



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN BASS,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 218, 2022
)
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Nature and Stage of the Proceedings	1
Summary of the Argument	5
Statement of Facts	6
Argument	
I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING BASS POSTCONVICTION RELIEF	25
Conclusion	54

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<i>Adams v. State</i> , 794 So.2d 1049 (Miss. Ct. App. 2001)	37
<i>Bass v. Redman</i> , C.A. 89-278, Report and Recommendation, M.J. Robinson (D. Del. Jun. 19, 1990).....	2
<i>Bass v. State</i> , Del. Supr., No. 14, 1984, order, Horsey, J. (Sept. 20, 1985)	1
<i>Bass v. State</i> , 1989 WL 47282 (Del. Apr. 5, 1989)	1
<i>Bass v. State</i> , 1993 WL 478076 (Del. Nov. 5, 1993)	2
<i>Bass v. State</i> , 1998 WL 231270 (Del. May 1, 1998)	2
<i>Bass v. State</i> , 2003 WL 21810837 (Del. Aug. 4, 2003)	2
<i>Bass v. State</i> , 2013 WL 2398580 (Del. May 31, 2013).....	2
<i>Brown v. State</i> , 329 A.2d 153 (Del. 1974).....	34
<i>Capano v. State</i> , 781 A.2d 556 (Del. 2001).....	25
<i>Crump v. Delaware</i> , 139 S. Ct. 1400 (2019)	50
<i>Crump v. State</i> , 2018 WL 3769261 (Del. Aug. 7, 2018).....	50
<i>Dawson v. State</i> , 673 A.2d 1186 (Del. 1996)	25
<i>Duckett v. State</i> , 231 So.3d 393 (Fla. 2017)	50
<i>Frye v. United States</i> , 293 F. 1013 (D.C. 1923)	20
<i>In re Bass</i> , No. 04-3450, Order, Rendell, J. (3d. Cir. Sept. 24, 2004).....	2
<i>Jenkins v. State</i> , 305 A.2d 610 (Del. 1973)	53

<i>Keyser v. State</i> , 893 A.2d 956 (Del. 2006)	25
<i>Lloyd v. State</i> , 534 A.2d 1262 (Del. 1987)	30, 31
<i>Maxion v. State</i> , 686 A.2d 148 (Del. 1996)	28
<i>Murphy v. State</i> , 632 A.2d 1150 (Del. 1993).....	28
<i>Outten v. State</i> , 720 A.2d 547 (Del. 1998)	25
<i>Parson v. State</i> , 222 A.2d 326 (1966).....	33
<i>Pitts v. State</i> , 591 S.W.3d 786 (Ark. 2020)	51, 52
<i>Purnell v. State</i> , 254 A.3d 1053 (Del. 2021)	26, 30, 31, 32, 52
<i>Seward v. State</i> , 723 A.2d 365 (Del. 1999)	25
<i>State v. Bass</i> , 2021 WL 5984262 (Del. Super. Ct. Dec. 15, 2021).....	<i>passim</i>
<i>State v. Bass</i> , 2022 WL 2093956 (Del. Super. Ct. June 10, 2022).....	<i>passim</i>
<i>State v. Crump</i> , 2017 WL 6403510 (Del Super. Ct. Dec. 14, 2017)	49, 50
<i>Swan v. State</i> , 248 A.3d 839 (Del. 2021).....	53
<i>Thompson v. State</i> , 539 A.2d 1052 (Del. 1988).....	33
<i>Unitrin, Inc. v. American General Corp.</i> , 651 A.2d 1361 (Del. 1995)	37
<i>Vaughn v. State</i> , 646 S.E.2d 212 (Ga. 2007)	37
<i>Zebroski v. State</i> , 822 A.2d 1038 (Del. 2003)	25

STATUTES AND RULES

Del. Supr. Ct. R. 14(b)	28
Del. Super. Ct. Crim. R. 61(d)(2)	26-27, 28, 29, 30, 52

Del. Super. Ct. Crim. R. 61(i)(1)	28, 29
Del. Super. Ct. Crim. R. 61(i)(2)	28
Del. Super. Ct. Crim. R. 61(i)(3)	29
Del. Super. Ct. Crim. R. 61(i)(4)	29
Del. Super. Ct. Crim. R. 61(i)(5)	29
D.R.E 403.....	20

OTHER AUTHORITIES

https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj- microscopic-hair-comparison-analysis-review (last visited on September 1, 2022.....	22, 36
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NATURE AND STAGE OF THE PROCEEDINGS

In June 1983, a Superior Court jury found Alan Bass guilty of two counts of first-degree rape, three counts of first-degree kidnapping, two counts of first-degree robbery, one count of attempted first-degree robbery, two counts of second-degree burglary, and one count of third-degree burglary.¹ The Superior Court sentenced Bass to five consecutive life sentences plus 45 years in prison.² Bass appealed. In September 1985, this Court affirmed his convictions.³

In November 1987, Bass filed his first motion for postconviction relief under Superior Court Criminal Rule 61.⁴ The Superior Court denied the motion in August 1988, and this Court affirmed the Superior Court's judgment in April 1989.⁵ Bass subsequently filed five more Rule 61 motions between 1990 and 2003, all of which

¹ D.I. 10. "D.I. __" refers to item numbers on the Superior Court Criminal Docket in *State v. Alan Bass*, I.D. #83000508DI. A1-16g.

² D.I. 26.

³ *Bass v. State*, Del. Supr., No. 14, 1984, order, Horsey, J. (Sept. 20, 1985). A699-708.

⁴ D.I. 46.

⁵ D.I. 51, 52; *Bass v. State*, 1989 WL 47282 (Del. Apr. 5, 1989).

the Superior Court denied.⁶ This Court affirmed each denial.⁷ Bass also unsuccessfully petitioned the Delaware District Court for federal habeas relief.⁸

On June 25, 2015, a Special Counsel for the United States Department of Justice (“USDOJ”) notified the Delaware Attorney General and Bass that the USDOJ and the Federal Bureau of Investigation (“FBI”) had determined that the microscopic hair comparison (“MHC”) analysis testimony or laboratory report in Bass’s case included statements that exceeded the limits of science (the “USDOJ/FBI review”).⁹

On April 26, 2018, Bass, through counsel, filed his seventh Rule 61 motion in the Superior Court.¹⁰ Bass’s motion claimed that he has provided new evidence of his actual innocence in the form of “the new understanding in forensic science regarding the limitations of MHC evidence for individualistic identification” and the

⁶ D.I. 58, 63, 74, 77, 86, 91, 100, 109, 113, 124.

⁷ *Bass v. State*, 1993 WL 478076 (Del. Nov. 5, 1993); *Bass v. State*, 1998 WL 231270 (Del. May 1, 1998); *Bass v. State*, 2003 WL 21810837 (Del. Aug. 4, 2003); *Bass v. State*, 2013 WL 2398580 (Del. May 31, 2013). Bass did not appeal from the denial of his sixth motion for postconviction relief.

⁸ *Bass v. Redman*, C.A. 89-278, Report and Recommendation, M.J. Robinson (D. Del. Jun. 19, 1990) (recommending denial of habeas petition), *adopted*, Order, Longabardi, J. (D. Del. Dec. 26, 1990), *cert. of appealability denied*, No. 91-3043, Stapleton, J. (3d. Cir. Apr. 5, 1991). In 2004, the United States Court of Appeals for the Third Circuit denied Bass’s application to file a successive habeas corpus petition. *In re Bass*, No. 04-3450, Order, Rendell, J. (3d. Cir. Sept. 24, 2004).

⁹ A17-19.

¹⁰ D.I. 127.

USDOJ/FBI review identifying inappropriate statements made by the FBI's hair and fiber expert witness at trial.¹¹ Bass argued that the introduction of this evidence violated his due process rights.¹² On August 9, 2018, the State answered Bass's motion, and Bass filed a reply on September 5, 2018.¹³

Subsequently, the parties learned that the trial exhibits with hair evidence still existed.¹⁴ The parties stipulated to have the FBI perform MHC analysis and DNA testing on the hair evidence.¹⁵ The FBI issued a report from its MHC analysis on July 25, 2019, and a report from its DNA testing on January 14, 2020.¹⁶ Based on the FBI's mitochondrial DNA ("mtDNA") testing, a partial mtDNA sequence was obtained from hair that originated from a pubic combing of one of the victims (S.K.).¹⁷ The partial mtDNA sequence and one obtained from Bass's buccal sample were the same.¹⁸ Accordingly, the FBI could not exclude Bass as the source of the hair.¹⁹

¹¹ *State v. Bass*, 2021 WL 5984262, at *13 (Del. Super. Ct. Dec. 15, 2021).

