EFiled: Jun 13 2024 06:41AM EDT
Filing ID 73380830
Case Number 148,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO,	)	
	)	
Defendant Below,	)	
Appellant,	)	No. 148, 2024
	)	
v.	)	ON APPEAL FROM THE
	)	SUPERIOR COURT OF THE
STATE OF DELAWARE,	)	STATE OF DELAWARE
	)	ID No. 1502007987
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

Megan J. Davies, Esq. (#6777)
Law Offices of Megan J. Davies
716 N. Tatnall Street
Wilmington, DE 19801
mjd@mjdavieslaw.com
(856)671-1188

Attorney for Appellant

Dated: June 13, 2024

Table of Contents

TABLE OF AUTHORITIES

Cases

Rules

NATURE OF PROCEEDINGS

On February 16, 2015, an indictment was returned against Defendant/Appellant, John Brisco ("Brisco") and several codefendants charging, among other offenses, gang participation, three counts of first degree-murder, and related firearms charges for the homicides of Ioannis Kostikidis, Devon Lindsey, and William Rollins.[1] Brisco was a juvenile at the time of the homicides. [2] A reverse amenability hearing took place. Brisco was waived to Superior Court where he stood trial for: (1) Gang Participation occurring from January 2013 to September 2015; (2) the February 6, 2013 death of Kostikidis and related counts; (3) the January 18, 2015 death of Lindsey and related counts; (4) the January 24, 2015 death of Rollins and related counts; and (5) charges related to weapons and ammunition offenses resulting from a search of Brisco's bedroom.[3]

Brisco was acquitted of the First Degree Murder of Devon Lindsey and all related counts. He was acquitted of First Degree Murder of Ioannis Kostikidis under the intentional murder theory as well as Possession of a Firearm during the commission of an intentional murder. Brisco was convicted the First Degree Felony Murder of Kostikidis as well as the Possession of a Firearm During the

[1] A. 32- 92
[2] Exhibit A at 2. To the extent there is no disagreement between the parties the Appellant adopts the facts in the Superior Court's Order.
[3] Exhibit A at 2

Commission a Felony Murder. He was convicted of the First Degree murder of Rollins, possession of a firearm during the commission of a felony, and all other counts.[4]

On July 21, 2017, Brisco, was sentenced to two life sentences plus 35 years of incarceration followed by community supervision.[5]

Brisco's convictions and sentences were affirmed by this Court on direct appeal. *Brisco v. State,* 186 A.3d 798 (Del. 2018)

A timely Motion for Post Conviction Relief ("Rule 61 Motion") was filed on November 7, 2018.[6] On July 17, 2023, appointed counsel filed an amended Rule 61 motion and brief.[7] Brisco's trial attorney filed an affidavit in response to the allegations raised in the Rule 61.[8] On February 21, 2024, the State filed its Response.[9] On April 9, 2024, the Superior Court issued its Decision denying Brisco's Rule 61 Motion.[10]

Brisco filed a timely Notice of Appeal.[11] This is Appellant's opening brief.[12]

---

[4] Exhibit A, at 2-3
[5] Exhibit A at 3
[6] A. 93- 96, Docket No. 89
[7] A.97- 153, Docket No. 157
[8] A. 154 – 160, Docket No. 161
[9] A. 161 – 278, Docket No. 162
[10] Attached to this Opening Brief as Exhibit A
[11] A. 279-280
[12] Appellant raised seven claims of ineffectiveness below, he seeks review by the Court of four issues.

SUMMARY OF ARGUMENT

1. The defendant's trial attorney was ineffective under *Strickland v. Washington* when he failed to understand and investigate GPS location evidence. This failure resulted in trial counsel misadvising his client on the likelihood of success at trial, and advancing a deeply flawed defense to the jury.

2. The defendant's trial attorney was ineffective under *Strickland* when he failed to object to impermissible and prejudicial "expert" testimony.

3. The defendant's trial counsel was ineffective under *Strickland* in failing to object to improper warnings given to the State's cooperating witnesses, which compelled them to testify.

4. The Superior Court erred in failing to assess the cumulative impact of the defendant's claims and/or failed to grant a necessary evidentiary hearing.

STATEMENT OF FACTS[13]

Appellant provides a general overview of the facts relevant to this appeal. Additional facts that are pertinent to the claims raised in this appeal are set forth in the Argument section which follows.

The Ioannis Kostikidis Homicide and related Charges

On the evening of February 6, 2013, Kostikidis was shot and killed. The crime occurred at the 600 block of Tattnall Street.[14] The cause of death was a gunshot wound to the left arm.[15] A spent 9-millimeter casing was found at the scene.[16] A live 9-millimeter round was found nearby, in front of 307 West Sixth Street.[17] No DNA or fingerprints tied Brisco to these items.

Kina Madric testified that on February 6, 2017, she resided at 612 N. Tatnall Street with her then boyfriend.[18] Jakeem Broomer and his friend, Corvon Hammond, had come to the house to speak with Jakeem's father (Madric's boyfriend). Shortly after 8:00pm, two more boys came to the door looking for Broomer.[19] Madric identified Brisco as one of the boys, however admitted she did not see him with a gun. She did not see where the two boys went when they left

---

[13] *See State v. Brisco*, No. 1502007987 (Del. Sup. Ct. April 9, 2024); *Brisco v. State,* 186 A.3d 798 1170 (Del. 2018)
[14] N.T. 3/7/2017, 63, 112
[15] N.T. 3/9/17, 29
[16] N.T. 3/7/17, 84
[17] N.T. 3/7/17, 90
[18] N.T. 3/8/17, 28
[19] N.T. 3/8/17, 31

her front steps.[20] Broomer and Hammond left the house after the other two boys had gone.[21]

While lay witnesses and Brisco's GPS monitoring bracelet placed him the area of the Kostikidis homicide, only two witnesses indicated that Brisco committed the crime. Both were cooperators who provided this information well after the occurrence of the murder.

Corvon Hammond was an uncooperative witness who, at trial, denied any memory of the day in question.[22] Hammond's statement was played for the jury pursuant to §3507.[23] In his recorded statement, Hammond indicated that he was outside on the step with Brisco and Damiere Wisher when Brisco and Wisher told Hammond they were going to rob someone. An individual walked by and Wisher told Hammond they were going to rob that person. Hammond did not see the robbery or shooting, but heard the gunshot.[24]

Jakeem Broomer also proved to be an uncooperative witness, initially refusing to answer any questions.[25]Again, the recorded statement was played pursuant to §3507. This witness had given three prior statements. It was not until his third statement, given almost one year after the homicide and while he was

[20] N.T. 3/8/17, 41
[21] N.T. 3/8/17, 41
[22] N.T. 3/8/17, 79, 84-85
[23] N.T. 3/8/17, 98
[24] *Id.*
[25] N.T. 3/9/17, 35

facing his own robbery charges, that Broomer implicated Brisco. Broomer stated that he called Brisco the night of the homicide and Brisco told him that he had shot the victim using a 9-milimeter during a robbery gone bad.[26]

On the date of the homicide, as a condition of his juvenile probation, Brisco was equipped with a GPS monitoring device.[27] A report detailing his movements was entered into evidence without objection.[28] According to the report, for a period of 16 minutes, from 8:42:03pm to 8:58:04pm, Brisco was located at 641 North Tatnall Street.[29] The homicide had occurred at 603 North Tatnall Street. Over objection, the probation officer testified that there was a 30 meter range of accuracy, in any direction, from the location noted in the report.[30] Probation Officer Robert Johnson testified that the address was generated through cell phone towers utilizing a triangulation method to get the most approximate address.[31] He further testified that there was not an actual residence or business at 641 North Tatnall Street.[32]

<u>The Murder of Devon Lindsey and Related Charges</u>

[26] Exhibit A at 5
[27] Exhibit A at 6
[28] A. 304 - 305
[29] N.T. 3/15/17, 165
[30] A. 295
[31] A. 299 - 300
[32] A. 292

Brisco was acquitted of these charges. Therefore, no detailed statement of facts is necessary for the determination of the merits of Brisco's appeal.

The William Rollins Homicide and Related Charges

On January 24, 2015, William Rollins was shot and killed in the area of 21st and Washington Street. The cause of death was multiple gunshot wounds to his head and upper body. Shell casings from the scene matched a gun found on co-defendant McCoy when he was arrested. A second gun connected to the crime was found in McCoy's residence when a letter from McCoy to Brisco, asking Brisco hide the gun, was intercepted. [33]

This time, only one individual, another cooperating witness, claimed Brisco was the perpetrator of the homicide. Karel Blalock, who was facing robbery and firearms charges, testified that he had a conversation with Brisco about the Rollins homicide in February of 2015.[34] Blalock did not come forward to law enforcement until five months later, when he was himself charged with robbery and weapons offenses. At the time he spoke with law enforcement, Blalock was facing a minimum of 12 years and a maximum of at least 100 years in prison.[35] Blalock indicated that Brisco confessed to him participation in both the William Rollins

[33] *Id.*
[34] N.T. 3/13/17, 21
[35] N.T. 3/13/17, 36

and Devon Lindsey homicides. Brisco was acquitted of any involvement in the Lindsey Homicide.

ARGUMENTS

I. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE UNDER STRICKLAND WHEN HE ARGUED A FATALLY FLAWED ALIBI TO THE JURY AND INCORRECTLY ADVISED HIS CLIENT SUCH AN ALIBI EXISTED.

Question Presented: Whether the defendant's trial attorney was ineffective when he failed to investigate and understand GPS location evidence, resulting in counsel (1) arguing a fatally flawed alibi defense to the jury and (2) advising the defendant, during plea negotiations, that a strong alibi existed. This issue was raised in the court below in Brisco's Amended Rule 61 Motion. (A. 111 – 126, Docket No. 157)

Scope of Review: This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion. *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013). A *de novo* standard is applied to legal questions and constitutional questions. *Id.*

Merits of the Argument: The Superior Court erred in dismissing Mr. Brisco's motion for postconviction relief based upon his counsel's presentment of a fatally flawed alibi defense. The Court's findings did not rely upon accurate facts and law. Trial counsel was ineffective at both the plea and trial stages and Brisco was prejudiced.

At the time of the Kostikidis homicide, Brisco was wearing a GPS monitoring bracelet. Counsel argued to the jury that the GPS records "exonerated"

Brisco of the murder. The murder occurred at 603 Tatnell Street in Wilmington, Delaware. At the time of the homicide, Brisco's GPS location displayed further down the block, at 641 Tatnell Street. Trial counsel told the jury, "What those ankle bracelet records don't say was he was at 603 Tatnell. They say he was at 641 Tatnell. There's a difference. If [Brisco] was at 603, the records would say it. So those GPS records, they don't implicate John, they exonerate him."[36]

In reality, the records in no way exonerated Brisco. Anything more than the most cursory review of the records would have shown that the GPS report provided a location range, not an exact location. For Mr. Brisco, his bracelet placed him squarely in the range of the homicide at the time of the crime. The evidence at trial unquestionably confirmed this for the jury. Counsel's argument otherwise was both unsound and detrimental.

In denying Brisco's claim, the Superior Court found that there was no deficient performance because: (1) trial counsel's affidavit, refuting ineffectiveness at both the plea and trial stages, was credible; (2) trial counsel did not limit his arguments to the GPS location data and; (3) trial counsel's use of the "potential alibi" was tactical in nature and attorneys have "wide latitude" in making such decisions under *Strickland*.

Brisco addresses each of these in turn.

[36] A. 284

Reliance on Trial Counsel's Affidavit (Trial Stage):

While the court relied heavily on counsel's affidavit, the affidavit itself was wholly inconsistent with the record made both at trial and on appeal.

Firstly, trial counsel summarized Brisco's claim in a manner which altered the claim and therefore alleviated counsel of wrong doing. Counsel wrote:

> "petitioner argues that counsel should not have raised the discrepancy since the State could respond with their margin of error argument. Counsel submits it would be gross deviation to ignore this discrepancy." […] "Petitioner argues the defendant should have abandoned the argument or not made any reference to the discrepancy in the GPS report because the error could be explained that it was in the margin of error. There is a difference between an argument being infallible and [an] argument being flawed. Although this argument may not be infallible it certainly was not flawed."[37]

This statement was not responsive to Brisco's claim. Brisco's claim was not that trial counsel was ineffective for pointing out a discrepancy in the State's evidence. Brisco's claim was that trial counsel argued to the jury that the records were fully exonerating, when they were not. In fact, had trial counsel merely argued to the jury that the records could do no more than confirm the defendant was in the general area, not undoubtedly prove he was at the scene of the homicide, Brisco would have raised no claim. That is not, however, what counsel did. In light of overwhelming evidence to the contrary, trial counsel took the position that the GPS records served as an alibi. There is a stark difference between telling a jury

[37] A. 155

that the State's evidence cannot satisfy the burden of proof, versus telling jurors that the State's evidence exonerates the defendant. One argument is credible and effective, the other is contradictory to clear evidence and loses the trust of the jury.

