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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

STATE'S CORRECTED ANSWERING BRIEF

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Dated: September 17, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On January 23, 2007, 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. (A1, D.I. 1 & 2). Jury selection for a joint trial began on April 3, 2008. (A6). 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. Purnell's jury trial began on April 14, 2008. (A8, D.I. 50). After a nine-day trial, the jury found Purnell guilty of the lesser-included offense of second degree murder and the remaining counts as charged. (*Id.*). On October 17, 2008, Superior Court sentenced Purnell to an aggregate of 77 years of level V incarceration (21 mandatory), suspended after 45 years for decreasing levels of supervision. (A8, D.I. 55 & 57). This Court affirmed Purnell's conviction on August 25, 2009.[1]

On March 25, 2010, Purnell moved pro se for postconviction relief. (A12, D.I. 85). After Purnell retained counsel, counsel filed an amended motion for postconviction relief on October 11, 2011. (A12, D.I. 96). Pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62, on October 25, 2011, the Superior

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

Court referred the amended motion to a Commissioner for findings of fact and recommendations based on the application of pertinent law. (*Id.*).

On November 14, 2011, the State filed a response to the amended motion for postconviction relief. (A13, D.I. 98). The State's response attached an affidavit from trial counsel. (*Id.*; A23). Purnell filed a reply memorandum on December 8, 2011. (A14, D.I. 101). Following this Court's decision in *Brooks*,[2] the Superior Court requested supplemental submissions regarding its impact on Purnell's motion. (A14, D.I. 102). Purnell filed a supplemental memorandum on March 19, 2012 (A14, D.I. 103), and the State filed a supplemental answering memorandum on March 27, 2012. (A14, D.I. 104).

On July 3, 2012, the Commissioner issued a "Report and Recommendation that Defendant's Motion for Postconviction Relief Should be Denied."[3] On July 17, 2012, Purnell appealed the Commissioner's Report and Recommendation. (A15, D.I. 107). On December 6, 2012, the Superior Court held oral argument on the matter. (A15, D.I. 109). On May 31, 2013, after *de novo* review, the Superior Court denied Purnell's amended motion for postconviction relief.[4]

Purnell timely appealed and filed an opening brief. This is the State's answering brief.

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[2] *Brooks v. State*, 40 A.3d 346 (Del. 2012).
[3] *State v. Purnell*, 2012 WL 2832990 (Del. Super. Jul. 3, 2012).
[4] *State v. Purnell*, 2013 WL 4017401 (Del. Super. May 31, 2013).

SUMMARY OF THE ARGUMENT

Purnell has failed to demonstrate that the Superior Court abused its discretion in denying his amended motion for postconviction relief. In each instance of claimed error of trial counsel, the Superior Court correctly found that Purnell had failed to establish that trial counsel's performance was "ineffective" under the two-prong test of *Strickland v. Washington.*

I. Denied. Purnell failed to establish that trial counsel provided constitutionally ineffective assistance of counsel when he did not request a *Bland* jury instruction concerning the credibility of his accomplice's testimony.

II. Denied. Purnell failed to establish that trial counsel provided constitutionally ineffective assistance of counsel where he did not request that the trial court instruct the jury regarding the effect of Harris' guilty plea.

III. Denied. Purnell failed to establish that trial counsel provided constitutionally ineffective assistance of counsel where, on direct appeal, he did not raise the trial court's denial of his request to empanel a new jury after Harris pled guilty after jury selection, but before opening statements.

IV. Denied. Purnell failed to establish that trial counsel provided constitutionally ineffective assistance of trial counsel where he did not object to the prosecutor's questions of Harris required to meet the foundational requirement to admit his prior statements under 11 *Del. C.* § 3507.

STATEMENT OF FACTS[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.[6] As they walked, two young men approached them and demanded money. Mrs. Giles recognized one of the men, calling him by his name, Mark.[7] 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.[8] Paramedics transported Mrs. Giles to the Christiana Hospital where she died from her injuries.[9]

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

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[5] The facts are taken verbatim from *State v. Purnell*, 2013 WL 4017401, at *2-4 (Del. Super. May 31, 2013) (footnotes as in original).
[6] *See Purnell v. State*, 979 A.2d 1102, 1104 (Del. 2009).
[7] *Purnell*, 979 A.2d at 1104, n.1 ("Kellee Mitchell informed Detective Gary Tabor that Mark Purnell later told Mitchell this fact").
[8] *Id.*
[9] *Id.*

observed the two pairs of people walk past each other. Rayne heard one gunshot and then saw the two young men running away.[10]

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, 2006, Rayne identified Harris as the assailant whom she had seen earlier on the day of the attack.[11]

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.[12] 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.[13] 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

[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

2005.[14] 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 had cashed the tax refund check the day she was murdered.[15] Mr. Giles lied to the police about how the refund check was spent.[16]

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.[17] After this, 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.[18]

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

[14] *Id.*
[15] April 17, 2008 Trial Transcript, 56 [B7].
[16] *Purnell*, 979 A.2d 1104.
[17] *Id*. at 1104–1105.
[18] *Id*. at 1105.

