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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 CORRECTED REPLY BRIEF

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Dated: August 17, 2020

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INTRODUCTION

Mark Purnell filed an opening brief in this Court on June 1, 2020. The State filed a motion to affirm on June 16, 2020. This Court denied the motion to affirm on June 29, 2020. The State filed an answering brief on July 20, 2020. Below is Purnell's reply brief.

In its answering brief, the State makes two statements that Purnell has waived his remaining claims for failing to brief the issues, without citing the claims to which they referring.[1] Purnell does not waive any of his claims. Without knowing to what claims the State is referring, Purnell cannot answer the State's two assertions.

[1] Answer at 11, 19.

ARGUMENTS

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

In his Opening Brief, citing *Bronshtein v. Horn,*[2] Purnell argued that if this Court fails to reverse the lower court's application of Rule 61 (eff. June 2014) to default Purnell's successive post-conviction claims, this Court will violate the United States Constitution.[3] The consequence of this violation is *de novo* federal review of the state defaulted claims. The lower court erred by following an unpublished Delaware Superior Court opinion, *State v. Taylor,*[4] which addressed the same argument that Purnell has made. The court in *Taylor* chose to focus on *Fahy v. Horn,*[5] despite that the procedural posture in *Bronshtein* was more analogous.[6] Regardless, the court in *Taylor*/*Purnell* misunderstood the purpose of

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[2] 404 F.3d 700 (3d Cir. 2005).
[3] *Ford v. Georgia*, 498 U.S. 411 at 424 (1991); *Cabrera v. Barbo*, 175 F.3d 307 at 313 (1999).
[4] 2018 WL 3199537, at *2-3 (Del. Super. Ct. June 28, 2018).
[5] 516 F.3d 169 (3d Cir. 2008) (citing *Bronshtein v. Horn*, 404 F.3d 700, 707-08 (3d Cir. 2005)).
[6] AR-14.

the *Fahy/Bronshtein* argument. That this Court affirmed *Taylor*[7] is irrelevant here because Taylor chose not to brief the court's *Fahy/Bronshtein* error.[8]

In *Purnell*, the court concluded that the "*Bronshtein* ruling [was] not controlling precedent, as was articulated in *State v. Taylor*."[9] However, the court in *Taylor* incorrectly ruled that Taylor's fair notice constitutional argument was "unripe because Taylor [was] not asking a federal court to review the state court's decision that Taylor's motion was barred on procedural grounds."[10] The court in *Taylor* did not understand that the purpose of the *Fahy/Bronshtein* argument was to notify the state court of the need to apply the correct version of Rule 61 to avoid a United States Constitutional violation. The adequacy analysis involves identifying and applying the federal due process and equal protection law that states must comply with for federal courts to defer to their procedural default rulings.[11] If state courts want federal court deference, they must comply with *Fahy/Bronshtein.*

After incorrectly ruling that Taylor's argument was "unripe," the court in *Taylor* decided to consider Taylor's argument that *Fahy* required a prior version of

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[7] Answer at 15 (citing *Taylor v. State*, 2019 WL 990718 (Del. Feb. 27, 2019)).
[8] AR-14.
[9] *State v. Purnell*, 2020 WL 837148, at *12 (Del. Super. Ct. Feb. 19, 2020) (citing *Bronshtein,* 404 F.3d at 706.
[10] *Id.* at *4.
[11] *Coleman v. Thompson*, 501 U.S. 722 (1991).

Rule 61 to be applied (the Superior Court appears to have overlooked Taylor's citation to *Bronshtein)*.[12] Using a Catch-22 methodology, the court circularly concluded that *Fahy* had been satisfied because Taylor had been on notice of the 2014 amendment for three years when he filed his successive petition.[13] But *Fahy/Bronshtein* is not satisfied where a movant has been given *post hoc ergo propter hoc* (after this, therefore resulting from it) notice that an avenue of relief has already been foreclosed.

