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Case Number 113,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT MARK PURNELL'S OPENING BRIEF

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Dated: June 1, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

Mark Purnell and co-defendant, Ronald Harris, were indicted on April 30, 2007, for, among other things, on one count of first degree murder.[1] On April 7, 2008, Harris pled guilty.[2] On April 25, 2008, a New Castle County jury convicted Purnell of the lesser-included offense of second degree murder and the remaining counts.[3] On October 17, 2008, the Honorable M. Jane Brady sentenced Purnell to an aggregate of 77 years of level V incarceration (21 Mandatory), suspended after 45 years for decreasing levels of supervision.[4] This Court affirmed Purnell's convictions on direct appeal.[5]

Purnell filed a *pro se* motion for post-conviction relief under Superior Court Criminal Rule 61 (Rule 61) on March 25, 2010, which the Superior Court denied on May 31, 2013.[6] On appeal, this Court affirmed the denial of Purnell's Rule 61 on November 21, 2014.[7]

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[1] A21
[2] A27
[3] A8
[4] A390
[5] *Purnell v. State*, 979 A.2d 1102 (Del. 2009)
[6] *State v. Purnell*, 2013 WL 4017401 (Del. Super. Ct. May 31, 2013)
[7] *Purnell v. State*, 106 A.3d 337 (Del. 2014)

On May 14, 2018, Purnell filed a second Rule 61 motion in the Superior Court.[8] The State responded on November 19, 2018.[9] On March 8, 2019, Purnell filed a reply.[10] The Court held a procedural hearing on September 4, 2019.[11] Purnell filed a post-procedural hearing brief on October 4, 2019,[12] the State responded on November 4, 2019,[13] and Purnell replied on November 19, 2019.[14] On February 19, 2020, the Superior Court summarily dismissed the motion.[15]

Purnell filed a timely notice of appeal of the court's dismissal and this is his opening brief.

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[8] A399
[9] A1408
[10] A1594
[11] A1626
[12] A1712
[13] A1827
[14] A2101
[15] A2118

SUMMARY OF THE ARGUMENTS

1. The Superior Court erred when it ruled that Purnell failed to plead with particularity new evidence creating a strong inference that he is innocent of the underlying conviction.

2. The Superior Court erred in applying Rule 61 (eff. June 2014) to Purnell's postconviction motion and thereby dismissing Purnell's potentially meritorious claims.

STATEMENT OF FACTS[16]

Angela Rayen (Rayne), a $500 per day crack addict, was under the influence the night she observed Tameka and Ernest Giles walking towards her and two teenagers.[17] She could not see the teenagers' faces clearly because it was dark and they wore hoods, but she recognized one of them as the "boy that got locked up on Jefferson" from earlier in the day.[18] When Rayne heard a single gunshot, she looked towards the sound and saw Tameka Giles on the ground and the two teenagers running away.[19] Rayne later identified Codefendant Ronald Harris, who had had contact with the police that day, from a photograph lineup.[20] Ultimately, Harris pled guilty after jury selection and testified, along with two other teenagers, against his codefendant, Purnell.[21]

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[16] *See State v. Purnell*, No. 0701018040 (Del. Sup. Ct. Feb. 19, 2020); *Purnell v. State*, 979 A.2d 1102 (Del. 2009); *Purnell v. State*, 106 A.3d 337 (Del. 2014)
[17] A78-88
[18] *Id.*
[19] *Id.*
[20] A82
[21] *See* n.16

ARGUMENTS

I. The Superior Court Erred when it Ruled that Purnell Failed to Plead with Particularity New Evidence Creating a Strong Inference that he is Innocent of the Underlying Conviction.

Question Presented: Whether the Superior Court erred in finding that the allegations in Purnell's Rule 61 motion did not meet the standard set forth in Rule 61(d)(2)(i) for reviewing successive motions? This question was preserved because it was raised in Purnell's reply to the State's response to his Rule 61 motion, the procedural hearing and in the post-procedural hearing briefing.[22]

Scope of Review: This Court reviews dismissals of Rule 61 motions for abuse of discretion, although questions of law are reviewed de novo.[23]

Merits of the Argument: Should this Court find that Rule 61 (eff. 2014) applies to this case, which it should not (see Argument II), Purnell still meets the standard set forth in Rule 61(d)(2)(i) (eff. 2014) for successive motions. Under this standard, a motion cannot be dismissed if it "pleads with particularity that new evidence exists that creates a strong inference that the movant is actually innocent in fact of the acts underlying the charges of which he was convicted[.]"[24] The

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[22] A1594; A1626; A1712; A2101
[23] *Baldwin v. State*, 166 A.3d 938, 940 (Del. 2017)
[24] Super. Ct. Crim. R. 61(d)(2)(i)

newly discovered evidence Purnell has alleged in his motion creates a strong inference that Purnell was innocent of the crimes for which he was convicted, requiring this Court to reverse the summary dismissal of his motion.

At age sixteen, Purnell was charged with a murder that he did not, and physically could not, commit. There is no physical evidence connecting Purnell to the crime. No eyewitness has ever identified Purnell as being involved with the shooting. The two eyewitnesses did not recognize Purnell, but one, deceased at the time of trial, did identify the shooter as someone who was *not* Purnell.

In his second Rule 61 Motion, Purnell presents new evidence that three state witnesses, overwhelmed, terrified teenagers—one of whom is intellectually disabled—have recanted their previously false statements and trial testimony to their families and one in an affidavit.[25] Purnell also presents new evidence refuting the prosecution's trial ballistics evidence and conclusively confirming that Purnell was dependent on crutches for mobility at the time of the shooting.[26]

This new evidence satisfies Rule 61(d)(2)(i) by creating "a strong inference that [Purnell] is actually innocent in fact." Upon satisfying the rule, the Superior

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[25] A488; A511; A514; A667; A671
[26] A722; A809; A812; A815; A818

Court not only should have considered Purnell's new claims, but also should have considered his formally adjudicated claims for the purpose of conducting a cumulative error analysis.

A. The Test for Newly Discovered Evidence

There appears to be no authority from this Court on what constitutes newly discovered evidence specifically under the relatively recent enacted Rule 61(d)(2)(i) (eff. 2014), but there is authority suggesting that the same test that applies to Rule 33 motions applies to Rule 61 motions. In *Downes v. State*, this Court cites the test for Rule 33 motions.[27] This Court then rules that a movant can seek reversal based upon newly discovered evidence using a Rule 61 motion. *Id.* at 292. ("The question thus arises whether a defendant may avoid the time bar of Rule 33 by bringing a motion for a new trial, based on newly discovered evidence, as a Rule 61 motion. . . . we now hold that a defendant may use Rule 61 to seek a new trial even if such a motion would be timed barred under Rule 33.") Although this Court does not squarely state that the same test applies, the inference is that it does.

