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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Mark Purnell ("Purnell") and his co-defendant, Ronald Harris ("Harris"), were arrested on January 23, 2007, and subsequently indicted for first-degree felony murder, attempted first-degree robbery, possession of a firearm during the commission of a felony, possession of a deadly weapon during the commission of a felony, second-degree conspiracy, and possession of a deadly weapon by a person prohibited.[1] On April 7, 2008, immediately after jury selection, Harris pled guilty to attempted first-degree robbery and second-degree conspiracy.[2] On April 25, 2008, after a nine-day trial, the jury found Purnell guilty of the lesser-included offense of second-degree murder and the remaining counts as charged.[3] In October 2008, the Superior Court sentenced Purnell to an aggregate of 77 years of level V incarceration, suspended after 45 years for decreasing levels of supervision. (A390-96).

Purnell appealed, claiming the trial judge abused her discretion by excluding a deceased witness's statements as hearsay and by denying Purnell's motion for a

[1] *State v. Purnell*, 2012 WL 2832990, at *1 (Del. Super. Ct. July 3, 2012).

[2] *Id.*

[3] *Purnell v. State*, 979 A.2d 1102 (Del. 2009).

mistrial, which alleged juror misconduct. (A1084-94). This Court affirmed Purnell's convictions on August 25, 2009.[4]

In March 2010, Purnell filed a *pro se* motion for postconviction relief. (A893-1026). Purnell retained counsel and filed an amended motion in October 2011. (A1028-33). Purnell raised three claims of ineffective assistance of counsel, for not: (1) requesting a jury instruction on the credibility of accomplice testimony under *Bland v. State*[5] and its progeny with respect to Harris's trial testimony and out-of-court statements; (2) requesting a jury instruction on the effect of Harris's guilty plea, or raising the issue on appeal; and (3) objecting to prosecutorial "vouching" for Harris's credibility. (*Id.*). The Superior Court assigned Purnell's amended motion to a Commissioner for findings of fact and recommendations. (A13 at DI 96). In November 2011, the State filed a response to the amended motion (A13 at DI 98), which attached an affidavit from trial counsel. (A1041-44). Purnell filed a reply in December 2011. (A14 at DI 101). Following this Court's decision in *Brooks v. State*,[6] the Superior Court requested supplemental submissions regarding its impact on Purnell's motion. (A14 at DI 102). The parties filed supplemental briefing in March 2012. (A14 at DI 103-04).

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[4] *Id.*

[5] 263 A.2d 286 (Del. 1970).

[6] 40 A.3d 346 (Del. 2012).

In July 2012, the Commissioner issued a report recommending the court deny Purnell's amended postconviction motion.[7] Purnell appealed (A15 at DI 107), and the Superior Court held oral argument (A15 at DI 109). In May 2013, after *de novo* review, the Superior Court denied Purnell's motion.[8] Purnell appealed, and this Court affirmed.[9]

In December 2014, Purnell sought relief in the United States District Court for the District of Delaware, filing a *pro se* petition for a federal writ of habeas corpus. (A1224-40). In January 2016, Purnell, through counsel, filed an amended habeas petition, alleging ineffective assistance of trial counsel for not: (1) securing Purnell's medical records; (2) retaining a medical expert; and (3) requesting an accomplice-credibility jury instruction.[10] In July 2017, Purnell moved for leave to file an Actual Innocence Amendment to the Amended Petition under 28 U.S.C. § 2254.[11] In August 2017, the District Court granted Purnell's motion and stayed the matter for Purnell to exhaust his innocence claim in the state courts.[12]

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[7] *Purnell*, 2012 WL 2832990.

[8] *State v. Purnell*, 2013 WL 4017401 (Del. Super. Ct. May 31, 2013).

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

[10] *Purnell v. Metzger*, C.A. No. 14-1523-LPS (D. Del.).

[11] *Id.*, D.I. 43.

[12] *Id.*, D.I. 53.

On May 14, 2018, Purnell filed a counseled second motion for postconviction relief in the Superior Court. (A399-483). Purnell's trial counsel submitted an affidavit responding to allegations of ineffective assistance raised in the motion.[13] (A1397-1407). Following additional briefing and oral argument on which version of Rule 61 properly applied to Purnell's second postconviction motion (A1626-1711), the Superior Court found that the version of Rule 61 in place at the time Purnell filed his second postconviction motion in May 2018 applied to his motion. The court held that Purnell failed to establish a strong inference of actual innocence to overcome Rule 61's procedural bars and summarily dismissed Purnell's untimely and successive postconviction motion.[14] Purnell appealed and filed his opening brief and appendix. This is the State's Answering Brief.

[13] Purnell's initial postconviction counsel, Joseph Bernstein, Esq., passed away in June 2014.

[14] *State v. Purnell*, 2020 WL 837148 (Del. Feb. 19, 2020).

SUMMARY OF THE ARGUMENT

I. & II. DENIED. The Superior Court did not abuse its discretion in denying Purnell's second motion for postconviction relief. The provisions of Superior Court Criminal Rule 61 in effect in May 2018 when Purnell filed his second postconviction motion apply to Purnell's motion, and thus his motion is governed by the version of Rule 61 existing after the substantial amendments to the rule in June 2014. The motion was Purnell's second, and he filed it more than seven years after the limitations period expired. Rule 61 therefore barred the motion as untimely and successive. Purnell's proffered "newly discovered evidence" fails to satisfy the actual-innocence exception to the procedural bars because, as the court found, Purnell's proffered evidence was not "new" evidence under Rule 61.

Nor does the application of the post-2014 amendment version of Rule 61 to Purnell's second postconviction motion violate Purnell's federal due process rights. This Court has rejected similar constitutional challenges. A State is not required to provide any collateral review of a criminal conviction. An amendment of whatever civil collateral review is afforded does not violate any State or Federal due process right. Likewise, the June 2014 amendment is not impermissibly retroactive because there is no requirement to provide any form of State collateral review.

Finally, the "miscarriage of justice" and "interests of justice" exceptions to Rule 61's procedural bars no longer exist.

STATEMENT OF FACTS[15]

Tameka Giles ("Mrs. Giles") was murdered after a botched robbery attempt on January 30, 2006. She was walking with her husband when two men approached them and demanded money. After she refused, one of them fatally shot her in the back. Both men fled.

The police quickly identified Harris as a suspect based on eyewitness identification from Angela Rayne, who had been smoking crack cocaine nearby at the time of the shooting. Mrs. Giles' husband also tentatively identified Kellee Mitchell ("Mitchell") as one of the shooters in a photo lineup. The police arrested both men on February 18, 2006. At the time of the arrest, Purnell was in Harris' apartment, but was not yet considered a suspect. Neither Harris nor Mitchell identified Purnell as one of the assailants during any of their respective interviews with the police in 2006.

Purnell was not identified as a suspect until January 2007, when Corey Hammond ("Hammond") informed the police that he had seen Purnell and Harris together on the day of the shooting. Hammond had previously denied knowing anything about the crime, but suddenly recalled that Purnell had complained about needing money and was carrying a firearm on the morning of January 30, 2006. Hammond also informed police that Purnell had later bragged about killing Mrs.

