EFiled: Aug 12 2013 10:54AM EDT
Filing ID 53678336
Case Number 339,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK PURNELL,	:	
Defendant Below-	:	
Appellant,	:	
	:	
v.	:	**No. 339, 2013**
	:	
STATE OF DELAWARE,	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
ID No. 0701018040

APPELLANT'S OPENING BRIEF

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Dated: August 12, 2013

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NATURE AND STAGE OF PROCEEDINGS

The Defendant/Appellant, Mark Purnell ("Purnell") was convicted in a jury trial of the following offenses: Murder Second Degree; Attempted Robbery First Degree; Possession of a Firearm During Commission of a Felony; Possession of a Deadly Weapon During Commission of a Felony; Possession of a Deadly Weapon by a Person Prohibited; and, Conspiracy Second Degree. On October 17, 2008, Purnell was sentenced by the court to an aggregate of 77 years at L-5, 21 years of which was mandatory, suspended after serving 45 years for decreasing levels of probation. See, *State v. Purnell*, ID No. 0701018040, (Del. Super., May 31, 2013) (hereinafter "*Rule 61 Decision*").[1] Purnell's convictions and sentences were affirmed by this Court on direct appeal.[2]

A timely Motion for Post-Conviction Relief ("Rule 61 Motion") was filed on March 25, 2010 Docket #85) (A12). An Amended Rule 61 Motion was filed on October 11, 2011 (Docket #96) (A13); (A17, *et seq.*). In general, the Amended Rule 61 Motion asserted several claims based on alleged ineffective assistance of counsel at trial. Purnell's trial attorney filed an affidavit in response to the allegations in the Rule 61 Motion. (A23).[3] The Superior Court then referred the matter to Commissioner Lynn M. Parker for findings and a recommendation.[4] On July 3, 2012,

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[1] In accordance with Supreme Court Rule 14(b)(vii), a copy of the Rule 61 Decision is appended to this Brief.

[2] See, *Purnell v. State*, 979 A. 2d 1102 (Del. 2010).

[3] The Superior Court did not conduct an evidentiary hearing.

[4] See, 10 *Del.C.* §512(b); Superior Court Criminal Rule 62.

the Commissioner issued her findings and recommendation that the Rule 61 Motion be denied. See, *State v. Purnell*, 2012 Del. Super. LEXIS 316 (Del. Super., 2012). Purnell filed a timely appeal from the Commissioner's Findings and Recommendation. Docket #107 (A15). On May 31, 2013, the Superior Court issued its *Rule 61 Decision* to deny Purnell's Rule 61 Motion.

On June 28, 2013, Purnell filed a timely appeal in this Court from the *Rule 61 Decision*. (Docket #112) (A15). This is Purnell's Opening Brief in support of his appeal.

SUMMARY OF ARGUMENT

1. The defendant's trial attorney was "ineffective" under *Strickland v. Washington* when he failed to request a jury instruction concerning the credibility of accomplice testimony under *Bland v. State*.

2. The defendant's trial attorney was ineffective under *Strickland* when he failed to request that the jury be given a limiting instruction concerning the guilty plea that was entered by the co-defendant, Ronald Harris, where the plea was entered after the jury had been selected for a joint trial, but before the commencement of the trial itself.

3. The defendant's appellate attorney was ineffective under *Strickland* when he failed to appeal the trial court's ruling which denied his request to empanel a new jury after it was disclosed that the co-defendant Harris had entered a guilty plea.

4. The defendant's trial attorney was ineffective under *Strickland* when he failed to object to comments made by the prosecutor which amounted to improper "vouching" for the credibility of the co-defendant, Ronald Harris.

STATEMENT OF FACTS

Historical Facts Leading to Conviction[5]

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. As they walked, two young men approached them and demanded money. Mrs. Giles refused to give up her belongings and kept walking. One of the young men 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. Paramedics transported Mrs. Giles to the Christiana Hospital where she later died from her injuries. *Rule 61 Decision, pp. 2-3.*

Angela Rayne ("Rayne"), who admitted at trial that she was smoking crack cocaine at the time, was an "earwitness" to the shooting. Rayne, who was sitting on a step near the intersection of Fifth and Willing Streets, testified that she 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. (A32-35). Shortly after the shooting, Rayne told the police 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,

[5] Except as noted by references to the trial transcript, the facts set forth herein have been adapted from the Commissioner's recitation of the historical facts leading to Purnell's convictions, which, in turn, were adopted by the Superior Court below. See, *Rule 61 Decision*, p. 3.

Ronald Harris ("Harris"), and included his picture in a photo array, which was shown to Rayne. During an interview with the police on February 16, 2006, Rayne identified Harris as the assailant whom she had seen earlier on the day of the attack. *Rule 61 Decision, p. 4.*

Shortly after the shooting, while his wife was being treated for her injuries, the police briefly interviewed Mr. Giles at the hospital. Mr. Giles was interviewed a second time at the police station on February 3, 2006.[6] During that interview, Mr. Giles told the police 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. As the interview concluded, the police asked Mr. Giles to 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.

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. He then selected two more photographs that he said looked similar to the shooter. One of those photos was of Kellee Mitchell

[6] 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. Mr. Giles had a history of domestic violence directed against his wife. The police also 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. He then became a person of interest in the investigation of his wife's murder. See, *Rule 61 Decision, pp. 4-5*.

