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Case Number 530,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KASHIEM THOMAS,	)	
	)	
Appellant,	)	No. 530, 2024
v.	)	
	)	On Appeal from the
STATE OF DELAWARE,	)	Superior Court of Delaware
	)	In and for New Castle County
	)	ID No. 1703001172
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
DUC 1703001172

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Kashiem Thomas was charged with Murder First Degree and Possession of a Firearm During the Commission of a Felony for the death of Keevan Hale.[1] A jury convicted him.[2] He was sentenced to serve the balance of is natural life plus fifteen years in prison.[3]

On direct appeal, Mr. Thomas argued that the trial court should have granted his motion for judgment of acquittal.[4] This Honorable Court affirmed the convictions in an opinion dated March 4, 2020.[5]

Thomas filed this petition *pro se* in the Superior Court on March 31, 2020.[6] Two amended motions were filed.[7] The Honorable Paul Wallace denied all claims for relief on December 16, 2024.[8]

Before this Honorable Court is an appeal of Thomas' Petition for Postconviction Relief. Thomas filed a notice of appeal on December 27, 2024.[9] This is Thomas' Opening Brief challenging the postconviction court's denial of his claims stemming from the ShotSpotter evidence.

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[1] A94.
[2] A1088.
[3] A1145.
[4] A1150-A1169.
[5] *Thomas v. State*, 2020 WL 1061692 (Del. Mar. 4, 2020). A1226.
[6] A15-A16 (D.I. 101) and A1229.
[7] A21b-A21c (D.I. 146, 155). A1485-A1569. A1570-A1618.
[8] Exhibit 1.
[9] See Supreme Court Docket.

SUMMARY OF THE ARGUMENT

(1) Trial counsel rendered ineffective assistance of counsel by withdrawing a motion *in limine* challenging ShotSpotter expert opinion of Paul Greene where the evidence was critical to the jury's determination of guilt and Thomas did not knowingly or intelligently waive the issue. Had ShotSpotter been excluded, Thomas' would have been acquitted.

(2) Trial counsel rendered ineffective assistance of counsel by failing to present exculpatory, affirmative, rebuttal expert testimony of Simone Ellison. Had counsel presented the expert, Thomas' would have been acquitted.

(3) Greene's perjured testimony, that it was he who reached out to the State about replacing Ellison as an expert witness, not *vice versa*, would have reasonably affected the judgment of the jury had it been corrected. The argument is not procedurally defaulted because counsel's failure to raise the issue, correct the testimony, or motion for mistrial fell below an objective standard of reasonableness but for which Thomas would have been acquitted.

(4) The cumulative effect of the errors was that the jury determined guilt based upon controversial science, a matter of first impression in Delaware, ripe for exclusion in other jurisdictions, without the benefit of effective cross-examination and/or rebuttal experts and, in part, based on a misrepresentation of fact critical to assessing the application of ShotSpotter in this case. The cumulative error undermines confidence in the convictions.

STATEMENT OF FACTS[10]

On February 23, 2017, "various 911 calls and ShotSpotter alarms alerted police to shots fired in the area"[11] of the 600 block of East 23rd Street in Wilmington.[12] "One 911 caller reported that at about the time she heard shots being fired, she saw a car drive up Hale's block and turn the corner. Surveillance video confirmed that within seconds of the shots being picked up by ShotSpotter, two cars drove up the block where Hale's house was located."[13]

Officer Kavanagh arrived on scene first "at which time I did observe a victim lying in front of 606 East 23rd and that would have been on the pavement within the area of the residence."[14] It was Thomas,[15] "injured on the sidewalk between Hale's and Hale's neighbor's houses."[16] He had a gunshot entry wound to his right posterior flank.[17] "The officers did not find Thomas with a gun."[18] At no time did the detective see anyone take anything from Thomas.[19] On surveillance as

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[10] Mr. Thomas incorporates the facts as outlined in his Opening Brief on Direct Appeal at A1155-A1160.
[11] A1155-A1160.
[12] A450.
[13] A1155-A1160. A744-A746. A737. A1226.
[14] A451
[15] A453.
[16] A1226. *Thomas v. State*, 2020 WL 1061692 at *1 (Del. Mar. 4, 2020).
[17] A710. A1226. *Thomas v. State*, 2020 WL 1061692 at *1 (Del. Mar. 4, 2020).
[18] A1227. *Thomas v. State*, 2020 WL 1061692 at *2 (Del. Mar. 4, 2020).
[19] A459.

he approached prior to the shooting, Thomas had one hand in his pocket and the other swinging freely.[20]

Meanwhile, inside Hale's residence, 602 East 23rd Street,[21] Hale had been shot and was dying.[22] "Officers found a Walther PPS. 40 caliber Smith & Wesson handgun underneath a couch armrest in Hale's living room. In Hale's lawn, the officers found four Smith & Wesson .40 caliber cartridge casings and three plastic shot shell casings with 410 bore."[23] "The State never recovered the gun responsible for Hale's death."[24]

At trial, defense counsel argued that Mr. Thomas was a victim not a shooter, did not possess weapon, and that the shots killing Hale came from the street where the cars drove by instead of from the sidewalk where Mr. Thomas was found.[25]

ShotSpotter Technology As Described At Trial

ShotSpotter analysis was a critical piece of evidence in the State's case against Thomas.[26] Paul Greene testified for the State as a ShotSpotter expert.[27] Greene had been working for ShotSpotter for eleven years and managed the

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[20] A737.
[21] A476.
[22] A477.
[23] A1227. *Thomas v. State*, 2020 WL 1061692 at *2 (Del. Mar. 4, 2020).
[24] A1227. *Thomas v. State*, 2020 WL 1061692 at *2 (Del. Mar. 4, 2020).
[25] A1005-A1013.
[26] A137. See also Exhibit 1. *State v. Thomas*, 2024 WL 5117117 at *8 (Del. Super. Dec. 16, 2024).
[27] A589-A688.

forensic services department.[28] He was the only expert witness to testify on the topic of ShotSpotter technology and its application in this case.[29]

ShotSpotter is an acoustic gunshot detection and location system that purports to listen for impulsive sounds ("anything that goes bang, boom, or pop")[30] to identify gunfire[31] in a geographic area.[32] It reports the occurrence, time, location, audio recordings and classification to law enforcement,[33] in this instance the City of Wilmington Police Department. [34] The information is reported rapidly, notifying police of gunfire within 60 seconds to aid in response time.[35]

There are three chief components to the ShotSpotter system: (1) sensors equipped with microphones, computers, GPS, and network devices;[36] (2) software that receives data from the sensors, classifies it as gunfire or not, and calculates the location from which the sound originated;[37] and (3) an interface used by human operators at ShotSpotter headquarters conducting a "review consult," editing the data to eliminate sounds erroneously classified as gunfire.[38] Audio recordings are

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[28] A590.
[29] See full trial transcript.
[30] A597-A598.
[31] A593.
[32] A594. For geographic area, see also A617-A618.
[33] A593-A594.
[34] A633-A634.
[35] A595
[36] A595.
[37] A596.
[38] A596-A597.

transmitted to ShotSpotter staff who listen to weed out false positives - incidents that trigger the system but are not really gunfire.[39] Reviewers may dismiss, reclassify, and relabel sounds as gunfire or not.[40] ShotSpotter then reports the data to police to aid in their response to the incident.[41]

ShotSpotter uses "multilateralization" – using multiple known geographic points to determine an unknown point by "time difference of arrival" – purportedly to determine location.[42] When a sensor hears a sound it believes is gunfire, it timestamps the sound and measures amplitude, sharpness, frequency, bass, treble, timing, and environmental temperature.[43] The timing is compared across multiple sensors in the area and the difference is computed against the speed of sound using differential calculus.[44]

ShotSpotter analysts also make changes during "post-processing."[45] Post-processing is a manual re-evaluation of the incident data reported by the ShotSpotter system.[46] A forensic analyst re-evaluates the audio files to determine number and location of shots and to produce a report for customers and juries.[47]

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[39] A602-A603.
[40] A603-A604.
[41] A606.
[42] A599-A601.
[43] A599-A600.
[44] A600.
[45] A623.
[46] A623.
[47] A624-A625.