While counsel now states that he was simply pointing out a discrepancy, the record is clear – trial counsel argued, and always intended to argue, an alibi defense. In his cross of Johnson, counsel spent significant time, ineffectively, trying to show Johnson could not support his position that a recorded location was within a thirty meter range.[38] In his closing argument, counsel directly informed the jury that the GPS records did not implicate Brisco, they "exonerated" him.[39] Counsel's arguments before this Court confirm the trial record- counsel was always arguing an alibi, not just a discrepancy:

- "The GPS **records were a definitive alibi** which put Brisco at the other end of the block when the crime occurred." [40]

- "This witness was allowed to present speculative evidence or opinion, as if he was a qualified expert, that **eviscerated the alibi**."[41]

[38] A. 296 – 303 This cross however, was entirely unsuccessful as trial counsel ultimately reaffirmed that the bracelet system used cell tower coordination, which uses the towers to triangulate the location of the individual. He brought out testimony that the waves don't always go to the closest tower and that the waves can bounce off of things like water – reiterating that the location cannot be pinpoint accurate.
[39] A. 284
[40] A. 334, Reply Brief in appeal of trial conviction authored by trial counsel
[41] *Id.*

- "The State put the GPS records from the ankle bracelet into evidence and we didn't object to that because **it showed my client wasn't at the murder scene** at the time it occurred."[42]

- "The witness's unsupported opinion that the range of accuracy of the device showed that the defendant could be at the scene of the crime was grossly unfair, prejudicial, **incriminated the defendant unfairly and eviscerated his alibi.**"[43]

Based upon his Affidavit, it appears trial counsel now recognizes he *should* have made a discrepancy argument, not an exoneration argument. But, that is not what he did.

Not only did counsel's affidavit lack credibility when he altered Brisco's claim, it should not have been deemed credible when counsel affirmed that he, "fully understood and investigated the GPS evidence." Again, the record demonstrates otherwise.

The GPS report, on its face, demonstrated that the locations were not exact, but close approximates. Trial counsel was aware that, on the night of the homicide Brisco departed his residence at 6PM and returned to his residence at 10:50 PM.[44] There was no dispute that Brisco had spent the night in his own home, located at 409 North Madison Street. However, the actual address noted in the GPS report was 447 North Madison Street[45] – a discrepancy of 262 feet. The distance between

[42] A. 306, trial counsel's oral argument before DESC
[43] A. 336, Reply Brief on Appeal of Brisco's trial conviction authored by trial counsel.
[44] A. 117, A. 453
[45] A. 302 (note the records are in central time, Exhibit A at 10)

603 Tatnall (the crime scene) and 641 Tatnall (the GPS location) was even less than that - only 135 feet. This short distance was one that, as this Court pointed out in 2018, could be closed in under thirty seconds.[46]

Moreover, on its face, it was clear the report did not list every location where Brisco had stood during the course of a day. For example, the reported location jumped from 641 Tatnall Street (the area of the crime) to 447 N. Madison Street (the area near Brisco's home), a distance of about a half a mile. Given that Brisco cannot teleport, he must have been present at multiple locations between the two addresses as he traveled from one to the other. In fact, by the time oral argument occurred before this Court in 2018, counsel was forced to admit that he could not interpret the records to mean that the defendant had remained statically at 641 Tattnall Street for the entire 16 minutes captured by the report.[47]

A plain reading of the GPS record, available well before trial, should have made it clear to competent counsel that no alibi defense existed. If, for some reason, counsel still thought an alibi argument could be possible, he had a duty to thoroughly investigate that argument. As this Court pointed out in 2018, that would include reviewing the manual for the GPS bracelet, something counsel did not do.[48]

[46] A.314
[47] A. 315-16
[48] A.309

Despite being inconsistent with the record, the Superior Court determined counsel's affidavit was credible, finding:

> "trial counsel flatly denied that he misunderstood the GPS location or misadvised Brisco about it. His affidavit and the record at trial reflect that counsel made the tactical decision to rely on this to establish a potential alibi for Brisco. Trial counsel did fully understand the GPS evidence, which was that a shooting occurred on a Wilmington city block populated by row houses and that Defendant was at an address different from the location of the shooting, however at the end of the same block."[49]

Not only did the court err in finding counsel's affidavit credible, given it was contradicted by the record, but the court abused its discretion in relying upon incorrect facts. The court held that trial counsel fully understood the evidence which was that the defendant "was at an address different from the location of the shooting." As outlined above, that was never a proper interpretation of the evidence. The GPS record did not conclusively show the defendant was actually located at an address different from the shooting. A competent reading of the report could only reveal the defendant was within a range of the location listed on the GPS report – a range that encompassed the location of the shooting. This was confirmed by the evidence at trial.

Trial Counsel's Affidavit (Plea Stage):

[49] Exhibit A at 16-17

In denying Brisco's claim in relation to the plea stage, the Superior Court found that there was no evidence that trial counsel put pressure on the defendant to reject the plea.[50] The court accepted counsel's affidavit that at no time did he advise Brisco to reject the plea.[51] The court then relied on *Urquhart v. State,*[52] to find that the "arguments that counsel misadvised [Brisco] about the strengths and weaknesses of the State's evidence do not establish counsel's ineffectiveness."[53]

Brisco submits that the law does not require that counsel expressly told a defendant to reject a plea, or pressured a defendant to reject a plea, in order for counsel to be ineffective at the plea stage. For Brisco to show ineffectiveness at the plea stage, he needs to demonstrate that, "but for ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, the court would have accepted its terms, and that the conviction or sentence would have been less severe than under the actual judgement and sentence imposed.[54]

Brisco submits that the court's interpretation of *Urquhart* is an incorrect finding of law. In fact, it appears from *Urquhart* that discussions on the likelihood of acquittal, which presumably would include whether or not a definitive alibi exists, are requirements of adequate consultation.

---

[50] Exhibit A at 15
[51] *Id.*
[52] 203 A.3d 719 (Del. 2019)
[53] Exhibit A at 15
[54] *Lafler v. Cooper*, 566 U.S. 156, 162 (2012)

Looking at whether advice was effective at the plea stage involves more than just determining whether a defendant was advised to accept or reject a plea. Of equal, if not greater, importance is whether the defendant was advised on trial strategy and the strengths and weaknesses of the evidence. The choice to accept or reject a plea belongs entirely to a defendant. Therefore, it is counsel's role at the plea stage to provide a defendant the information he needs to make an informed choice.

Moreover, Brisco notes that counsel's affidavit does not deny that he advised Brisco that GPS records provided him an alibi for the Kostikidis murder. On appeal, trial counsel repeatedly told this Court that his client had an alibi defense. Trial counsel argued that alibi defense to the trial jury. It is only logical he would have told his client of the same defense.

Surely, being informed that there was a "definitive alibi," would influence a decision to accept or reject a plea. But for this incorrect advice, there existed a reasonable probability that a plea would have been entered.[55] The Superior Court erred in finding otherwise. At minimum, the court should have ordered an evidentiary hearing as to the claim of ineffectiveness at the plea stage.

[55] There is no opinion by the Superior Court that Brisco did not meet the other requirements, and he would have. The plea was to substantially less than the sentence after trial. It was in writing supporting the proposition it would have been presented to the court if signed. Brisco was a juvenile at the time of the offenses and the plea called for him to admit to lesser offenses than the third degree murder for which he was charged. Additionally, the State's case relied largely on cooperating witnesses with criminal records and other credibility issues.

Counsel's arguments were not limited to the GPS location data:

The Superior Court found that trial counsel was not ineffective because he did not solely rely on the alibi defense, but pursued other litigation strategy.[56] Brisco submits that, in arguing an alibi defense that was entirely refuted by clear and credible evidence, trial counsel lost the trust and confidence of the jury.

For guidance, Brisco directed the Superior Court to the Second Circuit Decision in *Poole*, which found that, "there is nothing as dangerous as a poorly investigated alibi […] a poorly prepared alibi is worse than no alibi at all."[57] While *Poole* may not be binding on this court, it expresses something every competent defense counsel knows, an inaccurate alibi is very dangerous. No alibi should be argued that hasn't been thoroughly investigated, tested, and prepared. It must be able to hold up to challenge. The alibi trial counsel presented was one which no reasonable juror could believe.

Once counsel raised a fatally flawed alibi, any other arguments he made were tainted. Trial counsel's additional arguments focused on witness credibility. It is unpersuasive to argue another's lack of credibility when you yourself have lost yours. Moreover, in focusing on a discredited alibi, counsel failed to point out pivotal weaknesses in the State's case. While evidence placed Brisco in the area of

[56] Exhibit A at 12
[57] *Henry v. Poole*, 409 F.3d 48, 65 (2d Cir. 2005).

the crime, only two individuals were able to testify that Brisco actually perpetrated the crime. Both ended up cooperating with the State to implicate Brisco. Both became uncooperative at the time of the trial.

Corey Hammond's statement was played for the jury. He stated that he was outside at the time of the shooting. Shortly before the shooting, he observed Brisco with a 9-milimeter handgun. He heard Brisco say he was about to rob someone. He then saw Brisco and co-defendant Wisher follow someone down the street and heard the gunshot. Hammond had originally been a suspect himself. The State argued Hammond was credible because he said he saw Brisco with a 9 millimeter and 9 millimeter shell casings were found at the scene. Counsel failed to point out to the jury that, in Hammond's recorded statement it was law enforcement, not Hammond, that first stated Brisco had a 9-milimeter gun. He further failed to point out that two other lay witnesses placed Hammond inside at the time of the crime, not outside where he could have observed Brisco following his supposed robbery target.

The second cooperating witness was Jakeem Broomer. Broomer's statement was given a year after the homicide, and only after he was charged with a serious robbery. It was then that Broomer told officer's Brisco had confessed to him. Trial counsel failed to point out to the jury that, when Broomer came looking for a deal, it was law enforcement who initially suggested to him that Brisco was the shooter.

The Superior Court erred in finding that the defendant was not prejudiced by the argument of a false alibi because counsel made some arguments outside of the alibi. Counsel's reliance on a fatally flawed alibi was a colossal blunder which destroyed an otherwise strong defense and cost Brisco a reasonable chance of a different outcome.

Trial Counsel's decision was tactical and within the "wide latitude" he is afforded:

The Superior Court held that trial counsel's conduct fell within the "wide latitude" afforded trial attorneys when making tactical decisions. "Trial counsel made a tactical decision to rely on the evidence to establish a potential alibi for Brisco."[58]

While it is true that strategic decisions are provided a strong presumption of effectiveness, those decisions must first be found to have been made after a thorough investigation of law and facts relevant to plausible options.[59] "If there is more than one plausible line of defense, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting.[60]

[58] Exhibit A at 16
[59] *Green v. State*, 238 A.3d 160, 174 (Del. 2020)
[60] *Strickland*, 466 U.S. 668, 681 (1984)

This was not a case where trial counsel made a strategic choice to advance a "fallible"[61] defense after a thorough investigation of law and facts and after weighing other options. This was a case where counsel had all of the information available to him, well before trial, to recognize that there was no alibi defense, but failed to competently review that evidence. This was a case where, even when his alibi theory was entirely discredited during the State's case-in-chief, trial counsel clung fast to the fatally flawed defense in closing. No competent counsel, having adequately reviewed the records, would have argued an alibi defense.

The jury had seen multiple maps of the area of the crime. They were able to view the close distance between 603 Tatnall and 641 Tatnall. The jury heard that the GPS bracelet placed Brisco *near* his home address at a time he no one denied he was actually at his home. The jurors heard from Probation Officer Johnson that the GPS bracelet used cell towers to get the most approximate address and that the wearer can be within a 30 meter range, in any direction, of the address shown in the report. Trial counsel's cross of the probation officer did nothing to dissuade the jury of this understanding. In fact, the cross examination which focused on the use of cell phone towers, served to confirm that the bracelet locations could not be strictly construed.[62] ("The waves from these devices, they can bounce off towers or

[61] Counsel referred to his defense as "fallible" but not flawed.
[62] A296 – A302

go to not necessarily the closest tower, is that correct?")[63] No reasonable juror could have construed the GPS report to read that Brisco remained stationary, 135 feet from the crime, at the time of the crime. The trial evidence was clear - the report provided approximates. It did not, and could not, provide an alibi.

When trial counsel indicates that he made a strategic decision, Brisco's burden is to demonstrate that, under the circumstances, the challenged action cannot be considered sound trial strategy.[64] Brisco has done so. Counsel's incorrect adherence to, and emphasis on, the "exonerating" GPS records evidence, was a representation that fell far below an objectively acceptable level of professional competence and Brisco was prejudiced as a result.

Conclusion:

For all of the foregoing reasons, the Superior Court abused its discretion in denying Brisco's claim related to the investigation and understanding of GPS records.