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.[19]

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.[20]

Purnell, who was not a suspect at the time of the search warrant, was inside Harris' apartment. The police did not arrest Purnell.[21]

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.[22]

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

[19] *Id*. at 1105.
[20] *Id*.
[21] *Id.*
[22] *Id*.

containing Purnell's picture. Neither Giles nor Rayne identified Purnell as one of the two assailants.[23]

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.[24] 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."[25]

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.[26] Kellee Mitchell told the police that Purnell stated that he intended to rob Tameka Giles because it was tax time.[27] As noted above, Tameka Giles had cashed a tax refund check for $1,748 the day she was murdered.[28]

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[23] *Id*.
[24] *Id*.
[25] *Id*; April 16, 2008 Trial Transcript, 37, 39 [A42].
[26] Purnell, 979 A.2d at 1104; April 15, 2008 Trial Transcript, 34-35 [A36].
[27] April 15, 2008 Trial Transcript, 36 [A36].
[28] April 17, 2008 Trial Transcript, 56 [B7].

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.[29] DeWayne Harris was Ronald Harris' brother. DeWayne Harris had been considered a person of interest in Mrs. Giles' murder.[30]

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.[31]

Ernest Giles died on January 9, 2008, in Springfield, Massachusetts, four months before trial.[32]

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.[33] 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.[34] After the commencement of jury selection, on April 7, 2008, Harris accepted a plea offer from the State, and he provided a proffer

[29] April 16, 2008 Trial Transcript, 115-116 [A45].
[30] *See* April 14, 2008 Trial Transcript, 165 [B3].
[31] *Purnell*, 979 A.2d at 1105.
[32] April 17, 2008 Trial Transcript, 55-56 [B7].
[33] *Id*., 169-171 [B10].
[34] *Id*., 169-171 [B10].

implicating Purnell in the murder/attempted robbery of Mrs. Giles. Pursuant to the plea agreement, Harris agreed to testify for the State. When 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.

At the beginning of his testimony, Harris testified that he had been convicted of two felonies from his participation in the crime in this case, and had been adjudicated delinquent for two felony level crimes.[35]

Harris testified that on the morning of January 30, 2006, the day Tameka Giles was killed, he and Purnell talked about committing a robbery.[36] They specifically discussed "snatching a purse."[37] Harris testified that Purnell said to him, "let's go rob somebody."[38] The two agreed that they would commit a purse-snatching.[39] They did not discuss the plan again.[40] Later on in the day, after meeting Purnell at Compton Towers, Harris and Purnell began walking up Fifth Street towards Willing.[41] At that time, Harris saw a bus stop and Mr. and Mrs. Giles exit the bus holding bags from a store.[42]

[35] *Id*., 133-36 [A47].
[36] *Id*., 138-39 [A48].
[37] *Id*., 138:21 [A48].
[38] *Id*., 139:6 [A48].
[39] *Id*., 139:14-19 [A48].
[40] *Id*., 139-43 [A48-49].
[41] *Id*., 142-43 [A49].
[42] *Id*., 143-45 [A49-50].

Harris testified that he and Purnell walked up to Mr. and Mrs. Giles and Purnell said to them "Can I get y'all stuff?"[43] Harris testified that after Purnell said that, "[h]e pulled out a gun."[44] Harris stated that he had not seen Purnell with a gun at any point earlier in the day.[45] Harris testified that when Purnell pulled the gun out from his waist and got about three or four feet away from Mr. and Mrs. Giles, Harris started to run in the opposite direction.[46] Harris stated that he had been running for "five seconds" and was about twenty to twenty-five feet away when he "heard a shot."[47] Harris testified that before he began running, he saw Purnell point the gun at Mrs. Giles.[48]

[43] *Id*., 145:8-15 [A50].
[44] *Id*., 146:8-12 [A50].
[45] *Id*., 146:13-17 [A50].
[46] *Id*., 147-148 [A50].
[47] *Id*., 147:7-8, 149-50 [A50; B8].
[48] *Id*., 148:12 [A50].

I. The Superior Court committed no error in finding Purnell failed to establish that trial counsel provided ineffective assistance of counsel because he failed to request a *Bland*[49] instruction.

Question Presented

Whether trial counsel provided Purnell constitutionally effective assistance of counsel where he did not request a *Bland* jury instruction regarding the credibility of accomplice testimony.

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief, including those based upon claims of ineffective assistance of counsel, for abuse of discretion.[50] Nonetheless, this Court reviews questions of law *de novo*.[51]

Merits of the Argument

Purnell argues that the Superior Court erred in holding that Purnell failed to prove his claim that trial counsel provided constitutionally ineffective assistance of counsel because he failed to request a *Bland* instruction in connection with Ronald Harris' testimony. There is no merit to his argument. The Superior Court

[49] *Bland v. State*, 263 A.2d 286 (Del. 1970).
[50] *Gattis v. State*, 697 A.2d 1174, 1178 (Del. 1996) (citing *Dawson v. State*, 673 A.2d 1186, 1190 & 1996 (Del. 1996); *Bailey v. State*, 588 A.2d 1121, 1124 (Del. 1991); *Shockley v. State*, 565 A.2d 1373, 1377 (Del. 1989)).
[51] *Id.* (citing *Dawson*, 673 A.2d at 1190; *Bailey*, 588 A.2d at 1124).

correctly concluded that Purnell failed to prove either prong of the well-established *Strickland*[52] test.