In summary, the court in *Fahy* actually concluded that because the Pennsylvania common law exclusion to the timeliness rule for capital post-conviction cases changed *after* Fahy began his fourth post-conviction proceeding, the rule change did not apply to Fahy.[14] The court in *Bronshtein* similarly concluded that although the same rule change occurred *before* Bronshtein initiated his successive proceeding, the rule change did not apply to Bronshtein because the rule change did not go into effect at a time when Bronshtein could comply with it: which was when Bronshtein initiated his *initial* (not his successive) post-conviction proceedings.[15] That the new rule was issued only months before

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[12] 2018 WL 3199537, at *3.
[13] *Id.*
[14] 240 F.3d at 245.
[15] 404 F.3d at 709.

Bronshtein filed his successive proceeding was a nonfactor in the court's analysis.[16] The operative factor was whether the new rule was issued at a time when Bronshtein could comply with it.[17] Because the answer was no—Pennsylvania courts should have applied the old rule.[18] As demonstrated by the parallels below, Purnell is in the exact same procedural posture as Bronshtein.

The applicable Pennsylvania statute during Bronshtein's case took effect on January 16, 1996.[19] At that time, however, Pennsylvania had a common law "relaxed waiver" exception[20] to the statute's timeliness rule that operated in the same manner as the "colorable claim" exception to the Delaware Rule 61 (2005) timeliness and successive bar rules: new colorable constitutional claims could be raised in perpetuity.

When Bronshtein's initial post-conviction proceeding was initiated on December 3, 1997, the "relaxed waiver" exception applied; similarly, when Purnell's initial post-conviction proceeding was initiated on March 25, 2010, the Rule 61 (2005) "colorable claim" exception applied.

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[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] 42 PA. Cons. Stat. Ann. § 9545(b).
[20] 404 F.3d at 709 (citing *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001).

After a competency proceeding, Bronshtein's initial post-conviction claims were dismissed with prejudice; this was upheld on appeal on April 16, 1999.[21] After a hearing and oral argument, Purnell's initial post-conviction claims were denied; this was upheld on appeal on November 21, 2014.

More than a year after the conclusion of his initial post-conviction proceedings, on April 29, 1999, Bronshtein informed the Pennsylvania court that he wanted to litigate a successive post-conviction proceeding initiated on April 23, 1999. However, after the conclusion of his *initial* proceedings, three decisions had issued on November 23, 1998, December 21, 1998, and on March 2, 1999, abolishing the "relaxed waiver" timeliness exception.[22] As a result, the Pennsylvania lower court dismissed Bronshtein's untimely successive claims; this dismissal was affirmed by the Pennsylvania Supreme Court.[23]

Like Bronshtein, Purnell initiated a successive post-conviction proceeding more than a year after the conclusion of his initial proceedings, on May 14, 2018. Like Bronshtein, after the denial of Purnell's *initial* post-conviction proceedings,

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[21] *Id.*
[22] *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998); *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998); *Commonwealth v. Banks*, 726 A.3d 374 (Pa. 1999).
[23] 404 F.3d at 709.

the Superior Court amended Rule 61 in June 2014, abolishing the "colorable claim" timeliness and successive petition exceptions. Just as in Bronshtein, the lower court dismissed Purnell's untimely successive claims. And now this Court must review that dismissal.

In *Bronshtein*, the federal courts determined that the state procedural dismissal of Bronshtein's claims violated fair notice and equal protection constitutional requirements. They then refused to defer to the Pennsylvania courts' procedural ruling; instead they considered the merits of Bronshtein's state defaulted claims *de novo*—which is exactly what will happen in Purnell's case should this Court affirm the lower court's dismissal.

To reach their conclusion in *Bronshtein*, the federal courts ruled that it was the old "relaxed waiver" rule in place when Bronshtein filed his *initial* proceedings that the state courts should have applied to his *successive* proceedings, not the new clearly established rule in effect when he filed his *successive* petition; this was true despite that the new rule had been "clearly established" for over a month, if not for three full months before Bronshtein filed his successive petition.[24]

[24] *Bronshtein*, 404 F.3d at 709.