[63] A300
[64] *Green*, 238 A.3d 160, 689

II. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE UNDER STRICKLAND WHEN HE FAILED TO OBJECT TO IMPERMISSIBLE EXPERT TESTIMONY.

Question Presented: Whether the defendant's trial attorney was ineffective when he failed to object to testimony from the State's expert with a proffered expertise in "gang investigations with a minor in social media investigations." This issue was raised in the court below in Brisco's Amended Rule 61 Motion. (A. 126 – 136. Docket No. 157)

Scope of Review: This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion. *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013). A *de novo* standard is applied to legal questions and constitutional questions. *Id.*

Merits of the Argument: The Superior Court erred in dismissing Brisco's motion for postconviction relief based upon his counsel's failure to object to testimony which (1) did not qualify as expert testimony under D.R.E. 702; (2) did not alternatively qualify under D.R.E. 701; (3) exceeded the permissible bounds of dual officer/expert testimony; and (4) served as improper summary testimony not permissible through an expert witness. The Superior Court's finding that there was no basis for such an objection, and that Brisco was not prejudiced, relied upon incorrect law and facts.

Flaherty's Opinions as an Investigations Expert Were Inadmissible under 702:

The court held that Detective Flaherty was "unquestionably qualified to have testified as an expert in gang activity."[65] However, Flaherty was not proffered as an expert in gang activity. Flaherty was proffered as an expert in gang and social media investigations. In his Rule 61 claim, Brisco did not take issue with gang experts generally, but with this this so-called "investigations" expertise. Brisco readily acknowledged that gang experts are widely recognized and utilized in litigation, but noted that he could he could locate no case which recognized "investigations" experts.

Officer experts became commonplace in trials beginning in the 1980s. The purpose of such experts, in relation to gang cases, has been to provide a comprehensive overview of the gang in question, and introduce jurors to a criminal world they would not otherwise understand.[66] Historically, this has included explaining the operation, symbols, jargon, and internal structure of a gang.[67]

While, traditionally, a gang expert would explain how gangs operate, presumably, a gang and social media *investigations* expert, would testify to how a

---

[65] Exhibit A at 19

[66] *See, e.g., United States v. Tocco*, 200 F.3d 401, 419 (6th Cir. 2000) ("[E]vidence regarding the inner-workings of organized crime has been held to be a proper subject of expert opinion because such matters are 'generally beyond the understanding of the average layman"

[67] *United States v. Mejia*, 545 F.3d 179, 190 (2nd Cir. 2008)("[L]aw enforcement officers may be equipped by experience and training to speak to the operation, symbols, jargon and internal structure of criminal organizations.); *United States v. Feliciano*, 223 F.3d 102, 109 (2d Cir. 2000) (upholding gang expert testimony about "the structure, leadership, practices, terminology, and operations of [the gang] Los Solidos")

case was investigated. Such "expert" testimony could only serve to allow the witness to describe the investigation and, as an "expert," to award credibility to the actions of the investigators and to validate officers' beliefs in a defendant's guilt. What opinion can an investigations expert offer other than that his investigation was proper and his belief of guilt is correct? Such testimony goes far beyond the accepted purpose of gang expert testimony, and runs afoul of permissible expert testimony.

Trial counsel was ineffective in failing to request a *Daubert* hearing as Flaherty's opinions as a investigations expert were inadmissible under the rules of evidence and not the product of reliable principles and methods. The court erred in finding otherwise.

Delaware Rule of Evidence 702 is intended to track with the Federal Rule of Evidence. (D.R.E. 702, comments). F.R.E. 702 requires that the court serve as a gatekeeper and find impermissible expert conclusions which go beyond what the expert's basis and methodology may reliably support. Recently, the Advisory Committee on the Federal Rules of Evidence made it clear that the courts have not been performing their gatekeeping function as rigorously as originally intended. If the witness is relying solely or primarily on experience, which Flaherty was, "then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is

reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it."[68]

Flaherty's "expert" testimony immediately and repeatedly ran afoul of those 702 requirements. Under Rule 702, Expert testimony is not admissible when its sole aim is telling the jury which conclusion to reach, when it infringes on the jury's right to make credibility assessments, and when the subject of the testimony is not the witness's scientific, technical, or other specialized knowledge.

At the outset of his testimony, Flaherty told the jury that, for him to even have investigated the group, there had to have been a predicate offense committed.[69] He later went on to specifically, in his expert opinion, inform the jury that he had directly tied Brisco to all three predicate homicides for which he stood trial.[70] This testimony goes far beyond acceptable gang expert testimony and beyond permissible 702 expert testimony.

Brisco was certainly prejudiced when the jury heard from an "expert" that the "expert" had determined predicate offenses had been committed and Brisco was specifically tied to the three predicate homicides for which he stood trial.

<u>Flaherty's Opinions were Not Alternatively Admissible Under D.R.E. 701:</u>

---

[68] Fed. R. Evid. 702, Advisory Committee Notes for the 2000 Amendments
[69] A. 350, 447
[70] A. 434 - 436 ("A. you know as a part of the validation of the gang is multiple crimes that occur within the gang, so I have listed some of the crimes that I have tied to specific members of TMG.
Q. Do you want to go through and talk about the members that are tied to each one.
A. Yes.")

The Superior Court further found that, to any extent Flaherty testified beyond the role of an expert witness under D.R.E. 702, the testimony was unobjectionable because Flaherty was also permitted to provide lay opinion testimony under D.R.E. 701. Brisco submits this is an improper finding of law.

Lay opinion testimony cannot be based on hearsay or speculation. It further cannot be used to disguise expert testimony, and it cannot usurp the function of the jury. Brisco raised multiple area of problematic testimony which were not admissible under either D.R.E. 701 nor D.R.E. 702.

For example, Flaherty was permitted to testify that some of the rap lyrics written by Brisco "reminded him" of the homicides he investigated, homicides for which Brisco was then on trial.[71] This is not expert opinion, this is not lay opinion, this was the State's argument coming in through the State's "expert". While an expert witness could interpret slang words in lyrics for the jury, (i.e. "chopped" means "shot at")[72] the rules of evidence do not permit him to opine as to what the lyrics "reminded" him of. If Flaherty was supposedly testifying to this information under D.R.E. 701, it is entirely irrelevant what the lyrics "reminded" him of. The relevant exchange was as follows:

A. The 'little Torrin wasn't talking like he about it when he got his car chopped.' To me, that would be his car, 'chopped' would be shot at.

[71] A.426
[72] A.426, 427

Q. An through your investigation and reviewing all of the cases and working with Detective Nowell, **did that ring true to any particular case**?"

A. **Yes, the Devon Lindsey homicide**.

Q. And how about if we were going back up: pull up on the opp block, slide doors and get to clappin, **did that, if any case, remind you of one**?

A. **Yes, the same, the Devon Lindsey homicide**."[73]

"Q. What's the next line?

A. Last nigga dissed the squad caught 12 on the dot.

Q. **Does that ring true to any case you've been looking into**?

A. **Yes, the Billy Rollins homicide."[74]**

This testimony was inadmissible under D.R.E. 701 or 702. Counsel was ineffective in failing to object. Brisco was prejudiced. Flaherty was the last witness of the trial and spent almost a full day testifying. In sum, he was able to make the State's entire closing argument for them, supporting their beliefs of guilt in his "expert" role. Telling the jury that Brisco had committed certain predicates and that Brisco had written rap lyrics discussing them were determinations for the jury to make.

Flaherty's testimony otherwise ran afoul of permissible dual witness testimony:

In denying Brisco's claim, the Superior Court relied in part on *Hardin*.[75] Citing this Court's opinion in *Hardin*, the Superior Court wrote, "The Delaware Supreme Court has concluded that 'police officers frequently testify as both fact and expert witnesses' and has not found a 'persuasive reason' to 'interrupt that

[73] A.427

[74] A.427

[75] *Hardin v. State*, 844 A.2d 982 (Del. 2004)

practice.'" Brisco does not disagree. Brisco never took issue with utilization of dual experts generally. Brisco's claim dealt with the testimony of the dual expert in his trial, which he submitted exceeded permissible bounds of dual expert testimony. Brisco submits that the *Hardin* opinion is actually supportive of his arguments.

To be clear, *Hardin* does not hold that this Court finds all testimony couched as "dual witness testimony" to be appropriate. This Court found the testimony in *Hardin* appropriate, in part, because it determined that the witness's opinion testimony first qualified as expert testimony under D.R.E. 702. (something Brisco argues was not true here). In *Hardin*, this Court found that there was no risk that the dual witness testimony would confuse the jury or bolster its assessment of the witnesses' factual testimony. The role of the dual witness in *Hardin*, and the evidence he presented, was very different from the instant case. The expertise in *Hardin* dealt with drug packing for distribution. This is one of the most commonly recognized forms of expert testimony. *Hardin*'s fact witness testimony came from his involvement in arresting the defendant and seizing the drugs. The dual roles were easily distinguishable to a jury. This court's ruling in *Hardin* cannot be interpreted to mean that all proffered dual witness testimony, in any depth or breathe, is permissible.

Moreover, in *Hudson*, this Court addressed *Commonwealth v. Carter,* a Pennsylvania case. In *Carter*, the court found that testimony from a fact witness being used as an expert was highly prejudicial when the witnesses "expert" opinion was cumulative of his testimony as a fact witness. This Court did not disagree with the holding in *Carter*, but found that the facts in *Hudson* were distinguishable. In Sum, it appears this Court has recognized that there are boundaries which govern permissible dual witness testimony.

Courts across the country have routinely and consistently warned about the pitfalls of dual witnesses testimony, drawing clear lines of where the testimony is permitted, and where it is travels beyond the acceptable scope.[76] Brisco argued that, to the extent any of Flaherty's testimony was admissible as a gang expert

[76] *United States v Amuso*, 21 F.3d 1251, 1263 (2nd Cir. 1994). Expert testimony which specifically enforces testimony given by Government's witnesses should not be admitted. *Id.* *United States v. Rios*, 830 F.3d. 403 (6th Cir. 2016) (Sixth Circuit held that a duel witness gang expert, "strayed into testimony that [was] potentially problematic when he testified about specific criminal actions" as opposed to testifying "within the appropriate scope of gang expert testimony, as it focused on the traditional areas in which a gang expert can testify - history, organization, and unique terminologies or symbols.") *United States v. Ayala*, 601 F.3d 256, 275 (4th Cir. 2010) (approving of experts who "offered their independent judgments, most of which related to the gang's general nature as a violent organization and were not about the defendants in particular"). *United States v. Garcia*, 752 F.3d 382, 391–92 (4th Cir. 2014)("we hold that the agent's testimony was fraught with error: the conflation of Agent Dayton's expert and fact testimony, particularly her reliance on her knowledge of the investigation to support her coding interpretations; her failure to apply her methodology reliably; and last, her failure to state on the record an adequate foundation for very many of her specific interpretations. Moreover, because Agent Dayton's testimony was so extensive and most likely highly influential in the jury's evaluation of the Government's case against Garcia, we are constrained to hold that these flaws deprived Garcia of a fair trial, i.e., that the missteps were not harmless, and thus require vacatur of Garcia's convictions.)

and/or fact witness, trial counsel should have objected to the conflation of the two roles.

The court held that Brisco had not demonstrated that there was "any controlling precedent requiring counsel to have sought to bifurcate the detective's lay and expert opinions."[77] That is not, however, the Standard under *Strickland*. Under *Strickland*, the question is whether or not counsel's representation was unreasonable in light of prevailing professional norms. There is often not law that "requires" defense counsel to take any specific actions, because trial decisions are often fact specific. Brisco submits that, under *Strickland*, it certainly would be unreasonable for counsel to stand idly by while Flaherty testified extensively, beyond the rules of evidence, and in a manner which was highly influential in the jury's evaluation of the State's case.

Trial counsel had grounds to object under the rules of evidence, as well as Delaware case law. In *Hudson v. State*[78] the trial court found that officer witness also qualify as an expert witness. However, the court *sua sponte* took issue with the comingling of the officer's fact and expert testimony:

> "The problem that I have with his testimony at the moment is that he is intermingling what he knows about this case and his interest in this case, with his independence as an expert. And he starts using words like "I've arrested"… "I did this." "I did that." And so all of the

[77] Exhibit A at 20
[78] 956 A.2d 1233 (Del. 2008)

> sudden he takes it out of the realm of being an expert who is independently using factors. […]"

The trial court recognized that lines must be drawn between fact and expert testimony when the two are comingled before the jury. This Court took no issue with the trial court's concerns and corrective measures in *Hudson*.

Improper Expert/Summary Witness Testimony

In his Rule 61 Claim, Brisco had additionally raised concerns about the State's expert witness serving as a summary witness. Flaherty was repeatedly asked to connect social media posts to different events which occurred during the course of the investigation - including the homicides for which Brisco was charged- homicides this "expert" investigated. For example, the State would ask Flaherty to indicate that a certain picture was posted to social media within a few days or months of a specific homicide, or that guns in a photo matched guns used in a specific homicide.[79] Again, this was not permissible expert testimony, or even permissible fact witness testimony. The State used their "expert" as a summary witness to make closing arguments during trial. This witness was the final witness in the case and testified for almost a full day.