[15] The facts are taken verbatim from *Purnell*, 106 A.3d at 340-41.

Giles. As with most of the State's witnesses, Hammond's credibility was an issue: his statement to police followed an arrest on drug-related charges, and the State agreed to reduce his sentence in exchange for his trial testimony.

Also in January 2007, Mitchell changed his story and informed the police that Purnell was involved in the shooting. He recalled a conversation in April 2006 with Purnell in which Purnell confessed to shooting Mrs. Giles. Mitchell's girlfriend, Etienne Williams ("Williams"), also claimed that she had overheard Purnell confess during a telephone call.

Based on this evidence, the police arrested Purnell. In April 2007, Purnell and Harris were jointly indicted on charges of murder in the first degree, attempted robbery in the first degree, conspiracy in the second degree, possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited. A jury was selected for the trial on April 2, 2008. Five days later, before the trial began, Harris accepted a plea deal from the State. In exchange for pleading guilty to reduced charges, Harris agreed to testify against Purnell. The trial against Purnell began on April 14, 2008, with the same jury initially selected for the joint trial.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE POST-JUNE 2014 VERSION OF RULE 61 IN PLACE AT THE TIME PURNELL FILED HIS SECOND POSTCONVICTION MOTION APPLIED TO THE MOTION.[16]

Question Presented

Whether the Superior Court erred by determining that the post-June 2014 version of Rule 61 in place at the time Purnell filed his second postconviction motion (the "post-2014 version") applied to the motion.

Standard and Scope of Review

This Court reviews the denial of postconviction relief for an abuse of discretion.[17] It reviews associated legal and constitutional questions *de novo*.[18]

Merits of Argument

In his second postconviction motion, Purnell acknowledged that his motion was untimely and a second or successive motion. (A411). He also acknowledged that he filed his motion after the Superior Court amended Rule 61 in June 2014, altering the procedural requirements for consideration of successive motions.

[16] Argument I addresses argument II in Purnell's opening brief.

[17] *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).

[18] *Id.*

(A409-10). Nevertheless, Purnell asserted that his claims should be considered under the "more lenient 2005 version of Rule 61."[19] (A1595-1611, A1712-16).

Purnell raised ten claims in his second postconviction motion: (1) actual innocence;[20] (2) trial counsel was ineffective for failing to withdraw due to a conflict of interest and for failing to investigate, develop, and present evidence implicating Mitchell and Harris's brother, Dawan Harris, and appellate and initial postconviction counsel were ineffective for failing to raise the conflict of interest claim in the first Rule 61 motion; (3) trial counsel was ineffective for failing to investigate, develop, and present evidence regarding two witnesses who implicated Harris's brother to police; (4) trial counsel was ineffective for failing to investigate, develop, and present evidence showing prosecution witnesses' testimony was coerced and unreliable; (5) trial counsel was ineffective for failing to investigate Purnell's impossibility defense and investigate, develop, and present extensive evidence of his dependence on crutches for mobility; (6) trial counsel was ineffective for failing to object to prosecutorial misconduct; (7) his trial was rendered fundamentally unfair

[19] Purnell had initially conceded that the post-2014 version of Rule 61 applied to his successive motion. (A409-10).

[20] Delaware courts have not recognized actual innocence as a freestanding claim for relief in Rule 61 proceedings. *See generally State v. Wright*, 2012 WL 1400932, at *29 (Del. Super. Ct. Jan. 3, 2012), *rev'd*, 67 A.3d 319 (Del. 2013). Rather, it is a means by which state courts may consider otherwise procedurally defaulted Rule 61 claims. *See* Super. Ct. Crim. R. 61(d)(2)(i).

by the misconduct of the prosecution; (8) his right to a fair trial was violated when the court excluded Mr. Giles' out-of-court statement and trial counsel was ineffective for failing to raise this argument; (9) appellate counsel was ineffective for failing to raise numerous claims on appeal and initial postconviction counsel was ineffective for failing to argue appellate counsel's ineffectiveness in the first Rule 61 motion; and (10) cumulative errors violated his right to a fair trial and trial, appellate, and initial postconviction counsel were ineffective for failing to raise this claim. (A399-483).

Following briefing and oral argument on whether the 2005 or post-2014 version of Rule 61 should apply to Purnell's motion (A1626-1711), the Superior Court rejected Purnell's reasoning and summarily denied his motion as procedurally barred under the post-2014 version of Rule 61 in place at the time Purnell filed his motion in May 2018.[21] The Superior Court found that Purnell failed to establish a strong inference of actual innocence to overcome Rule 61's procedural bars and summarily dismissed the untimely and successive motion under Rule 61(d)(2).[22]

On appeal, Purnell argues the Superior Court violated his constitutional rights by applying the post-2014 version of Rule 61 to his May 2018 second postconviction motion. (Op. Br. at 5-19). Purnell contends that the court should have applied the

[21] *Purnell*, 2020 WL 837148.

[22] *Id.*

2005 version of Rule 61 that was in effect on September 15, 2010, when Purnell's time ran out to file a timely initial Rule 61 motion, not the post-2014 amended version. (*Id.*). According to Purnell, had the Superior Court applied the 2005 version of Rule 61, the court would not have summarily dismissed his motion because he pled sufficient facts to warrant merits review under the "interests of justice" and "miscarriage of justice" exceptions in that version. (*Id.* at 16-53). Purnell's claims are unavailing. Purnell has also waived his remaining claims he raised below because he failed to brief the issues.[23]

A. The Superior Court Did Not Err by Applying the Post-2014 Version of Rule 61.

Prior to reaching the merits of Purnell's postconviction claims, the Superior Court was required to first apply the procedural requirements of Rule 61.[24] "To protect the procedural integrity of Delaware's rules, the Court will not consider the merits of a postconviction claim that fails any of Rule 61's procedural requirements."[25] "It is a matter of fundamental import that there be a definitive end to the litigable aspect of the criminal process."[26] As this Court has noted, "Rule 61

[23] Supr. Ct. R. 14(b)(vi)(A)(3).

[24] *E.g.*, *Coles v. State*, 2017 WL 3259697, at *1 (Del. July 31, 2017).

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

[26] *Flamer v. State*, 585 A.2d 736, 745 (Del. 1990).

is intended to correct errors in the trial process, not to allow defendants unlimited opportunities to relitigate their convictions."[27]

There is no legal basis for Purnell's assertion that the Superior Court should have applied the version of Rule 61 in place when his time ran out to file a timely initial Rule 61 motion. As the Superior Court noted, this Court has clearly and repeatedly stated that the court should apply the version of Rule 61 in place at the time the motion under consideration was filed.[28] Purnell filed his second Rule 61 motion on May 14, 2018, almost four years after Rule 61 was amended in June 2014. Accordingly, the Superior Court correctly found that the post-2014 version of Rule 61 applied to Purnell's second postconviction motion.

Relying on federal habeas cases, Purnell argues that the Superior Court's

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[27] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013); *accord Walls v. State*, 2016 WL 4191922, at *1 (Del. Aug. 1, 2016).