Thus, the lower court in *Purnell*/*Taylor* misunderstood the plain language in *Fahy/Bronshtein* as supporting the application of new Rule 61 (eff. June 2014), when in fact *Fahy/Bronshtein* required the old rule to be applied. As a result, the *Purnell/Taylor* opinions produced an absurd result. Why would federal courts care how much time has passed from the date it became *too late* to comply with a post-conviction rule change? Whether it is 45 days, three months or three years, the result is the same: the rule changed at a time when it was too late for the movant to comply. Where this is the case, state courts must apply the version of the rule in place at the time when the movant was able to comply with the rule:

> Although one might argue that either *Albrecht* or *Peterkin* marked the point when it became firmly established that the PCRA time limits would be applied literally in capital cases, our opinion in *Fahy v. Horn,* 240 F.3d 239, 245 (3d Cir.2001), implies that the unavailability of judicially created exceptions to the PCRA time limits was less than perfectly clear until the state supreme court decided *Banks.* For present purposes, however, it is not necessary for us to decide whether *Albrecht, Peterkin,* or *Banks* marked the critical point in time because Bronshtein's one-year deadline expired before the earliest of the three dates. As of October 20, 1998—the one-year anniversary of the conclusion of direct review in Bronshtein's case—Bronshtein did not have fair notice that he would not be given the benefit of the "relaxed waiver" rule and that his failure to file his PCRA petition within the one-year statutory deadline would result in the dismissal of his petition.[25]

[25] 404 F.3d at 709 (emphasis added).

At the one-year anniversary of the conclusion of Purnell's direct appeal, Purnell did not have fair notice that he would not be given the benefit of the "colorable claim" rule, and that his failure to file his colorable claims during his initial post-conviction proceedings would later result in a dismissal of those claims.

The court in *Fahy/Bronshtein* found it irrelevant that when Bronshtein filed his April 23, 1999 successive petition, he had notice that the colorable constitutional claim exception had already been abolished—just as it is irrelevant that when Purnell filed his 2014 petition, he had notice that the colorable constitutional claim exception had already been abolished.

That the "relaxed waiver" exception in *Bronshtein* was created by caselaw rather than embedded within the rule itself is of no moment. If anything, that the "colorable claim" exception was embedded in Rule 61 creates a stronger fair notice and equal protection violation than a caselaw created exception. The key here is that the notice must be given at a time when the movant who relied on the prior rule can comply with the new rule, which in *Bronshtein* and *Purnell* was during their *initial* postconviction proceeding. Otherwise, the old rule applies.

The Court in *Bronshtein* noted that "Pennsylvania courts could have maintained an adequate procedural bar through the rule change if they employed a

transitional rule that *gave warning* to potential filers that after a certain date, they would be strictly enforcing the time bar."[26] The same is true in Delaware.

The State's argument that in *Turnage*,[27] this Court ruled that the Rule 61 amendment did not operate retroactively as applied to Turnage is correct but inapplicable. Unlike in *Purnell*, the movant in *Turnage* had fair notice of the 2014 amendment for seven months *before* she filed her *initial* post-conviction motion. Thus, unlike Purnell, Turnage had the opportunity to comply with the 2014 amendment.

The State's argument that this Court has clearly and repeatedly stated that courts should apply the version of Rule 61 in place at the time the motion under consideration was filed is irrelevant because this Court did not have the current argument in front of it in any of the cases cited by the State.[28]

While the State is correct that there is no right to post-conviction proceedings,[29] once a state chooses to provide post-conviction proceedings, the proceedings *must* comply with the due process and equal protection clauses of the

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[26] *Id.* (emphasis added).
[27] 2015 WL 6746644, at **2.
[28] *See* Answer at 12.
[29] Answer at 16 (citing *Turnage v. State*, 2015 WL 6746644 (Del. Aug. 1, 2016).