The Superior Court did not address this concern in its Order. The State's response was that "even if this evidence was summary evidence, such evidence has

[79] A. 414 – 415, A.422, A.425. 429 – 430.

been permitted in complex cases as helpful to the jury."[80] Firstly, it is in the discretion of the court to allow or disallow summary witnesses. The State never made an application to present a summary witness so no witness should have been testifying as such. Further, even if it's presumed the trial court would have allowed a summary witness, summary evidence should not come from an "expert" witness as that gives undue weight and credibility to what are, essentially, the States closing arguments. Below, Brisco had argued that the United States Court of Appeals for the Second Circuit, in an opinion which has been cited by the Third Circuit, held that it is improper for an officer testifying in dual roles to serve as a summary witness, testifying as an expert about the general meaning of conversations and facts of a the case.[81]

Trial Counsel failed to object. The Superior Court erred in failing to consider this portion of the claim.

Demonstration of Prejudice:

The Superior Court found that Brisco failed to demonstrate prejudice because he, "has not demonstrated that the outcome of his trial would have been different but for any error of trial counsel."[82] The actual burden is that Brisco

[80] A. 219
[81] *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003), citied by the Third Circuit in *United States v. Anthony*, 2022 WL 16947930 and *United States v. Bridges*, 2022 WL 4244267
[82] Exhibit A at 22

would have to demonstrate that there was a *reasonable probability* that the outcome would have been different. A defendant need not show that counsel's conduct more likely than not altered the outcome of the case[83], the question is if, with the inclusion of Flaherty's objectionable testimony, Brisco received a fair trial. A fair trial is understood as a trial resulting in a verdict worthy of confidence.[84] Brisco has met that standard.

Without objection, Flaherty testified extensively, beyond the rules of evidence, and in a manner which was highly influential in the jury's evaluation of the State's case. As an expert he told the jury that predicate homicides were committed and that Brisco committed them. As an expert he implied to the jury the investigation was done properly and that the State's belief in guilt was correct. Flaherty was the State's final witness, testifying for almost an entire day, frequently bouncing back and forth between his roles of fact witness, summary witness and expert witness, given unwarranted weight to his testimony as a whole. Brisco was prejudiced by counsel's failure to object.

Conclusion:

For all of the foregoing reasons, the Superior Court erred in denying Brisco's claim relevant to the testimony of Detective Flaherty.

[83] *Strickland*, 466 U.S. at 693.
[84] *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)

III. THE DEFENDANT'S TRIAL ATTORNEY WAS INEFFECTIVE UNDER STRICKLAND WHEN HE FAILED TO OBJECT TO THE COURT'S IMPROPER WARNINGS TO THE STATE'S COOPERATING WITNESSES.

Question Presented: Whether the defendant's trial attorney was ineffective when he failed to object to the court's warnings to witnesses about refusal to testify when those warnings far exceeded the actual penalties faced. This issue was raised in the court below in Brisco's Amended Rule 61 Motion. (A. 145 – 148, Docket No. 157)

Scope of Review: This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion. *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013). A *de novo* standard is applied to legal questions and constitutional questions. *Id.*

Merits of the Argument: The Superior Court held that any objection to the trial judge's warnings would have been unsupported. This holding relies upon incorrect application of law.

Only two witnesses could specifically tie Brisco to the homicide of Kostikidis. At trial, each refused to answer any questions. In refusing to testify, each faced the maximum penalties for Contempt of Court, a misdemeanor offense.[85] The Court,

[85] Neither witness was pending sentencing under a cooperation agreement so neither risked additional penalties in other relevant circumstances.

however, in compelling the witnesses to testify, threatened a more serious risk to each.

In response to Hammond's refusal to testify the court warned him: "At this moment, you're lying in court in front of me. So either you answer the questions, sir, or **you will be spending an extended period of time in custody**. Now, that's your option. He's not asking you to answer anything about the event yet. He's not asking you to answer anything about Mr. Brisco. He's asking you whether or not you had a conversation. So, I suggest that, at least at this point in time, you answer the questions. And then we can see how it goes. **They have a recording that you gave them, and they're going to play that at some point. So either you cooperate a little bit today, or you just sit in jail.** All right?" [86]

As to witness Broomer, the court took the warning significantly further: "Mr. Broomer, we can play the game that you are playing at the moment, if you want, but the only end result is that however long you are now in prison will be **dramatically increased**, because as long as you continue to refuse to answer questions that are not going to incriminate you, I will sentence you to a longer period of prison." "But to sit here and not answer questions is **simply going to see**

[86] A. 146 (Note: Brisco argued below that the threat to Hammond was not just in relation to extended time in jail. Hammond was improperly told his statement would be played regardless of whether he testified, meaning he'd sit in jail and the thing he wished to avoid would still happen. This was untrue given that the foundation for 3507 must be laid, which requires a least some testimony.)

how long I can put you in jail. So, if you don't care about that, that's fine, but **I assure you, sir, you will be quite aged by the time you get out of jail because, at the moment, you're lying in front of me and I will hold you in contempt.**" [87]

The Superior Court held that an objection would be unsupported because, "The judge acted well within his discretion in providing a warning to the uncooperative witnesses; his warnings did not inform the witnesses about any particular sentences they would have received and, to the extent they are interpreted as threatening to impose sentences in excess of statutory limits for contempt, they were not required to have been mathematically precise."[88]

Brisco submits this is an incorrect finding of law. The idea that a court does not need to advise a witness of the precise consequences they will face, does not in turn permit a court to threaten a witness with any consequence it wishes. There is a difference between a warning one will be held in contempt, without advisal of the length of a contempt charge, versus telling a young man they will be "quite aged" when they are released. This is the difference between appropriate warnings and improper intimidation.

[87] A. 146
[88] Exhibit A at 32

What happened in Brisco's trial was akin to what occurred in *Webb v. Texas*.[89] There, the United States Supreme Court held that there was a denial of due process where the judge threatened the sole defense witness with perjury charges, likely conviction, a multiple-year sentence, and a negative review to the potential parole board.

Counsel should have objected to any undue pressure on the key witnesses against his client. The only two witnesses who could tie Brisco to the Kostikidis homicide were refusing to testify, even enough to lay a foundation under §3507. Had trial counsel prevented the witnesses from being intimidated, there is a reasonable possibility they would have opted not to testify against Brisco, and the outcome of his trial would have been different.

The Superior Court erred in finding otherwise.

[89] *Webb v. Texas*, 409 U.S. 95 (1972) as cited by the DESC in *Torres v. State*, 979 A.2d 1087 (Del. 2009)

IV. THE SUPERIOR COURT ERRED IN FAILING TO GRANT AN EVIDENTIARY HEARING AND/OR ADDRESS THE CUMULATIVE EFFECT OF BRISCO'S CLAIMS.

Question Presented: Whether the Superior Court erred in failing to address the cumulative effect of Brisco's claims and/or order an evidentiary hearing relevant to those claims. This issue was raised in the court below in Brisco's Amended Rule 61 Motion. (A.140 – 145, A.150, Docket No. 157)

Scope of Review: This Court reviews the Superior Court's decision on a motion for postconviction relief for abuse of discretion. *Ploof v. State*, 75 A.3d 840, 851 (Del. 2013). A *de novo* standard is applied to legal questions and constitutional questions. *Id.*

Merits of the Argument: In denying a number of Brisco's individual claims, the Court failed to address the cumulative effect of the attorney's actions or grant an evidentiary hearing where the facts were contested.

Brisco had raised two additional claims which are relevant to this argument. Trial counsel was ineffective for (1) failing to ask for a mistrial when the jury panel voiced feelings of fear and discomfort during the trial, and (2) failing to seek and adjournment, instead allowing his client to appear before the jury bearing evidence of assault and smelling like pepper spray.

The Superior Court denied each of these claims, without an evidentiary hearing. The Appellant recognizes that he bears a high burden to demonstrate that

the court abused its discretion. However, the issue remains that, while the court reviewed each of these claims independently, it failed to address the cumulative effect of these interwoven events. Brisco not only argued the cumulative impact of all claims, but specifically tied the facts and impact of these two claims together in his submission.

During the course of the trial, the jury voiced feelings of fear and discomfort to the court. This occurred at the time of witness Hammond's testimony. The record reflects that the jury was intimidated by the spectators who were somewhat vocal and unruly.[90] The trial judge noted that he agreed with the jurors that the setting was intimidating.[91] The courtroom was small and filled with lots of spectators. The State advised that they expected a similar audience presence during the testimony of witness Broomer. The Bailiff reported that the situation had "gotten progressively worse day by day."[92] Additional capital police were placed in the courtroom.

The morning after the jury had raised concerns, Brisco arrived in the courtroom with scratches and swelling on his face, and smelling of pepper spray.[93] The parties and the court learned that a family member of one of the victims had

[90] Exhibit A at 29
[91] Exhibit A at 27
[92] Exhibit A at 28
[93] Exhibit A at 31

intentionally gotten himself arrested in order to attack Brisco in jail. When officers could not stop the attack, they utilized pepper spray to end the assault. While the officers were able to shower Brisco, they advised he would likely still smell of pepper spray during the trial day.[94] Trial counsel asked that ice be brought for the swelling on Brisco's face, but no ice was ultimately provided.[95] A concern arose that news of the attack might agitate the spectators further.

Brisco, in his Rule 61 claims argued that counsel was ineffective in failing to seek a mistrial when the jury advised it was feeling intimidated. Brisco further argued that, if counsel was not going to seek a mistrial at this juncture, he should have been prompted to do so when, on top of the jury already feeling intimidated, his client showed up bruised and smelling of pepper spray.[96] The trial court did not comment on the second portion of Brisco's mistrial argument, but only focused on the facts surrounding the jury's feelings of intimidation.

Brisco additionally raised the assault concern as a separate claim, arguing that, if a mistrial was denied, counsel should have asked for a continuance so his client did not appear injured and smelling of pepper spray before the jury. The Superior Court erred in failing to address the cumulative impact of counsel's actions. The jury was left to speculate, in circumstances where they were feeling

[94] A. 142
[95] A. 143
[96] A.143

intimidated and uncomfortable, why the defendant showed up with signs of assault on his face. There are not any positive connotations associated with scratches and swelling on ones face, especially when charged with crimes of violence.

The superior court should have, at minimum, held and an evidentiary hearing on these issues. While the Superior Court had broad discretion to determine the need for an evidentiary hearing, in this situation there was evidence in the record which contested trial counsel's affidavit. While trial counsel averred that the scratches and bruises were minimal, the injury was significant enough that he requested ice for his client's face. Moreover, the bailiffs informed the court that the attack was serious enough that they could not stop it without the use to pepper spray. Trial counsel averred that the bruises and scratches were "minimal." However, the question is not how many bruises or scratches were observable, but if the injuries were observable to the jury. This question that remains unanswered.

These claims should be remanded for the Court to conduct an evidentiary hearing and/or to rule of the cumulative effect of the claims.

CONCLUSION

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

Respectfully Submitted,

Megan J. Davies, Esquire (#6777)
Law Offices of Megan J. Davies
716 N. Tatnall Street
Wilmington, DE 19801
mjd@mjdavieslaw.com
(856)671-1188

Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO,	)	
	)	
Defendant Below,	)	
Appellant,	)	No. 148, 2024
	)	
v.	)	ON APPEAL FROM THE
	)	SUPERIOR COURT OF THE
STATE OF DELAWARE,	)	STATE OF DELAWARE
	)	ID No. 1502007987
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Appellant's Opening Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word Office 365.

2. Appellant's Opening Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9605 words, which were counted by Microsoft Word Office 365.

Dated: June 13, 2024

Megan J. Davies, Esquire (#6777)
Law Offices of Megan J. Davies
716 N. Tatnall Street
Wilmington, DE 19801
mjd@mjdavieslaw.com
(856)671-1188

Attorney for Appellant

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	)	
	)	
v.	)	**I.D. No.: 1502007987**
	)	
JOHN BRISCO,	)	
	)	
Defendant.	)	

SUBMITTED: February 21, 2024
DECIDED: April 9, 2024

ORDER AND OPINION

On Defendant's Motion for Post Conviction Relief – **DENIED**.

Brian Arban, Deputy Attorney General, Delaware Department of Justice, 820 N. French Street, 7th Floor, Wilmington, Delaware 19801. Counsel to the State of Delaware.

Megan Davies, Esquire, Law Offices of Megan J. Davies, 716 N. Tatnall Street, Wilmington, Delaware 19801. Counsel to John Brisco.

Jones, J.