[28] *See, e.g.*, *Durham v. State*, 2017 WL 5450746, at *2 (Del. Nov. 13, 2017) ("Rule 61(d)(2), and the other amendments to Rule 61 in June 2014, were made effective on June 4, 2014 and apply to motions for postconviction relief filed on or after that date, including Durham's motion filed in February 2017."); *Coles*, 2017 WL 3259697, at *2 (applying version of Rule 61 that was in effect when defendant filed his Rule 61 motion); *Nastatos v. State*, 2019 WL 7041891, at *3 (Del. Dec. 20, 2019) (same); *Redden v. State*, 150 A.3d 768, 772 (Del. 2016) (same); *Bradley v. State*, 135 A.3d 748, 757 n.24 (Del. 2016) (same); *Jones v. State*, 2015 WL 6746873, at *1 & n.4 (Del. Nov. 4, 2015) (same); *Turnage v. State*, 2015 WL 6746644, at *1 (Del. Nov. 4, 2015) (same); *Collins v. State*, 2015 WL 4717524, at *1 (Del. Aug. 6, 2015) (same); *see also Coble v. State*, 2016 WL 2585796, at *1 (Del. Apr. 28, 2016) ("Superior Court erroneously applied the provisions of Superior Court Rule 61 that were in effect before the appellant filed his second Rule 61 petition on September 1, 2015.").

application of the post-2014 version of Rule 61 violated the "fair notice requirements" in the Due Process Clause of the United States Constitution, because that version was not in place at the time of his alleged "initial default" in September 2010. (*Id.* at 16-19). Purnell claims that to satisfy the fair notice requirement, the court should have applied the 2005 version of Rule 61 that was in effect on September 15, 2010, when Purnell's time ran out to file a timely initial Rule 61 motion, to this untimely, second Rule 61 motion. Purnell also claims that, while this Court "has relied upon [the] effectivity language" in the Superior Court's June 4, 2014 Order (A1936-40), providing that 2014 amendments to Rule 61 "shall be effective on June 4, 2014 and shall apply to postconviction motions filed on or after that date," to repeatedly uphold dismissals of successive petitions, this Court has "never analyzed whether this effectivity language satisfies federal due process requirements." (Op. Br. at 19). Purnell's reliance on federal habeas case law is misplaced, and he is otherwise incorrect.

Purnell's second postconviction motion is subject to the post-2014 version of Rule 61 in effect at the time it was filed in May 2018, regardless of the deadline to file his initial postconviction motion. As discussed, this Court has repeatedly upheld the application of the successive motions procedural bar to motions filed even shortly after the rule's amendment. Rule 61, as amended in 2014, was firmly established by the date Purnell submitted his second motion for postconviction relief

in May 2018, and thus applies.

Purnell contends that applying the post-2014 version of Rule 61 would violate the notice requirements discussed in the Third Circuit's decision in *Bronshtein v. Horn*[29] and *Lark v. Secretary Pennsylvania Department of Corrections*,[30] because that version was not in place at the time of Purnell's alleged default in September 2010. As the Superior Court recognized, this argument was previously rejected in *State v. Taylor* (*Milton Taylor*).[31] In *Milton Taylor*, the Superior Court noted:

> The federal requirement is designed to (1) ensure that a habeas petitioner is on notice of how to follow the state procedural rules when filing his petition; and (2) prevent discrimination by means of inconsistently-applied procedural rules through whim or prejudice against a claimant. "[W]hether the rule was firmly established and regularly followed is determined as of the date the default occurred, not the date the state court relied on [the rule], because a petitioner is entitled to notice of how to present a claim in state court."[32]

The court found Taylor's procedural default claim unripe because Taylor was not asking a federal court to review a state court's decision that his Rule 61 motion was barred on procedural grounds, and Taylor could not have defaulted until this Court found his motion procedurally barred.[33] The court further held the Third Circuit's

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[29] 404 F.3d 700 (3d Cir. 2005).

[30] 645 F.3d 596 (3d Cir. 2011).

[31] 2018 WL 3199537, at *2-3 (Del. Super. Ct. June 28, 2018).

[32] *Id.*

[33] *Id.*

notice requirements were satisfied because amended Rule 61 was firmly established by the time Taylor filed his second Rule 61 motion in August 2017—more than three years after Rule 61 was amended and almost eight years after Taylor filed his first Rule 61 motion.[34] The Delaware Supreme Court affirmed "on the basis of and for the reasons stated in [the] opinion."[35]

Like Taylor, Purnell filed his first postconviction motion before Rule 61 was amended in 2014 and his second postconviction motion almost four years after the 2014 amendments. As in *Taylor*, Purnell's procedural default argument is unripe because he is not asking a federal court to review a state court's decision that his motion was barred on procedural grounds. Further, any Third Circuit notice requirements were satisfied because Purnell was on notice for more than three years how to follow amended Rule 61's procedural rules, and Delaware courts have consistently applied amended Rule 61 in reviewing postconviction motions filed over the past six years.[36]

As the Superior Court noted, in *Turnage v. State*,[37] this Court analyzed the constitutionality of applying amended Rule 61 to movants whose judgment of

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[34] *Id.*

[35] *Taylor v. State*, 2019 WL 990718 (Del. Feb. 27, 2019).

[36] *See Milton Taylor*, 2018 WL 3199537, at *3; *State v. Mercer*, 2019 WL 1418061, at *3 (Del. Super. Ct. Mar. 26, 2019).

[37] 2015 WL 6746644.

conviction became final prior to the June 2014 Superior Court order amending the rule. Turnage's conviction for drug dealing became final in February 2014, but she did not file a motion for postconviction relief until May 2015.[38] Turnage argued that the version of Rule 61 in effect prior to June 2014 should have been applied to her motion because the 2014 amendments to Rule 61 contained unconstitutional restrictions on her right of access to the courts, violated due process, and were impermissibly retroactive.[39] This Court found Turnage's claims meritless. In so finding, this Court stated that the United States Supreme Court has held that "[s]tates have no obligation to provide [postconviction] relief."[40] As such, amended Rule 61 provides more due process and access to the courts than is constitutionally required, and therefore, Turnage's argument about the extent to which she has been afforded a right that the State does not have to provide, fails.[41] The Court also held that Turnage's "related argument that the amended Rule 61 is operating retroactively as to postconviction motions filed before June 4, 2014 is factually erroneous," because a defendant does not have a right to pursue any postconviction claim indefinitely, and Turnage was on notice of the amendment for seven months before Rule 61's

[38] *Id.* at *1.

[39] *Id.*

[40] *Id.*

[41] *Id.*

one-year period expired.[42]

Because the post-2014 version of Rule 61 provides more due process and access to courts than is constitutionally required, Purnell's argument about the extent to which he has been afforded a right that the State does not have to provide fails.[43] Rule 61 was intended to correct errors in the trial process, not to allow defendants unlimited opportunities to relitigate their convictions.[44]

B. The Exceptions in the 2005 Version of Rule 61 Do Not Apply.

Purnell acknowledges that his motion is successive. (Op. Br. at 5). Relying on the "interests of justice" and "miscarriage of justice" exceptions in the 2005 version of Rule 61, Purnell contends, however, that he has pled sufficient facts to overcome his procedural defaults. (*Id.* at 19). Purnell's argument is unavailing.

