IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
	Plaintiff,)))	
v.)))	Cr. ID No. 0701018040
MARK PURNELL,)	
	Defendant.)	

Submitted: March 27, 2012 Decided: July 3, 2012

COMMISSIONER'S REPORT AND RECOMMENDATION THAT DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF SHOULD BE DENIED.

Elizabeth R. McFarlan, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the State.

Joseph M. Bernstein, Esquire, 800 N. King Street, Suite 303, Wilmington, Delaware, Attorney for Defendant Purnell.

PARKER, Commissioner

This 3rd day of July, 2012, upon consideration of Defendant's Motion for Postconviction Relief, it appears to the Court as follows:

I. PROCEDURAL HISTORY

On January 23, 2007, Defendant Mark Purnell and his co-defendant, Ronald Harris, were arrested and subsequently indicted on charges of first degree felony murder, attempted first degree robbery, possession of a firearm during the commission of a felony, possession of a deadly weapon during the commission of a felony, second degree conspiracy, and possession of a deadly weapon by a person prohibited.

Jury selection for a joint trial began on April 3, 2008. On April 7, 2008, Harris entered into a plea agreement with prosecutors, and he pled guilty to attempted first degree robbery and second degree conspiracy. With Harris no longer facing trial, Purnell's jury trial began on April 14, 2008. After an eleven day trial, the jury found Purnell guilty of the lesser-included offense of second degree murder and the remaining counts as charged. On October 17, 2008, the Superior Court sentenced Purnell to a total of 77 years at Level V incarceration (21 years being mandatory), suspended after 45 years for decreasing levels of supervision.

On direct appeal, on August 25, 2009, the Delaware Supreme Court affirmed Purnell's conviction and sentence.¹

On March 25, 2010, Purnell filed a *pro se* motion for postconviction relief pursuant to Rule 61. Purnell subsequently retained counsel. After Purnell retained counsel, an amended motion for postconviction relief was filed on October 11, 2011. In the amended motion, Purnell raises three grounds for relief, all of them alleging ineffective assistance of counsel.

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¹ Purnell v. State, 979 A.2d 1102 (Del. 2009).

II. **FACTS**

In the early evening hours of January 30, 2006, Ernest and Tameka Giles were walking along the sidewalk near Fifth and Willing Streets in Wilmington, Delaware. The married couple were carrying several shopping bags containing their recent purchases from Walmart.² As they walked, two young men approached them and demanded money. Mrs. Giles recognized one of the men, calling him by his name, Mark.³ Mrs. Giles refused to give up her belongings and kept walking. The young man then fired a single shot, hitting Mrs. Giles in the back. She fell to the ground and Mr. Giles screamed for help. The two men fled the scene.⁴ Paramedics transported Mrs. Giles to the Christiana Hospital where she died from her injuries.⁵

Angela Rayne, who was smoking crack cocaine, witnessed the murder/attempted robbery while sitting on a step near the intersection of Fifth and Willing Streets. Rayne saw two young men walk past her, turn around, and then walk past her again. She then saw a man and a woman coming up the hill and observed the two pairs of people walk past each other. Rayne heard one gunshot and then saw the two young men running away.6

Rayne testified that she had seen one of the two assailants earlier in the day at Fifth and Jefferson Streets in the company of the Wilmington police. Using that information, the police developed a suspect, Ronald Harris, and included his picture in a photo array. After viewing that array during an interview with the police on February 16,

² See, *Purnell v. State*, 979 A.2d 1102, 1104 (Del. 2009). ³ *Purnell*, 979 A.2d at 1104.

⁴ *Id*.

⁵ *Id*.

⁶ *Id*.

2006. Rayne identified Harris as the assailant whom she had seen earlier on the day of the attack.7

Shortly after the shooting, the police briefly interviewed Mr. Giles at the hospital while his wife was being treated for her injuries. Mr. Giles was interviewed a second time at the police station on February 3, 2006. By that time, the police had discovered a number of facts that led them to believe that Mr. Giles might have had some involvement in the incident. He then became a person of interest in the investigation of his wife's murder. 9 Mr. Giles had a history of domestic violence directed against his wife. The police discovered that Mr. Giles lied to them about his reason for being in the vicinity of the shooting and about his whereabouts after Mrs. Giles died in the hospital. The police also discovered that Mrs. Giles had made statements that her husband had stolen her tax refund in 2005. 10 Additionally, the police learned that only a day or two before the murder, Mrs. Giles had received a tax refund check in the amount of \$1748. Tameka Giles cashed the tax refund check the day she was murdered. 11 Mr. Giles lied to the police about how the refund check was spent. 12

During his second interview with police on February 3, 2006, Mr. Giles initially stated that he did not believe that he would be able to recognize the perpetrators unless they were dressed the same way that they had been at the time of the crime. Later, while alone in the interview room, Mr. Giles made several cell phone calls and indicated to his callers that the police viewed him as a suspect. 13 After this, the police asked Mr. Giles to

⁷ *Id*.

