IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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

Submitted: February 6, 2012
Decided: May 31, 2013

Upon Defendant's Motion for Postconviction Relief
Pursuant to Superior Court Criminal Rule 61
DENIED.

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

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

BRADY, J

PROCEDURAL HISTORY

On April 25, 2008, Mark Purnell ("Purnell" or "Defendant") was convicted, following a trial by a jury, of Murder in the Second Degree, Attempted Robbery in the First Degree, Possession of a Firearm During the Commission of a Felony, Possession of a Deadly Weapon During the Commission of a Felony, Conspiracy in the Second Degree, and Possession of a Deadly Weapon by a Person Prohibited. On October 17, 2008, this Court sentenced Purnell to an aggregate of 77 years of Level V incarceration, 21 years of which was mandatory, suspended after 45 years for decreasing levels of supervision. Purnell filed a timely appeal of the sentence to the Delaware Supreme Court, which affirmed his conviction and sentence on August 25, 2009.[1]

On March 25, 2010, Purnell filed a *pro se* Motion for Postconviction Relief. Purnell subsequently retained counsel, and, with the Court's consent, filed an Amended Motion for Postconviction Relief on October 11, 2011. In the Amended Motion, Purnell raised three grounds for relief, all of them alleging ineffective assistance of counsel. These claims are as follows:

a. Ineffective assistance of trial counsel for failure to request a jury instruction concerning the credibility of accomplice testimony under *Bland v. State*[2] and its progeny;
b. Ineffective assistance of counsel for failure to request a jury instruction concerning the effect of Harris' guilty plea and failure to raise the issue on direct appeal; and
c. Ineffective assistance of counsel for failure to object to prosecutorial "vouching" for credibility of Harris.

The State filed a response to the motion and Defendant filed a reply thereto.[3] Following the Delaware Supreme Court's decision on February 23, 2012, in *Brooks v.*

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[1] *Mark Purnell v. State*, 979 A.2d 1102 (Del. 2009).
[2] *Bland v. State,* 263 A.2d 286, 289-290 (Del. 1970).
[3] Super. Ct. Crim. R. 61(g)(1) and (2).

State,[4] counsel were offered an opportunity to file supplemental submissions, which they did.

This Court referred the matter to Superior Court Commissioner Lynn M. Parker pursuant to 10 *Del. C.* § 512(b) and Superior Court Criminal Rule 62 for findings of fact and recommendations based on the application of pertinent law. The Commissioner, after considering the merits of any claim of ineffective assistance by trial counsel, issued the Findings of Fact and Recommendations on July 3, 2012, recommending that Purnell's Amended Motion for Postconviction Relief be denied.[5] On July 17, 2012, Purnell appealed from the Commissioner's Findings of Fact and Recommendations. Additional submissions were received, and on December 6, 2012, this Court held Oral Argument on the matter. A transcript was requested, and received by the Court on February 6, 2013, at which time the Court took the matter under advisement.

FACTS

The Commissioner's recitation of the facts in this matter is quite complete and is substantially included herein.

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

[4] *Brooks v. State,* 40 A.2d 346 (Del. 2012).
[5] Commissioner's Finding of Fact and Recommendations, July 3, 2012.
[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).

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 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

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

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 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

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

Mitchell. Mr. Giles then pointed to the picture of Mitchell and said "it might have been him," and that between the two photos, the shooter looked most like Kellee Mitchell. Then, after some hesitation, he said that he could be wrong, it might have been the other one.[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 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

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

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]

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]

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[24] *Id.*
[25] *Id;* April 16, 2008 Trial Transcript, 37, 39.
[26] *Purnell,* 979 A.2d at 1104; April 15, 2008 Trial Transcript, 34-35.
[27] April 15, 2008 Trial Transcript, 36.
[28] April 17, 2008 Trial Transcript, 56.
[29] April 16, 2008 Trial Transcript, 115-116.
[30] *See* April 14, 2008 Trial Transcript, 165.
[31] *Purnell,* 979 A.2d at 1105.

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 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

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[32] April 17, 2008 Trial Transcript, 55-56.
[33] *Id*., 169-171.
[34] *Id*., 169-171.
[35] *Id*., 133-36.
[36] *Id*., 138-39.
[37] *Id*., 138: 21.
[38] *Id*., 139: 6.
[39] *Id*., 139:14-19.