INTRODUCTION

On February 16, 2015, a New Castle County grand jury returned an indictment against Defendant John Brisco ("Brisco" or "Defendant") and several codefendants charging, among other offenses, gang participation, three counts of first-degree murder, and related firearm charges for the homicides of Ioannis Kostikidis, Devon Lindsey, and William Rollins.[1] The case was reindicted on November 9, 2015.[2] Brisco was a juvenile at the time of the crimes.[3] A reverse amenability hearing took place and as a result of that proceeding Defendant was waived to Superior Court where he stood trial for: (1) Gang Participation occurring from January 2013 to September 2015; (2) the February 6, 2013 death of Kostikidis and related counts; (3) the January 18, 2015 death of Lindsey and related counts; (4) the January 24, 2015 death of Rollins and related counts; and (5) charges related to weapons and ammunition recovered from a search of Brisco's bedroom.[4]

Brisco was acquitted of: (1) the First-Degree Murder of Lindsey and all related counts, (2) First Degree Murder of Ioannis Kostikidis under the intentional murder theory as well as Possession of a Firearm during the Commission of an Intentional Murder.[5] He was convicted of first-degree felony murder of Kostikidis, first-degree

[1] February 16, 2015, Docket Item ("D.I.") 1.
[2] November 9, 2014, D.I. 20.
[3] D.I. 157, at 2.
[4] May 19, 2015, D.I. 4.
[5] D.I. 62.

murder of Rollins, possession of a firearm during the commission of a felony, and all other counts.[6]

On July 21, 2017, Brisco was sentenced to an aggregate of two life sentences plus 35 years of incarceration followed by community supervision.[7] Brisco appealed the Court's decision to the Delaware Supreme Court, raising the issue that a probation officer gave impermissible expert testimony about the range of accuracy of the GPS ankle monitor worn by Brisco at the time of the Kostikidis homicide.[8] On May 10, 2018, the Delaware Supreme Court affirmed Brisco's convictions.[9] The Court found that it need not reach the issue raised by Brisco because Brisco did not challenge the general accuracy of the evidence and that any error was harmless because there was overwhelming evidence placing him in the vicinity of the homicide.[10] At the time of Brisco's conviction, he was represented by his then counsel, Michael Heyden, Esquire.[11]

On November 7, 2018, Brisco filed a *pro se* motion for post-conviction relief pursuant to Rule 61 of the Delaware Rules of Criminal Procedure and a motion for the appointment of counsel. Counsel was appointed for Brisco. An amended Rule 61 motion was filed on July 17, 2023. On November 30, 2023, Brisco's former

[6] D.I. 62.
[7] *See* Superior Court Criminal Docket, 9 (Brisco was sentenced to two life sentences, plus 35 years).
[8] D.I. 157, at 2.
[9] *John Brisco v. State of Delaware,* 186 A.3d 798 (Del. 2018).
[10] *Id*.
[11] *See* Appendix Volume I for Case No. 1502007987 (2017).

counsel, Michael Heyden, Esquire, filed Trial Counsel's Answer to Motion for Post Conviction Relief Pursuant to Rule 61.[12] On February 21, 2024, the State filed its response in opposition to Brisco's amended postconviction motion.[13] The matter is now ripe for decision.

FACTUAL BACKGROUND

On the evening of February 6, 2013, Ioannis Kostikidis was shot and killed standing outside his car in a parking lot in Wilmington, Delaware.[14] He suffered one gunshot wound to his upper body.[15] A single 9 mm shell casing was found near his body at the crime scene.[16] A witness saw two men running from the crime scene.[17]

One witness, Kina Madric, said that two (2) young men came to her house, which was on the same block, prior to the murder.[18] She identified John Brisco as one of those men.[19] She also said that he went by the name "John"; however, she admitted that she didn't see him with a gun, nor did she see him commit a robbery or commit a shooting.[20]

Another witness said he was with Brisco and Wisher the day of the shooting. He said he went into a house, leaving the other two men outside.[21] Shortly thereafter,

[12] D.I. 161.
[13] D.I. 162.
[14] PA-22.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] PA-22.
[20] *Id*.
[21] *Id*.

he heard a shot.[22] Later that night, the witness telephoned Brisco who told him that he and Wisher tried to rob someone, but the victim resisted and Brisco shot him.[23] This witness also told the police that Brisco and Wisher were armed with guns that night.[24]

On January 24, 2015, at 8:03pm, William Rollins was shot in the area of 21st and Washington street.[25] He suffered multiple gunshot wounds to his head and upper body.[26] The medical examiner collected a bullet from Rollins's head. It was a .357 caliber.[27] They also found 9 mm shell casings at the crime scene.[28] The shell casings matched a gun that was found on co-defendant McCoy when he was arrested.[29] Prior to Brisco's arrest, McCoy attempted to send Brisco a letter instructing Brisco to get rid of the gun that was in McCoy's house.[30] The letter was intercepted by the prison authorities.[31] The police searched McCoy's house and found the gun. That gun was connected to the murder.[32]

Karel Blalock ("Blalock") testified that he had known Brisco for between seven and eight years.[33] Blalock testified that he knew that Brisco sold heroin and

---

[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] PA-23.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] D.I. 162, at 8.

he was known to carry a gun.[34] Brisco told Blalock that Rollins was on the phone, and when Rollins turned away, Brisco shot him 11-12 times in the back on 21st Street.[35] McCoy then walked over to Rollins and shot him in the back of the head with a .357.[36] Brisco told Blalock that he used a P90 Ruger.[37] Brisco told Blalock that Rollins had a "check on his head" because he had killed a person named "Beano."[38] Brisco told Blalock that he was paid $13,000 for killing Rollins.[39]

STANDARD OF REVIEW

A. Postconviction Relief Procedural Filters

Before addressing the merits of any postconviction claim, the Court must first determine whether the claims pass through the procedural filters of Rule 61.[40] This Court will not address the substantive aspects of Brisco's claims if the claims are procedurally barred.[41] Rule 61 imposes four procedural requirements on Brisco's motion: (1) the motion must be filed within one year of a final order of conviction; (2) any basis for relief must have been previously asserted in any prior postconviction proceedings; (3) any basis for relief must have been asserted at trial or on direct appeal as required by court rules; and (4) any basis for relief must not

[34] *Id*. at 9.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*. at 10.
[39] *Id*.
[40] *See Younger v. State*, 580 A.2d 552, 554 (Del. 1990) ("This Court applies the rules governing procedural requirements before giving consideration to the merits of the underlying claim for postconviction relief.").
[41] *See id.*

have been formerly adjudicated in any proceeding. Under Rule 61(i)(5), a defendant may avoid the first three procedural imperatives if the claim is jurisdictional or is a "colorable claim that there was a miscarriage of justice because of a constitutional violation."[42] Further, challenges based on ineffective assistance of counsel may only be raised during a defendant's first Rule 61 proceeding.[43]

The Court is satisfied Brisco's Motion is timely and procedurally proper except as indicated below.

B. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are governed by the two-prong test set forth in *Strickland v. Washington*.[44] The *Strickland* test requires the defendant to prove "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[45] Evaluating counsel's conduct begins with a "strong presumption" the representation was reasonable.[46] This presumption is meant to avoid the "distorting effects of hindsight."[47]

---

[42] Super. Ct. Crim. R. 61(i)(5).
[43] *See Wing v. State*, 690 A.2d 921, 923 (Del. 1996).
[44] *See Albury v. State*, 551 A.2d 53 (Del. 1988).
[45] *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Per *Strickland*, the Court is to begin its analysis under the strong presumption that the conduct of defense counsel constituted sound trial strategy. *See id.* at 689.
[46] *Albury*, 551 A.2d at 59.
[47] *Id.* at 60. The *Strickland* Court explained that an error by trial counsel, even if professionally unreasonable, does not warrant setting aside the judgment of conviction if the error had no effect on the judgment. *See Strickland*, 466 U.S. at 691.

In order to successfully allege ineffective assistance of counsel, a petitioner must show that counsel's performance both: 1) fell below "an objective standard of reasonableness"[48] and 2) resulted in prejudice.[49] Under the performance prong, the Delaware Supreme Court has held that "it is all too easy for a court examining counsel's defense after it has proved unsuccessful to succumb to the distorting effects of hindsight."[50] As such, trial counsel's "actions are afforded a strong presumption of reasonableness and that reviewing court must "reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time."[51]

ANALYSIS

Defendant asserts seven (7) reasons in support of his claim for post-conviction relief. The Court will address each in turn.

1. Counsel was Ineffective in Failing to Understand and Investigate GPS Location Evidence. This Failure Resulted in Counsel Misadvising his Client on the Likelihood of Success at Trial and Advancing a Deeply Flawed Alibi Defense to the Jury.

In his first claim, Brisco alleges that trial counsel's performance was ineffective and prejudiced him at both the plea and the trial stages of his proceedings.[52] Specifically, Brisco asserts that, in reference to a GPS tracking device

[48] *Strickland*, 466 U.S. 668; *Williams*, 529 U.S. 362; *Wiggins*, 539 U.S. 510; *Rompilla*, 545 U.S. 374.
[49] *Id*.
[50] *Neal v. State*, 80 A.3d 935, 942 (Del. 2013) (quoting *Strickland*, 466 U.S. 689).
[51] *Id*.
[52] D.I. 162, at 17.

installed on his body at the time of the Ioannis Kostikidis homicide, trial counsel incorrectly interpreted the report of the device's location data regarding Brisco's location.[53] Brisco further argues that counsel's deficient performance prejudiced him at both the plea and trial stages of his proceedings.[54]

At the plea stage, Brisco notes that the State had offered him a plea bargain in which it would have capped its sentence recommendation of Level V imprisonment at 45 years.[55] Brisco claims that "there is a reasonable probability [he] would have accepted the plea, the plea would have been presented to the Court, and the Court would have sentenced [him] less severely than he was sentenced post-trial."[56] Brisco posits that he was prejudiced at the trial stage because of "[i]nstead of focusing on the [] many weaknesses in the State's case and the State bearing the burden of proof, trial counsel argued a non-existent alibi," and counsel was unable to adjust his defense when the alibi was destroyed at trial" and thus 'lost the trust of the jury."[57]

At trial, the State called Brisco's probation officer, Robert Johnson ("Johnson"), to testify that in February 2013, the Division of Youth and Family Rehabilitative Services Juvenile Probation, by an ankle bracelet with GPS on Brisco's person, electronically monitored Brisco. The system used "cell tower

[53] D.I. 157, at 12.
[54] *Id.*
[55] *Id.* at 21.
[56] *Id*. at 23.
[57] *Id* at 27.

coordination," which uses cell towers to triangulate the location of the individual.[58] Without objection, the State admitted into evidence a GPS report, and Johnson proceeded to testify about the report.[59]

Johnson said that the company that provided the ankle bracelet (Sentinel) was based in Indiana, and, as such, the date used the Central Time Zone, which was one hour earlier than the Eastern Time Zone.[60] He noted that the data showed "how long an individual was in one particular location for a duration of time."[61] The report showed that between 8:42 p.m. and 8:58 p.m. (Eastern Time) on February 6, 2013, Brisco was located at 641 North Tatnall Street in Wilmington, a non-existent address.[62] When the State asked Johnson if there is "a range of where a person could be stopped within that area for 16 minutes," trial counsel objected.[63] Trial counsel argued that Johnson "can read from the report and tell us what it says," but he was not "qualified as an expert to talk about the range of accuracy or the degree of reliability."[64] Trial counsel contended that "[t]he report says what it says."[65] The State responded that Johnson "has had basic training on how the report reads and what information they're providing that they give a range; that it's not a specific

[58] D.I. 162, at 17-18.
[59] PA-2.
[60] PA-3,9.
[61] PA-4.
[62] PA-2,5.
[63] PA-6.
[64] *Id.*
[65] *Id.*

pinpoint he's at this location, but it's within meters of where the subject is noted as being stopped."[66] The trial judge noted that Johnson will need "to have to put it into context and say as a part of [his] training and experience."[67] Johnson then testified that he had received "training and instruction" as he supervised two units – one for street monitoring and the other one for GPS monitoring.[68] Johnson stated that an individual can be within 30 meters of a GPS location.[69]

On cross-examination, Johnson admitted that he did not have specialized training as an engineer or in cell phone tower analysis.[70] Johnson was unable to identify the cell towers that were utilized for the report.[71] Based on trial counsel's questioning, Johnson admitted that a device does not "necessarily go to the closest tower" and that Johnson could not testify whether any cell tower used as part of the analysis was the closest tower.[72] Johnson said that his training about cell phone technology amounted to in-house training for a couple of hours.[73]

During closing summations, trial counsel argued to the jury that the murder occurred at 603 Tatnall Street, but "[w]hat those ankle bracelets record don't say, they don't say he was at 603 Tatnall Street."[74] Counsel argued that "[i]f he was at

[66] *Id.*
[67] PA-6 to 7.
[68] PA-7.
[69] PA-8.
[70] PA-9.
[71] PA-11 to 12.
[72] PA-13 to 14.
[73] PA-14.
[74] PA-80.