Greene's department conducts this forensic analysis.[48] The analyst that authors the forensic report in a case may testify at trial to give an expert opinion on the identification and location of gunfire.[49] Forensic reports are "divided into two major parts. The first half of the report details what was reported to the customer, the 911 center, in real time. The second half of the report is a more detailed breakdown that was obtained during our post-process analysis."[50]

Green cautioned: "there are any number of factors in the environment that could prevent ShotSpotter from accurately locating, finding and accurate geographic locations for where that weapon was fired."[51] These include "any factor in the environment that muffles, modifies, or changes that sound so that when it does reach the ShotSpotter sensor, the ShotSpotter sensor doesn't recognize it as an impulsive noise and doesn't report it. And these could be buildings; these could be hills and other topography. This could also be loud noises it could be street noise; it could be construction; it can be engine noises."[52] "None of what we do is absolutely perfect or perfectly repeatable at times. We're doing the best we can with the data that we have available, and we're admonishing our customers, we're admonishing the Court, too, that this is not a comprehensive

[48] A592.
[49] A632.
[50] A637.
[51] A612.
[52] A612-A613.

analysis and it should be corroborated by other evidence. It should not be the only evidence used to arrive at your verdict."[53] "Acoustical data analysis of a gunfire incident is complex and not comprehensive. The conclusions above should be corroborated with other evidentiary sources such as recovered shell casings, and witness statements."[54]

Green testified: "It is a product. When you sell a product to a customer, when you're spending hundreds of thousands of dollars…the customer wants a guarantee of what that product will deliver."[55] ShotSpotter guarantees[56] a 90% accuracy rate in the detection of gun fire within a 25-meter radius.[57] Although, Greene testified that the system "regularly" places gunshot locations within ten feet of the actual shooting.[58] The advertised guarantee increased from 80% to 90% prior to Thomas' trial with no corresponding equipment or usage change.[59] Greene is a shareholder in ShotSpotter, which is a publicly traded company.[60] 98% of its customers are law enforcement[61] paying data reporting and expert witness fees.[62]

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[53] A650-A651.
[54] A651 and A247.
[55] A608.
[56] A608.
[57] A607-A608. A624.
[58] A607.
[59] A607-A608.
[60] A633.
[61] A594.
[62] A634.

Competing ShotSpotter Conclusions To Thomas' Jury

Greene's report relays the initial, automatic ShotSpotter alert - a multiple gunshot incident at longitude -75.534796 and latitude 39.750697.[63] The associated address for the alert changed between 602, [64] 608 and 610 East 23rd Street.[65] In post-processing, Greene "performed a complete analysis of the incident listing all ten shots, the discharge time down to a millisecond, as well as the latitude and longitude that was calculated for each of the individual rounds fired."[66] While, ShotSpotter auto-determined only the first five of ten sounds were gunfire while others were fireworks,[67] Greene concluded that all ten sounds were gunfire.[68]

Critically, Greene told the jury that the first several shots were fired <u>on the sidewalk</u> where Thomas was found at the scene.[69] Greene admitted that others may reach different conclusions.[70] In fact ShotSpotter analyst Simone Ellison, the original forensic analyst on Thomas' case,[71] did reach a different conclusion.[72] Greene admitted that Ellison's analysis placed several of the shots <u>in the middle of</u>

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[63] A638-A639 and A241.
[64] A639.
[65] A642 and A241.
[66] A645. A243.
[67] A640-A645 and A241-A244.
[68] A645.
[69] A646 and A244.
[70] A650.
[71] A631 and A227.
[72] A653.

the street.[73] When asked "one, two, three, and four look like they would be squarely in the roadway and not anywhere else; is that correct?" he replied, "I believe so, yes."[74] "The individual shot locations that Ellison calculated were different from mine in some cases by up to 30 feet, 30 to 40 feet, which, in light of our limited performance guarantee, is actually really minor. My understating is that this is an issue, but as far as ShotSpotter is concerned, as long as –as far as I'm concerned, as long as her results are within 25 meters of the original location and are close to what mine are, then as far as I'm concerned, she is learning and her results were as accurate as they could be at the time."[75] "25 meters is 82 feet."[76] While Ellison did not testify, Greene discussed her report[77] and her report was entered into evidence.[78] Greene described Ellison as a "junior colleague" who has never testified."[79] He said he did not know how she came to her conclusions.[80]

[73] A659. A1243-A1276. Compare A1250 to A1262.
[74] A660.
[75] A653-A654.
[76] A654.
[77] A652-A659.
[78] A653 and A227.
[79] A632.
[80] A656.

Originally, Ellison was subpoenaed to testify at trial to her conclusion that multiple shots came from the street.[81] Greene took her place,[82] authoring his new report placing those shots on the sidewalk.[83] Greene told the jury that he reached out to the State about substituting for Ellison because she was pregnant.[84] At a sidebar, the State suggested that was not true – implying that the State had reached out to Greene about him testifying.[85] The false statement was never corrected in front of the jury.[86]

ShotSpotter Cross-Examination

Defense counsel attempted to cross-examine Greene on the topic of a different case in which Greene was similarly replaced as the expert witness by Robert Calhoun.[87] Upon objection by the State, defense counsel proffered:

> "There's a case in which, just like Mr. Greene has come into court today and sort of overruled, for lack of a better term, of Ms. Ellison's report, when push came to shove and it was time to come to court, the exact same thing happened in the case two years ago where Mr. Greene did a report which did not sort of sync up with what the police

[81] A632.
[82] A632.
[83] A632 and A238.
[84] A679-A682.
[85] A682-A683.
[86] A683. A685-A686.
[87] A666-A668.

> said. And then, when the police went and told Mr. Calhoun how many shots were actually fired based on the number of cartridges they found, Mr. Calhoun filed a different report and came to court in order to testify…I'm trying to show that any time there's a difference in opinion or a difference between what the State would prefer to put forward given that law enforcement is 98 percent of its customer base, that they send in a new expert so that the person will say whatever it is that sort of jibes or gels with the State's evidence, and that was done when Mr. Calhoun came in and overruled –"[88]

The Court sustained the objection: "I'm not going to allow that type of testimony. He's not going to testify as to what happened in some other case in a whole other jurisdiction. Under 403, I find we would have to have a mini trial on what the actual evidence was in that case, what the circumstances were in that case. You can cross-examine him on his specific work in this case, his experience, his knowledge, any bias that you believe he may have. But we're not going to get into what other findings were in other cases."[89]

[88] A667.
[89] A667-A668.