("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 this one. Then, after some hesitation, he said that he could be wrong, it might have been the other one. *Rule 61 Decision, pp. 5-6*.[7]

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. Purnell, who was not a suspect at the time of the search warrant, was found inside Harris' apartment. The police did not arrest Purnell. 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 the commission of a felony, and conspiracy. Mitchell was charged with an unrelated firearms offense. A few days after the police executed the search warrants and arrested 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. *Rule 61 Decision*, p.6.

The focus of the investigation did not shift to Purnell until January 2007, when police arrested Corey Hammond ("Hammond") for drug offenses. At trial, Hammond testified 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

[7] Ernest Giles died on January 9, 2008, in Springfield, Massachusetts, four months before Purnell's trial. *Rule 61 Decision*, p. 8.

going to do about it, Hammond observed that Purnell had a firearm in his waistband. 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." (A38-A41). At trial, Hammond acknowledged that he had made a "deal" with the State to reduce a three year sentence that he was serving in exchange for his testimony. (A37-A38). When Hammond was first interviewed by the police in September 2006, he stated that he did not know anything about the shooting of Mrs. Giles. (A42-A43).

In January 2007, the police also interviewed Kellee Mitchell (Mitchell"), who told the police that he had a conversation in April of 2006 with Purnell at a juvenile detention center. Mitchell told the police that Purnell stated that he intended to rob Tameka Giles, but that she recognized him and called him by his name, so he shot her. Mitchell also told the police that Purnell stated that he intended to rob Tameka Giles because it was tax time. (A36). Mitchell's girlfriend, Etienne Williams, told the police that she overheard a phone conversation between Purnell and Jerome Portis and heard Purnell say that he killed the lady and that DeWayne Harris (Ronald Harris' brother) was sitting in jail for the murder. (A44-A45).

In April 2007, Ronald Harris and Purnell were jointly indicted on charges of murder in the first degree, attempted robbery in the first degree, conspiracy in the second degree, possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited. (A1). On April 2, 2008, a jury was selected for the joint trial of Harris and Purnell on the above charges. (A27). On April 7, 2008, after a jury had been selected for the joint trial, the Court was informed

that Harris had accepted a plea offer from the State and had provided a proffer implicating Purnell in the murder/attempted robbery of Mrs. Giles. Pursuant to the plea agreement, Harris also agreed to testify for the State. *Rule 61 Decision*, p. 8.[8]

At trial, Harris testified that he and Purnell decided to rob a man and woman, who were carrying several shopping bags, that they saw walking near 5th and Willing Streets. Harris also testified that it was Purnell who shot the woman when she refused to give Purnell the property that she was carrying. (A47-A50).[9] On April 25, 2008, Purnell was found guilty of second degree murder and all of the other charges set forth in the indictment. (Docket #50) (A8).

The Direct Appeal

In the direct appeal, Purnell's former attorney[10] raised two issues: (1) whether the trial court abused its discretion in ruling that out-of-court statements by the victims spouse, Ernest Giles, who deceased four months before Purnell's trial, were inadmissible hearsay; and (2) whether the trial court abused its discretion in refusing to dismiss a juror who had expressed concerns that jury deliberations might interfere with that juror's vacation plans. See, *Purnell*, 979 A.2d at 1103.

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[8] Harris pled guilty to Attempted Robbery and Conspiracy Second Degree. (A47).

[9] Prior to the entry of his guilty plea, 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. 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. *Rule 61 Decision*, p. 8.

[10] Purnell's trial attorney also represented Purnell in his direct appeal.

The Post-Conviction Proceedings

In the Amended Motion for Post-Conviction Relief, Purnell raised three claims for relief, all of which alleged ineffective assistance of counsel:

> (1) Trial counsel was ineffective in failing to request a jury instruction concerning the credibility of accomplice testimony under *Bland v. State*, 263 A.2d 286 (Del. 1970) and its progeny, with respect to the trial testimony and out-of-court statements of Ronald Harris.
>
> (2) Trial counsel was ineffective in the trial when he failed to request that the jury be instructed concerning the effect of Harris' guilty plea, which took place after the jury had been selected for the joint trial of Harris and Purnell. The defendant's former attorney was also ineffective in the direct appeal when he failed to raise this issue in the direct appeal.
>
> (3) Trial counsel was ineffective in failing to object to comments made by the prosecutor which amounted to improper "vouching" for the credibility of Ronald Harris.

See, *Rule 61 Decision*, p. 2; (A19-A22).

After reviewing each of Purnell's claims, the court below concluded that Purnell had failed to establish that he was entitled to relief and therefore denied the Rule 61 Motion. *Rule 61 Decision*, p. 23. Additional facts that are pertinent to the claims raised in this appeal are set forth in the Argument sections which follow.

I. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE UNDER *STRICKLAND* WHEN HE FAILED TO REQUEST A JURY INSTRUCTION CONCERNING THE CREDIBILITY OF ACCOMPLICE TESTIMONY UNDER *BLAND V. STATE*

Question Presented

Whether the defendant's trial attorney was "ineffective" under the Sixth Amendment when he failed to request a jury instruction concerning the credibility of accomplice testimony under *Bland v. State*, 263 A.2d 286 (Del. 1970) and its progeny with respect to the trial testimony and out-of-court statements of Ronald Harris? This issue was raised in the court below in Appellant's Amended Rule 61 Motion. (A19-A20).