603, the records would say it" and that they "don't implicate [Brisco], they exonerate him."[75]

Counsel did not limit his arguments about the evidence solely to the GPS location data. Counsel also highlighted that, while there was evidence that the perpetrators of Kostikidis's homicide were wearing dark hoodies, Madric had testified that the individual named "John" who had visited the residence she shared with Broomer's father around the time of the murder was wearing a blue jacket.[76] Counsel highlighted that Madric said that John was not carrying a gun and that she had not seen John rob or shoot anyone.[77] Counsel argued that Madric's testimony exonerated his client.[78] Counsel also targeted the credibility of the State's witness and suggested that someone other than Brisco had committed the shootings. Counsel pointed out that Hammond was uncooperative on the witness stand and had provided "different stories," including that he "didn't know anything."[79] Counsel stated that Hammond had been convicted of drug felonies, was a heavy drug user, and schizophrenic.[80] Counsel noted that Hammond had not contacted police or

[75] *Id.*
[76] PA-79.
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*

"render[ed] aid to a guy that got shot."[81] Counsel argued that Hammond "matche[d] the description of the two guys running from the crime scene."[82]

Moreover, counsel highlighted to the jury that another witness, Broomer, "matche[d] the description of the two guys running up the street" and that Broomer had a criminal history of robbery and firearms charges.[83] Counsel contended that Broome had given three inconsistent statements to police, including about who was with him when Broomer visited his father's house.[84] Counsel noted that Broomer had mentioned in his first statement to police that Hammond was with him at the house, but he subsequently omitted Hammond from his second and third statements.[85] Counsel argued that Broomer was covering up Hammond's involvement in the crime and that he and Hammond had in fact committed the murder as their clothing matched the description of the items worn by the perpetrators.

Trial Counsel's Affidavit

In his affidavit, trial counsel states:

> Counsel fully understood and investigated the GPS evidence. It was not a deeply flawed alibi defense. The State's evidence showed that a shooting occurred on a Wilmington city block populated by row houses. The GPS evidence showed that the Defendant was at an address different from the location of

[81] *Id.*
[82] *Id.*
[83] *Id*.
[84] *Id.*
[85] *Id.*

> the shooting; however, at the end of the same block. Although the house was close by, it was a different address. The State countered with an argument that even though the address was different, it was within the margin of error for the GPS reading.
>
> Petitioner argues that counsel should not have raised the discrepancy since the State could not respond with their margin of error argument. Counsel submits it would be a gross deviation to ignore this discrepancy in the GPS evidence and not use it to his advantage. Furthermore, it would be erroneous to concede that the GPS, with its margin of error, correctly showed the Defendant at the crime scene. The incorrect location was in the report and developed through the State's witness and therefore a separate GPS expert identified the discrepancy would not be necessary.
>
> Petitioner argues that the Defendant should have abandoned the argument or not made any reference to the discrepancy in the GPS report because the error could be explained that it was within the margin of error. There is a difference between an argument being infallible and argument being flawed. Although this argument may not be infallible, it certainly was not flawed.[86]

Defendant argues that his right to effective trial extends to the plea negotiation process.[87] Brisco was offered a plea which would have capped the State's sentencing recommendation to a total of 45 years.[88] However, if not for ineffective counsel, Brisco suggests that "there is a reasonable probability he would have accepted the plea, the plea would have been presented to the Court, and the Court would have sentenced him less severely than he was sentenced post-trial."[89] Defendant rejected

[86] D.I. 161.
[87] D.I. 157, at 20 (citing *Lafler v. Cooper*, 566 U.S. 156, 162 (2012)).
[88] *Id*. at 21.
[89] D.I. 162. (Defendant was sentenced to two consecutive life sentences plus 35 years).

the plea offer of his own volition, and at no point did trial counsel attempt to convince him to reject the plea.[90]

Counsel's performance was not deficient. His statements that trial counsel misadvised him about the strengths and weaknesses of the State's evidence do not establish counsel's ineffectiveness.[91] Such assertions do not substantiate that trial counsel failed to fully inform him about the State's evidence.[92] Nor does Brisco's conclusory contention that he would have accepted the plea offer automatically establish prejudice.[93]

The record pertaining to the plea colloquy shows that Brisco voluntarily and clearly rejected the plea. There is no evidence that trial counsel put pressure on the Defendant to reject the plea. The Court accepts trial counsel's testimony that at no time did he advise Brisco to reject the plea. On this record, there is no deficiency.

Brisco posits that he was prejudiced at the trial stage because "instead of focusing on the many weaknesses in the State's case and the State bearing the burden of proof, trial counsel argued a non-existent alibi," and counsel was "unable to adjust his defense when the alibi was destroyed at trial" and thus "lost the trust of the jury."[94] Defendant further argues that lack of a true alibi, in addition to providing a

[90] *Id*. at 3.
[91] *Urquhart v. State*, 203 A.3d 719 (Del. 2019).
[92] *Id*.
[93] *Id*.
[94] D.I. 162.

false alibi to the jury was damning for Defendant's case.[95] It is Defendant's belief that trial counsel lost all credibility when he told the jury that the GPS report exonerated the Defendant.[96] Instead, three witnesses and the GPS records were able to place Defendant in the area of the Kostikidis homicide at that time, evidence which the Delaware Supreme Court stated was overwhelming.[97]

Trial attorneys have a "wide latitude" in making tactical decisions and thus there is a "strong presumption" that the challenged conduct "falls within the wide range of reasonable professional assistance" or, in other words, that the challenged action "might be considered sound trial strategy."[98] "Even evidence of isolated poor strategy, inexperience, or bad tactics does not necessarily amount to ineffective assistance of counsel."[99]

Trial counsel flatly denied in his affidavit that he misunderstood the GPS location evidence or misadvised Brisco about it.[100] His affidavit and the record at trial reflect that counsel made the tactical decision to rely on this evidence to establish a potential alibi for Brisco. Trial counsel did fully understand the GPS evidence which showed that a shooting occurred on a Wilmington city block

[95] *Id.* at 24.
[96] *Id.*
[97] D.I. 157, at 24.
[98] *Strickland*, 466 U.S. at 689.
[99] *Burns*, 76 A.3d 840, 853 (Del. 2013).
[100] D.I. 161.

populated by row houses and that Defendant was at an address different from the location of the shooting, however, at the end of the same block.

There was no deficient performance on the part of trial counsel.

2. Counsel was Ineffective in Failing to Object to Impermissible and Prejudicial "Expert" Testimony.

In his second claim, Brisco alleges that trial counsel was constitutionally ineffective for not objecting before or during trial to impermissible and prejudicial expert testimony from Detective Flaherty, the State's officer expert, about gangs. Brisco contends that "the true acceptable purpose of a 'gang expert' is to testify to the cultural more of a particular social group" and that "there remains a line between the legitimate use of an officer expert to translate esoteric terminology or to explain an organization's hierarchical structure from the illegitimate and impermissible substitution of expert opinion for factual evidence."[101] Brisco argues that the testimony of Detective Flaherty fell repeatedly beyond the scope of permissible testimony in ways that were grossly prejudicial to Defendant because the testimony was "so infected with improper statements to the jury, and no efforts were made by trial counsel to bar this testimony through pretrial motions or objections at trial."[102]

Brisco agrees that it is permissible for the qualified officer to testify as to both a fact witness and an expert witness, however, it must be done in a manner where

[101] *Id*.
[102] D.I. 157, at 28.

the two roles are not improperly conflated, and undue prejudice can result from the mixture of testimony when one officer serves as both a fact witness and an expert witness.[103] The state introduced Detective Flaherty as an "expert in gang investigations with a minor in social media investigations."[104] Brisco argues that this should have immediately alerted trial counsel to the fact that Detective Flaherty's testimony would cross the line of permissibility.[105]

Trial counsel's affidavit in response to Brisco's ineffectiveness claim stated, "Detective Flaherty's background, experience, and education supported a conclusion that he was a qualified expert."[106] The detective's testimony included reference to the nicknames of gang members, their relationships and activities, all of which was found in the police reports developed by the police agencies.[107] The witness testified as a gang expert about social media communications; his research and conclusions about the social media evidence was based upon the factual evidence submitted.[108] There was nothing erroneous with an expert referring to factual evidence in his report or his testimony."[109]

Brisco has not demonstrated that trial counsel's performance was deficient because he has not established that there was a basis to have objected to Detective

[103] *Id*. (Citing *Hudson v. State,* 956 A.2d 1233, 1242 (Del. 2008)).
[104] *Id*. at 32.
[105] *Id*.
[106] D.I. 162, at 48.
[107] *Id*.
[108] *Id*.
[109] D.I. 161

Flaherty's testimony.[110] While Brisco acknowledges that the detective was offered as both an expert witness and a fact witness, much of the detective's testimony was admissible as a lay person opinion. The Delaware Supreme Court has concluded that "police officers frequently testify as both fact and expert witnesses" and has not found a "persuasive reason" to "interrupt that practice."[111]

Under D.R.E. 702, "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion."[112] D.R.E. 703 provides that "an expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed" and "if experts in the particular field would reasonably rely on those kind of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted."[113] "Delaware case law provides that experts may rely on hearsay while forming their opinions, as long as that hearsay evidence is reasonably relied upon by experts in the field."[114] That is the case here and Detective Flaherty was unquestionably qualified to have testified as an expert in gang activity.

In support of his contentions, Brisco cites the Delaware Supreme Court's ruling in *Hudson v. State*[115] and the Second Circuit's decision in *United States v.*

---

[110] D.I. 162, at 49.
[111] *Hardin v. State*, 844 A.2d 982 (Del. 2004).
[112] *Id*.
[113] D.R.E. 703.
[114] *State ex rel. French v. Card Compliant, LCC*, 2018 WL 4151288, at *4 (Del. Super. Ct. Aug. 29, 2018).
[115] *Hudson,* 956 A.2d 1233.

Mejia.[116] In discussing *Hudson*, Brisco contends that "[t]he Delaware Supreme Court has found that undue prejudice can result from the mixture of testimony when one officer serves as both a fact and expert witness" and the logic of the trial judge, including separating out the lay and expert witness portions of the witness's testimony, "was found to be sound by the Delaware Supreme Court."[117] Brisco's arguments are unavailing. Brisco had not demonstrated that there is any controlling precedent requiring trial counsel to have sought to bifurcate the detective's lay and expert opinions.

Brisco misapprehends *Hudson's* ruling. *Hudson* involved the arguments that "the Superior Court abused its discretion by allowing …the chief investigating officer…to testify both as a fact and an expert," "the trial judge abused his discretion in ruling that [the detective] was qualified to testify as an expert," the detective "should not have testified as an expert witness because he had never served before in that capacity and was unfamiliar with the role of an expert witness," the detective's expert testimony was not required, the detective was biased, and "the trial judge erred in permitting the prosecutor to 'educate' [the detective] on how to testify as an expert."[118] *Hudson* did not impose any requirement that a witness's lay and expert opinions be distinguished.

[116] *United States v. Mejia,* 545 F.3d 179 (2d Cir. 2008).
[117] Mot. At 29-30.
[118] *Hudson*, 956 A.2d 1233, 1237-41.

Brisco's reliance on *Mejia* is likewise misplaced. In *Mejia*, the Second Circuit determined that an officer who had testified as an expert witness in the area of organized criminal activity had impermissibly recited out-of-court testimony statements in rendering her expert opinion in violation of the Confrontation Clause of the Sixth Amendment.[119] The Second Circuit opined about the limits that should be imposed on officer experts in the area of organized crime activity, noting that, under its precedent involving a witness who testifies as both a fact and expert witness, including *Dukagjini*, the Court had concluded that "[t]he officer's expert status…was likely to give his factual testimony an 'unmerited credibility' before the jury."[120] But the problem with *Mejia* is two-fold. For one, *Mejia* involved the testimony of a witness who was offered as an expert under D.R.E. 702.[121] Here, as aforementioned, Detective Flaherty's testimony was admissible both as a lay and expert witness opinion under D.R.E. 701 and D.R.E. 702.[122] Moreover, other jurisdictions have disagreed with *Dukagjini's* rationale. At least one jurisdiction has concluded that *Dukagjini's* "premise that juries are awed by the aura of infallibility of expert opinion testimony and thus defer to it is flawed speculation.[123]

[119] *Mejia*, 545 F.3d 179.
[120] *Id.* at 192 (citing *United States v. Dukagjini,* 326 F.3d 45, 55 (2d Cir. 2008)).
[121] *Id.*
[122] *See United States v. Harris,* 788 F. App'x 135, 150-51 (3d Cir. 2019) (distinguishing *Mejia* because the witness was only proffered as an expert and, "rather than imbuing the agent's testimony with elevated legitimacy by admitting him as an expert, the District Court permitted the actual case agent personally involved in the investigation to testify based on his perceptions").
[123] *State v. Beard,* 2019 WL 645049, at *8 (N.M. Jan. 31, 2019).