Under *Strickland*, to establish that he received constitutionally ineffective assistance of counsel, Purnell had to demonstrate that: 1) defense counsel's representation fell below an objective standard of reasonableness; and 2) there exists a reasonable probability that, but for his counsel's unprofessional errors, the outcome of the trial or appeal would have been different.[53] "'Surmounting *Strickland*'s high bar is never an easy task.'"[54] Mere allegations of ineffectiveness are insufficient; instead, Purnell had to make and substantiate concrete allegations of actual prejudice.[55] There is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[56] Moreover, there is a strong presumption that defense counsel's conduct constituted sound trial strategy.[57] In evaluating an attorney's performance, a reviewing court should also "eliminate the distorting effects of hindsight," "reconstruct the circumstances of counsel's challenged conduct," and "evaluate the conduct from counsel's

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[52] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
[53] *See Strickland*, 466 U.S. at 687; *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003); *Wright v. State*, 671 A.2d 1353, 1356 (Del. 1996).
[54] *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010)).
[55] *See Zebroski*, 822 A.2d at 1043; *Gattis*, 697 A.2d at 1178-79 (Del. 1997); *Younger v. State*, 580 A.2d 552, 556 (Del. 1990).
[56] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.
[57] *See Strickland*, 466 U.S. at 689; *Flamer v. State*, 585 A.2d 736, 753-54 (Del. 1990).

perspective at the time."[58] Purnell had the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[59]

Furthermore, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment."[60] Because the defendant must prove both parts of his ineffectiveness claim, a court may dispose of a claim by first determining if the defendant has established prejudice.[61] The "prejudice" analysis "requires more than a showing of theoretical possibility that the outcome was affected."[62] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[63] "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice, because attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they

[58] *See Strickland*, 466 U.S. at 689; *Gattis*, 697 A.2d at 1184.
[59] *Richter*, 131 S. Ct. at 787 (2011) (quoting *Strickland*, 466 A.2d at 687) (internal quotations omitted).
[60] *Strickland*, 466 U.S. at 691.
[61] *Id.* at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").
[62] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).
[63] *Strickland*, 466 U.S. at 694; *Reese v. Fulcomer*, 946 F.2d 247, 256-57 (3d Cir. 1991).

are to be prejudicial." [64] "It is not enough to 'show that the errors had some conceivable effect on the outcome of the proceeding.'"[65] Thus, the defendant must identify the particular defects in counsel's performance and specifically allege prejudice (and substantiate the allegation).[66]

Purnell argues that he has met the first prong of *Strickland* because: 1) trial counsel was unable, 2 ½ years after trial, to state a specific reason why he did not request a *Bland* instruction; and 2) "[i]t is well-established that the failure to request a *Bland* instruction … constitutes deficient performance…." Both of Purnell's premises are fatally flawed. The first premise is flawed because *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.[67] Indeed, in reviewing the reasonableness of a particular action, the court may not "insist counsel confirm every aspect of the strategic basis for his or her actions."[68] "There is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect.'"[69] Thus, the Superior Court

[64] *Strickland,* 466 U.S. at 693. *See id.* at 696 (court "must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors").
[65] *Richter,* 131 S. Ct. at 787 (quoting *Strickland,* 466 U.S. at 693).
[66] *Dawson,* 673 A.2d at 1196.
[67] *Richter,* 131 S. Ct. at 790 (citing 466 U.S. at 688).
[68] *Id.*
[69] *Id.* (citing *Yarborough v. Gentry,* 540 U.S. 1, 8 (2003) (per curiam)).

properly discerned the defense strategy from the record and found that it was not objectively unreasonable.[70] The Superior Court found:

> Defense counsel did not want the jury to disregard Harris' testimony in its entirety, but wanted the jury to find Harris' pre-plea statements to the police credible and to discredit his post-plea proffer and trial testimony.[71] The defense strategy was to persuade the jury to believe those statements that did not implicate Purnell and to conclude that the only reason Harris subsequently did implicate Purnell was to save himself. Defense counsel cross-examined Harris extensively concerning the beneficial plea he had negotiated with the State in an effort to attack the credibility of his proffer and trial testimony.[72] During 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.[73] Defense contended Harris' credibility was an issue because during the interview that lasted for thirteen hours on February 18, 2006, he denied knowing Mark Purnell.[74] Then, after he was identified as being at the scene of the shooting, he still did not name Mark Purnell as the shooter.[75] Defense counsel argued that Harris only named Mark Purnell as the shooter to receive a plea deal with the State, and because of that, Harris' exposure to incarceration was reduced from life in prison to only three years.[76] Defense counsel called the plea agreement "an offer you can't refuse."[77] Defense counsel pointed to inconsistencies

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[70] *Purnell*, 2013 WL 4017401, at *9 ("the defense strategy regarding Harris' testimony is clear from the record"). Additionally, the Superior Court compared the instructions given to Purnell's jury to the law as it existed at the time. *Purnell*, 2013 WL 4017401, at *5-7 (providing detailed analysis of the forty-year evolution of Delaware law regarding a *Bland* instruction). The Superior Court concluded: "The Court finds that on April 2, 2008, Purnell's jury instruction was a correct statement of the substance of the law, was reasonably informative and not misleading. The lack of a specific accomplice instruction, or a *Bland* instruction or 'with caution' language did not undermine the jury's ability to intelligently perform its duties in returning a verdict." *Purnell*, 2013 WL 4017401, at *8.

