



## I. INTRODUCTION & PROCEDURAL HISTORY

Before the Court is a Motion for Postconviction Relief filed pursuant to Superior Court Criminal Rule 61 (“Rule 61”) by Anel Hubbard (“Defendant”) on October 17, 2011.

On July 20, 2009, the Defendant was indicted on one count of Attempted Murder in the First Degree, five counts of Possession of a Firearm During the Commission of a Felony (“PFDCF”), two counts of Robbery in the First Degree, one count of Carjacking in the First Degree, one count of Reckless Endangering in the First Degree, one count of Conspiracy in the Second Degree, and one count of Possession of a Deadly Weapon by a Person Prohibited (“PDWBPP”).<sup>1</sup> A jury trial was held on January 21, 2010 through January 28, 2010 on all charges except the PDWBPP charge, which was severed and heard simultaneously as a bench trial.<sup>2</sup> The jury found the Defendant guilty on all charges and the Court found the Defendant guilty of PDWBPP.<sup>3</sup> On February 26, 2010, the State filed a Motion to Declare Defendant an Habitual Offender,<sup>4</sup> which was granted on April 23, 2010.<sup>5</sup> The Defendant was sentenced to twelve life terms of incarceration without the possibility of probation or parole.<sup>6</sup>

On May 5, 2011 the Delaware Supreme Court affirmed the judgment of the Superior Court. On October 17, 2011 the Defendant filed a *pro se* motion for postconviction relief and a memorandum of law in support of his motion. On October 25, 2011 the Defendant moved for leave to amend his Motion, which was granted by the Court. An amended *pro se* motion for postconviction relief and memorandum of law in support were then filed on November 16, 2011.

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<sup>1</sup> Indictment, *State v. Hubbard*, No. 090602144, Docket No. 2 (July 20, 2009).

<sup>2</sup> Jury Trial, *State v. Hubbard*, No. 090602144, Docket No. 31 (Jan. 28, 2010).

<sup>3</sup> See Jury Trial, *State v. Hubbard*, No. 090602144, Docket No. 31 (Jan. 28, 2010).

<sup>4</sup> See State’s Mo. to Declare Def. an Habitual Offender, *State v. Hubbard*, No. 090602144, Docket No. 41 (Feb. 26, 2010).

<sup>5</sup> Order, *State v. Hubbard*, No. 090602144, Docket No. 45 (April 23, 2010).

<sup>6</sup> Sentence, *State v. Hubbard*, No. 090602144, Docket No. 47 (April 23, 2010).

On March 5, 2012 the Defendant filed a motion for appointment of counsel. The Motion was assigned to a Commissioner, who reviewed the Motion and filed a Report on May 16, 2012 which recommended that the Defendant's Motion be denied. On March 20, 2012 the United States Supreme Court decided *Martinez v. Ryan*,<sup>7</sup> which addressed defendants' rights to assistance of counsel in first postconviction motions.

The findings of the Commissioner were not adopted by the Court. Rather, on May 24, 2012 the Court ordered the Office of Conflict Counsel to appoint an attorney to represent the Defendant in his postconviction proceedings. On June 28, 2012 Christopher Tease, Esquire was appointed to represent the Defendant. Mr. Tease filed an amended motion for postconviction relief on September 30, 2012.<sup>8</sup> Mr. Tease subsequently became an inactive member of the bar, and the case was re-assigned to present counsel, Christopher Koyste, Esquire on December 4, 2014. The Court requested that he review the file and make any amended or additional claims as necessary.

On June 5, 2015 Mr. Koyste filed the present Amended Motion for Postconviction Relief and Request for Evidentiary Hearing. The Court, acknowledging Mr. Tease's inactive status, and Mr. Koyste's Amended Motion, entered a new scheduling order allowing the State and the Defendant additional time to respond to the claims raised in the Amended Motion. On November 6, 2015 the State filed its response to the Defendant's Amended Motion. On December 7, 2015 the Defendant filed his reply. On March 14, 2016, after reviewing the Amended Motion and responses, the Court requested that Trial and Appellate Counsel, Patrick

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<sup>7</sup> 132 S.Ct. 1309 (2012).

<sup>8</sup> Present appointed counsel, Mr. Koyste, had an opportunity to fully review the Amended Motion submitted by Mr. Tease, the Affidavit of Trial and Appellate Counsel, and the responses from the State. The Court shall address only the arguments raised in Mr. Koyste's amended Motion for Postconviction Relief. It should be noted that with the exception of one argument, Mr. Koyste's amended Motion sets forth similar arguments raised by Mr. Tease and contained in the Defendant's *pro se* Motion for Postconviction Relief.

Collins, Esquire, file a new affidavit addressing the claims of ineffectiveness against him. Mr. Collins filed his affidavit on May 3, 2016.

On August 30, 2016 an office conference was held. The defense withdrew their request for an evidentiary hearing in relation to the § 3507 claim raised in the Motion for Postconviction Relief. In addition, the Court requested that the defense identify specific information which he expected would be elicited in an evidentiary hearing to determine: (1) if the Defendant was prejudiced by trial counsel's failure to request a *Bland* instruction; (2) the reasons for the State acquiring the Defendant's prison phone calls; (3) and whether the identification of the Defendant by Isaiah Taylor should have been suppressed. The Defendant filed his supplement in response to questions asked during the conference on September 23, 2016. The State filed its response to the Defendant's supplement on October 17, 2016. The Court then took the matter under advisement. This is the Court's decision.