During the sidebar on the objection, defense counsel asked permission to cross-examine Greene on a case from California in which ShotSpotter opinion was excluded from evidence.[90] Defense counsel asked:

> "I can't bring in evidence showing that it has [been excluded]? Because there's a case where – actually there's testimony – it's actually in the motion I filed. It's actually attached as an exhibit showing that it was not accepted in California, that the Court struck it down on not accepted in the scientific community ground."[91]

The trial judge replied: "you can ask him if he's familiar with that; but other than that, you're stuck with the answer."[92]

The Motion In Limine That Never Was

Trial counsel filed a motion *in limine* to exclude the ShotSpotter evidence.[93] As summarized by the postconviction court:

> "On March 5, 2018, trial counsel filed a comprehensive motion *in limine* to summarily exclude the ShotSpotter evidence, or alternatively, for a *Daubert* hearing. That comprehensive motion argued that the ShotSpotter evidence was 'both intrinsically and extrinsically unreliable,'[94] had an 'unacceptably

[90] A668-A669. See also A664.
[91] A669.
[92] A669.
[93] A117-A123.
[94] A119.

high error rate,'[95] and lacked acceptance within the scientific community."[96]

"Trial counsel also challenged the ShotSpotter evidence because 'it purports to pinpoint an exact location that a gun was fired or the order of the firing of those gunshots.'" [97]

"Trial counsel had also retained two experts to testify at any potential *Daubert* hearing – both had been involved in an earlier challenge of ShotSpotter in California."[98] Both experts, Dr. Franceshetti and Dr. Lomakin, were available to testify at a *Daubert* hearing on April 9, 2018.[99] Franceshetti and Lomakin had "testified about this exact issue before."[100] Franceshetti has testified that ShotSpotter's detection and location system is not generally accepted in the scientific community and is not reliable.[101] He cited reflection, diffractions, and scattering, problems presented by obstacles in urban environments making it difficult to discriminate sound location.[102] Lomakin has testified to his concerns

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[95] A123.
[96] A121. See also Exhibit 1. *State v. Thomas*, 2024 WL 5117117 at *7 (Del. Super. Dec. 16, 2024).
[97] A122. See also Exhibit 1. *State v. Thomas*, 2024 WL 5117117 at *7 (Del. Super. Dec. 16, 2024).
[98] A138. See also Exhibit 1. *State v. Thomas*, 2024 WL 5117117 at *8 (Del. Super. Dec. 16, 2024).
[99] A142. A140. See also Exhibit 1. *State v. Thomas*, 2024 WL 5117117 at *7 (Del. Super. Dec. 16, 2024).
[100] A150. A1299-A1362 and A1373-A1432.
[101] A1313-A1321, A1327.
[102] A1313-A1315.

regarding the error rate inherent in classifying a certain impulse as a specific sound.[103] Lomakin also said that ShotSpotter is not generally accepted in the scientific community.[104] He cites concerns with reliability, error and confidence rates, and problematic technology making it not viable for use in court.[105]

"Given that the issue was of first impression in Delaware, the admissibility issue's complexity, and that trial was imminent, the Court was concerned with the defense-proposed tight scheduling of a *Daubert* hearing. So, the Court proposed rescheduling the trial to a date in mid-June or shortly thereafter. The Court then queried the parties on whether the trial date would have to be moved to properly accommodate a *Daubert* hearing and the Court's decision on 'a crucial piece of evidence for both sides and their ability to either present or attack it.'"[106]

Trial counsel withdrew the motion *in limine*. In an email on March 19, 2018, trial counsel said "I spoke with my client this morning at length, and he would like to keep the April trial date. In consideration, the defense understands that we will not be having a *Daubert* hearing and that the State will not be calling any additional experts. I spoke with my client in detail about this decision and advised

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[103] A1405-A1406.
[104] A1415.
[105] A1416. See also A1438-A1467 for prior testimony of Greene in California.
[106] Exhibit 1. *State v. Thomas*, 2024 WL 5117117 at *8 (Del. Super. Dec. 16, 2024). See also A148-A154. See also A140 (State indicating they wish to make a full record on this matter of first impression).

him that I would still be permitted to cross-examine the State's expert (Paul Greene) with regard to this anticipated testimony regarding ShotSpotter."[107]

The trial court ordered counsel to file a formal motion to withdraw and the State requested that "we have a clear record that defense counsel explained to pros and cons of going forward to trial without a *Daubert* hearing to her client and that the defendant was further made aware that a backup trial date was selected for July 16, 2018 in the event defense elected to proceed with a full *Daubert* hearing."[108]

In a letter to the trial judge dated March 20, 2018, trial counsel stated that "in consideration of being able to move to trial more quickly and keep the previously scheduled April trial date, my client will withdraw the *Daubert* motion which was filed earlier this month. My client also understands that the State will not call any additional expert witnesses with respect to the ShotSpotter evidence which they intend to introduce at trial. He also understands that I may cross-examine the state's ShotSpotter witness at trial."[109] In a second letter that same day, trial counsel reiterated that "I spoke with my client this morning at length and he would like to keep the April trial date. In consideration, the defense understands that we will not be having a *Daubert* hearing and that the State will not be calling any additional experts. I spoke with my client in detail about this decision and

[107] A168-A169.
[108] A168.
[109] A166.

advised him that I would still be permitted to cross-examine the State's expert (Paul Greene) with regard to this anticipated testimony regarding ShotSpotter."[110]

In a March 26, 2018 status hearing, [111] defense counsel stated that Thomas knew of the secondary July trial date option but that his preference was to go to trial in April, that trial counsel supported that decision, and that trial counsel was prepared for trial.[112] The trial court addressed Mr. Thomas directly on the issue of withdrawing the motion *in limine*. Mr. Thomas answered "yes" when asked "you understand the strategy that [trial counsel is] employing on your behalf to attack this forensic type evidence?"[113] Mr. Thomas also responded affirmatively when the trial judge stated: "I want to make sure that this is done now because I don't want an argument later on if things don't go your way or you don't get a result that you are in agreement with that you didn't have enough time to think about this, that you didn't understand what was going on, do you understand that, sir?[114] The motion *in limine* was rendered moot as withdrawn.[115]

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[110] A167.
[111] A191-A211.
[112] A193-A194.
[113] A194-A195.
[114] A195.
[115] A196 and A124.

Trial Counsel's Affidavits

Trial counsel authored two affidavits in connection with these post-conviction proceedings.[116] In the second affidavit, trial counsel said:

- "I discussed with Defendant the option of pursuing a *Daubert* hearing regarding the admissibility of ShotSpotter evidence or, in the alternative, keeping the pending trial date with the understanding that I would cross-examine the State's ShotSpotter expert regarding the two conflicting reports filed by their corporation. The first report clearly supports the defense that a drive-by shooter fired the shots that fatally wounded the decedent because the report placed those shots *as coming from the street*. The *later* report prepared by Paul Greene directly conflicted with the initial ShotSpotter report and instead placed the shots as coming from the sidewalk area where Defendant had been shot by the decedent, thus bolstering the State's case."[117]
- The numerous ShotSpotter problems set forth in the recent *Motherboard* article (previously supplied to the Court, prior Rule 61 counsel and Defendant shortly following its release) support Defendant's claim that his conviction should be invalidated…the *en banc* questioning by the Delaware

[116] A1645-A1649.
[117] A1648-A1649.