Scope of Review

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 697-698 (1984). Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However, the trial court's ultimate conclusion that counsel rendered effective assistance is a legal conclusion that is reviewed *de novo*. *Id*.

Overview of Law: Ineffective Assistance of Counsel [11]

In order to prevail on a claim which alleges ineffective assistance of counsel, the defendant has to meet the well established two-pronged test established in

[11] This discussion applies to all of the claims which allege ineffective assistance of trial counsel.

Strickland. In *Strickland*, the Court identified the two components to any ineffective assistance claim as being: (1) deficient attorney performance; and, (2) prejudice.

(1) Deficient Attorney Performance Under *Strickland*

Under *Strickland*'s performance component, a defendant must establish that his counsel's performance was deficient -"that under all the circumstances, the attorney's representation fell below an objective standard of reasonableness." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) (the inquiry is "whether counsel's representation fell below an objective standard of reasonableness").

In *Strickland* itself, the Court also adopted a somewhat deferential standard in reviewing counsel's performance and established a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. 689. Conversely, the Supreme Court has also squarely held that merely invoking the word "strategy" to explain attorney errors is insufficient. See, *Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background").

The distinction between omissions that were the result of sound "strategy" and omissions that were the result of "prejudicial oversight" was parsed by the Third Circuit Court of Appeals in *Thomas v. Varner*, 428 F.3d 498 (3d Cir. 2005):

> Our review reveals a tiered structure with respect to *Strickland's* strategic presumptions. At first, the presumption is that counsel's conduct might have been part of a sound strategy. The defendant can rebut this "weak" presumption by showing either that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound...However, if the Commonwealth can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the "weak" presumption becomes a "strong" presumption, which is "virtually unchallengeable."

Id., at 499-500.

(2) Determination of "Prejudice" under *Strickland*

Although *Strickland* phrases the "prejudice" inquiry in terms of "proving" prejudice, in reality, the "prejudice" determination is a three-step process.[12] First, it is the defendant's burden to identify and substantiate the errors made by trial counsel. See, *Varner*, 428 F.3d at 502, n12 ("As it is the petitioner's burden to show prejudice, it is his responsibility to develop a record under which the merits of the [claimed error] can be determined"). Second, the petitioner must show that he likely would have prevailed on the merits of the claimed attorney error. *Id.*, at 502 ("Were it likely that the suppression motion would have been denied (or the objection overruled), then

[12] The prejudice standard under *Strickland* is not a stringent one. See, *Jacobs v. Horn*, 395 F.3d 92, 105 (3d Cir. 2005) (the defendant "need not show that counsel's deficient performance 'more likely than not altered the outcome in the case' -- rather, he must show only 'a probability sufficient to undermine confidence in the outcome'").

[petitioner] could not show prejudice"). If the petitioner succeeds in the first two steps, the court then decides, as a matter of law, whether, in the words of *Strickland*, the error[s] were "pervasive" or "trivial." See, *Strickland*, 466 U.S. at 696 ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999) ("A court simply cannot make [*Strickland's* prejudice] determination without considering the strength of the evidence against the accused").

Factual Background

After a jury had been selected and just prior to the start of the defendant's trial, Ronald Harris, who was Purnell's co-defendant and was scheduled to be tried jointly with Purnell, entered a guilty plea concerning his participation in the robbery/homicide and agreed to testify for the State at Purnell's trial. *Rule 61 Decision*, p. 8. At trial, Harris testified that he and Purnell decided to rob a man and woman, who were carrying several shopping bags, whom they saw walking near 5th and Willing Streets. Harris also testified that it was Purnell who shot the woman when she refused to give Purnell the property that she was carrying. (A47-A50). In response to the claim in the Amended Rule 61 Motion that he should have requested a jury instruction under *Bland*, Purnell's trial attorney conceded that he did not request a special jury instruction under *Bland* concerning the credibility of Harris' testimony:

> The record is clear that I did not request a jury instruction under *Bland*. **Candidly, I cannot recall why I did not request the instruction**.[13]

Deficient Attorney Performance: Failure to Request a Specific Instruction on Credibility of Accomplice Testimony

In Claim One, it was alleged that Purnell's trial attorney was ineffective in failing to request a jury instruction based on *Bland v. State*[14] concerning the credibility of accomplice testimony. (A19-A20). In order to determine whether this claimed error was objectively reasonable performance under *Strickland*, the Court must first examine the merits of the claimed error. See, *Smith v. State*, 991 A.2d 1169, 1174 (Del. 2010) ("The state of the law is central to an evaluation of counsel's performance ... a reasonably competent attorney patently is required to know the state of the applicable law"); *Everett v. Beard*, 290 F.3d 500, 509 (3d Cir. 2002) (accord).

Under Delaware law, it was well established at the time of Purnell's trial that a defendant was entitled to a specific jury instruction concerning the credibility of accomplice testimony in cases where the evidence rests primarily, if not entirely, on the testimony of an admitted accomplice. In *Bland*, the court approved the use of the following jury instruction in such cases:

> 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

[13] Affidavit of Peter W. Veith, Esquire, §12 (A24-A25) (emphasis added).

[14] 263 A.2d 286 (Del. 1970).