## **II. FACTS**<sup>9</sup>

Defendant was arrested by City of Wilmington police officers in connection with a shooting that occurred on West 5<sup>th</sup> Street. On June 25, 2009 John Walker ("Walker") and Waldemar Ortiz ("Ortiz") left Ortiz's residence located on 5<sup>th</sup> Street in Wilmington, Delaware, and walked toward the driveway where Walker's motorcycle was parked. As Walker was getting on his motorcycle, two black males approached him. One of the men ordered Walker to get off the motorcycle while the other man pointed a handgun at both Walker and Ortiz. The individual with the handgun ordered Walker and Ortiz to lay face down on the ground. The unarmed man was unable to start the motorcycle and ordered Walker to get up and explain how to start it. As the unarmed man began to drive away on the motorcycle, the gunman started

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<sup>9</sup> The facts are adopted from the Supreme Court's Opinion Affirming Defendant's Conviction. See *Hubbard v. State*, 16 A.3d 912 (Del. 2011).

shooting at Ortiz and Walker. Walker was shot once in the jaw, twice in the thigh, and once in the calf. Ortiz was able to escape uninjured. The gunman then fled the scene. Ortiz returned to the scene and drove Walker to Saint Francis Hospital.

Wilmington police arrived at the scene of the shooting and observed surveillance cameras at the Latin American Community Center, which was adjacent to the scene of the shooting. The surveillance cameras depicted Walker and Ortiz being approached by two black males, one who appeared to have a gun in his hand. The surveillance cameras however did not depict the shooting itself.

After viewing the surveillance cameras officers went to Saint Francis Hospital and interviewed Ortiz who gave a description of the perpetrators. Police then located the stolen motorcycle at a WaWa on North DuPont Highway in New Castle, Delaware. An individual was sitting on the motorcycle that matched Ortiz's description and who was later identified as Isaiah Taylor ("Taylor"). Taylor was taken into custody.

On June 25, 2009, Ortiz was interviewed by Detective Peter Leccia ("Detective Leccia") at the Wilmington Police Department. Ortiz was shown a photographic lineup and positively identified Taylor as the man who rode away on the motorcycle. Ortiz was unable to identify the gunman from the photographic lineup. On June 25, 2009 Police officers attempted to interview Walker who was unable to speak due to his injuries. Walker however, positively identified Taylor from a photographic lineup as the individual who stole the motorcycle, but was unable to identify the gunman.

Taylor was apprehended and interviewed by Detective Leccia. Taylor admitted that he and another man, who was later identified as Defendant, stole the motorcycle. According to Taylor, Defendant began firing shots as Taylor drove away. Based on Taylor's statement, a

search warrant was issued for Defendant's home. Defendant was taken into custody as he was leaving the residence. A handgun was recovered from the ceiling tiles in the room Defendant was residing, which was later examined by forensic firearms examiners who were unable to conclusively establish that the five shell casings recovered from the scene were fired from the handgun. The forensic examiners determined that a bullet that was found at the scene of the crime had been fired from the handgun retrieved from Defendant's residence.

On June 25, 2009, Defendant was brought to the Wilmington Police Department where he was interviewed by Detective Leccia. Defendant was advised of his *Miranda* rights and stated that he understood them. Defendant waived his *Miranda* rights and answered Detective Leccia's questions. The Defendant initially denied being present at the crime, but eventually admitted that he was at the scene of the crime, and advised that he had given the gun to Taylor, and that Taylor had shot the victim and given the gun back to the Defendant.

### **III. PARTIES' CONTENTIONS**

#### **Defendant's Contentions**

The Defendant's first claim is that the State failed to establish the proper foundation to properly admit a prior statement made by a testifying witness, Isaiah Taylor under 11 Del. C. § 3507, and that trial counsel was ineffective for failing to object to the admission of the statement. Specifically, the Defendant contends that the State failed to address whether the prior statement made by Taylor during his interview with police was truthful.

Next, the Defendant contends that trial counsel was ineffective for failing to request that the Court provide the jury with a *Bland* instruction regarding to the testimony of Isaiah Taylor, who was an accomplice of the Defendant.

The Defendant also contends that trial counsel was ineffective for failing to move to suppress the Defendant's prison phone calls, which were obtained with a blanket Attorney General's subpoena, admitted without objection, and which tended to establish consciousness of guilt of the Defendant. The Defendant contends that, before the Defendant's trial took place, the Delaware Supreme Court recognized that recording prisoner's phone calls was not proper unless the two-pronged test as recounted in *Procunier v. Martinez* was met.

The Defendant contends that trial counsel was ineffective for failing to challenge the identification of the Defendant by his accomplice, Isaiah Taylor. The Defendant argues that because, when police showed Taylor a photograph of another individual, Sean Hubbard, Taylor identified Sean as the shooter, his subsequent identification of the Defendant as the shooter should have been inadmissible. The Defendant also contends trial counsel should have sought to exclude the in-court identification of the Defendant by Taylor.

The Defendant contends that the cumulative due process errors denied the Defendant his right to a fair trial. The Defendant contends that it is necessary to have an evidentiary hearing, discussed, *infra*, whereby additional evidence can be gathered to augment the record in relation to the ineffectiveness of counsel.