Supreme Court shows that our Justices believed that this was a close case in terms of the evidence presented. Further, the prosecution, during an office conference, deemed the ShotSpotter evidence to be 'critical' thus supporting the assertion that the ShotSpotter evidence was persuasive. The information, described and set forth in the *Motherboard*, article is new…because the problems described therein occurred subsequent to Defendant's trial and therefore could not have been discovered pre-trial."[118]

[118] A1648-A1649.

ARGUMENT

I. THE POSTCONVICTION COURT COMMITTED REVERSABLE ERROR BECAUSE TRIAL COUNSEL'S WITHDRAWAL OF THE MOTION *IN LIMINE* CHALLENGING SHOTSPOTTER DATA, METHODOLOGY, AND ANALYSIS WAS OBJECTIVELY UNREASONABLE AND THE EXPERT TESTIMONY WAS SO CRITICAL TO THE JURY'S DETERMINATION OF GUILT OR INNOCENCE THAT ITS EXCLUSION WOULD CREATE A REASONABLE PROBABILITY OF ACQUITTAL.

Question Presented

Was it objectively unreasonable and prejudicial to withdraw Thomas' motion *in limine* challenging Greene's ShotSpotter opinion when the methodology had not been peer reviewed, was ripe for exclusion by courts in other jurisdictions, and had been rightfully characterized as controversial by multiple national publications – especially when the application in Mr. Thomas' case was prejudicially altered to move the location of the shots fired from a location that supported the defense to a location that supported the State? (*Error Preserved at Exhibit 1 pages 11 – 12, pages 16 – 34, 48 – 49; A1234*).

Standard of Review

The standard of review on appeal of a court's denial of a defendant's motion for postconviction relief is generally whether it abused its discretion.[119] The abuse of discretion standard is also applied to the Superior Court's decision whether to

[119] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)). See also *Starling v. State*, 130 A.3d 316 (Del. 2015).

order a hearing.[120] When deciding legal or constitutional questions, the Supreme Court applies a *de novo* standard of review.[121] Further, the Court reviews ineffective assistance of counsel claims *de novo*.[122]

Merits of the Argument

When reviewing the Superior Court's denial of a postconviction motion pursuant to Superior Court Criminal Rule 61, the Supreme Court first must consider the procedural requirements of the rule before addressing any substantive issues.[123] None of Thomas' claims are procedurally barred. This is Thomas' first motion for postconviction relief.[124] It was filed within a year of his convictions becoming final.[125] His claims have not been formerly adjudicated.[126] His ineffective assistance of counsel claims are not procedurally defaulted because, to the extent they were not asserted in the proceedings leading to his convictions, he demonstrates cause for relief from procedural default and resulting prejudice.[127]

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[120] *Harris v. State*, 410 A.2d 500 (Del. 1979).
[121] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)).
[122] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013) (citing *Starling v. State*, 130 A.3d 316 (Del. 2015)).
[123] See *Younger v. State*, 580 A.2d 552 (Del. 1990); *Stone v. State*, 690 A.2d 924 (Del. 1996); *Teagle v. State*, 755 A.2d 390 (Del. 2000).
[124] See Superior Court Criminal Rule 61(i)(2).
[125] See Superior Court Criminal Rule 61(i)(1).
[126] Superior Court Criminal Rule 61(i)(4).
[127] See Superior Court Criminal Rule 61(i)(3).

"Such claims are appropriate in motions for postconviction relief."[128] Ineffective assistance of counsel is cause to excuse default.[129]

"In *Strickland v. Washington*, the United States Supreme Court established a two-pronged test for ineffective assistance of counsel claims: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." [130] In *Starling v. State*, this Court said that defense counsel is deficient where counsel's representation falls below an objective standard of reasonableness.[131] To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result at trial would have been different.[132] "A reasonable probability of a different result means a 'probability sufficient to undermine confidence in the

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[128] *Flamer v. State*, 585 A.2d 736, 753 (Del. 1990) (citing *DuRoss v. State*, 494 A.2d 1265, 1267-68 (Del. 1985)).
[129] See *Shelton v. State*, 744 A.2d 465, 475 (Del. 2000).
[130] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).
[131] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (citing *Gattis v. State*, 697 A.2d 1174 (Del. 1997).
[132] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

outcome,' a standard lower than 'more likely than not.'"[133] "The likelihood of a different result must be substantial, not just conceivable.'"[134]

In Thomas' case, trial counsel's withdrawal of the motion *in limine* challenging ShotSpotter data and analysis was objectively unreasonable and the expert testimony was so critical to the jury's determination of guilt or innocence that its exclusion would have created a reasonable probability of acquittal.[135] Thomas' representation fell short of that which is required by the Sixth and Fourteenth Amendments to the *United States Constitution* and by Article I § 7 of the *Delaware Constitution*.

Appropriately argued by trial counsel in a written motion *in limine*, Greene's ShotSpotter data, methodology and analysis were expert opinion, subject to the limitations of Delaware Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[136] "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the

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[133] *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984)).
[134] *Harrington v. Richter*, 562 U.S. 86 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 693 (1984)).
[135] *See Dorsey v. State*, 937 A.2d 92 (Del. 2007). See also *Neal v. State*, 80 A.3d 935 (Del. 2013). See also *Strickland v. Washington*, 466 U.S. 668 (1984).
[136] A117.

testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principes and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[137] "The Delaware Supreme Court has adopted a five-part test for trial courts to consider when determining the admissibility of scientific or technical testimony. The trial court must decide whether: (i) the witness is qualified as an expert by knowledge, skill, experience, training, or education; (ii) the evidence is relevant and reliable; (iii) the expert's opinion is based upon information reasonably relied upon by experts in the particular field; (iv) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and (v) the expert testimony will not create unfair prejudice or confuse or mislead the jury."[138]

None of these factors were considered by the trial court in Mr. Thomas' case because the motion *in limine* was withdrawn. It is likely that the trial court would have excluded Greene's expert opinion because ShotSpotter and Greene himself had been widely characterized as unreliable, had not been peer reviewed, and had not been sufficiently vetted by courts in Delaware or anywhere else. More, two analysts from ShotSpotter disagreed on the critical location conclusion.

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[137] D.R.E. 702. See *Schueller v. Cordrey*, 2017 WL 631769 at *2 (Del. Super. Feb. 15, 2017). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[138] *Schueller v. Cordrey*, 2017 WL 631769 at *2 (Del. Super. Feb. 15, 2017) (citing *Cunningham v. McDonald*, 689 A.2d 1190, 1193 (Del. 1997)).