¹² *Id.*

¹³ D.I. 134, 135.

¹⁴ *Bass*, 2021 WL 5984262, at *12.

¹⁵ A1004-05.

¹⁶ A1173-75, A1217-20.

¹⁷ A1173.

¹⁸ *Id.*

¹⁹ *Id.*

The parties thereafter engaged in supplemental briefing.²⁰ On December 15, 2021, the Superior Court Commissioner issued a report and recommendation that Bass’s postconviction motion be denied as procedurally barred under Rule 61.²¹ The Commissioner determined that “Bass has not met his burden to establish that the new evidence creates a strong inference that Bass is actually innocent in fact of the acts underlying the charges for which he was convicted.”²²

Bass filed objections to the Commissioner’s report.²³ After receiving the State’s response, on June 10, 2022, the Superior Court adopted the Commissioner’s report and recommendation and denied Bass postconviction relief.²⁴

On June 27, 2022, Bass timely filed a notice of appeal. On August 9, 2022, Bass filed his opening brief. This is the State’s answering brief.

²⁰ D.I. 150, 155, 156.

²¹ *Bass*, 2021 WL 5984262, at *20.

²² *Id.* at *1.

²³ D.I. 165, 166.

²⁴ *State v. Bass*, 2022 WL 2093956, at *15 (Del. Super. Ct. June 10, 2022).

SUMMARY OF THE ARGUMENT

I. Bass's argument is denied. The Superior Court did not abuse its discretion by denying Bass postconviction relief. Bass's seventh Rule 61 motion is untimely and successive, and he does not overcome the procedural bars. The USDOJ/FBI review's determination that the expert made overstatements during his trial testimony does not create a strong inference of Bass's actual innocence. The expert tempered his overstatements by acknowledging the limits of MHC analysis, and Bass has not demonstrated factual innocence in view of the FBI's recent MHC analysis and mtDNA testing linking him to one of the attacks. The remaining evidence sufficiently supports Bass's convictions. The attacks shared many similarities, including in their *modus operandi*, and the State presented evidence of Bass's other crimes. Bass's challenges to the witnesses' identifications, which also support his convictions, are insufficient to show that the result of a new trial would probably change without the expert's overstatements. This Court and other jurisdictions have also declined to grant relief based on similar errors in expert testimony. But even if this Court were to reach the merits of Bass's due process claim, he would not be entitled to relief. The MHC analysis corroborated other substantial evidence of Bass's guilt. The USDOJ/FBI review did not exculpate Bass or eliminate the fact that similarities existed in hair evidence from some of the attacks and Bass.

FACTS²⁵

1. The Crimes

a. S.K.'s Attack²⁶

On November 10, 1981, 20-year-old victim S.K. was working alone at a North Wilmington law office at 7:00 p.m. when she saw a black male enter the office.²⁷ The man ran over to her, stuck an object into her side, and demanded money.²⁸ He forced her to hang up the phone and took some petty cash.²⁹ He then went through her purse and took her watch and jewelry.³⁰

The assailant then forced her into a conference room in the law office and ordered her to lift her sweater and cover her face.³¹ The assailant tied up her feet, forced her to unbutton her pants, and raped her vaginally for 20 to 30 seconds.³² He had difficulty maintaining an erection and did not ejaculate.³³ S.K. caught a glimpse

²⁵ Except for Section 5 (The USDOJ/FBI Review), the facts are substantially adopted from either the Commissioner's report and recommendation regarding Bass's postconviction motion or the Superior Court's memorandum opinion denying Bass postconviction relief.

²⁶ *See Bass*, 2022 WL 2093956, at *1, 3.

²⁷ A131, A135-36, A301.

²⁸ A198

²⁹ A137.

³⁰ A140

³¹ A140-41.

³² A141-45, A303-04.

³³ A144-45.

of his face when her assailant permitted her to remove the sweater from her face.³⁴ He went to another room and returned with a different sweater to put over her head again.³⁵ He covered her face and gagged her mouth with that sweater, tied her hands behind her back, and left.³⁶ Police later found a screwdriver in the conference room where she was raped.³⁷

S.K. described her attacker as a black male with a dark complexion, slender, 20 to 30 years old, 5'8" to 5'10", possibly with a mustache, and with a deep, soft-spoken voice.³⁸ She further described him as tall and thin.³⁹ She recalled that he wore a hat, sunglasses, a sport coat, a turtleneck, and dark pants.⁴⁰

Before trial, S.K. was unable to identify her assailant from a physical lineup.⁴¹ Bass was not in that lineup.⁴² She also did not make any positive identifications from a photo lineup although Bass's photo was included,⁴³ and she thought one or

³⁴ A145.

³⁵ A146.

³⁶ *Id.*

³⁷ A198.

³⁸ A116, A136-37, A186-87.

³⁹ A136.

⁴⁰ *Id.*

⁴¹ A188.

⁴² *Id.*

⁴³ A170, A193.

more of the men resembled her assailant.⁴⁴ At trial, S.K. unequivocally identified Bass as her attacker.⁴⁵ She was cross-examined about her inability to identify Bass pre-trial.⁴⁶ On redirect, she offered the jury an explanation as to why she was unable to identify Bass until trial.⁴⁷

b. A.S.'s Attack⁴⁸

On July 2, 1982, Bass gave his friend, Loretta Schoell, a check that belonged to William Stevens.⁴⁹ She forged and cashed the check within one or two hours of receiving it from Bass.⁵⁰

Stevens worked at an insurance company in Claymont. His checkbook had been stolen from his desk along with a dictating machine.⁵¹ A dictating machine that matched the description of the one stolen from Stevens—including the same brand and model—was subsequently found in Schoell's car.⁵²

On July 10, 1982, 26-year-old victim A.S. was working alone on the third

⁴⁴ A169, A193.

⁴⁵ A155.

⁴⁶ A168, A172.

⁴⁷ A174.

⁴⁸ *See Bass*, 2021 WL 5984262, at *7.

⁴⁹ A344-45.

⁵⁰ *Id.*

⁵¹ A334, A338.

⁵² A312-13, A337, A443-44.

floor of an office at the same insurance company.⁵³ A black man entered the office at approximately 9:30 a.m. holding a screwdriver and wearing dark glasses and a cardigan sweater over his head,⁵⁴ covering the sides of his face and hair.⁵⁵ She saw him for at most 30 seconds before he approached her.⁵⁶ He shoved the screwdriver into her side and forced her to look at the floor.⁵⁷ After demanding money, he emptied her purse, and gagged her by tying his sweater over her head.⁵⁸ She could only see his gray shoes as he forced her into a conference room.⁵⁹

Thereafter, he demanded her wedding and engagement rings, which she begged him not to take.⁶⁰ Her assailant then threatened to kill her, punched her in the face, took her rings, and tied her hands and feet.⁶¹ He then removed her clothes from the waist down, undressed himself, and raped her vaginally for about 60 to 90 seconds.⁶² He had trouble penetrating her and maintaining an erection.⁶³ After this

⁵³ *See Bass*, 2022 WL 2093956, at *2-3; A217-20.

⁵⁴ A223-24, A228.

⁵⁵ A223.

⁵⁶ A206.

⁵⁷ A226-28.

⁵⁸ A227-29.

⁵⁹ A225, A229.

⁶⁰ A231.

⁶¹ A232-33.

⁶² A233-34.

⁶³ A234.

time period of penetration, he seemed disgusted, gave up, and said, “Forget it.”⁶⁴ He then dressed her and himself, retied her hands and feet, covered her with a raincoat, and left.⁶⁵

A.S. helped police create a composite sketch of her assailant.⁶⁶ A.S. was dissatisfied with the sketch because her assailant’s cheeks were hollower, and the sketch depicted him with a goatee.⁶⁷ In July 1982, a police detective showed A.S. a photographic lineup that included a photo of Bass from 1978.⁶⁸ A.S. chose Bass’s photo and said that his weight and facial structure were similar to her assailant.⁶⁹ A.S. also selected another photo and said the person likewise resembled her assailant.⁷⁰

In October 1982, the detective conducted a second lineup with A.S. that included a more recent photo of Bass.⁷¹ A.S. narrowed her selection to two persons,

⁶⁴ A235.

⁶⁵ A235-36.

⁶⁶ *See Bass*, 2021 WL 5984262, at *7; A240.

⁶⁷ A240.

⁶⁸ A307, A309.

⁶⁹ A308.

⁷⁰ A309.