In view of the inapplicability of *Hudson* and *Mejia* and the fact that Brisco's claim alleges ineffective assistance of counsel, the appropriate framework for analyzing his claim is considering what trial counsel should have done under controlling Delaware precedent. Brisco has not established that controlling Delaware law required the demarcation of the detective's gang activity testimony based on whether he was offering lay or expert opinion. As such, trial counsel had no obligation to have sought the demarcation of Detective Flaherty's testimony or to have taken additional prophylactic measures.

Brisco has also failed to demonstrate prejudice under *Strickland* because any error was harmless as Brisco has not demonstrated that the outcome of his trial would have been different but for any error of trial counsel.

3. Counsel was Ineffective in Failing to Consult with a DNA Expert.

In his third claim, Brisco argues that trial counsel was ineffective for not adequately reviewing and understanding DNA evidence, and not "obtaining a DNA expert to help strategize, to help prepare cross examination, and to testify on behalf of the defense." In support of this argument, Brisco points to the fact that trial counsel has a duty to conduct an adequate investigation, and Counsel failed to do so pertaining to his DNA that was found on both guns in connection to the Rollins murder; it was trial counsel's responsibility to explain to the jury that his DNA was

found on the guns not in connection to the murder, but because he came in contact with the guns before or after the shootings.[124]

At trial, the State called Lara Adams to testify in its case-in-chief.[125] Adams testified that she worked at the Federal Bureau of Investigation's laboratory in Quantico, Virginia as a DNA and serological examiner.[126] After explaining that the laboratory was accredited and how DNA is analyzed, she discussed her expert report regarding certain pieces of evidence she had tested.[127] She explained that she had analyzed DNA swabs taken from a Ruger firearm that was involved in a Wilmington bank robbery.[128] She also testified that she had compared those samples with known or reference samples from Rollins, Stewart, McCoy, and Brisco.[129] Adams testified that the FBI uses likelihood ratios, which "expresses how much more likely it is for us to see this particular profile from the evidence, if the DNA was contributed from the individuals that we're comparing versus if it was contributed by another randomly chosen unrelated individual."[130] For the Ruger firearm, Adams concluded that: (1) it was 500,000 times more likely that the DNA mixture from the firearm's trigger came from Brisco and three unrelated unknown individuals than if it had originated from four unrelated unknown individuals; (2) it was 100 million times

[124] D.I. 157, at 38.
[125] B148.
[126] *Id.*
[127] B149-51.
[128] B151.
[129] B152-53.
[130] B154.

more likely that the DNA mixture from the firearm's hammer originated from Brisco and three unrelated unknown individuals than if it came from four unrelated unknown individuals; and (3) that the DNA from the firearm's grip/magazine well, slide, rigger/trigger guard, and hammer was 860,000 times more likely to have originated from Brisco than an unrelated unknown individual.[131]

These ratios provided very strong to extremely strong support.[132] For the .357 firearm, Adams concluded that there was very strong support for the conclusion that it was 170,000 times more likely if the DNA mixture obtained from the firearm's grip, trigger, and hammer had originated from Brisco and two unrelated unknown individuals.[133]

On cross-examination, trial counsel asked Adams:

> Q. Is it fair to say there is any specific period of time that the touch has to occur before there can be a transference of DNA?
>
> A. No, not specifically. There have been studies, again, looking at transfer of DNA to an item, and specifically with regard to touching an item, as you asked. And what they found is that we cannot predict the length of time an individual came into contact with an item based on the amount of DNA that was left behind.
>
> Q. Okay. So, then there's contact, and then there's the transfer of DNA cells from the person to the object, correct?
>
> A. There may be transfer of DNA from cells from a person onto an object when they touch it. But as we mentioned

[131] B151,155, 156.
[132] B155-56.
[133] B156.

> earlier, it is possible for an individual to touch an object and not leave behind DNA that was detected by the methods that were used….
>
> Q. Now, if you and I shook hands, we shook hands, and then they do a DNA test, and they would see that some of your DNA cells perhaps were on my hands? Is that how it works?
>
> A. That can happen. In fact, that has been tested, typically with extended periods of time of handshaking. But, yes, they did find that it's possible for some DNA to be transferred from one person to another. They found other instances where DNA was not transferred that they could detect from one person to another.
> Q. So, then, after I shake your hand, and then your DNA cells are on my hand, and then I pick up this pen, then is it possible that your DNA cells that are on my had then get transferred to this pen?
>
> A. It is possible.
>
> Q. Okay. So despite the fact that you never touched this pen, your DNA cells can end up on this pen, correct?
>
> A. Yes, I would say that's possible.[134]

Trial counsel also elicited Adams's concession that, to conclude that a person is the actual source of DNA, then the likelihood ratio would need to be over 700 billion.[135] Also, the FBI cannot "say with a hundred percent certainty that an individual is the source" and that he FBI's source conclusion is not "without a doubt."[136] On recross-

[134] B158.
[135] B159-60.
[136] B160.

examination, Adams conceded that none of the items tested by the FBI "reach[ed] the level of the source" regarding Brisco.[137]

During closing arguments trial counsel stated:

> Now, counsel talked about the DNA testing. There was no DNA found in the van. There was some DNA that was found on the guns. Now, you remember when Laura Adams was testifying, I asked her, "well how does that work?" And we talked about how it gets transferred. We talked about a scenario where I shake her hands and then her skin cells can get on my hand, her DNA gets on my hand. And then I picked up a pen and then they test the pen and her skin cells that were on my hand then get transferred to the pen; therefore, her DNA gets on the pen without her ever happening to it. That's the idea of transference in DNA. Now, that's how things like that can happen.

In addressing Brisco's ineffectiveness claim, trial counsel states:

> In this case, there were two guns and Defendant's DNA was on both guns. Petitioner argues that Defendant should have hired a DNA expert who would confirm that Defendant's DNA was on the gun; however, the Defense could argue that the DNA got on the gun's [(sic)] before or after the shootings. To put an expert on the stand that would confirm that the Defendant handled the murder weapons would not be helpful to the Defendant and in fact would have been harmful. The fact that the DNA could have been put there before or after the crime is not something that requires expert testimony. Conceding that the Defendant handled the guns would not be a good strategy. The better strategy would be to argue that the Defendant's DNA appeared on the gun's [(sic)] through the process of transference because he had contact with the gunman and the DNA was inadvertently transferred from the gunman to the Defendant, that it is why his DNA was on the guns.[138]

[137] B160-61.
[138] B181.

Brisco has not established that trial counsel's performance was deficient. Trial counsel's decision to abstain from presenting inculpatory evidence was reasonable. Trial counsel made the strategic decision to not concede that Brisco had handled the firearms and to instead focus on creating reasonable doubt regarding this fact. Thus, Brisco's claim that trial counsel was ineffective for failing to address the issue of his DNA being found on the murder weapons does not meet the *Strickland* standard.

4. Counsel was Ineffective in Failing to Ask for a Mistrial When the Jury Panel Verdict Voiced Feelings of Fear and Discomfort During the Trial.

Brisco next argues that trial counsel was ineffective by failing to ask for a mistrial when the jury voiced feelings of fear and discomfort during the trial.[139]

At trial, after Hammond testified, the trial judge took a recess and discussed an issue with counsel:

> THE COURT: The Court has received information through conversations with the bailiff that the jurors feel intimidated in the setting of the courtroom. And I think it is too small a courtroom for what we're doing with the number of people that we have.
>
> And the only way that I think I can provide them some sort of comfort is to go to a much larger courtroom, restrict the number of pews that are available to the public, and separate them as best as I can from the audience. In this courtroom, the audience is almost on top of them.
>
> There hasn't been any communication with the jurors, but I have to agree with them. It is an intimidating kind of setting, because there's lots of people here, and the courtroom size doesn't help.

[139] D.I. 157, at 42.

> So assuming [a different courtroom] is available, I think we should move to [that courtroom], at least tomorrow, depending upon what you have left to do today.[140]

The State then noted that it anticipated its next witness, Broomer, would "be much of the same, even more difficult."[141] The trial judge noted that "[i]t will be very difficult today to limit who gets in and out" and that "they're all here."[142] The judge then suggested moving to the different courtroom and roping off much of it "[v]ersus I've got a full gang of people who are already here."[143] The bailiff then noted that "[i]t's just gotten progressively worse day by day" and that the different courtroom would have a more favorable setup to separate the jury from those appearing at trial to support the defense.[144] The bailiff observed that "[t]here's definitely more on the defense side than there is on the State's side."[145] After contemplating different seating arrangements for the jurors in the different courtroom, the judge noted that the issue "hasn't risen to the point where I'm concerned that the jury's being influenced, but it is uncomfortable."[146] The judge noted that the current courtroom is "a really small courtroom, and with that many

[140] PA-97, 99.
[141] PA-100.
[142] PA-101.
[143] PA-100 to 01.
[144] PA-101.
[145] PA-101 to 02.
[146] PA-102.

people in it," and he "need[s] to do something to minimize the impact that's occurring."[147] The judge then ended the trial for the day.[148]

Brisco argues that spectators were somewhat unruly and vocal during the trial. Although these concerns continued throughout the trial, the Judge ultimately determined that he did not feel the situation rose to the level where the commotion was influencing the jury.[149]

"A trial judge should grant a mistrial only where there is a manifest necessity, or the ends of public justice would be otherwise defeated."[150] "The trial judge is in the best position to assess whether a mistrial should be granted and may exercise his discretion in deciding whether to grant a mistrial."[151]

To impeach a jury verdict, the defendant has the burden of establishing both improper influence and actual prejudice to the impartiality of the juror's deliberations."[152] Yet, if the defendant is able to demonstrate "a reasonable probability of juror taint, due to egregious circumstances, that are inherently prejudicial, it will give rise to a presumption of prejudice and the defendant will not have to prove actual prejudice."[153]

---

[147] *Id.*
[148] *Id.*
[149] *Id*.
[150] *Banther v. State*, 977 A.2d 870, 890 (Del. 2009).
[151] *Smith v. State*, 913 A.2d 1197, 1220 (Del. 2006).
[152] *Dixon v. State*, 2014 WL 4952360, at *2 (Del. Oct. 1, 2014).
[153] *Id*.

Brisco has not demonstrated that the circumstances were so egregious as to create a presumption of prejudice. He has not shown any improper influence or jury taint or that the jury was unable to remain fair and impartial. The trial judge determined that the circumstances were not so serious as to influence the jury.[154]

Through the lens of the *Strickland* test, trial counsel cannot be considered ineffective for following the lead of the trial judge, who was fully aware of the state of the courtroom and proceeded, taking precautions, and keeping in mind the jury. Thus, Brisco's claim that trial counsel was ineffective for failing to ask for a mistrial when the jury panel voiced feelings of fear and discomfort during the trial does not meet the *Strickland* standard.

5. Trial Counsel was Ineffective in Failing to Seek an Adjournment, Instead Allowing his Client to Appear Before the Jury Bearing Evidence of Assault and Smelling Like Pepper Spray.

In his fifth claim, Brisco asserts Defendant appeared in court with fresh cuts and bruises and smelling of pepper spray.[155] Brisco argues that there are a number of assumptions the jury could draw from Defendant's appearance, none of them positive or in his favor. Further, the jury was not informed that Brisco was attacked and involved in an unprovoked altercation. The Court asked trial counsel if Defendant was prepared to proceed given his condition and in response, Counsel did

[154] D.I. 162.
[155] D.I. 157, at 45.

not take the opportunity to request a short continuance. Due to this, Brisco argues that he was denied a fair trial when counsel unreasonably moved ahead with the trial, rather than requesting a one-day recess.

Trial counsel has averred that the smell of pepper spray was not evident throughout the courtroom, Defendant's scratches and bruises were minimal, and the jury was not informed that Defendant was in a fight the prior evening.[156] No evidence of an altercation was known by the jury.[157]

Brisco has not demonstrated that trial counsel's performance was deficient under *Strickland*. Any allegations that his injuries influenced the jury are speculative and without record support, especially as Brisco concedes that "the jury was not told that he was attacked."[158] Moreover, the record reflects that Brisco's injuries were minimal (scratches but no open cuts).

On this record there has been no showing of deficient performance.

6. Trial Counsel Failed to Object to Improper Warnings Given to the State's Cooperating Witnesses.

In his sixth claim, Brisco claims that trial counsel was ineffective for not objecting to the trial judge's improper warnings to the State's witnesses.[159] Brisco asserts that two cooperating witnesses were the main source of evidence connecting

[156] D.I. 161, at 5.
[157] *Id*.
[158] *Id*.
[159] D.I. 162, at 87.

him to the Kostikidis homicide. Both witnesses took the stand, but in response to their refusal to answer the questions, the Court made warnings to both indicating that they would "be quite aged by the time they got out of prison as a punishment for failing to answer and lying on the stand."[160]

An objection to the trial judge's warnings would have been unsupported. The judge acted well within his discretion in providing a warning to the uncooperative witnesses; his warnings did not inform the witnesses about any particular sentences they would have received and, to the extent they are interpreted as threatening to impose sentences in excess of statutory limits for contempt, they were not required to have been mathematically precise.[161] The warnings adequately placed the witnesses on notice about their "contumacious behavior."[162]

It has not been shown that trial counsel's performance fell below an objective standard of reasonableness, nor that it resulted in prejudice. Thus, the claim that trial counsel was ineffective for failing to object to improper warnings is without merit.