⁸ *Id*.

¹¹ April 17, 2008 Trial Transcript, pg. 56. ¹² *Purnell*, 979 A.2d 1104.

¹³ *Id.* at 1104-1105.

look at a photo array, which did not contain Purnell's photo. Mr. Giles selected two pictures that he stated, taken in combination, were "close" to what one of the perpetrators looked like, but only if the men in the photos were 5'4" or 5'5" in height. 14

On February 16, 2006, police interviewed Mr. Giles a third time. During that interview, Mr. Giles stated that he had only seen the shooter from the side and that the shooter was wearing a hat. Shown another photo array, Mr. Giles then selected two more photographs that he said looked similar to the shooter. One of those photos was of Kellee Mitchell. Mr. Giles then pointed to the picture of Mitchell and said "it might have been him," and that between the two photos, the shooter looked most like Kellee Mitchell. Then, after some hesitation, he said that he could be wrong, it might have been the other one.15

Based on Rayne's identification of Harris and Mr. Giles' identification of Mitchell, the police applied for and were granted search warrants for Harris' and Mitchell's apartments. Both apartments were in the same building about five blocks from the shooting. The police executed the search warrants on February 18, 2006 and arrested both Harris and Mitchell. 16

Purnell, who was not a suspect at the time of the search warrant, was inside Harris' apartment. The police did not arrest Purnell. 17

The police did not charge Harris or Mitchell with killing Mrs. Giles. Harris was charged with attempted robbery in the first degree, possession of a deadly weapon during

¹⁴ *Id.* at 1105. ¹⁵ *Id.* at 1105.

¹⁶ *Id.* 17 *Id.*

the commission of a felony, and conspiracy. Mitchell was charged with an unrelated firearms offense. 18

A few days after the police execution of the search warrants and the arrest of Harris and Mitchell, the police separately showed Giles and Rayne photo arrays containing Purnell's picture. Neither Giles nor Rayne identified Purnell as one of the two assailants. 19

The focus of the investigation did not shift to Purnell until January 2007 when police arrested Corey Hammond for drug offenses. Hammond informed the police that he had seen Harris and Purnell together on the day of the shooting and that Purnell complained of being broke. When Harris asked Purnell what he was going to do about it, Hammond observed that Purnell had a firearm in his waistband. 20 When Hammond saw Purnell a few days later, Purnell allegedly bragged, "I told the bitch to give it up, she didn't want to give it up, so I popped her."²¹

Kellee Mitchell told that police that he had a conversation in April of 2006 with Purnell at a juvenile detention center in which Purnell stated that he intended to rob Tameka Giles, but that she recognized him and called him by his name, so he shot her.²² Kellee Mitchell told the police that Purnell stated that he intended to rob Tameka Giles because it was tax time. 23 As noted above, Tameka Giles had cashed a tax refund check for \$1.748 the day she was murdered. ²⁴

¹⁸ *Id*.

¹⁹ *Id*.

Id. April 16, 2008 Trial Transcript, pg. 37, 39.
 Purnell, 979 A.2d at 1104; April 15, 2008 Trial Transcript, pgs. 34-35.

²³ April 15, 2008 Trial Transcript, pg. 36. ²⁴ April 17, 2008 Trial Transcript, pg. 56.

Another person, Etienne Williams, Kellee Mitchell's girlfriend, told the police that she heard Purnell say that he killed the lady and that DeWayne Harris was sitting in jail for the murder. 25 DeWayne Harris was Ronald Harris' brother. DeWayne Harris had been considered a person of interest in Mrs. Giles' murder. 26

As a result of the continuing investigation into Mrs. Giles' murder, police arrested Purnell in January 2007, and the State indicted him on charges of murder in the first degree, attempted robbery in the first degree, conspiracy in the second degree, possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited.²⁷

Ernest Giles died on January 9, 2008, in Springfield, Massachusetts, four months before trial.²⁸

Prior to the trial, co-defendant Ronald Harris, had been interviewed by the police on two occasions. Harris was interviewed on February 18, 2006 for about 13 hours and again on January 24, 2007 for about two hours.²⁹ During both those interviews, Harris repeatedly told the police that he did not associate or socialize with Purnell and that Purnell did not have any involvement with the murder/attempted robbery.³⁰ After the commencement of jury selection, on April 7, 2008, Harris accepted the State's plea offer, and he provided a proffer implicating Purnell in the murder/attempted robbery of Mrs. Giles. Pursuant to the plea agreement, Harris agreed to testify for the State. When

April 16, 2008 Trial Transcript, pgs. 115-116.
 See, April 14, 2008 Trial Transcript, pg. 165.