> 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.[15]

In this case, it is undisputed that defense counsel did not request a *Bland* instruction and that such an instruction was not given at trial. Furthermore, Purnell's trial attorney offered no "strategic" explanation for the failure to request a *Bland* instruction, stating: "Candidly, I cannot recall why I did not request the instruction." (Peter W. Veith Affidavit, §12) (A24). It is now well established that the failure to request a *Bland* instruction concerning the credibility of accomplice testimony constitutes deficient performance under *Strickland*. See, *Smith*, 991 A.2d at 1176-1177 ("There is no reasonable trial strategy for failing to request the cautionary accomplice testimony instruction...We cannot envision an advantage which could have been gained by withholding a request for th[ese] instruction[s]."); *Brooks v. State*, 40 A.3d 346, 354 (Del. 2012) ("Counsel who forgets to request an instruction that could help his client fails to meet an objective standard of reasonableness").[16] Therefore, the court should conclude that Purnell has met the first prong of

[15] *Bland*, 263 A. 2d, at 289-290.

[16] In *Brooks*, the Court reaffirmed that a *Strickland* claim based on trial counsel's failure to request a *Bland* instruction can be asserted in a Rule 61 proceeding. *Id.*, 40 A. 3d at 350 n.12. The Court also made it clear that such claims should be decided under *Strickland's* "deficient performance/prejudice" formulation. *Id.*, at 353-355. See, *Hoskins v. State*, 14 A. 3d 554, 562 (Del. 2011) (trial counsel's failure to request a *Bland* instruction is not prejudice *per se* under *Strickland* formulation).

Strickland's formulation. Thus, the only question which remains is whether Purnell can establish that he was "prejudiced" by his attorney's deficient performance.

Determination of "Prejudice" Under *Strickland*

In *Brroks*, the Court concluded that the defendant had failed to establish that he was "prejudiced" by his attorney's failure to request a *Bland* instruction, except for his conviction for Conspiracy Second Degree:

> If independent evidence supports accomplice testimony, then we will not find a defendant prejudiced by counsel's failure to ask for the *Bland* instruction.
>
> * * * * *
>
> The appellant cannot demonstrate a reasonable probability that the jury would have decided differently had it heard the *Bland* instruction. Even if the jury were told to exercise great caution regarding Epps' testimony, the large quantity of corroborating evidence would satisfy a jury, even one that deliberates with great caution.

Brooks, 40 A. 3d 354-355.[17]

The determination of "prejudice" under *Strickland* is "a legal conclusion." *Smith*, 991 A.2d at 1177 n.41. The "prejudice" formulation, as articulated above in *Brooks*, is the functional equivalent of a "harmless error" approach to attorney errors premised on the failure to request a *Bland* instruction. Purnell respectfully submits that the Court should re-examine the validity of the "prejudice" standard established in *Brooks*. In holding that a defendant is not "prejudiced if: (1) the testimony of the accomplice is corroborated by "independent evidence,"; and (2) the defendant fails

[17] The court set aside Brooks' conviction for Conspiracy because proof of the existence of the conspiracy rested entirely on the testimony of the accomplice. *Id.*, at 355 ("No evidence of an agreement exists aside from Epps' testimony").

to show a "reasonable probability" that the outcome would have been different, the Court has re-defined *Strickland's* prejudice inquiry by making it more difficult to establish "prejudice" than is required under *Strickland* and its progeny.[18]

Purnell submits that the "prejudice" standard articulated in *Brooks* should be rejected because it fails to recognize the fundamental difference between the "prejudice" inquiry under *Strickland* and traditional "harmless error" analysis. Contrary to *Brooks*, *Strickland's* "prejudice" prong does not require a defendant to "prove" that but for his counsel's errors, he would have been found "not guilty." In fact, *Brooks'* "harmless error" approach was squarely rejected in *Strickland* itself:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. **The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.**

Id., 466 U.S. at 694 (emphasis added).[19]

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[18] Although "the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law," state courts are not free to provide less of a remedy than required by federal law. *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008). To the contrary, "[f]ederal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Id*. State courts may give broader effect to rules of criminal procedure than required by the Supreme Court, but cannot provide less of a remedy. *Id.*, 552 U.S. at 287.

[19] In *United States v. Cronic*, 466 U.S. 648 (1984), decided on the same date as *Strickland*, the Court explained that the focus of the Sixth Amendment's right to effective assistance of counsel is on the integrity of the adversarial process itself and specifically on the "effect of challenged conduct on the **reliability** of the trial process." *Id.*, at 658 (emphasis added); *Smith*, 991 A.2d at 1177 ("[T]he prejudice prong of the Strickland standard requires 'attention to whether the result of the proceeding was fundamentally unfair or unreliable'").

It is clear from the above authorities that the focus of the "prejudice" inquiry must be upon the effect of Harris' trial testimony in influencing the jury to find Purnell guilty. See, *Strickland*, 466 U.S. at 696 ("A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). In this case, as in *Smith*, whether Purnell was a participant in the robbery/homicide rested largely on the credibility of Harris, whose "11th hour" change of plea and dramatic trial testimony made him the centerpiece of the State's case.[20] Conversely, the "independent" evidence pointing to Purnell's guilt was either weak or non-existent:

- There was no physical or forensic evidence linking Purnell to the robbery/homicide. (A31).

- Other than Harris, no one who claimed to have witnessed the incident identified Purnell as a participant. A few days after the police executed the search warrants and arrested 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. *Rule 61 Decision*, p.6.

- Corey Hammond, who testified at trial that Purnell had "confessed" to the homicide, had previously told the police that he did not know anything about the shooting and implicated Purnell only after he had been promised a substantial reduction to a sentence he was then serving. (A37-A38).