In *United States v. Godinez*,[139] the defendant filed a motion *in limine* in District Court requesting a hearing to challenge ShotSpotter opinion pursuant to *Daubert.*[140] "Godinez argued that that ShotSpotter methodology and its underlying data were not the product of reliable principles and methods. ShotSpotter's programming and algorithms have never been peer reviewed, Godinez contended, so the district court should hold a *Daubert* hearing and require the government to establish ShotSpotter's reliability. If the district court did find the technology reliable under *Daubert*, Godinez argued that ShotSpotter had deliberately placed the approximate locations of shots at the crime scene, so that evidence should be excluded as unduly prejudicial."[141]

The Court of Appeals for the 7th Circuit found that the District Court committed an abuse of discretion by admitting the expert testimony without a hearing.[142] Most critical to the Circuit Court's abuse of discretion review[143] was the fact that the ShotSpotter evidence admitted at trial implicated the system's methodology.[144] "Recall that at first, the system identified two gunshots – Spratte's

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[139] *United States v. Godinez,* 7 F4th 628, 634 (7th Cir. 2021) (finding abuse of discretion but affirming by harmless error *United States v. Godinez*, 2019 WL 4857745 (N.D. Ill. East. Div. Oct. 2, 2019). *But see State v. Hill*, 851 N.W.2d 670 (Neb. 2014).
[140] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[141] *United States v. Godinez,* 7 F4th 628, 634 (7th Cir. 2021)
[142] *United States v. Godinez,* 7 F4th 628, 637-38 (7th Cir. 2021).
[143] *United States v. Godinez,* 7 F4th 628, 637 (7th Cir. 2021)
[144] *United States v. Godinez,* 7 F4th 628, 638 (7th Cir. 2021)

return fire. Then, after Chicago police contacted ShotSpotter and asked them to search for additional audio clips, the system identified five more preceding shots. This identification and location process goes to how ShotSpotter collects, analyzes, and reports its data – its methodology."[145] "Without a more searching examination of ShotSpotter's methods under *Daubert*, we cannot conclude that this evidence was properly admitted against Godinez. After giving due deference to the district court's consideration of the record, we conclude that it abused its discretion in admitting Greene's testimony and the ShotSpotter evidence."[146]

The expert in *Godinez* was Greene[147] – *the very same expert witness that testified to the jury in Thomas' case*. The expert witness is not the only thing that Thomas has in common with *Godinez*. In both cases, Greene testified that he identified more gunshots than were detected automatically by the ShotSpotter system. As in *Godinez*, Thomas did not call his own expert witness. As in *Godinez*, the trial judge said that Thomas could effectively cross-examine the expert at trial. As in *Godinez*, Thomas' withdrawn motion *in limine* challenged the methodology of the ShotSpotter system and analysis.

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[145] *United States v. Godinez,* 7 F4th 628, 638 (7th Cir. 2021)
[146] *United States v. Godinez,* 7 F4th 628, 638 (7th Cir. 2021).
[147] *United States v. Godinez,* 7 F4th 628, 633 (7th Cir. 2021)

ShotSpotter was formally addressed by the Delaware Superior Court in the context of a civil defamation action in *ShotSpotter v. VICE Media, LLC*.[148] That action arose from a news story published by VICE Media on July 26, 2021, entitled *Police Are Telling ShotSpotter to Alter Evidence from Gunshot-Detecting AI*.[149] "The Article details how ShotSpotter has exhibited a 'pattern' of 'altering' gunshot alerts at the request of police departments. It labels ShotSpotter data as 'untested evidence and states that prosecutors have been 'forced to withdraw' ShotSpotter evidence during trial."[150] Trial counsel and Thomas both cited the VICE Media news article to the post-conviction court in these postconviction proceedings in *ex post facto* support of the withdrawn motion *in limine*.[151]

The article cited *Godinez*.[152] It also cited the case of Michael Williams in Chicago. There, a ShotSpotter alert was manually overridden to reclassify an impulsive sound as a gunshot. "Later, the company issued a forensic report with a map and GPS coordinates identifying the same intersection that ShotSpotter had

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[148] *ShotSpotter v. VICE Media, LLC*, 2022 WL 2373418 (Del. Super. June 30, 2022).
[149] *ShotSpotter v. VICE Media, LLC*, 2022 WL 2373418 at *1 (Del. Super. June 30, 2022).
[150] *ShotSpotter v. VICE Media, LLC*, 2022 WL 2373418 at *1 (Del. Super. June 30, 2022). *Police Are Telling ShotSpotter to Alter Evidence From Gunshot Detecting AI*, Todd Feathers, VICE, July 26, 2021 at A1656-A1672.
[151] *State v. Thomas*, 2024 WL 5117117 at *20 and Footnote 217 (Del. Super. Dec. 16, 2024).
[152] *Police Are Telling ShotSpotter to Alter Evidence From Gunshot Detecting AI*, Todd Feathers, VICE, July 26, 2021 at A1656-A1672.

initially identified in the real-time alert but updated the address to be closer to the actual GPS coordinates it initially identified."[153] Williams argued that the "human-involved" method "dramatically transformed from data that did not support criminal charges of any kind to data that now forms the centerpiece of the prosecution's murder case against Mr. Williams."[154] In Williams' case, the ShotSpotter evidence was withdrawn before it could be challenged in court for reliability.[155] The evidence in Thomas' case was modified by the forensic analyst in the same manner and to the same effect.

ShotSpotter's habit of using unreliable, untested, and altered data has been addressed in other periodicals. In 2021, the ACLU published a report stating that the "ShotSpotter methodology is used to provide evidence against defendants in criminal cases but isn't transparent and hasn't been peer-reviewed or otherwise independently evaluated. That simply isn't acceptable for data that is used in court."[156] In 2023, the Associated Press published an article noting ShotSpotter's resistance to independent scientific scrutiny and its designation of its

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[153] *Police Are Telling ShotSpotter to Alter Evidence From Gunshot Detecting AI*, Todd Feathers, VICE, July 26, 2021 at A1656-A1672.
[154] *Police Are Telling ShotSpotter to Alter Evidence From Gunshot Detecting AI*, Todd Feathers, VICE, July 26, 2021 at A1656-A1672.
[155] *Police Are Telling ShotSpotter to Alter Evidence From Gunshot Detecting AI*, Todd Feathers, VICE, July 26, 2021 at A1656-A1672.
[156] *Four Problems With The ShotSpotter Gunshot Detection System*, Jay Stanley, ACLU News & Commentary, August 24, 2021 at A1673-A1677.

"comprehensive training and operational materials" as confidential trade secrets."[157] Various other articles have asserted that ShotSpotter is not accurate in its detection and classification of gunfire.[158]

In California, the Court of Appeals determined that a ShotSpotter conclusion related to the number of shots fired required a *Kelly/Frye*[159] reliability test to determine admissibility – especially since there was a noted absence of case law establishing the reliability of ShotSpotter evidence.[160] As the trial court noted in Thomas' case – the reliability of ShotSpotter was and remains a matter of first impression in Delaware.