[27] *Downes*, 771 A.2d 289, 291 (2001) (referencing *Blankenship v. State*, 447 A.2d 428 (1982))

B. New Evidence Regarding Kellee Mitchell.

Kellee Mitchell denied speaking with Purnell about the murder. However, during trial, the State called Detective Tabor as a rebuttal witness who played the videotaped portion of Mitchell's custodial interrogation, creating a conflict between Mitchell's trial testimony and his interrogation statement.[28] Recently, Purnell was able to obtain Affidavits from Dawon Brown and Andrew Moore consisting of newly discovered evidence which lends credibility to Mitchell's testimony and supports Purnell's claim of actual innocence.[29] Moore's statement provides new evidence in the form of an explanation by Mitchell for why he initially lied: he was "young and scared," because he had been identified out of the photo array by the victim's husband who was an eyewitness to the murder.[30] Mitchell's statement to Moore occurred after Purnell's trial.[31]

Mitchell's testimony and cross-examination presents a unique situation that renders the new affidavits more than just impeaching and cumulative. They answer the jury's important question of *why* Mitchell provided testimony that conflicted

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[28] A112-13
[29] *See* A505, A508
[30] A508
[31] *Id.*

with his original statements to the police.[32] Thus, these affidavits are not merely impeaching and cumulative. Like the new witness in *Young*, Purnell's new witnesses are credible because they are unrelated to Purnell, and have nothing to be gained by lying.

C. New Evidence Regarding Codefendant's Recantation

In his Rule 61, Purnell argues new evidence that codefendant Harris was intellectually disabled and recanted to his parents his trial testimony that he committed the crime. Intellectually disabled Harris' interrogation lends *substantial* credibility to Harris's recantation. Then teenager Harris's seven-hour interrogation is a textbook example of what the criminal justice community has now come to accept as the type of interrogation that produces false confessions from intellectually disabled teenagers. Today, it would be axiomatic that such interrogation techniques would be found extremely suspect leading to exclusion. This lends credibility not only to Harris's interrogation confused statements (even after he was convinced to inculpate himself,) that he did not meet Purnell until *after* the murder,[33] but also to the new evidence of Harris's recantation after trial to

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[32] *See Hicks v. State*, 913 A.2d 1189, 1194 (2006) (citing *State v. Young*, 1982 Del. Super. Lexis 1062 (Del. Super. Oct. 4, 1982)
[33] A531

his parents that he lied about his involvement in the crime to avoid a potential life sentence.[34] The new evidence of Harris's individualized education plan (IEP) and special education classes supports the existence of his intellectual disability and substantiates his parents' report that he can barely read or write, relying on his stepfather to fill out job applications.[35]

That the declarations were written by his parents rather than Harris who cannot read and write is not surprising, and therefore does not make the new evidence of his recantation less believable. Harris's recantation that he lied about being involved in the murder completely refutes his testimony which lends credence to Purnell's claim that is innocent. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Rev. 2003), Guideline 10.7 commentary provides that coerced confessions and mental disability have contributed to the 110 people being freed from death row between 1976 and 2003.[36]

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[34] A511
[35] *See* A511, A514
[36] Hofstra Law Review Vol. 31:913 at 1017-18

D. New Evidence Regarding Corey Hammond

Corey Hammond recanted to his close friend Alfred Lewis, Jr. Indeed, after trial, Hammond told Lewis that the police "kept coming at me to say something on Mark-Mark and I only told them what everyone had heard . . . [and I] just ended up telling the court what everyone was saying in the streets about the crime."[37] This new information from Lewis is powerful given his lack of motive to lie. After learning of Hammond's deception, Lewis vowed to never speak to Hammond again, and he has not—despite requests from Hammond and Hammond's mother.[38]

Further, new evidence from Hammond's brother corroborates that Hammond was never at the scene of the shooting in contrast to what Hammond testified, which was used by the prosecution to bolster his testimony.[39] While this evidence is impeachment, it lends credibility to Purnell's new evidence that Hammond, a year after the crime, admitted to fabricating testimony to avoid substantial prison time on a new arrest.

Purnell also provides new evidence that implicates *Brady v. Maryland.*[40] Longtime police informant and Hammond's father, Hammond Johnson, worked

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[37] A666
[38] *Id.*; *see Hicks*, 913 A.2d at 1194 (citing *Young*, 1982 Del. Super. Lexis 1062)
[39] A349; *Compare* A158 *with* A672
[40] 373 U.S. 83 (1963)

with the police to turn his son into a witness against Purnell.[41] *See* II.B.8 below. This Court should find this *Brady* violation sufficient to overcome summary dismissal.[42]

E. Newly Discovered Evidence Reveals the State's Argument regarding the Murder Weapon was Incorrect, and this Error Supports Purnell's Actual innocence by Implicating the Initial Suspects.

The State minimized the significance of the .38 caliber revolver found at the girlfriends' apartment of State witnesses Mitchell and Dawan Harris (who looked just like his brother, Ronald Harris, Purnell's intellectually disabled codefendant).[43] The State did this by incorrectly indicating during opening statements that a 9-millimeter casing was found "just a few feet from where she fell after being shot."[44] During trial, there was testimony that Purnell was seen with a Glock, which uses 9-millimeters.[45] During closing argument, the prosecutor stated that a 9-millimeter shell was found near the crime scene.[46]

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[41] A664
[42] *See*, *e.g.*, *Banks v. Dretke*, 540 U.S. 668 (2004); *see generally Wright v. State*, 91 A.3d 972, 9 (Del. 2014)
[43] *See* A1521-22
[44] A61
[45] A1487
[46] A370

In truth, the 9-millimeter was found 40 to 50 feet north of the intersection where Giles was shot.[47] Newly discovered evidence reveals that it is scientifically impossible that a 9-millimeter shell casing recovered 40 to 50 feet from the crime location was involved in the shooting.[48] Robert Tressel is the Chief Criminal Investigator at the Cobb County District Attorney's Office in Marietta, Georgia, and has been certified since July 1990 to teach death investigation to law enforcement officers and trained in firearms investigation techniques through the Department of the Treasury.

This information was not before the jury at trial. Instead, trial counsel made in ineffective argument that only barely alluded to the issue.[49] Chief Tressel's new scientific evidence that the 9 millimeter casing found 40 to 50 feet from the shooting is not cumulative of trial counsel's unintelligible argument that the 9 millimeter casing might be from a random shooting earlier in the day.

Although the remainder of Purnell's information in this claim is not new, it highlights the importance of Chief Tressel's new scientific evidence: (1) an October 2007 supplemental police report noting several sources identified Kellee

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[47] A717
[48] A726
[49] A1574

Mitchell as the shooter[50]; (2) Mitchell's so-called alibi collapsed during trial[51]; (3) Eyewitness Giles's identification of Mitchell as the shooter;[52] and (4) Eyewitness Rayne, who did not identify Purnell from a photo array, was never shown a photo array containing pictures of Mitchell or Dawan Harris (who looked quite like his younger brother, Purnell's codefendant).

