SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

March 21, 2011

Samuel H. McGlotten
SBI# 0019
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

RE: *State of Delaware v. Samuel H. McGlotten*, Def. ID# 0707015477

DATE SUBMITTED: March 10, 2011

Dear Mr. McGlotten:

Defendant Samuel H. McGlotten ("defendant") filed a motion for postconviction relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). In his motion, defendant asserted trial counsel was ineffective on numerous grounds. This Court, in its decision of October 8, 2009, ruled defendant failed to establish ineffective assistance of counsel. *State v. McGlotten*, 2009 WL 3335325 (Del. Super. Oct. 8, 2009) ("*McGlotten First 61*"). In *McGlotten First 61*, the Court did not require trial counsel to submit an affidavit after concluding the various claims could be resolved without such. Defendant appealed that decision and the Supreme Court, after determining that trial counsel needed to submit an affidavit responding to defendant's

contentions, remanded the matter so that trial counsel could submit such. *McGlotten v. State*, No. 634, 2009, Jacobs, J. (Del. Sept. 23, 2010).

During the preliminary hearing stage of his case, the Public Defender's office represented defendant. Dean C. Johnson, Esquire, appeared on behalf of defendant at the preliminary hearing. Once it was determined that the Public Defender's Office represented William Holloman ("Holloman"), who was the key witness against defendant, then the Public Defender's Office transferred the case to Christopher M. Hutchison, Esquire ("trial counsel"), a conflict attorney. Because, as will be noted below, nothing occurred during the period when the Public Defender's Officer represented defendant which prejudiced the outcome of his case, this Court did not require Mr. Johnson to submit an affidavit in this Rule 61 proceeding. Only trial counsel was required to submit an affidavit.[1]

Trial counsel submitted the required affidavit, labeled "Affidavit of Response to Defendant's Motion for Post-Conviction Relief Pursuant to Superior Court Criminal Rule 61" ("Trial Counsel's Affidavit"). The State of Delaware ("the State") filed a response to defendant's Rule 61 motion, captioned "State's Response to Defendant's Motion for Post-Conviction Relief" ("State's Response"). Thereafter, defendant filed responses to both trial counsel's affidavit and the State's Response. Defendant's responses are not properly sworn. Incarcerated defendants have the ability to submit sworn affidavits; they submit properly sworn documents to this Court on a daily basis. Although the Court does not excuse defendant for not submitting properly sworn affidavits, it does not penalize him because the fact the responses are unsworn is irrelevant to this

[1]The Supreme Court's order only required trial counsel to submit an affidavit; it did not direct that Mr. Johnson submit an affidavit.

Court's decision.

On March 10, 2010, past the deadline set for the filing of any submissions and less than a month before this matter is due back to the Supreme Court, defendant filed a motion to amend his Rule 61 motion to allege trial counsel was ineffective because he failed to request a jury instruction regarding Holloman's credibility, citing *Bland v. State*, 263 A.2d 286 (Del. 1970) ("*Bland*) and *Smith v. State*, 991 A.2d 1169 (Del. 2010) ("*Smith*"). The Court allows this motion to amend and addresses the merits of that motion in this decision.[2]

For ease of reference and to avoid issuing a disjointed decision, this opinion readdresses the Rule 61 motion and addresses new matters. Thus, I repeat much of what appears in *McGlotten First 61*.

After trial on December 12, 2007, a jury found defendant guilty of all the charges against him: trafficking in cocaine in an amount greater than 10 grams but less than 50 grams; possession with intent to deliver cocaine; maintaining a vehicle for keeping controlled substances; and possession of drug paraphernalia. The facts presented at trial showed the following.

On or about July 12, 2007, members of the Governor's Task Force ("GTF" or "police") arrested Holloman on drug charges. The GTF asked Holloman if he could provide the name of drug suppliers. Holloman gave them defendant's name. While being monitored by the police, Holloman contacted defendant by telephone and made arrangements for defendant to sell him drugs at the Tru Blu station on the outskirts of Seaford, Delaware. The police recorded these

[2] For a brief period of time, Joseph M. Bernstein, Esquire, entered his appearance on behalf of defendant. However, he withdrew his appearance without submitting any pleadings or briefs. According to defendant, Mr. Bernstein suggested defendant seek to amend his motion to include the ineffective assistance of counsel claim based on the failure to request a *Bland*-type instruction.

telephone calls between Holloman and defendant regarding this transaction. The method of recording was not by wiretaps but by holding a tape recorder beside Holloman's cellular phone. At times, Holloman had defendant on speaker phone; at times, he did not. In any case, the tape recorder was held up to Holloman's cell phone, whether it was on speaker phone or not. The police officer heard the conversations. The recordings of those conversations were entered into evidence.

The GTF set up surveillance at the Tru Blu station. They observed the following. During the early morning hours of July 12, 2007, defendant drove his vehicle into the parking lot of the Tru Blu station. Defendant parked the vehicle next to the portable toilet in the station's parking lot and exited the vehicle. Defendant was standing on the passenger side of the vehicle between the vehicle and the portable toilet. Defendant held something up to his face which appeared to be a cellular phone.