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[20] At trial, Harris testified that he and Purnell decided to rob a man and woman, who were carrying several shopping bags, that they saw walking near 5th and Willing Streets. Harris also testified that it was Purnell who shot the woman when she refused to give Purnell the property that she was carrying. (A47-A50).

• Other witnesses who claimed that Purnell had "confessed" to the shooting also conceded that they believed that Purnell was "joking" when he made the incriminating statements. (A46).

• Kellee Mitchell had a powerful motive to implicate Purnell in his out-of court statement to the police[21] because Giles had identified Mitchell as one of the robbers.

• The defense case included testimony that Purnell was at home at the time of the shooting and that Purnell could not have participated in the robbery/homicide described by Giles and Rayne because he was on crutches recovering from a gunshot wound to his leg. (A54-A55) (Defense closing argument)).

A *Bland*-type instruction "would have focused and guided the jury's assessment of the credibility of [Harris]." *Smith*, 991 A.2d at 1177. Just as in *Smith*, the absence of such an instruction was prejudicial because it undermined the reliability of the jury's verdict.

[21] See A40-A41.

II. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE UNDER *STRICKLAND* WHEN HE FAILED TO REQUEST THAT THE JURY BE INSTRUCTED CONCERNING THE EFFECT OF HARRIS' GUILTY PLEA

Question Presented

Whether the defendant's trial attorney was "ineffective" under the Sixth Amendment when he failed to request a jury instruction concerning the effect of Harris' guilty plea? This issue was raised in the court below in Appellant's Amended Rule 61 Motion. (A20-A21).

Scope of Review

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 697-698 (1984). Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However, the trial court's ultimate conclusion that counsel rendered effective assistance is a legal conclusion that is reviewed *de novo*. *Id*.

Factual Background

When the jury in this case was selected, Harris and Purnell were both seated at the defense table and the jury was informed by the court that Harris and Purnell were co-defendants and would be tried together for the Murder and related charges. (A27). On April 7, 2008, after the jury had been selected for the joint trial, Purnell's attorney and the Court learned that Harris had accepted a plea offer from the State and had agreed to testify against Purnell. *Rule 61 Decision, p. 8*. On April 8, 2008,

Purnell's attorney requested that the court select a new jury "based on the fact that they knew that Mr. Harris was a co-defendant and now he has pled guilty." That request was denied by the trial court. (A29-A30).

On April 14, 2008, when the trial itself started, Harris was absent from the defense table and the jury learned for the first time, from the prosecutor's opening statement, that Harris had pled guilty and would testify against Purnell. (A31.1). Purnell's trial attorney did not request a cautionary instruction concerning the effect of Harris' plea. (A25-A26).

Deficient Attorney Performance

In order to determine whether the failure to request a cautionary instruction was objectively reasonable under *Strickland,* the Court must first examine the merits of the claimed error. See, *Smith*, 991 A.2d at 1174 ("The state of the law is central to an evaluation of counsel's performance ... a reasonably competent attorney patently is required to know the state of the applicable law"). In this case, the potential for prejudice that can arise when the jury learns, after the jury had been selected, that one of the co-defendants in a multi-defendant trial entered a guilty plea, is both obvious and well established. In *Allen v. State*, 878 A.2d 447 (Del. 2005), the Court emphasized the necessity for a cautionary instruction whenever the jury is informed that a co-defendant or accomplice has entered a guilty plea:

> [a] co-defendant's plea agreement may not be used as substantive evidence of a defendant's guilt, to bolster the testimony of a co-defendant, or to directly or indirectly vouch for the veracity of another co-defendant who pled guilty and then testified against his or her fellow accused. However, there are limited circumstances in which a

> prosecutor may seek to introduce a co-defendant's guilty plea. During the direct examination of a co-defendant, a prosecutor may elicit testimony regarding that co-defendant's plea agreement and may actually introduce that agreement into evidence. This admission of the plea agreement into evidence is for the limited purpose of allowing the jury to accurately assess the credibility of the co-defendant witness, to address the jury's possible concern of selective prosecution or to explain how the co-defendant witness has first-hand knowledge of the events about which he or she is testifying. **In these situations, a trial court must still give a proper cautionary instruction as to the limited use of the plea agreement and the accompanying testimony about it. The absence of such a limiting instruction is an important factor in determining whether the admission of the guilty plea was harmless error.**

Id., at 450-451 (emphasis added).[22]

In his Affidavit, Purnell's trial attorney admitted that he did not request a cautionary instruction and offered no tactical or strategic reason for his failure to make such a request. (Affidavit of Defense Counsel, §12) (A25-A26). Under the facts of this case, and based on *Allen*, a reasonably competent defense attorney would have requested a cautionary instruction. Based on the above authorities, it is submitted that the Court should conclude that the failure to request a cautionary

[22] See also, *Hudson v. North Carolina*, 363 U.S. 697, 702 (1960) ("The potential prejudice [arising from] such an occurrence is obvious ..."); *Brandt v. Scafiti*, 301 F. Supp. 1374, 1378 (D. Mass. 1969) (collecting cases). Such prejudice is generally alleviated by a cautionary instruction that the co-defendant's plea cannot form the basis of any inference as to the guilt of the remaining co-defendant. See, *Redden v. State*, 2009 Del. LEXIS 15, *5-*6 (Del. 2009) (where co-defendant fled during the trial, it was proper for the trial judge to instruct the jury that they should not infer the defendant's guilt from the absence of his co-defendant); *Freije v. United States*, 386 F.2d 408, 411 and n. 8 (1st Cir. 1967). There is no tactical reason for the defense not to have requested such a cautionary instruction, especially after counsel's request that a new jury be empaneled was denied. *Id.,* 386 F.2d at 411.

instruction was deficient performance under *Strickland* and go on to decide whether Purnell was "prejudiced" by this error.