Further, the jury never heard about the suspicious nature of Mitchell's or Dawan Harris's acquisition of the .38 caliber revolver. Dawan Harris claimed he stole the weapon from his cousin, Cameran Johnson *after* the murder of Giles and he and Mitchell jointly possessed the gun.[53] When detectives questioned Cameran Johnson, he informed them that the gun was stolen "like two maybe three weeks" *before the murder*.[54]

New evidence that someone else committed the crime, in combination with forensic evidence called into question, is sufficient to satisfy the actual innocence exception to procedural bars, even under the stricter federal standard.[55]

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[50] A674
[51] A1505
[52] A687
[53] A762 at 10:22:56 timestamp, 10:23:16-10:23:40 timestamp (*See* CD-Rom Motion)
[54] A791-92
[55] *See House v. Bell*, 547 U.S. 518 (2006)

F. New Medical Evidence of Purnell's Dependence on Crutches and was Physically Unable to Run at the Time of the Incident

Purnell acknowledges that his new evidence of Purnell's crutch dependence differs in quality, not kind, as the testimony presented at trial. However, a medical doctor's conclusion that Purnell was likely unable to run during the crime,[56] is new in comparison to the orthopedic surgeon's testimony that he did not see Purnell after surgery and was unable to provide an opinion.[57] *See* II.B.6 below.

G. Prejudice and Actual Conflict

This newly discovered evidence would probably change the result at a new trial, and Purnell also meets the more stringent test that in light of this new evidence there is no reasonable juror who would have voted to convicted.

[56] A807-08
[57] A1563

II. The Superior Court erred in applying Rule 61 (eff. June 2014) to Purnell's postconviction motion and dismissing Purnell's potentially meritorious claims.

Question Presented: Whether the Superior Court erred in applying Rule 61 (eff. June 2014)? This question was preserved because it was raised in Purnell's Rule 61 Motion, Reply to the State's response to his Rule 61 motion, the procedural hearing and in the post-procedural hearing briefing.[58]

Scope of Review: This Court reviews dismissals of Rule 61 motions for abuse of discretion, although questions of law are reviewed de novo.[59]

Merits of the Argument: Federal courts will only honor state court post-conviction procedural rulings, if those rulings satisfy the fair notice requirements arising from the Due Process Clause of the United States Constitution. To satisfy fair notice requirements, state courts must provide post-conviction movants with adequate notice of its procedural rules. If a state court applies a new or modified procedural rule without adequate notice, then federal courts will not defer to the state procedural ruling. Instead, the federal courts will consider the merits of the post-conviction motion *de novo*. This is what will occur for Purnell should this

[58]A399; A1594; A1626; A1712; A2101
[59] *Baldwin v. State*, 166 A.3d 938, 940 (Del. 2017)

Court not reverse the lower court's application of Rule 61 (eff. June 2014) to Purnell's successive petition.

A. A State Rule Is Adequate Only if it is Firmly Established and Regularly Applied.

For a state rule to be adequate, it must be firmly established and regularly applied so as to provide petitioners with notice of how to present their claims prior to the petitioner's *initial* default date.[60] "Whether a procedural rule 'was firmly established and regularly applied is determined as of the date the default occurred, and not as of the date the state court relied on it (which is what happened here), because a movant is entitled to notice of how to present a claim in state court'" before he files his *initial* document.[61]

In the post-conviction context, the default occurs on the date that the petitioner's *initial* post-conviction motion was due, which is one year after the movant's judgment became final. *Bronshtein v. Horn*, 404 F.3d 700, 706 (3d Cir. 2005) (state procedural rule not adequate because it was developed more than a year after petitioner's initial post-conviction motion was denied). This due process

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[60] *Ford v. Georgia*, 498 U.S. 411, 424 (1991)
[61] *Lark v. Secretary Penn. Dept. of Corrections*, 645 F.3d 596, 611 (3d Cir. 2011); *Albrecht v. Horn*, 485 F.3d 103, 115 (3d Cir. 2007); *Morris v. Beard*, 633 F.3d 185 (3d Cir. 2011)

requirement makes logical sense because the only way for a petitioner to avoid a default is if the petitioner knows what the rules are regarding defaults *before* he files his *initial* Rule 61 motion.

Purnell's conviction became final with the issuance of the mandate on September 15, 2009, after this Court affirmed his conviction on August 25, 2009. Purnell's default date to file a timely initial Rule 61 motion was one year later, on September 15, 2010. At this time, the 2005 version of Rule 61 was in effect. Therefore, it was the 2005 version of Rule 61 that Purnell followed when determining what to put in his petition. To satisfy the fair notice requirement in the Due Process Clause of the United States Constitution, this Court must apply the 2005 version of Rule 61 in effect on September 15, 2010, to Purnell's successive petition.

Where a petitioner meets the requirements of a prior version of the rule, but is later defaulted because of a novel and unforeseeable change to the rule, that change renders the rule inadequate as applied to that petitioner.[62] This is what happened when the lower court applied the June 2014 version of Rule 61 to Purnell's case. The Delaware Superior Court defaulted Purnell for failing to satisfy

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[62] *See generally NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)

the default requirements in the June 2014 version of Rule 61 when Purnell filed his initial Rule 61 motion, which was prior to his September 15, 2010 Rule 61 motion filing default date.

The June 2014 version of rule 61 was applied to Purnell's successive petition because this version contains language stating that it was effective immediately. This Court has relied upon this effectivity language to repeatedly uphold dismissals of successive petitions. However, this Court has never analyzed whether this effectivity language satisfies federal due process requirements. As explained above, it does not. Therefore, the lower court erred by relying on this Court's prior opinions to determine that the 2014 version of Rule 61 applies to Purnell's successive Rule 61 Motion rather than the 2005 version.

B. Purnell Pled Sufficient Facts to Overcome Rule 61 (eff. 2005) Defaults.

Had the Lower Court applied the correct version of Rule 61, (eff. 2005) , the Court would have ruled that Purnell pled sufficient facts to establish that merits review is warranted in the "interest of justice" and to prevent a "miscarriage of justice." Under the 2005 version of Rule 61, a movant need not conclusively prove the underlying claim in order to overcome the procedural bars and receive merits

review under the (i)(5) exception; his Rule 61 motion need only offer more than mere speculation.[63]

The caselaw in place at the time of Purnell's default also recognized that repetitive or formally adjudicated claims would be considered in the interests of justice. This Court defined the exception with breadth and flexibility. In *Weedon v. State*,[64] this Court described the former adjudication bar of Rule 61(i)(4) as a codification of the law of the case doctrine, embracing two exceptions: (1) for clear error or a change in circumstances, particularly factual circumstances, and (2) for equitable concerns about injustice that "trump" the prior ruling.[65]

1. Ineffective Assistance of Counsel

Counsel Rendered Constitutionally Ineffective Assistance in Violation of Purnell's Right to Counsel.[66]

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[63] *See State v. Kirk* WL 396407, at *4-6 (Del. Super. Feb. 26, 2004); *State v. Smith*, 2004 WL 1551513 at *3-4 (Del. Super. June 28, 2004); *State v. Crawford*, 2005 WL 2841652 at *1 (Del. Super. Oct. 28, 2005); *Webster v. State*, 604 A.2d 1264, 1367 (Del. 1992); cf. *State v. Mayfield*, 2004 WL 21267422 at *5 (Del. Super. June 2, 2003)

[64] 750 A.2d 521 (Del. 2000)

[65] 750 A.2d at 527-28

[66] Del. Const. Art. 1. Sect. 7; U.S. Const. amends VI, XIV

2. Trial Counsel Failed to Withdraw due to Previously Representing another Suspect in the Same Incident. This Conflict of Interest was Prejudicial *Per Se*.