[71] Affidavit of Defense Counsel, 2–3 [A24-25].

[72] April 17, 2008 Trial Transcript, 169–176 [B10-11].

[73] April 23, 2008 Trial Transcript, 136–137 [B25-26].

[74] *Id.*, 136:16–21 [B25].

[75] *Id.*, 137 [B26].

[76] *Id.*, 137 [B26].

[77] *Id.*, 137:14 [B26].

> between Harris' testimony and the testimony of other witnesses.[78] Finally, defense counsel argued that Ron Harris "wants to get a deal. And to get a deal he's got to go through my client."[79]
>
> Throughout the trial, defense counsel diligently pursued the defense theme: that the witnesses implicating Purnell were motivated to do so in order to save themselves. The motivations of Harris were clearly presented to the jury by defense counsel. The fact that the defense counsel's strategy did not prove to be successful does not diminish the reasonableness of the strategy.[80]

Purnell ignores that the record reveals this clear defense strategy regarding Harris' testimony and that a *Bland* instruction advising the jury to view what Harris says "with suspicion and great caution" could have a detrimental impact on the strategy of asking the jury to believe what he first told the police. Thus, Purnell's premise that counsel's inability to state the rationale underlying the lack of a request for a *Bland* instruction entitles him to postconviction relief ignores the facts and strategy of the trial and must be rejected.

Purnell continues to ignore the importance of the facts and trial strategy in a particular case when he argues that it is "well-established" that failing to request a *Bland* instruction is deficient performance under *Strickland*. While it has included some broad language in its rulings, this Court has not adopted a categorical rule that counsel's performance is deficient if an accomplice testified and counsel did not request a *Bland* instruction. In finding deficient performance in *Smith*,[81] the

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[78] *Id.*, 139 [B26].
[79] *Id.*, 140:1–3 [B26].
[80] *Purnell*, 2013 WL 4017401, at *9.
[81] *Smith* v. *State*, 991 A.2d 1169 (Del. 2010).

Court focused on the fact that the testimony of Smith and Deshields, his accomplice, conflicted and that Deshields' testimony was uncorroborated.[82] The Court stated, "The record reflects that a specific *Bland*-type instruction would have focused and guided the jury's assessment of the credibility of Deshields, whose uncorroborated testimony was central to the State's case against Smith as Deshields' accomplice." Even in *Brooks*, where the Court adopted a "clear path," requiring a specific, modified *Bland* instruction in all cases in which an accomplice testifies **in all future cases**, the Court again based its conclusion about the reasonableness of Brooks' counsel's performance on the facts of his case.[83] In neither *Smith* nor *Brooks* was defense counsel presented with the situation here, where the defense wanted the jury to believe part of what the accomplice said. Here, where counsel argued that the jury should believe the accomplice's statements to the police, but not his post-plea proffer and trial testimony, it would be detrimental to that strategy to request an instruction focusing the jury's attention on the overall lack of credibility of the accomplice. The facts and the defense strategy in Purnell's case reveal that there *can* be "an advantage which could have been gained by withholding a request for th[ese] instruction[s]."[84] Because Purnell wanted the jury to find some of Harris' statements to be credible, it is not

[82] *Id.* at 1172-77.
[83] *Brooks*, 40 A.3d at 354 ("**On these facts**, the first prong of *Strickland* is satisfied.") (emphasis added).
[84] *Smith*, 991 A.2d at 1176 (quoting *Freeman v. Class*, 95 F.3d 639, 642 (8th Cir. 1996) (citations omitted)).

unreasonable for counsel not to request a jury instruction that might cause the jury to reject all of Harris' statements. Thus, the Superior Court correctly concluded that Purnell had not satisfied the first prong of *Strickland*.

The Superior Court also correctly found that Purnell failed to satisfy the second, prejudice prong of *Strickland*. In analyzing the prejudice prong, the Superior Court recognized that "*Bland* instructions are most important when there is no independent corroborating evidence."[85] Indeed, this Court has ruled: "If independent evidence supports accomplice testimony, then we will not find a defendant prejudiced by counsel's failure to ask for the *Bland* instruction."[86] The Superior Court found that Purnell could not demonstrate prejudice because "Purnell's case is not one in which the only, or even most of the, evidence or testimony was presented through an accomplice. Several witnesses corroborated Harris' testimony."[87]

Indeed, despite Purnell's characterization of the independent corroborating evidence as "weak or non-existent," the Superior Court's finding is supported by the record:

- Through the section 3507 statement of Kellee Mitchell,[88] the jury learned that Purnell admitted killing Ms. Giles. Purnell said he saw

[85] *Purnell*, 2013 WL 4017401, at *9.
[86] *Brooks*, 40 A.3d at 354.
[87] *Purnell*, 2013 WL 4017401, at *9.
[88] The State introduced evidence that Purnell wrote letters threatening Kellee Mitchell for being a "snitch," and suggested that may have affected his willingness to cooperate at trial. State's Ex. 11, 12, 15, 16, 17, 18; April 23, 2008 Transcript,p. 107-09 (B18-19).