⁷¹ A309-10.

including Bass.⁷² A.S. said that Bass looked the most like her assailant.⁷³ The detective then told A.S. that Bass was the suspect.⁷⁴ Having already told A.S. that Bass was the suspect, the detective aborted a third photographic lineup.⁷⁵

At trial, A.S. described her assailant as a thin black male with a small hair growth on his chin, early thirties, 5'11" to 6'0", with a medium complexion,⁷⁶ and that Bass "resembles the person who attacked me."⁷⁷ A.S. stated that Bass's height and build were similar but that her attacker was thinner and did not have a mustache.⁷⁸ The State elicited testimony from law enforcement that Bass had gained 15 to 20 pounds since his arrest.⁷⁹

A.S. also testified that she saw the assailant's gray shoes as he forced her into a conference room.⁸⁰ She further described them as a gray slip-on type "that had a suede top, and what [she] thought was some kind of soft crepe sole."⁸¹ The State

⁷² A311.

⁷³ *Id.*

⁷⁴ A319.

⁷⁵ A320.

⁷⁶ *See Bass*, 2022 WL 2093956, at *3; A224-25.

⁷⁷ A249.

⁷⁸ A249-50.

⁷⁹ A325-26.

⁸⁰ A225, A229.

⁸¹ A225-26.

provided a pair of Bass's shoes at trial, but this victim was unable to identify them as belonging to her attacker.⁸²

c. S.M.'s Attack⁸³

On July 16, 1982, 30-year-old victim S.M. attended an office party hosted by her employer in North Wilmington where her wallet and personal checks were stolen.⁸⁴ Two of the stolen checks were forged and cashed.⁸⁵

On the morning of August 26, 1982, S.M. was alone in her office when a male assailant approached her from behind and covered her mouth.⁸⁶ When she asked what he wanted, he told her to shut up and asked if she had money.⁸⁷ She responded that she did not.⁸⁸ After a few exchanges wherein she tried to convince him that someone else was in the office,⁸⁹ he forced her into a windowless lab room and struck her on the head.⁹⁰ She tried to persuade him that the police were on the way because

⁸² A244-45.

⁸³ *See Bass*, 2022 WL 2093956, at *3-4.

⁸⁴ A361, A377-78; A381-82.

⁸⁵ A347-52, A383.

⁸⁶ A369-70.

⁸⁷ A370.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ A371-74.

her purse had been stolen.⁹¹ After accusing her of lying, he became angrier and ordered her to kneel and to shut up.⁹² At some point during the attack, she lost control of her bladder and urinated.⁹³ Shortly thereafter, she heard her assailant walk out of the room.⁹⁴ After she managed to stand, she locked herself in the office and called the police.⁹⁵

S.M. never saw her attacker's face⁹⁶ and was not able to positively identify Bass. But she testified that her attacker was 5' 10" to 6'0" and had a thin build with long, thin black fingers, a blue shirt, and a calm voice.⁹⁷

Though no witnesses were present during her attack, the jury heard from two eyewitnesses who were in the same office building on the day of the attack. Both provided evidence favorable to the State. One of these two eyewitnesses was Roger Reynolds, a building manager in the office building where S.M. was assaulted.⁹⁸ He testified that shortly after the attack, he received a call from police and began looking

⁹¹ A371.

⁹² A371-73.

⁹³ A373-74.

⁹⁴ A373.

⁹⁵ A373, A376.

⁹⁶ A376.

⁹⁷ A374-76.

⁹⁸ A386-87.

around the building.⁹⁹ Reynolds noticed a man located in a bathroom stall of the men's restroom about 30 feet from S.M.'s office.¹⁰⁰

While in the stall, it appeared that this man's pants were up, he was not using the toilet, and his shoes were clearly visible.¹⁰¹ He described the man as black, about 6'0" tall, with facial hair, and wearing gray suede shoes with a flat sole and heel.¹⁰² When shown the same gray shoes which were presented to A.S., Reynolds stated they "looked like the same shoes" as those worn by the man in the bathroom stall.¹⁰³ Although he acknowledged that he did not see the man's entire face, he selected Bass from a photo lineup based on the "definite formation" of the forehead.¹⁰⁴

The second eyewitness, Christine Shaw, testified that, on the morning of the assault, she passed a man in the hallway who was exiting the office where the attack occurred.¹⁰⁵ She described him as a neatly dressed tall black man, who stood about 5'10" and 130 pounds, approximately 30 years old, wearing a blue shirt and blue tweed pants, with glasses, and a "short to medium afro."¹⁰⁶ She told the police that

⁹⁹ A390.

¹⁰⁰ *Id.*

¹⁰¹ A391.

¹⁰² A391-93.

¹⁰³ A394.

¹⁰⁴ A393-94, A453.

¹⁰⁵ A428-29.

¹⁰⁶ A429-31.

he was clean shaven but at trial could not definitively say whether or not he had a mustache.¹⁰⁷ She said that she saw him walk toward her down a hallway for about one minute and that he said “hello” as he passed her.¹⁰⁸ Shaw positively identified Bass in a photo lineup, testifying that when viewing the photo lineup she recognized the picture of the man “as soon as [she] saw the picture,” and did not have any doubt that she selected the correct individual.¹⁰⁹ She also unequivocally identified Bass at trial.¹¹⁰

d. Loretta Schoell and Bass’s Other Crimes¹¹¹

After receiving immunity from the State, Loretta Schoell testified that she had known Bass for about 11 years and described him as being “like a member of [her] family.”¹¹² She told the jury that Bass had lived with her at Stoneybrook Apartments in Claymont from October to December 1981 and again from June to September 1982,¹¹³ coinciding with when the three assaults took place—November 1981, July 1982, and August 1982.

¹⁰⁷ A434-35.

¹⁰⁸ A430.

¹⁰⁹ A433, A449.

¹¹⁰ A433-34.

¹¹¹ *See Bass*, 2022 WL 2093956, at *4-5.

¹¹² A340, A343.

¹¹³ A340-41.

The two of them engaged in cash-stealing schemes and targeted offices to commit thefts, including the offices where the assaults of A.S. and S.M. occurred in July and August 1982. Schoell testified that on July 16, 1982 (when S.M. attended her office party), they traveled to S.M.'s office building, and Bass went inside while she waited in the car.¹¹⁴ According to Schoell, Bass returned after approximately 20 minutes with S.M.'s checks.¹¹⁵ Schoell forged and cashed two of them.¹¹⁶ Schoell testified that Bass gave her a stolen check from Stevens eight days before A.S. was raped.¹¹⁷ She also stated that Bass dressed "like an office worker" so he would fit in with an office environment.¹¹⁸ Lastly, she confirmed the same gray shoes shown to A.S. and Reynolds belonged to Bass.¹¹⁹

2. Bass's Trial Testimony¹²⁰

Bass elected to testify at trial, asserting that he did not attack the three women.¹²¹ He admitted to stealing personal checks and other valuables but could

¹¹⁴ A348-50.

¹¹⁵ A350.

¹¹⁶ A347-52, A383.

¹¹⁷ A337-39, A344-45.

¹¹⁸ A354-55.

¹¹⁹ A357.

¹²⁰ *See Bass*, 2022 WL 2093956, at *5.

¹²¹ A535-36.

not recall where he had committed the thefts.¹²² He testified that he had not worked for years and had supported himself by stealing from office buildings.¹²³ When he committed these thefts, he would not speak to anyone when leaving the location, and never returned to those office buildings.¹²⁴

3. FBI Special Agent's Trial Testimony¹²⁵

The police sent articles of clothing, pubic hair combings, and hair samples from Bass, A.S., and S.K. to the FBI for hair comparison analysis.¹²⁶ FBI Special Agent Andrew Gary Podolak, a forensic examiner, testified at Bass's trial in June 1983.¹²⁷

Podolak testified that his job was to first determine whether there were any hairs present on the items submitted and then try to make an association between those hairs and a particular individual.¹²⁸

¹²² A523-24.

¹²³ A518-20.

¹²⁴ A527.

¹²⁵ *See Bass*, 2021 WL 5984262, at *11.

¹²⁶ A35-43, A52-55.

¹²⁷ A463-513.

¹²⁸ A467.

Podolak testified that, with hair comparison analysis, it is the characteristics of the hair that makes it unique and that allows an association to be made of that hair to a particular individual.¹²⁹

There was no MHC evidence presented at trial as to S.M. As to S.K., Podolak testified that he found “dark brown pubic hairs of negroid origin” in the pubic combings taken from S.K.¹³⁰ He concluded that hair found in the combings of S.K.’s pubic area matched a sample of Bass’s pubic hair.¹³¹ Podolak testified that the “dark brown pubic hairs of negroid origin, which microscopically matched in every observable characteristic the known pubic hairs of Alan Bass.”¹³²

As to A.S., Podolak testified that he compared a hair sample taken from Bass with hairs taken off of A.S.’s clothing and “found a dark brown head hair of negroid origin which microscopically matched the known head hair sample of Alan Bass in every observable microscopic characteristic.”¹³³ Podolak also compared pubic combings taken following the sexual assault of A.S. with pubic hair taken from Bass and concluded, “I found a dark brown pubic hair of negroid origin which matched

¹²⁹ A473-74, A512.