United State Constitution. And it is due process and equal protection demands that drove the court in *Bronshtein* when they ruled that the operative rule for Bronshtein was that which applied during his *initial* post-conviction proceedings while he had the opportunity to decide what claims to include.[30] The same demands require this Court to rule in Purnell's favor and reverse his dismissal—if this Court prefers that Delaware courts be given an opportunity to consider Purnell's colorable constitutional claims thereby prompting federal courts deference rather than *de novo* review.

[30] 404 F.3d at 709.

II. 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.

Should this Court find that Rule 61 (eff. 2014) applies to this case, which it should not (*see* Argument I above), this Court should determine that Purnell meets the standard set forth in Rule 61(d)(2)(i) (eff. 2014) for successive motions. To avoid dismissal, a movant must "plead[] 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[.]"[31] On the spectrum between DNA evidence (which courts across the country have considered reliable evidence of actual innocence) and recantation evidence (which courts across the country have deemed generally unreliable), the medical evidence in Purnell's case is much closer in kind to the former rather than the latter.

Mark Purnell is actually innocent because he did not commit this crime. Despite his innocence, this sixteen year old Delawarean has been condemned to 77 years (45 to serve) in prison. The shooting occurred on January 30, 2006. The jury heard testimony that one week before the shooting, Purnell was hospitalized for

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

"major" knee surgery on January 22, 2006, from a gunshot wound to the back of his knee,[32] where he received approximately 13 surgical staples.[33]

Despite inaccurate stereotypes that African Americans can bear more pain than other Americans, the jury appears to have taken notice of the common knowledge that recuperation from knee surgery is particularly long and painful, as well as the fact that there were significant reliability issues with the State's other evidence: A juror with Saturday vacation plans informed the Court at 12:00 p.m. on the second day of deliberations that the jury planned to report a deadlock should they not reach an agreement by Friday evening:

> THE JUROR: It has come up. I have let them [the jury] know from the beginning that my intention is to go on vacation the 28th. So they have very much had that in mind during the deliberations.
>
> We are making progress. And I would not say the progress is because of some sort of imposed deadline by the fact of my vacation. I would say that I think the deadline for them is that if they don't get a decision today, then it's pretty much a hung jury. I think most of them—have drawn that conclusion.
>
> THE COURT: And that's based on factors other than your plans for vacation?
>
> THE JUROR: That's primarily – that is based on my plans for vacation of which they all are aware.[34]

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[32] A339-40, A333-35, A337, A342-43.
[33] A339-40.
[34] AR-9.

In response to the impending deadlock, the Court provided the equivalent of a dynamite charge while instructing the jurors not to consider vacation plans during deliberations,[35] and the jury returned with a guilty verdict later in the day. Thus, it took two full days of deliberation and a dynamite charge before the jury entered a guilty verdict after only an approximate week of testimony and argument. This was a close case.

Although both defense counsel and the prosecution possessed hospital medical records corroborating that Purnell had been discharged from the hospital in a wheelchair *with crutches* to take with him on January 23, 2006, the prosecution falsely stated that upon discharge from his knee surgery, Purnell "refused crutches."[36] Failing to correct this significant misstatement and failing to present expert medical testimony was one of many areas where Purnell's *actually conflicted*[37] trial counsel was ineffective.[38] Although trial counsel ineffectiveness and an actual ethical conflict cannot alone establish actual innocence, this Court should consider this evidence in conjunction with independent evidence of actual innocence.