²⁷ Purnell, 979 A.2d at 1105.

²⁸ April 17, 2008 Trial Transcript, pg. 55-56.

²⁹ April 17, 2008 Trial Transcript, pgs. 169-171.

³⁰ April 17, 2008 Trial Transcript, pgs. 169-171.

called to testify for the State during Purnell's trial, Harris, for the first time, stated that he associated with Purnell and that Purnell had, in fact, shot and killed the victim.

On April 25, 2008, Purnell was found guilty of second degree murder and all of the other charges set forth in the indictment.

DEFENDANT'S POST-CONVICTION RELIEF MOTION III.

As stated above, Purnell, through counsel, filed an amended motion for postconviction relief on October 11, 2011. In his amended motion, Purnell raises three claims for relief. These claims are as follows:

- 1) ineffective assistance of trial counsel for failure to request a jury instruction concerning the credibility of accomplice testimony under Bland v. State ³¹ and its progeny;
- 2) ineffective assistance of counsel for failure to request a jury instruction concerning the effect of Harris' guilty plea and failure to raise the issue on direct appeal; and
- 3) ineffective assistance of trial counsel for failure to object to prosecutorial "vouching" for the credibility of Harris.

Defendant's trial counsel submitted an Affidavit addressing Defendant's claims. Thereafter the State filed a response to the motion and Defendant filed a reply thereto.³² Following the Delaware Supreme Court's decision of February 23, 2012, in *Brooks v*. State³³, counsel was offered an opportunity to file supplemental submissions addressing the effect, if any, of that decision upon the issues raised in Defendant's Rule 61 Motion.

³¹ Bland v. State, 263 A.2d 286, 289-90 (Del. 1970). ³² Super.Ct.Crim.R. 61(g)(1) and (2).

³³ Brooks v. State. 40 A.3d 346 (Del. 2012).

Since each of Defendant's claims involve ineffective assistance of counsel contentions, it is necessary to first discuss the standard for judging an ineffective assistance of counsel claim.

To prevail on an ineffective assistance of counsel claim, the defendant must meet the two-pronged *Strickland* test by showing that: (1) counsel performed at a level "below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense." The first prong requires the defendant to show by a preponderance of the evidence that defense counsel was not reasonably competent, while the second prong requires him to show "that there is a reasonable probability that, but for defense counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different." ³⁵

Although not insurmountable, the *Strickland* standard is highly demanding and leads to a strong presumption that the representation was professionally reasonable.³⁶ Mere allegations of ineffectiveness will not suffice; instead, a defendant must make and substantiate concrete allegations of actual prejudice.³⁷ Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.³⁸

In considering post-trial attacks on counsel, *Strickland* cautions that trial counsel's performance should be reviewed from the defense counsel's perspective at the time decisions were being made. It is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of

³⁶ Bezarez v. State, 2012 WL 1390247 (Del. 2012); Albury v. State, 551 A.2d 53, 59 (Del. 1988); Salih v. State, 2008 WL 4762323, at *1 (Del. 2008).

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³⁴ Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

³⁵ *Id.* at 687-88, 694.

³⁷ *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).

³⁸ Strickland, 466 U.S. at 689.

counsel was unreasonable.³⁹ A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided.⁴⁰

There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Consequently, defense counsel must be given wide latitude in making tactical decisions.⁴¹

The United States Supreme Court noted that it is difficult to establish an ineffective assistance claim when counsel's overall performance indicated active and capable advocacy. Counsel's representation must be judged by the most deferential of standards. The United States Supreme Court cautioned that reviewing courts must be mindful of the fact that unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with his client, with opposing counsel, and with the judge.

Turning now to the subject case, whether or not defense counsel was a flawless strategist, it is clear from a thorough and complete review of the record that defense counsel provided active and capable advocacy. Indeed, the record reflects that defense counsel consistently, vigorously and diligently defended the charges against Defendant. When reviewing the entire proceeding, the record reflects counsel's overall performance as being active, diligent, thorough and capable advocacy.

Defendant's specific claims are discussed below.

⁴¹ Harrington v. Richter, 131 S.Ct. 770, 788-89 (2011).