the bus stop at Fifth and Orange Streets and saw Ms. Giles and her husband get off the bus carrying white bags. Purnell said he intended to rob them, but when Ms. Giles recognized him and called him by name, he shot her.[89]

- Corey Hammond testified that he saw Harris and Purnell together near the site of murder earlier in the day. Hammond said Purnell complained about being broke and had a semi-automatic handgun in his waistband.[90] When Hammond saw Purnell and Harris a couple days to a week later, he said, "I know you didn't do what I think you all did," to which Purnell replied, "I told the 'B' give it up, she didn't want to give it up, so I popped her."[91]

- Etienne Williams testified that she heard Purnell say he "did kill the lady."[92]

- Through her 3507 statement, the jury learned that Aqueshia Williams told police that Purnell said, "I shot one bitch, I'll kill another."[93]

- The State introduced a recording of a telephone call between Tramont Mitchell, Kellee Mitchell's brother, and Purnell in which Purnell, when asked, said he had "a lot" to do with the murder.[94]

- Purnell was found in Harris' apartment when police searched it.[95]

- Both Angela Rayne and Corey Hammond testified that they heard one gunshot.[96]

- Angela Rayne, Corey Hammond and Kellee Mitchell all said that the Giles were carrying bags, which the police found at the murder scene.[97]

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[89] April 15, 2008 Trial Transcript, 34 (A36).
[90] April 16, 2008 Trial Transcript, 30-31 (A40).
[91] *Id.*, 37 (A42).
[92] April 16, 2008 Trial Transcript, 115 (A45).
[93] April 16, 2008 Trial Transcript, 205 (B6).
[94] State's Ex. 13; April 23, 2008 Trial Transcript, 90 (B14).
[95] April 14, 2008 Trial Transcript, 156 (B2).
[96] April 14, 2008 Trial Transcript, 91 (A34); April 16, 2008 Trial Transcript, 33 (A41).

While, as at trial, Purnell attacks the motivation of the witnesses, the lack of physical evidence or eyewitness identification linking Purnell to the murder, and presents his alibi/physical condition defense, the Superior Court correctly concluded that there was independent corroborating evidence that precludes Purnell from proving prejudice.

Without the facts to support his claim of error below, Purnell argues that the law should be different.[98] Purnell argues that this Court got it wrong when it held "[i]f independent evidence supports accomplice testimony, then we will not find a defendant prejudiced by counsel's failure to ask for the *Bland* instruction."[99] Purnell claims that *Brooks* creates a higher standard than *Strickland*. Purnell is wrong. *Brooks* recognizes that the *Strickland* prejudice analysis is tied to "the totality of the evidence before the judge or jury."[100] This Court explicitly recognized that requirement in *Smith*: "The prejudicial effect depends on the facts and circumstances of each particular case."[101] The *Brooks* prejudice rule does not alter the *Strickland* standard. The *Brooks* prejudice rule merely takes into consideration the totality of the evidence before the jury (i.e., the presence of evidence corroborating the accomplice's testimony). Moreover, the *Brooks*

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[97] April 14, 2008 Trial Transcript, 68 (B1), 90 (A34); April 15, 2008 Trial Transcript, 34 (A36); April 16, 2008 Trial Transcript, 35 (A41).
[98] *See* Op. Brf. at 16-17.
[99] *Brooks*, 40 A.3d at 354.
[100] *Strickland*, 466 U.S. at 695-696.
[101] *Smith*, 991 A.2d at 1180.

prejudice rule incorporates *Strickland's* requirement that the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[102] Because the primary danger that a *Bland*-type instruction guards against is the jury's consideration of uncorroborated accomplice testimony, it is appropriate, and does not establish a stricter test than *Strickland*, to find that a defendant cannot show a reasonable probability that the result of the proceeding would have been different if a *Bland* instruction had been given where the accomplice's testimony is corroborated.[103]

[102] *Strickland*, 466 U.S. at 694.

[103] Moreover, even if there were a case in which the Court should reexamine whether prejudice could be proven even where there is corroboration, this is not the case. As the Superior Court found, "Purnell's case is not one in which the only, or even most of the, evidence or testimony was presented through an accomplice." *Purnell*, 2013 WL 4017401, at *9.

II. The Superior Court committed no error in finding Purnell failed to establish that trial counsel provided ineffective assistance of counsel based on the fact he did not request that the jury be instructed about the effect of Harris' guilty plea.

Question Presented

Whether trial counsel provided Purnell constitutionally effective assistance of counsel where he did not request that the trial court instruct the jury regarding the effect of Harris' guilty plea.

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief, including those based upon claims of ineffective assistance of counsel, for abuse of discretion.[104] Nonetheless, this Court reviews questions of law de novo.[105]

Merits of the Argument

Purnell argues that the Superior Court erred in holding that Purnell failed to prove his claim that trial counsel provided constitutionally ineffective assistance of counsel because, after the jury was selected with Harris present at the defense table, Harris entered a guilty plea, and trial counsel failed to request a cautionary instruction about the effect of the plea. Purnell's argument is meritless. The

[104] *Gattis*, 697 A.2d at 1178 (citing *Dawson*, 673 A.2d at 1190 & 1996; *Bailey*, 588 A.2d at 1124; *Shockley*, 565 A.2d at 1377).
[105] *Id.* (citing *Dawson*, 673 A.2d at 1190; *Bailey*, 588 A.2d at 1124).

