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Case Number 530,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KASHIEM THOMAS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 530, 2024
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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Date: January 30, 2026

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NATURE AND STAGE OF PROCEEDINGS

In June 2017, a New Castle County grand jury indicted Kashiem Thomas for first-degree murder, possession of a firearm during the commission of a felony ("PFDCF"), and possession of a firearm by a person prohibited ("PFBPP"). DI 5.[1]

On March 5, 2018, Thomas filed a motion *in limine* to exclude the State's ShotSpotter evidence, or, alternatively, to permit Thomas to present evidence and cross-examine the State's proposed experts in a hearing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[2] ("*Daubert* motion").[3] A116-23, A1243-1480. Before trial, the defense withdrew the *Daubert* motion, and the Superior Court held a colloquy with Thomas before ordering the motion be deemed moot as withdrawn. A166-69, A191-96, A124.

Thomas's jury trial began on April 23, 2018.[4] DI 63. At the close of the State's case, Thomas moved for judgment of acquittal, which the court denied. A955-60. On May 1, 2018, the jury convicted Thomas of first-degree murder and PFDCF. DI 63.

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[1] "DI" refers to docket items in *State v. Thomas*, I.D. #1703001172 (A1-21i).

[2] 509 U.S. 579 (1993).

[3] ShotSpotter "is a company that partners with law enforcement agencies nationwide to implement its network of gunfire-detecting acoustic sensors to monitor and notify police of purported gunshots and enable faster responses." *ShotSpotter Inc. v. VICE Media, LLC*, 2022 WL 2373418, at *1 (Del. Super. Ct. June 30, 2022) (cleaned up).

[4] The State *nolle prossed* the severed PFBPP charge. A426; DI 87.

On May 7, 2018, Thomas filed a renewed motion for judgment of acquittal (A1090-91), which the court denied on February 8, 2019.[5] The Superior Court sentenced Thomas that same day to life in prison plus fifteen years. A1121-32, A1145-49. This Court affirmed Thomas's convictions and sentence.[6]

On March 31, 2020, Thomas filed a *pro se* motion for postconviction relief under Superior Court Criminal Rule 61 ("Rule 61") and a motion to appoint counsel. A1229-39. The Superior Court appointed counsel to represent Thomas. A1240-42.

In June 2021, after Thomas informed counsel verbally and in writing that he no longer wanted the assistance of counsel for his postconviction motion, postconviction counsel moved to withdraw as counsel so Thomas could proceed *pro se*. DI 116-17. In August 2021, Thomas elected to proceed with postconviction counsel's representation, and the motion to withdraw as counsel was deemed moot. DI 125.

On February 7, 2022, postconviction counsel moved to withdraw, stating that no meritorious claims could ethically be advocated. B1-42. Thereafter, Thomas responded (A1481-84), and Thomas's former trial and appellate counsel each filed affidavits addressing Thomas's ineffective-assistance-of-counsel claims. A1645-47, A1650-54. In June 2022, Thomas filed an amended motion for postconviction

[5] *State v. Thomas*, 2019 WL 669934 (Del. Super. Ct. Feb. 8, 2019).

[6] *Thomas v. State*, 2020 WL 1061692 (Del. Mar. 4, 2020).

relief. A1485-1569. Thomas's former trial and appellate counsel each filed an additional affidavit (A1648-49; B102-08), and the State responded to Thomas's postconviction claims. B109-184. Thereafter, Thomas filed his reply to the State's response and an amended postconviction motion (A1570-1618, A1619-44), and the State filed a supplemental response. B212-36.

"Because some of the issues raised in [Thomas's] supplements were either new or significant revisions of his prior complaints, the [c]ourt instructed [p]ostconviction [c]ounsel to re-examine all of [Thomas's] claims to assure their withdraw was still warranted."[7] Subsequently, postconviction counsel informed the court that their assessment of Thomas's postconviction claims remained unchanged, and they were unable to ethically advocate for any claims on his behalf. B237-43.

On December 16, 2024, the Superior Court denied Thomas's postconviction motion and granted postconviction counsel's motion to withdraw.[8]

Thomas appealed and filed his opening brief and appendix. On November 21, 2025, the Innocence Project and Innocence Project Delaware filed an amicus brief. This is the State's Answering Brief.

[7] *State v. Thomas*, 2024 WL 5117117, at *4 n.27 (Del. Super. Ct. Dec. 16, 2024).
[8] *Id.* at *5-22.

SUMMARY OF THE ARGUMENT

I. DENIED. Thomas has failed to demonstrate that trial counsel's performance was professionally unreasonable, or that he suffered prejudice from any action or inaction of his counsel.

II. DENIED. Thomas failed to present his ineffective-assistance-of-trial-counsel claim to the Superior Court. His argument is thus waived under Rule 8 because the allegations do not constitute plain error.

III. DENIED. Thomas's due process/perjury claim is barred by Rule 61(i)(3).

IV. DENIED. Because Thomas's ineffective-assistance-of-counsel and perjury claims lack merit, he cannot establish that he was denied a fair trial due to cumulative error.

STATEMENT OF FACTS[9]

On February 23, 2017, at approximately 8 p.m., gunfire erupted on the 600 block of East 23rd Street of Wilmington. When the dust settled, two men were down. Keevan Hale [("Hale")] had been struck multiple times and collapsed inside his residence at 602 East 23rd Street.

[Thomas] was felled on the front sidewalk just outside [Hale's] home. He had been struck in the right rear flank when [Hale] fired back at him. [Thomas] could not get to his feet, despite efforts to do so, and remained incapacitated on the sidewalk.

The testimonial and video evidence introduced at trial showed some of the actions of the two men just before the shooting started.

[Hale] had been drinking beer on his porch and talking with his neighbor, Hale Omar Baird [("Baird")]. At that same time, video surveillance recorded [Thomas] purchasing a cigarette from a convenience store about a block away on the corner of 23rd and Pine Streets. That surveillance footage captured [Thomas] leaving the store wearing dark pants, a black North Face jacket, and a ski mask rolled up on his

[9] These facts are quoted from the Superior Court's opinion denying Thomas's postconviction motion. *Thomas*, 2024 WL 5117117, at *1-3 (decision footnotes omitted; the State has added footnotes to explain or provide additional context to some facts).

forehead.[10] It also tracked him walking toward the direction of his home on the 300 block of East 23rd Street. On this trek, [Thomas] stopped briefly and interacted with those in a car that had pulled up to him. He then continued to walk toward home.

A few minutes later, the same surveillance camera caught [Thomas] again—now with his ski mask rolled down over his face, his hood pulled up, and his right hand in his pocket—walking towards the 600 block of East 23rd Street as two cars passed by. Forty-one seconds after leaving the surveillance camera's view, ShotSpotter alerted to ten gunshots outside the Hale residence.