During this same time, defendant called Holloman and told Holloman that he was by the bathroom at the Tru Blu.

The front seat passenger in defendant's vehicle exited defendant's vehicle and entered the portable toilet. Members of the GTF closed in on defendant. The officers apprehended defendant as he was about to enter the driver's side of the vehicle. On the ground where he had been standing, near the rear passenger side of the vehicle and between the vehicle and the portable toilet, was a bag containing numerous plastic baggies which later were determined to contain a total of 40.06 grams of cocaine base crack.

Others in defendant's vehicle included the female front seat passenger who had entered the portable toilet, a female back seat passenger and a male back seat passenger. The windows in

the vehicle remained up and the doors remained closed except for the time when the front seat passenger got out of the vehicle and went into the porta potty. The two female passengers had marijuana on them.

After he was arrested, one of the officers interviewed defendant. Defendant told the officer he was coming from Ocean City, Maryland back to Delaware; he had stopped at the Tru Blu to use the restroom; he had actually used the restroom; and he was not on the phone. When the officer said he had witnessed defendant on the phone, defendant said he may have been talking to his sister or somebody may have been talking to him.

The State recorded this statement on a DVD and failed to provide a copy of it to the defense pursuant to trial counsel's discovery request. Trial counsel had been informed defendant made a statement and the summary provided trial counsel was that defendant said he was coming from Ocean City, Maryland, and was using the restroom. Trial counsel was not aware of the DVD of the statement until trial when the State sought to introduce the DVD. Trial counsel objected and the Court recessed to allow trial counsel to listen to the DVD recording. After listening to the DVD, trial counsel did not object to the admission of the DVD. The Court ruled as follows. The State inadvertently failed to turn over the DVD. Trial counsel had some of the statements by way of the summary. The remaining statements were not out of line with what already had been disclosed. There was no prejudice to the defense strategy in the late production of the DVD. Any violation was cured by allowing the defense time to review the DVD. Transcript of December 12, 2007, Proceedings at 72-4.

The defense was that the State had failed to prove its case. Trial counsel argued the following. Holloman's credibility was questionable. Despite being observed the entire time he

was at the Tru Blu station, not one witness saw defendant with the bag of drugs in his hands. Furthermore, others were present who could have been the source of the drugs. Reasonable doubt had to exist.

The jury returned guilty verdicts on all counts.

Defendant was sentenced to substantial periods of incarceration followed by probation.

Defendant appealed the judgment of the Superior Court. On appeal, trial counsel filed a motion to withdraw pursuant to Supreme Court Rule 26(c). Defendant himself submitted the following issues on appeal: insufficiency of the evidence/credibility of witnesses; untimely discovery; denial of *pro se* motions; denial of right to testify; ill-timed jury instructions; and prosecutorial leniency for State's witnesses. *McGlotten v. State*, 963 A.2d 139, 2008 WL 5307990, *1 (Del. Dec. 22, 2008) (TABLE) ("*McGlotten*").

The Supreme Court concluded as follows. The State's evidence was sufficient to allow the jury to find defendant guilty beyond a reasonable doubt. The Superior Court acted within its discretion when it allowed into evidence the late production of the DVD recording of the police interview with defendant.[3] The Superior Court properly refused to consider defendant's *pro se* motions when counsel represented him. Defendant failed to present any evidence of record to support his contention that the Superior Court interfered with his right to testify. Defendant's contention that the trial court erred when it instructed the jury before closing arguments was a meritless argument; the timing of giving jury instructions was within the sound discretion of the

[3]Defendant actually argued that it was error to allow introduction of a tape and forensic lab report outside of the discovery deadline. *McGlotten v. State, supra* at *2. The Supreme Court considered the argument to be addressing the late introduction of the DVD recording of this police interview and consequently, that is the argument it addressed. *Id.*

trial court. *Id.* at **1-2. The final argument and decision thereon is important to this pending motion:

> McGlotten alleges that, at the time of trial, the State intended to offer leniency to a State's witness, who was also the subject of a drug investigation, in exchange for that witness' testimony against McGlotten. According to McGlotten, the State purposely concealed its intention, thereby prejudicing McGlotten by denying him the opportunity to cross-examine the witness on this point. McGlotten's claim is without merit. The record reflects that on cross-examination, Counsel highlighted the possibility that the witness may have been testifying against McGlotten with the hopes of obtaining a favorable plea agreement.

Id. at 2.

Thus, the Supreme Court ruled the appeal was without merit and it affirmed the judgment of the trial court. *Id.* at 3.

The Supreme Court mandate was dated January 8, 2009.

On August 5, 2009, defendant filed his first motion for postconviction relief.

No procedural bars preclude consideration of the claims.[4] The motion was timely filed.