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³⁹ Strickland, 466 U.S. at 688-89.

⁴⁰ Id at 688-89

⁴² *Id.* at 791.

⁴³ *Id.* at 787-88.

1) Failure to Request a Bland Instruction

Defendant first claims that his trial counsel was ineffective for failing to request a cautionary jury instruction, pursuant to Bland, regarding the weight to be accorded accomplice testimony.

It is important to have a full and comprehensive understanding of this case in order to evaluate this claim.

The defense did not want the jury to disregard the co-defendant's, Harris', testimony in its entirety. The defense wanted the jury to believe that Harris had some credibility and that his pre-plea statements should be believed. 44 The defense strategy in this case was to try to persuade the jury that Harris, the co-defendant, was truthful in his first two statements to the police, provided on February 18, 2006 and on January 24, 2007. In those statements, Harris repeatedly told the police that he did not associate or socialize with Purnell and that Purnell did not have any involvement with the murder/attempted robbery.

The portion of Harris' testimony that the defense did not want the jury to find credible was Harris' proffer and trial testimony after Harris accepted an attractive plea deal. 45 It was only after Harris accepted an attractive plea deal that he implicated Purnell in the murder/attempted robbery. The defense strategy was to try to persuade the jury to believe that the only reason Harris implicated Purnell was to save himself.

After all, it was Harris who was identified as one of the robbers by an eyewitness, Angela Rayne. The other participant had not been identified by an eyewitness. The issue

Affidavit of Defense Counsel, at pgs. 2-3 (Exhibit A to State's Response).
 See, Affidavit of Defense Counsel, at pgs. 2-3 (Exhibit A to State's Response).

in this case was whether Purnell was the other participant. The defense strategy was to persuade the jury that Harris had a strong motivation to implicate Purnell, namely that Harris implicated Purnell only after he took a plea and was only doing so to save himself.

In support of this strategy, defense counsel cross-examined Harris concerning the beneficial plea he received which required him to testify, in an effort to attack the credibility of his proffer and trial testimony. In closing argument, defense counsel argued that Harris' proffer and trial testimony were not credible because of the great plea deal he received from the State. Defense counsel argued that Harris' pre-plea statements should be believed rather than his post-plea testimony which was not credible because of the favorable plea deal.

In further support of this defense strategy, defense counsel called Latoya Moody as a witness.⁴⁹ Ms. Moody testified that Harris is her cousin. Moody testified that she never saw Harris and Purnell socialize or interact. This testimony supported the defense strategy that Harris' two statements to the police in which he denied associating with Purnell and denied that Purnell was involved in the murder/attempted robbery were credible.

The defense was, however, confronted with obstacles in persuading the jury to accept its version of the case. Harris' post-plea proffer and trial testimony in which he implicated Purnell in the murder/attempted robbery was corroborated by other witnesses. In addition, the trial record established that Purnell was in Harris' apartment when the

⁴⁹ See, April 21, 2008 Trial Transcript, pgs. 40-41, 44.

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April 17, 2008 Trial Transcript, pgs. 169-176.
 April 23, 2008 Trial Transcript, pgs. 136-137.

⁴⁸ April 23, 2008 Trial Transcript, pgs. 136-137.

police executed a search warrant. 50 This fact showed, in and of itself, that Purnell and Harris did socialize and interact at least on occasion.

Evewitnesses, Angela Rayne and Ernest Giles, both agreed that there were two robbers. Furthermore, Kellee Mitchell gave a statement to the police that he had a conversation with Purnell in which Purnell stated that he intended only to rob Tameka Giles, but when she recognized him and called him by his name, he shot her. Kellee Mitchell also gave a statement that Purnell targeted Tameka Giles because it was tax time. Tameka Giles had cashed a tax refund check for \$1,748 the day she was murdered.

Corey Hammond testified that he saw Purnell with a gun in his waistband and was complaining about being broke shortly before the robbery and murder. Hammond also testified that Purnell told him he had shot Tameka Giles because she did not want to "give it up." Etienne Williams, Kellee Mitchell's girlfriend, testified that she heard Purnell say he killed the lady and that DeWayne Harris was sitting in jail for that murder.⁵¹

Kellee Mitchell and Corey Hammond, witnesses who corroborated Harris' postplea testimony, both had legal troubles of their own. It also bears mention that Kellee Mitchell had once been a suspect in the subject murder/attempted robbery. 52 Both Kellee Mitchell and Corey Hammond came forward to the police with their statements implicating Purnell while their respective legal problems were pending and both were seeking to obtain favorable treatment from the State for their own respective problems for testifying in the subject case.⁵³

April 17, 2008 Trial Transcript, pg. 98.
 See, April 16, 2008 Trial Transcript, pgs. 106-119.
 April 14, 2008 Trial Transcript, pgs. 155, 165; April 15, 2008 Trial Transcript, pg. 50.

