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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

APPELLANT'S REPLY BRIEF

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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*.

Argument

Deficient Performance Under *Strickland*

In this case, it is undisputed that Purnell's trial attorney did not request a *Bland*[1] instruction and that such an instruction was not given at trial. Furthermore, Purnell's trial attorney did not offer any "strategic" or "tactical" 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). Undaunted by trial counsel's inability to articulate any strategic or tactical explanation for his failure to request a *Bland* instruction, the Superior Court below nevertheless scoured the record and proceeded to create its own "strategic" explanation for the failure to request a

[1] *Bland v. State*, 263 A. 2d 286 (1970).

Bland instruction, which it then pronounced as being an objectively reasonable strategy:

> While defense counsel cannot now articulate any specific reason why he did not request a *Bland* instruction, the defense strategy regarding Harris's testimony is clear from the record. 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. 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...The fact that the defense counsel's strategy did not prove to be successful does not diminish the reasonableness of the strategy.[2]

In its Brief, the State urges the Court to accept and adopt the Superior Court's finding that trial counsel did not request a *Bland* instruction for strategic reasons. See, Answering Brief, pp. 15-17. In response, this Court is respectfully urged to reject both the Superior Court's reasoning and the State's argument.

First, it is well established under Delaware law that the failure to request a *Bland* instruction amounts to deficient performance *per se* under *Strickland*. See, *Smith v. State*, 991 A.2d 1169, 1176-1177 (Del. 2010) ("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

[2] *State v. Purnell*, 2013 Del. Super. LEXIS 331, *26-*28 (Del. Super. 2013) (hereinafter "*Rule 61 Decision*, at *_").

objective standard of reasonableness").[3] Next, *Strickland's* "presumption" that decisions made by trial counsel reflects trial tactics rather than "sheer neglect," *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003), does not allow for the post-conviction court to indulge a "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions. See, *Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003).[4] That is precisely what the Superior Court did in this case when it found a "strategy" to excuse defense counsel's oversight in neglecting to request a *Bland* instruction.

Prejudice Under *Strickland*

In its Brief, the State argues that even if the Court agrees that the failure to request a *Bland* instruction amounted to "deficient performance," the Court should nevertheless conclude that Purnell was not "prejudiced" by that error. Relying on *Brooks*, the State points to other evidence in the case which it claims "corroborates" Harris' testimony and argues that the mere existence of such corroborating evidence is sufficient to bar Purnell's *Strickland* claim. See, Answering Brief, pp. 19-21. In response, Purnell submits that the State's analysis is based on an incorrect

[3] The holdings in *Smith* and *Brooks* that the failure to request a *Bland* instruction will constitute "deficient performance" are controlling here even though they were decided after Purnell's trial. See, *Capano v. State*, 781 A. 2d 556, 663-664 (Del. 2001) (court must apply law as it exists at time of decision).

[4] Even if the Superior Court below was correct in concluding that defense counsel's "strategy" was to persuade the jury to disbelieve Harris' testimony that incriminated Purnell, then requesting a *Bland* instruction would have been the perfect vehicle to accomplish that purpose. The purpose of the *Bland* instruction is to tell they jury that they should view "with suspicion and great caution" those statements of an admitted participant which **incriminate** the defendant. See, *Bland,* 263 A. 2d at 289-290.

formulation and application of *Strickland's* "prejudice" inquiry and should be rejected.

The determination whether Purnell was "prejudiced" by his attorney's error is a legal conclusion that is reviewed *de novo*. See, *Smith*, 991 A. 2d at 1177. In *Strickland*, the court explained how the lower courts should make the "prejudice" determination:

> **The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.
>
> * * * *
>
> **In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury...Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect**...Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id., at 695-696.

Strickland's "prejudice" prong also does not require a defendant to "prove" that, but for his counsel's errors, he would have been found "not guilty." Such an outcome determinative test was squarely rejected by the court in *Strickland*:

> 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).[5]

Thus, under *Strickland*, the focus of the "prejudice" inquiry must be on the effect of Harris' testimony in influencing the jury to find Purnell guilty of Murder. The "totality of the evidence" is a factor that is weighed to determine whether the *Bland* error was "pervasive" or "trivial." Conversely, the mere existence of other evidence, which, if believed, might have corroborated Harris' trial testimony, does not automatically preclude, as the holding in *Brooks* suggests, a finding that Harris' trial testimony had a "pervasive effect" on the jury's ultimate conclusion that Purnell was guilty of Murder.

