

I. Issue

The Court has before it the appeal of the Commissioner's Report and Recommendation and must decide whether this Court should adopt the Report and Recommendation upon the Defendant's Amended Motion for Postconviction Relief.

II. Factual and Procedural Background

In the early morning of July 17, 2008 several African American males entered the Jones family's residence in Harrington, Delaware and stole numerous items from the home, including several firearms. On August 4, 2008, while responding to a trespassing complaint at an apartment complex in Milford, Delaware State Police identified several of the items stolen in the Harrington home invasion, including one of the stolen firearms, as being in the possession of the Defendant, Julius Cannon (hereinafter "Cannon"). Police later recovered a firearm with a serial number matching one of the stolen weapons from the Harrington home invasion during an unrelated robbery investigation; the suspects in that investigation all testified that Cannon had sold them the weapon.

Multiple witnesses, including several accomplices, testified in Cannon's trial. On June 4, 2009 a jury found Cannon guilty of one count of Possession of a Firearm by a Person Prohibited and one count of Conspiracy in the Second Degree. Cannon was found not guilty on three counts of Robbery in the First Degree, three counts of Possession of a Firearm during the Commission of a Felony, one county of Burglary in the First Degree, one county of Wearing a Disguise During the Commission of a Felony, and four counts of Theft of a Firearm. One additional count of Rape in the

Second Degree was *nolle prosequi*'d by the State prior to trial.

Cannon subsequently appealed his conviction to the Delaware Supreme Court. The attorney (hereinafter "Trial Counsel" or "Counsel") who represented Cannon during his trial filed a brief and motion to withdraw pursuant to Supreme Court Rule 26(c)¹ on the basis that no meritorious issues existed. The Supreme Court granted Counsel's motion. Cannon subsequently raised five issues with the Supreme Court *pro se*: (1) there was insufficient evidence presented at trial to support his conviction of Conspiracy in the Second Degree; (2) the jury's questions to the trial judge during deliberations were not adequately answered; (3) there was insufficient evidence presented at trial to support his weapon conviction; (4) the charges should have been severed because they stemmed from separate incidents; and (5) the State's witnesses presented inconsistent testimony.² On May 10, 2010 the Supreme Court issued a mandate granting the State's motion to affirm as to all five claims.³

On May 2, 2011 Cannon filed his original Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61.⁴ Cannon filed his original motion *pro se*. In February of 2012, new counsel (hereinafter "Postconviction Counsel") entered

¹ Del. Sup. Ct. R. 26(c) ("[i]f the trial attorney, after a conscientious examination of the record and the law, concludes that an appeal is wholly without merit, the attorney may file a motion to withdraw.").

² *Cannon v. State*, 994 A.2d 744, 2010 WL 1543852, at *1 (Del. Apr. 19, 2010) (TABLE).

³ *Id.* at *2.

⁴ *See* Del. Super. Ct. Crim. R. 61.

her appearance on behalf of Cannon. On March 25, 2012 Postconviction Counsel filed an Amended Motion for Postconviction Relief on Cannon's behalf. The State filed a response to the Amended Motion, and Trial Counsel filed a verified letter affidavit in response to each of Cannon's claims.

The Commissioner issued a Report and Recommendation⁵ upon Cannon's Amended Motion for Postconviction Relief on May 31, 2013. The Commissioner construed Cannon's Amended Motion as raising eight separate grounds for relief:

Claim One: Trial Counsel was ineffective in failing to request a specific unanimity instruction relating to the Possession of a Firearm by a Person Prohibited charge and Conspiracy in the Second Degree charge.

Claim Two: The trial judge committed plain error in failing to give a specific unanimity instruction *sua sponte*.

Claim Three: Trial Counsel was ineffective when he failed to argue that evidence of the Possession of a Firearm by a Person Prohibited charge was limited to July 17, 2008.

Claim Four: Trial Counsel was ineffective when he refused to request a *Bland* accomplice testimony instruction.

Claim Five: Trial Counsel was ineffective when he failed to call Theodore Singletary (hereinafter "Singletary") as a witness at trial.

Claim Six: Trial Counsel was ineffective when he failed to request a judgment of acquittal based upon irreconcilable conflict.

⁵ Hereinafter "Commissioner's Report at ____".

Claim Seven: Counsel failed to raise a claim relating to the unanimity instruction on direct appeal.