### **Trial Counsel's Contentions**<sup>10</sup>

Trial counsel concedes that the Defendant is correct in stating that the truthfulness of the statement is part of the required foundation for § 3507. However, as a matter of trial strategy, trial counsel did not insist on this aspect of the foundation for several reasons: (1) trial counsel knew that he was going to attack Taylor on a rigorous cross examination, particularly about the

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<sup>10</sup> The contentions of trial counsel can be found in the three affidavits which he filed, in response to the claims made by the Defendant regarding his performance at the trial and appellate stage of the Defendant's case. See Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 72 (January 4, 2012); Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 103 (Feb. 18, 2014); Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 123 (May 6, 2016).

deal which he struck with police in exchange for his testimony. Because trial counsel planned to directly attack Taylor's credibility, he saw no reason to demand that the State ask Taylor whether he was telling the truth in his § 3507 statement; (2) Taylor was not a turncoat witness who refused to testify or recanted his § 3507 statement, rather he was testifying consistent with his prior statement. Trial counsel did not want to impede the State in admitting the tape of Taylor's statement because trial counsel felt it contained ample ground for cross examination, including the fact that Taylor identified someone other than the Defendant; and (3) trial counsel is confident that had he objected to the admission of the statement, the Court would have allowed the State to remedy the problem by asking the truthfulness question.

Trial counsel concedes that he was ineffective in failing to request that the jury be specifically given a *Bland* instruction on accomplice testimony. Trial counsel notes that a form of the accomplice testimony instruction was read to the jury, which was found in the Superior Court Criminal Pattern Jury Instructions. Trial counsel contends that *Smith v. State*<sup>11</sup> holds that the preferable practice is to use the original *Bland* language, and that even though *Brooks v. State*<sup>12</sup> was decided after the Defendant's trial, trial counsel felt he was ineffective for failing to request a *Bland* instruction in this case.

Trial counsel cites the following three reasons for not filing a motion to suppress the in-court and out-of-court identifications of the Defendant by Taylor: (1) trial counsel did not feel that he had a good faith basis to file a motion to suppress because it was obvious from the record that the Defendant and Taylor knew each other; (2) trial counsel filed motions to suppress based on suggestive identifications in the past, and has lost every one, and counsel did not want to provide a preview of his cross-examination of Taylor to the State; and (3) Taylor misidentified

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<sup>11</sup> 991 A.2d 1169 (Del. 2010).

<sup>12</sup> 40 A.3d 346 (Del. 2012).



the Defendant in his initial identification, and trial counsel felt that was a “ripe”<sup>13</sup> area for cross examination.

### State’s Contentions

Procedurally, the State contends that three of Defendant’s claims, those relating to the § 3507 statement by Taylor, the Defendant’s prison phone calls, and the identification of the Defendant by Taylor, are barred by Rule 61(i)(3) because the claims were not asserted in the proceedings leading to the judgment of conviction. Additionally, the State contends that an evidentiary hearing is unnecessary because the Court has all of the information which it needs to decide the Defendant’s motion.

As to Defendant’s claim that trial counsel was ineffective for failing to object to the admission of Taylor’s § 3507 statement, the State argues that the Defendant failed to demonstrate that trial counsel’s performance fell below objective standards.<sup>14</sup> The State contends that it was reasonable trial strategy for trial counsel to cross-examine Taylor on the truthfulness of his statement, which trial counsel indicates in his affidavit.<sup>15</sup> Further, even if trial counsel could be arguably ineffective because he did not object to the admission of the statement, the State contends the Defendant cannot prove that he was prejudiced by such action. The State contends that if counsel had objected for the failure to lay a proper foundation, all the prosecutor needed to do was ask Taylor whether his statement was truthful, and foundation for admission of the statement would have been shown.

As to the Defendant’s claim that trial counsel was ineffective for failing to request a *Bland* instruction, the State and trial counsel concede that it was ineffective for counsel to fail to request an accomplice instruction. However, the State contends the Defendant was not

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<sup>13</sup> Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 123 p. 4 (May 6, 2016).

<sup>14</sup> See *Strickland v. Washington*, 446 U.S. 668, 687 (1984).

<sup>15</sup> See Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 72 (January 4, 2012).

prejudiced because the Court provided the jury with its form accomplice testimony instruction *sua sponte*, which was proper under the law at the time. Furthermore, at the time of the Defendant's trial, the case which mandated a *Bland* instruction when accomplice testimony was in evidence, *Brooks v. State*,<sup>16</sup> was not yet decided.

As to the Defendant's claim that trial counsel was ineffective for failing to suppress the Defendant's prison phone calls, the State contends that trial counsel was not ineffective because both cases, *State v. Curtis*,<sup>17</sup> and *State v. Johnson II*,<sup>18</sup> which trial counsel might have relied on for this argument, were decided after the Defendant's trial occurred. The State argues that trial counsel could not be ineffective for failing to move to suppress the calls.

As to the Defendant's claim that trial counsel was ineffective for failing to move to suppress the identification of the Defendant by Taylor, the State contends that trial counsel provided three strategic reasons as to why he did not move to suppress the identifications.<sup>19</sup> Because the decision was strategic, the State contends that the Defendant cannot show that trial counsel was ineffective. Further, the Defendant fails to establish that, but for trial counsel's error, the proceedings against him would have turned out differently.