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[4]In Rule 61(i), it is provided as follows:

> *Bars to relief.* (1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.
> (2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim in warranted in the interest of justice.
> (3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows
> (A) Cause for relief from the procedural default and
> (B) Prejudice from violation of the movant's rights.
> (4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

All of defendant's claims assert ineffective assistance of counsel. These claims normally are raised for the first time during a postconviction proceeding.

In making a claim for ineffective assistance of counsel, defendant has the burden of establishing (i) a deficient performance by his trial counsel (ii) which actually caused defendant prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984) ("*Strickland*"). Deficient performance means that the attorney's representation of defendant fell below an objective standard of reasonableness. *Id.* at 688. In considering post-trial attacks on counsel, *Strickland* cautions judges to review trial counsel's performance from the defense counsel's perspective at the time decisions were being made. Second guessing or "Monday morning quarterbacking" should be avoided. *Id*. at 689.

A finding of counsel's deficient performance needs to be coupled with a showing of actual prejudice. Actual prejudice is not potential or conceivable prejudice. "The Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. *Strickland* establishes that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id*. at 686.

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(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

To restate the requirements of *Strickland*, a defendant must establish two things, not just one: that trial counsel's performance was deficient **and** that but for that deficiency, the outcome of the proceedings would have been different. If a defendant cannot establish both prongs, then the ineffective assistance of counsel claim fails.

Conclusory allegations are insufficient to establish a claim of ineffective assistance of counsel. *Younger v. State*, 580 A.2d 552, 555 (Del. 1990).

I examine below each of defendant's claims.

1) Judgment of Acquittal

Defendant argues that trial counsel was ineffective because he did not file a motion for judgment of acquittal. In his affidavit, trial counsel explains that he did not file such a motion as it would have been frivolous. Trial counsel reviews the evidence presented at trial and explains:

> Viewing this evidence in a light most favorable to the State, there was clearly enough evidence for a jury to conclude that defendant possessed trafficking weight of cocaine and intended to sell said cocaine to William Holloman. Since defendant used his vehicle to transport both himself and the cocaine to the Tru Blue, there was sufficient evidence to find defendant guilty of Maintaining a Vehicle which is used for delivery of controlled substances. Furthermore, there was evidence presented to show that the cocaine was packaged in plastic baggies, proving the basis for the Possession of Drug Paraphernalia charge. In light of the aforementioned evidence, any motion for judgment of acquittal would have been frivolous.

Trial Counsel's Affidavit at 2.

The State notes that the Supreme Court reviewed this matter on appeal and determined there was sufficient evidence to convict defendant.

Defendant argues that trial counsel should have filed the motion for acquittal and it **may** have been granted. In that case, the outcome would have been different.

An attorney does not have an obligation to file frivolous motions; in fact, he or she has an obligation not to file frivolous motions. *State v. Pandiscio*, 1995 WL 339028, * 5 (Del. Super. May 17, 1995), *aff'd*, 670 A.2d 1340, 1995 WL 715627 (Del. Oct. 25, 1995) (TABLE). A motion for an acquittal in this situation would have been frivolous because, as the Supreme Court found in *McGlotten*, sufficient evidence existed to convict defendant of the charges. Furthermore, I can state that as the trial judge, had defense counsel filed such a motion, I would have denied it.

Trial counsel's decision not to file a motion for acquittal was reasonable. Furthermore, defendant's argument that there was a **possibility** the outcome would have been different is insufficient to meet his burden of establishing prejudice. *Strickland v. Washington, supra.* Consequently, this claim fails.

2) Untimely preliminary hearing

Defendant argues that Mr. Johnson should have been required to submit an affidavit to explain why he failed to object to the case proceeding against him because his preliminary hearing was not held within ten days of his initial appearance before the Justice of the Peace Court. Defendant argues that the charges would have been dismissed against him and the outcome of his case would have been different. The Court did not require Mr. Johnson to submit an affidavit regarding this issue because defendant cannot in any circumstance show prejudice.

Defendant was arrested on July 12, 2007, and his initial appearance before the Justice of the Peace took place on that date. His preliminary hearing was scheduled for July 19, 2007. It was continued until July 26, 2007, because the testifying police officer was not available on July 19, 2007. The Public Defender's Office did not object to the continuance request. The preliminary hearing took place on July 26, 2007. Defendant's preliminary hearing was held

fourteen days from his arrest.

A preliminary hearing should be held within ten days of a defendant's initial court appearance if a defendant is in custody. Super. Ct. Crim. R. 5(d); CCP Crim. R. 5(d).[5] However, the hearing may be continued if a defendant does not lodge an objection to the continuance request. *Id.* The defense did not object. Even if this Court assumed the failure of the public defender to object constituted deficient performance, defendant cannot establish the prejudice prong.

First, defendant cannot show that if Mr. Johnson had objected, then the Court of Common Pleas would have denied the continuance request.

Second, defendant cannot show that even if the continuance request had been denied, the outcome would have been different. Defendant appears to argue that a dismissal of his case at the preliminary hearing stage would have meant the case was over and he could never have been tried on it. Defendant is wrong.