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[35] AR-11-12.
[36] A353.
[37] A1327-30.
[38] A1275-76

Purnell has presented new evidence from Francis X. McGuigan, MD, who 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 two new affidavits from counselors at the New Castle County Detention Center and concluded:

> Based on the medical records documenting Mr. Purnell's condition on the evening of discharge on January 23, 2006, as well as the observations of Mr. Purnell on crutches by staff at the New Castle Detention Center on February 1, 2016—February 3, 2006, I believe with reasonable medical probability that Mr. Purnell would have likely been unable to run unimpeded on January 30, 2006.[39]

Purnell is actually innocent because for weeks after his surgery, Purnell was incapable of walking without crutches, and thus was medically incapable of being one of the culprits seen running from the crime a few days later.[40] While the jury did hear lay testimony from Purnell's family and friends that Purnell had to use crutches and was home during the time period in question,[41] it is a legal fiction to equate family and friend testimony with an expert opinion from a medical doctor who relied upon neutral paperwork from the hospital and a detention center. This medical doctor's conclusion, that Purnell was likely unable to run during the time

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[39] A807-08.
[40] A81, A84.
[41] A260-61, A261, A287.

of the murder,[42] is new in comparison to the orthopedic surgeon's testimony that he did not see Purnell after surgery and was therefore unable to provide an opinion.[43]

There are two tests that this Court has considered when determining whether a new trial should be granted: (1) the test in *Taylor v. State*[44] addressing new evidence in general; and (2) the test in *Blankenship v. State*[45] regarding new recantation evidence. When considering the recantation of the State's extremely problematic witnesses, this Court should rely upon Purnell's new medical evidence as part of the reason this Court is reasonably well satisfied that material witnesses provided false testimony as required by the test in *Blankenship*.

The jury was understandably disturbed by the State witnesses, several of whom have since recanted in various forums.[46] During the morning of the first day of deliberations, the jurors asked to rehear the "[a]udio, video and/or transcripts of interviews [of prior suspects turned State witnesses and the codefendant turn State witness] Corey Hammond, Kellee Mitchell and Ronald Harris," which the trial court allowed.[47] Even the State's Answering brief reveals that its witnesses were

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[42] A807-08.
[43] A1563.
[44] 2018 WL 655627 (Del. Jan. 31, 2018).
[45] 447 A.2d 428 (Del. 1982).
[46] *See* Opening Brief at 6; A1361-66.
[47] AR-1.

significantly flawed, but argues that these flaws were before the jury that found Purnell guilty of the lesser offense of second degree murder rather than of first degree murder. Purnell does not repeat arguments here that he made in his Opening Brief, and more extensively in his Rule 61 motion,[48] regarding the significant credibility issues with the State's witnesses, but instead offers a quick summary for the sake of current arguments:

> **Angela Rayne (witness)**: $500 a day crack addict under the influence when speaking to police shortly after murder. Did not witness the crime, but saw the culprits running from the crime scene. Did not identify Purnell from a photo spread, but did identify with 100% certainty **Ronald Harris (codefendant & witness)** who looks just like his brother, **Dawan Harris,** who was not in the photo spread.
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> **Ronald Harris (codefendant & witness)**: Ronald looks just like his brother, **Dawan Harris**, the roommate of **Kellee Mitchell (suspect & witness).** Two people had identified **Dawan Harris** as the shooter—"you should have seen the way she fell"—one witness said Dawan "Oatmeal" Harris repeated several times.[49]
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> **Kellee Mitchell (suspect & witness)**: Arrested with **Dawan Harris** on .38 revolver charge shortly after victim's husband **Ernest Giles** (eyewitness) identified **Kellee Mitchell** as one of the culprits. Mitchell knew he was murder suspect when arrested on the gun charge. Gun charge dropped in exchange for testimony.[50]

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[48] A399
[49] A419-23; *see also* A707-708 ("Miller identifies Dawan Harris as the person involved in the homicide with Alrasul").
[50] A415-19.

