rejected Purnell's argument that Hammond's testimony was not credible; (b) it does not refute other evidence against Purnell at trial, including Purnell's own statements; and (c) it is not reliable or credible, coming ten years after the alleged conversations took place. Naco Hammond's statement that Hammond's father was a police informant is also inadmissible hearsay.[39]

- **Andrew Moore Declaration**: The evidence is: (1) not new because it could have been discovered before trial using due diligence; (2) impeaching and cumulative; (3) not evidence that would probably change the result at trial because it is not reliable or credible, coming nine years after trial and over four years after Mitchell's alleged statements, Mitchell's motivations for providing his recorded statement were introduced at trial, and it does not refute other credible, contrary evidence against Purnell.
- **Mitchell Affidavit:** The evidence is: (1) not new because it was available and/or known at the time of trial; (2) impeaching and cumulative; and (3) not

[39] *Cabrera v. State*, 840 A.2d 1256, 1266-68 (Del. 2004).

evidence that would probably change the result at trial because it is not reliable or credible, coming nine years after trial and eleven years after his prior statements, without any justification for delay;[40] and it contains only a subtle difference from his trial testimony and does not address other credible evidence against Purnell.

- **Ronald Harris Recantation:**[41] The evidence is: (1) not new because (a) Harris repeatedly claimed before trial that he and Purnell were not involved and did not socialize and Harris was vigorously questioned at trial about such statements, and Harris's prior statements and favorable plea deal were introduced at trial; and (b) as Purnell concedes, Harris's alleged intellectual disabilities were known at trial or could have been discovered using due diligence (Op. Br. at 38; A512-20), and the jury knew Harris could not read and his interrogations' length (A231, A247-49); (2) impeaching and cumulative; (3) not evidence that would probably change the result at trial because (a) it is not a true recantation; (b) it is not credible or reliable, coming nine years after trial, without explanation, and contradicts eyewitness testimony that Harris was one assailant and Harris's sworn testimony and

[40] *State v. White*, 2018 WL 6131897 at n.38 (Del. Super. Ct. Nov. 21, 2018), *aff'd*, 208 A.3d 731 (Del. 2019); *Hicks v. State*, 913 A.2d 1189, 1194-96 (Del. 2006).

[41] Purnell mistakenly refers to this as "Dawan Harris Recantation." (Suppl. at 35). Dawan did not testify or recant.

statements at sentencing (A82-88; A1046-48); (c) it does not establish Harris was incompetent to testify and conflicts with the Superior Court's finding a few days before Harris testified that he was competent to plead guilty; and (d) there was "significant, additional information before the jury that substantiated [Harris's] testimony."[42]

- **Dawon Brown Affidavit:** The evidence is: (1) not new because it was available and/or known at time of trial (A417); (2) impeaching; and (3) not evidence that would probably change the result at trial because it is not reliable or credible, coming ten years after events, and it does not refute Mitchell's testimony or address other credible, contrary evidence against Purnell.

[42] *Purnell v. State*, 106 A.3d 337, 348 (Del. 2014).

CONCLUSION

For the foregoing reasons, the Superior Court's judgment should be affirmed.

/s/ *Carolyn S. Hake*
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Wilmington, DE 19801
(302) 577-8500

Dated: December 16, 2020

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:
	:
v.	:
	: **I.D. No. 0701018040**
	:
MARK PURNELL,	:
Defendant.	:
	:

MOTION FOR LEAVE TO AMEND
MOTION FOR POST-CONVICTION RELIEF

Pursuant to Criminal Rule 61(b)(6), the above defendant hereby moves the Court for leave to file an amended Motion for Post-Conviction Relief. In support of this Motion, it is further represented as follows:

1. On March 16, 2010, the defendant filed a *pro se* Motion under Criminal Rule 61 entitled "Notice of Appeal from Rule 61." The defendant also filed a Motion seeking appointment of counsel to represent him in post-conviction proceedings. Those matters are still pending and a hearing on that Motion and related issues is scheduled on September 8, 2011.

2. The undersigned is presently representing the defendant concerning his post-conviction claims. In order to facilitate a proper review of the defendant's post-conviction claims, the undersigned has determined that it is necessary to file an amended Motion for Post-Conviction Relief. The undersigned further estimates that the amended Motion can be filed within the next 45 days.

3. The undersigned has reviewed and discussed the content of this Motion with Elizabeth R. McFarlan, Esquire, attorney for the State in this matter and is authorized to represent that the State does not oppose the Motion to Amend.

JOSEPH M. BERNSTEIN (#780)
10354 Flat Stone Loop
Bonita Springs, FL 34135
239-948-7960
Attorney for Defendant

Dated: August 26, 2011

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	:
	:
v.	:
	: **I.D. No. 0701018040**
	:
MARK PURNELL,	:
Defendant.	:
	:

ORDER

AND NOW, this ____ day of _____, 2011, upon consideration of the defendant's Motion to Amend the Motion for Post-Conviction Relief, **IT IS ORDERED**:

1. The defendant shall file an Amended Motion for Post-Conviction Relief on or before October 10, 2011. A copy of said Amended Motion shall be served on the Department of Justice.

2. The State may file a Response to the Amended Motion on or before November 14, 2011.

3. The defendant may file a Reply to the State's Response on or before December 14, 2011.

4. The hearing in this matter, previously scheduled to be held on September 8, 2011, at 11)0 a.m., is hereby cancelled as being moot.

_____

M. Jane Brady, Judge

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK PURNELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 113, 2020
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This supplemental brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This supplemental brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,998 words, which were counted by Microsoft Word.

Dated: December 16, 2020 /s/ *Carolyn S. Hake*