¹³⁰ A491.

¹³¹ *Id.*

¹³² *Id.*

¹³³ A499-501.

in every observable microscopic characteristic the known pubic hairs of Alan Bass.”¹³⁴

On cross-examination, Podolak admitted that “hair comparisons do not constitute a basis for absolute personal identification.”¹³⁵ He said he can tell the race of the person a hair came from or if the person “has mixed racial characteristics” but not the person’s sex.¹³⁶

Podolak further testified that microscopic hair comparisons do not constitute a basis for absolute personal identification, but over the years, “we have persisted in that hair comparisons are a very good means of identification, not a hundred percent, but a very good means of identification.”¹³⁷ Then Podolak, over defense counsel’s objection, discussed a then-recent Minnesota academic study where hair examiners matched “questioned” hair samples with “known” hair samples 100% of the time.¹³⁸ Podolak stated that there was “good reliability” or “a very good ability” for an examiner to take a “questioned” hair and match it to an individual criminal suspect.¹³⁹

¹³⁴ A502-03.

¹³⁵ A506.

¹³⁶ A506-07.

¹³⁷ A75.

¹³⁸ A75-78.

¹³⁹ A78.

Podolak conceded that he only concluded that the hairs “could have originated” from Bass and could not “positively state” that the hairs came from him.¹⁴⁰ Podolak similarly said that he could not say with a 100% surety that they originated from Bass.¹⁴¹ He acknowledged that hair comparisons “are not like fingerprints.”¹⁴² In addition, he admitted that it was possible to have two hair samples coming from the same person that would not be microscopically similar.¹⁴³

4. Direct Appeal¹⁴⁴

On direct appeal, Bass raised the issue of the admissibility of the Minnesota academic study and claimed that it was potentially misleading and inadmissible under *Frye v. United States*¹⁴⁵ and Delaware Rule of Evidence 403.¹⁴⁶ The Delaware Supreme Court found that *Frye* did not apply because Podolak’s testimony drew limited conclusions from the study and was not dependent upon it.¹⁴⁷ Citing Podolak’s concessions that hair comparisons were not faultless or perfectly accurate,

¹⁴⁰ A505-06.

¹⁴¹ A71.

¹⁴² A506.

¹⁴³ A511-12.

¹⁴⁴ *See Bass*, 2021 WL 5984262, at *12.

¹⁴⁵ 293 F. 1013 (D.C. 1923).

¹⁴⁶ A701-02.

¹⁴⁷ A703-04.

this Court found no fundamental error.¹⁴⁸

5. The USDOJ/FBI Review

The USDOJ/FBI review of Podolak’s trial testimony in 2015 found that his testimony exceeded the limits of science to the extent it stated or inferred “that the evidentiary hair could be associated with a specific individual to the exclusion of all others.”¹⁴⁹ Specifically, the review identified the following inappropriate statements:

- Podolak’s description of MHC analysis as trying to associate hairs with a particular individual;¹⁵⁰
- Podolak’s equating the arrangement of a hair’s characteristics to the features of a human face and his claim that the arrangement of these characteristics provides the hair with uniqueness and allows it to be associated with an individual;¹⁵¹
- Podolak’s discussion about the morphology of human head hairs as an “individual characteristic of identity” and that an analyst can match a crime scene hair to an individual;¹⁵² and
- Podolak’s indication that hairs can be unique to an individual.¹⁵³

¹⁴⁸ A702-04.

¹⁴⁹ A18, A23.

¹⁵⁰ *See* A28.

¹⁵¹ *See* A34-35.

¹⁵² *See* A78.

¹⁵³ *See* A80.

The USDOJ/FBI review did not disavow MHC analysis as a science, however. The FBI has advised that “[i]t’s important to note that microscopic hair comparison analysis is a valid scientific technique still conducted by the FBI Laboratory. The science of microscopic hair comparisons is not the subject of the review,” but rather to ensure that “FBI Laboratory examiner testimony regarding microscopic hair comparison met acceptable scientific standards.”¹⁵⁴ The FBI has “developed and implemented mitochondrial DNA (mtDNA) analysis in conjunction with probative hair analysis because it is the most effective protocol for the forensic examination of hair, and it provides a more meaningful association than either technique used alone.”¹⁵⁵

6. The 2019 MHC Analysis¹⁵⁶

The July 25, 2019 FBI Laboratory Report sets forth the results of the additional MHC testing.¹⁵⁷ The report provides that as to the A.S. hair samples, due to the limited nature of this hair, no conclusion could be reached as to whether or not Bass can be included as a possible source.¹⁵⁸

¹⁵⁴ <https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review> (last visited on September 1, 2022).

¹⁵⁵ *Id.*

¹⁵⁶ *See Bass*, 2021 WL 5984262, at *13.

¹⁵⁷ A1217-20.

¹⁵⁸ A1218. One of the two hairs samples was deemed not suitable for meaningful MHC analysis. *See id.*

As to the S.K. sample, a pubic hair that exhibited the characteristics of African ancestry in the sample was microscopically consistent with the hairs of the pubic sample from Bass. Accordingly, based on the FBI retest in 2019, Bass can be included as a possible source of this hair.¹⁵⁹

7. The mtDNA Testing¹⁶⁰

The FBI Laboratory Report, dated January 14, 2020, provides the results of the mtDNA testing.¹⁶¹ It states that, as to the A.S. hair samples, the mtDNA sequences obtained from the samples indicated the presence of a mixture of mtDNA from more than one individual. Because mixtures of mtDNA are not interpretable, no comparisons could be performed.¹⁶²

As to the S.K. hair sample, a partial mtDNA sequence was obtained, nucleotide positions 178-408, and a comparison analysis was able to be performed. The mtDNA sequences obtained from that sample and Bass were the same within the sequence range. There was a common DNA base at each position at which sequence data were obtained in the sample. If the samples differed at two or more nucleotide positions, Bass would have been excluded as coming from the same

¹⁵⁹ *Id.*

¹⁶⁰ *See Bass*, 2021 WL 5984262, at *13.

¹⁶¹ A1173-75.

¹⁶² A1173-75.

source. Bass was not excluded, and, as such, he cannot be excluded as the source of the sample.¹⁶³

It is possible for up to 1 out of every 135 African-Americans to have the same mtDNA sequence obtained from the sample and from Bass. Thus, the upper bound frequency estimate of a match in the African-American population is less than a 1% probability (0.74%).¹⁶⁴

¹⁶³ *Id.*

¹⁶⁴ *Id.*

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING BASS POSTCONVICTION RELIEF.

Question Presented

Whether the Superior Court abused its discretion by denying Bass postconviction relief on his untimely and successive Rule 61 motion alleging that FBI Special Agent Podolak's testimony violated his due process rights.

Standard and Scope of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.¹⁶⁵ This Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law were erroneous.¹⁶⁶ This Court ordinarily reviews claims alleging the infringement of a constitutionally protected right *de novo*.¹⁶⁷

Merits of the Argument

In the Superior Court, Bass claimed that he was entitled to postconviction relief because Podolak's false testimony at trial violated his due process rights.¹⁶⁸ In addressing Rule 61's procedural bars, Bass argued that his claim "meets the *Purnell*

¹⁶⁵ *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

¹⁶⁶ *Id.*; *Outten v. State*, 720 A.2d 547, 551 (Del. 1998); *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

¹⁶⁷ *Keyser v. State*, 893 A.2d 956, 961 (Del. 2006); *Capano v. State*, 781 A.2d 556, 607 (Del. 2001); *Seward v. State*, 723 A.2d 365, 375 (Del. 1999).

¹⁶⁸ A1306.