Prejudice

As discussed in the preceding Argument with respect to the *Bland* claim, the proper inquiry under *Strickland* is the extent to which the error may have influenced the jury's verdict, thereby undermining confidence in the reliability of the verdict, and not whether other evidence in the case might be sufficient to support a conviction. In this case, the timing of Harris' guilty plea, coupled with his trial testimony that Purnell was the shooter – testimony which flatly contradicted all of his previous out-of-court statements – sent the unmistakable message to the jury that Harris changed his plea because he was in fact "guilty" and that Purnell, by implication, was also guilty.

In *Allen*, the court granted the defendant a new trial based, in part, on its conclusion that absent a cautionary instruction, the jury would use the co-defendants' guilty pleas as substantive evidence of the defendant's guilt. *Id.*, 878 A.2d at 451 ([In the absence of a limiting instruction], "we have no basis to conclude that the jury did not use the plea agreement as substantive evidence of Allen's guilt"). The court's reasoning in *Allen* is equally applicable to this case. Purnell was prejudiced by his attorney's failure to request a curative instruction. Under the authorities discussed above, and especially *Allen*, the risk that the jury would infer that Purnell was guilty,

in the absence of a curative instruction, after they learned that Harris had pled guilty, was sufficient to undermine confidence in the jury's verdict.[23]

[23] The Superior Court attempted to distinguish *Allen* on its facts. See, *Rule 61 Decision, p. 21*. The Superior Court's reasoning should be rejected by the Court. The potential for prejudice, clearly recognized in *Allen*, exists whenever the jury learns, by whatever means, that a co-defendant had pled guilty. Such prejudice was created in this case when the prosecutor informed the jury in the opening statement, that Harris had pled guilty. (A31.1). That prejudice persisted throughout the trial, whether or not Harris testified and whether or not Harris' guilty plea was put in evidence.

III. THE DEFENDANT'S FORMER ATTORNEY WAS INEFFECTIVE UNDER *STRICKLAND* WHEN HE FAILED TO APPEAL THE TRIAL COURT'S DENIAL OF HIS REQUEST TO EMPANEL A NEW JURY

Question Presented

Whether the defendant's former attorney was ineffective in failing to appeal the trial court's rejection of his request to empanel a new jury, after it was disclosed that Harris had pled guilty and would testify against Purnell. This claim was raised in the defendant's Amended Motion for Post-Conviction Relief. (A20).

Scope of Review

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 697-698 (1984). Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However, the trial court's ultimate conclusion that counsel rendered effective assistance is a legal conclusion that is reviewed *de novo*. *Id*.

Factual Background

On April 2, 2008, a jury was selected for the joint trial of Ronald Harris and Mark Purnell on charges of First Degree Murder and related charges. (A27). On April 7, 2008, after the jury had been selected, Harris entered a guilty plea which resolved his case. In the plea agreement, Harris also agreed to testify against Purnell. On April 8, 2008, Purnell's attorney requested that the court select a new jury "based on the fact that they knew that Mr. Harris was a co-defendant and now he has pled

guilty." That request was denied by the trial court. (A29-A30). Trial counsel did not raise this issue in the direct appeal. In his Affidavit, trial counsel stated that he did not appeal the "new jury" issue because "I did not believe that this issue would have been successful...because the jury swore and [sic] oath to be fair and impartial. (A25).

Deficient Performance

The standard established in *Strickland* is also applicable to a claim that appellate counsel was ineffective in failing to raise a meritorious issue on direct appeal. *See, Smith v. Robbins*, 528 U.S. 259, 285-286 (2000) (applying *Strickland* to claim of attorney error in appellate proceedings). Whether appellate counsel was ineffective under *Strickland's* "performance prong" in failing to pursue the "new jury" in the direct appeal depends on an examination of the following factors: (1) was the issue a "significant and obvious issue"; (2) was the ignored issue "clearly stronger" than the issues actually raised in the direct appeal; and, (3) was the decision not to pursue the issue on appeal a "strategic decision?" *Id.*

(1) Was the "New Jury" Issue "Significant and Obvious"?

The "new jury" issue was clearly "obvious" to trial counsel. The issue was raised at trial, thereby preserving the issue for appeal. The "new jury" issue was also "significant" because Purnell would have been granted a new trial if the claim had been successfully pursued.

(2) Was the New Jury Issue "Stronger" Than the Other Appellate Issues?

In the direct appeal, Purnell's former attorney raised two issues: (1) whether the trial court abused its discretion in ruling that out-of-court statements by the

victims spouse, Ernest Giles, who deceased four months before Purnell's trial, were inadmissible hearsay; and (2) whether the trial court abused its discretion in refusing to dismiss a juror who had expressed concerns that jury deliberations might interfere with that juror's vacation plans. See, *Purnell* , 979 A.2d at 1103.