Just before the gunfire, [Baird] had left [Hale] to walk to the convenience store and purchase more beer. On his walk, [Baird] saw a man wearing all black and a mask pass him. Moments after passing him, [Baird] heard gunshots. [Baird] testified that the black-clad man was the only person he saw on that block of 23rd Street when [Hale] was shot.[11] And the sum of his trial testimony and pretrial statements made it clear that [Thomas]—whom [Baird] had just passed on the street and whom he saw trying to get up from the sidewalk just after the exchange of gun fire—was the person who shot and killed [Hale].

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[10] The temperature outside was 59 degrees. A543.

[11] Although two cars drove down the street in front of Hale's house around the same time, no brake lights could be seen on either car as they drove down the street. A754.

From inside her home, [Hale's] mother watched her son fall through their front door bleeding. She called 911. While on that call, she located [Hale's] 40 caliber handgun on her front porch and passed it to her daughter who hid it in their couch before the police arrived.

Police arrived quickly to a bevy of onlookers, intermeddlers, and various members of both the Hale and Thomas families. The first responding officer was there within two minutes of the S[h]ot[Sp]otter alert. He found [Thomas] injured on the sidewalk just outside the Hale house. The officer attempted to render medical aid, but [Thomas] resisted telling the officer, "Don't touch me, get off me." And a never-identified man wearing a yellow traffic vest who was present told [Thomas], "Yo, don't answer his questions, don't tell the cops shit."[12] The crowd that continued to form crouched around the officer and [Thomas] and hindered the officer's attempt to provide aid as they awaited paramedics. Medical and forensic evidence demonstrated [Thomas] suffered a single gunshot wound to his lower back; he had been hit by a .40 caliber round.

Officers found [Hale] injured inside his home. He had sustained four to six gunshot wounds to his torso and upper extremities. Before being taken to the hospital, [Hale] responded affirmatively when officers asked: "The guy outside shot

[12] The unidentified man also told Corporal Kavanagh not to touch Thomas, saying, "Yo man, get the fuck off him, just let the paramedics touch him." A457.

you, buddy?" But [Hale] was *in extremis* on his living room floor and was unable to answer any of the follow-up inquiry for a description or whether [Hale] knew his shooter. At the hospital, [Hale] died that evening from his multiple injuries. The weapon used to shoot and kill [Hale] fired .410 shot shells.

The police located [Hale's] Smith & Wesson Walther PPS .40 caliber handgun tucked under the arm of the couch in his living room. Strewn on the grass in front of 602 East 23rd Street and near its front porch area, they found four Smith & Wesson .40 caliber spent cartridge casings, as well as three plastic shell casings and wadding from .410 shot shells. And in the door of a car parked across the street from [Hale's] residence, they removed a discharged .40 caliber copper bullet jacket fragment. Additionally, officers saw multiple projectile holes covering the door frame of a neighboring home and [Hale's] shattered glass home door. The firearm that was used to kill [Hale] was never found. And by the time police got to him, no firearm was on or around [Thomas].

Forensic evidence showed gunshot residue on [Thomas's] hand. Two ShotSpotter analyst reports were also introduced at trial.[13] In the first, the analyst concluded that the initial five shots of ten detected were fired from the street in front of the Hale residence. The second analyst found: (a) that those first five shots were fired from the sidewalk directly in front of [Hale's] house; (b) three shots were then

[13] The reports were admitted without objection. A636, A653.

fired from the Hales' lawn; and (c) two more shots were fired from the lawn directly adjoining the Hales' home.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THOMAS POSTCONVICTION RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR WITHDRAWING THE *DAUBERT* MOTION.

Question Presented

Whether the Superior Court abused its discretion in denying Thomas postconviction relief on his claim that trial counsel was ineffective for withdrawing the *Daubert* motion challenging ShotSpotter data, methodology, and analysis.

Standard of Review

This Court reviews the Superior Court's denial of postconviction relief for abuse of discretion.[14] Nevertheless, this Court reviews the record to determine "whether competent evidence supports the [Superior Court's] findings of fact and whether its conclusions of law are not erroneous."[15] This Court reviews questions of law *de novo*.[16] This Court generally declines to review arguments or questions not raised below and not fairly presented to the trial court for decision "unless the interests of justice require such review."[17]

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[14] *Zebroski v. State*, 822 A.2d 1038, 1043 (Del. 2003).

[15] *Id.*

[16] *Id.*

[17] *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004); Supr. Ct. R. 8.

Merits

Thomas argues that trial counsel was constitutionally ineffective for withdrawing the *Daubert* motion challenging ShotSpotter data, methodology, and analysis. (Opening Br. 28-40). Thomas raised a substantially similar claim in his postconviction motion. The Superior Court rejected Thomas's claims, holding that trial counsel's performance was not deficient because counsel made a tactical, objectively reasonable decision, which was knowingly assented to by Thomas, to forego the already-filed *Daubert* motion in order to keep the trial date and use "what could be critically helpful aspects of the ShotSpotter analyses" for the defense.[18] The Superior Court also found that Thomas failed to satisfy *Strickland*'s prejudice prong because he had done nothing to demonstrate prejudice and had failed, at the very least, to establish a "meaningful chance that had counsel tried to wholly exclude the ShotSpotter evidence on a *Daubert* challenge she would have been able to do so."[19]

On appeal, Thomas contends that trial counsel performed deficiently because "there was no justification" to forego the evidentiary challenge "[w]ith an alternative trial date only a few months later (July instead of April)." (*Id.* 31-40). He also contends that the court erred in finding he "knowingly forfeited" his right to pursue the *Daubert* motion because counsel has the authority to manage the day-to-day

[18] *Thomas*, 2024 WL 5117117, at *9-12.

[19] *Id.*

conduct of the defense and is not required to obtain the defendant's consent to "every tactical decision," and thus it would be unfair to hold him responsible for his "lawyer's misconduct." (*Id.*). Thomas also argues that he did not knowingly or intelligently waive the issue. (*Id.*). Finally, Thomas contends he was prejudiced by trial counsel's failure to pursue the *Daubert* motion because it is "likely" that the trial court would have excluded Greene's expert opinion and "its exclusion would have created a reasonable probability of acquittal." (*Id.*).

Claiming that ShotSpotter "exemplifies both lack of empirical validation and the kind of subjectivity prone to cognitive bias – particularly when it comes to the evidence and testimony the prosecution introduced in this case," Amici "urge this Court to give due consideration to these risk factors when it assesses trial counsel's reasonableness in withdrawing the *Daubert* challenge, the likelihood that a *Daubert* hearing would have resulted in exclusion of the ShotSpotter evidence, and the impact of that evidence on the outcome at trial."[20] (Amicus 12-24).

For the reasons below, the Superior Court did not abuse its discretion in denying Thomas postconviction relief.