There can be no doubt that Harris' trial testimony, coming as it did after the jury witnessed his dramatic change of plea, was the "centerpiece" of the State's case. Without Harris' testimony, nearly all of the alleged evidence relied upon by the State to "corroborate" Harris' testimony, was a hopeless tangle of inconsistencies and contradictions:

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[5] 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).

• Kellee Mitchell's out-of-court statement to Det. Tabor, in which he claimed that Purnell had admitted killing Ms. Giles, is inherently suspect.[6] Mitchell had a powerful motive to implicate Purnell in his out-of court statement to the police because Mr. Giles had identified Mitchell as one of the robbers. See, *Rule 61 Decision*, at *7.

• 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).

• Etienne Williams testified at trial that she overheard a phone conversation between Purnell and her sister, Aqueshia Williams, in which Purnell said he had "kill[ed] the lady." (A45). On cross-examination, however, she testified that she believed that Purnell was joking when he made that statement. (A46).

• Aqueshia Williams also testified at trial about the phone conversation with Purnell. According to Aqueshia, Purnell stated that "their mans[7] are in jail for something that I did." On cross-examination, however, she testified that she believed that Purnell was joking when he made that statement.[8]

• The fact that Purnell was in Harris' apartment when it was raided by the police, relied upon by the State as corroboration of Purnell's guilt, is of little

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[6] See, Trial Transcript, 4/15/2008, pp. 34- 35 (A36).

[7] Williams believed that Purnell was referring to Kellee Mitchell and DeWayne Harris. See, Trial Transcript, 4/16/2008, p. 188 (AR1).

[8] See, Trial Transcript, 4/16/2008, pp. 188-190 (AR1-AR2).

consequence. The police were looking for Ronald Harris and Kellee Mitchell. They did not find anything linking Purnell to the robbery/homicide and he was not arrested. (B2).

• The fact that Angela Rayne and Corey Hammond both stated they heard only one shot and said that the Giles' were carrying bags, which the police found at the murder scene, does not corroborate that Purnell was involved in the robbery/homicide. At most, it corroborates that the incident actually took place.

• 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, as described by Mr. 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.

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

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*.

Argument

In the Superior Court below, Purnell claimed that his trial attorney was ineffective under *Strickland* in failing to request a cautionary or limiting instruction concerning the effect of Harris' "11th hour" plea agreement with the State and his subsequent trial testimony. Purnell claimed that such an instruction was required under *Allen v. State*, 878 A. 2d 447, 450-451 (Del. 2005) and that Purnell was "prejudiced" by his trial attorney's failure to request such an instruction. 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. (Peter W. Veith Affidavit, §12) (A25-A26).

In the *Rule 61 Decision*, the Superior Court below held that Purnell's trial attorney was not ineffective because "the facts in *Allen* significantly differ from this

case." See, *Rule 61 Decision*, *29-*31. In its Brief, the State urges the Court to adopt the Superior Court's reasoning and conclusion. See, Answering Brief, pp. 23-24. As the discussion which follows demonstrates, the decision in *Allen* is fully applicable to this case. Furthermore, trial counsel was "ineffective" when he failed to utilize *Allen* and request a cautionary or limiting instruction based on *Allen*.

Analysis of *Allen* Decision

In *Allen*, the defendant and his co-defendants, Isaiah Howard ("Howard") and Kevin McCray ("McCray"), were indicted on numerous charges arising from three separate incidents, which took place on May 31, 2002, August 12, 2002, and August 27, 2002. *Allen*, 878 A.2d at 449. Co-defendants Howard and McCray pled guilty to reduced charges prior to trial. Allen, however, did not plead guilty. Co-defendant Howard testified for the prosecution at Allen's trial. At the beginning of his direct examination, co-defendant Howard testified about his plea agreement with the State. Although co-defendant McCray did not testify, the State moved into evidence McCray's plea agreement at the conclusion of Howard's testimony. Defense counsel objected, arguing that McCray's plea agreement was simply hearsay used to bolster co-defendant Howard's testimony. The trial court overruled the objection and permitted the plea agreement into evidence. *Id.* The trial court also gave the following cautionary instruction to the jury as part of the jury charge:

> The State has placed in evidence the guilty plea agreement related to Kevin McCray. You are instructed that there are many reasons why a person may enter into a guilty plea, including actual guilt, fear of the consequences of going to trial, a more favorable recommendation at sentencing --just

> to name some. You are not permitted to speculate about why Kevin McCray entered the plea.[9]

The Superior Court was simply wrong in concluding that *Allen* is limited to the situation where the State attempts to offer the guilty plea of a **non-testifying co-defendant** in evidence. See, *Rule 61 Decision*, at *31. Such a conclusion is refuted by *Allen* itself. While it is true that the narrow holding in *Allen* addressed the error in admitting the guilty plea of a non-testifying co-defendant, the Court also emphasized the need for a cautionary instruction whenever the guilty plea of a co-defendant is offered in evidence, including situations where the co-defendant testifies at trial:

> [T]here 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).

[9] *Id.*, at 449-450.

Application of *Allen* to This Case

As with the *Bland* issue discussed in the preceding Argument, the "state of the law" is critical, if not dispositive, to an evaluation of trial counsel's performance. Purnell's trial attorney should have been aware of *Allen* and the need for a cautionary instruction concerning Harris' guilty plea. Furthermore, the fact that trial counsel immediately asked the court to empanel a new jury (as opposed to merely requesting a cautionary instruction), when he learned about Harris' change of plea, strongly suggests that counsel was fully aware of the potential for prejudice when the jury learned that Harris was no longer a co-defendant and would testify for the State against Purnell. Given the timing of Harris' guilty plea, the failure to request a cautionary instruction, if anything, was even more prejudicial than the "garden variety" case where one co-defendant pleads guilty and then testifies against the remaining co-defendant.

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

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*.

Argument

As noted in the preceding Argument, *Allen* requires that the jury be given a cautionary instruction concerning the effect of a co-defendant's guilty plea whenever the jury learns that a co-defendant has pled guilty. The need for a cautionary instruction arises from the risk 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"). When Purnell's attorney asked the trial court to empanel a new jury, he clearly recognized the risk that the jury would use Harris' last-minute change of plea as evidence that Purnell was guilty. That request was made after the jury had been selected for the joint trial of Purnell and Harris, but before the trial itself

commenced. (A29-A30). When the trial court denied the request for a new jury panel, the court handed trial counsel a strong appeal issue based on uncontested facts that presented a purely legal issue.

In its Brief, the State repeats the argument that *Allen* is distinguishable on its facts and would not have provided support for an argument that the failure to empanel a new jury was an abuse of discretion. (Answering Brief, pp. 30-31). As discussed below, the State's argument should be rejected.

As with the preceding Arguments, the "state of the law" is critical to the determination whether the failure to appeal to "new jury" issue amounted to ineffective assistance of counsel under *Strickland*. As noted above, the clear teaching of *Allen* is that, absent a cautionary instruction, juries simply cannot be trusted to refrain from using the guilty plea of a co-defendant to infer that the remaining co-defendant is also guilty. That risk was even more pronounced in this case, where the jury witnessed for itself Harris' transformation from an adversary to an ally of the State.

Clearly, Purnell's jury needed a cautionary instruction, under *Allen*, concerning the limited use of Harris' guilty plea. Defense counsel's explanation that he did not raise the "new jury" issue in the direct appeal because "I did not believe that this issue would have been successful...because the jury swore and [sic] oath to be fair and impartial"[10] rings hollow indeed. The failure to raise the "new jury" issue in the direct appeal was due to oversight. There is simply no "strategy" that can justify the

[10] See, Affidavit of Peter W. Veith, §12 (A25).

failure to appeal this issue. Based on *Allen*, there is at least a reasonable probability that an appeal of the "new jury" issue would have been successful and would have resulted in a new trial. See, e.g., *Sanabria v. State*, 974 A. 2d 107, 116 (Del. 2009) (failure to give limiting or cautionary instruction concerning limited use of out-of-court statements constituted reversible error).

CONCLUSION

For the reasons and upon authorities set forth herein and in Appellant's Opening Brief, 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: September 30, 2013