> **Eitenne Williams (witness &girlfriend)** of **Kellee Mitchell**. Sister of **Aqueshia Williams** (**witness & girlfriend**) of **Dawan Harris** (Kellee Mitchell's roommate). Williams admitted during trial that Purnell indicated that he was only kidding.[51]
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> **Corey Hammond (witness):** Favorable plea deal and prior denials about knowing anything about the crime.[52]

Four of the five witnesses implicating Mark Purnell—Kelle Mitchell and Eitenne Williams, Dawan Harris and Aqueshia Williams, were couples who lived together.[53] Kellee Mitchell and Dawan Harris were arrested on a gun charge as suspects in the murder. Mitchell, identified by an eyewitnesses, was a prime suspect until Mitchell, his girlfriend and his girlfriend's sister implicated Purnell. However, both crack addict Angela Rayne and the victim's husband Ernest Giles (who was originally a suspect) were shown a photo array shortly after the crime containing Purnell's picture and neither recognized him. Giles did, however, identify Kellee Mitchell from the photo array and Rayne identified Dawan Harris's (Mitchell's roommate's) look alike brother, Ronald Harris.[54]

During his police interview, Mitchell implicated Purnell as a way to deflect suspicion from himself and his roommate, Dawan Harris. During his police

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[51] A31.
[52] A159, A164-75, A360.
[53] A416.
[54] A82.

interview, Ronald Harris, repeatedly denied knowing anything about the crime and denied knowing Mark Purnell. Ronald Harris did not implicate Purnell until *after* jury selection when he was offered a deal of only three years of incarceration to implicate and testify against Purnell.[55] Corey Hammond, a long time benefit of his father's status as an informant, denied to police knowing anything about the murder until Hammond needed his father's help to get out of prison after Hammond's child was born.[56]

The only untainted evidence against Purnell was himself. In addition to his "joking" statements to Mitchell's girlfriend and her sister, there was testimony that a sixteen year old Purnell (presumably angry about being falsely accused) wrote language threatening Mitchell on the plywood board under his bed while he was at the Juvenile Detention Center, and sent a letter containing similarly threatening language to Mitchell's mother. When asked by Mitchell's brother on a recorded telephone call, Purnell said he had "a lot" to do with the murder, but did not explain what he meant by that statement, e.g., "a lot" presumably meaning Purnell knew that Mitchell was guilty but had implicated him in the murder.

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[55] A419-23; A522-614.
[56] A423-28.

Purnell, a sixteen year old teenager, made these jives to other teenagers at a time when he could not fathom being charged and convicted for a murder he did not commit. After all, witnesses knew Purnell could not walk prior to, during and after the shooting. And people had witnessed Purnell at home resting his leg when the murder occurred. What did it matter to this sixteen-year old if he joked around and, when falsely accused and tried to get Mitchell to set the record straight through angry threats? Unfortunately, Purnell never had an effective opportunity to set the record straight.

Given the stringent nature of the actual innocence standard, Purnell unsuccessfully asked the lower court to consider relying upon *State v. Burroughs*[57] to except Purnell from having to meet the actual innocence Rule 61 exception because Purnell's trial counsel had an *actual conflict:* he represented Dawan Harris (Mitchell's roommate) who was arrested on the gun charge and listed as a suspect in the very murder that Purnell was later convicted of committing.[58]

Although trial counsel preserved the issue of his actual conflict below, trial counsel also acted as Purnell's direct appeal attorney and did not raise his actual

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[57] 2016 WL 1436949 (Del. Super. Apr. 4, 2016).
[58] A1370.

conflict on appeal. Purnell, however, raised this issue in his *pro se* petition.[59] Remarkably, post-conviction counsel abandoned this claim without consulting Purnell or obtaining his permission.[60] Post-conviction counsel treated post-conviction proceedings like a second direct appeal: he solely obtained the trial transcripts from prior counsel; he did not conduct *any* extra-record investigation; and he solely raised transcript-based ineffective assistance of counsel claims. Adding insult to injury, trial counsel with the actual conflict, relied upon the advice of the prosecution in preparing his Rule 61 affidavit, adopting the prosecution's "suggestions" for why trial counsel took certain actions.[61]

In *Boroughs*, this Court made an exception to the actual innocence requirement when trial counsel failed to submit a timely appeal around the time Rule 61 was modified to abolish the colorable constitutional claim exception. Given that Purnell's trial and direct appeal counsel violated ethical rules by representing Purnell despite having an actual conflict, and post-conviction counsel failed to undertake his required duty of conducting an extra-record investigation,

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[59] A894.
[60] A1332.
[61] A1335.

this Court would be within its authority to make an exception to Rule 61(b)(2)(i) (eff. 2014) under the unusual circumstances of this case.