[v. *State*] rubric for an actual innocence claim under Rule 61(d)(2).”¹⁶⁹ Bass contended that his evidence is new, is not cumulative or impeaching, and would change the outcome of a new trial.¹⁷⁰ Bass asserted that Podolak’s overstated testimony tied the State’s evidence together because “[a]ll the identifications were flawed, often by inappropriate disclosures by the [prosecution] and police personnel,” and the evidence placing him at the locations of the crimes came from Schoell, who testified under an immunity agreement and “had nothing to lose and everything to gain.”¹⁷¹

In recommending the denial of postconviction relief, the Superior Court Commissioner found that Bass’s seventh Rule 61 motion was barred as an untimely and successive motion and that he has not provided new evidence demonstrating his actual innocence.¹⁷² In adopting the Commissioner’s report and recommendation, the Superior Court agreed with these determinations.¹⁷³ The Superior Court concluded that, although Bass’s evidence is new and neither cumulative nor impeaching under *Purnell*,¹⁷⁴ it is not persuasive because the result of a new trial

¹⁶⁹ A1308 (citing *Purnell v. State*, 254 A.3d 1053 (Del. 2021)).

¹⁷⁰ A1308-09.

¹⁷¹ A1307.

¹⁷² *Bass*, 2021 WL 5984262, at *1

¹⁷³ *Bass*, 2022 WL 2093956, at *8, 12.

¹⁷⁴ *Id.* at *8-9.

would not probably change.¹⁷⁵ The Superior Court found that Podolak tempered his overstatements with admissions about the limitations of MHC analysis and that Bass has not established that someone else committed the attacks.¹⁷⁶ The result of a new trial would not change because of similarities in the attacks and evidence of other criminal conduct, including through Schoell's testimony.¹⁷⁷ Nor did Bass's challenges to the identifications of him as the assailant show that the result would be different without Podolak's overstatements.¹⁷⁸

On appeal, Bass contends that the Superior Court erred in finding that Podolak's improper testimony was limited.¹⁷⁹ Bass claims that the Superior Court erroneously concluded that the result of any new trial would not change because the State's case was otherwise based on flawed identifications.¹⁸⁰ Bass alleges that the Superior Court misread *Purnell* by requiring him to establish who committed the crimes.¹⁸¹ He asserts that he has met the actual innocence standard for overcoming his procedural default under Rule 61(d)(2).¹⁸² His arguments are unavailing. The

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *9-10.

¹⁷⁷ *Id.* at *10-12.

¹⁷⁸ *Id.* at *11-12.

¹⁷⁹ Opening Br. at 36.

¹⁸⁰ *Id.* at 40.

¹⁸¹ *Id.* at 44-45.

¹⁸² *Id.* at 45-46.

Superior Court did not abuse its discretion by denying Bass postconviction relief on his procedurally barred motion.¹⁸³

A. Procedural Bars to Relief

In any motion for postconviction relief, this Court addresses the procedural bars under Criminal Rule 61 before turning to the merits.¹⁸⁴ Rule 61(i)(1) prohibits this Court from considering a motion for postconviction relief unless it is filed within the applicable time limitation.¹⁸⁵ Rule 61(i)(2) bars the filing of a second or successive motion unless the requirements of Rule 61(d)(2)(i) or (ii) are satisfied.¹⁸⁶ Rule 61(d)(2) requires the summary dismissal of a second or subsequent motion unless the movant was convicted after trial, and, under Rule 61(d)(2)(i), the movant “pleads with particularity that new evidence exists that creates a strong inference” of actual innocence, or, under Rule 61(d)(2)(ii), “that a new rule of constitutional

¹⁸³ Bass also argued in the Superior Court that his due process rights were violated because the State dismissed charges in a separate case against a different defendant that involved errors with the FBI’s hair and fiber expert testimony. A1301-02, A1306. The Superior Court found that Bass’s claim was unsupported. *See Bass*, 2022 WL 2093956, at *13-14. Bass has waived appellate review of the claim by failing to present it in his opening brief. Supr. Ct. R. 14(b)(vi)(A)(3); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) (“The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal.”).

¹⁸⁴ *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996).

¹⁸⁵ Super. Ct. Crim. R. 61(i)(1).

¹⁸⁶ Super. Ct. Crim. R. 61(i)(2).

law, made retroactive to cases on collateral review” applies to movant’s case.¹⁸⁷ Rule 61(i)(3) bars claims not “asserted in the proceedings leading to the judgment of conviction,”¹⁸⁸ while Rule 61(i)(4) bars formerly adjudicated claims.¹⁸⁹ Rule 61(i)(5) provides that any claim barred by Rule 61(i)(1) through (i)(4) may nonetheless be considered if the claim is jurisdictional or otherwise satisfies the pleading requirements of (d)(2)(i) or (d)(2)(ii).¹⁹⁰

Here, the Superior Court noted that Bass’s motion is “his seventh Rule 61 motion filed over 30 years after his conviction became final.”¹⁹¹ It is therefore subject to summary dismissal as an untimely or successive postconviction motion unless Bass satisfies the pleading requirements of Rule 61(d)(2).¹⁹² Bass does not argue that a new rule of constitutional law applies to him. Accordingly, he must plead with particularity that new evidence exists creating a strong inference of his actual innocence—a burden he fails to meet.

¹⁸⁷ R. 61(i)(2), (d)(2).

¹⁸⁸ Super. Ct. Crim. R. 61(i)(3).

¹⁸⁹ Super. Ct. Crim. R. 61(i)(4).

¹⁹⁰ Super. Ct. Crim. R. 61(i)(5).

¹⁹¹ *Bass*, 2021 WL 5984262, at *13.

¹⁹² R. 61(d)(2).

B. Bass has not met his heavy burden under Rule 61(d)(2).

In denying Bass’s Rule 61 motion as untimely and successive, the Superior Court found that Bass did not meet his “heavy burden to satisfy the actual innocence test.”¹⁹³ The Superior Court appropriately relied on *Purnell* in reaching this determination.¹⁹⁴ Contrary to Bass’s claims, he has not met the standard under *Purnell* and, as the Superior Court properly concluded, has not overcome his procedural default under Rule 61(d)(2).

1. *Purnell*

The actual-innocence inquiry is not an independent basis for relief but serves as a potential gateway to reaching the merits of an underlying claim that is otherwise procedurally barred under Rule 61.¹⁹⁵ In *Purnell*, this Court provided the framework for demonstrating actual innocence under Rule 61. A defendant must “establish that his evidence is (1) new and (2) sufficiently persuasive.”¹⁹⁶ To answer those questions, this Court adopted a three-part test from *Lloyd v. State*,¹⁹⁷ which set forth the standard for obtaining a new trial based on purported new evidence of actual

¹⁹³ *Bass*, 2022 WL 2093956, at *8, 14.

¹⁹⁴ *Id.* at *8-12.

¹⁹⁵ *Purnell*, 254 A.3d at 1096.

¹⁹⁶ *Id.* at 1095.

¹⁹⁷ 534 A.2d 1262 (Del. 1987).

innocence.¹⁹⁸ *Lloyd*'s test requires a defendant to show: "(1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial and could not have been discovered before by the exercise of due diligence; and (3) that is not merely cumulative or impeaching."¹⁹⁹ The second part of the test relates to the newness of the evidence, while the first and third parts concern the persuasiveness of the evidence.²⁰⁰ *Purnell* determined that "[s]atisfying the actual innocence test is, by design, a heavy burden, and such meritorious claims are exceedingly rare."²⁰¹ In other words, findings of actual innocence are reserved for the "rare" or "extraordinary" case.²⁰²

¹⁹⁸ *Purnell*, 254 A.3d at 1097.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1097.

²⁰¹ *Id.* at 1100.

²⁰² *Id.*

2. Application of *Purnell*.

In applying *Purnell* to Bass’s Rule 61 motion, the Superior Court concluded that the USDOJ/FBI’s admission that Podolak exceeded the limits of science is new evidence because “clearly [it] could not have been discovered by [Bass] before trial.”²⁰³ The court also found that the evidence is neither cumulative nor impeaching.²⁰⁴ The State does not dispute the Superior Court’s determinations regarding these factors.

But Bass has not sustained his burden of showing that the new evidence would probably change the result if a new trial were granted. As the Superior Court properly found, “the expert’s overstatements were effectively limited through cross-examination, the new evidence does not exonerate [Bass], and the remaining evidence sufficiently supports [Bass’s] conviction.”²⁰⁵ Bass’s case is nothing like *Purnell*, and it is certainly not one of those “rare” or extraordinary cases that the *Purnell* standard contemplates.

a. Podolak’s testimony contained limiting statements.

Bass contends that the Superior Court “minimize[d] the significant impact of Podolak’s false testimony on the jury” because “[i]t focuse[d] on a few snippets of

²⁰³ *Bass*, 2022 WL 2093956, at *8.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at *9.

cross-examination as demonstrative of the limitations on Podolak's testimony."²⁰⁶

Bass argues that Podolak's limiting statements on cross-examination were insufficient because he subsequently testified on redirect examination about how Bass's hairs are unique, described a Minnesota study demonstrating that the FBI's technique was 100% successful, and bragged about his skills as an examiner.²⁰⁷ Yet, this Court has already made findings in this case consistent with the Superior Court's conclusions.