Claim Eight: Counsel failed to raise a claim relating to the lack of a Bland accomplice testimony instruction on direct appeal.⁶

The Commissioner found that Cannon’s first, second, sixth, seventh, and eighth claims were all raised in Cannon’s original motion and thus were not time barred.⁷ Because these claims were not asserted in the proceedings leading to Cannon’s conviction, the Commissioner examined each claim for excuse from procedural default.⁸ The Commissioner analyzed Cannon’s first, sixth, seventh, and eighth claims as ineffective assistance of counsel claims, and found that Cannon had failed to meet his burden under the two-pronged test of *Strickland v. Washington*.⁹ As to the second claim, the Commissioner found that because it was not ineffective assistance for Trial Counsel to fail to request a specific unanimity instruction, it was not plain error for the trial judge to fail to request such an instruction *sua sponte*.¹⁰

⁶ See Commissioner’s Report at 6-7.

⁷ Commissioner’s Report at 7. Criminal Rule 61 provides that a motion for postconviction relief may not be filed more than one year after the judgment of conviction is final. Del. Super. Ct. Crim. R. 61(i)(1).

⁸ See Del. Super. Ct. Crim. R. 61(i)(3) (barring grounds for relief not asserted in the proceedings leading to the judgment of conviction unless the movant shows “[c]ause for relief from the procedural default” and “[p]rejudice from violation of the movant’s rights.”).

⁹ 466 U.S. 668 (1984); Commissioner’s Report at 11-13; 17-18.

¹⁰ Commissioner’s Report at 13.

The Commissioner also found that Cannon failed to demonstrate that Rule 61's bars to relief were inapplicable to these claims.¹¹ Accordingly, the Commissioner denied Cannon postconviction relief on his first, second, sixth, seventh, and eighth¹²

As to Cannon's remaining claims, which also alleged ineffective assistance of counsel, the Commissioner found that these claims were time barred, because they were not asserted in Cannon's original *pro se* motion, and Cannon's Amended Motion was filed more than a year after his conviction.¹³ Rather than engage in an in-depth analysis of these claims under *Strickland*, the Commissioner examined each claim for a colorable claim of miscarriage of justice under Rule 61(i)(5) that would provide an exception to the time bar.¹⁴ The Commissioner found that no exception to the time bar applied, and accordingly denied Cannon postconviction relief on his third, fourth and fifth claims.¹⁵

This appeal followed. Cannon challenges each of the Commissioner's recommendations: specifically, Cannon contends that his third, fourth and fifth claims were not time barred, and argues that the Commissioner erred by finding his

¹¹ See Del. Super. Ct. Crim. R. 61(i)(5) (“[t]he bars to relief in . . . this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.”).

¹² See Commissioner's Report at 19.

¹³ Commissioner's Report at 7-8.

¹⁴ Commissioner's Report at 8; 13-17.

¹⁵ See Commissioner's Report at 19.

remaining claims to be procedurally barred. Cannon also objects to the Commissioner's decision to not hold an evidentiary hearing prior to making her findings. The State did not file a response to Cannon's appeal, and instead has chosen to rely on its original response to Cannon's Amended Motion.

III. Standard of Review

When a party appeals the Commissioner's findings and recommendations upon a motion for postconviction relief, this Court makes a *de novo* determination as to the validity of the objections raised.¹⁶ The Court "may accept, reject or modify, in whole or in part, the findings or recommendations made by the Commissioner."¹⁷

IV. Discussion

A. The Commissioner's Report and Recommendation is adopted in part as to claims one, two, six, seven, and eight.

After careful and *de novo* review of the record, and for the reasons stated in the Commissioner's Report and Recommendation, the Commissioner's Report and Recommendation is adopted in part as to claims one, two, six, seven, and eight. The Commissioner's reasoning as to each of these claims is thoughtful and well-reasoned. Cannon has failed to demonstrate that the Commissioner somehow misapplied Delaware law, made a finding unsupported by the record, or otherwise committed legal error that would justify granting Cannon's Amended Motion on any of these

¹⁶ *State v. Hester*, 2012 WL 3608713, at *2 (Del. Super. Ct. Aug. 21, 2012); 10 *Del. C.* § 512(b)(1)(d).

¹⁷ 10 *Del. C.* § 512(b)(1)(d).

grounds. Accordingly, Cannon's Amended Motion for Postconviction Relief is denied as to his first, second, sixth, seventh, and eighth claims.