The courts substantially amended Rule 61 in June 2014 by adopting, among other things, new procedural bars for second and subsequent motions, found in Rule

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[42] *Id.* at *2.

[43] *See Ploof v. State*, 2018 WL 4600814, at *1 (Del. Sept. 18, 2018) (citing *Turnage*, 2015 WL 6746644, at *1); *Milton Taylor*, 2018 WL 3199537, at *6 ("Applying amended Rule 61 does not violate Taylor's fair notice rights because the amended rule was well-established and regularly used by the time Taylor filed his Motion."), *aff'd*, 2019 WL 990718; *Mercer*, 2019 WL 1418061, at *2-3 ("The Delaware Supreme Court has consistently held that the applicability of the post-June 2014 revision to Rule 61 to all Rule 61 motions filed on or after June 4, 2014, is not in violation of any constitutional rights.").

[44] *Id.*

61(d)(2) and referenced in Rule 61(i)(5).[45] The June 2014 amendment eliminated both the "interests of justice" exception in former Rule 61(i)(2 and 4), and the "miscarriage of justice" exception in former Rule 61(i)(5), applicable to the procedural bars of former Rule 61(i)(1-3). The new procedural requirements in the June 2014 amendment apply to any postconviction motion filed after June 4, 2014.[46]

Because Purnell filed his second Rule 61 motion on May 14, 2018, his motion is governed by the version of Rule 61 existing after the substantial amendments to the rule on June 4, 2014. Review of Purnell's claims is thus not warranted "in the interests of justice" or to prevent "a miscarriage of justice," because those exceptions are no longer available to Purnell.[47]

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[45] *See Sykes v. State*, 2018 WL 4932731, at *1 (Del. Oct. 10, 2018) (noting Rule 61's procedural bars were amended "with this Court's approval in evident part to deal with costly and non-meritorious motions such as this one").

[46] *E.g., Durham*, 2017 WL 5450746, at *2.

[47] *See id.*; *Burton v. State*, 2018 WL 6824636, at *1 (Del. Dec. 26, 2018) ("[T]he Superior Court applied the incorrect version of Rule 61 [the "miscarriage of justice" exception] when reviewing Burton's [August 2016] motion."); *Coble*, 2016 WL 2585796, at *1 (same).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING PURNELL'S SECOND MOTION FOR POSTCONVICTION RELIEF.[48]

Question Presented

Whether the Superior Court abused its discretion by denying Purnell's untimely, second postconviction motion.

Standard and Scope of Review

The State incorporates the standard of review set forth in Argument I herein.

Merits of Argument

Appropriately applying the version of Rule 61 in place at the time Purnell filed his second postconviction motion, the Superior Court summarily dismissed Purnell's motion. The court found his motion was untimely and procedurally barred as a successive motion, and that Purnell failed to present new evidence of actual innocence to overcome the bar. Purnell argues that, should this Court find that the post-2014 version of Rule 61 applies, the Superior Court erred in finding that he failed to establish a strong inference of actual innocence to overcome Rule 61's procedural bars. (Op. Br. at 5). Purnell's claim is unavailing. Purnell has also waived any remaining claims he raised below because he failed to brief the issues.[49]

[48] Argument I addresses argument II in Purnell's opening brief.

[49] Supr. Ct. R. 14(b)(vi)(A)(3).

A. Rule 61(i)(1) and (2) Barred Purnell's Second Rule 61 Motion.

The Superior Court did not abuse its discretion in finding that Purnell's second postconviction motion was untimely under Rule 61(i)(1) and barred by Rule 61(i)(2) as a second or successive postconviction motion. As discussed, when considering a motion under Rule 61, the Court must consider the procedural rules before reaching the merits of the claim. Purnell's convictions became final on September 15, 2009, when this Court issued its mandate.[50] (A11). Purnell filed this second motion for postconviction relief in May 2018, well over one year after his convictions were final. As such, the Rule 61(i)(1) and (2) bars against untimely and successive motions apply.

Although the Superior Court only addressed the procedural bars in Rule(i)(1) and (2), to the extent Purnell is attempting to relitigate previously adjudicated claims (*e.g.*, Claim 8), such claims are also procedurally barred by Rule 61(i)(4). Further, to the extent Purnell could have raised his claims in his direct appeal (*e.g.*, Claims 7 and 10), those claims are barred by Rule 61(i)(3) as a result of Purnell's failure to assert these grounds for relief in the proceedings leading up to conviction. Because the procedural bars in Rule 61(i)(1) and (2) precluded the Superior Court from

[50] Super. Ct. Crim. R. 61(m)(2).

reaching the merits of any of Purnell's postconviction claims, the State respectfully submits that this Court need not address the procedural bars in Rule 61(i)(3) and (4).

B. No Exception to the Procedural Bars Applies; Purnell Did Not Plead with Particularity That New Evidence Created a Strong Inference He Is Actually Innocent of the Underlying Charges.

The Superior Court was correct that Purnell failed to overcome Rule 61's procedural bars. Under Rule 61, Purnell can only overcome his procedural defaults and avoid summary dismissal of his untimely and successive postconviction motion, if he presents a claim that the Court lacked jurisdiction[51] or pleads with particularity that: (1) "new evidence exists that creates a strong inference that [he] is actually innocent in fact of the acts underlying the charges of which he was convicted," or (2) a new rule of constitutional law made retroactive to cases on collateral review applied to his case and rendered his convictions invalid.[52]

Purnell has not alleged that the trial court lacked jurisdiction over his convictions and sentence. Nor has he identified the existence of a newly retroactively applicable rule of constitutional law. Purnell claims that he can meet the actual-innocence exception of Rule 61(d)(2)(i), but his proffered evidence is not "new" and is merely impeaching or cumulative.

As the Superior Court previously recognized, "actual innocence" means

[51] Super. Ct. Crim. R. 61(i)(5).

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

factual, not legal, innocence.[53] "Proving actual innocence requires more than innocence of intent; it requires new evidence that a person other than the petitioner committed the crime."[54] In *Taylor v. State* (*Emmett Taylor*),[55] this Court held that to satisfy the actual-innocence exception, a defendant must show that the proffered evidence: "(a) will probably change the result if a new trial is granted; (b) was discovered since the trial and could not have been discovered before by the exercise of due diligence; and (c) is not merely cumulative or impeaching."[56]

Purnell asserts that the following constitutes "new evidence" strongly suggesting that he is actually innocent: (1) prosecution witnesses, Mitchell, Harris, and Hammond, "have recanted their previously false statements and trial testimony to their families and one in an affidavit;" (2) "new evidence refut[es] the prosecution's trial ballistics evidence;" and (3) "new evidence … conclusively confirm[s] that Purnell was dependent on crutches for mobility at the time of the shooting." (Op. Br. at 6).

None of the evidence he presented is "new," however, under the test set forth by this Court in *Emmett Taylor*. The proffered evidence is cumulative, impeaching,

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[53] *See Milton Taylor*, 2018 WL 3199537, at *7.

[54] *Id.*

[55] 2018 WL 655627 (Del. Jan. 31, 2018).