A preliminary hearing is held to determine if probable cause exists for an arrest. That also is the time when bond, which initially was set at the Justice of the Peace Court, is reviewed. If the Court of Common Pleas had dismissed the charges, then defendant would have been released from incarceration until that point in time when the State obtained an indictment on these

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[5]Both Superior Court Criminal Rule 5(d) and Court of Common Pleas Criminal Rule 5(d) contain the same pertinent language:

> Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody.... With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times. In the absence of such consent by the defendant, time limits may be extended only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

charges. There is no doubt that the State could have obtained such since it, in fact, did obtain an indictment in this case. The dismissal in the Court of Common Pleas would have had absolutely no affect on the right of the State to proceed with the case. It would not have meant the end of the case.

Since defendant cannot show that the outcome would have been other than what it was, this claim regarding the continuance of the preliminary hearing fails.

3) Conflict of counsel

Defendant, within the context of the delayed preliminary hearing argument, argues that his rights were violated because he was represented at this hearing by a member of the Public Defender's office and that office had a conflict because it also represented Holloman. Trial counsel had no obligation to address this issue by affidavit and the Court did not require Mr. Johnson to address it because it is a meritless argument.

Defendant makes no effort to present a substantive argument on this issue. His argument is, basically, the mere fact there was a conflict at the preliminary hearing stage means the verdict in his case should be thrown out. This argument is conclusory, and consequently, meritless. *Younger v. State*, *supra*.

4) Lack of pretrial investigation and failure to interview witnesses and

5) Failure to obtain discovery in a timely manner

It is judicially economical to address these arguments together.

Defendant makes the following argument:

> The defendant should be granted Post-conviction Relief Due [sic] to ineffective assistance of counsel because counsel failed to conduct any pretrial investigations and also failed to interview any witnesses. During trial, 6 witnesses for the state

> against the defendant, 4 officers and 1 informant and 1 medical examiner. However, counsel did not interview any of the states [sic] witnesses before trial, nor did counsel request for [sic] production of the witnesses [sic] statements after trial was completed. **See:** *Superior Ct. R. 26.2.*

First, to clarify, Superior Court Criminal Rule 26.2[6] does not provide authority for the defendant to obtain any post-trial statements. There is no merit to his argument regarding post-trial production of witness statements.

Trial counsel has submitted an affidavit addressing the pre-trial investigation and the acquiring of discovery. He explains the following.

In June 2007, trial counsel signed a standard Rule 16 discovery request and was added to the list of attorneys to whom the State files automatic discovery responses.[7] That meant that in every case involving trial counsel, a discovery request automatically was provided to the State. In response to that automatic discovery request, the State filed its response to discovery on September 24, 2007 (Docket Entry No. 8). This receipt came just before defendant's first case review on October 1, 2007. To give counsel the opportunity to review the evidence, copy it, provide the copies to defendant and discuss the evidence with defendant, trial counsel requested a second case review date. That date was October 29, 2007. Trial counsel had several meetings with defendant to discuss the discovery productions.

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[6]This rule provides in pertinent part:

> (a) *Motion for production.* After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney general ... to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

[7]The State agrees that because trial counsel participated in the automatic discovery process, discovery automatically was provided to trial counsel without the need for a written request.

The State provided trial counsel with the police reports, which included all witness statements. Counsel reviewed these reports and provided copies of them to defendant. Trial counsel discussed the case with the detectives and with the Deputy Attorney General. He reviewed the audio tapes of the preliminary hearing and he listened to the recorded conversations between defendant and Holloman.

The police did not formally question the women passengers in the vehicle. One of the women had a baggie of marijuana on her. Trial counsel decided it was best not to question the women. By not questioning them, he did not learn information which may have reflected negatively on defendant's case. By not questioning them, he was able to use their absence to assist the defense by pointing to the possibility that one of the women was responsible for the drugs the police found. The Court notes that if he had questioned the women and had learned that neither was responsible for the drugs the police found, then he, as an officer of the court, could not have suggested that they were responsible for those drugs.

Trial counsel's decision not to interview the others in the vehicle constituted a reasonable trial strategy. The claim fails for this reason.

Alternatively, the claim fails because defendant has not shown prejudice. Defendant, who was in the vehicle with the other witnesses, has not suggested to what any of the supposed witnesses would have testified. He says only, "Perhaps one such witness may have confessed to counsel the crimes for which Sam was convicted."

Defendant's argument does not establish prejudice. The Court will not allow such speculation to overturn defendant's conviction based on sound evidence that defendant agreed to meet his buyer and sell him drugs; that he called his buyer to tell him he was at the meeting

place, the Tru Blu; and that the drugs were found where defendant had been standing. Defendant must produce concrete information which would establish the outcome of the case would have been different if any of the passengers in his vehicle had been interviewed. He has not done so. This claim fails.