Lastly, the State argues the evidence of guilt was overwhelming and contends that the Defendant fails to demonstrate that the alleged due process errors were cumulative or that he was prejudiced, in any way, by trial counsel's conduct.

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<sup>16</sup> 40 A.3d 346, 348 (Del. 2012) (Trial judges must give a modified version of the instruction recommended in *Bland v. State* whenever a self-identified accomplice testifies).

<sup>17</sup> *State v. Curtis*, C.A. No. 1003018968, at 5–8 (Del. Super. Dec. 13, 2010) (TRANSCRIPT) (providing that seized prison phone calls may be suppressed if the Attorney General subpoena is unreasonable, in that it is only hoping that it might obtain potential evidence.

<sup>18</sup> Discussed *infra*, see fn. 9.

<sup>19</sup> See Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 123 (January 4, 2016).

#### IV. PROCEDURAL BARS

Before addressing the merits of Defendant's claims, the Court must determine whether the procedural bars set forth in Superior Court Criminal Rule 61(i)<sup>20</sup> apply to the Defendant's Motion. The version of the Rule in effect at the time that Defendant's pro se motion for postconviction relief was filed,<sup>21</sup> requires the Court to reject a motion for postconviction relief if it is procedurally barred. That Rule provides that a motion is procedurally barred if the motion is untimely, repetitive, a procedural default exists, or the claim has been formerly adjudicated.<sup>22</sup> Rule 61(i)(1) provides that a motion for postconviction relief is time barred when it is filed more than one year after the conviction has become final or one year after a retroactively applied right has been newly recognized by the United States Supreme Court or by the Delaware Supreme Court.<sup>23</sup> Rule 61(i)(2) provides that a motion is waived if the defendant has already filed a Motion for Postconviction Relief and a claim is repetitive if the defendant has failed to raise it during a prior postconviction proceeding, unless "consideration of the claim is warranted in the interest of justice."<sup>24</sup> Rule 61(i)(3) bars consideration of any claim "not asserted in the proceedings leading to the conviction" unless the petitioner can show "cause for relief from the procedural default" and "prejudice from violation of the movant's rights."<sup>25</sup> Rule 61(i)(4) provides that any claim that has been adjudicated "in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus

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<sup>20</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>21</sup> As the Delaware Supreme Court noted in *Collins v. State*, a Motion for Postconviction Relief is controlled by the version of Rule 61 in effect when the motion was filed and not by any former version of the rule. *Collins v. State*, 2015 WL 4717524, at \*1 (Del. Aug. 6, 2015).

<sup>22</sup> See Super. Ct. Crim. R. 61(i)(1)-(4) (2005).

<sup>23</sup> Super. Ct. Crim. R. 61(i)(1) (2005).

<sup>24</sup> Super. Ct. Crim. R. 61(i)(2) (2005).

<sup>25</sup> Super. Ct. Crim. R. 61(i)(3) (2005).

proceedings” is barred “unless reconsideration of the claim is warranted in the interest of justice.”<sup>26</sup>

Rule 61(i)(5) provides that the procedural bars can be overcome if Defendant makes out a “colorable claim that there was a miscarriage of justice because of a constitutional violation that undermines the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”<sup>27</sup>

Defendant’s Motion was timely filed. However, some of Defendant’s claims of ineffectiveness are truly collateral attacks on the evidence which was used to convict him, and should or could have been raised on appeal. Defendant’s claims that suppression was warranted relating to: (1) the § 3507 statement of Taylor; (2) his seized prison phone calls; and (3) the identification of the Defendant by Taylor, are claims which could have been raised at the appellate stage. Defendant’s three claims referenced above are barred because they were “not asserted in the proceedings leading to the conviction.”<sup>28</sup> The Court will not apply an exception to this procedural bar unless the petitioner can show “cause for relief from the procedural default” and “prejudice from violation of the movant’s rights.”<sup>29</sup>

In order for the Defendant’s claims to be excepted under Rule 61(i)(3), the Defendant must have demonstrated “cause” and “prejudice.” A defendant must prove that his attorney was ineffective in order to constitute “cause” for a procedural default even when that default occurs on appeal rather than at trial.<sup>30</sup> As will be discussed below, trial counsel, who also served as the Defendant’s appellate counsel, was not ineffective. The Defendant cannot establish the “cause” necessary to be excepted from his procedural default.

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<sup>26</sup> Super. Ct. Crim. R. 61(i)(4) (2005).

<sup>27</sup> *Id.*

<sup>28</sup> Super. Ct. Crim. R. 61(i)(3) (2005).

<sup>29</sup> *Id.*

<sup>30</sup> *Younger v. State*, 580 A.2d 552, 556 (Del. 1990) (citing *Murray v. Carrier*, 477 U.S. 478, 492 (1986)).

The Defendant's claims of "prejudice" are not supported by sufficient and specific evidence. Trial counsel provided sound strategic reasons for not raising such arguments.<sup>31</sup> Therefore, the Court finds that the Defendant's claims as referenced above are barred pursuant to the provisions of Rule 61(i)(3).

#### V. REQUEST FOR EVIDENTIARY HEARING

As a result of the August 30, 2016 office conference, the defense withdrew their request for an evidentiary hearing in relation to the § 3507 claim raised in the Motion for Postconviction Relief. In addition, the Court requested that the defense identify specific information which he expected would be elicited in an evidentiary hearing to determine: (1) if the Defendant was prejudiced by trial counsel's failure to request a *Bland* instruction; (2) the reasons for the State acquiring the Defendant's prison phone calls; (3) and whether the identification of the Defendant by Isaiah Taylor should have been suppressed.