[56] *Id.* at *1.

or was available at the time of trial and could have been discovered with due diligence. Thus, none of the submitted "new" evidence in the proffered affidavits and declarations establishes a reasonable probability of a different result at trial. Because this proffered "not new" evidence does not lead to a strong inference that Purnell was actually innocent in fact, the Superior Court correctly determined that he did not satisfy Rule 61(d)(2)(i)'s pleading standard and properly summarily dismissed Purnell's untimely, second motion under Rule 61(d)(2).

1. Witness Affidavits

a. <u>Mitchell</u>

Purnell claims that Mitchell recanted his trial testimony. At trial, Mitchell claimed that he had talked to Purnell about a robbery, but he did not remember Purnell talking about a murder.[57] (A108). The State then introduced, through 11 *Del. C.* § 3507, statements Mitchell made to investigators before trial in which he claimed Purnell had bragged about the murder. (A110-14). In his prior statements, Mitchell claimed he had a conversation with Purnell at a juvenile detention center in April 2006 in which Purnell confessed to shooting Mrs. Giles, because she recognized him and called him "Mark," when he tried to rob her. (A111). Purnell

[57] Purnell states that Mitchell "denied speaking with Purnell about the murder." (Op. Br. at 8). However, Mitchell merely claimed not to recall that portion of the conversation. (*See* A108).

told Mitchell he intended to rob Mrs. Giles because it was "tax time."[58] (A111). The State also introduced evidence Mitchell was unwilling to cooperate at trial because Purnell had threatened him for being a "snitch." (A134-48, A179-81, A354-55; State's Trial Exs. 9, 11, 14, 18).

In support of his claim that Mitchell has "recanted" his testimony, Purnell relied on a May 2017 affidavit from Mitchell in which Mitchell: (1) denies ever knowing anything about Mrs. Giles' murder; (2) denies Purnell ever bragged to him about killing Mrs. Giles; (3) claims police tried to coerce him into a story they had already made up; (4) states he was not going to testify to something that was not true and claims he told "the truth on the stand" that he did not know anything about the murder; and (5) states he does not know if Purnell killed Mrs. Giles, but Purnell never told him that he did. (Op. Br. at 6; A489-90). To support the credibility of Mitchell's supposed recantation, Purnell submitted written statements from two additional individuals. Specifically, Purnell provided: (1) an affidavit from Dawon Brown, a third person who Mitchell claimed was present when Purnell bragged about the murder, which denies that such a conversation ever happened (A506-07), and (2) a declaration from Andrew Moore, Mitchell's co-inmate, stating that Mitchell confessed to him after Purnell's trial that he lied when he implicated Purnell

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

in the murder because he was young and scared and was a suspect in the case (A509-10). Purnell argues that, under *Hicks v. State*,[59] the affidavits and declaration are not merely impeachment and cumulative evidence because they offer the reason *why* Mitchell provided testimony that conflicted with his original statements to the police. (Op. Br. at 8-9).

As the Superior Court found, the affidavits and declaration are not new evidence that creates a strong inference Purnell is actually innocent in fact. First, Mitchell's statement that he never heard Purnell talk about the murder is not "new" evidence because Mitchell made equivalent statements in his trial testimony when he claimed not to remember speaking to Purnell about the murder. (A107-08). Second, the purported new evidence would not change the result at trial, as nothing in the sworn statements refutes Mitchell's previous testimony. Indeed, the affidavit *supports* his testimony: in it, Mitchell states he "told the truth on the stand." Mitchell's affidavit only shows his continued lack of cooperation or stated knowledge, which was explored at trial. To the extent Mitchell's denials extend beyond his trial testimony, such as his new allegation of police coercion, his affidavit is not reliable or credible, coming nine years after trial and eleven years after the murder and his prior statements to police, without any justification for the delay.[60]

[59] 913 A.2d 1189 (Del. 2006).

[60] *See State v. White*, 2018 WL 6131897, at n.38 (Del. Super. Ct. Nov. 21, 2018),

It also does not address independent evidence at trial concerning Purnell's participation in the murder, including testimony from his co-conspirator, Harris (A239-42); Hammond (A156-59); the Williams' sisters (A176-81, A189-92, A196-97, A201); Purnell's recorded statement to police about shooting a victim if they run away from a robbery (State Trial Ex. 38); and Purnell's recorded statement to Mitchell's brother, in which Purnell bragged that he had "a lot" to do with Mrs. Giles' murder (State Trial Ex. 13; A219-22, A228).[61] Mitchell's affidavit is merely impeachment evidence, only questioning the credibility of his out-of-court statement. Evidence that tends only to impeach testimony at trial is insufficient to establish actual innocence.[62]

Mitchell's statement is not a post-trial recantation. Even if it was, Purnell failed to meet the three-pronged *Blankenship v. State*[63] test for granting a new trial. Under *Blankenship*, a court should grant a new trial when: (1) the court is reasonably well satisfied that a material witness provided false testimony; (2) the jury might have reached a different conclusion without the testimony; and (3) the movant was

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aff'd, 208 A.3d 731 (Del. 2019); *Hicks*, 913 A.2d at 1194-96.

[61] *Id.*

[62] *Emmett Taylor*, 2018 WL 655627, at *1; *State v. Brathwaite*, 2017 WL 5054263, at *2 (Del. Super. Ct. Oct. 23, 2017), *aff'd*, 2018 WL 2437233 (Del. May 30, 2018).

[63] 447 A.2d 428 (Del. 1982). While *Blankenship* dealt with a motion for a new trial, Delaware courts have applied it to postconviction motions based on a recantation. *See, e.g.*, *White*, 2018 WL 6131897, at *4.

taken by surprise at trial by the false testimony and was unable to meet it or did not know of its falsity until after trial.[64] "Delaware courts view motions based upon recanted testimony with considerable suspicion," because "there is no proof so unreliable as recant[ed] testimony."[65] Indeed, "Delaware case law is rife with instances of recantation procured through bribery, threats, and, more subtly, coercion from family and neighbors who believe that felony sentences are too harsh."[66]

Purnell cannot show that Mitchell's trial testimony was false. In Mitchell's affidavit "recanting" his testimony, Mitchell states he "told the truth on the stand." (A489). In addition, as discussed, Mitchell's newly produced affidavit is not reliable or credible. Mitchell's affidavit is even more implausible as there is evidence that Mitchell was unwilling to cooperate at trial because Purnell had threatened him for being a "snitch" (A134-48, A179-81; State Trial Exs. 9, 11, 14, 18), and because there was independent evidence against Purnell, including his own statements implicating himself in the murder (*see*, *supra*). Because there was other credible evidence against Purnell, Purnell cannot establish that the jury would not have

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[64] *Id.* (citing *Blankenship*, 447 A.2d at 433-34).

[65] *State v. Rogers*, 2009 WL 726305, at *1 (Del. Super. Ct. Mar. 17, 2009); *State v. White*, 2004 WL 2750821, at *1 (Del. Super. Ct. Nov. 17, 2004); *Blankenship*, 447 A.2d at 433; *see also Landano v. Rafferty*, 856 F.2d 569, 572 (3d Cir. 1988); *Teagle v. Diguglielmo*, 2009 WL 1941983, at *3 (3d Cir. June 11, 2009).