In absence of this, according to the State, Purnell has what appears to be at first glance an unsurmountable actual innocence burden. The State argues that this Court should ignore Purnell's new medical practitioner evidence of likely impossibility and new evidence of the motive for state witnesses lying because they do not meet the test for proving actual innocence[62]--that the evidence could have been discovered by Purnell's actually ethically-conflicted trial counsel, and the evidence is cumulative or impeaching.

There does not appear to be one Rule 61 (eff. 2014) case in which this Court has ruled that a movant has met the actual innocence test.[63] In *Sykes v. State*,[64] this Court faulted the movant for presenting no argument that his new evidence could not have been discovered before trial by the exercise of due diligence. In *Taylor v. State (Linwood Taylor)*, impeaching evidence against a rape victim was deemed not new where the Superior Court disbelieved the rape victim's recantation during

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[62] Answer at 22 (citing *Taylor v. State (Emmett Taylor)*, 2018 WL 655627, at *1 (Del. Super. Jan. 31, 2018).
[63] Per Westlaw search of cases since June 1, 2014 using the terms: "Rule 61" & "Strong Inference" & "actual innocence"
[64] 2018 WL 4932731 at *2 (Del. Oct. 10, 2018).

an evidentiary hearing.[65] This Court ruled in *Meritt v. State*[66] that movant's evidence of a younger sister's lack of awareness of sexual abuse is not new where this evidence had already been presented at trial through a videotaped interview of the younger sister and a detective. Per *Kent v. State*, a sufficiency of the evidence argument does not meet the actual innocence standard.[67] In *Emmett Taylor*, evidence that the blunt force trauma was from a fall rather than a frying pan, a background of trauma negating intent and victim impeachment evidence did not created a strong evidence of actual innocence.[68] In *Phipps v. State*, the movant's new evidence had been provided to defense counsel prior to trial, but defense counsel did not use it.[69]

The remaining cases denied by this Court appear to be: (1) *pro se* motions that either did not sufficiently state a Rule 61 claim or that prompted this Court to provide a Rule 61(j) abuse of process warning, and (2) cases in which the claims involved Chief Medical Examiner Richard Callery, who was terminated in 2014,

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[65] 2019 WL 6130480 (Del. Nov. 18, 2019).
[66] 2019 WL 5831275, at *2 (Del. Nov. 5, 2018).
[67] 2018 WL 3156987, at *4 (Del. June 26, 2018).
[68] 2018 WL 655627, at *2.
[69] 2015 WL 1604855 (Del. Apr. 7, 2015).

shortly before the enactment of the actual innocence requirement in Super. Ct. Crim. R. 61(d)(2)(i)(eff. June 2014).[70]

The 2014 amendment to Rule 61 was issued while the State's Medical Examiner's Office was embroiled in the massive medical examiner scandal which was said to undercut the validity of hundreds, if not thousands of drug convictions; Delaware courts were set to be flooded by Rule 61 filings challenging those convictions. Indeed, by May 1, 2014, the State Public Defender had already filed over one hundred post-conviction motions for clients seeking relief of their convictions. It declared it to be "'the first wave' of legal challenges to try and overturn 9,500 drug convictions because of tampering and thefts at the state's drug testing lab" between January 2010 and February 2014."[71]

The 2014 amendment appears to be at least in part an overreaction to this scandal. Delaware courts could have resolved the medical examiner cases under the old version of Rule 61 by applying the same logic that it used to affirm the