In the Defendant's supplemental briefing, he identified the reasons why he thinks an evidentiary hearing is necessary. As to trial counsel's conduct, the Defendant contends that additional testimony from trial counsel to clarify his reasons for failing to request a *Bland* instruction,<sup>32</sup> failing to move to suppress the prison phone calls, and for failing to move to exclude the identifications of the Defendant by Taylor. In relation to the *Bland* claim, the Defendant contends that he would present defense witnesses to testify that the prevailing norm of defense counsel strategy is to request a *Bland* instruction in any multi-defendant case. As to the prison phone calls, the Defendant contends that *Procurier v. Martinez* was controlling law at the

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<sup>31</sup> See Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 72 (January 4, 2012); Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 103 (Feb. 18, 2014); Aff. of Tr. Counsel, *State v. Hubbard*, No. 090602144, Docket No. 123 (May 6, 2016).

<sup>32</sup> Trial counsel did not specifically address the Court's question of what testimony would be elicited at an evidentiary hearing which would support his contention that the Defendant was prejudiced by trial counsel's failure to request a *Bland* instruction.

time of the Defendant's trial as to how the State could properly seize prisoner's outgoing phone calls. The Defendant argues that the State should be required to submit its reasons for acquiring the Defendant's prison phone calls on the record so that the Court could determine if the reasons were sufficient. As to the identification claim, the Defendant contends that the conduct of the Wilmington Police Department must be made a part of the record in order to determine if the identification process was suggestive. The Defendant would also seek to admit the Wilmington Police Department's training manual, which the Defendant contends would help to establish the inadequate training of officers as to identification protocols and support a conclusion that suggestive techniques must have been used for Taylor to identify the Defendant.

Rule 61 provides, in pertinent part, that, "[a]fter considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable.<sup>33</sup> If, however, it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.<sup>34</sup>

First, the Court is satisfied that trial counsel has provided the Court with sufficient evidence of his conduct and decisions leading up to, and at trial, as evidenced by three affidavits, which were submitted throughout this postconviction proceeding. Trial counsel has explained his strategic decisions and has claimed ineffectiveness regarding the *Bland* instruction.

Whether it was the prevailing norm to request a *Bland* instruction is not dispositive. *Brooks* mandated a Bland instruction in any accomplice case, but not until after the trial in this matter. The Court accepts counsel's representation, given that strategic reasons are offered for other decisions, that oversight is the explanation for not requesting the instruction here. As to the

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<sup>33</sup> Super. Ct. Crim. R. 61(h)(1).

<sup>34</sup> *Id.* at (h)(3).

prison phone calls claim, the Court does not agree with the Defendant's contention that *Procunier v. Martinez* controlled the manner with which the State could properly seize prisoner phone calls at the time of this trial. Given that the ruling in *Procunier* is not applicable to this matter, there is no need to hear testimony on that issue.<sup>35</sup> Finally, the Court finds that there was sufficient testimony elicited at trial to establish that the identification procedure was not suggestive. In this case, a photographic array was not used; rather, during the recorded interview, the police showed Taylor a photograph of an individual they knew as "Hub."<sup>36</sup> The individual in that photograph was Sean Hubbard.<sup>37</sup> Later in the interview, Taylor was shown a second photograph, which showed the Defendant, and Taylor stated that the second photograph, "was definitely [the Defendant], [I] was incorrect with the earlier photo."<sup>38</sup> The entire interview with Taylor, including both identifications, was videotaped, admitted into evidence, and published to the jury.<sup>39</sup> Trial counsel was aware of this information, and made a strategic decision not to move to exclude the identifications. There is no further testimony needed to decide this issue.

After reviewing the trial transcript, the many submissions by the parties, and including discussion at the August 30, 2016 office conference, the Court is satisfied that it has all of the evidence before it in order to make a decision, and an evidentiary hearing is not necessary. Therefore, the Defendant's request for an evidentiary hearing is **DENIED**.

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<sup>35</sup> This issue is discussed further, *supra*.

<sup>36</sup> Tr. Transcript, *State v. Hubbard*, No. 090602144, Docket No. 52 p. 21-22 (Jan. 25, 2010).

<sup>37</sup> *Id.* at p. 22

<sup>38</sup> *Id.* at p. 24, 62.

<sup>39</sup> *Id.* at p. 20.

## VI. DISCUSSION

Ineffective assistance of counsel claims are evaluated under the two-pronged test enumerated in *Strickland v. Washington*.<sup>40</sup> Under *Strickland*, in order to articulate a colorable ineffective assistance of counsel claim, the movant must demonstrate: (1) his defense counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.<sup>41</sup> An inmate must satisfy the proof requirements of both prongs to succeed on an ineffective assistance of counsel claim. Failure to meet the requirements of either prong is sufficient and the Court need not address the other.<sup>42</sup> When evaluating the performance of trial counsel in hindsight, there is a strong presumption that counsel's representation was reasonable.<sup>43</sup> In addition, this Court must eliminate from its consideration the "distorting effects of hindsight" when evaluating counsel's representation and strategic decisions.<sup>44</sup> "Mere allegations of ineffectiveness will not suffice. A defendant must make specific allegations of actual prejudice and substantiate them."<sup>45</sup> As a result, the defendant may not rely on mere conclusory statements of ineffectiveness; he must plead all allegations of ineffectiveness with particularity.<sup>46</sup>

The Court will address each of Defendant's claims with this legal framework.