B. Claims three, four and five of Cannon's Amended Motion for Postconviction Relief are not time barred.

Cannon argues that because his original motion for postconviction relief was timely filed, the Commissioner was incorrect in finding that the claims raised for the first time in his Amended Motion were time barred. Cannon is correct based on the Delaware Supreme Court's recent decision in *Ploof v. State*.¹⁸

In *Ploof*, the defendant amended his motion for postconviction relief to include several claims that were not raised in his initial motion, which was timely filed.¹⁹ The Supreme Court rejected the State's argument that the grounds for relief raised in the amended motion were time barred, and considered the merits of those claims.²⁰ The Supreme Court held "that Rule 61's time limit applies only to the initial filing, and...Rule 61 grants Superior Court judges discretion to permit defendants to amend their motions when justice so requires."²¹ Pursuant to the Supreme Court's holding in *Ploof*, this Court has allowed amendments to motions for postconviction relief more than one year after a petitioner's conviction so long as the original motion was timely

¹⁸ 2013 WL 2422870 (Del. June 4, 2013).

¹⁹ *Id.* at *6.

²⁰ *Id.*

²¹ *Id.*

filed.²²

Cannon filed his original motion for postconviction relief on May 2, 2011. This was within one year from the issuance of the Supreme Court’s mandate on May 10, 2010; i.e., the date Cannon’s conviction became final. On May 4, 2012, after obtaining Postconviction Counsel to represent him, Cannon filed his Amended Motion for Postconviction Relief, which included three claims that were not raised in his original motion. Despite being raised more than one year after Cannon’s conviction became final, these three claims are not time barred because Cannon’s original motion was timely filed.

Thus, this Court does not adopt the Commissioner’s Report and Recommendation as to Cannon’s third, fourth and fifth claims because these claims are not time barred.

C. Claims three, four and five of Cannon’s Amended Motion for Postconviction Relief lack merit.

Cannon’s third, fourth and fifth grounds for relief raised in his Amended Motion for Postconviction Relief each assert ineffective assistance of counsel claims against Cannon’s Trial Counsel. It is appropriate for defendants to raise ineffective assistance of counsel claims for the first time on a motion for postconviction relief rather than on direct appeal, because such claims “argue that counsel’s defaults precluded the prior proceedings from being a fair resolution of guilt in accord with

²² See *State v. Sykes*, 2013 WL 3834048, at *1 (Del. Super. Ct. July 12, 2013).

then applicable legal principles.”²³ A defendant’s failure to meet the standard for ineffective assistance of counsel will result in his claims being procedurally barred under Rule 61, unless the defendant can establish either excuse from procedural default or that the procedural requirements of Rule 61 do not apply.²⁴

Ineffective assistance of counsel claims are evaluated under the “highly demanding” two-pronged standard set forth by the United States Supreme Court in *Strickland v. Washington*.²⁵ First, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness.”²⁶ This Court’s review of the trial attorney’s performance is “highly deferential” and involves “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance;” i.e., the Court presumes that a challenged action by the defendant’s trial counsel might be considered the product of sound trial strategy.²⁷ The reasonableness of trial counsel’s conduct is judged “on the facts of the particular case, viewed as of the time of counsel’s conduct.”²⁸ Second, the defendant must affirmatively prove that “there is a reasonable probability that, but for counsel’s

²³ *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 373-380 (1986)).

²⁴ *See id.* at 747-48, 753; *see also* Del. Super Ct. Crim. R. 61(i)(3); (i)(5).

²⁵ *Flamer*, 585 A.2d at 754-54 (citing *Kimmelman*, 477 U.S. at 382).

²⁶ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

²⁷ *Id.* at 689.

²⁸ *Id.* at 690.

unprofessional errors, the result of the proceeding would have been different.”²⁹ Reasonable probability means “probability sufficient to undermine confidence in the outcome.”³⁰ In making this determination, the Court “must consider the totality of the evidence before the judge or jury.”³¹ The defendant’s failure to make the required showing for either prong of the *Strickland* test will defeat his ineffective assistance of counsel claim.³²

Under the foregoing principles, and as explained *infra*, the Court finds that Cannon’s third, fourth and fifth claims fail to establish ineffective assistance of counsel.

i. Claim Three: Trial Counsel failed to argue that evidence of the Possession of a Firearm by a Person Prohibited charge was limited to July 17, 2008.

On appeal from the Commissioner’s Report and Recommendation, Cannon objects to the Commissioner’s finding that his third claim was time barred, but does not specifically address the merits of the claim. Cannon’s third claim in his Amended Motion for Postconviction Relief alleges that Trial Counsel was ineffective by failing to argue that evidence of his Possession of a Firearm by a Person Prohibited charge was limited to July 17, 2008 (the date of the home invasion in Harrington). In his

²⁹ *Id.* at 694.

³⁰ *Id.*

³¹ *Id.* at 695.