In affirming Bass's convictions on direct appeal, this Court found that Podolak's testimony about the Minnesota study did not amount to fundamental error, and, in reaching that conclusion, this Court relied on Podolak's concessions that MHC comparisons were not faultless.²⁰⁸ Moreover, it was known at the time that MHC analysis had limited capability to associate hairs with specific individuals. In 1966, this Court "acknowledged the fact that hair comparisons are not as positive in identification as are fingerprints."²⁰⁹ Nonetheless, this Court subsequently concluded in 1974 that testimony about hair specimens "exhibit[ing] the same microscopic characteristics" as those belonging to a defendant is admissible and

²⁰⁶ Opening Br. at 36.

²⁰⁷ *Id.* at 38-40.

²⁰⁸ A703-04.

²⁰⁹ *Thompson v. State*, 539 A.2d 1052, 1058 (Del. 1988) (citing *Parson v. State*, 222 A.2d 326, 331 (1966)).

rejected claims that such statements amount to speculation or conjecture.²¹⁰ Instead, this Court found that it is within the jury’s province to decide the weight to afford this evidence.²¹¹ Nor did the USDOJ/FBI review conclude that, standing alone, testimony about the Minnesota study was improper.

In denying Bass’s Rule 61 motion, the Superior Court reasonably determined that Podolak’s “overstatements were effectively limited through cross-examination.”²¹² The court noted that Podolak tempered his testimony on cross-examination by admitting that MHC analysis is not like fingerprints and that it is not 100 percent accurate.²¹³ Podolak conceded that MHC analysis is not a basis for “absolute personal identification” and that it cannot identify if a hair originated from a male or female or the person’s age.²¹⁴ Podolak acknowledged that the hair samples only “could have originated” from S.K., A.S., or Bass, and he could not “say with a hundred percent surety that they originated from those individuals.”²¹⁵ After Podolak discussed the Minnesota study on redirect examination, on further cross-examination, Podolak admitted that “you can have similar hairs coming from

²¹⁰ See *Brown v. State*, 329 A.2d 153, 154 (Del. 1974).

²¹¹ See *id.*

²¹² *Bass*, 2022 WL 2093956, at *9.

²¹³ See *id.* (citing A67).

²¹⁴ See *id.* (citing A67); A68-69.

²¹⁵ See *Bass*, 2022 WL 2093956, at *9 (citing A71).

different people” and “you could have two samples coming from the same head and they would not be microscopically similar.”²¹⁶ The Superior Court reasonably determined that “[t]he jury therefore heard that hair comparison analysis was neither one hundred percent accurate nor absolute for personal identification” and that “[c]onsidered in its totality, the impropriety of the expert’s testimony lacks the requisite force to impact the State’s case against [Bass].”²¹⁷

b. Bass has not shown that a person other than him committed the attacks.

Bass contends that the Superior Court erroneously placed the burden on him to specifically prove the perpetrator’s identity.²¹⁸ Bass’s claim misconstrues the standard under *Purnell* applied by the Superior Court: the new evidence must show that someone other than the movant committed the crime, not specifically identify that other person. The new evidence here did not exclude Bass, nor did it newly suggest a different suspect.

As an initial matter, the USDOJ/FBI review did not invalidate MHC analysis, and it is not a defunct science.²¹⁹ The FBI still conducts MHC analysis but uses it

²¹⁶ A74-80.

²¹⁷ *Bass*, 2022 WL 2093956, at *9.

²¹⁸ Opening Br. at 44.

²¹⁹ *See Bass*, 2021 WL 5984262, at *14.

in conjunction with mtDNA testing as the most effective protocol for forensically examining hair evidence.²²⁰

The Superior Court reasonably concluded that the 2019 MHC analysis failed to exonerate Bass. The result of the 2019 MHC analysis regarding the hair evidence in A.S.’s attack, as the court noted, fell short of exoneration: it simply reflected that “no conclusions could be drawn” from those samples.²²¹ More importantly, the analysis found that “Bass was still included as a source of the pubic hair” in S.K.’s attack.²²² The partial mtDNA sequences obtained from the hair from S.K.’s attack and Bass were “the same within the sequence range obtained in common to the samples,” and Bass could not be excluded as the source of the hair.²²³ To be sure, mtDNA testing provides less individualized information than nuclear DNA testing, and it cannot produce a unique identification. Yet, statistics can be used to quantify the probability of people sharing the same partial mtDNA sequence.

Here, at most, 0.74% of the African-American population has the same partial mtDNA sequence. Thus, there is less than a 1% probability of finding someone with the same partial sequence in the African-American population. The mtDNA testing

²²⁰ <https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review> (last visited on September 1, 2022).

²²¹ *Bass*, 2021 WL 5984262, at *15.

²²² *Id.*

²²³ A1173.

corroborated both S.K.'s identification of Bass as the perpetrator and the 2019 MHC analysis. Courts have relied on mtDNA typing with other evidence presented at trial to sustain defendants' convictions.²²⁴ Nevertheless, the Superior Court appropriately determined that Bass's actual innocence claim is unsupported based on the USDOJ/FBI review and the subsequent forensic testing in this case.

c. The remaining relevant evidence sufficiently supports Bass's convictions.

Even with the new evidence, or if Podolak's erroneous testimony was excluded entirely, the evidence establishes Bass as the assailant, and the result of the trial would not probably change. Bass concedes that "it is certainly true that certain elements of the crimes established a *modus operandi*," but he also claims that this "only established the same person very likely committed all three attacks."²²⁵ Bass argues that Podolak's inadmissible testimony bolstered a case otherwise supported

²²⁴ See, e.g., *Vaughn v. State*, 646 S.E.2d 212, 214 (Ga. 2007) (convictions sustained based on defendant's admission that he had taken victim to dinner on the night of her murder and mtDNA evidence showing that victim could not be excluded as contributor of hair obtained from the defendant's vehicle's shock absorber assembly despite appearance of more than one mtDNA type in individual); *Adams v. State*, 794 So.2d 1049, 1059 (Miss. Ct. App. 2001) (upholding conviction because "[t]he jury heard the details of the attacks, testimony of officers placing Adams in the vicinity of the crimes, DNA evidence linking Adams to the rape, and the identification by one of Adams' victims); see also *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) (This Court can affirm on grounds different than those articulated by the Superior Court).

²²⁵ Opening Br. at 41.

by flawed identifications because “[e]very identification in the case was weak, contradictory, or induced by police or DOJ personnel.”²²⁶ Bass’s assertions are unavailing—the evidence does establish his identity.

i. Similarities in the Attacks

The attacks share multiple similarities, including in their *modus operandi*. Notably, in affirming Bass’s convictions on direct appeal, this Court highlighted some of the similarities.²²⁷ In denying Bass’s seventh Rule 61 motion, the Superior Court likewise identified numerous common features of the attacks. The court concluded that “[a]ll three victims were young women working in offices in the North Wilmington and Claymont areas,” and the “attacks were temporarily and geographically close to one another” and occurred only a few miles from where Bass was residing with Schoell.²²⁸ In each attack, the perpetrator was a black man who was well-dressed and could blend into an office environment.²²⁹ “In all [of the attacks], the assailant’s description is the same: a male, between 20 to 30 years old who was thin, black, and approximately 5’8” to 6’0” in stature.”²³⁰ At the time of his trial, Bass was 5’11” and 32 years old, and he weighed 20 pounds more than his

²²⁶ *Id.* at 43.

²²⁷ *See* A700-01.

²²⁸ *Bass*, 2022 WL 2093956, at *10.

²²⁹ *Bass*, 2021 WL 5984262, at *16.

²³⁰ *Bass*, 2022 WL 2093956, at *11.

arrest weight of 152 pounds.²³¹ Further, the victims also described their attacker as having an older or deep voice.²³²

The *modus operandi* of the attacks demonstrate that the same person (Bass) committed them. The victims were attacked while alone in their offices,²³³ and the perpetrator used force to subdue each victim by either shoving a screwdriver into her side (S.K.'s and A.S.'s attacks) or putting his hand over the victim's mouth (S.M.'s attack).²³⁴ The assailant either robbed the victims by taking money or jewelry from them or attempted to rob the victim (S.M. had no money).²³⁵ The perpetrator ordered each victim not to look at him or stayed behind her so she could not see him.²³⁶ In kidnapping the victims, the perpetrator forcibly removed each victim and took her from the place of the initial encounter to a secluded area to be physically or sexually assaulted.²³⁷ Although he raped two of the three victims (S.K. and A.S.), the evidence suggests that the third victim (S.M.) was not sexually assaulted because she lost control of her bladder.²³⁸

²³¹ *Id.*

²³² A187, A265, A376.