Superior Court correctly concluded that Purnell failed to prove counsel was ineffective under *Strickland*.

When confronted with Harris' plea after selection of the jury and before opening statements, Purnell's trial counsel requested a new jury be empanelled, and when that request was denied, elected to cross-examine Harris regarding the benefits he received for entering his plea. While trial counsel did not request a cautionary instruction regarding Harris' guilty plea, Purnell fails to identify any specific cautionary instruction that his trial counsel should have requested. Instead, Purnell relies on *Allen v. State*[106] to support his claim that counsel was ineffective because he did not request a cautionary instruction. In *Allen*, the State used the plea of a *non-testifying* co-defendant to establish the guilt of the defendant. This Court explained that, while a co-defendant's plea agreement may not be used as substantive evidence of the defendant's guilt, a prosecutor may elicit testimony regarding a co-defendant's plea agreement during the direct examination of that codefendant and may also introduce that agreement into evidence.[107] The admission of the plea agreement into evidence is for the limited purpose of allowing the jury to assess the credibility of the witness, to address the jury's possible concern of selective prosecution, or to explain how the witness has first-hand knowledge of the events about which he is testifying.

[106] 878 A.2d 447, 450-51 (Del. 2005).
[107] *Id.* at 450-51. *See also Charbonneau v. State*, 904 A.2d 295, 320 n.68 (Del. 2006).

The Superior Court correctly found that the facts of *Allen* are markedly different than those in Purnell's case.[108] In *Allen*, the co-defendant did not testify and his guilty plea was used for the purpose of establishing the defendant's guilt. Here, Harris testified, and "was subject to rigorous cross-examination" and the nature and circumstances of his plea were thoroughly fleshed out at trial. Here, Harris' guilty plea was not used to establish Purnell's guilt.

None of the cases Purnell cites[109] provide a basis to demonstrate prejudice in this case. First, Purnell looks to *Hudson v. North Carolina*[110] to demonstrate that prejudice is "obvious." In *Hudson*, a codefendant had hired an attorney who agreed to represent all three codefendants at a joint trial as long as their defenses did not conflict. That codefendant then pled guilty mid-trial in front of the jury and his attorney withdrew, leaving the other two codefendants without legal representation. The *Hudson* Court held that leaving a defendant without counsel in a situation such as this with "potential prejudice" deprived the defendant (who had requested and been denied appointment of counsel) of due process. That is manifestly not the case here. Next, Purnell relies on *Brandt v. Scafati*[111] for the proposition that a jury will infer that the remaining codefendant, who has not changed his plea, is also guilty. In *Scafati*, the codefendant pleaded guilty during

[108] *Purnell*, 2013 WL 4017401, at *10.
[109] *See* Op. Brf. at 22, n.22.
[110] 363 U.S. 697 (1960).
[111] 301 F. Supp. 1374 (D. Mass. 1969).

trial in front of the jury, without any instruction that the plea should not be used to infer the guilt of the remaining defendant. Further, the *Scafati* Court, considering and rejecting the claim in a federal habeas action, found no constitutional basis for the claim, instead finding the claim to be grounded on rules of criminal procedure. Moreover, there was no discussion in *Scafati* of the type of circumstance present here – that Purnell's counsel, himself, used the plea agreement to undermine the credibility of Harris' testimony that Purnell committed murder.

Next, Purnell cites to *Freije v. United States*[112] and *Redden v. State*[113] to support his assertion that a cautionary instruction is appropriate when evidence of a codefendant's plea is admitted. *Freije* was a case in which the prosecution used a codefendant's plea agreement as affirmative evidence against the defendant - a situation not present here. *Redden* was a case in which the codefendant failed to appear at the fifth day of a joint trial and the jury was instructed that each defendant had a right to be there or not and that no inference should be taken from the exercise of that right by one of the defendants – a situation not present here.

Here, the Superior Court correctly concluded that Purnell had not established prejudice because trial counsel cross-examined Harris at length about his last-minute plea agreement and the change in Harris' version of events pre-plea and post-plea. Clearly the defense wanted the jury to infer that the change in Harris'

[112] 386 F.2d 408 (1st Cir. 1967).
[113] 2009 WL 189868 (Del. Jan. 14, 2009).

story came about only as the result of such a beneficial plea. Thus, defense counsel used the admission of the plea agreement in formulating a defense. Moreover, the prosecutors did not mention Harris' plea agreement in closing argument. Defense counsel, however, specifically referred to Harris' plea agreement in closing:

> Well, when you're sitting in jail about to go to trial and you've been identified by a witness as being there when the murder happens and you get an offer to potentially three years as opposed to life, that's an offer you can't refuse. That is a good offer. And he testified he was --- he has already served about 15 months, so he's out in 16 months if he gets his three based upon his testimony. Go from life in prison to three years. I submit that is a lot of motivation to tell them a story they want to hear. And he had to tell them a story that the police wanted to hear and the State wanted to hear before he gets the deal.
>
> [objection by the State]
>
> Ladies and gentlemen, as part of this agreement he agreed to testify and provide a proffer, that is a statement, as to what the State and Mr. Harris – you need to be truthful. And he signs the agreement and its executed and it says the date – it notes the date as April 7th of 2008. Okay? It's not quite a get out of jail free card but it is close when you face murder in the first degree.
>
> And Ron Harris, his story – and I say story. This is what he tells the police after being interviewed twice....
>
> ***
>
> And I would submit to you that he wants to get a deal. And to get a deal he has to go through my client.[114]

In rebuttal, the prosecutor simply responded:

> Now, Ronald Harris testified in this trial as the State's witness, that's true, and it's important that you look at the plea agreement, which I supposedly have, and I would like you to read it. It is State's

[114] April 23, 2008 Trial Transcript, 137-40 (B26).