³² *Strickland*, 466 U.S. at 700.

verified letter affidavit, Trial Counsel states that he implicitly argued that such evidence was limited to July 17, 2008 during his summation.

A careful review of the relevant portions of the trial transcript reveals that Trial Counsel is correct. During his summation, Trial Counsel references each charged offense that arose from the Harrington home invasion. Trial Counsel included the Possession of a Firearm by a Person Prohibited charge with these offenses. While a more explicitly-stated argument might have been prudent, failure to make such an argument cannot be said to fall outside the wide range of reasonable professional assistance. Accordingly, Cannon's third claim fails under *Strickland*.

ii. Claim Four: Trial Counsel was ineffective when he failed to request a Bland accomplice testimony instruction.

In *Bland v. State*, the Delaware Supreme Court held that a cautionary jury instruction is necessary whenever a defendant's self-identified accomplice provides uncorroborated testimony at the defendant's trial, in order to warn the jury of the "suspicion and great caution" with which such testimony must be evaluated.³³ This rule and the contents of the jury instruction have undergone several deviations over the years until the Supreme Court's recent decision in *Brooks v. State*.³⁴ Prior to *Brooks*, the Supreme Court held in *Smith v. State* that a defense attorney's failure to

³³ *Bland v. State*, 263 A.2d 286, 289-90 (Del. 1970).

³⁴ 40 A.3d 346 (Del. 2012).

request a *Bland* cautionary instruction amounted to ineffective assistance of counsel.³⁵

In *Brooks*, the Supreme Court clarified prior case law by announcing a bright-line rule: “[t]rial judges must give a modified version of the instruction recommended in *Bland v. State* whenever a self-identified accomplice testifies.”³⁶ The Supreme Court declined to apply this rule retroactively.³⁷ The *Brooks* Court further clarified its holding in *Smith* by observing that the decision in *Smith* “require[d] a determination of the prejudicial effects of counsel’s failure to request an accomplice liability instruction. . . .”³⁸ The *Brooks* Court explained that “[i]f independent evidence supports accomplice testimony,” then the prejudice prong of *Strickland* is not met by the trial attorney’s failure to request a *Bland* instruction.³⁹

Several of Cannon’s accomplices testified against him at trial. No *Bland* instruction was requested by Trial Counsel, nor did the Court require one *sua sponte*. The State as well as Trial Counsel in his verified letter affidavit correctly point out that the rule announced in *Brooks* is not retroactive in nature; accordingly, the mandatory rule that a trial court must always give a modified *Bland* jury instruction whenever a self-identified accomplice testifies does not apply to the case *sub judice*.

³⁵ *Smith v. State*, 991 A.2d 1169, 1172 (Del. 2010).

³⁶ *Brooks*, 40 A.3d at 348.

³⁷ *Id.* at 351.

³⁸ *Id.* at 354.

³⁹ *Id.* at 354-55.

Cannon contends that regardless of the rule in *Brooks*, a cautionary instruction was still required under *Bland*, and Trial Counsel's failure to request such an instruction amounts to ineffective assistance of counsel. The *Brooks* Court made it clear that *Smith* does not stand for a bright-line rule that failure to request a *Bland* instruction automatically amounts to ineffective assistance of counsel. Trial Counsel's failure to request a *Bland* instruction must still satisfy both prongs of the *Strickland* test.

Trial Counsel's failure to request a *Bland* instruction fails to satisfy the prejudice prong of *Strickland*, because there was ample independent evidence presented at trial that supported the accomplice testimony. This independent evidence included *inter alia*: the testimony of two of the victims as well as an eyewitness as to what was stolen from the victims' home; the recovery of several of the stolen items from apartments in Milford which Cannon either lived in or had unfettered access to; Cannon's own admission that he possessed a video game console that was identified as one of the items stolen from the victims' residence; and the recovery of a firearm from Cannon's vehicle that was identified as one of the weapons stolen from the victims' residence. Based on this evidence, it cannot be said that the failure of Trial Counsel to request a *Bland* instruction created a reasonable probability that the result of Cannon's trial would have been different had the instruction been requested. Thus, Cannon's fourth claim fails to satisfy the prejudice prong of *Strickland*.

iii. Claim Five: Trial Counsel was ineffective when he failed to call Singletary

as a witness at trial.