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[70] *Garvey v. State*, 2016 WL 4191925 (Del. Aug. 2, 2016); *Rowley v. State*, 2016 WL 617451 (Feb15, 2016); *Manuel v. State*, 2016 WL 363284 (Del. Jan. 28, 2016) *Williams v. State*, 2015 WL 7776322, at *1 (Del. Dec. 2, 2015); *Cannon v. State*, 127 A.3d 11164 (Del. 2015); *Turnage v. State*, 2015 WL 6746644, at *1 (Del. Nov. 4, 2015); *Collins v. State*, 2015 WL 4717524 (Del. Aug. 6, 2015).

[71] Sean O'Sullivan, *Public Defender Seeks 9,500 Drug Conviction Reversals*, THE NEWS JOURNAL, May 1, 2014. D.I. 48-1.

dismissals: the overwhelming of majority of movants did not provide a causal connection between the misconduct and the movant's conviction. Delaware courts could have addressed the general problem of multiple successive petitions in a similar fashion to what was done in Pennsylvania, by allowing only one successive petition limited to the ineffective assistance of initial post-conviction counsel filed within one year after the conclusion of initial post-conviction proceedings, and successive claims based upon recently discovered *Brady* evidence.[72]

It was, however, within the purview of Delaware Courts to save resources by shifting the post-conviction resource burden to federal courts to conduct *de novo* review, as long as it complied with fair notice requirements (*see* Argument I). Indeed, this Court shifted *pro bono* review of claims that initial post-conviction counsel was ineffective when it issued *Durham v. State*[73] declining to hear claims of whether initial post-conviction counsel were ineffective because of the 2014 amendment to Rule 61.[74]

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[72] 42 PA. Cons. Stat. Ann. § 9545(b).
[73] *Durham v. State*, 2017 WL 5450746 (Del. Nov. 13, 2017) (ruling that *Guy v. State*, 82 A.3d 710 (Del. 2013), is supplanted by the June 2014 amendment to Rule 61)
[74] *Martinez*, 566 U.S. 1 (2012) (The United States Supreme Court ruled that where states do not provide a forum for litigating the ineffective assistance of *initial* post-conviction counsel, federal courts must consider these claims *de novo*). Under *Martinez* and its progeny, state defaulted claims will be heard where a petitioner

Where, as here, this Court's interpretation of the actual innocence requirement has been so stringent that it has resulted in no movant being found actually innocent, this Court should consider: (1) rejecting the State's invitation to construe the actual innocence test to exclude actually innocent movants like Purnell; (2) overruling *Durham* to allow petitioners to file one successive petition alleging the ineffective assistance of *initial* post-conviction counsel; or (3) abolishing the actual innocence exception, thereby enabling litigants to skip the step of returning to state court in the interest of Comity.

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demonstrates: (1) that the underlying ineffective assistance of trial counsel claim is a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit," and (2) that initial-collateral counsel rendered ineffective assistance of counsel under the standards set forth in *Strickland*. To show that the underlying ineffective assistance of trial counsel claim is "substantial," the petitioner must demonstrate only that it has some potential merit, which is the same standard as that for issuing a certificate of appealability—that reasonable jurists could debate whether the issue warrants further examination.

III. CONCLUSION

Purnell's conviction was the result of a perfect storm of injustice. There is no physical evidence connecting Purnell to this incident. No eyewitness has ever identified Purnell as having been involved in the shooting. After the only two eyewitnesses to the crime were shown a photo array containing Purnell's picture, both people informed detectives that they did not recognize anyone in those spreads as the shooter. The only eyewitness identifications made of the culprits were *not* of Purnell. The prosecution relied on statements of overwhelmed, terrified teenagers, including Purnell's codefendant who is severely intellectually disabled; And three of them have recanted their false statements and trial testimony, one in a sworn Affidavit.[75]

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

/s/ Herbert W. Mondros

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[75] A489-90, A512-13, A515-16, A668-70, A672-73.

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