[66] *White*, 2004 WL 2750821, at *1; *Rogers*, 2009 WL 726305, at *1.

convicted him without Mitchell's testimony. Finally, Purnell was not surprised by Mitchell's testimony. Purnell had a copy of Mitchell's 3507 statement prior to trial, and evidence showed that Purnell had threatened him not to cooperate at trial. Therefore, even if Mitchell's affidavit was credible, it fails to satisfy *Blankenship*.

The Superior Court also correctly found that the other affidavits offered to support Mitchell's were not "new" evidence. Brown claims in his affidavit that: (1) he was at the juvenile detention center with Purnell and Mitchell in April 2006, and he never heard Purnell talk about a murder; (2) Mitchell was lying if he told police Brown heard Purnell talking about killing someone; and (3) no detective talked to him about the case. (A506-07). Brown's affidavit relates to statements Mitchell made prior to Purnell's trial, and Brown could have been located to testify with relative ease.[67] Indeed, Purnell acknowledged that the information in Brown's affidavit was not new, writing in his motion, "[n]either defense counsel nor the detectives contacted Dawon Brown to confirm [Mitchell's] unsubstantiated account. Had they done so, they would have learned that this presumed conversation about the shooting at the Detention Center ... never took place." (*See* A417). Moreover, nothing in Brown's affidavit refutes Mitchell's previous testimony or creates a strong inference that Purnell is actually innocent in fact. Brown's affidavit is also not credible, coming almost ten years after the events in question.

[67] *See Brathwaite*, 2017 WL 5054263, at *2; *Hicks*, 913 A.2d 1189.

Likewise, the sworn statement from Moore, Purnell's "good friend" (A509), who could have been easily located to testify, nine years after trial and over four years after Mitchell's alleged statements, is not credible or reliable. Moore states in his declaration that: (1) he is good friends and grew up with Purnell; (2) he was in prison with Mitchell in 2012-13 and did not want anything to do with Mitchell because he testified against Purnell; (3) while in prison together in 2012-13, Mitchell told Moore that Mitchell was not at the scene of the murder and he does not know who shot Mrs. Giles, Mitchell did not shoot Mrs. Giles, and Mitchell pointed the police in Purnell's direction because he was hearing rumors that Purnell did it; and (4) Mitchell was young and scared and did not know what else to do, because he did not want to spend the rest of his life in prison. (A509-10). Moore's affidavit does not address other contrary testimony at trial and is merely impeaching and cumulative. And, notably, Moore's claim that Mitchell told him that he was not at the scene of the murder and that he did not see Purnell shoot Mrs. Giles is also not new. Mitchell never testified or told police that he was at the scene of the murder or that he saw Purnell shoot Mrs. Giles.

Finally, Purnell is wrong that Mitchell's, Brown's, and Moore's statements are more than just impeaching and cumulative because they "answer the jury's important question of *why* Mitchell provided testimony that conflicted with his original statements to the police." (Op. Br. at 8-9). Purnell's attempt to reframe the

evidence does not serve him; the question of "why" Mitchell gave conflicting testimony is still an issue of his credibility and, therefore, impeachment. In any event, the jury was aware that Mitchell fit the description of the second assailant, did not have an alibi, and was once a suspect, and the defense cross-examined Mitchell about his motivations for providing his recorded statement to the police. (A96, A99, A115, A126, A179, A189-90, A192, A224, A229, A360).

b. Harris

When interviewed prior to trial, Harris repeatedly told police he did not associate or socialize with Purnell and Purnell did not have any involvement with Mrs. Giles' murder/attempted robbery. (A247). After the commencement of jury selection, Harris accepted a plea offer reducing his exposure to incarceration from life in prison to only three years in exchange for testifying for the State during Purnell's trial, and provided a proffer implicating Purnell in Mrs. Giles' murder/attempted robbery. (A247-49). At trial, Harris testified he talked with Purnell on the day of the murder/attempted robbery about committing a robbery, and Purnell had, in fact, shot and killed Mrs. Giles after he tried to rob her.[68] (A239-42).

[68] Harris testified he and Purnell agreed that they would commit a purse-snatching on the morning Mrs. Giles was killed. (A239). Later that day, after meeting Purnell at Compton Towers, Harris and Purnell began walking up Fifth Street towards Willing Street. (A240). At that time, Harris saw Mr. and Mrs. Giles exit a bus holding bags from a store. (A240-41). Harris testified that he and Purnell walked up to Mr. and Mrs. Giles, and Purnell said to them, "Can I get y'all stuff?" (A241). Harris testified Purnell then "pulled out a gun," and he saw Purnell point the gun at

Harris also testified he had been convicted of two felonies from his participation in the crime in this case, and had been adjudicated delinquent for two felony level crimes. (A238).

Purnell argues that Harris's alleged recantation of his trial testimony through his parents' affidavits and Harris's intellectual disabilities qualified as new evidence. (Op. Br. at 9-10). Purnell relies on May 2017 declarations from Harris's mother and stepfather (but not Harris), claiming: (1) Harris has cognitive delays and learning disabilities; (2) Harris told his mother in February 2006 that he had nothing to do with the murder; (3) Harris's mother told police about Harris's disabilities; (4) Harris was "railroaded" and felt "trapped" to plead; (5) you could "plainly see" at trial that Harris was confused and his testimony did not make sense; (6) Harris never hung out with Purnell; (7) Harris still cannot talk about his arrest, trial, or incarceration, but maintains he is innocent of the murder; (8) two weeks after his testimony, Harris told his mother he "just said it so I could come home"; (9) Harris told his parents, after trial, that he had two choices: testify against Purnell or spend the rest of his life in prison, and he told authorities what they wanted to hear to survive; and (10) Harris's mother knows he is innocent, and "if he is innocent, [Purnell] may very well be too." (A512-16). Purnell contends that these affidavits should be viewed in

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Mrs. Giles. (A241). Harris stated he started to run in the opposite direction and "heard a shot" about five seconds later when he was about 20-25 feet away. (A241-42).

concert with the fact that the jury did not appreciate the extreme interrogation tactics, which included a seven-hour interrogation of "intellectually disabled" teenaged Harris. (Op. Br. at 9-10). Purnell claims that Harris's second-hand recantation is credible because of the interrogation techniques and because his in-court testimony conflicted with his prior recorded statement. Purnell is incorrect.

Despite being sworn, the statements that Purnell provided from Harris's mother and stepfather are not credible or reliable, as they are not even from Harris, come nine years after the trial and eleven years after the murder, and contradict an eyewitness' testimony that Harris was involved in the murder. (A82, A87-88). Purnell alleges that Harris cannot read and write (Op. Br. at 10), but even if true, Harris could have used a scribe to provide a sworn statement. And, because Harris repeatedly claimed, prior to trial, that neither he nor Purnell were involved with the murder, and Harris was questioned on direct and cross-examination about his statements, his alleged statements to his mother and stepfather that he and Purnell had nothing to do with the murder are not "new" or a post-trial recantation.[69]

Harris's mother and stepfather's statements and Harris's alleged intellectual disabilities are also not new evidence that "could not have been discovered before by the exercise of due diligence."[70] Harris's parents admit that Harris's alleged

[69] *See White*, 2018 WL 6131897, at *4.