The postconviction court found that Thomas "knowingly forfeited" his right to pursue the motion *in limine*.[161] It was not up to Thomas. "When a defendant is represented by counsel, the authority to manage the day-to-day conduct of the

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[157] *Confidential Document Reveals Key Human Role in Gunshot Tech*, Garnace Burke and Michael Tarm, Associated Press, January 20, 2023 at A1678-A1682. The Associated Press also released an article discussing ShotSpotter's application in Mr. Williams' case specifically in *How AI-Powered Tech Landed Man In Jail With Scant Evidence*, Garnace Brukem Martha Mendoza, Juliet Linderman, and Michale Tarm, Associated Press, March 5, 2022 at A1683-A1698.
[158] *NYDP ShotSpotter Gunshot Detection Is Wildly Inaccurate, New Study Finds*, Lars Daniel, Forbes, December 5, 2024 at A1699. *ShotSpotter Is A Failure. What's Next?*, Hannah Cheves, MacArthur Justice Center, May 5, 2022 at A1704.
[159] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (superseded by *Daubert*).
[160] *People v. Hardy*, 65 Cal.App.5th 312, 328 (Cal. Ct. App. First District, Div 2, June 9, 2021). See also *People v. Coneal*, 41 Cal.App.5th 951, 955 (Cal. Ct. App. 2019) and *People v. Rubio*, 43 Cal.App.5th 342, 345 (Cal. Ct. App. 2019).
[161] Exhibit 1 page 26.

defense rests with the attorney. Though the attorney has a 'duty to consult with the defendant regarding 'important decisions,' that 'does not require counsel to obtain the defendant's consent to 'every tactical decision.'"[162] "The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. Moreover, given the protections afforded by the attorney-client privilege and the fact that extreme cases may involve unscrupulous conduct by both the client and the lawyer, it would be highly impracticable to require an investigation into their relative responsibilities before applying the sanction of preclusion."[163] Trial counsel should have ignored any desire to forgo the evidentiary challenge. ShotSpotter was crucial to the determination of guilt. With an alternative trial date only a few months later (July instead of April), there was no justification.

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[162] *Reed v. State*, 258 A.3d 807 (Del. 2021) (citing *Cooke v. State*, 977 A.2d 803, 840-41 (Del. 2009)). See also *Florida v. Nixon*, 543 U.S. 175, 187 (2004). See also *Davenport v. State*, 212 A.3d 804 (Table) (Del. 2019).
[163] *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988).

Any waiver, forfeiture, or acquiescence by Mr. Thomas was not made knowingly or intelligently and would be ineffective.[164] A waiver would have been predicated and conditioned upon trial counsel conducting an effective cross-examination of Greene[165] – which did not happen. In his first amendment to his postconviction motion, Thomas argued that trial counsel did not effectively advise him on the "pro's and con's of having the *Daubert* hearing as opposed to cross-examine at trial."[166] Trial counsel's cross-examination of Greene, presumably previewed to Thomas by trial counsel in their pro/con discussion, was predictably shut down by a sustained State objection.[167] Trial counsel should have known and advised Thomas, that they would not be able to cross-examine Greene "as to what happened in some other case in a whole other jurisdiction."[168] Trial counsel should have known and advised Thomas that she would not be able to explore at trial evidence of a prior exclusion of ShotSpotter in California beyond asking Greene if he was familiar – and being stuck with his answer.[169]

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[164] *See Boyer v. State*, 985 A.2d 389 (Del. 2009) and *Morrison v. State*, 135 A.3d 69 (Del. 2016) assessing the effectiveness of a waiver in the context of the Sixth Amendment right to counsel.
[165] See A166-A169, A194-A195 and A1648-A1649.
[166] A1527-A1528.
[167] A666-A668.
[168] A667-A668.
[169] A669.

"Upon a Rule 403 objection, the Court limited only certain inquiry regarding the testimonial practices of ShotSpotter analysts and specific admissibility rulings in other jurisdictions that Mr. Greene had no personal knowledge of. As proffered, the evidence about what happened in ShotSpotter cases in other jurisdictions would require additional testimony about the actual evidence and circumstances thereof. The Court was rightly concerned that it would divert either into a mini-trial of another court's ruling or cause trial counsel to offer her own testimony as to what occurred elsewhere…such Rule 403 rulings have long been common and recognized as appropriate in Delaware."[170]

If Thomas' waiver was predicated upon this cross-examination, and/or upon the understanding that not even Ellison would be called to testify at trial,[171] then it was not a knowing and intelligent waiver at all.

[170] Exhibit 1 pages 33-35. See *Bryant v. State*, 1999 WL 507300 at *2 (Del. June 2, 1999); *Tilghman v. Delaware State University*, 2014 WL 703869, at *3 (Del. Super. Feb. 10, 2014).
[171] See Argument II, *infra*.

II. THE POSTCONVICTION COURT COMMITTED REVERSABLE ERROR BECAUSE TRIAL COUNSEL WAS INEFFETIVE BY FAILING TO PRESENT SIMONE ELLISON AS A DEFENSE EXPERT WITNESS EVEN THOUGH HER TESTIMONY WOULD HAVE DIRECTLY SUPPORTED THE DEFENSE THEORY AND CONTRADICTED THE STATE THEORY.

Question Presented

Was it objectively unreasonable for trial counsel to fail to call Simone Ellison to testify to her own expert opinion that multiple shots were fired from the street, not from the sidewalk, and is there a reasonable probability that her testimony would have sufficiently contradicted Paul Greene to result in an acquittal? (*Facts Related to Error Noted at A1528-A1529*[172] *and A1532*[173]*).*

Standard of Review

The Supreme Court will "generally decline to review contentions not raised below and not fairly presented to the trial court for decision unless we find 'that the trial court committed plain error requiting review in the interest of justice.'[174] This

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[172] "If the motion is then denied, as it was here, the defense may still utilize the abundance of evidence in its possession corroborating counsel's theory of a drive-by shooting…forensic evidence that corroborate counsel's intended defense."
[173] "Simone Ellison made a report stating…shots came from the street."
[174] *Hoskins v. State*, 102 A.3d 724, 728 (Del. 2014) (citing *Banks v. State*, 93 A.3d 643, 651 (Del. 2014)).

standard requires an 'error so clearly prejudicial to [a defendant's] substantial rights as to jeopardize the very fairness and integrity of the trial process.'"[175]

Mr. Thomas asks the Court to find that this issue was fairly presented to the postconviction court; however, he acknowledges that his *pro se* petition and amendments should have presented it directly. Thomas noted Ellison's report when he complained that trial counsel failed to use corroborating forensic evidence.[176] However, he did not list Ellison as a witness that trial counsel failed to call.[177] In any event, the postconviction court's failure to vacate on this issue was plain error.

Merits of the Argument

In Thomas' case, humans manually overrode the automated system to re-classify the second five of ten impulsive sounds as gunfire – but those humans did not agree as to where four of the shots occurred. While Ellison placed shots one through four squarely in the roadway, Greene's report placed them on the sidewalk. This change was critical to the State's case against Thomas – and damning to Thomas' chosen defense. Specifically, the modified opinion moved the shooting away from the road where the drive-by vehicle was operated and instead placed them where Thomas' body was found when police arrived. Thus, Thomas

[175] *Hoskins v. State*, 102 A.3d 724, 728 (Del. 2014) (citing *Ozdemir v. State*, 96 A.3d 672, 675 (Del. 2014)).
[176] A1528-A1529 and page A1532.
[177] A1577-A1583.

was transformed from being the victim of crossfire to being the shooter himself.