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]

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]

DISCUSSION

Ineffective assistance of counsel claims are governed by the two-part test established in *Strickland v. Washington.*[49] A defendant's claim of ineffective assistance of counsel is subject to a strong presumption that the representation was professionally reasonable.[50] To overcome the presumption, the defendant must establish (1) that his trial counsel's efforts fell below a reasonable objective standard, and (2) that there is a reasonable probability that the outcome of the proceedings would have been different but

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[40] *Id.*, 139-43.
[41] *Id.*, 142-43.
[42] *Id.*, 143-45.
[43] *Id.*, 145: 8-15.
[44] *Id.*, 146: 8-12.
[45] *Id.*, 146: 13-17.
[46] *Id.*, 147-148
[47] *Id.*, 147: 7-8, 149-50.
[48] *Id.*, 148: 12.
[49] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).
[50] *Winn v. State*, 705 A.2d 245, 1998 WL 15002, at *2 (Del. Jan. 7, 1998) (citing *Albury v. State*, 551 A.2d 53, 59 (Del. 1988)).

for counsel's unprofessional errors.[51] The defendant must substantiate concrete allegations of actual prejudice or risk summary dismissal.[52] The Court must "evaluate the [defense counsel's] conduct from counsel's perspective at the time," free from the "distorting effects of hindsight."[53]

A. It was not ineffective of counsel to fail to request a *Bland* Instruction.

Defendant's first claim regards defense counsel's failure to request a cautionary jury instruction regarding the testimony of an accomplice.

In Delaware, a jury instruction must be a correct statement of the substance of the law and must be reasonably informative and not misleading.[54] Even if some inaccuracies are present in an instruction, the Supreme Court "will reverse only if the deficiency undermined the jury's ability to 'intelligently perform its duty in returning a verdict."[55]

A *Bland* instruction acknowledges the special scrutiny with which a jury should view the testimony of an accomplice. The instruction addressed by the Delaware Supreme Court in *Bland* states:

> 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,

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[51] *Strickland*, 466 U.S. at 689.
[52] *Dawson v. State,* 673 A.2d 1186, 1196 (Del. 1996).
[53] *Gattis v. State,* 697 A.2d 1174, 11778 (Del. 1997).
[54] *Cabrera v. State*, 747 A.2d 543, 544 (Del. 2000)(citing *Miller v. State*, 224 A.2d 592 (Del. 1966)); *Baker v. Reid*, 54 A.2d 103 (Del. 1947).
[55] *Id*.(citing *Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973).

> despite the lack of corroboration, and in finding the defendants guilty.[56]

Bland was decided in 1970. The law regarding the need for a *Bland* instruction has changed since the time of Purnell's trial. The Court will analyze how Delaware's jurisprudence regarding *Bland* instructions has evolved.

Bland Instructions 1970-2012

From the time *Bland* was decided until 2012, the Delaware Supreme Court had held that it was within the trial court's discretion to decide whether or not to give a *Bland* instruction.[57] In *Cabrera*, the Delaware Supreme Court discussed the *Bland* instruction and its adoption within the pattern jury instructions.[58] In *Cabrera*, the instruction given was not the same as recited in *Bland* nor was it the same as the then pattern jury instructions, however, the Supreme Court held that its analysis of jury instructions was not "focused on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty."[59] The Supreme Court noted that the trial court warned jurors that "accomplice testimony may be suspect because of the accomplice's self-interest and his plea agreement."[60]

The defendant in *Bordley* appealed the trial court's denial of her requested instruction for the jury to consider the accomplices' testimonies with "great suspicion and great caution."[61] The Supreme Court held that "the trial judge should be granted wide

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[56] *Bland*, 263 A.2d at 289-290 (Del. 1970).
[57] *See Soliman v. State*, 918 A.2d 339, 2007 WL 63359, *2-*3 (Del. Jan. 10, 2007)(TABLE); *Bordley v. State*, 832 A.2d 1250, 2003 WL 22227558, at *2-*3 (Del. Sep. 24, 2003)(TABLE); *Cabrera v. State*, 747 A.2d 543, 545 (Del. 2000).
[58] *Cabrera*, 747 A.2d at 545.
[59] *Id*.
[60] *Id*.
[61] *Bordley*, 2003 WL 22227558, at *2.