Defendant's remaining arguments regarding pretrial efforts by trial counsel are based on his failure to understand that the discovery requests made through the automatic discovery process required production of the information he claims trial counsel did not request. Thus, his arguments are based on the incorrect premise that trial counsel did not make the discovery requests he actually did make. To the extent he argues trial counsel was ineffective for not making specific requests, those arguments fail as factually meritless.

Defendant argues that the DVD with his statements should have been produced sooner. Defendant is correct; the State should have produced the DVD sooner than the day of trial. Trial counsel requested the production of the DVD. The State failed to produce the DVD and the Court deemed the failure inadvertent. Trial counsel's actions were not ineffective regarding the discovery process and the DVD. This claim fails. Defendant argues the tape recordings of defendant's telephone conversations should have been produced sooner so that a motion to suppress could have been filed. The recordings of the phone conversations were produced in a timely manner. Trial counsel made the appropriate decision not to move to suppress them because there was no basis for such. That decision was reasonable. *State v. Day*, 2010 WL 2861852, * 3 (Del. Super. July 8, 2010). Defendant has failed to state a claim for ineffective assistance of counsel on this issue.

Defendant argues that trial counsel should have obtained the lab reports from the Medical

Examiner's Office sooner. This issue is addressed in subsection 6 below.

Defendant claims no evidence was produced showing that any of the witnesses had felony convictions. Defendant mentions Holloman. Trial counsel was aware of Holloman's record and cross-examined Holloman regarding those convictions. Transcript of December 12, 2007, Proceedings at 43. Defendant also mentions the woman who exited the vehicle. Trial counsel made a decision regarding the use of this woman and decided talking to her could only hurt the defense. This Court previously concluded that not talking to this witness and not calling her was a reasonable trial strategy. Thus, obtaining information on her criminal history was irrelevant. This claim fails.

6) Failure to seek dismissal because of State's requested continuances

Defendant argues that trial counsel was ineffective when he failed to seek a dismissal of the case pursuant to Superior Court Criminal Rule 48(b)[8] after the case was continued because the State was awaiting the results of the Medical Examiner's Report. He also argues trial counsel was ineffective for failing to obtain the Medical Examiner's Report sooner.

A review of the file shows the following. Defendant's final case review was scheduled for November 21, 2007, and his trial date was scheduled for November 27, 2007. At his case review on November 21, 2007, the State represented that the Medical Examiner's Report was not yet available. The Court rescheduled the case review until November 26, 2007, and kept the trial date for November 27, 2007. On November 26, 2007, the State asked for a continuance because

[8]In Superior Court Criminal Rule 48(b), it is provided in pertinent part as follows:

> *By court.* ... [I]f there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment....

the Medical Examiner's Office had not yet gotten its result to it. **Trial Counsel objected**. The Court noted that the charges would be nolle prossed if the results were not in by December 5, 2007. The next case review was set for December 5, 2007, and the trial was scheduled for December 12, 2007. Thus, the trial was continued for two weeks.

Trial counsel addresses this argument in his affidavit. First, he explains that he requested the timely production of this report by way of the automatic discovery. He notes that he did object to the continuance of the trial because the Medical Examiner's Report had not been completed. The State agrees with that fact. The Court granted the State's continuance request with the condition that all charges would be dismissed if the State did not produce the report by the date for the rescheduled case review. The State provided the results within the time frame allowed by the Court and trial counsel advised defendant of the receipt of the results.

The State was allowed to introduce a forensic lab report; i.e., the Medical Examiner's Report, outside of the discovery deadline the Court had set. This Court ruled there was no basis for granting a motion to suppress the Medical Examiner's Report. Transcript of December 12, 2007, Proceedings at 4-5. Defendant seeks to relitigate this issue within the context of the ineffective assistance of counsel claim. Again, trial counsel did not do anything improper. He sought the production of the lab reports. He objected to a continuance when they were not provided in a timely manner. Despite this objection, the Court granted the continuance anyway. Trial counsel's actions were reasonable in this situation and there was no ineffective assistance of counsel.

Defendant argues that trial counsel was ineffective for failing to file a motion to dismiss for unnecessary delay in bringing defendant to trial. Trial counsel had objected to the continuance

of the trial. He practically did seek to have the case dismissed for failing to prosecute. To have thereafter formally moved for a dismissal under Rule 48(b) would have been frivolous. The decision not to file a frivolous motion was reasonable. Alternatively, had trial counsel made the motion, the Court would have denied it. A two week continuance of defendant's trial based upon a delay in obtaining the Medical Examiner's Report would not have supported a dismissal pursuant to Superior Court Criminal Rule 48(b).

Trial counsel also addressed, in his affidavit, what he perceived to be defendant's contention that trial counsel was ineffective by not raising the argument that the Medical Examiner's Report was not provided 5 days before trial and thereby violated 10 *Del. C.* § 4332.[9] Trial counsel correctly notes the provision does not support the proposition for which defendant cites it; i.e., it does not require that the results be produced within 5 days of the trial. In addition, he points out that the forensic chemist did appear and testify at trial.