⁵³See, April 16, 2008 Trial Transcript, pgs. 80-82.

Although Mitchell and Hammond were not co-defendants in the subject action, the defense strategy was to attempt to persuade the jury that Mitchell, Hammond and Harris (the co-defendant) all had self-interests and motivations in implicating Purnell, and that none of their testimony implicating Purnell should be believed. The only portion of testimony that defense counsel wanted the jury to believe from these three witnesses was that of the co-defendant, Harris. He gave statements to the police that Purnell had no involvement in this case. These statements were made before Harris made his deal to save himself.

Indeed, defense counsel argued at closing that Kellee Mitchell gave his statement implicating Purnell, because Mitchell was the person who actually committed the murder/attempted robbery and he did not want to serve a life sentence. "Why would Kellee Mitchell give his statement that my client admitted to him that he was involved in this? . . . His motivation is because he did it. . . He's got a life time of motivation to come in here and say it was my client."54

As to Corey Hammond, defense counsel argued that it was not until he was arrested on drug charges that he "comes up with a story implicating Mark Purnell."55 Hammond, it was argued, should have no credibility because he had a motive to make up a story.⁵⁶

From opening statement, during the examination and cross-examination of each witness, through closing arguments, defense counsel consistently, vigorously and diligently pursued the defense theme: that the witnesses implicating Purnell were motivated to do so in order to save themselves. Defense counsel did a very thorough,

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April 23, 2008 Trial Transcript, pg. 129.
 April 23, 2008 Trial Transcript, pgs. 131-132.
 Id.

vigorous and diligent job conveying this defense. The fact that the defense strategy did not ultimately prove to be successful does not diminish the reasonableness of the strategy and the effort made by defense counsel to present it.

The modified *Bland* instruction that the Delaware Supreme Court ruled must be given, effective March 15, 2012, in every case any time a witness who claims to be an accomplice testifies⁵⁷, is as follows:

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 more care and caution than the testimony of a witness who did not participate in the crime charged. 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 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.⁵⁸

Although this modified version of the *Bland* jury instruction is to be given beginning March 15, 2012, this requirement does not apply retroactively.⁵⁹ Purnell was tried in 2008, nearly four years before the effective date of the new requirement. This new rule did not exist at the time of Purnell's trial. Thus, there is no mandate that the *Bland* jury instruction be given at Purnell's trial.

The law as it existed at the time of Purnell's trial was that the failure to request an accomplice testimony instruction would be deemed ineffective assistance of counsel only

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⁵⁷ Brooks v. State, 40 A.3d 346 (Del. 2012).

⁵⁸ Brooks, 40 A.3d at 350; citing, Bland v. State, 263 A.2d 286, 289-90 (Del. 1970).

⁵⁹ Torrence v. State, 2012 WL 2106219, at *3 (Del. 2012).

if it probably affected the outcome of the trial.⁶⁰ In conducting this analysis, the facts and circumstances of each particular case are to be considered.⁶¹

In applying the two-prong *Strickland* standard to this issue, it must first be determined whether counsel's failure to request an accomplice testimony instruction amounted to "deficient attorney performance" and, if so, whether that deficient performance prejudiced the defense.

Applying the first prong of the *Strickland* standard, to the facts of this case, defense counsel was not deficient for not requesting a *Bland* jury instruction. The *Bland* jury instruction does not appear to further the defense interests and it was not ineffective for defense counsel to not request that such an instruction be given.

First, defense counsel did not want the jury to disregard Harris' testimony in its entirety. Counsel did not want the jury to view all of Harris' testimony with "more care and caution" than other witnesses. Counsel wanted the jury to find Harris' pre-plea statements to the police credible and to discredit his post-plea proffer and trial testimony. Counsel wanted the post-plea portion of Harris' testimony to not be found credible because of Harris' motivation to save himself. Defense counsel wanted the emphasis placed on the acceptance of a favorable plea as Harris' motivation in changing his testimony. The *Bland* instruction does not accomplish this defense goal. The *Bland* instruction calls into question the entirety of the co-defendant's testimony.

Second, the *Bland* instruction that "the testimony of an alleged accomplice should be examined by you with more care and caution than the testimony of a witness who did not participate in the crime charged" does not appear to fit in this case from the defense

⁶⁰ Brooks, 40 A.3d at 353-54.