latitude in framing his jury instruction."[62] The trial judge in *Bordley* did not use the words "with caution" in its instructions to the jury on accomplice testimony, but did warn that an accomplice's testimony "may be affected by self-interest, by an agreement she may have with the State, by her own interest in the outcome, and by prejudice against the defendant."[63] The Supreme Court, in finding that the trial judge did not abuse his discretion in denying the requested instruction, held that the instruction given was "a correct statement of the law and adequately guided the jury as trier of fact and determiner of credibility."[64]

In *Soliman*, decided the year before Purnell's trial, the Supreme Court expressly rejected the argument that *Bland* instructions should be required.[65] In *Soliman*, the defendant requested a specific jury instruction to view the accomplice's testimony with caution.[66] The Court held that "[a]s a general rule, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law."[67] The jury in *Soliman* was instructed as follows:

> The testimony of an alleged accomplice, someone who said that he participated with another person in the commission of a crime, has been presented in this case. [Witness] may be considered an alleged accomplice in this case. The fact that an alleged accomplice has entered a plea of guilty to certain offenses charged does not mean that any other person is guilty of the offenses charged.
> As stated elsewhere in these instructions, you're the sole judges of the credibility of each witness, of the weight to be given the testimony of each. You may consider all the factors which affect the witness' credibility, including whether the testimony of the accomplice has been affected by self-interest, by an agreement

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[62] *Id.*(citing *Cabrera*, 747 A.2d at 544).
[63] *Id.*
[64] *Id.*
[65] *Soliman*, 2007 WL 63359, at *3.
[66] *Id.*, at *2.
[67] *Id.*(citing *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

> which he may have with the State, by his own interest in the outcome of the litigation, by prejudice against the defendant, or whether or not the testimony has been corroborated by any other evidence in the case.[68]

The Supreme Court found this to be a correct statement of the law and rejected the defendant's argument that the instruction failed "to convey the inherent untrustworthiness in accomplice testimony to the jury.[69] The Supreme Court finally held that, similar to the instructions given in *Cabrera* and *Bordley*, an "instruction on accomplice testimony was sufficient in itself, without language that the jury should examine the accomplice's testimony 'with caution.'"[70]

In 2010, the Delaware Supreme Court addressed a defendant's counsel's failure to request a complete *Bland* instruction.[71] The Court discussed its holdings in *Bordley* and *Cabrera* and held that the defendant "was entitled to a *Bland*-type of instruction on accomplice credibility, if requested, as a matter of law."[72] The Court went on to state that defense counsel's failure to request a *Bland* instruction "will not always be prejudicial *per se*," but the prejudicial effect will depend "upon the facts and circumstances of each particular case."[73] In *Smith*, the Court determined the failure to request an accomplice instruction did amount to ineffective representation.

In *Hoskins v. State*,[74] decided a year after *Smith*, the Delaware Supreme Court limited the holding of *Smith*. The Court emphasized that the trial judge is required to give a *Bland* instruction "*upon request*,"[75] and specifically held that a trial judge does not

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[68] *Id*., at n. 20.
[69] *Id*., at *3.
[70] *Id*.(citing *Bordley*, 2003 WL 22227558 at *2-*3).
[71] *Smith v. State*, 991 A.2d 1169, 1177 (Del. 2010).
[72] *Id*.
[73] *Id*., at 1180.
[74] 14 A.3d 554 (Del. 2011).
[75] *Id*., at 562(*emphasis in original*).

commit plain error in failing to give *sua sponte* an accomplice credibility instruction at trial.[76] The Court distinguished between raising this issue on direct appeal as opposed to in a Rule 61 motion for post-conviction relief.[77] Hoskins raised this issue on direct appeal. The Court concluded that "the trial judge did not commit plain error in not giving an accomplice credibility jury instruction because defense counsel did not request it."[78] The Court continued that this did not preclude Hoskins from raising an ineffective assistance of counsel claim under Rule 61.[79]

Bland Instructions 2012-present

Cabrera, Bordley, Soliman and *Hoskins* were explicitly overruled by the Delaware Supreme Court in *Brooks v. State*.[80] In *Brooks*, the Delaware Supreme Court ruled that the modified *Bland* instruction must be given in every case any time a witness who claims to be an accomplice testifies.[81] In modifying the *Bland* instruction, the Supreme Court held that:

> Any time a witness who claims to be an accomplice testifies, judges must give the following instruction:
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> A portion of the evidence presented by the State is the testimony of admitted participants in the crime with which these defendants are charged. For obvious reasons, the testimony of an alleged accomplice should be examined by you with more care and caution than the testimony of a witness who did not participate in the crime charged. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplices' accusation that these defendants participated

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[76] *Id.*
[77] *Id.*("The [*Smith*] quotation about must be read with due regard for the procedural posture of *Smith*. There, *the defendant moved for postconviction relief on the ground that his counsel was ineffective* for failing to request a *Bland*-type of instruction.")(*emphasis added*).
[78] *Id*. at n.33.
[79] *Id*.
[80] *Brooks v. State,* 40 A.3d 346, 348-50 (Del. 2012).
[81] *Id*., at 348.

> in the crime. Without such corroboration, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and you may safely rely upon it. Of course, if you are so satisfied, you would be justified in relying upon it, despite the lack of corroboration, and in finding the defendants guilty.[82]

Subsequently, the Supreme Court reached this issue of retroactivity in its discussion in *Owens*.[83] The Court found that the instruction given by Owens' trial judge mirrored the one given by the trial judge in *Soliman* and noted that *Soliman* was upheld "only ten months before the trial judge instructed the jury in Owens' case."[84] The Court found that *Bordley* and *Soliman* "provided the law at the time" of Owens' trial.[85] The Court went on to hold that "[a]lthough we announce a different rule *for the future*, the trial judge correctly applied the law *as it existed on the day he instructed the jury* in Owens' trial, November 20, 2007.[86] The Court expounded on this principle in *Torrence v. State*.[87] In *Torrence*, the Court pointed out that *Brooks* did not apply retroactively and reviewed the jury instruction on accomplice testimony under the law as it existed at that time.[88]

Analysis of Purnell's Jury Instruction

The trial court in this case did not give an accomplice testimony instruction *sua sponte*, nor was one requested by counsel. The question before the Court is whether the jury instructions that were given were sufficient, in their entirety, to address the concerns a *Bland* instruction is intended to address.

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[82] *Id*., at 350.
[83] *Owens v. State* was consolidated by the Delaware Supreme Court with *Brooks v. State*.
[84] *Brooks v. State,* 40 A.3d at 351-52.
[85] *Id*., at 351.
[86] *Id*.
[87] 45 A.3d 149, 2012 WL 2106219 (Del. 2012)(TABLE).
[88] *Id*., at *3.

The Court gave Purnell's jury its instructions on April 24, 2008. The relevant portions of those instructions state:

> You are the sole judges of credibility of each person who has testified and of the weight to be given to the testimony of each. You are to judge the credibility of all the witnesses that have testified before you whether for the prosecution or for the defense.
> . . .
> In considering the credibility of witnesses and in considering any conflict in testimony, you should take into consideration each witness' means of knowledge, strength of memory and opportunity for observation, the reasonableness or unreasonableness of the testimony, the consistency or inconsistency of the testimony, *the motives influencing the witness*, the fact, if it is a fact, that the testimony has been contradicted, *the witnesses* [*sic*] *bias or prejudice or interest in the outcome of the litigation*, the ability to have acquired the knowledge of the facts to which the witness testified, the manner and demeanor upon the witness stand, and *that apparent truthfulness of the testimony, and all other facts and circumstances shown by the evidence which affect the credibility of the testimony.*[89]

And, further,

> *The fact that a witness has been convicted of a felony or a crime involving dishonesty, if such be a fact, may be considered by you for one purpose only, namely, in judging the credibility of that witness.* The fact of such a conviction does not necessarily destroy or impair the witness' credibility and it does not raise the suggestion that the witness testified falsely.[90]

In light of the Delaware Supreme Court's holdings in *Brooks* and *Torrence*, the Court must determine if it correctly applied the law as it existed on April 24, 2008. The Court is guided by the holdings in *Soliman* and *Bordley*, as they provide the law at the time of Purnell's case.[91]

Though the instructions in both *Bordley* and *Soliman* contain a specific instruction regarding the accomplice's plea agreement or agreement with the State as factors in

[89] April 24, 2008 Trial Transcript, 38:10-40:2(*emphasis added*).
[90] *Id.*(*emphasis added*).
[91] *Brooks v. State*, 40 A.3d at 351.