[70] *Brathwaite*, 2017 WL 5054263.

intellectual disabilities were known before trial, and Purnell has failed to establish that any such evidence would have probably changed the result if presented to the jury. Indeed, Harris's mother's declaration, which states that you could "plainly see" at trial that Harris was confused and his testimony did not make sense, refutes Purnell's claim. And, the jury was aware that Harris could not read. (A249). Further, Harris's prior statements to police and the video of his interrogation were available at the time of trial and provided to the defense. In one of the recorded interviews, Harris told the police he was on medication, he had mental problems for which he took medicine, and he could not read.[71] (A517-20). Harris's parents admittedly were present at trial (A512, ¶3), and thus could have been located to testify with ease about Harris's alleged intellectual disabilities and inability to read and write. And, Harris's parents' declarations do not establish that Harris was incompetent to testify, and conflict with the Superior Court's finding a few days before Harris testified that he was competent to plead guilty.

Finally, nothing in the declarations creates a "strong inference that [Purnell] is actually innocent in fact." Harris's favorable plea deal and Purnell's claim that he and Harris did not socialize were presented at trial. The jury rejected them.

[71] Purnell also ignores that Harris did not confess in the 2006 or 2007 interviews. Rather, he repeatedly claimed that neither he nor Purnell were involved. (A247; A522-614). He did not admit his and Purnell's involvement until a year later, and that video was introduced at trial. (A245-46).

c. Hammond

Hammond testified that he saw Harris and Purnell together on the day of the shooting and that he was there when Purnell and Harris planned the robbery. (A156-57). Hammond testified Purnell complained of being "broke" and had a semi-automatic gun in his waistband.[72] (A157). About 45 minutes to an hour later, Hammond heard a gunshot near the intersection of Fifth and Willing Streets and discovered Mrs. Giles had been shot. (A158). When Hammond saw Purnell a few days later, Purnell bragged he had "popped" Mrs. Giles because she refused to hand over her money. (A158-59).

In support of his claim that Hammond recanted his testimony, Purnell relied, not on a sworn statement from Hammond, but on affidavits from Hammond's mother, Naco Hammond ("Naco"); his brother, Troy Hammond ("Troy"); and a friend of Hammond's family, Alfred Lewis. (A665-73). Purnell presents Lewis's and Naco's affidavits as suggesting that Hammond's testimony was the result of a ploy by his now-deceased father to keep Hammond out of prison. Lewis's 2017 affidavit states that Hammond told him in 2008 that: (a) Purnell never told him anything about a murder; (b) the police pressured him; and (c) Hammond only told the police "what everyone had heard," and he testified about "what everyone was

[72] A 9-mm shell casing was found approximately 40 feet from the scene of the crime, which had been fired from a semi-automatic gun. (A74-76, A164-65, A234-37).

saying in the streets about the crime." (A665-66). Lewis also claims that: (a) while in prison with Hammond's father in January 2007, Hammond's father told him he had previously worked with police to get charges thrown out and he would do anything, even "lie," to get his son out of trouble; and (b) Lewis told Hammond, while they were in jail in 2007, that Hammond's father was going to "help him out." (*Id.*). Naco's affidavit states that: (1) Hammond's father (now deceased) "would say anything to get out of jail;" (2) whenever Hammond got in trouble, his father would go to the police station to get him, and without fail, he "would be out;" (3) Hammond's father told police Hammond knew something about Mrs. Giles' murder; (4) "I know my son. He didn't know anything about that murder;" (5) after he testified, Hammond told Naco he was being labeled a "snitch because his dad involved him in the case;" (6) "[o]nly [Hammond] knows what his father said to him but I wouldn't be surprised if [his father] put words in his mouth;" and (7) "I never heard any rumors of [Purnell] bragging to people about the murder." (A668-70).

Purnell also relied on Troy's affidavit, claiming that: (1) he was hanging out with friends on the corner of Fifth and Jefferson Streets the night of Mrs. Giles' murder and Hammond was not with him; (2) he heard a shot and a woman screaming and ran to Fifth Street between Washington and West Streets and saw a woman lying on the ground who had been shot; (3) he never saw Hammond at the scene, although he was there for several minutes; and (4) lots of people talked about what happened

that night and what they saw at the scene, and Hammond possibly heard them talking. (A672-73). Although Purnell concedes that Troy's affidavit is impeachment evidence (Op. Br. at 11), which is thus insufficient to establish actual innocence under Rule 61(d)(2)(i), Purnell claims that it lends credibility to the other purported new evidence of the falsity of Hammond's trial testimony and knowledge of Purnell's involvement in the murder. (*Id.*).

As the Superior Court found, these three affidavits do not qualify as new evidence. They are merely impeaching, attacking the credibility of Hammond's trial testimony, and they are cumulative because Hammond's credibility was aggressively attacked on cross examination by Purnell's trial counsel. Indeed, Hammond's favorable plea deal and prior denials to knowing anything about the crime were known at trial, and, based on the verdict, the jury rejected Purnell's argument that Hammond's testimony was not credible. (A159, A164-75, A360).

Lewis's affidavit, dated almost ten years after Hammond's alleged statements, is also not reliable or credible, especially given that Hammond has not submitted any sworn recantation. Lewis's statement also does not create a strong inference that Purnell is actually innocent in fact. Notably, Lewis's affidavit does not refute other evidence against Purnell at trial, including Hammond's testimony that: (1) he saw Harris and Purnell together on the day of the shooting; (2) Purnell complained of being broke and replied "it's whatever," when Harris asked Purnell what he was

going to do about it; (3) he observed a semi-automatic firearm in Purnell's waistband "around the same time;" and (4) he heard a gunshot and someone screaming about 45 minutes later and he ran to the scene and saw Mrs. Giles on the ground. (A156-58).

Purnell also argues that information in Lewis's and Naco's affidavits indicating that Hammond's father was a police informant implicates *Brady v. Maryland*.[73] (Op. Br. at 11-12). Purnell's entirely speculative claim of a *Brady* violation is without basis. The statements, provided over ten years after the alleged conversations took place, are not reliable or credible and do not create a "strong inference that [Purnell] is actually innocent in fact." The affidavits do not refute other evidence against Purnell at trial, including Purnell's own statements. While Purnell relies on inadmissible hearsay contained in the affidavits,[74] the State is not aware of any evidence that would support Purnell's claim that Hammond's father worked out an agreement with police for Hammond to testify against Purnell. Moreover, Purnell's unsupported allegations overlook that Hammond testified that the State agreed to reduce his sentence for his 2006 felony drug conviction in exchange for his trial testimony. (A165-75). Thus, the proffered evidence would not change the result of the trial.

[73] 373 U.S. 83 (1963).

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

2. Ballistics

During their investigation, police recovered a 9-mm Luger cartridge case 40-50 feet north of the intersection where the shooting took place. In a June 2017 declaration, Robert Tressel, the Chief Criminal Investigator at the Cobb County District Attorney's Office in Georgia, opined the 9-mm Luger cartridge case was unrelated to the shooting. (A723-60). Purnell claims that this newly obtained evidence revealing that a 9-mm shell casing could not travel 50 feet after being ejected from a firearm refutes the prosecution's ballistics evidence and supports Purnell's actual innocence by implicating the initial suspects, Mitchell and Dawan Harris. (Op. Br. at 12-14).