Purnell's defense counsel represented him at both trial and on direct appeal, in the face of an irreparable and fatal conflict of interest with another suspect in the same case, Dawan Harris (Dawan). Dawan[67] was arrested on February 18, 2006, along with Kellee Mitchell (who was identified as the shooter by an eyewitness), for possessing a gun that was recovered during the execution of a search warrant related to the shooting.[68] In court documents for that gun charge, Dawan was listed as a possible "suspect in murder."[69]

In fact, Dawan was questioned about his role in the murder on February 18, 2006, and detectives continued to investigate his possible involvement in the months following the shooting. On June 1, 2006, Detective Gary Tabor spoke with a witness who told him that Dawan (who the witness knew as "Oatmeal") had spoken to him about the shooting. Additionally, this witness informed police that "Oatmeal" told him, "you should have seen the way she fell."[70] On July 5, 2006,

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[67] To avoid confusion with his brother, Ronald Harris (Purnell's codefendant), Dawan Harris is referred to herein as "Dawan."
[68] A492, A827
[69] A832
[70] A707

detectives spoke with a second witness who implicated Dawan in the shooting.[71] However, trial counsel never spoke with either of these witnesses despite his having been provided with this crucial information in discovery.

Defense counsel was aware of this conflict of interest months before the start of trial. However, instead of notifying the court, trial counsel wrote a letter to the assigned prosecutor inquiring about whether he intended to call Dawan as a witness.[72] Trial counsel was under the mistaken belief that the prospect of a conflict hinged on whether he might have to cross-examine his own client, Dawan. Thus, when the prosecution responded by letter explaining that it did not intend to call his client Dawan as a witness, defense counsel took no further action.[73]

The issue of the conflict was not addressed, until it surfaced again at a hearing on the eve of trial. Dawan's name appeared on the co-defendant's witness list, and trial counsel raised the issue of a conflict for the first time with the court.[74] Trial counsel finally appeared to grasp the pervasive nature of the conflict. It did not simply rise and fall on whether or not Dawan was called as a witness. Trial

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[71] A708
[72] A835
[73] A837
[74] A38

counsel responded in the affirmative to a question from the court about whether a conflict would exist even if Dawan were not a prosecution witness. *Id.*

Dawan was more than "tangentially" involved in this case and trial counsel knew about this reality for months. During this pre-trial hearing, trial counsel launched a desperate effort to conflict himself out of the case.[75] Trial counsel reported how his potential trial theories would create a conflict of interest by explaining that he would argue that it was either Harris (Dawan's brother) and Dawan or Mitchell and Dawan (who looked like Harris) who committed the crime. In either event, Harris was covering for his brother Dawan by naming Purnell.[76] This conflict was worsened by the prosecution's attempt to downplay the significance of Dawan to its case. In an effort to avoid the last minute removal of defense counsel, the prosecution misrepresented to the court that Dawan was never identified as a suspect despite two witnesses having told detectives otherwise in June and July 2006.[77]

The court appeared very troubled by the timing of the request and repeatedly asked trial counsel what new information had arisen to explain the sudden conflict.

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[75] A38-45
[76] A39
[77] A41; *see also* A708-09

Obviously, trial counsel's prior representation of Dawan always presented an irreconcilable conflict of interest, and trial counsel should have petitioned the court to be removed much earlier. The court mistakenly denied trial counsel's request to conflict out of the case. The court never conducted the necessary conflict hearing to determine if Purnell was aware of the conflict, or if he waived the issue. Purnell would have strongly objected to trial counsel's remaining on his case had the court asked. This conflict issue was a claim Purnell raised *pro se* in his state post-conviction proceedings.[78]

After denying trial counsel's request to be removed due to a conflict of interest, the court reserved the right to revisit the issue if trial counsel decided to call Dawan as a witness.[79] Subsequently, trial counsel did not call Dawan as a defense witness. And ultimately, he failed to cross-examine Harris about covering for his brother Dawan (and trial counsel's other client) by testifying against Purnell.

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[78] A840
[79] A49-50

3. Trial Counsel Failed to Withdraw on Direct Appeal despite His Continued Conflict of Interest and Failed to Argue that the Trial Court should have Removed Him due to the Ongoing Conflict.

Despite trial counsel unsuccessfully raising the conflict issue with the trial court, he did not raise the viable conflict of interest claim on direct appeal, leaving the trial court's decision on the matter unchallenged.[80]

4. State Post-Conviction Counsel Failed to Raise a Viable Ineffective Assistance of Trial Counsel/Conflict of Interest Claim without Consulting with Petitioner or Obtaining his Permission to Abandon it.

After being convicted based on the fabricated testimony of three young teen witnesses, and suffering through his conflict of interest claim being waived by direct appeal counsel, Purnell filed a timely *pro se* petition for post-conviction relief in the Superior Court of Delaware.[81] Additionally, he filed an in-depth memorandum of law detailing nine grounds for relief that entitled him to a new trial.[82] The first issue that Purnell raised was trial counsel's conflict of interest in representing Dawan Harris. Purnell asserted that the "trial court abused its discretion when it failed to conduct an evidentiary hearing or factual inquiry to

[80] A845
[81] A838
[82] A892

determine if disqualification of counsel was appropriate" and that trial counsel "was ineffective . . . for his failure not to raise this issue on direct appeal."[83]

Purnell petitioned the court to appoint counsel for his state post-conviction proceedings[84] and counsel entered his appearance on August 22, 2011.[85] State post-conviction counsel filed an Amended Motion for Post-Conviction Relief on October 11, 2011. [86] Regrettably, post-conviction counsel *abandoned Purnell's conflict of interest claim altogether* without consulting with Purnell or obtaining his permission. In response to the question, "has the Petitioner filed any other motions or petitions seeking relief from the judgments in state or federal court?" state post-conviction counsel answered with a definitive "No." [87]

Moreover, it is apparent from email correspondence between post-conviction counsel and trial counsel that post-conviction counsel limited his "plan" for the case to a "review [of] the record."[88]

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[83] A916
[84] A12
[85] A13
[86] A13
[87] A1027
[88] A1035

Although post-conviction counsel obtained a copy of the trial transcripts from defense counsel, he never sought to obtain counsel's trial file. [89]As a result, post-conviction counsel provided glaringly ineffective legal representation, when he failed to conduct any post-conviction investigation. He never examined the facts of the case, nor did he conduct any follow-up witness investigation which would have revealed Purnell's actual innocence. Instead, state post-conviction counsel treated the case as a second direct appeal by merely raising four, limited ineffective of assistance of counsel claims based solely on the transcripts. [90]

Compounding the flagrant miscarriage of justice in Purnell's case, the four claims raised by state post-conviction counsel were undercut by trial counsel seeking, and relying upon, advice of the prosecution in preparing his Rule 61 affidavit. In an October 31, 2011 email exchange between trial counsel and the prosecution, trial counsel stated, "I will be working on Purnell tomorrow any advice would be helpful."[91] The prosecution responded the following day with "thoughts" on each claim suggesting what trial counsel's strategy decisions may

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[89] *Id*.
[90] A1028
[91] A1038

have been.[92] Trial counsel adopted the prosecution's suggestions in his affidavit to the Superior Court explaining trial tactics.[93]

5. Trial Counsel Failed to Investigate, Develop and Present Evidence Implicating Kellee Mitchell and Dawan Harris.

a) Trial counsel failed to investigate, develop and present ballistics evidence to dispel of the prosecution's theory that the 9-millimeter cartridge case recovered at the scene was related to the shooting.