determining credibility, Purnell's instructions are sufficiently similar to direct the jury to consider Harris' credibility as an accomplice in deciding the matter. Under *Bordley*, the Court was granted "wide latitude" in framing Purnell's jury instruction. The jury was instructed to consider "the motives influencing the witness" and the witness' "bias or prejudice or interest in the outcome of the litigation."[92] The jurors were also instructed that they were "the sole judges of credibility of each person . . . and of the weight to be given to the testimony of each."[93] The Court brought further attention to Harris' credibility by the instruction regarding his prior felony convictions.[94]

The Court finds that on April 24, 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 testimony 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.[95]

When deciding whether there was any prejudice from the failure to give an accomplice instruction, the particular facts of the case and the strength of the evidence must be considered. There was significant, additional information before the jury that substantiated the accomplice's testimony. As noted above, Corey Hammond testified that he was there when the Defendant and Harris discussed and planned the robbery, and he testified that the Defendant had stated he needed money.[96] Further, subsequent to the incident, Hammond testified, the Defendant made the statement to him that the Defendant

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[92] April 24, 2008 Trial Transcript, 38:10-40:5.
[93] *Id*.
[94]*Id.*, 39:18-40:2
[95] *See Soliman*, 2007 WL 63359 at *2; *Cabrera*, 747 A.2d at 545; *Storey*, 314 A.2d at 194.
[96] *Purnell*, 979 A.2d at 1105; April 16, 2008 Trial Transcript, 30.

killed the victim because she would not give him what he was trying to steal.[97] Kelee Mitchell testified, largely through his 3507 statement because he claimed not to recall at trial much of what he previously told the police, that the Defendant bragged about committing the homicide, and said that the reason he killed the victim was because she recognized him.[98] The State introduced evidence that the Defendant had written letters threatening Mitchell for being a "snitch", and suggested that may have affected Mitchell's willingness to cooperate at trial.[99] Additionally, the State introduced a recording of a telephone call between Tramont Mitchell and the Defendant in which the Defendant, when asked, said he had "a lot" to do with the murder.[100]

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.[101] 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.[102] During closing argument, defense counsel argued that Harris' proffer and trial testimony were not credible because of the great plea deal he received

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[97] April 16, 2008 Trial Transcript, 37.
[98] April 15, 2008 Trial Transcript, 34-35.
[99] State's Ex. 11, 12, 15, 16, 17, 18 ; April 23, 2008 Trial Transcript, 107:6-109:8.
[100] State's Ex. 13; April 23, 2008 Trial Transcript, 90:21-23.
[101] Affidavit of Defense Counsel, 2-3.
[102] April 17, 2008 Trial Transcript, 169-176.

from the State.[103] 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.[104] Then, after he was identified as being at the scene of the shooting, he still did not name Mark Purnell as the shooter.[105] 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.[106] Defense counsel called the plea agreement "an offer you can't refuse."[107] Defense counsel pointed to inconsistencies between Harris' testimony and the testimony of other witnesses.[108] 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."[109]

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.

The pattern jury instruction the Court gave was adequate and counsel was not ineffective for not requesting anything additional. The first prong of the *Strickland* standard has not been met and therefore this claim must fail.

Even if the first prong was met, Defendant also fails to establish prejudice as required by the second prong. As discussed by the Supreme Court in both *Bland* and

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[103] April 23, 2008 Trial Transcript, 136-137.
[104] *Id*., 136:16-21.
[105] *Id*., 137.
[106] *Id*., 137.
[107] *Id*., 137:14.
[108] *Id*., 139.
[109] *Id*., 140:1-3.

Brooks, *Bland* instructions are most important when there is no independent corroborating evidence.[110] 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. Because there were independent corroborating circumstances implicating Purnell in the murder/attempted robbery aside from Harris' post-plea testimony, Purnell cannot demonstrate the prejudice required by *Strickland*'s second prong. Accordingly, the Defendant cannot sustain a claim of ineffective assistance of counsel on this ground.

B. It was not ineffective for counsel not to request a jury instruction regarding Harris' guilty plea.

Next, Purnell asserts that counsel was ineffective for failing to request a jury instruction concerning the effect of Harris' guilty plea. Purnell also appears to argue that trial counsel was ineffective for failing to appeal the denial of defense counsel's request to have a new jury empanelled.

In the present case, Harris' plea agreement was used by defense counsel to show Harris' strong motivation for testifying as to what Harris believed the State wanted to hear, to save himself. Harris' plea agreement, itself, was not being used as evidence of Purnell's guilt, and Purnell fails to suggest any specific cautionary instruction that would have saved his case.