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[20] According to Amici, "the fact that Greene provided a conclusion more favorable to the prosecution – locating the source of the gunshots on the sidewalk rather than the street – after communicating with the prosecution raises the possibility that he was exposed to biasing contextual information [a]nd the fact that two analysts considering the same acoustic data reached different conclusions – meaning that the ShotSpotter testimony was by definition not reproducible – casts doubt on ShotSpotter's foundational validity." (Amicus 12).

A. Thomas's Preserved Ineffectiveness Claim Is Not Procedurally Barred.

In considering a motion under Rule 61, the Court must consider the procedural bars before reaching the merits of the claim.[21] Thomas's convictions became final on March 31, 2020, when this Court issued its mandate.[22] DI 103. Thomas filed his first motion for postconviction relief on that same day (DI 101); therefore, the bars against untimely and successive motions do not apply. Because ineffective-assistance-of-counsel claims generally cannot be raised on direct appeal,[23] Thomas's ineffectiveness claim concerning counsel's withdrawal of the *Daubert* motion is not procedurally defaulted under Rule 61(i)(3). And his claim was not formerly adjudicated. Although Thomas's preserved ineffectiveness claim is not procedurally barred, his claim lacks merit for the reasons discussed below.

B. Thomas's Ineffectiveness Claim Is Meritless.

The Superior Court properly denied Thomas postconviction relief on his ineffectiveness claim about withdrawing the *Daubert* motion. In concluding that trial counsel had effectively represented Thomas, the Superior Court found an absence of deficient performance.[24] After reviewing the record, including trial

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[21] *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

[22] Super. Ct. Crim. R. 61(m)(1)(ii).

[23] *Green v. State*, 238 A.3d 160, 175 (Del. 2020).

[24] *Thomas*, 2024 WL 5117117, at *11-12.

counsel's affidavit, it determined that trial counsel's tactical decision – knowingly assented to by Thomas – to allow admission of and to herself use the ShotSpotter evidence was objectively reasonable.[25] The court also found that Thomas had "done nothing to demonstrate the prejudice needed to succeed on this ineffectiveness claim."[26] As will be discussed, the Superior Court did not abuse its discretion by denying Thomas postconviction relief. Thomas has not demonstrated either objectively unreasonable performance under *Strickland v. Washington*[27] or a reasonable probability that, but for any purported deficiency, the result of his proceedings would have been different.

1. ShotSpotter Reports

On November 17, 2017, the State provided Thomas with two ShotSpotter analyst reports. A150-51, A227-48. One analyst, Paul Greene, found that the first five shots were fired from the sidewalk directly in front of Hale's house. A238-48. Three shots were then fired from Hale's lawn. *Id.* And two more shots were fired from the lawn directly adjoining Hale's. *Id.* The other analyst, Simone Ellison, concluded that the initial shots were fired from the street. A227-37. The State also identified Greene as an expert in ShotSpotter technology and notified

[25] *Id.*

[26] *Id.*

[27] 466 U.S. 668 (1984).

Thomas of the expectation that Greene would testify consistently with his report. DI 19; A150-51.

2. *Daubert* Motion

On February 22, 2018, trial counsel requested an extension of its deadline for expert reports and motions related to the ShotSpotter technology report that the State provided on November 17, 2017. A110d-110e. Trial counsel specifically noted that she was not requesting a continuance of the trial date. *Id.* The Superior Court granted the defense's request and set a new deadline of March 5, 2018. *Id.* Jury selection remained as scheduled for April 17, 2018, with trial to commence on April 23, 2018. A110a.

On March 5, 2018, trial counsel filed a motion *in limine* to exclude the State's ShotSpotter evidence, or, alternatively, to permit Thomas to present evidence and cross-examine the State's proposed experts in a *Daubert* hearing. A116-23, A1243-1480. In support of her argument that the ShotSpotter evidence was "both intrinsically and extrinsically unreliable," trial counsel claimed that the expert testimony was "internally flawed" because two of ShotSpotter's own employees "each provided a different report with different conclusions as to the location and timing of shots fired," and ShotSpotter had an "unacceptably high error rate," ShotSpotter lacked acceptance within the scientific community, as other courts had recognized. A119-23. Trial counsel also objected to the admission of the

ShotSpotter evidence "as it purports to pinpoint an *exact location that a gun was fired* or the *order of the firing of those gunshots*." A122 (emphasis in original). According to trial counsel's motion, while "ShotSpotter technology provides *some* objective basis for detecting sounds which are (or are similar to) gunshots, it is necessary for an actual human being to listen to the audio recording to make a determination as to whether or not the sounds which were recorded are in fact gunshots," and thus, "there is a subjective component to ShotSpotter evidence which depends upon the skill and ability of the individual who 'makes the call' who may be cognitively biased [given that] [a]ll of the persons who listen to the ShotSpotter audio recordings are employed by or aligned with law enforcement." *Id.* (emphasis in original). Trial counsel also retained two experts from Cal Tech, who had testified in a California case regarding the unreliability of ShotSpotter evidence, to testify at the *Daubert* hearing. A138-142, A150.

At an office conference on March 8, 2018, the Superior Court addressed the defense's motion. A137. The State indicated that the ShotSpotter was a "critical piece" of evidence. *Id.* The court instructed the parties to confer regarding the hearing and then contact chambers for scheduling. *Id.* Noting the upcoming April 23, 2018 trial date, trial counsel indicated that things would need to be scheduled quickly. A138.

The parties communicated with chambers regarding scheduling the hearing, and the Superior Court held a teleconference on March 15, 2018. A144-65. Due to this being an issue of first impression in Delaware, the complexity of the issue, and the fact that trial was scheduled for only about a month away, the court expressed concern with scheduling the *Daubert* hearing before the April 23rd trial and proposed rescheduling the trial to a date after June. A145-47. The court asked the parties their positions on whether the trial date would have to be moved to accommodate a *Daubert* hearing and to provide sufficient time for the court's decision on this "crucial piece of evidence." A146-47, A153-155, A160.

The State agreed with the court that a continuance was necessary. A157-58. When asked her position on the continuance, trial counsel explained that she was concerned about a continuance and would prefer not to reschedule the trial because Thomas was only incarcerated on the instant charges, and thus, she would not want to continue the trial "significantly past June." A158-59. The court advised that it would find a date as soon as possible. A160. Rather than agreeing to continue the trial date to schedule a *Daubert* hearing, trial counsel asked to keep the April 23rd trial date until she met with Thomas on March 19th and had the opportunity to confer with him regarding whether he "would prefer to not go forward on the *Daubert* [motion] knowing that the ShotSpotter information could come in against him . . . as it normally would with cross-examination." A162-63. The Superior Court agreed,

but also instructed trial counsel to schedule a new potential trial date so that she could discuss that alternative date with Thomas when she conferred with him regarding how they wanted to proceed with the motion. A163-64.