All the while, much of the evidence at trial was consistent with the defense theory of the drive-by shooter. The postconviction court highlighted that trial counsel presented evidence suggesting someone besides Thomas was the shooter: "(a) two vehicles were present in surveillance video driving up East 23rd Street about the time of the shooting and a 911 caller said that heard a car at time of the shots; (b) Ms. Ellison's ShotSpotter analysis reported that the initial shots came from the street; (c) there was no eye witness who either saw the actual shooting or Mr. Thomas with a gun; (d) that no murder weapon was located; (e) Mr. Hale told the police that he did not know what the shooter looked like or what the shooter was wearing; (f) the victim's family's attempts to hide his weapon after the shooting; (g) the discrepancy in the number of projectiles or shells found and reported shots fired; (h) the Hale family's and Mr. Baird's use of the plural to describe who shot Mr. Hale. Trial counsel also cross-examined the State's witnesses regarding the dubiousness of the gunshot residue evidence, the DNA, and ballistics evidence to cast doubt on Mr. Thomas' guilt."[178]

Trial counsel's performance fell below an objective standard of reasonableness when she failed to call Ellison as an expert witness at trial. Any reasonable attorney would have, as her analysis of the ShotSpotter data

[178] Exhibit 1 pages 38-39.

corroborated the defense theory that shots came from the street during a drive-by. The outcome at trial had Ellison been called would likely have been acquittal.

Trial counsel may, in some cases, "be deemed ineffective for failing to consult or rely on experts."[179] In *People v. Ackley*, [180] Supreme Court of Michigan found trial counsel ineffective where it failed to secure an expert witness to testify for the defense where "expert testimony was the cornerstone of the prosecution's case."[181] In *Ackley*, trial counsel's defense theory was that a child's death was accidental, and counsel was referred to a specific expert who could provide that theory and testify; however, that expert was never contacted.[182] The Michigan Court cited the lack of "objective, expert testimonial support" for the defense theory and "the prominent controversy within the medical community regarding the reliability of" the scientific evidence relied upon by the prosecution.[183]

In *United States v. Tarricone,* a Federal Circuit Court of Appeals found that, had trial counsel called a handwriting expert to testify at trial, the guilty verdict may have likely been different.[184] Even where other evidence of guilt was present,

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[179] *Harrington v. Richter*, 562 U.S. 86 (2011).
[180] *People v. Ackley*, 870 N.W.2d 858, 863 (Mich. June 29, 2015).
[181] *People v. Ackley*, 870 N.W.2d 858, 860 (Mich. June 29, 2015).
[182] *People v. Ackley*, 870 N.W.2d 858, 863 (Mich. 2015).
[183] *People v. Ackley*, 870 N.W.2d 858, 864 (Mich. 2015).
[184] *United States v. Tarricone*, 996 F.2d 1414, 1419-1420 (2d Cir. 1993) (remanding the case for an evidentiary hearing to develop a factual record on the issue of ineffective assistance of counsel).

the Circuit Court believed the jury may have been swayed by expert testimony that contradicted the prosecution's experts in which they concluded that it was the defendant's handwriting on a document.[185] "The primary reason for our conclusion is the significance attached by both counsel to the handwriting on the throughput agreement throughout the trial."[186] The prosecution experts' testimony contradicted the defense theory and the prosecution emphasized such in summation.[187]

In *Sierra v. State*, this Court found that trial counsel was not ineffective in failing to call a defense expert forensic pathologist.[188] However, that was because the conclusion the defense expert would have drawn was agreed upon and testified to by the State's own forensic pathologist.[189] There the two experts both drew the same conclusion that a shooter could not have been standing over top of the victim when firing the fatal shots.[190] Because the conclusions were the same, there was no reason to believe that failure to call the cumulative, defense expert would have affected the outcome of the trial.[191] Similarly, in *Ploof v. State*, this Court found no prejudice in trial counsel's failure to call a ballistics expert to opine about the distance of shots fired because the defense expert's testimony did not conflict or

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[185] *United States v. Tarricone*, 996 F.2d 1414, 1419 (2d Cir. 1993).
[186] *United States v. Tarricone*, 996 F.2d 1414, 1419 (2d Cir. 1993).
[187] *United States v. Tarricone*, 996 F.2d 1414, 1420 (2d Cir. 1993).
[188] *Sierra v. State*, 242 A.3d 563, 572-573 (Del. 2020).
[189] *Sierra v. State*, 242 A.3d 563, 572-573 (Del. 2020).
[190] *Sierra v. State*, 242 A.3d 563, 572-573 (Del. 2020).
[191] *Sierra v. State*, 242 A.3d 563, 572-573 (Del. 2020).

directly contradict the prosecution's evidence regarding a crucial issue in the case.[192]

In Thomas' case, even though Greene was questioned about Ellison and her report was entered into evidence, Greene did everything he could to discredit her. He referred to her as a junior analyst who has never testified, while he simultaneously bolstered his own credibility as an expert. He attacked her conclusions, stating that he did not agree with her determination that shots were fired from the street and that he could not determine how she reached such a conclusion. While Ellison's report was used as impeachment material, her expert testimony was not presented to the jury. The jury never heard her say that the shots were in the street and the jury never heard her explanation of her methodology. Had she been called to testify, she would have told the jury affirmatively that the shots were in the street – an entirely different presentation of her opinion than that which the jury received.

As in *Ackley*, there was a lack of "objective, expert testimonial support" for Thomas' defense theory. As in *Ackley*, there is "prominent controversy" within the community regarding the reliability of the scientific evidence relied upon by the prosecution. As in *Tarricone,* there was great significance attached to ShotSpotter by both the defense and the state both pre-trial and throughout the trial. As in

[192] *Ploof v. State*, 75 A.3d 811, 826 (Del. 2013).

Tarricone, the prosecution expert's testimony contradicted the defense theory and the prosecution emphasized such throughout trial. Further, and unlike in *Sierra* or *Ploof*, Ellison's opinion was contradictory to that which was presented to the jury by the State's expert.

III. GREENE'S PERJURED TESTIMONY DENYING THE STATE REACHED OUT TO HIM ABOUT EXPERT TESTIMONY REASONABLY AFFECTED THE JUDGMENT OF THE JURY AND THE ARGUMENT IS NOT PROCEDURALLY DEFAULTED BECAUSE TRIAL COUNSEL FAILED TO RAISE THE ISSUE WHICH WAS IDENTIFIED AT SIDEBAR WHERE THOMAS COULD NOT HEAR IT.

Question Presented

Could the truth, that the State reached out to Greene about expert testimony, have reasonably affected the judgment of the jury as to the reliability of his conclusion that the shots came from the sidewalk instead of the street and is procedural default excused where neither trial counsel nor the State corrected the false testimony which was identified by the State at sidebar outside of Mr. Thomas' earshot ? (Error *Preserved in the Record at Exhibit 1 pages 11 and pages 31 – 33, A1521-A1526 and A1585-A1597*).