Aware that substantial evidence implicated Mitchell and Dawan, the prosecution sought to disprove their involvement in the murder. The prosecution was successful in minimizing the significance of the .38 caliber revolver found at Mitchell and Dawan's residence by deliberately misrepresenting to the jury that the firearm could not have been involved in the shooting. Trial counsel failed to investigate, develop, and present evidence to rebut this falsehood.

In its opening statement, the prosecution mischaracterized the evidence:

> Now, let me hasten to add and caution you that you will see no evidence whatsoever that that .38-caliber revolver was the weapon that killed Tameka Jiles (sic). You will learn, in the course of the trial that no bullet was found inside of Tameka Jiles (sic). But you will see that a single 9-millimeter casing was found on Willing Street, *just a few feet from where she fell after being shot*. And you will learn a .38-caliber revolver cannot fire a 9-millimeter shell

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[92] A1039
[93] A1040

> casing. So there's no evidence that that .38-caliber revolver I just told you about had anything to do with this crime.[94]

In truth, the police recovered the 9-millimeter shell casing "*50 feet north of the intersection*" where Giles was shot.[95] As a result of new investigation, forensic evidence reveals that a 9-millimeter shell casing could not travel 50 feet after being ejected from a firearm. In fact, the maximum distance that a cartridge case could travel after being ejected from a handgun is 21 feet.[96] Had trial counsel consulted with a ballistics expert, he could have presented evidence that it was scientifically impossible for the 9-millimeter shell casing recovered 50 feet from the location of the shooting to be related to the murder of Giles.[97]

Moreover, when considered in conjunction with the testimony of Carl Rone, Forensic Firearms Examiner with the Delaware State Police, this evidence would have suggested that the .38 caliber revolver was the probable murder weapon. The prosecution originally called Rone in an effort to eliminate the .38 caliber revolver as the possible weapon. He testified that it would be impossible for a .38 caliber revolver to eject a 9-millimeter cartridge case because "instead of [the case] being kicked out of the [revolver], it's just rotated out of the way. It actually stays right

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[94] A61 (emphasis added)
[95] A717 (emphasis added)
[96] A726
[97] A727

in the gun."[98] This testimony was accurate. Most significantly, if a cartridge case was not ejected from the gun that fired the fatal shot, this fact made it very likely that a revolver was used in the shooting. Had defense counsel properly investigated the crime scene by hiring a ballistics expert, the testimony of the *prosecution's firearms examiner* would have pointed directly back to the .38 caliber revolver recovered from Mitchell and Dawan.

Additionally, Dawnell Williams, a long-time employee of the Salvation Army, located at 400 North Orange Street in Wilmington, recalled hearing gunshots on January 30, 2006, while outside of her workplace on a smoke break.[99] In an interview with the Wilmington police, Williams described hearing "two gunshots coming from the area of 5th and Willing Street."[100] Williams stated that hearing gunshots in this area was not unusual and she had likely heard gunshots there "over a hundred" times.[101] While Williams was unable to specifically determine the direction from which the two shots were fired, she believed that they were coming from nearby "West Street or Tatnall Street."[102] West Street was two

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[98] A235
[99] A633
[100] A685
[101] A255
[102] *Id.*

blocks from her building, and Tatnall Street was only one block away. She acknowledged that she did not see who fired the weapons, but she saw two men running shortly after hearing the shots, enter a car and drive away "up Orange Street."[103]

If trial counsel had conducted a proper investigation, the defense would have established that the random 9-millimeter cartridge case found lying on the street was unrelated to this shooting. The combination of William's and Rone's testimony would have refuted prosecution's theory about the murder weapon. No other shell casings were found at the scene.

b) Trial counsel failed to investigate, develop and present evidence regarding the suspicious nature of Kellee Mitchell's and Dawan Harris's acquisition of the .38 caliber revolver.

Following Dawan's arrest for the revolver on February 18, 2006, detectives told him that he was a suspect in the shooting that occurred on January 30, 2006.[104] After being pressed for information about the gun by police, Dawan admitted that he stole the revolver from his cousin, Cameron Johnson, and eventually sold it to Mitchell.[105] However, he conveniently claimed that he stole and sold the weapon to

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[103] A255
[104] A762
[105] A762 at 10:22:56 timestamp (*See* CD-Rom Motion)

Mitchell *after* the murder of Giles. Also, he told the police that he and Mitchell considered the gun both of theirs "because we hang out together." [106] Based on Dawan's statement, detectives brought Johnson in for questioning about the revolver.[107] Johnson told police that the gun was stolen "like two maybe three weeks" *before the murder*.[108]

At trial, Mitchell denied that Dawan gave him the gun. A125. Trial counsel was ineffective for failing to challenge this phony testimony by calling Dawan to explain that he sold the gun to Mitchell. Moreover, trial counsel failed to elicit from Dawan that he and Mitchell jointly possessed the gun before the shooting. Additionally, trial counsel failed to present Johnson to explain that the gun had been stolen by Dawan weeks before the shooting.

6. Trial Counsel Failed to Investigate, Develop and Present Evidence Regarding Two Witnesses Who Implicated Dawan Harris to Police.

As mentioned above, on June 1, 2006, Detective Tabor spoke with a witness who told him that Dawan Harris (Codefendant Ronald Harris's brother who the witness knew as "Oatmeal") had informed police that "Oatmeal" told him, "you

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[106] *Id.* at 10:23:16-10:23:40 timestamp (*See* CD-Rom Motion)
[107] A763
[108] A791-92

should have seen the way she fell."[109] And on July 5, 2006, detectives spoke with a second witness who implicated Dawan in the shooting.[110] Trial counsel never spoke with either of these witnesses despite his having been provided with this crucial information in discovery.

7. Trial Counsel Failed to Cross-Examine Co-Defendant Ronald Harris About the Likelihood of His Covering for His Brother Dawan Harris By Naming Purnell as an Accomplice.

During a pre-trial hearing addressing the conflict of interest issue, trial counsel explained to the court that his trial theory would hinge on the jury believing that Harris was covering for his brother Dawan by naming Purnell.[111] However, after the court denied trial counsel's request to be removed due to the conflict of interest, he failed to cross-examine Harris about the likelihood that he was covering for his brother, Dawan (trial counsel's other client) by testifying against Purnell.

8. Trial Counsel Failed to Cross-Examine Corey Hammond about His Close Relationship with Dawan Harris and Supposed Interactions with Him on the Night of the Shooting.