3. Withdrawal of the *Daubert* Motion

On March 20, 2018, trial counsel informed the court that she "spoke at length with [Thomas] . . . regarding the *Daubert* motion and the potential for the trial to be continued to July if we move forward with the *Daubert* hearing." A166. She reported that "[i]n consideration of being able to move to trial more quickly and keep the previously scheduled April trial date, [Thomas] will withdraw the *Daubert* motion." A166-67. She indicated that Thomas understood the State would not "call any additional expert witnesses with respect to the ShotSpotter evidence" and she could "cross-examine the [S]tate's ShotSpotter witness at trial." *Id.* That same day, the State asked that the defense's decision to withdraw the *Daubert* motion be placed on the record. A168.

On March 26, 2018, the Superior Court held a status conference and indicated that the court wanted to put the defense's withdrawal of the *Daubert* motion "on the record with [Thomas] present, mainly because [the court] do[esn]'t want to hear later on from [Thomas] if things don't go well [that] I wanted a *Daubert* hearing and my attorney didn't give me a *Daubert* hearing." A192-93. The court asked trial counsel to "let me know where you are on your motion and if it's moot now, it's moot, and

we'll deal with the experts at trial, which certainly is another strategy based on whatever you wish that you can deal with." A193. Trial counsel explained that she spoke with Thomas last week regarding the *Daubert* motion and the potential new July 2018 trial date. A193-94. She noted that he understood that he could have a *Daubert* hearing if he went to trial in July, but that his preference was to go to trial in April because "this is the only set of charges [Thomas] is held on" and "he's anxious to go to trial." A194. She made it clear that after consultation with her, Thomas – "with his eyes wide open" – wanted to withdraw the *Daubert* challenge. A194. She also explained that she supported Thomas's decision to forego the *Daubert* motion because of her alternative strategy of addressing those issues on cross-examination at trial. A194.

The Superior Court held a colloquy with Thomas. Thomas confirmed that he spoke to trial counsel regarding the situation, he understood the strategy that trial counsel was employing to attack the ShotSpotter evidence, and that he had enough time to discuss the pros and cons of the strategy with her:

> The Court: Mr. Thomas, because I've had to deal with scheduling and because it had to do with also waiving a motion that had already been filed, you've had an opportunity to talk to [trial counsel] about this situation, correct?
>
> [Thomas]: Yes.
>
> The Court: You understand the strategy that she's employing on your behalf to attack this forensic type of evidence?

[Thomas]: Yes.

The Court: And you feel you had enough time to discuss with her the pros and cons of going forward that way, correct?

[Thomas]: Yes.

The Court: And you heard what I said, basically 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?

[Thomas]: Yes.

A195. The court then ruled that the *Daubert* motion was "now moot as withdrawn for the reasons" stated on the record and the letters filed by trial counsel. A196. Trial counsel also confirmed that the defense did not intend to call any experts concerning ShotSpotter at trial. A199.

4. Trial/Closing Arguments

During trial, trial counsel attacked the ShotSpotter evidence through cross-examination. A658-88. She cross-examined Greene regarding the inconsistent results in the two ShotSpotter reports and how he came to testify instead of Ellison. A658-62, A679-84. She focused on the earlier, more favorable report written by Ellison, which indicated that the initial shots came from the street. A658-61. Counsel got Greene to agree that Ellison's report placed several of the shots coming from the middle of the street and other shots closer to the sidewalk. A658-60.

Counsel also got Greene to admit that he had talked to the prosecutors much earlier than he initially testified and that he did, in fact, obtain case-specific information from the State. A680-84.

Counsel also cross-examined Green about his history of testifying and some of his cases. A661-64. She asked Greene about his familiarity with other jurisdictions disallowing ShotSpotter technology because it is not accepted in the scientific community[28] and questioned Greene about the reliability of ShotSpotter technology.[29] A664-79. Greene admitted that ShotSpotter relies on feedback from customers (*i.e.*, police departments). A672-73, A686-88.

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[28] Greene testified he was not aware of any cases where ShotSpotter testimony was disallowed in California. A664. Trial counsel then asked Greene about his familiarity with a California decision, which was cited in the *Daubert* motion (A120-21), where the judge disallowed ShotSpotter technology "because it's not accepted by the scientific community." A669-70. Greene testified that the judge in that case later reversed his own ruling. A669-70.

[29] On direct, Greene testified about the human aspect to ShotSpotter detection, which involves a review operator listening to the alert and deciding whether the sounds are gunshots or not. A603-06, A627-28, A640-41. He also testified that environmental factors could affect the accuracy of gunshot detection and location. A611-14. He testified that ShotSpotter's analyses are not "perfect" or "even perfectly repeatable at times," and that their analysis "should be corroborated by other evidence" and "not be the only evidence used to arrive at your verdict." A650-51. During cross-examination, the court overruled the State's objection that trial counsel's questioning went beyond direct examination, ruling that, "[e]ven when matters pass through the *Daubert* test, the risk on cross-examination of the science and on its application, it is permitted. And I think this is fair cross-examination on whether or not this is reliable science, and the jury gets to determine in the end whether it believes or does not believe that this is credible evidence that they can depend on." A675-76.

During closing arguments, trial counsel urged the jury to accept the results of Ellison's report indicating that the initial shots fired came from the street and argued that the ShotSpotter evidence was consistent with the defense's theory of a drive-by shooting and that Thomas was not the shooter. A1009-12. And, trial counsel argued that Greene's report was only consistent with the State's case because he was provided case-specific information directly by the State before writing his report:

> You have to ignore ShotSpotter report number one in order to fit with the theory that the State has which is my client was the shooter in this case. And that wasn't a problem. Apparently according to [Greene] who is one of the owners of ShotSpotter, how he gets literally in that case – because we all agree that the customer must always be right, because what he defined as being 100 percent accurate, if no one ever calls us about these reports, we write we give ourselves a 100.
>
> If the police tell us, oh, good job, that's exactly where we found cartridges, where you say the shots were fired. They're going to give themselves a 100 on that. He explained [Ellison], she may have been away on maternity leave, but he made it very clear she's not a testifier. When push comes to shove, when it's time to fly around the country to protect our interest in our product for the police, it's one of the big dogs that goes in. It's one of three people, and he's one of them. And what did he say he did? He didn't say, oh, [Ellison], thanks for doing your report. I got this. You enjoy your maternity leave, that's not what happened. What he did, he called the Attorney General's office, according [to] his testimony, and said, I want to find out the pertinent details of this case. That's what he said from the witness stand. And low and behold, we have a brand spanking new report that's got the shots fired from exactly where my client is found laying on the sidewalk. Not at all the report that has [Ellison] showing that the shots were fired from the street. Totally different.

A1012.

5. Trial and Appellate Counsel's Affidavits

In her supplemental affidavit addressing Thomas's ineffectiveness claim, trial counsel averred that she advised Thomas on the ShotSpotter/*Daubert* issue before withdrawing the *Daubert* motion:

> 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 [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.

A1648.