Standard of Review

The standard of review on appeal of a court's denial of a defendant's motion for postconviction relief is generally whether it abused its discretion.[193] The abuse of discretion standard is also applied to the Superior Court's decision whether to order a hearing.[194] When deciding legal or constitutional questions, the Supreme

[193] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)). See also *Starling v. State*, 130 A.3d 316 (Del. 2015).
[194] *Harris v. State*, 410 A.2d 500 (Del. 1979).

Court applies a *de novo* standard of review.[195] Further, and herein, the Supreme Court reviews ineffective assistance of counsel claims *de novo*.[196]

Merits of the Argument

As established in *Napue v. Illinois*[197] and its progeny, to establish a due process violation for perjury in this case, Mr. Thomas must show: (1) that the witness committed perjury; (2) that the State knew or should have known that the testimony was false; (3) that the false testimony was not corrected; and (4) that there is a reasonable likelihood that the perjured testimony could have affected the judgment of the jury.[198] "[W]hen the reliability of a particular witness may be determinative of innocence or guilt, a 'new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury'"[199] This places the burden on the government to prove the false testimony did not contribute to the verdict. The standard is "strict" against the government, "a veritable hair-trigger for setting aside the conviction."[200]

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[195] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)).
[196] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013) (citing *Starling v. State*, 130 A.3d 316 (Del. 2015)).
[197] *Napue v. Illinois,* 360 U.S. 264 (1959).
[198] *State v. Swan*, 248 A.3d 839, 878 (Del. 2021).
[199] *United States v. Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975) (*citing Giglio v. United States*, 405 U.S. 150, 154, (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959).
[200] *US v Butler,* 955 F3d 1052, 1058 (D.C. Ct. App. 2020).

The only conclusion is that Greene testified falsely when he claimed that the State did not reach out to him about expert testimony. Greene testified that he reached out to the State and was put in contact with Mr. Thomas' prosecutors. To the State's credit, one prosecutor told the trial court at sidebar that Greene's testimony was false, and, in fact, the State had reached out to him. Further, it is inescapable that the State knew the testimony was false since it admitted as much at sidebar. However, neither the State nor trial counsel corrected the false testimony in front of the jury.[201]

While it may seem like a minor point, its impact on the consideration of expert opinion reliability is not minor. The correction would have reasonably affected the judgment of the jury as it weighed whether to believe Greene or to believe Ellison. Which report to believe would determine where shots were fired – cutting to the core of both the State and defense theories of the case.

The State reaching out to Greene about expert testimony would have bolstered the defense's attack on his report. It also would be consistent with the articles stating ShotSpotter frequently modifies its opinions at the request of law enforcement.[202] It would have been consistent with the changes ShotSpotter made to its reports in the cases of Williams and *Godinez*. In fact, Greene himself

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[201] A682-A688. See also A631-A633.
[202] See, for example, *Police Are Telling ShotSpotter to Alter Evidence From Gunshot Detecting AI*, Todd Feathers, VICE, July 26, 2021 at A1656-A1672.

changed the location analysis in *Godinez* leading to challenge. Even if the misrepresentation to the jury was unintentional, it speaks to the reliability of Greene's opinion that the jury had to weigh. The postconviction judge said that "trial counsel fully laid out the lack-of credibility charge she had leveled at Greene and the jury was unimpeded in considering it."[203] That is not so. Had the jury known the truth, that the State reached out to him, it is reasonably likely that the jury would have discredited Greene's testimony.

Further, Thomas' is excused from procedural default because there is cause for relief from the default and there is prejudice from the violation.[204] No reasonable trial counsel would fail to correct the false testimony in front of the jury. Trial counsel was made aware of the false testimony but did not correct it and did not address the false testimony with the trial court after the State failed to correct it. The truth was told at a sidebar where Thomas could not hear it. Only upon review of his transcripts after trial would he have been able to learn of the false testimony. Thomas is prejudiced because, contrary to the trial court's finding below, the false testimony precluded the jury from learning a crucial fact: law enforcement reached out to ShotSpotter and ShotSpotter changed its opinion – as it has been known to do in other cases.

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[203] Exhibit 1 page 33.
[204] Superior Court Criminal Rule 61(i)(3).

IV. THE POSTCONVICTION COURT COMMITTED REVERSABLE ERROR BECAUSE THE CUMULATIVE ERRORS CITED HEREIN UNDERMINE CONFIDENCE IN THE CONVICTIONS.

Question Presented

Did the cumulative effect of the above-cited errors undermine confidence in Thomas' convictions? (*Error Preserved in the Record at Exhibit 1 pages 49-50; A1564-A1566).*

Standard of Review

The standard of review on appeal of a court's denial of a defendant's motion for postconviction relief is generally whether it abused its discretion.[205] The abuse of discretion standard is also applied to the Superior Court's decision whether to order a hearing.[206] When deciding legal or constitutional questions, the Supreme Court applies a *de novo* standard of review.[207] Further, and herein, the Supreme Court reviews ineffective assistance of counsel claims *de novo*.[208]

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[205] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)). See also *Starling v. State*, 130 A.3d 316 (Del. 2015).
[206] *Harris v. State*, 410 A.2d 500 (Del. 1979).
[207] *Ploof v. State*, 75 A.3d 811 (Del. 2013) (citing *Swan v. State*, 28 A.3d 362 (Del. 2011)).
[208] *Ploof v. State*, 75 A.3d 811, 820 (Del. 2013) (citing *Starling v. State*, 130 A.3d 316 (Del. 2015)).

Merits of the Argument

The cumulative effect of errors has been relied upon to grant a new trial in the context of a motion for post-conviction relief.[209] Here, cumulative error undermines confidence in the convictions.[210]

In Thomas' case, the jury determined guilt based upon controversial science, a matter of first impression in Delaware, ripe for exclusion in other jurisdictions, without the benefit of the trial court's gatekeeping function demanded by *Daubert*. Counsel was ineffective for failing to pursue a *Daubert* challenge that would have likely resulted in exclusion and acquittal. Trial counsel attempted to cross-examine using inadmissible material. While she was rightfully permitted to use evidence from other jurisdictions as impeachment material, she was rightfully confined to accept the witness' responses. The trial court predictably excluded admission of evidence from other cases in other jurisdictions that would have been more appropriate for a *Daubert* hearing.

At the same time, if trial counsel was not going to effectively challenge the underlying science, but instead rely on the affirmative opinion of Ellison, then she should have called Ellison as a witness. The jury only heard Greene's opinion

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[209] *Drumgo v. State*, 44 A.3d 922 (Del. 2012) (*citing Wright v. State*, 405 A.2d 685 (1979))

[210] *Kyles v. Whitley*, 514 U.S. 419, 421, 434 (1995) (evidence must be viewed by the cumulative effect and warrants a reversal when it undermines the confidence of the verdict).

without the benefit of a rebuttal expert known to the defense to have an exculpatory conclusion that the jury needed to hear.

All of this was aggravated by the misrepresentation of a fact critical to assessing Greene's credibility. Greene has changed the ShotSpotter conclusion in previous cases after being contacted by his customers. In this case, he told the jury that the customer did not contact him, but that he instead reached out to them, suggesting that he changed the opinion after speaking with the State.

CONCLUSION

For each of the reasons cited herein, independently and collectively, Thomas is entitled to a new trial. In the alternative, he is entitled to remand for a *Daubert* hearing.

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