⁶¹ See, *Smith v. State*, 991 A.2d 1169, 1177-80 (Del. 2010); *Bezarez v. State*, 2012 WL 1390247, at *2 (Del. 2012).

perspective. This instruction would emphasize that Harris' testimony should be considered with more care and caution than the testimony of Hammond and Mitchell, simply because Hammond and Mitchell were not charged with the murder/attempted robbery at issue and, therefore, were not co-defendants in the subject case. Yet, the defense strategy was to argue that Harris, Hammond and Mitchell were all self-interested and motivated to implicate Purnell. Each of these witnesses, defense counsel argued, was motivated in their desire to help themselves with their own respective legal problems, irrespective of whether their status was that of co-defendant in this case.

Moreover, the *Bland* instruction provides that the accomplice's testimony should be viewed cautiously especially when it is not corroborated by other witnesses. The flip side is that when the accomplice's testimony is corroborated by other witnesses, it is not to be viewed as cautiously because it is corroborated. In this instance the now requested instruction would appear to bolster Harris' post-plea testimony, Hammond's testimony and Mitchell's testimony since they each corroborate one another in implicating Purnell for the murder/attempted robbery.

Since Hammond and Mitchell were not charged in this case, they are not codefendants with Purnell. The *Bland* instruction could have bolstered Harris' post-plea testimony because it was corroborated by other witnesses (Hammond and Mitchell), certainly a result not desired by the defense. It was reasonable in this case for defense counsel not to want the jury to find the other witnesses whose testimony corroborated Harris' post-plea testimony to be examined with less care and caution than Harris' testimony simply because they were not co-defendants in this case. This is especially so in this case, where at least one of those other witnesses (Mitchell) was himself a suspect in this case at one time.

In this case, defense counsel wanted the emphasis placed on the self-interest and motivations of all the witnesses, including but not limited to Harris, in implicating Purnell.

The court gave the pattern jury instruction on how to consider conflicting testimony of witnesses, to assess the credibility and the weight to be given their statements, to assess the motivations and interests of the witnesses, and all other significant parameters that should be considered when evaluating the testimony of witnesses. 62 This instruction given was adequate, and counsel was not ineffective for not requesting anything additional.

Defense counsel emphasized this jury instruction during his closing. Defense counsel stated: "Now you are going to be instructed about conflicting testimony and that's what I'm trying to highlight is conflicting testimony that's been presented by the State's witness. And you have been instructed to do your best, try to make one harmonious story of the events on January 30th 2006. That is going to be a hard job based upon all those conflicting statements and all the motivation that people have to get out of jail, get out of trouble. You've got a tough job."63 Defense counsel then proceeded to go through each witnesses' testimony, Harris', Mitchell's, Hammond's, and emphasized their motivations and self-interests and why their testimony implicating Purnell should not be believed.⁶⁴

April 24, 2008 Trial Transcript, pgs. 38-39.
 April 23, 2008 Trial Transcript, pg. 140.
 April 23, 2008 Trial Transcript, pgs. 116-147.

As the United States Supreme Court has cautioned, it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.⁶⁵ A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. Second guessing or "Monday morning quarterbacking" should be avoided.⁶⁶

Defense counsel is to be given wide latitude in his tactical decisions.⁶⁷ Defense counsel's trial strategy in this case was reasonable and the record reflects that defense counsel consistently, vigorously and diligently defended the charges against Defendant and emphasized the motivations and self-interests of all the State's witnesses implicating Defendant in the murder/attempted robbery at issue.

Under the facts and circumstances of this case, it was not deficient for counsel not to have requested a *Bland* jury instruction. The first prong of the *Strickland* standard has not been met and therefore this claim must fail.

Yet, even if the first prong of the *Strickland* standard was met, Defendant also fails to establish prejudice as required by the second prong of the *Strickland* standard. For this reason as well, the claim should fail. To establish prejudice under the second prong of *Strickland*, a defendant must show that, but for counsel's deficient conduct, there is a reasonable probability that the outcome of the case would have been different.

In this case, there was independent corroborating evidence implicating Purnell in the murder/attempted robbery aside from Harris' post-plea testimony. There was other direct evidence supporting the post-plea testimony of Harris at trial, that is, the testimony of Kellee Mitchell and Corey Hammond. In addition, other witnesses including Etienne

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⁶⁵ Strickland, 466 U.S. at 688-89.

⁶⁶ *Id.* at 688-89.

⁶⁷ Harrington v. Richter, 131 S.Ct. 770, 788-89 (2011).

Williams, also corroborated the post-plea testimony of Harris implicating Purnell in the murder/attempted robbery, as more fully discussed above.