### Failure to Request *Bland* Instruction

During the Defendant's trial, his accomplice, Taylor, testified as a State witness against the Defendant. The Defendant contends that his counsel should have requested the specific

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<sup>40</sup> 446 U.S. 668, 687 (1984).

<sup>41</sup> *Id.* See also *Alston v. State*, 2015 WL 5297709, at \*3 (Del. 2015).

<sup>42</sup> *Strickland*, 446 U.S. at 697; See also *Ploof v. State*, 75 A.3d 811, 825 (Del. 2103) (*Strickland* is a two-pronged test, and there is no need to examine whether an attorney performed deficiently if the deficiency did not prejudice the defendant.").

<sup>43</sup> *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).

<sup>44</sup> *Strickland*, 446 U.S. at 689.

<sup>45</sup> *Id.*

<sup>46</sup> See *Monroe v. State*, 2015 WL 1407856, at \*5 (Del. 2015) (citing *Dawson v. State*, 673 A.2d, 1186, 1196 (Del. 1996)).



*Bland* instruction be given to the jury, and that his failure to do so constituted ineffective assistance of counsel. The Court instructed the jury regarding accomplice testimony using the Superior Court Pattern Jury Instruction.<sup>47</sup> The law at the time of the Defendant's trial did not mandate a *Bland* instruction in all cases where accomplice testimony was given.

In *Bland*, this Court first recognized the "inherent weaknesses"<sup>48</sup> of accomplice testimony, which are "sufficiently problematical to merit a special jury instruction concerning the credibility of accomplice testimony."<sup>49</sup> The *Bland* instruction provides:

A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with suspicion and great caution. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.<sup>50</sup>

During the next four decades, the Delaware Supreme Court did not restrict trial judges to the exact language of the original *Bland* instruction or otherwise insist that specific instruction language be required. Instead, the Supreme Court, "allowed trial judges considerable latitude in formulating the language of an accomplice testimony instruction."<sup>51</sup> In *Cabrera v. State*,<sup>52</sup> *Bordley v. State*,<sup>53</sup> and *Soliman v. State*,<sup>54</sup> the Court found "accomplice testimony instructions

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<sup>47</sup> See Instructions to the Jury, *State v. Hubbard*, Id. No. 09060214444, Docket No. 30 (Jan. 28, 2010).

<sup>48</sup> *Bland v. State*, 263 A.2d 286, 289 (Del. 1970).

<sup>49</sup> *Smith v. State*, 991 A.2d 1169, 1178 (Del. 2010).

<sup>50</sup> *Bland v. State*, 263 A.2d 286, 289–90 (Del. 1970).

<sup>51</sup> *Id.*

<sup>52</sup> 747 A.2d 543 (Del. 2000) (finding adequate accomplice instruction where the Court warned the jurors that accomplice testimony may be suspect because of the accomplice's self-interest his plea agreement, and that the testimony should be examined with caution).

*Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000), overruled by *Brooks v. State*, 40 A.3d 346 (Del. 2012).

<sup>53</sup> 832 A.2d 1250 (Del. 2003) (TABLE) (finding the Pattern Criminal Jury Instruction on accomplice testimony to be adequate)).

<sup>54</sup> 918 A.2d 339 (Del. 2007) (TABLE) (finding the Pattern Criminal Jury Instruction on accomplice testimony to be adequate)).

acceptable so long as they [were] accurate and adequately explain[ed] the potential problems with accomplice testimony.”<sup>55</sup> These cases reaffirmed that defendants had a right to an accomplice testimony instruction upon request, but were not entitled to any specific formulation of its language.

The Court then decided *Smith v. State*,<sup>56</sup> a case of first impression involving trial counsel's failure to request a *Bland* instruction on an ineffective assistance of counsel claim. In *Smith*, the Delaware Supreme Court reiterated that “a general credibility instruction is not an acceptable substitute for a specific accomplice credibility instruction.”<sup>57</sup> Further, the Court explained that the best practice was to use the language originally suggested in *Bland* when giving an accomplice testimony instruction, but the Court’s suggestion was not a mandate to do so.<sup>58</sup>

The Court in *Smith* did determine that “the failure of [a defendant's] trial counsel to request a specific instruction on the credibility of accomplice testimony amounted to ‘deficient attorney performance’ under the first part of our *Strickland* analysis.”<sup>59</sup> However, *Smith* still required the defendant to establish prejudice under the second prong of *Strickland* by “show[ing] that, but for counsel's unprofessional errors, there [was] a reasonable probability that the outcome of the case would have been different.” The Court held that “trial counsel's failure to request such an instruction will not always be prejudicial *per se*,”<sup>60</sup> and that an analysis under the specific facts and circumstances of each case would be required.

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<sup>55</sup> *Brooks v. State*, 40 A.3d 346, 349 (Del. 2012).

<sup>56</sup> 991 A.2d 1169 (Del. 2010).

<sup>57</sup> *Id.* at 1179.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1177.

<sup>60</sup> *Id.* at 1180.