All claims of ineffective assistance of counsel with regard to the Medical Examiner's Report fail.

7) Failure to object to perjured testimony

Defendant argues that trial counsel was ineffective because he did not object to what defendant labels "perjured testimony".

Defendant sets forth two situations where he maintains witnesses perjured themselves.

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[9]In 10 *Del. C.* § 4332(a)(1), it is provided:

> *In general.* – (1) In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to the trial, require the presence of the forensic toxicologist or forensic chemist, or any person in the chain of custody as a prosecution witness.

The first situation concerns the testimony of Detective Larry Smith.

At the preliminary hearing, Detective Smith testified as follows regarding the transaction between defendant and Holloman:

Q. Did you know the details of what was arranged to be served?

A. No, there was not an amount stated.

Transcript of July 26, 2007, Proceedings at 5.

During his trial testimony, Detective Smith testified that Holloman ordered an ounce of cocaine from defendant. Transcript of December 12, 2007, Proceedings at 48-9. Holloman, too, testified that he ordered an ounce of cocaine from defendant. *Id.* at 38; 44.

On pages 5-6 of his affidavit, trial counsel addresses this contention:

> The difference between the two statements is that at trial, Detective Smith testified as to his understanding of the interaction between defendant and William Holloman. While Detective Smith's testimony at the Preliminary Hearing is technically correct, no specific amount was ever discussed between defendant and Mr. Holloman, at trial, he went further to state that the agreement was that an ounce was to be delivered. Sergeant Workman then testified as the expert and indicated that drug dealers rarely use actual amounts in discussions. Rather, they use phrases such as: "I need to get straight for tomorrow". Between defendant and Mr. Holloman, "I need to get straight for tomorrow" was indicative of wanting to purchase an ounce of cocaine.
> From a strategic standpoint, the alleged agreement was less relevant than the fact that at no time was the defendant observed with the drugs on his person. The defense strategy was to point out that despite all of the details the police undertook to cause an arrest, at no point did any of the officers ever observe the defendant with a brown paper bag (which contained the cocaine).
> The issue of the actual alleged agreement also provided a complex problem for the defense. What the jury did not hear was that the defendant routinely sold drugs to William Holloman, and it was customary in their business relationship for Mr. Holloman to purchase one to two ounces of cocaine from defendant (which was the approximate amount found at the scene.) Although the State agreed not to introduce this evidence during its case-in-chief, counsel knew that focusing too much on a specific agreement would ultimately open the door for the State to introduce the business relationship, which would spell disaster for the defendant.

> In fact, during cross-examination of William Holloman, counsel pressed Mr. Holloman about differences between his testimony and what was actually heard on the audio tape. The State objected and argued that an answer to the question would open the door to the prior business understandings regarding amounts routinely sold. Counsel made a strategic decision to argue the evidence as it stood, essentially a simple statement that "I need to be straight for tomorrow" with nothing more and no direct observation of the defendant with actual possession of the drugs, simply was not enough to convict.

Trial counsel's strategy regarding the cross-examination of Detective Smith on the statements about the amount of drugs was reasonable. There was no ineffective assistance of counsel.

Alternatively, defendant has not shown any prejudice. He has failed to show how the outcome of the trial would have been different if the inconsistencies in these statements had been called to the attention of the jury. Hollomon testified he ordered an ounce. The drugs were located where defendant had been standing. Defendant has not tried to show prejudice and the Court does not find any prejudice.

This claim fails.

The second situation allegedly involving perjured testimony was with regards to Holloman.

Defendant argues that Holloman lied when he testified that he was testifying willingly because it was the right thing to do and he was not sure whether the outcome of his case would be affected by his testimony. Defendant argues that the charge of possession with intent to distribute was dismissed and Holloman went home.[10] Defendant further asserts the prosecutor

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[10]Defendant mischaracterizes the plea agreement. Holloman pled guilty to charges of possession of cocaine (a lesser included offense of the charge of possession with intent to deliver cocaine), maintaining a vehicle for keeping controlled substances, resisting arrest with force, disregarding a police officer's signal and reckless endangering in the second degree.

committed misconduct in suborning such perjury. Defendant argues trial counsel should have asserted prosecutorial misconduct occurred.

During the trial, trial counsel cross-examined Holloman and brought out that Holloman could obtain a plea agreement based on his testimony. *Id.* at 43-4. This issue has been addressed previously and decided previously. *State v. McGlotten*, 2008 WL 5307990 at *2; *State v. McGlotten,* Def. ID# 0707015477 (Del. Super. Jan. 4, 2011). Continuously presenting it will not make it meritorious. Trial counsel's cross-examination of Holloman was reasonable. This claim fails.

8) Failure to timely file a motion to suppress

Defendant advances several arguments regarding suppression motions.