Appellate counsel declined to raise any issue related to ShotSpotter on direct appeal, explaining:

> Prior to trial, Thomas' trial counsel waived issues related to the admissibility of the ShotSpotter evidence. Appellate counsel's review of the record prior to the filing of the appeal, led her to believe that the waiver was not an oversight. Two individuals at the company used by the State had conducted separate analyses of the ShotSpotter information and each obtained somewhat inconsistent results. At least one interpretation was consistent with other evidence, such as a 911 call, that the shots fired came from a car that drove by and not from Thomas. This evidence was consistent with the defense theory of a drive-by shooting. Accordingly, it was helpful on appeal for purposes of the insufficiency of the evidence argument with respect to identification. While that argument was ultimately unsuccessful, appellate counsel still believes it was the best and only argument to be raised on appeal.

A1653-54; B43-47.

6. *Strickland*

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show both that: (1) "counsel's representation fell below an objective standard of reasonableness;" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[30] A defendant must overcome the strong presumption that trial counsel's conduct was professionally reasonable.[31] He must also "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."[32]

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[33] The question to be answered is not whether trial counsel could have made a better choice, but whether the choice he did make was outside

[30] *Strickland*, 466 U.S. at 688, 694.

[31] *Albury v. State*, 551 A.2d 53, 59 (Del. 1988).

[32] *Strickland*, 466 U.S. at 689-90 (cleaned up).

[33] *Id*.

the "wide range of professionally competent assistance."[34] "There are countless ways to provide effective assistance in any given case."[35]

Demonstrating prejudice "requires more than a showing of a theoretical possibility that the outcome was affected."[36] The defendant must actually show a reasonable probability of a different result but for trial counsel's alleged errors.[37]

7. Trial Counsel's Performance Was Not Deficient.

a. Trial Counsel Did Not Elide an Obvious Issue.

The Superior Court properly concluded that Thomas has not shown deficient performance under *Strickland*. First, this is not an instance where trial counsel overlooked an obvious issue. A1648, A1653-54. Trial counsel filed a timely *Daubert* motion raising nearly identical arguments, as Amici raise in their brief, regarding the intrinsic and extrinsic reliability of ShotSpotter, the subjective nature of ShotSpotter's post-processing methods, and the lack of empirical validation. (*Compare* A116-23 *with* Amicus 5-24). Although trial counsel was fully prepared to litigate the motion, she ultimately made a strategic decision to forego the motion to keep the trial date, which was consistent with Thomas's express objective, and to

[34] *Id.*

[35] *Id.*

[36] *Frey v. Fulcomer*, 974 F.2d 348, 358 (3d Cir. 1992).

[37] *Strickland*, 466 U.S. at 694.

herself use helpful aspects of the ShotSpotter evidence. Thomas has not overcome the strong presumption that trial counsel's performance was objectively reasonable based on trial counsel's efforts.

b. Trial Counsel's Performance Was Objectively Reasonable.

Although Thomas claims there was "no justification" for counsel's decision because the alternative trial date was only a few months later, he overlooks that the record reflects counsel's trial strategy was two-fold. In addition to withdrawing the *Daubert* motion to keep the immediate trial date, trial counsel made the strategic decision to withdraw the motion to use what could be critically helpful aspects of the ShotSpotter analyses at trial. A1648, A1651-52.

The strategy that trial counsel followed to attack the ShotSpotter evidence through cross-examination was not objectively unreasonable. Trial counsel was prepared to, and did attack, the intrinsic and extrinsic reliability of the ShotSpotter evidence during trial, including the alleged "lack of empirical validation," the potential for error, "the fact that two analysts considering the same acoustic data reached different conclusions," and the possibility that Greene "was exposed to biasing contextual information," as discussed above. A658-88.

Trial counsel's effectiveness must be examined considering the circumstances she faced at the time of her challenged conduct. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of

hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."[38] The question to be answered is not whether trial counsel could have made a better choice, but whether the choice she did make was "outside the wide range of professionally competent assistance."[39] As the United States Supreme Court emphasized in *Harrington v. Richter*, "*Strickland* ... calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind," because "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome."[40]

Evaluating the conduct from trial counsel's perspective at the time, Thomas has failed to demonstrate that counsel's performance fell below objectively reasonable standards. The reasonableness of trial counsel's decision is also supported by the Superior Court's acknowledgement during the March 2018 hearings that cross-examination of experts at trial was another strategy to deal with

[38] *Id.* at 689.

[39] *Id.* at 690.

[40] *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011).

expert testimony, especially given that it "seem[ed] like the question is more about results than perhaps some of the basics of the science."[41] A193, A163.

Amici argue that ShotSpotter's "fundamental scientific problems" should be considered when assessing the reasonableness of trial counsel's decision to withdraw the *Daubert* challenge. (Amicus 4-22). Amici's claim is unavailing. *Strickland* makes plain that a lawyer's performance will not be deemed deficient if it results from informed strategic choices about how to mount a defense.[42] The record reflects that trial counsel made a strategic decision here to attack the "fundamental scientific problems" identified by Amici through cross-examination of Greene.

Although Amici contend that "cross-examination alone is unlikely to cure the prejudicial effects of unreliable forensic evidence" (Amicus 7-8), Amici are mistaken. *Daubert* itself recognizes that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[43] Even assuming the evidence was "shaky," Thomas's and Amici's

[41] *State v. Coverdale*, 2018 WL 259775, at *4 (Del. Super. Ct. Jan. 2, 2018).

[42] *Strickland*, 466 U.S. at 689-90.

[43] *Daubert*, 509 U.S. at 596.

reliability, subjectivity/bias, and validation concerns go to the weight of the evidence, not its admissibility.[44]

Here, the Superior Court's finding that trial counsel "was prepared to and did attack the ShotSpotter evidence" is entitled to deference.[45] Counsel's decision to rely on this questioning – which drew attention to possible weaknesses in Greene's conclusions – rather than to challenge Greene's opinion through a *Daubert* hearing was a reasonable tactical decision.[46] The court's refusal to second-guess counsel's strategy was a reasonable application of *Strickland*.

Finally, Thomas and Amici have not cited any case law finding deficient performance for failing to pursue a *Daubert* motion to exclude ShotSpotter evidence as unreliable. Given that other courts have determined that expert testimony regarding ShotSpotter is reliable under *Daubert*, counsel's decision to withdraw the *Daubert* motion was not constitutionally deficient.[47]

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[44] *Johnson v. State*, 2016 WL 6902066, at *3 (Ind. Ct. App. Nov. 22, 2016).

[45] *Thomas*, 2024 WL 5117117, at *12.

[46] *State v. Sykes*, 2014 WL 619503, at *22 (Del. Super. Ct. Jan. 21, 2014) (strategic decision not to raise *Daubert* challenge was objectively reasonable).