The "new jury" issue was clearly stronger than both of the above issues. The request to empanel a new jury was made immediately after counsel learned about Harris' change of plea and before the trial had actually started. Picking a new jury would not have prejudiced the State and would have delayed the start of the trial, at most, by only a few hours. Based on the above undisputed facts, appellate counsel could have persuasively argued, based on *Allen*, that the trial court abused its discretion in refusing to empanel a new jury.

(3) Was the Decision Not to Appeal the New Jury Issue a "Strategic Decision"?

Finally, the court should consider whether the decision not to appeal the "new jury" claim was a "strategic" decision. See, *United States v. Mannino*, 212 F.3d 835, 844 (3d Cir. 2000) ("We 'must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct'"(quoting *Strickland,* 466 U.S. at 690)). As previously discussed herein, the "state of the law" is critical to a determination whether the decision not to appeal the "new jury" issue was a "strategic" decision.

When defense counsel's Affidavit is viewed against the backdrop of the then existing law, and especially *Allen*, the Court must conclude that the decision not to appeal the "new jury" issue was objectively unreasonable under *Strickland*. Defense

counsel's request for a new jury, after he learned that Harris had made a deal with the State, strongly suggests that counsel instinctively knew that the jury would likely infer that his client was guilty once they learned that Harris had changed his plea and would testify for the State against Purnell. In the direct appeal, when he clearly had more time to reflect on the issue, defense counsel should have known that the decision in *Allen* provided strong ammunition to support raising the "new jury" claim in the direct appeal. Furthermore, there is nothing in trial counsel's Affidavit to suggest that he actually researched the "new jury" issue and then reached the conclusion that the claim had no merit. In fact, defense counsel's claim that he did not pursue the "new jury" issue in the direct appeal based on his view that the appellate court would presume the jury to be "fair and impartial," and would not be improperly influenced by Harris' guilty plea, is rebutted by *Allen* itself. If anything, the overriding theme in *Allen* is that, in the absence of a limiting instruction, the jury simply cannot be trusted to ignore the prejudicial impact of evidence of a co-defendant's guilty plea. The "new jury" issue had substantial merit and Purnell's former attorney was ineffective under *Strickland's* performance prong when he failed to raise it in the direct appeal. *See, Mannino*, 212 F.3d at 844 ("the fact that the sentencing issues were raised at sentencing and preserved for appeal and that no other sentencing issue was raised on appeal, there is simply no rational basis to believe that counsel's failure to argue the relevant conduct issue on appeal was a strategic choice"); *United States v. Headley*, 923 F.2d 1079, 1084 (3d Cir. 1991) (failure to raise obvious and potentially successful sentencing guidelines issue at sentencing

cannot be said to have been a strategic choice but, rather, amounts to ineffective assistance); *Matire v. Wainwright*, 811 F.2d 1430, 1438-1439 (11th Cir. 1987) (finding ineffective assistance of counsel when appellate counsel ignored a substantial Fifth Amendment issue that was "obvious on the record" and on which trial counsel had expressly objected); *Fagan v. Washington,* 942 F.2d 1155, 1157 (7th Cir. 1991) ("His lawyer failed to raise either claim, instead raising weaker claims .... No tactical reason -- no reason other than oversight or incompetence -- has been or can be assigned for the lawyer's failure to raise the only substantial claims that [defendant] had").

Prejudice

Under the facts of this case, the failure to appeal the "new jury" issue was prejudicial error under *Strickland*. The "state of the law," especially *Allen*, compels the conclusion that a proper presentation of the "new jury" issue in the direct appeal would likely have been successful and would have resulted in a new trial for Purnell.

IV. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE IN FAILING TO OBJECT TO COMMENTS MADE BY THE PROSECUTOR WHICH AMOUNTED TO IMPROPER "VOUCHING" FOR THE CREDIBILITY OF RONALD HARRIS

Question Presented

Whether the defendant's trial counsel was ineffective in failing to object to comments made by the prosecutor which amounted to improper "vouching" for the credibility of Ronald Harris. This claim was raised in the defendant's Amended Motion for Post-Conviction Relief. (A21-A22).

Scope of Review

Claims of ineffective assistance of counsel are viewed as mixed questions of law and fact and, therefore, are reviewed *de novo*. *Strickland v. Washington*, 466 U.S. 668, 697-698 (1984). Subsidiary findings of fact made by the trial court in the course of deciding an ineffectiveness claim are entitled to deference. However, the trial court's ultimate conclusion that counsel rendered effective assistance is a legal conclusion that is reviewed *de novo*. *Id*.

Factual Background

During the course of the prosecutor's questioning of Ronald Harris at trial, the prosecutor made repeated comments that Harris was "telling the truth" when he made certain statements to the police after he entered a guilty plea and in the course of his trial testimony, and that he had not told the truth in his earlier statements to the police. (A51-A53). These comments by the prosecutor were not objected to by defense counsel. In his Affidavit, trial counsel stated that he did not object "because I did not

consider the prosecutor's statements to be vouching for the witness because I had raised the truthfulness of his statements during the cross examination of Harris." (A26).

Application of *Strickland*

Deficient Performance

As with the previous claims discussed herein, the court must review the state of the law to determine whether the failure to object to the above comments amounted to deficient performance under *Strickland*. At the time of the defendant's trial, it was well established that it was improper for a prosecutor to "vouch" for the credibility of a witness by stating or implying that the witness was telling the truth. See, *Mills v. State*, 2007 Del. LEXIS 525, *10 (Del. 2007); *White v. State*, 816 A. 2d 776, 779-780 (Del. 2003). The Superior Court below concluded that no improper vouching had occurred because the prosecutor's statements were a prerequisite to the admission of the out-of-court statements under 11 *Del.C.* §3507. *Rule 61 Decision, p. 22*.