By January 2007, nearly a year after Tameka Giles had been shot, Corey Hammond was in custody again as a result of a new arrest on drug charges for

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[109] A707
[110] A708
[111] A39

which he was facing a significant period of incarceration. In his January 4, 2007 statement to police, Hammond provided a different, second version about what he allegedly knew about the January 30, 2006 shooting.[112] Hammond also spoke with detectives on September 19, 2006.[113]

In this new account, Hammond told detectives that he was with "Oatmeal," (Dawan Harris), when he heard the shot at Eighth and Washington Streets and that "*we ran down there and looked*" at the crime scene.[114] Although Hammond's entire story was decidedly untrue, this peculiar detail was added to his story, one that trial counsel could have explored on cross-examination. Instead, when Hammond denied that Dawan was with him when he heard the shot and ran to Fifth and Willing Streets, trial counsel failed to impeach him at trial with his 2007 statement. Also, trial counsel neglected to cross-examine Hammond about telling the detective that "Little Ron[115] pulled the trigger," or about the close relationship that he had with Dawan, who he called "his cousin."[116] These significant details explain why Hammond was hesitant to testify about Dawan. These factors suggest that

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[112] A615
[113] A623
[114] A628-29 (emphasis added)
[115] "Little Ron" is Ronald Harris
[116] A625-27

Hammond, like Harris, was willing to cover for Dawan by pointing the finger at Purnell.

9. Trial Counsel Failed to Investigate, Develop and Present Evidence Showing the Testimony of Prosecution Witnesses was Coerced and Unreliable.

a) Trial Counsel Failed to Investigate, Develop and Present Evidence Refuting Kellee Mitchell's False Statement that Purnell Bragged to Him about the Murder

In 2007, Mitchell claimed that Purnell was involved in the shooting of Tameka Giles. He now denies that previous statements he made to the police were accurate. Purnell never told, let alone "bragged" to Mitchell that he (Purnell) had anything to do with a shooting.[117]

In fact, at the time of the murder, seventeen-year-old Kellee Mitchell was a primary suspect of the police. When investigators were initially searching for the gunman, the victim's husband, Ernest Giles, identified Mitchell as the shooter to the police. Mitchell and Harris's older brother, Dawan, were arrested at their girlfriend's apartment on February 18, 2006, following the execution of a search warrant related to the murder.[118]

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[117] A489
[118] A491

Police recovered a firearm hidden in the ceiling at the apartment where Mitchell and Dawan stayed with their girlfriends. Both suspects were arrested for possessing the firearm. Additionally, they were questioned by police about the gun, and their possible involvement in the murder. Mitchell was detained in juvenile custody for four months on charges in connection with the gun recovered at the apartment; but the prosecution curiously withdrew those charges in June 2006.

On January 22, 2007, nearly a year after the incident, Mitchell was again arrested by Wilmington police on a warrant. He was transported to the Criminal Investigations Division for more questioning about the shooting by the lead investigator on the Giles case, Detective Gary Tabor. The initial portion of Mitchell's interrogation was neither videotaped nor transcribed.[119] It was during this "missing" segment of the tape that Mitchell claims the police told him they already knew that Purnell had bragged to him about the shooting. Additionally, they insisted that Mitchell needed to come clean about it and provide them with the details. Despite knowing this scenario was completely untrue, Mitchell adopted the detective's story because they (falsely) told him that "Purnell put my name in

[119] A111-12

this case."[120] At some point during the questioning, the recorder was turned on, and Mitchell repeated the fictional account of Purnell bragging about the incident to him and two other teens, Dawon Brown and "Terrance." This fabricated tale supposedly occurred while all four were detained at the Juvenile Detention Center in April 2006.[121]

Neither defense counsel nor the detectives contacted Dawon Brown to validate Mitchell's unsubstantiated account. Had they done so, they would have learned that this imagined conversation about the shooting at the Detention Center (or "Bridgehouse") never took place.[122]

Mitchell refused to perjure himself at Purnell's trial by testifying about the fictional conversation with Purnell. In fact, he denied ever speaking to Purnell about the shooting.[123] Nevertheless, the prosecution called Detective Tabor as a rebuttal witness, and played the videotaped portion of Mitchell's custodial interrogation where he claimed Purnell bragged to him.[124] As explained in § I.B above, Mitchell has since recanted to Andrew Moore.

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[120] A489
[121] A501
[122] A506
[123] A107
[124] A112

b) Trial Counsel Failed to Investigate, Develop and Present Evidence of Ronald Harris's Intellectual Disabilities and the Coercive Techniques Used by Police to Obtain His False Testimony.

Harris's significant cognitive impairments made him easily susceptible to provide a false confession to the Wilmington police. As explained in I.C above, Harris recanted his confession to his parents. Harris's seven-hour long police interrogation was recorded, and his intellectual delays were easily observable.[125] Inexplicably, trial counsel failed to investigate, develop and present evidence contained in this videotape interrogation that clearly demonstrates Harris's cognitive impairments.

Had trial counsel conducted a thorough investigation, he would have learned that Harris had an individualized education plan (IEP), and he was in special education classes before he dropped out of school. Additionally, Harris received Social Security Income assistance due to a coordination disorder and heart condition. Even now, he is barely able to read or write, and he relies on his stepfather to fill out job applications.[126]

The uncontroverted facts are that Harris did not meet Purnell until *after* the date of the shooting, a point he continued to make during his interminable

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[125] A518, A520; *See* CD-Rom Motion
[126] A511, A514

interrogation, even after detectives convinced him to implicate himself.[127] Reluctantly, Harris agreed to plead guilty to a charge of robbery for a three year prison sentence in exchange for his testimony inculpating Purnell. Ronald Harris explained to his mother why he testified that he had robbed the victim with Purnell: "I just said it so I could come home."[128]

On the morning of February 18, 2006, Ronald Harris was arrested in connection to the shooting. At the time, the sole evidence tying him to the crime was his having been picked out of a photo array by an eyewitness, Angela Rayne. She claimed to have seen Harris with the shooter while she was sitting on the front step of a row-home in the area smoking crack cocaine.[129] After the police brought Harris to the Criminal Investigations Division in handcuffs, detectives interrogated him over the course of seven unremitting hours, all of which was captured on video.[130] Harris's mother and stepfather informed the police about his intellectual delays.[131] Also, Harris told the police on more than one occasion that he had a "mental problem" for which he took medicine.[132]

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[127] A140
[128] A518
[129]A78
[130] A518, A520
[131] A512
[132] A518

Armed with this information, the detectives used various interrogation techniques to first upset and confuse Harris, and then to twist his words to get him to admit that he was at the crime scene. Within minutes of the start of the interrogation, the videotape clearly shows that Harris was brought to hysterical sobs.[133] Time after time, Harris insisted that he was not present at the shooting, but the detectives continued their grilling. In the end, Ronald Harris was induced to say that he might have been in the area visiting his aunt who lived several blocks away. After several more hours of being upset and confused by police, Harris ultimately claimed that he was present for the shooting. This mangled version of his whereabouts on the date of the shooting was used as evidence in the case against him after Harris's statement placed himself at the scene.

However, the details that Harris provided after being pressured by the police made *absolutely* clear that he was not present at the shooting, and that he was simply telling investigators the story he believed they wanted to hear. When asked how many gunshots he heard, Harris said "three," a detail that was decidedly false given all other testimony to the contrary.[134] When pushed to draw a map of where he was when he heard the shots, Harris told police that he would be unable to do

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[133] A518 at 9:43 timestamp; *See* CD-Rom Motion
[134] A518 at 13:54:35 timestamp; *See* CD-Rom Motion

so, because he could not read.[135] Furthermore, he said that one of the men had a beard, a detail that did not match any other witness testimony.[136]

Harris's cognitive delays were easy to observe in his February 18, 2006 seven-hour police interrogation.[137] Inexplicably, trial counsel failed to present the video of this grueling interrogation at Purnell's trial.