[47] *See*, *e.g.*, *State v. Hill*, 851 N.W.2d 670, 792-95 (Neb. 2014) (rejecting argument that Greene's ShotSpotter testimony was unreliable under *Daubert* and holding court did not abuse its discretion in admitting testimony); *J.A.R. v. State*, 374 So.3d 25, 30-31 (Fla. Dist. Ct. App. 2023) (holding court did not abuse its discretion in finding expert's ShotSpotter testimony satisfied *Daubert*); *United States v. Pena*, 2024 WL 4132379, at *1-2 (E.D.N.Y. 2024) (denying motion to preclude expert testimony about ShotSpotter technology and declining to hold *Daubert* hearing); Leila Lawlor, *Hardware, Heartware, or Nightmare: Smart-City Technology and the*

As a result, Thomas cannot meet the first prong of *Strickland*.

c. Thomas cannot establish deficient performance because counsel followed Thomas's wishes when forgoing the *Daubert* motion.

The Superior Court also properly concluded that Thomas cannot claim ineffective assistance because trial counsel acted in accordance with Thomas's wishes when forgoing the *Daubert* motion.[48] Delaware courts have recognized that a defendant cannot claim ineffective assistance of counsel after having agreed to an informed trial strategy.[49] Here, the record reflects that counsel's strategic decision was influenced by Thomas and his desire to maintain the established trial date. This Court held a colloquy with Thomas, wherein he agreed with the strategy being employed by trial counsel with regards to the *Daubert* motion and ShotSpotter evidence. Having agreed to the informed strategy, Thomas cannot now claim counsel was ineffective.

Concomitant Erosion of Privacy, 3 J. Comp. Urb. L. & Pol'y 207, 220 (2019) ("ShotSpotter recordings and reports are regularly admitted into evidence.").

[48] *Thomas*, 2024 WL 5117117, at *11-12.

[49] *Cabrera v. State*, 173 A.3d 1012, 1032 (Del. 2017) ("Cabrera cannot demonstrate that his counsel was constitutionally ineffective under *Strickland* for following his wishes."); *State v. Copeland*, 2024 WL 2787692, at *4 (Del. Super. Ct. May 30, 2024) (holding defendant cannot claim ineffective-assistance-of-counsel after agreeing to informed trial strategy); *Coverdale*, 2018 WL 259775, at *5 (same); *State v. Womack*, 2025 WL 2797120, at *9 (Del. Super. Ct. Sept. 30, 2025) (same); *State v. Wright*, 653 A.2d 288, 295 (Del. Super. Ct. 1994) (taking defendant's choices into account in assessing counsel's strategic decisions).

On appeal, Thomas nevertheless contends that the court erred by finding that he forfeited his right to pursue the motion because this decision belonged to his counsel, not him. (Opening Br. 37-38). The Superior Court rejected a similar argument in *State v. Coverdale*, finding that such an argument "would seriously compromise the long-accepted standard for examining a trial attorney's trial behavior."[50] Specifically, as *Coverdale* noted, under such construct, "an attorney's reasoned and informed strategic act that his or her client expressly instructed him to take would be found to [be] an unprofessional error violative of the Sixth Amendment merely because it didn't work."[51] As the Superior Court found, Thomas cannot complain now that his attorney should have overridden his express instruction to forego the *Daubert* motion or be deemed to have provided constitutionally deficient representation simply because the informed and agreed-upon tactic failed.

Thomas also alleges that his waiver was not made knowingly or intelligently because "[a] waiver would have been predicated and conditioned upon trial counsel conducting an effective cross-examination of Greene." (*Id.* 39). Thomas also claims that 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

[50] *Coverdale*, 2018 WL 259775, at *4-5.

[51] *Id.*

whole other jurisdiction" and 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." (*Id.*). His claims are unavailing.

Trial counsel's statements in 2018 and in her June 2022 affidavit refute Thomas's claim. In filings before the March 26, 2018 hearing, trial counsel stated that she had consulted with Thomas "at length" regarding "the *Daubert* motion and the potential for the trial to be continued to July if we move forward with the *Daubert* hearing." A166-67. She also told the court, in Thomas's presence before his colloquy, that Thomas wanted to withdraw the *Daubert* challenge. A193-94. Trial counsel told the Court she believed Thomas was "making that decision with his eyes wide open." A194. Counsel also advised the court, in Thomas's presence, that she did not intend on calling any ShotSpotter experts. A199. In addition, in her June 2022 affidavit, trial counsel confirms that she "discussed with [Thomas] 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 [she] would cross-examine the State's ShotSpotter expert regarding the two conflicting reports filed by their corporation." A1648. Trial counsel's explanation of the advantages and disadvantages of withdrawing the *Daubert* motion is owed a strong presumption of professional reasonableness and sound trial strategy.

Thomas's statements during the colloquy also directly contradict his claim that his waiver of his opportunity to pursue the *Daubert* motion was not made knowingly or intelligently because trial counsel failed to properly advise him about the pros and cons of having a *Daubert* hearing as opposed to keeping the trial date and cross-examining the State's ShotSpotter expert at trial. Thomas confirmed that he spoke to trial counsel regarding the issue, he understood the strategy that trial counsel was employing to attack the ShotSpotter evidence, and he had enough time to discuss the pros and cons of the strategy with her. A195. Given the record, Thomas's claim is unavailing.

The record also does not support Thomas's claim that his waiver was ineffective because it was "predicated and conditioned upon trial counsel conducting an effective cross-examination of Greene – which did not happen." (Opening Br. 39). Counsel's decision as to how to cross-examine Greene falls within the strong presumption of sound trial strategy.[52] Furthermore, as appellate counsel recognized (A1653-54; B107-13), trial counsel thoroughly cross-examined Greene about the reliability of ShotSpotter evidence and exposed credibility issues with Greene and his report, which were helpful for the defense. A658-88, *see also* A1653-54.

[52] *Ragland v. State*, 2009 WL 2509132, at *2 (Del. Aug. 18, 2009); *State v. Ellerbe*, 2016 WL 4119863, at *3-4 (Del. Super. Ct. Aug. 2, 2016), *aff'd*, 2017 WL 1901809, at *3-4 (Del. May 8, 2017).

Nor does the record support any claim that Thomas's waiver was based on his understanding that Ellison would be called to testify. At the March 26, 2018 hearing, trial counsel confirmed that she would not be calling any experts concerning ShotSpotter. A199.

In any event, Thomas's argument regarding waiver is unavailing because the Superior Court separately found that trial counsel's decision to withdraw the *Daubert* motion was a reasonable strategic one under the circumstances, *regardless* of whether Thomas assented or whether the decision was consistent with Thomas's express objective.[53]

Because Thomas fails to show that trial counsel's decision to forego the *Daubert* motion was objectively unreasonable for the reasons discussed above, his ineffective-assistance-of-trial-counsel claim fails.

8. Thomas Has Not Demonstrated Prejudice.

The Superior Court also properly determined that Thomas has failed to demonstrate prejudice under *Strickland*.