²³³ *Bass*, 2021 WL 5984262, at *16.

²³⁴ *Id.* at *16; *Bass*, 2022 WL 2093956, at *11.

²³⁵ *Bass*, 2021 WL 5984262, at *16.

²³⁶ *Id.*

²³⁷ *Bass*, 2022 WL 2093956, at *11.

²³⁸ *Id.*; *Bass*, 2021 WL 5984262, at *16.

The Superior Court also reasonably concluded that “[t]he jury was free to consider the independent culpability of Bass as to each assault or whether the series of assaults were committed by one assailant.”²³⁹ In the attacks on S.K. and A.S., the assailant vaginally raped them but could not maintain an erection.²⁴⁰ During those attacks, the perpetrator wore gray loafers, tied the victims’ hands and legs with materials he found in their offices, and gagged them with sweaters.²⁴¹

ii. Other Crimes

Evidence of Bass’s check stealing also linked him to the attacks. Bass’s association with Schoell and items stolen from the exact locations where the attacks occurred created circumstantial evidence of his guilt. Checks were stolen from A.S.’s and S.M.’s workplaces before their attacks, and Schoell testified that Bass stole the checks and gave them to her to cash.²⁴² A dictation machine that was stolen

²³⁹ *Bass*, 2022 WL 2093956, at *11.

²⁴⁰ *Id.*

²⁴¹ *Id.*; *Bass*, 2021 WL 5984262, at *11.

²⁴² A344-45, A347-52, A383.

from A.S.'s workplace had similar features to the one police found in Schoell's vehicle.²⁴³

iii. Identifications

The witnesses' identifications also demonstrated that Bass was the assailant. Bass argues that "Podolak's egregiously overstated testimony about the certainty of his identification of Mr. Bass shored up a case that was otherwise based on flawed identifications."²⁴⁴ Bass contends that the identifications were flawed because, among other reasons, they were influenced by the State's improper statements.²⁴⁵

Bass is incorrect. The Superior Court properly concluded that Bass's challenges to the identifications were insufficient to disturb the jury's verdict.²⁴⁶ The Superior Court reasonably determined that the identifications were not suggestive and that the defense had explored the issues with the identifications through cross-examination.²⁴⁷ Among other things, the detective who conducted the photo lineups regarding the attacks on A.S. and S.M. "acknowledged that it would be improper for an officer to indicate who a suspect is before going through a photo lineup because

²⁴³ A312-13, A337, A443-44.

²⁴⁴ Opening Br. at 40.

²⁴⁵ *Id.* at 41-43.

²⁴⁶ *Bass*, 2022 WL 2093956, at *12.

²⁴⁷ *See id.* at *11-12.

the officers do not want to have any influence on the person's selection."²⁴⁸ As explained below, Bass's contentions about the identifications do not show that the outcome of a new trial would probably change.

1) S.K.'s Attack

While S.K. did not identify Bass as her assailant during the police's investigation, she unexpectedly identified him in the courtroom, stating that she had no doubt that he was the man who had attacked her.²⁴⁹ Bass argues that S.K.'s identification was suggestive because the prosecution told S.K. it had evidence that Bass had committed her attack, and he would be at one of the tables in the front of the courtroom.²⁵⁰

Bass's assertion is unavailing. The defense cross-examined S.K. about her ability to identify Bass as the perpetrator, and S.K. indicated that the prosecution had not influenced her identification.²⁵¹ S.K. testified that she "didn't know if [she] was going to walk in and it was going to look exactly like him."²⁵² On redirect examination, S.K. explained about her inability to identify Bass from the police's photos. She said that she did not "think photographs really show it all" and that

²⁴⁸ *Id.* at *12 (citing A319).

²⁴⁹ A155, A170, A193.

²⁵⁰ Opening Br. at 41.

²⁵¹ *See* A170-72.

²⁵² A171.

seeing Bass in person again enabled her to identify him as the assailant.²⁵³ S.K. unequivocally denied that the prosecution had influenced her identification.²⁵⁴ The Superior Court concluded that “[i]t is reasonable for the State to represent to the victim(s) that evidence at trial is expected to support a conviction against the very person sitting at the defense table.”²⁵⁵ The jury was free to accept or reject S.K.’s explanation in making credibility determinations about the witnesses in the case.²⁵⁶ The subsequent MHC analysis and mtDNA testing linking Bass to the attack bolsters S.K.’s identification of him as the perpetrator.

2) A.S.’s Attack

Although Bass contends that A.S. never “positively” identified him as her attacker in any photo lineup or in court, she identified him in a second photo lineup as the one who looked the most like her attacker.²⁵⁷ Bass also argues that A.S.’s identification testimony was flawed in other ways. Bass contends that Bass’s photo was the only one that remained in the second photo lineup, although A.S. had suggested that Bass and someone else resembled her attacker in the first photo

²⁵³ A174.

²⁵⁴ *Id.*

²⁵⁵ *Bass*, 2022 WL 2093956, at *11.

²⁵⁶ *See id.*

²⁵⁷ Opening Br. at 13; A309-11.

lineup.²⁵⁸ Bass contends that the police suggested to A.S. that he was the perpetrator.²⁵⁹ He argues that “[t]he prosecutor tried to get A.S. to identify a pair of shoes later seized from Mr. Bass as the shoes he was wearing during A.S.’s attack,” but she was unable to confirm that he had worn the gray shoes seized by police.²⁶⁰

Bass’s arguments are meritless. On direct appeal, this Court rejected Bass’s claim that the second photo lineup was unduly suggestive because the police had removed the one individual, other than Bass, whom A.S. chose as resembling her attacker in the first photo lineup.²⁶¹ In denying Bass’s Rule 61 motion, the Superior Court noted that the detective’s statement to A.S. indicating that Bass had committed the attack came after she said that Bass most resembled her assailant.²⁶² Moreover, A.S. said that no one had positively told her that Bass would be in the courtroom at trial.²⁶³ She testified that Bass resembled the person who had attacked her, but he seemed heavier (a police officer testified that Bass had gained weight by the time of trial).²⁶⁴ The defense also extensively cross-examined A.S. about her inability to

²⁵⁸ Opening Br. at 41.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 14.

²⁶¹ A706-08.

²⁶² *Bass*, 2022 WL 2093956, at *12 (citing A318-19).

²⁶³ A250.

²⁶⁴ A249, A325-26.

positively identify Bass as her attacker and whether the police had suggested to her that Bass had committed the crimes.²⁶⁵ As the Superior Court noted, “[t]he most the jury heard is that [Bass] resembled her attacker.”²⁶⁶

As for the shoes, the State simply asked A.S. on direct examination to “tell [it] whether or not those particular shoes resemble the shoes [she] recall the attacker wearing on the morning of July tenth.”²⁶⁷ A.S. described how the shoes were different, but acknowledged that their color was the same and unusual.²⁶⁸ The defense also cross-examined A.S. about her inability to identify the shoes as belonging to her attacker.²⁶⁹ A.S. stated that the gray shoes were “very similar except for the texture, as [she] remember[ed] it.”²⁷⁰ Even if A.S. was unable to link the specific pair of shoes to Bass, her testimony corroborated that her assailant dressed like an office worker when he committed his crimes and that Bass wore a similar shoe style.

²⁶⁵ A257, A261, A264.

²⁶⁶ *Bass*, 2022 WL 2093956, at *12.

²⁶⁷ A244.

²⁶⁸ A244-45.

²⁶⁹ A267-68.

²⁷⁰ A268.

3) S.M.'s Attack

Contrary to Bass's arguments, the identifications in this attack were not suggestive. S.M. never identified Bass as her assailant. However, her testimony corroborated Bass's method for committing these crimes based on her description of her attack and because checks had been previously stolen from her office.

As for Shaw's identification, she confidently identified Bass from a police photo lineup by recognizing Bass as the man she saw on the morning of S.M.'s attack as soon as she saw his photo.²⁷¹ Shaw subsequently identified Bass in court without reservation.²⁷² Bass suggests that her in-court identification was tainted because the detective disclosed to her that Bass was the suspect.²⁷³ However, as the Superior Court noted, the detective's disclosure came after she had already positively identified Bass in the lineup.²⁷⁴ Moreover, Shaw's descriptions of the individual's height, build (she said the male weighed only about 130 pounds), and age were similar to those provided by other witnesses in the attacks.²⁷⁵ The Superior Court reasonably determined that "[a]ny improper statements made by [the detective] are

²⁷¹ A449.