Nearly a year after first being questioned, detectives interrogated Harris a second time on January 24, 2007 where they focused on getting him to place Purnell at the scene of the shooting. Evidence of this interrogation was never presented to the jury by Purnell's trial counsel. Over the course of several hours, investigators lied to Harris by telling him that Purnell had already pointed the finger at him.[138] They took full advantage of Harris's intellectual disabilities by telling him, "Purnell he's not quite as dumb as you Ron."[139] Trial counsel never raised any additional inquiries about Harris's severely impaired ability to understand even the simplest terms of his arrangement with the prosecution.

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[135] *Id*. at 13:54:45 timestamp; *See* CD-Rom Motion
[136] *Id.* at 13:56:10 timestamp; *See* CD-Rom Motion
[137] A518, A520; *See* CD-Rom Motion
[138] A556
[139] A560

Before his trial testimony even began, the prosecution characterized Harris as "a little bit unpredictable."[140] Harris's rehearsed trial testimony was in stark contrast to his first statement to police, where notably he claimed to have heard three shots. In fact, at trial Harris testified to hearing only one shot, a detail the prosecution suggested bolstered his story. [141] The remainder of his testimony was remarkably thin on detail and lacked veracity.[142] Harris's mother, who knew that her son and Purnell were not acquainted before the crime, recalls sitting in the courtroom during her son's testimony thinking that it sounded confused and did not make any sense.[143]

Had Purnell's trial counsel investigated, developed, and presented evidence of Harris's intellectual disabilities, and the coercive techniques used by police to obtain his testimony, it is reasonably probable that the jury would have concluded that neither Purnell nor Harris were involved in the shooting. Instead of focusing on the many inconsistencies in his claims about Purnell's supposed participation in this incident, Harris was subjected to a directionless, minutes-long cross-

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[140] *See* A207
[141] A349
[142] A237-249
[143] A512

examination by defense counsel in contrast to the torturous hours spent in the interrogation room with detectives on February 18, 2006, and January 24, 2007.[144]

c) Trial Counsel Failed to Investigate, Develop and Present Evidence of Coercive Techniques Used by Police to Secure Corey Hammond's Testimony, (Including the Use of his Informant Father), as well as Evidence Refuting Corey Hammond's False Testimony.

As part of a deal to reduce a prison sentence that he was serving at the time of Purnell's trial by nearly two years, Hammond misleadingly told the jury that he had heard Purnell and Harris discuss a robbery plot on the night of the incident. Hammond further fabricated his story by claiming that days later he heard Purnell bragging about the shooting.

Using interrogation tactics similar to those employed to strong-arm a false statement from Harris, detectives brought Hammond to the Criminal Investigations Division and questioned him on two separate occasions. The first time, on September 19, 2006, Hammond did not provide investigators any substantive information about the shooting other than that he knew Purnell, Harris, Dawan and Mitchell. Hammond did claim that he heard people talking about the crime in his neighborhood.[145]

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[144] A247-48
[145] A617

Hammond was arrested by Wilmington police for felony drug charges prior to an ensuing police interrogation on January 4, 2007. Hammond was brought back in to meet with detectives despite his previous statements that he did not know anything about the shooting. Additionally, Hammond now had a newborn son, and he was facing a substantial jail sentence, as a result of the new felony drug charges. During this subsequent round of questioning, Detective Tabor told Hammond, he "could miss a lot" of his son's childhood because of the new charges.[146] The detective's message to Hammond was clear, "he would get me home to my son" if he cooperated with police.[147]

Additionally, trial counsel failed to investigate, develop, and present evidence that Hammond's father,[148] a long-time police informant, was working with police to get a useful statement from his son.[149] Although this information about Hammond's father was known to the police, the full nature of his relationship with authorities was never made available to trial counsel. The failure of the prosecution to disclose this material was itself improper.[150]

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[146] A625
[147] A159
[148] The name of Corey and Troy Hammond's father is Hammond Johnson. To avoid confusion, he is referred as "father."
[149] A665
[150] *Brady v. Maryland*, 373 U.S. 83 (1963)

Moreover, trial counsel failed to investigate, develop and present evidence refuting the credibility of Hammond's testimony. Naco Hammond, (Corey Hammond's mother) knew that Hammond's father long had a reputation to "say anything to get out of jail," and that he was "always released and back out on the street within the hour" anytime he was in trouble for drugs, guns, or violating probation.[151] Also, Hammond's father intervened with the police if his children were arrested, and he "would go down [to the station] and, without fail, Hammond and Troy would be out."[152] The exact nature of Hammond's father's involvement with the Wilmington police was never provided to trial counsel, and the father is now deceased. Nevertheless, Hammond told his mother that his father was the reason that he was involved in the case. Based on her knowledge about the father's collaboration with the police, she stated she "wouldn't be surprised if Big Hammond put words in his mouth."[153]

Although the prosecution failed to disclose the full nature of the father's involvement in the case, his name is specifically noted in the police paperwork that was available to defense counsel at the time of trial. While questioning Hammond

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[151] A668
[152] A669
[153] A291

on January 4, 2007, Detective Tabor, out-of-the-blue, asked him whether he had "discussed this case with your dad at all?"[154] When Hammond answered that his father knew nothing about the case, Detective Tabor responded, "I think he knows a lot more than you think."[155] Confused, Hammond stated, "[h]e knows a lot more than I do, that's why I told you call my dad."[156] This exchange demonstrates that both Hammond and Detective Tabor had spoken with his father about the shooting prior to Hammond's second police interrogation. Trial counsel never presented any details about the father providing Hammond with any information that he provided to police, and the father's name was never mentioned during trial.

The information Hammond furnished about Purnell was decidedly false and based solely on stories he had heard from others. Shortly after testifying against Purnell, Hammond admitted to a family friend, Alfred Lewis, Jr., that he had testified to nothing more than hearsay.[157]

In addition to not investigating, developing and presenting these details about Hammond and his father, trial counsel inexcusably missed opportunities to prove that Hammond's testimony was a farce. Perhaps most egregious was his

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[154] A647
[155] *Id.*
[156] *Id.*
[157] A666

failure to impeach Hammond with his January 4, 2007 statement where he told detectives that "Little Ron pulled the trigger."[158] This statement completely refuted the prosecution's theory about who was the shooter, and directly invalidated Hammond's trial testimony that Purnell had "popped" the victim.[159]

Moreover, trial counsel failed to investigate, develop and present the testimony of Hammond's brother, Troy Hammond (Troy).[160] Troy was at Fifth and Jefferson Streets with friends at the time of the gunshot; *Corey Hammond was nowhere to be seen.*[161] Troy and his friends ran to the scene when they heard screaming and saw a woman lying on the street with bags around her. Troy is certain that his brother was not there after the shooting, and he suspects that Hammond simply repeated details to the police that he heard from Troy and his friends. All sorts of people in the neighborhood were talking about it.[162]

Moreover, in Hammond's January 4, 2007 statement, he told detectives that he was walking at *Eighth and Washington Streets* when he heard the shot.[163] That location was four blocks away from the intersection of Fifth and Jefferson Streets

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[158] A625
[159] A159
[160] Troy Hammond is Corey Hammond's brother.
[161] A672
[162] A673
[163] A252

where he deceitfully placed himself during his testimony.[164] This inconsistency confirms why Troy never saw his brother at Fifth and Jefferson Streets or anywhere near the crime scene which was less than a block away, because Hammond simply was not there. Most noticeably, the January 4, 2007 statement shows that his fictional story was repeatedly altered to suit the needs of law enforcement. Throughout the questioning, the police informed Hammond when he was "straight on the right track," or when he was "starting to step off" with his account.[165] However, trial counsel never impeached Hammond with the glaring inconsistencies about his location after the shooting, or the coercive techniques used by investigators to get his story.