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[110] The language in the instructions in both cases is identical:

> This rule becomes *particularly important* when there is *nothing in the evidence*, direct or circumstantial, *to corroborate* the alleged accomplices' accusation that these defendants participated in the crime. *Without such corroboration*, you should not find the defendants guilty unless, after careful examination of the alleged accomplices' testimony, you are satisfied beyond a reasonable doubt that it is true and you may safely rely upon it.

Brooks, 40 A.3d 348; *Bland*, 263 A.2d at 289-290(*emphasis added*)

Defendant relies on *Allen v. State*[111] to support his contention that a limiting instruction is required. However, the facts in *Allen* significantly differ from this case. In *Allen*, the Supreme Court's decision to remand for a new trial was based on the fact that a co-defendant, whose plea agreement was introduced into evidence, did not testify at trial.[112] Because this co-defendant did not testify, "there was no justifiable basis for introducing his guilty plea into evidence."[113] The Court held that it had "no basis to conclude that the jury did not use the plea agreement as substantive evidence of Allen's guilt, to bolster the testimony of [another co-defendant] or to directly or indirectly vouch for the veracity of [another co-defendant] who pled guilty and testified against Allen at trial."[114]

There is not an issue of a non-testifying co-defendant's plea agreement being entered into evidence in Purnell's case. Harris took the stand and testified against Purnell. Harris was subject to rigorous cross-examination and the jury was free to make inferences as to Harris' motivation for testifying, as was argued to them by defense counsel. The failure to give a limiting instruction to the jury regarding Harris' plea agreement does not constitute harmless error, and, it was not ineffective for defense counsel not to request a jury instruction regarding Harris' guilty plea.

As regards the related matter, Defense counsel did request a new jury be empanelled, but the request was denied by the court.[115] Defense counsel stated in his affidavit that he did not raise this issue on direct appeal because he did not believe that it

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[111] *Allen v. State*, 878 A.2d 447, 450-51 (Del. 2005).
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] April 8, 2008 Trial Transcript, 17-18.

would have been successful.[116] 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.[117] 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.

C. Defense counsel was not ineffective for failing to object to what Defendant claims is "vouching" for the credibility of a State witness.

Finally, Purnell states that counsel was ineffective for failing to object to prosecutorial "vouching" for the credibility of Harris. At trial, the prosecutor asked Harris whether the out-of-court statements he made to the police were true,[118] prior to offering those statements pursuant to 11 *Del. C.* § 3507. The prosecutor is required to ask these questions to lay a proper foundation for the admission of the statements into evidence pursuant to 11 *Del. C.* § 3507.[119]

Purnell has argued that this practice constitutes vouching and challenges the Court's rulings in *Feleke* and *Ray*. While Purnell may challenge the procedural requirements established by the Delaware Supreme Court regarding the introduction of statements pursuant to 11 *Del. C.* § 3507, the procedure used in Purnell's trial was in conformity with the Supreme Court's pronounced requirements. It was, therefore,

[116] Affidavit of Defense Counsel, 3-4.
[117] *Id*.
[118] April 17, 2008 Trial Transcript, 155-59, 177-78.
[119] *See Washington v. State*, 62 A.3d 1224, 2013 WL 961561 at *2 (Del. Mar. 12, 2013)(TABLE); *Woodlin v. State*, 3 A.3d 1084, 1087-89 (Del. 2010); *Feleke v. State*, 620 A.2d 222, 226-27 (Del. 1993); *Ray v. State*, 587 A.2d 439, 443 (Del. 1991). A two-part foundation must be established before a witness' out of court statement may be offered into evidence pursuant to 11 Del. C. § 3507. First, the witness must testify as to the truthfulness of the statement. *Feleke*, 620 A.2d at 226-27(citing *Ray*, 586 A.2d at 443).

appropriate for the prosecutor to ask Harris whether his out-of-court statements were truthful in order to establish a proper foundation for the admission of the statements into evidence. Accordingly, the Defendant cannot sustain a claim of ineffective assistance of counsel on this ground.

NOW, THEREFORE, after careful and *de novo* consideration of the record in this matter, and finding that all of Defendant's claims for relief are without merit,

IT IS HEREBY ORDERED the Motion for Postconviction Relief is **DENIED.**

/s/
M. Jane Brady