On appeal, Thomas expands on his argument below that he was prejudiced. Thomas now claims "[i]t 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

[53] *Thomas*, 2024 WL 5117117, at *11-12.

sufficiently vetted by courts in Delaware or anywhere else …[, and] two analysts from ShotSpotter disagreed on the critical location conclusion." (Opening Br. 32; *see* Amicus 12). To the extent that Thomas raises new arguments that were not fairly raised below, those arguments are waived, unless he can show plain error.[54] He cannot. In any event, his claims of prejudice are unavailing.

Strickland prejudice must be actual prejudice that the movant can prove.[55] Here, even assuming that counsel was deficient in failing to raise a *Daubert* challenge, Thomas fails to establish that it is "likely" the Superior Court would have excluded Greene's expert opinion after a *Daubert* hearing. While Thomas cites several cases from other jurisdictions holding that the trial court erred by not holding a *Daubert* or *Frye* hearing before admitting expert testimony concerning ShotSpotter, none held that ShotSpotter was unreliable under *Daubert*/*Frye* or establish that trial counsel would have succeeded with an attempt to have Greene's opinion evidence excluded. And, as the Superior Court recognized, Thomas has failed to show that any *Daubert* challenge would have been successful given other jurisdictions' decisions upholding a trial court's denial of a motion to exclude ShotSpotter evidence after a *Daubert* hearing.[56]

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[54] Supr. Ct. R. 8.

[55] *Strickland*, 466 U.S. at 694.

[56] *See Thomas*, 2024 WL 5117117, at *12 n.129 (citing *J.A.R.*, 374 So.3d at 30); *see also Hill*, 851 N.W.2d at 792-95.

Nor do the articles cited by Thomas, most of which were not cited below, establish that a *Daubert* challenge would have been successful. Indeed, VICE Media has recently withdrawn many of the allegations in its July 26, 2021 article regarding ShotSpotter, relied upon by Thomas, trial counsel (A1648-49; B48-106, and other articles. On August 2, 2022, ShotSpotter announced that VICE Media has retracted the "core allegations" in its July 26, 2021 article that said the company alters evidence for law enforcement.[57] B203-04. An Editor's Note has now been included in the VICE article that states: "Following the publication of this article, VICE received copies of court documents from the Michael Williams case, which show that ShotSpotter did not change the coordinates of the gunfire by a mile, but had identified the same intersection for the gunfire in both its initial real-time alert and in its later detailed forensic report. The article has also been updated to clarify that the original recording of the gunshots in the Silvon Simmons case were deleted, but that the jury heard a redacted copy of the recording with the five alleged gunshots." B205-16.

[57] According to ShotSpotter, the retraction "corrected the public record and vindicated the truth at the heart of [ShotSpotter's Delaware] complaint [against VICE for defamation.]" B203-04.

Finally, Thomas cannot establish that he suffered prejudice because there was independent, significant evidence against Thomas.[58] The record reflects that a minute before the shooting, Thomas walked in the direction of Hale's house with a ski mask covering his face, hood over his head, and his dominant hand in his pocket.[59] A736-37. While no one witnessed the gunfire, a neighbor present at the time of the shooting told a detective that he saw no one at the scene other than Thomas and Hale. A814, A817. The first responding officer also found only Thomas at the scene, injured on the sidewalk. A451. Although the State recovered no weapon, a group huddled closely over Thomas as he lay on the sidewalk, leading to an inference that someone could have removed a weapon during the confusion. A452, A477. And Thomas had GSR on his hands and the right pocket of his jacket. A804-07.

[58] *People v. Brewer*, 2024 WL 3518409, at *5-14 (Cal. Ct. App. July 24, 2024) (concluding ShotSpotter evidence not erroneously admitted and, even if it was, any error was harmless).

[59] *Thomas*, 2020 WL1061692, at *3.

II. THOMAS HAS NOT PRESERVED HIS INEFFECTIVE-ASSISTANCE-OF-TRIAL-COUNSEL CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ELLISON AS A REBUTTAL EXPERT WITNESS, AND HE HAS NOT SHOWN PLAIN ERROR.

Question Presented

Whether Thomas has demonstrated plain error based on his ineffective-assistance-of-trial-counsel claim that trial counsel was ineffective for failing to present Ellison as a rebuttal expert witness.

Standard of Review

See standard in Argument I.

Merits

Thomas contends trial counsel was ineffective for failing to present Ellison as a rebuttal expert witness. (Opening Br. 41-47). Thomas argues that "[a]ny reasonable attorney would have, as her analysis of the ShotSpotter data corroborated the defense theory that shots came from the street during a drive-by." (*Id.*). Thomas claim "[t]he outcome at trial had Ellison been called would likely have been acquittal." (*Id.*). As Thomas appears to acknowledge (*id.* 42), he did not fairly present his ineffective-assistance-of-trial-counsel claim concerning Ellison below. *See* A1229-34, A1481-1644. His claim is therefore waived absent plain error. Thomas has not demonstrated such error.

A. Trial Counsel's Performance Was Not Deficient.

Decisions to call experts fall within the presumption of sound trial strategy.[60] Here, the record reflects that trial counsel considered and rejected the idea of calling any expert witnesses to testify once she made the strategic decision to withdraw the *Daubert* motion and instead "cross-examine the State's ShotSpotter expert [Greene] regarding the two conflicting reports filed by their corporation," including the earlier, more favorable report written by Ellison that suggested the initial shots came from the street. A166-67, A194, A199, A1648. Thomas has not presented anything to overcome the presumption that trial counsel's strategic decision was reasonable.

Citing *People v. Ackley*[61] and *United States v. Tarricone*,[62] cases from other jurisdictions, Thomas contends that trial counsel was ineffective because "there was a lack of 'objective, expert testimonial support' for Thomas's defense theory …[,] there is 'prominent controversy' within the community regarding the reliability of the scientific evidence relied upon by the prosecution …[,] and there was great significance attached to ShotSpotter by both the defense and the [S]tate both pre-trial and throughout the trial." (Opening Br. 44-47). These cases are

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[60] *Cooke v. State*, 977 A.2d 803, 840-41 (Del. 2009); *State v. Hunter*, 2017 WL 5983168, at *2-5 (Del. Super. Ct. Sept. 29, 2017), *aff'd*, 2020 WL 362784 (Del. Jan. 22, 2020); *State v. Paitsel*, 2000 WL 703621, at *5 (Del. Super. Ct. May 5, 2000).

[61] 870 N.W.2d 858 (Mich. 2015).

[62] 996 F.2d 1414 (2d Cir. 1993).

distinguishable. In *Ackley*, the Michigan Supreme Court held that counsel was ineffective for choosing, and relying on, an expert who was opposed to the defense theory and completely failing to investigate and secure an expert who could testify in support of the defense's theory that the victim's injuries were accidental.[63] And, in *Tarricone*, the Second Circuit concluded that the defendant presented a sufficient claim to entitle him to a hearing as to whether trial counsel performed deficiently by failing to consult a handwriting expert in a tax evasion case where the parties disputed the handwriting on the document and no additional evidence of the defendant's handwriting was presented to the jury.[64]

In contrast, here, trial counsel consulted with qualified experts regarding ShotSpotter. A138-142, A150. She decided not to call any experts during trial based on her strategy to attack the ShotSpotter evidence through cross-examination of the prosecution's expert witness Greene.