Finally, the Delaware Supreme Court specifically held in *Brooks* that a *Bland* instruction was required in cases pending as of March 15, 2012 or filed thereafter.<sup>61</sup> The mandatory instruction set forth in *Brooks* was not to apply retroactively.<sup>62</sup>

The Defendant's trial began on January 21, 2010, more than two years prior to the *Brooks* decision. Trial counsel concedes in his affidavit that he should have requested a *Bland* instruction, and his failure to do so was an "oversight."<sup>63</sup> However, the Defendant cannot demonstrate that this "oversight" caused him any prejudice. The Court instructed the jury specifically on accomplice testimony, the Defendant cannot show a reasonable probability that the jury would have come to a different result had trial counsel requested, and the jury received, a *Bland* instruction. Accordingly, even if trial counsel's conduct fell below an objective standard of reasonableness, the Defendant's claim for ineffective assistance of counsel fails because the deficiency did not prejudice him at trial.

#### **Failure to Object to the Admission of Taylor's Prior Statement**

The Defendant contends that trial counsel was ineffective for failing to object to the admission of Taylor's prior statement to police, which implicated the Defendant in the robbery. The Defendant argues that because the prosecutor never asked Taylor whether his statement was truthful, a foundational element was not met, and trial counsel should have objected to its admission. Trial counsel filed an affidavit, which establishes that it was a matter of strategy for trial counsel not to require the State to ask Taylor whether his statement was truthful. Taylor was testifying live, consistent with his prior statement, and trial counsel used effective cross examination to attack Taylor's credibility.

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<sup>61</sup> *Brooks v. State*, 40 A.3d at 349 ("Effective March 15, 2012, any case involving accomplice testimony, trial judges must now give our modified version of the *Bland* instruction").

<sup>62</sup> *Id.* at 355.

<sup>63</sup> *See* Aff. of Trial Counsel, Docket No. 72, at 4 (Jan. 12, 2012).

11 *Del. C.* § 3507, in pertinent part, provides, “[i]n a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.”<sup>64</sup> In *Keys v. State*, the Delaware Supreme Court stated that, “[i]n order to offer the out-of-court statement of a witness, the statute requires the direct examination of the declarant by the party offering the statement, as to both the events perceived or heard and the out-of-court statement itself.”<sup>65</sup> Thus, a witness' statement may be introduced only if the two-part foundation is first established: the witness testifies about both the events and whether or not they are true.<sup>66</sup> In order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the witness must also be subject to cross-examination on the content of the statement as well as its truthfulness.<sup>67</sup> In *Johnson*, the Court adopted a case-by-case approach in determining whether a prior statement has been admitted into evidence under § 3507 in violation of an accused's Sixth Amendment right to confrontation.<sup>68</sup>

In this case, the Defendant was not prejudiced by trial counsel's failure to object to Taylor's prior statement. Trial counsel did not insist on this aspect of the foundation for several reasons. First, trial counsel knew that he was going to attack Taylor on rigorous cross examination, particularly about the deal which he struck with police in exchange for his testimony. Because trial counsel planned to directly attack Taylor's credibility, he saw no reason to demand that the State ask Taylor whether he was telling the truth in his prior statement, which was consistent with his in-court testimony. Second, Taylor was not a turncoat witness who

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<sup>64</sup> 11 *Del. C.* § 3507(a).

<sup>65</sup> 337 A.2d 18, 20 n. 1 (Del. 1975).

<sup>66</sup> *Ray v. State*, 587 A.2d 439, 443 (Del. 1991).

<sup>67</sup> *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975).

<sup>68</sup> *Blake v. State*, 3 A.3d 1077, 1083 (Del. 2010) (citing *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975)).

refused to testify or recanted his previous statement, rather he was testifying consistent with his prior statement. Trial counsel did not want to impede the admission of the tape because trial counsel felt it contained ample ground for cross examination, including the fact that Taylor previously identified someone other than the Defendant as the perpetrator. Third, trial counsel was confident that had he objected to the admission of the statement, the Court would have allowed the State to remedy the problem by asking the question about truthfulness. Further, there can be no question that singling out one question in order to address whether Taylor's prior statement was truthful would have only bolstered the credibility of his consistent in-court testimony.

Trial counsel was able to challenge Taylor's credibility based on whether his statements were consistent with one another, and the substance of some of those statements. Further, there was ample evidence, independent of Taylor's prior statement, which tied the Defendant to the crime. The Defendant made an inculpatory statement to police, the firearm used in the robbery was seized from a residence where the Defendant was present, and the Defendant's prison phone calls tended to establish consciousness of his guilt. Based on the circumstances of this case, the Court finds that the Defendant's claim must fail, as he was not prejudiced by trial counsel's decision not to object to the admission of Taylor's prior statement.

#### **Failure to Move to Suppress the Defendant's Prison Phone Calls**

The Defendant contends that trial counsel was ineffective for failing to move to suppress the Defendant's prison phone calls which tended to establish his consciousness of guilt. The calls were obtained subject to an Attorney General's subpoena, and were admitted without objection. The Defendant argues the Delaware Supreme Court recognized that recording prisoner's phone calls was not proper unless the two-pronged *Procunier v. Martinez* test first was

met.<sup>69</sup> Because the State did not satisfy the *Procunier* test before seizing the Defendant's phone calls, the Defendant contends that trial counsel should have moved for their suppression.