Defendant argues trial counsel was ineffective for failing to timely file a motion to suppress. At the start of the trial, trial counsel explained he had discussed this issue with defendant and had found the motion to be meritless. Transcript of December 12, 2007, Proceedings at 4. In his affidavit, trial counsel explains that the cocaine "was discovered on the ground of a public gas station between defendant's vehicle and a portable restroom." Trial Counsel's Affidavit at 6. He explains that defendant could not have had any reasonable expectation of privacy. There was no illegal search and a suppression motion would have been frivolous. Trial counsel does not have to file meritless motions; in fact, he has an obligation not to do so. *State v. Day, supra.* Trial counsel was not ineffective for refusing to file a motion to suppress the seized evidence.

Defendant argues trial counsel ineffectively failed to seek to suppress his arrest on the ground the police failed to obtain a warrant before arresting him. There is no legal basis for this

argument. The police, in this case, had reasonable ground to believe a felony had been committed; thus, no warrant was required. 11 *Del. C.* § 1904(b).[11] Trial counsel was not ineffective for not filing a motion regarding the warrantless arrest.

Defendant also argues he was not given *Miranda* warnings and thus, trial counsel was ineffective for failing to move to suppress those statements. Trial counsel explains in his motion that the police report stated that Detective Frank Fuscellaro gave defendant his *Miranda* warnings and consequently, there was no basis for filing a motion to suppress those statements. Trial counsel's actions were reasonable. *State v. Day, supra.* In any case, defendant cannot show prejudice. The State's evidence, which consisted of eyewitness testimony, overwhelmingly established the elements of the charges and the outcome of the case would not have been different whether the statements were entered as evidence or not. Defendant's failure to establish prejudice renders his claim meritless.

Finally, defendant argues that trial counsel was ineffective for failing to move to suppress the telephone conversations between him and Holloman on the ground that the police officers failed to obtain a warrant beforehand. Trial counsel explains that no basis for a suppression motion existed. There was no wiretapping. Holloman was a party to the calls and he gave the police permission to record them. The recordings of the overheard conversation were legal, 11

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[11]This statute provides in pertinent part as follows:

> (b) An arrest by a peace officer without a warrant for a felony, whether committed within or without the State, is lawful whenever:
>
> (1) The officer has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed: or
>
> (2) A felony has been committed by the person to be arrested although before making the arrest the officer had no reasonable ground to believe the person committed it.

Del. C. § 2402(c)(5)(a),[12] and there was no basis for such a motion. Trial counsel's refusal to file a meritless motion was reasonable. *State v. Day, supra.*

All the arguments of ineffective assistance of counsel regarding suppression motions fail.

9) Withdrawal of objection to untimely produced DVD

The following events are related at pages 67-74 of the Transcript of December 12, 2007, Proceedings. During the trial, one of the State's witnesses referenced a DVD recording of an interview of defendant. Trial counsel objected, stating this was the first he had heard of a DVD. The State explained the failure to provide the DVD to trial counsel was inadvertent; it occurred because the prosecuting attorney thought the attorney previously handling the case had provided it to trial counsel. The trial court provided trial counsel the opportunity to review the DVD. After he reviewed it, trial counsel explained he had no objection to it. The Court ruled as follows:

> THE COURT: I just want to make a contemporaneous record with respect to the oral statements on the DVD. Obviously, they are Rule 16 statements that would be routinely turned over. I find that in this case that the statement on the DVD, they were additional statements that the defense did not know about with respect to the use of the telephone, that the other statement on the DVD has been supplied through other materials. I am finding that the State, it's [sic] reason for not turning it in was inadvertent. There was a change, as I understand it, in the prosecutor and trial counsel. Mr. Donahue, was under the belief all the information had been provided. This isn't a case of sandbagging or anything like that. I find that the defense is not suffering any kind of prejudice here. The additional statements are not out of line with what has already been disclosed. With respect to the defense strategy, there is nothing that has changed, especially so considering we had a

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[12]In 11 *Del. C.* § 2402(c)(5), it is provided in pertinent part as follows:

> (c) *Lawful acts.* – It is lawful:
> ***
> (5) For a law-enforcement officer in the course of the officer's regular duty to intercept an oral communication, if:
> a. the law enforcement officer initially detained 1 of the parties and overhears a conversation....

> recess and during the recess he had the opportunity to review the DVD. And if there was a violation by not turning it over, it certainly has been cured. As to the defense, you are fully able to cross-examine and you have suffered no prejudice at all.
>
> MR. HUTCHISON: Absolutely.
>
> THE COURT: And in balancing the needs of society with the defendant's right to a fair trial, if the application had been for the exclusion of the additional statement, it would have been denied for the reasons that I have stated.
>
> MR. HUTCHISON: The reason I did not make an application is for the reasons I cited. I talked to Mr. Donahue. I reviewed the tape. I don't see any prejudice in that.

Transcript of December 12, 2007, Proceedings at 72-4.

On appeal, the Supreme Court ruled that defendant had not shown any prejudice due to the late production. *McGlotten v. State*, 2008 WL 5307990, at *2.

Trial counsel explains that he did not find any statements in the DVD that were incriminating or prejudicial. The police report accurately summarized what the DVD reflected. Consequently, trial counsel withdrew his objection.