Purnell also cited the following evidence, which he concedes is not new, but which he claims "highlights the importance of Chief Tressel's new scientific evidence": (1) an October 2007 supplemental police report noting several sources identified Mitchell as the shooter (A675-709); (2) Mitchell's so-called alibi collapsing during trial (A179); (3) Mr. Giles', the victim's husband, identification of Mitchell as the shooter (A48-49, A330-31);[75] (4) the fact eyewitness Rayne was never shown a photo array containing Mitchell's or Dawan Harris's pictures; and (5)

[75] The Superior Court ruled Mr. Giles' statements tentatively identifying Mitchell as the shooter and failing to identify Purnell as the shooter were inadmissible hearsay, because Mr. Giles died four months before trial (A218), and his statements lacked sufficient circumstantial guarantees of trustworthiness to be admitted under D.R.E. 807. (A48-49, A330-31). This Court affirmed. *Purnell*, 979 A.2d at 1106-08.

the fact that a .38-caliber revolver that Mitchell and Dawan Harris were sharing at the time of the shooting was found hidden in a ceiling outside of their girlfriends' apartment shortly after the crime. (A224-25). The Superior Court was correct that none of this proffered evidence is new evidence.

The ballistic evidence was available at the time of trial, which Purnell acknowledged below.[76] (A445) ("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 Mrs. Giles.").[77] Moreover, the proffered evidence would not change the result if a new trial is granted. Ballistics were never an essential part of the State's case. Rather, as the defense conceded at trial (A357), the core issue was the identity of the shooter. Harris and three other individuals identified Purnell as the shooter, and other evidence, including Purnell's own statements, supported the jury's verdict. And, the jury heard arguments refuting the connection between the casing and Mrs. Giles' murder.

While Purnell acknowledges that the remainder of his evidence is not new (*see* Op. Br. at 13), he nevertheless argues that the jury never heard about the

[76] Detective Tabor testified the 9-mm shell casing was found about 40 feet away from the intersection where Mrs. Giles was killed. (A75-76).

[77] Purnell provided no explanation for failing to obtain an expert for trial. (A156, A360).

suspicious nature of Dawan and Mitchell's acquisition of the .38-caliber revolver. (*Id.* at 14). Relying on a video of Dawan's interrogation by police and a transcript of Dawan's cousin's, Cameron Johnson, interrogation by police, Purnell claimed that Johnson's statement that the revolver was stolen two or three weeks before the murder is new evidence that would likely change the result at trial because it contradicts Dawan's statement that he did not obtain the gun until a few weeks after the murder. (*Id.*). As the Superior Court found, neither the video of Dawan's interrogation nor the Johnson interrogation are new evidence because the information was available at the time of trial. Purnell offers no proof that he made diligent efforts to obtain this information and was denied. The evidence would also not change the result at trial. The defense argued the .38-caliber revolver found in the ceiling outside of Mitchell's and Dawan Harris's girlfriends' apartment could have been the murder weapon. (A156, A360). The jury was also aware Mitchell and Dawan Harris were once suspects and Mitchell did not have an alibi. (A96, A99, A115, A179, A189-90, A192, A224, A229). Trial counsel also argued Mitchell gave his statement implicating Purnell because Mitchell fit the description of the second assailant and was the person who actually committed the murder/attempted robbery. (A126; A360).

3. Medical

Purnell submitted a June 2017 affidavit from Francis McGuigan, M.D. that he claimed was new evidence. In his affidavit, Dr. McGuigan stated that, based on Purnell's medical records and testimony at trial, he "believes with reasonable medical probability that [Purnell] would have likely been unable to run unimpeded" on the day of Mrs. Giles' murder. (A806-08). Purnell also submitted: (1) a June 2017 affidavit from Purnell's "close friend," who saw Purnell using crutches in court on an unknown date (A810-11); (2) a May 2017 affidavit from a youth rehabilitation counselor at New Castle County Detention Center ("NCCDC"), who saw Purnell using crutches there on an unknown date (A813-14); (3) a medical "progress note" from Ferris School documenting Purnell saw medical staff for wound care from February 1-3, 2006 (A816-17); and (4) a progress record from Christiana Care dated January 23, 2006 (A819). Although Purnell acknowledges that medical evidence of his dependence on crutches for mobility and inability to run at the time of the shooting only "differs in quality, not kind, as the testimony presented at trial," Purnell claims that Dr. McGuigan's opinion that he was likely unable to run during the crime, "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." (Op. Br. at 15).

As the Superior Court found, Purnell's proffered medical evidence does not satisfy Rule 61(d)(2)(i)'s exception. It is merely cumulative evidence. Purnell's

medical records were introduced at trial. (A334; State's Trial Ex. 36). The jury learned Purnell suffered a bullet wound to the back of his knee in January 2006, had knee surgery on January 22, 2006, requiring approximately 13 staples, and left the hospital on January 23, 2006 in a wheelchair. (A333-35, A337, A342-43). The jury also heard Purnell was in NCCDC two days after the murder (February 1-3, 2006), at which time the staples were removed. (A336, A343). A NCCDC youth rehabilitation counselor testified he "slightly" recalled Purnell using crutches during that time. (A319). Purnell's orthopedic surgeon testified he did not see Purnell after the surgery and, therefore, he was not able to give an opinion whether Purnell could walk or run on the day of Mrs. Giles' murder. (A336). Defense witnesses testified Purnell could not walk without crutches and was unable to run on the day of the murder, and trial counsel thus argued Purnell could not have committed the crimes. (A260-62, A266-69, A271, A274-75, A287-88, A363-64). The jury that convicted Purnell therefore did so with knowledge of the very material he claims is "new" evidence. Moreover, as the Superior Court found, "all of the medical evidence taken as a whole does not conclusively show that Purnell was physically unable to run on January 30, 2006."[78]

Purnell's pleadings are insufficient to invoke the actual-innocence exception. As the Superior Court recognized, "the operative effect of Purnell's proffered

[78] *Purnell*, 2020 WL 837148, at *16.

evidence is to belatedly attempt to create reasonable doubt as to Purnell's guilt for the charges for which he was convicted. However, Purnell's trial has long since been concluded, the jury as fact-finder found that the State met its burden of proving guilt beyond a reasonable doubt, and his conviction and sentence are no longer reviewable on the grounds of reasonable doubt."[79] The proffered evidence is merely impeaching or cumulative. Simply put, Purnell is seeking yet another opportunity to re-litigate his conviction, which Rule 61 does not allow.[80] Because the claimed new evidence of actual innocence is insufficient to meet Rule 61(d)(2)(i)'s requirements, the Superior Court did not abuse its discretion by applying the procedural bars to summarily deny Purnell's untimely, successive second postconviction motion.

[79] *Id.* at *17.

[80] *Ploof*, 75 A.2d at 820.

CONCLUSION

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

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Dated: July 20, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 10,000 words, which were counted by Microsoft Word.

Dated: July 20, 2020 /s/ *Carolyn S. Hake*