> Exhibit 26. Mr. Veith read part of it to you. I want to read the whole thing to you. This is what the defendant agreed to do.
>
> Ronald Harris agreed, and I quote, to cooperate with the prosecution of his co-defendant by testifying truthfully during the co-defendant's trial if called as a witness by either party. This doesn't say that Ronald Harris got a deal if [he] came in here and pointed the finger at the defendant. All it says is if Mr. Veith calls you as a witness, if the State calls you as a witness, you got to come in here and tell the truth. That's all it says, nothing more, nothing less.
>
> Would Ronald Harris' story given that he entered into this agreement on the eve of a first degree murder trial mean a whole lot if it was the only evidence we had? Well, candidly, no. No.[115]

The Superior Court correctly concluded that "Harris' plea agreement, itself, was not used as evidence of Purnell's guilt."[116] Defense counsel used the agreement to highlight a strong motivation for Harris to testify as to what he believed the State would want to hear. Purnell's argument now that "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" rings hollow when defense counsel used those very facts to argue that Harris was telling a "story." Consequently, the Superior Court correctly held that Purnell failed to establish that the outcome of his trial would have been different had his counsel requested a cautionary instruction regarding Harris' testimony.

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[115] *Id.*, 170-71 (B34).
[116] *Purnell*, 2013 WL 4017401, at *10.

III. The Superior Court committed no error in finding Purnell failed to establish that trial counsel provided ineffective assistance of counsel because he failed to appeal the trial court's denial of his request to empanel a new jury.

Question Presented

Whether trial counsel provided Purnell constitutionally effective assistance of counsel because, on direct appeal, he did not raise the trial court's denial of his request to empanel a new jury after Harris pled guilty after jury selection, but before opening statements.

Standard and Scope of Review

This Court reviews the Superior Court's decision on a motion for postconviction relief, including those based upon claims of ineffective assistance of counsel, for abuse of discretion.[117] Nonetheless, this Court reviews questions of law *de novo*.[118]

Merits of the Argument

Purnell argues that the Superior Court erred when it found he had not established that counsel was ineffective for failing to raise on direct appeal the denial of his request that the trial court empanel a new jury. Although Purnell correctly notes that the *Strickland* standard applies to representation on appeal,[119] Purnell fails to establish that the Superior Court erred in finding he had not met

[117] *Gattis*, 697 A.2d at 1178 (citing *Dawson*, 673 A.2d at 1190 & 1996; *Bailey*, 588 A.2d at 1124; *Shockley*, 565 A.2d at 1377).
[118] *Id.* (citing *Dawson*, 673 A.2d at 1190; *Bailey*, 588 A.2d at 1124).
[119] *See* Op. Brf. at 26 (citing *Smith v. Robbins*, 528 U.S. 259, 285-286 (2000)).

that standard. Purnell established neither that counsel's performance was objectively unreasonable nor that there is a reasonable probability that the outcome of the appeal would have been different if counsel had raised the new jury issue.

The Superior Court stated:

> Defense counsel stated in his affidavit that he did not raise [the denial of his request to empanel a new jury] on direct appeal because he did not believe that it would have been successful. 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. Furthermore, it is likely that even if a new jury was empanelled, the information regarding Harris' last-minute plea, with the date of the plea agreement, and the change in statement pre and post-plea would have been presented to the jury. Accordingly, the Defendant cannot sustain a claim of ineffective assistance of counsel on this ground.[120]

Indeed, the fact that the jury was empaneled before Harris pled guilty actually advanced the defense strategy. The defense strategy was to argue to the jury that Harris' testimony at trial should not be believed because it was motivated by the "offer he could not refuse," and that his prior statements to the police should be believed. The fact that the jury saw Harris sitting at defense table provided the jury a concrete basis to see that Harris did not take the plea until faced with actually starting trial on murder charges for which he faced a life sentence.

Purnell again ignores the facts and strategy in his case. Instead, he argues "defense counsel should have known that the decision in *Allen* provided strong

[120] *Purnell*, 2013 WL 4017401, at *10.

ammunition to support raising the 'new jury' claim in the direct appeal,"[121] and that "[t]he '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."[122] As discussed in connection with the cautionary instruction argument, the facts of *Allen* are different than the facts here. In *Allen*, the prosecution used the co-defendant's guilty plea as substantive evidence of the defendant's guilt. That was not the case here. In *Allen*, the co-defendant did not testify. Here, Harris testified and was vigorously cross-examined. In *Allen*, the defense did not use the guilty plea to argue that the trial testimony should not be believed. Here, the defense argued that Harris' guilty plea resulting in a 3-year sentence instead of potentially life was an "offer he could not refuse" and was the reason he told his new "story." Thus, *Allen* does not compel the conclusion that Purnell would have prevailed on the new jury claim on direct appeal, the claim was not "clearly stronger" than the issues counsel raised,[123] and the Superior Court correctly held that Purnell had not established his claim of ineffective assistance of appellate counsel.