Trial counsel was not ineffective for not pursuing an objection to the inadvertent late production of the DVD. Alternatively, as the trial court and the Supreme Court ruled, defendant did not suffer any prejudice from the late production of the DVD. This claim is meritless.

10) Failure to object to defendant wearing prison garb

Trial counsel agrees defendant wore prison clothing during the trial. However, according to trial counsel, defendant never requested to wear civilian clothing and no one brought civilian clothing for him. In his unsworn statement, defendant says 'he did question with counsel the propriety (the danger) of going to trial in prison garb." His argument evidences that he believes

this Court had an affirmative duty to engage defendant in a colloquy where it should have pointed out to defendant the possible danger of going forward at trial in prison clothes; that the State had a duty to raise the issue; and that trial counsel was required to object to the matter proceeding against him if he was in prison attire.

There is no duty of the Court to affirmatively talk with a defendant about wearing street clothes during trial. *Estelle v. Williams*, 425 U.S. 501, 512 (1976). There is no duty for the State to raise the issue. There is no duty of trial attorney to object to a defendant wearing prison clothes if defendant has not requested they be worn. *Id.* Instead, the law is that a defendant cannot be forced to wear prison clothes if he wishes to wear street clothes. *Id.* at 512-13; *Poteet v. State*, 5 A.3d 631, 2010 WL 3733917, *2 (Del. Sept. 24, 2010) (TABLE); *Smith v. State*, 976 A.2d 172, 2009 WL 1659873, * 2 (Del. June 15, 2009). If the defendant does not object to appearing in prison clothes during the trial, then no compulsion shall be found. *Estelle v. Williams*, *supra.*

Even if I accept defendant's unsworn statement as true, the only thing defendant offers is that he discussed the matter with trial counsel. He did not request that he be allowed to wear street clothes. He did not make arrangements to obtain street clothes. Most importantly, defendant was not forced to wear his prison attire. Furthermore, defendant has not shown that his appearance in prison clothes tainted the jury so that the presumption of innocence was ignored. Consequently, this ineffective assistance of counsel claim regarding his appearance in prison attire fails. *Smith v. State, supra; State v. Poteet,* 2005 WL 914472, *2 (Del. Super. March 11, 2005), *aff'd*, 931 A.2d 437, 2007 WL 2309983 (Del. 2007)(TABLE); *State v. Keperling*, 2000 WL 305493 (Del. Super. Jan. 27, 2000).

11) Failure to obtain *Bland* instruction

As noted at the first of this decision, defendant moved to amend the Rule 61 motion to add a claim of ineffective assistance of counsel based upon trial counsel's failure to request a *Bland* instruction.

As the Supreme Court explained in *Smith v. Smith*, 991 A.2d at 1175:

> [A] defendant is entitled, upon request, to a specific jury instruction concerning the credibility of accomplice testimony in cases where the State's evidence includes the testimony of an accomplice. In *Bland*, this 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 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. FN 27
> >
> > > FN27. *Bland v. State*, 263 A.2d 286, 689 (Del. 1970).

Failure to ask for a *Bland*-type instruction constitutes an oversight by trial counsel, as there cannot be an advantage gained by not requesting such an instruction. *Smith v. State, supra* at 1176-7; *State v. Brooks*, 2011 WL 494770, *8 (Del. Super. Feb. 3, 2011) ("*Brooks*").[13] However, the failure to request such does not constitute prejudice *per se*; instead, the Court must review the facts and circumstances of each case to determine whether prejudice exists. *Hoskins v.*

[13]This conclusion renders an affidavit by trial counsel unnecessary.

State, 2011 WL 664334, *6 (Del. Feb. 22, 2011); *Smith v. State*, 991 A.2d at 1180; *State v. Brooks, supra,* **8-9.

In *Smith*, the Supreme Court found that the outcome of the case hinged on the credibility of the defendant versus the credibility of defendant's accomplice and another witness. In the case at hand, unlike *Smith* but just as occurred in *Brooks*, the accomplice's testimony was corroborated. Here, a police officer overheard the conversations between the accomplice and defendant; the conversations were recorded and introduced into evidence; and police officers conducted surveillance of defendant at the scene of the crime and testified to such. Thus, significant independent evidence of defendant's guilt was presented. The outcome of the trial did not turn on any uncorroborated testimony of defendant's accomplice. I conclude there was no prejudice from the failure of trial counsel not to seek the *Bland*-type accomplice instruction. *State v. Brooks*, *supra.* This claim fails.

CONCLUSION

For the foregoing reasons, this Court denies defendant's motion for postconviction relief. Finally, because the issues defendant has raised are not complicated, I deny defendant's request for a hearing and I deny his request that an attorney be appointed to represent him.

This matter now is to be returned to the Supreme Court pursuant to the remand.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office
Clerk of Court, Supreme Court
Abby Adams, Esquire
John W. Donahue, IV, Esquire
Christopher M. Hutchison, Esquire