In light of the facts and circumstances of this case, Purnell cannot establish the outcome would have been different had counsel requested and the jury received a *Bland* type instruction regarding Harris' credibility. Having failed to establish either deficient performance or resulting prejudice, Purnell's claim of ineffective assistance of counsel for failure to request a *Bland* instruction should fail.

2) Failing to Request a Guilty Plea Jury Instruction

In Purnell's amended postconviction motion, he claims that his counsel was ineffective for failing to request a jury instruction concerning the effect of Harris' guilty plea. In his reply, he appears to add an additional argument claiming that trial counsel was ineffective for also failing to appeal the denial of defense counsel's request to have a new jury empanelled.

From a thorough, comprehensive and complete review of the trial, it is clear that Harris' plea agreement, itself, was not used as evidence of Purnell's guilt. An eyewitness to the murder/attempted robbery identified Harris as one of the two participants. The issue in this trial was whether Purnell was the other participant.

As previously discussed above, before accepting the favorable plea, Harris told the police that Purnell had nothing to do with the murder/attempted robbery. Harris who was identified as one of the two participants in the murder/attempted robbery accepted a favorable plea after jury selection but before the start of opening statements, and after doing so, for the first time, implicated Purnell as the second participant.

Defense counsel thoroughly cross-examined Harris about his last minute plea agreement and the change in his version of events pre-plea and post-plea. The full circumstances that lead to the acceptance of Harris' guilty plea were thoroughly fleshed out at trial and were known to the jury.

In Allen v. State, ⁶⁸the State sought to use the plea of a non-testifying co-defendant to establish the guilt of the defendant. In Allen, the Delaware Supreme Court explained that the use of a guilty plea of a co-defendant for the purpose of establishing the guilt of the defendant is improper, although the use of the guilty plea can be used for other purposes.⁶⁹

The facts of Allen differ markedly from the subject case. In Allen, the codefendant did not testify and the use of the guilty plea of the co-defendant was used for the purpose of establishing defendant's guilt. Here, the co-defendant did testify, and the nature and circumstances of the co-defendant's plea was thoroughly fleshed out at trial. Here, the guilty plea of the co-defendant, itself, was not used to establish the guilt of Purnell.

To determine whether the use of a guilty plea of a co-defendant was improper, and whether the failure to give some type of cautionary instruction was prejudicial, depends upon the facts and circumstances of each particular case. 70 Because the determination of whether the failure to give some type of cautionary instruction was prejudicial depends upon the facts and circumstances of each particular case, Purnell's motion, citing to a number of cases each of which is markedly different from the subject case, is not helpful to the analysis in this case.

⁶⁸ 878 A.2d 447 (Del. 2005).

⁶⁹ Allen, 878 A.2d at 450-51.

⁷⁰ Allen. 878 A.2d at 450-51.

In this case, in the first instance it is noted that Purnell fails to suggest any specific cautionary instruction that should have been given. Second, counsel did, in fact, request a new jury, which was denied by the court.⁷¹ Third, Harris testified and the full circumstances of his guilty plea was fleshed out at trial and known to the jury. Fourth, from a detailed review of the record, it was clear that the issue in this case was whether Harris was telling the truth when he implicated Purnell in the murder/attempted robbery or whether he was not telling the truth and just telling the State what it wanted to hear in order to save himself.

Consequently, Purnell cannot establish that there is a reasonable probability that the outcome of this trial would have been different had his trial counsel requested a cautionary instruction regarding the effect of Harris' guilty plea.

Under the facts of this case, it was clear that Harris' plea agreement, itself, was not used as evidence of Purnell's guilt. Harris' plea agreement was used by defense counsel to show Harris' strong motivation for testifying to what Harris believed the State wanted to hear. From opening statement, through cross-examination of Harris, to closing, defense counsel could not have been any clearer, Harris entered into his plea agreement and implicated Purnell in the murder/attempted robbery to save himself.

The State, responding to defense counsel's closing, told the jury during rebuttal: "What [defense counsel] is saying essentially in his typically gracious way is this: Look, Corey Hammond, Kellee Mitchell, Ronald Harris, they're all lying; they're all trying to get a deal; this isn't true." The State continued, "Would Ronald Harris' story given that

 ⁷¹ See, April 8, 2008 Trial Transcript, pgs. 17-18.
 ⁷² April 23, 2008 Trial Transcript. pg. 167.

he entered into this agreement on the eve of a first degree murder trial mean a whole lot if it was the only evidence that we had? Well, candidly no. No."73

There was no confusion in this case that Harris' plea agreement, itself, was not being used as evidence of Purnell's guilt. Consequently, even if it was deficient for counsel not to request a cautionary instruction, Purnell cannot establish that the outcome of the trial would have been different had his counsel requested a cautionary instruction that the plea agreement, itself, not be used as evidence of Purnell's guilt. Here, the lack of a limiting instruction was harmless, and thus counsel's failure to request such an instruction did not result in prejudice to Purnell.