IV. The Superior Court committed no error in finding Purnell failed to establish that trial counsel provided ineffective assistance of

[121] Op. Brf. at 28.
[122] Op. Brf. at 29.
[123] *See Purnell*, 979 A.2d 1102, 1103 (Del. 2009) (Purnell argued that "the trial judge abused her discretion by ruling that statements made by a deceased witness were inadmissible hearsay" and "by denying his motion for a mistrial as a result of juror misconduct.").

counsel because he failed to object to questions required to admit Harris' 3507 statements.

Question Presented

Whether trial counsel provided constitutionally effective assistance of counsel where he did not object to the prosecutor's questions of Harris required to meet the foundational requirement to admit his prior statements under 11 *Del. C.* § 3507.

Standard and Scope of Review

This Court reviews a decision on a motion for postconviction relief, including those based upon claims of ineffective assistance of counsel, for abuse of discretion.[124] Nonetheless, this Court reviews questions of law *de novo*.[125]

Merits of the Argument

Purnell argues that the Superior Court erred in finding that he failed to establish his "vouching" claim. His argument lacks merit because the Superior Court correctly recognized that the questions Purnell claims were objectionable "vouching" were mandated by this Court's decisions on the foundation required to admit prior statements under 11 *Del. C.* § 3507.

During direct examination of Harris at trial, the prosecutor asked Harris about statements he made to police in February 2006[126] and in January 2007.[127]

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[124] *Gattis*, 697 A.2d at 1178 (citing *Dawson*, 673 A.2d at 1190 & 1996; *Bailey*, 588 A.2d at 1124; *Shockley*, 565 A.2d at 1377).
[125] *Id.* (citing *Dawson*, 673 A.2d at 1190; *Bailey*, 588 A.2d at 1124).

The prosecutor asked Harris if he had told the truth when he gave those statements.[128] After properly laying the foundation for admission of the February 2006 and the January 2007 statements by Harris under section 3507 of Title 11 of the Delaware Code, Detective Tabor was called to testify regarding those statements.[129] No improper "vouching" occurred, and there was no misconduct about which trial counsel should have objected.

As this Court has explained:

> "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." The prosecutor's questions regarding the truthfulness of [Harris'] out-of-court statements were permissible. The prosecutor properly asked those questions to establish a foundation for introducing [Harris'] statements into evidence.[130]

The prosecutor was required to ask Harris whether or not his out-of-court statements were true in order to lay the foundation for admission of the statements into evidence at trial.[131] Purnell acknowledges this, as he must. Indeed, Purnell quotes this Court's finding that "[a]fter *Ray* and *Moore* were decided [in 1991 and

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[126] April 17, 2008 Trial Transcript, 155-56 (A51).
[127] *Id.*, 156-59 (A51-52).
[128] *Id.*, 156, 158-59 (A51-52).
[129] *Id.* 161-62 (B9).
[130] *Adkins v. State*, 2010 WL 922765, at *2 (Del. Mar. 15, 2000) (quoting *White v. State*, 816 A.2d 776, 779 (Del. 2003) and citing *Ray v. State*, 587 A.2d 439 (Del. 1991)).
[131] *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 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.") (citation omitted); *Woodlin v. State*, 3 A.3d 1084, 1088 (Del. 2010); *Ray*, 587 A.2d at 443.

1995, respectively], there was no reason for confusion, because our holding in *Moore* was completely consistent with *Ray*, where we construed *Johnson v. State*[132] as standing for the proposition that the witness must testify about **'whether or not'** the prior statement is true."[133] Yet, Purnell nonetheless argues that "defense counsel could have persuasively argued the [Court's prior holdings that the witness must testify whether or not the prior statement is true] should be re-examined because they are inconsistent with and contradict the plain language of §3507." Purnell's claim is meritless. Purnell cannot demonstrate that trial counsel's failure to object to foundational questioning required by this Court fell below an objective standard of reasonableness. Because the prosecutor's questions were entirely proper under existing law, and Purnell has failed to articulate a basis upon which reasonably competent counsel would have pursued an objection, Purnell cannot establish any deficient performance on the part of trial counsel in failing to object to required foundational questions. *A fortiori*, Purnell cannot demonstrate any prejudice.[134]

[132] 338 A.2d 124 (Del. 1975).
[133] *See* Op. Brf. at 32 (quoting *Blake*, 3 A.3d at 1082) (emphasis in *Blake*).
[134] *See Bailey v. Newland*, 263 F.3d 1022, 1029 (9th Cir. 2001) (noting that the *Strickland* prongs blur when considering the performance of appellate counsel and stating "[a]ppellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason-because she declined to raise a weak issue.")

CONCLUSION

For the foregoing reasons, the Order of the Superior Court denying Purnell's amended motion for post-conviction relief should be affirmed.

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Dated: September 16, 2013

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esquire, do hereby certify that on September 16, 2013, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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