As with his third claim, Cannon argues that the Commissioner erred by finding that his fifth claim was time barred, but does not actually address the merits of this claim in his appeal. In his Amended Motion for Postconviction Relief, Cannon argues that Trial Counsel was ineffective by failing to call Singletary—one of Cannon’s co-defendants—as a witness at trial because Singletary’s testimony would have exonerated Cannon. Included with Cannon’s Amended Motion is a sworn affidavit signed by Singletary, in which Singletary states that he “would have provided information that would have been helpful to Mr. Cannon” had Trial Counsel called him as a witness. Singletary states in his affidavit that he “never said anything to [Trial Counsel] that would have jeopardized” Cannon’s case, and that he told Trial Counsel that Cannon “had nothing to do with the charges.”

Singletary’s affidavit contradicts Trial Counsel’s reasons for not calling him as a witness. In his verified letter affidavit, Trial Counsel states that Singletary would have testified that Cannon had been present at the home invasion in Harrington along with Singletary and co-defendant, Keith Jones. Trial Counsel states he interviewed Singletary prior to trial, and determined that Singletary’s testimony would have been inculpatory rather than exculpatory in nature, and would have implicated Cannon in the home invasion. The Commissioner found Trial Counsel’s version of events more credible and reliable than Singletary’s.

This Court agrees with the Commissioner’s finding that Trial Counsel’s verified letter affidavit is more reliable than Singletary’s affidavit. Under Trial

Counsel's version of events, his decision to not call Singletary as a witness constituted sound trial strategy, because Singletary's testimony would likely be more harmful than helpful to Cannon. Trial Counsel's decision not to call Singletary thus falls within the wide range of professional assistance under *Strickland*. Even assuming *arguendo* that Singletary's version of events is correct, and that his testimony would have been helpful to Cannon, the prejudice prong of *Strickland* would still not be met based on the independent evidence against Cannon. Regardless of whether this Court chooses to adopt Trial Counsel's or Singletary's affidavit as the more credible and reliable version of events, Cannon's fifth claim fails to satisfy *Strickland's* two-pronged test.

Based on the foregoing, Cannon's third, fourth and fifth claims raised in his Amended Motion for Postconviction Relief fail to adequately allege ineffective assistance of counsel. Thus, these claims are procedurally barred under Rule 61(i)(3). Cannon has failed to establish excuse from procedural default, and has also failed to establish that Rule 61's procedural requirements do not apply because of lack of jurisdiction or a colorable claim of miscarriage of justice.⁴⁰ Accordingly, Cannon's third, fourth and fifth claims asserted in his Amended Motion for Postconviction relief must be denied.

D. No evidentiary hearing is necessary.

Pursuant to Rule 61(h), the Court shall determine "whether an evidentiary hearing is desirable" in a motion for postconviction relief after considering the

⁴⁰ See *supra* notes 8, 11.

motion, the State's response, the defendant's reply, the record of the prior proceedings, and any added materials.⁴¹ If the Court determines that an evidentiary hearing is not desirable, then the Court "shall make such disposition of the motion as justice dictates."⁴² Stated differently, "the decision to hold an evidentiary hearing in a postconviction proceeding is within the discretion of the Superior Court," and if the record demonstrates that the defendant is not entitled to relief, "then summary disposition of the case is appropriate."⁴³

Cannon objects to the Court's making its findings without a hearing. Upon careful review of the record, as well as of Cannon's Amended Motion for Postconviction Relief, the State's response, Cannon's reply, the record below, and Cannon's appeal, this Court finds no reason why an evidentiary hearing would be desirable. As noted *supra*, the only significant credibility issue involved in this motion is whether Singletary's affidavit is reliable. Regardless of whether Trial Counsel or Singletary is found to be more credible on the issue of whether Singletary's testimony would have exonerated Cannon, the result is the same under *Strickland*. Thus, no evidentiary hearing was required, because summary disposition of Cannon's Amended Motion was appropriate.

⁴¹ Del. Super. Ct. Crim. R. 61(h)(1).

⁴² Del. Super. Ct. Crim. R. 61(h)(3).

⁴³ *Outten v. State*, 720 A.2d 547, 551 (Del. 1998) (citations omitted).

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V. Conclusion

The Commissioner's Report and Recommendation is adopted in part as to the Commissioner's factual findings and as to claims one, two, six, seven, and eight. Upon careful *de novo* review of the record, claims three, four and five of Cannon's Amended Motion are denied as procedurally barred by Rule 61(i)(3) for failure to prove cause and prejudice and as completely meritless. Accordingly, Cannon's Amended Motion for Postconviction Relief is **DENIED** in its entirety.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Hon. William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Kathleen A. Dickerson, Esquire
Natalie S. Woloshin, Esquire
Alexander W. Funk, Esquire