Purnell acknowledges that this Court's decision in *Adkins v. State*[24] holds that such questioning is not improper "vouching" because such questioning is a "foundational requirement" for admissibility under §3507. See, *Blake v. State*, 3 A.3d 1077, 1082 (Del. 2010); *Gomez v. State*, 25 A.3d 786, 795-796 (Del. 2011) ("reaffirm[ing]" that it was a "foundational requirement" for admissibility under §3507 that "the witness must indicate whether or not the events are true"). With all

[24] 2010 Del. LEXIS 124 (Del. 2010).

due respect, the defendant submits that defense counsel could have persuasively argued the above holdings in *Blake* and *Gomez* should be re-examined because they are inconsistent with and contradict the plain language of §3507.

Ironically, in *Blake* itself, the State argued that §3507 did not include, as a foundational requirement, that the witness be questioned whether or not the out-of-court statement was "truthful":

> The State contends that certain of this Court's decisions after *Ray*[25] "have caused some confusion as to the necessity of asking the truthfulness question on direct examination in every instance." As an example, the State notes that this Court has, since *Ray*, also held that "there is no requirement that the witness either affirm the truthfulness of the out-of-court statement, or offer consistent trial testimony."[26] As a result, the State submits, there appears to be some inconsistency in the trial court decisions regarding the truthfulness aspect of S*ection 3507* practice.

Id., at 1082.

The State's argument was rejected by the Court, which explained:

> After *Ray* and *Moore* were decided, there was no reason for confusion, because our holding in *Moore* was completely consistent with *Ray*, where we construed *Johnson v. State*[27] as standing for the proposition that the witness must testify about **"whether or not"** the prior statement is true.

Id. (emphasis in original).

The defendant submits that *Blake* and *Gomez* were incorrectly decided because the plain language of §3507 provides that the only requirements for admissibility of

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[25] *Ray v. State*, 587 A.2d 439 (Del. 1991).

[26] *Moore v. State*, 1995 Del. LEXIS 69, at *2 (Del. 1995).

[27] 338 A.2d 124 (Del. 1975).

an out-of-court statement are: (1) the statement was "voluntary"; and (2) the out-of-court declarant is present in court and subject to cross-examination concerning the out-of-court statement. 11 *Del.C.* §3507(a). Whether the out-of-court statement is "truthful," or not truthful, is irrelevant:

> The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not.

11*Del.C.* §3507(b).

Obviously, if a witness' in-court testimony is inconsistent with the witness' out-of-court statement concerning the same subject matter, then only one of the statements can be "true." However, §3507(b) expressly provides that the out-of-court statement will be admitted in evidence irrespective of the "truth" of the statement. Indeed, the principal justification for §3507 is to deal with a "turncoat witness." See, *Johnson* , 338 A.2d at 127 (the drafters of Section 3507 "expressly contemplated that the in-court testimony [of a witness] might be inconsistent with the prior out-of-court statement. One of the problems to which *[section 3507*] is obviously directed is the turncoat witness..."). Thus, in *Moore*, the Court explained: "**[u]nder section 3507, there is no requirement that the witness either affirm the truthfulness of the out-of-court statement, or offer consistent trial testimony.**" *Id.*, 1995 Del. LEXIS 69 at *6 (emphasis added).

In *Blake*, as noted above, the Court was squarely confronted with the conflict between *Ray* and *Moore* concerning the "truthfulness" aspect of §3507. The Court, however, finessed the apparent conflict by stating that there was really no conflict

because the hi-lited passage from *Moore*, quoted above, was immediately followed by a citation to *Ray*, where the Court had reached just the opposite conclusion. See, *Blake*, 3 A.3d at 1082. If the "truthfulness" of the out-of-court statement is indeed irrelevant, then the comments by the prosecutor amount to improper "vouching," which prejudiced the defendant's right to a fair trial. See, *Mills v. State*, 2007 Del. LEXIS 525, *10 (it was improper for a prosecutor to "vouch" for the credibility of a witness by stating or implying that the witness was telling the truth); *White v. State*, 816 A. 2d 776, 779-780 (Del. 2003) (accord).

Prejudice

The prejudice arising from the failure to object to instances of improper "vouching" is determined by weighing the following factors: (1) the closeness of the case; (2) the centrality of the issue affected by the (alleged) error; and (3) the steps taken to mitigate the effects of the error. See, *Hughes v. State*, 537 A.2d 559, 571-572 (Del. 1981); *Kirkley v. State*, 41 A. 3d 372, 376 (Del. 2012) (accord). In this case, Harris' testimony was the centerpiece of the State's case. Without Harris, this was a "close" case and nothing was done to mitigate the prejudice caused by the prosecutor's "vouching" statements. The Court should therefore conclude that Purnell was "prejudiced" by his trial attorneys failure to object to the prosecutor's vouching statements.

CONCLUSION

For the reasons and upon authorities set forth herein, the Court should grant Appellant's Motion for Post Conviction Relief and remand the case to the Superior Court for a new trial.

Respectfully submitted,

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Dated: August 12, 2013