10. Trial Counsel Failed to Investigate Purnell's Impossibility Defense and Investigate, Develop, and Present Extensive Evidence of His Dependence on Crutches for Mobility.

Purnell was physically incapable of any involvement in this case on January 30, 2006. Eyewitnesses testified that they saw the shooting suspects running from the scene.[166] However, Purnell was hospitalized for major knee surgery days before the incident, and he was incapable of walking without crutches, let alone running days later. As a result of the medical procedure, he received

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[164] A158
[165] A630
[166] A81, A84

approximately 15 surgical staples to the front and back of his knee.[167] Although Trial counsel presented lay witness testimony regarding Purnell's injuries, he was ineffective for failing to present expert testimony that Purnell was physically incapable of running.

Francis X. McGuigan MD, reviewed Purnell's medical records, including the trial testimony of the orthopedic surgeon, James Rubano, who performed the medical procedure on Purnell's knee. Dr. McGuigan also reviewed the trial testimony and an affidavit of two counselor's from the New Castle County Detention Center and concluded "with reasonable medical probability that Purnell would have likely been unable to run unimpeded on January 30, 2006."[168]

11. Failure to Object to Prosecutorial Misconduct.

a) Trial Counsel Failed to Correct the Prosecution Misrepresentation that Purnell "Refused Crutches" Despite Possessing Contradictory Evidence.

At the time of Purnell's trial, both his counsel and the prosecution possessed hospital records corroborating the fact that Purnell was discharged from the hospital a week before the incident in a wheelchair, and that he was given crutches

[167] A339-40
[168] A806-07

to take with him as he healed.[169] Notwithstanding, trial counsel failed to object when the prosecution misled the jury in its closing statement by suggesting that "[h]e (Purnell) refused crutches" altogether.[170]

Also, William Davis observed that Purnell was dependent on crutches when he arrived at New Castle County Detention Center and each time he went to see the nurse to have his bandages changed.[171] A medical "progress note" from The Ferris School documented that Purnell saw medical staff for wound care on three separate occasions from February 1, 2006 – February 3, 2006.[172]

b) Trial Counsel Failed to Object to the Prosecution's Improper Burden-Shifting during Its Closing Argument.

Trial counsel's failure to investigate and present evidence of Purnell's condition was compounded by the prosecution's improper burden-shifting during its closing argument. Trial counsel failed to object to the prosecution's assertions that "the defendant didn't call any expert witnesses" to support Purnell's impossibility defense.[173]

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[169] A819; *See also* A820, A823, A825
[170] A353
[171] A812
[172] A815
[173] A365

Trial counsel also was ineffective for failing to object to the prosecution's improper cross-examination regarding how Purnell received his injuries. Aside from being irrelevant to any issue at trial, the defense was severely prejudiced when the government asked a witness, Latoya Moody, "how he (Purnell) got shot?"[174]

The prosecutorial misconduct was fundamentally unfair. The failure of Purnell's counsel to properly object to this misconduct was unreasonable, prejudicial and constituted ineffective assistance of counsel.

12. Purnell's Right to a Fair Trial Was Violated.

a) Purnell was Denied His Right to Present a Complete Defense when the Trial Court Excluded the Out-of-Court Statement of Eyewitness, Earnest Giles (previously presented in part).

The victim's husband, Ernest Giles, was one of only two eyewitnesses to the crime. Giles identified Kellee Mitchell as the shooter. Giles and the other eyewitness, Angela Rayne, were shown a photo array containing Purnell's picture. However, both witnesses informed detectives that they did not recognize anyone in those spreads.

[174] A265

Giles died of natural causes before trial. Surprisingly, the prosecution moved to preclude his statements to police, including his failure to identify Purnell as being involved in the case as "unreliable hearsay." The prosecution claimed that because Giles had been a potential suspect in the shooting of his wife, he could not be believed.[175] After securing a flawed ruling to keep out this vital testimony, the prosecution immediately abandoned any notion of Giles' alleged involvement (or untrustworthiness) and presented its new theory of a random "robbery gone bad" at trial.

13. Trial/Appellate Counsel Was Ineffective for Failing to Raise Numerous Errors at Trial and on Appeal.

Purnell suffered ineffective assistance of counsel on appeal because his appellate counsel (who was also his trial counsel) failed to raise substantial and cognizable federal and state constitutional issues, and failed to raise all available grounds during trial and on his appeal to the Delaware Supreme Court. [176] Specifically, counsel was ineffective by failing to properly raise the following claims, all of which are addressed in detail above and his fully incorporated herein: Claims I (actual innocence), I(A) (witnesses Kellee Mitchell, Ronald Harris and

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[175] A25-36

[176] U.S. Const. amends. V, VI, VIII & XIV; Del. Const. Art. I, §§ 4, 7, 9, 11, 12 and 13

Corey Hammond have recanted and new evidence of Hammond's informant father), I(A)(4)(substantial evidence implicating Kellee Mitchell and Dawan Harris), I(A)(5)(new medical evidence of Purnell's dependence on crutches for mobility and physical inability to run), II(A)-(B) (counsel's conflicts), I(D) (evidence implicating Kellee Mitchell and Dawan Harris), III (evidence regarding two witnesses who implicated Dawan Harris), IV (evidence showing the testimony of prosecution witnesses was coerced and unreliable), V (Purnell's impossibility defense of his inability to run), VI (failure to object to prosecutorial misconduct), VII (prosecutorial misconduct) and VII (right to a fair trial). Initial post-conviction counsel was also ineffective by failed to argue trial/appellate counsel's ineffectiveness.

14. Purnell is entitled to a New Trial Because the Prejudicial Effects of the Cumulative Errors in His Case Undermined Confidence in the Verdict.

Although each claim raised in his Rule 61 motion requires Purnell's conviction and sentence to be vacated, their cumulative effect is sufficiently prejudicial to require relief. [177]

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[177] U.S. Const. amends. V, VI, VIII & XIV; Del. Const. Art. I, §§ 4, 7, 9, 11, 12 & 13

III. CONCLUSION

For these reasons, this Court should reverse the Superior Court's dismissal of Purnell's Rule 61 motion.

/s/ Herbert W. Mondros

Dated: June 1, 2020

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