²⁷² A433.

²⁷³ Opening Br. at 42; A433.

²⁷⁴ *Bass*, 2022 WL 2093956, at *12.

²⁷⁵ A430.

insufficient to diminish the weight of her detailed testimony or destroy her unequivocal identification of the defendant.”²⁷⁶

Considering Reynolds’ identification, he selected Bass from a police photo lineup as the person he possibly saw in the building’s men’s room shortly after S.M.’s attack based on his forehead.²⁷⁷ Bass insinuates that the lineup was suggestive because the detective who conducted the lineup testified that he believed Reynolds was under the impression that the suspect’s photo was included in the lineup.²⁷⁸ Bass asserts that Reynolds also inaccurately identified the shoes worn by the perpetrator.²⁷⁹ According to Bass, Reynolds testified that he saw the individual in the bathroom stall wearing gray *suede* loafers with a low heel but also identified the shoes that police seized from Bass—gray *non-suede* loafers with a regular heel—as the same ones he saw that day.²⁸⁰

Bass’s assertions do not undermine Reynolds’ identification. The detective did not elaborate on why Reynolds believed that the suspect would have been included in the photo lineup, and he did not “recall if [he] actually said that [the

²⁷⁶ Bass, 2022 WL 2093956, at *12.

²⁷⁷ A453.

²⁷⁸ Opening Br. at 17.

²⁷⁹ *Id.* at 17-18.

²⁸⁰ Opening Br. at 17-18; A391, A394.

suspect was in the lineup].”²⁸¹ Regardless, the detective denied telling Reynolds that Bass was the suspect or that there was a photo of him in the lineup.²⁸² On cross-examination, Reynolds clarified that the shoes police seized were “very close” to the ones he saw the man wearing in the bathroom.²⁸³ Reynolds’ statements about the shoes comprised only part of his identification testimony. At the very least, this testimony corroborated that Bass dressed professionally when he committed his attacks and his preference for a particular shoe style.

In sum, the Superior Court reasonably determined that the record contained numerous challenges to the identifications through cross-examination.²⁸⁴ Even still, “[t]he State established guilt independently as to each victim and further presented the similarities that connected the series of these assaults to [Bass].”²⁸⁵ Thus, Bass’s arguments regarding the identifications are insufficient to demonstrate that the result of any new trial would probably change in view of Podolak’s overstatements.

²⁸¹ A452.

²⁸² *Id.*

²⁸³ A396.

²⁸⁴ *Bass*, 2022 WL 2093956, at *12.

²⁸⁵ *Id.*

d. Courts have declined to grant relief based on the USDOJ/FBI review.

Bass cites various cases in which courts have granted relief post-trial due to the FBI's errors with MHC analysis.²⁸⁶ However, Bass overlooks decisions where courts have declined to grant relief based on similar errors identified by the USDOJ/FBI review.

In *State v. Crump*, the Superior Court denied the defendant's successive Rule 61 motion after the USDOJ admitted that the FBI's hair and fiber expert had committed errors in his testimony at the defendant's trial.²⁸⁷ Although the expert conceded that MHC analysis is not a basis for positive personal identification, he also testified that hairs found on the victim's jacket and hat "microscopically matched" hairs belonging to the defendant.²⁸⁸ Subsequent DNA testing positively identified the defendant as the contributor of DNA found on the victim's pubic comb.²⁸⁹ The Superior Court concluded that the errors in the expert's testimony did not create a strong inference of the defendant's actual innocence.²⁹⁰ The court further determined that the outcome of a retrial would not be different because it

²⁸⁶ Opening Br. at 30-35.

²⁸⁷ 2017 WL 6403510, at *1-2 (Del Super. Ct. Dec. 14, 2017).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at *2.

²⁹⁰ *Id.*

would include the results of the DNA testing.²⁹¹ This Court affirmed the Superior Court on the basis of its “well-reasoned decision,” and the United States Supreme Court denied certiorari.²⁹² *Crump* illustrates that similar errors in expert testimony do not automatically result in the defendant overcoming Rule 61’s procedural bars and obtaining postconviction relief.

In *Duckett v. State*, the Florida Supreme Court upheld the denial of postconviction relief and concluded that the errors identified by the USDOJ/FBI review did “not give rise to a reasonable doubt as to [the defendant’s] culpability.”²⁹³ The court determined that “the full context of [the expert’s] testimony indicates that [the expert] also accurately represented the reliability of hair analysis by testifying that hair analysis is not on a par with fingerprints for purposes of identification and expressly and correctly stated that hair analysis cannot support a conclusion that a hair came from a single person to the exclusion of anyone else.”²⁹⁴ The court noted that the defense had extensively challenged the credibility of witness testimony regarding the MHC analysis.²⁹⁵ The court determined that MHC analysis has not

²⁹¹ *Id.*

²⁹² *Crump v. State*, 2018 WL 3769261, at *1 (Del. Aug. 7, 2018), *cert. denied*, *Crump v. Delaware*, 139 S. Ct. 1400 (2019).

²⁹³ *Duckett v. State*, 231 So.3d 393, 400 (Fla. 2017).

²⁹⁴ *Id.* at 399 (internal quotation and citations omitted).

²⁹⁵ *Id.*

been discredited as a scientific field and that “the hair evidence was by no means the only evidence supporting the conviction in this case.”²⁹⁶ Similarly, Podolak’s overstatements did not amount to exculpatory evidence undermining the fact that there are microscopic similarities in the hair evidence or that appropriate MHC analysis statements are admissible at trial. Podolak acknowledged the limits of MHC analysis, and defense counsel extensively cross-examined him about those limits.

In *Pitts v. State*, the Arkansas Supreme Court upheld the denial of a writ of error *coram nobis* based on the government’s repudiation of the FBI agent’s testimony regarding MHC analysis because it partly exceeded the limits of science.²⁹⁷ The court found that the defendant had not shown a reasonable probability that he would have been acquitted at trial if the repudiation had been previously disclosed to the defense.²⁹⁸ The court concluded that “[a]fter [the agent’s] testimony portrayed a definitive connection between Pitts and the victim, [defense] counsel brought out on cross-examination that [the agent] had admitted in his report that there were limitations on the strength of that connection in that the analysis could not be used as the basis for identification or even to simply determine

²⁹⁶ *Id.* at 399-400.

²⁹⁷ 591 S.W.3d 786, 789 (Ark. 2020).

²⁹⁸ *Id.* at 791-92.

gender.”²⁹⁹ The court described other circumstantial evidence linking the defendant to the crimes other than physical evidence from the scene.³⁰⁰ In Bass’s case, Podolak’s testimony contained similar limiting statements, and the State presented a strong case linking Bass to the crimes for which he was convicted through direct and circumstantial evidence.

To summarize, the Superior Court properly concluded that Bass has failed to satisfy the actual innocence test.³⁰¹ Even if Bass’s evidence is new, he has not demonstrated that it is persuasive under *Purnell*. This determination is supported by decisions from this Court and other jurisdictions that have declined to grant relief regarding similar errors with expert testimony. Because Bass has failed to plead with particularity that new evidence exists creating a strong inference of his actual innocence under Rule 61(d)(2), this Court need not reach the merits of his due process claim.

C. Bass’s due process claim about Podolak’s testimony is meritless.

Even if this Court were to reach the merits of Bass’s due process claim, his claim fails because Bass has not demonstrated that the prosecution knowingly used false testimony or “any reasonable likelihood that the false testimony could have

²⁹⁹ *Id.* at 793.

³⁰⁰ *Id.*

³⁰¹ *Bass*, 2022 WL 2093956, at *12.

affected the judgment of the jury.”³⁰² The outcome of Bass’s trial would not have been different without Podolak’s overstatements. The MHC analysis corroborated other substantial evidence of Bass’s guilt based on the similarities in the attacks, including their *modus operandi*; evidence of his other crimes; and witness identifications. The USDOJ/FBI review did not exculpate Bass or eliminate the fact that there exist similarities in hair evidence from some of the attacks and Bass. Bass’s due process claim is therefore meritless.

³⁰² *Swan v. State*, 248 A.3d 839, 878 (Del. 2021) (due process violated where State knowingly uses false testimony and if there is “any reasonable likelihood that the false testimony could have affected the judgment of the jury”) (citing *Jenkins v. State*, 305 A.2d 610, 616 (Del. 1973)).

CONCLUSION

Bass's arguments are unavailing, and the Superior Court properly denied his seventh Rule 61 motion. The State respectfully requests that this Court affirm the judgment below without further proceedings.

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Dated: September 12, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN BASS,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 218, 2022
)
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

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DATE: September 12, 2022