The Court does not agree with Defendant's assertion that the law at the time of the Defendant's trial mandated a *Procunier* analysis prior to seizure of prisoner phone calls. The Delaware Supreme Court adopted the *Procunier v. Martinez* test explicitly to address whether State seizure of *outgoing prisoner mail* was proper in *Johnson v. State I*.<sup>70</sup> Neither the Superior Court, nor the Delaware Supreme Court held that *Procunier* applied to prisoner's phone calls until after the Defendant's trial took place.

The Superior Court first applied the *Procunier* test to the seizure of a prisoner's phone calls in *State v. Curtis*.<sup>71</sup> That case was decided on December 13, 2010, subsequent to the Defendant's trial. The Delaware Supreme Court did not expressly hold that the seizure of prisoner communications (other than outgoing mail) were subject to the *Procunier* standard until *Johnson v. State II*,<sup>72</sup> decided more than two years after the Defendant's trial was held.

Here, trial counsel's representation did not fall below an objective standard of reasonableness because he did not have a good faith basis to move for suppression of the prison phones calls. Further, because the law at the time of the Defendant's trial did not require the *Procunier* test to be met before the State seized prisoner phone calls, the Defendant fails to demonstrate that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.<sup>73</sup>

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<sup>69</sup> See *Procunier v. Martinez*, 416 U.S. 396 (1974) (In order for the seizure to be proper, the contested actions [must further] an important or substantial government interest unrelated to the suppression of expression; and ... the contested actions [must be] no greater than necessary for the protection of that interest)).

<sup>70</sup> 983 A.2d 904, 922 (Del. 2009).

<sup>71</sup> C.A. No. 1003018968.

<sup>72</sup> 2012 WL 3893524 (Del. 2012).

<sup>73</sup> *Id.* See also *Alston v. State*, 2015 WL 5297709, at \*3 (Del. 2015).

### Failure to Object to the Identifications of the Defendant by Taylor

The Defendant contends that trial counsel was ineffective for failing to challenge the identification of the Defendant by his accomplice, Isaiah Taylor. The Defendant also contends the in-court identification of the Defendant by Taylor should have been excluded, because he had previously identified another person, but trial counsel failed to object. Trial counsel has asserted he made a strategic decision to not object to the admission of the identifications, and to attack Taylor on cross examination about his prior misidentification of the Defendant.

The general rule is that, absent an unduly suggestive pretrial identification procedure, questions as to the reliability of an in-court identification affect the in-court identification's weight, not its admissibility.<sup>74</sup> However, to satisfy due process, pretrial identifications resulting from a suggestive process must comport with the two-part analysis set forth by the United States Supreme Court in *Neil v. Biggers*.<sup>75</sup>

The first step of *Biggers* is to determine whether the pretrial identification procedure was impermissibly or unnecessarily suggestive.<sup>76</sup> At this stage of the inquiry, the defendant has the burden of proof.<sup>77</sup> If the defendant carries his burden of proof, the second step examines the five factors enumerated in *Biggers* to determine whether the identification procedure was so suggestive as to render the identification unreliable and, hence, inadmissible.<sup>78</sup>

Here, the Defendant fails to show that the pretrial identification made by Taylor was subject to a suggestive process. At the time of trial, trial counsel believed that it was obvious from the record that the Defendant and Taylor knew each other. Trial counsel did not want to provide a preview of his cross-examination of Taylor to the State. Taylor identified a different

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<sup>74</sup> *Byrd v. State*, 25 A.3d 761, 764 (Del. 2011)

<sup>75</sup> *Id.* (citing *Neil v. Biggers*, 409 U.S. 188 (1972)).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 197-99.

<sup>78</sup> *Id.*

individual, Sean Hubbard, in his initial identification, and trial counsel felt that was a ripe area for cross examination.

Trial counsel's decision was strategic, and the Defendant cannot show that trial counsel was ineffective for failing to object to the identification. Further, the Defendant fails to establish that but for trial counsel's error, the proceedings against him would have turned out differently. In fact, to argue Taylor's identification was flawed would be directly opposing the admission of the Defendant that he was with Taylor at the scene.

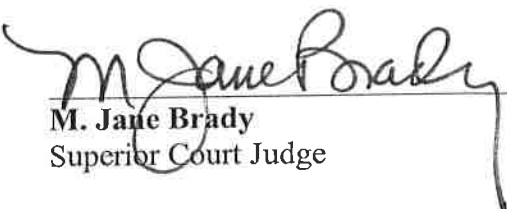
#### **No Cumulative Error**

The Defendant contends that the cumulative due process errors expressed above denied the Defendant his right to a fair trial. This contention is without merit. Cumulative error must derive from multiple errors that caused "actual prejudice."<sup>79</sup> As already discussed above, the grounds upon which the Defendant relies did not constitute actual prejudice. The Defendant fails to establish any cumulative error.

#### **VII. CONCLUSION**

For the reasons stated above, Defendant's Motion for Postconviction Relief is **DENIED**, and request for an evidentiary hearing **DENIED**.

**IT IS SO ORDERED.**

  
M. Jane Brady  
Superior Court Judge

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<sup>79</sup> *Michaels v. State*, 970 A.2d 223, 232 (Del. 2009) (citing *Fahy v. Horn*, 516 F.3d 169, 205 (3d Cir.2008) (citations omitted).