7. Trial Counsel was Ineffective at Sentencing.

In his seventh claim, Brisco asserts three reasons for why trial counsel was ineffective at sentencing.[163] First, Brisco contends that, rather than conceding a sentence of life imprisonment, trial counsel should have argued that Brisco's youth

[160] D.I. 157, at 47.
[161] D.I. 162, at 95.
[162] D.I. 157, at 49.
[163] *Id*.

was a mitigating factor and that, due to his juvenile status when he committed his crimes, he should have been sentenced to the mandatory minimum 25 years of Level V incarceration.[164] Second, Brisco claims that trial counsel should have sought the "merger of the possession of the person prohibited charges with the possession of a firearm by a prohibited juvenile charges."[165] Finally, Brisco complains that trial counsel made "no arguments at sentencing on his client's behalf."[166] Brisco contends that he suffered prejudice because "he received the highest possible sentence, and has no supportive record to request a sentencing modification."[167]

At sentencing the Court heard from two impact witnesses. Then the State provided its sentence recommendation. The State recommended two life sentences plus 38 years and six months of Level V imprisonment for Brisco's offenses.[168]

When the judge asked for trial counsel's comments, he stated:

> Your Honor, there is really nothing that I can say that would reduce the feelings and suffering that the Rollins family and Kostikidis family has gone through in the[ese] circumstances. They lost a loved one, but here the Brisco family is also going to lose a loved one. No doubt John will be spending the rest of his life in jail.[169]

[164] D.I. 162, at 99.
[165] *Id*.
[166] *Id*. at 100.
[167] *Id*.
[168] PA-122.
[169] *Id.*

The judge then asked Brisco if he had "[a]nything [he] would like to add," noting that [t]here is no requirement that [he] do so."[170] Brisco responded, "No, Your Honor."[171]

In imposing the Court's sentence, the judge remarked:

> To the families of the victims there is nothing I can say to bring them back. Mr. Brisco will be sentenced to two life sentences, in essence he will die in prison, and if that brings any solace to you, that will be the sentence that is imposed. I looked at the presentence report, Mr. Brisco. I kept trying to find something that would explain what happened here in your background. I have looked for – you have a really bad growing – situation growing up, not the best, but clearly not the worst, not the worst that I am going to see of individuals today.
>
> Look at his education, did he try to do well in school? I don't think I have seen someone with a 0.00 cumulative average. That means generally you didn't go. You never did anything. So, I said, 'well, did he work? Can I find something to give me something to hang on to, never held a job.' Sir, as far as I can tell for the young years of your life, you have done nothing, absolutely nothing to make yourself a better person, to do anything beneficial to society. It was all about you, and what you did in regards to living your life on the street.
>
> You are going to pay a tremendous price for it. The sentence is two life sentences plus 35 years.[172]

In his affidavit addressing Brisco's ineffectiveness claim, trial counsel avers:

> Petitioner claims that trial counsel was ineffective at sentencing contending that since the petitioner was a juvenile at the time of his crimes, he did not face a mandatory sentence

[170] *Id.*
[171] *Id.*
[172] PA-122 to 23.

> of life imprisonment. Noting that the sentencing range for juveniles who were convicted of Murder I is 25 years to life and there was nothing preventing trial counsel from [(sic)] arguing for the mandatory minimum of 25 years on each homicide along with the gun and related charges. Furthermore, a petition for sentence reduction in the future would be more likely with a lesser sentence.
>
> The Defendant was convicted of multiple homicides and gun charges. He was sentenced to two life terms plus 35 years. It is extremely unlikely that any argument would have changed the outcome of the sentencing.[173]

Given that Defendant was a juvenile at the time of both homicide offenses for which he is convicted, Defendant argues this fact should have been raised and emphasized by trial counsel, and the failure to do so resulted in homicide convictions that required a mandatory life sentence.

In his affidavit, trial counsel sets forth that the sentencing range for juveniles who were convicted of Murder First Degree is 25 years to life.[174] Additionally, trial counsel emphasizes that Defendant was convicted of multiple homicides and gun charges.[175] Given the nature of the crimes, it was trial counsel's view any argument made at trial had a low possibility of changing the outcomes of Defendant's sentence.[176]

[173] B183.
[174] D.I. 161, at 7.
[175] *Id*.
[176] *Id*.

"[T]rial judges are presumed to know the law and to apply it in making their decisions."[177] The judge noted Brisco's "young years," and his comments about Brisco's home environment, his education, and his work experience are consistent with the factors listed in SENTAC guidelines.[178] The judge was not required to have militaristically applied a checklist of mitigating factors, as the Delaware Supreme Court has declined to require a sentencing judge "to inscribe some arbitrary minimum amount of discussion for each mitigating factor individually, regardless of its nature, significance, or weight."[179] Reminding the trial judge that he was sentencing a juvenile convicted as an adult would have added nothing.[180] The fact that Brisco's sentence fell under §4209A accounted for his chronological age.[181] Brisco has not overcome the presumption that the judge was aware of the applicable law and applied it in sentencing Brisco.[182] The record indicates that the trial judge was guided by the presentence report, the nature of Brisco's crimes and their impact on the victims' families.[183] There is an absence of evidence that counsel's presentation hurt Brisco at sentencing.[184]

---

[177] *State v. Jackson*, 2010 WL 2179874, at *10 (Del. May 28, 2010) (citing *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on the other grounds by, Ring v. Arizona*, 536 U.S. 584 (2002) (discussing sentencing issue)).
[178] D.I. 162, at 110.
[179] *Taylor v. State*, 28 A.3d 399, 409-10 (Del. 2011) (discussing imposition of death sentence).
[180] D.I. 162, at 111.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *See Hunt v. State*, 2016 WL 6472888, at *4 (Del. Nov. 1, 2016) (in finding absence of deficient performance based on the allegation that "sentencing counsel failed to zealously advocate for a lesser sentence, noting the presumption of professional reasonableness and the defendant's burden of proof and concluding that "there is no evidence that sentencing counsel's statements actually prejudiced [the defendant]" as the court "was guided by the presentence report and an extensive list of aggravating factors, as well as concerns for public safety").

Brisco cannot demonstrate that the outcome of his sentence would have been different had trial counsel reminded the trial judge that he should consider Brisco's juvenile status at the time of his crimes. Brisco has failed to adequately specify other mitigating factors that trial counsel should have presented or to establish that counsel's statement negatively impacted the judge's sentencing decision. Therefore, Brisco has not demonstrated a reasonable probability of a different outcome.

Brisco next contends that his trial counsel erred by not arguing that his person prohibited offense merged to the extent he was convicted for possessing a deadly weapon as both a juvenile and having a prior felony adjudication of delinquency.[185] The issue of multiplicity based on a defendant's qualification to be convicted under multiple subparts of §1448 was not truly settled until the Delaware Supreme Court's decision in *Patrick*, which was issued years after Brisco's sentencing.[186]

An attorney's performance is judged on the state of the law at the time of his actions.[187] The state of the law at the time of Mr. Brisco's sentence was that there was no merger. Trial counsel was not deficient for failing to raise this argument.

Even if trial counsel was deficient in failing to raise the mergers argument, the Rule 61 Petition does not present an "actual controversy" and is not ripe for adjudication.

[185] D.I. 162, at 112.
[186] *Id*. at 113.
[187] *See Strickland*, 466 U.S. at 689.

Our Supreme Court, in affirming the Superior Court's denial of a defendant's motion for correction of sentence, has held "that the issue [defendant] raises regarding his sentence on the weapon offenses does not appear to be ripe for consideration in light of [his] four life sentences without parole."[188] In a subsequent decision in that case, the Superior Court stated:

> As the Delaware Supreme Court already noted in a prior motion filed by Defendant seeking a correction of his sentence, Delaware's issues regarding his sentence on the weapons offense does not appear to be ripe for consideration in light of the fact that he is serving life sentences without parole. Defendant must first serve his life sentences before he begins servant the sentences on the weapon convictions. Because Defendant is unlikely to ever serve those sentences, he does not appear to present an "actual controversy." Delaware courts are not required to expend judicial resources to answer questions that have no significant current impact.[189]

Two other 2010 cases are in accord. In a Superior Court case, defendant moved for postconviction relief after a jury convicted him, *inter alia*, of two counts of murder and he was sentenced to two life sentences plus additional time for other offenses. In denying the motion, the Court stated:

> Defendant's motion should be summarily dismissed because his issue regarding his life sentence on the Attempted First Degree Murder conviction is not ripe for consideration. Defendant must first serve his life sentence for First Degree Murder, without probation or parole or any other reduction, before he will be gin to serve his life

[188] *Govan v. State*, 832 A.2d 1251 (Table) (Del. 2003).
[189] *Govan v. State*, 2010 WL 3707416, at *1 (Del. Super. Aug. 31, 2010)(Comm's Order).

> sentence on the Attempted First Degree Murder conviction. Defendant does not challenge his life sentence, without probation or parole, on his First Degree Murder conviction. In addition, Defendant must serve an additional 86 years on the Second Degree Murder, conspiracy and weapons convictions. Because Defendant must first serve his life sentence without probation, parole or any other reduction for his First Degree Murder conviction, it is unlikely he will ever serve any of other remaining sentences. Thus, Defendant does not appear to present an "actual controversy" at the present time. Delaware courts are not required to expend judicial resources to answer questions that have no significant current impact.[190]

In a Supreme Court case affirming a decision of the Superior Court denying defendant's motion for correction of illegal sentencing, the Court stated:

> Equally meritless is Marvel's second claim that the start date on his life in prison. There is no indication that the start date of his sentence, erroneous or not, has any "significant current impact" on him or presents any "actual controversy" ripe for consideration by this Court.

Finally, in a recent Superior court case, a jury found defendant guilty of several rape and other sexual offenses. He was sentenced to seven life sentences. The Superior Court denied his second motion for postconviction relief, stating:

> Defendant cannot demonstrate prejudice under *Strickland* – a reasonable probability of a different result at trial – from counsel's failure to object to the State's omission of the tolling provision in the Indictment. Even if counsel successfully objected to those counts, the same objection would not have applied to Counts Vi-XXI, and the

[190] *State v. Twyman*, 2010 WL 4261921 (Del. Super. Oct. 19, 2010).

> Defendant was sentenced to seven life sentences without the possibility of release for the Rape First Degree convictions, plus more than eighty years of incarceration on the remaining convictions. Because Defendant is unlikely to serve out of the seven life sentences, his claim does not present an "actual controversy."[191]

Given his life sentences defendant will never get to his Level V time for the gun conviction. Therefore, his Rule 61 claims as to the merger argument is not ripe for adjudication.

Finally, Brisco contends that defense counsel made no arguments at sentencing on his client's behalf.[192]

At sentencing trial counsel stated:

> Your Honor, there is really nothing that I can say that would reduce the feelings and suffering that the Rollins family and Kostikidis family has gone through in the[ese] circumstances. They lost a loved one, but here the Brisco family is also going to lose a loved one. No doubt John will be spending the rest of his life in jail.[193]

In his affidavit trial counsel stated:

> The Defendant was convicted of multiple homicides and gun charges. He was sentenced to two life terms plus 35 years. It is extremely unlikely that any argument would have changed the outcome of the sentencing.[194]

[191] *State v. Hearne*, 2023 WL 2980324 (Del. Super. April 17, 2023).
[192] D.I. 162, at 100.
[193] *Id*. at 104.
[194] B183.

Trial counsel made a strategic decision to limit his sentencing remarks to the sentencing judge who has presided over the trial and was well aware of the Defendant and his actions. Trial counsel's decision was not deficient.

Even if deficient, there was no prejudice. The judge noted Brisco's young years and his comments about Brisco's home environment, his education, and work experience are not only consistent with the SENTAC factors, but demonstrates the trial judge's familiarity with the Defendant.[195] The record indicates that the trial judge was guided by the presentence report, the nature of Brisco's crimes, their impact on the victim's families, and Brisco's past.[196] There is simply no evidence that Brisco was prejudiced in any way by counsel's performance at sentencing.

For the reasons stated above, Defendant's claims for post-conviction relief are **DENIED**. Defendant's Request for an evidentiary hearing is also **DENIED**.

/s/ Francis J. Jones Jr.
Francis J. Jones, Jr., Judge

/jb
Original to Prothonotary

[195] D.I. 162, at 110
[196] *Id*. at 111.