Finally, it appears that in Purnell's Reply Memorandum in Support of his motion, he has added an additional claim. It appears that Purnell also contends that his trial counsel was ineffective for failing to appeal the denial that a new jury be empanelled after Harris entered into his guilty plea.

After Harris entered a guilty plea following jury selection but before opening statements in what was to be a joint trial with Purnell, Purnell's counsel requested that a new jury be empanelled. The Court however denied that request.⁷⁴ Defense counsel represented in his Affidavit in response to Purnell's Rule 61 motion, that he did not raise this issue on direct appeal because he did not believe that it would have been successful.⁷⁵ Defense counsel reasoned that his appeal would not likely be successful because after being empanelled, the jury swore under oath to be fair and impartial.⁷⁶ Moreover, defense counsel was able to cross-examine Harris concerning the beneficial

 ⁷³ April 23, 2008 Trial Transcript, pg. 171.
 ⁷⁴ See, April 8, 2008 Trial Transcript, pgs. 17-18.

⁷⁵ Affidavit of Defense Counsel, pgs. 3-4.

⁷⁶ Affidavit of Defense Counsel, at pgs. 3-4.

plea he received to testify against Purnell, in an effort to attack the credibility of Harris' proffer and trial testimony.

Defense counsel cannot be deemed ineffective for failing to raise an issue that lacks merit. Moreover, defense counsel is not required to raise every conceivable ground for appeal. Counsel may determine that weaker arguments should not be raised so as not to detract from stronger arguments advanced.⁷⁷

Defense counsel did not believe that this issue was a worthwhile appellate issue. For this reason, defense counsel chose not to raise it on appeal. Purnell has failed to meet his burden to establish that defense counsel's conduct in this regard was deficient nor has Purnell established actual prejudice as a result from any alleged deficiency.

3) **Improper Vouching**

Defendant contends that his trial counsel was ineffective for failing to object to prosecutorial "vouching" for the credibility of Harris.

Improper vouching occurs when the prosecutor implies some personal superior knowledge, beyond that logically inferred from the evidence at trial that the witness has testified truthfully.⁷⁸

In this case, the prosecutor asked Harris whether the out-of-court statements he made to the police, including those statements in February 2006 and January 2007, were true. 79 The prosecutor was required to ask these questions to lay a proper foundation for the admission of the statements into evidence pursuant to 11 Del. C. § 3507.80

⁷⁹ See, April 17, 2008 Trial Transcript, pgs. 155-59, 177-78.

⁷⁷ See, State v. Washington, 2007 WL 2297092, at *3 (Del.Super.), aff'd, Washington v. State, 2008 WL

⁷⁸ *Adkins v. State*, 2010 WL 922765, at *2 (Del. 2010).

⁸⁰ Gomez v. State, 25 A.3d 786, 796 (Del. 2011); Blake v. State, 3 A.3d 1077, 1081 (Del. 2010)(a two-part foundation must be established by the State during its direct examination before a witness' prior statement

Purnell contends that $Blake^{8l}$ and $Gomez^{82}$ were incorrectly decided by the

Delaware Supreme Court and that there should not be a requirement that the witness be

asked about the truthfulness of an out-of-court statement in order to lay a proper

foundation for the admission of that statement into evidence at trial.⁸³

Be that as it may, *Blake* and *Gomez* are controlling in this case and the prosecutor

was required to ask whether Harris' out-of-court statements were truthful in order to

establish a proper foundation for the admission of the statements into evidence. The

prosecutor's questions were entirely proper.

There is no legal or factual basis for this claim. Purnell cannot establish any

deficient performance on the part of defense counsel in failing to object to required

foundational questions.

IV. <u>CONCLUSION</u>

For the reasons stated above, Defendant's Motion for Postconviction Relief

should be denied.

IT IS SO RECOMMENDED.

Commissioner Lynne M. Parker

oc:

Prothonotary

cc:

Peter W. Veith, Esquire

can be admitted under Section 3507. First, the witness must testify about the events. Second, the witness must indicate whether or not the events are true.).

81 3 A.3d 1077 (Del. 2010).

82 25 A.3d 786 (Del. 2011).

⁸³ See, Defendant's Reply Memorandum, at pgs. 9-10.

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