Although trial counsel's affidavit does not address Thomas's newly raised claim about calling Ellison as a rebuttal witness, trial counsel was not ineffective because her cross-examination of Greene was just as effective as, and less risky than, calling Ellison on rebuttal.[65] The record reflects that, during Greene's cross-

[63] *Ackley*, 870 N.W.2d at 864.

[64] *Tarricone*, 996 F.2d at 1417-19.

[65] *Hunter*, 2017 WL 5983168, at *3.

examination, counsel thoroughly explored the issue of ShotSpotter employees changing their reports in Thomas's case to match the prosecution's theory to undermine Greene's credibility. She got Greene to agree that Ellison's report placed several of the detected shots coming from the middle of the street and other shots closer to the sidewalk, which supported Thomas's defense that a drive-by shooter fired the shots that fatally wounded Hale. A658-61. She also got Greene to admit that he completed his later report placing the shots as coming from the sidewalk area where Thomas had been shot by Hale, which supported the State's case, after he was provided case-specific information directly by the State. A680-84. During closing arguments, trial counsel urged the jury to accept the results of Ellison's report instead of Greene's later report. A1009-12.

Although the jury never heard Ellison testify live about her methodology and opinions, her expert report was introduced into evidence (A653), and counsel was able, through her cross-examination of Greene, to introduce Ellison's conclusions and to also impeach Greene's credibility. Considering Greene's admissions during cross-examination, it was reasonable for counsel not to risk calling the State's expert Ellison as a rebuttal witness, who could have potentially provided testimony rehabilitating Greene.

B. Thomas Has Not Demonstrated Prejudice.

Nor has Thomas established any actual prejudice. Although he claims that "[h]ad [Ellison] been called to testify, she would have told the jury affirmatively that the shots were in the street," he has not presented any evidence to support his conclusory claim other than her report. (Opening Br. 46). Nor can he establish that the result would have been different.[66] Ellison's report was introduced into evidence (A653), and trial counsel presented the same evidence that Thomas claims should have come in through Greene. A658-61 (agreeing Ellison placed several shots coming from middle of street and other shots closer to the sidewalk, which supported Thomas's defense that a drive-by shooter fired the shots that fatally wounded Hale); A1009-1012 (urging jury during closing to accept results of Ellison's report instead of Greene's later report). Yet, the jury rejected the defense's theory.

Because Thomas has not presented any record evidence that would demonstrate a reasonable probability of a different outcome had trial counsel called Ellison, he has failed to show *Strickland* prejudice.

[66] *Id.*; *State v. Dawson*, 681 A.2d 407, 423 (Del. Super. Ct. 1995); *Stone v. State*, 690 A.2d 924, 926 (Del. 1996); *Gattis v. State*, 697 A.2d 1174, 1186 (Del. 1997).

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING THOMAS'S DUE PROCESS/PERJURY CLAIM.

Question Presented

Whether the Superior Court properly found that Thomas's due process/perjury claim was procedurally barred under Rule 61.

Standard of Review

See standard in Argument I.

Merits

Citing *Napue v. Illinois*,[67] and *Giglio v. United States*,[68] Thomas asserts that the State violated his due process rights because neither the State nor trial counsel corrected Greene's "false" testimony that the State did not reach out to him about expert testimony. (Opening Br. 48-51). The Superior Court found Thomas's freestanding claim procedurally barred by Rule 61(i)(3) and, alternatively, meritless because no "perjury" occurred.[69] For the reasons below, the Superior Court did not abuse its discretion by denying Thomas postconviction relief.

This Court must initially consider Rule 61's procedural bars before it may reach the merits of Thomas's claim.[70] Under Rule 61(i)(3), a defendant who fails to

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[67] 360 U.S. 264 (1959).

[68] 405 U.S. 150 (1972).

[69] *Thomas*, 2024 WL 5117117, at *13-14.

[70] *Younger*, 580 A.2d at 554.

raise any claim in the proceedings leading to conviction is barred from later bringing such a new claim for relief unless he can show: (A) cause for the default; and (B) actual prejudice.[71] To establish cause, Thomas must show that an external impediment prevented him from constructing or raising the claim either at trial or on direct appeal.[72] Thomas must also demonstrate actual prejudice resulting from the previously unasserted alleged error.[73] This prejudice must have "worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[74]

Here, the Superior Court correctly found that Thomas's due process/perjury claim was procedurally barred by Rule 61(i)(3) because he did not raise the claim at trial or on direct appeal.[75] As will be discussed next, the court correctly determined that Thomas has failed to establish cause for relief from his failure to raise this issue because trial and appellate counsel were not ineffective. Nor can Thomas show actual prejudice because his claim lacks merit.

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[71] R. 61(i)(3).

[72] *Younger*, 580 A.2d at 556.

[73] *Id.* at 555-56.

[74] *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

[75] *State v. Perkins*, 2023 WL 7403265, at *13-14 (Del. Super. Ct. Nov. 8, 2023) (holding perjury claim not raised on direct appeal barred under Rule 61(i)(3)), *aff'd*, 331 A.3d 1270 (Del. 2024); *Reeder v. State*, 2006 WL 1210986, at *2 (Del. May 3, 2006) (same).

1. Background

On direct examination, Greene testified that he created his own report "strictly on the data and data alone" without obtaining any information about this case from the State, explaining that it was normal company policy to not "have any prior knowledge of any of this information before we perform the analysis." A654-55. He also stated that he first met with prosecutors only a few days before trial. A655. On cross-examination, trial counsel questioned Greene about the nature and extent of his contact with the State and law enforcement. A679-84. Greene clarified that, before creating his report, he spoke with the prosecutors to obtain the pertinent incident details, which he explained as the time, date, and location of the incident. A680-84.

2. Thomas has failed to establish cause.

Thomas claims that cause exists to excuse him from procedural default because trial counsel was ineffective for failing to address or correct the alleged false testimony at trial. (Opening Br. 51). As the Superior Court found, however, trial counsel was not ineffective for failing to object to "perjury" because there were no grounds to do so. While Greene provided inconsistent answers during direct and cross-examination regarding the nature and extent of his contact with the State, and the prosecutor chose not to "rehabilitate" him on redirect, Greene's inconsistent

testimony concerning the nature and extent of his contact with the State did not constitute perjury, but exposed credibility issues, which were helpful to the defense.

Perjury is committed when a witness "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." [76] Discrepancy alone "is not enough to prove perjury. There are many reasons testimony may be inconsistent; perjury is only one possible reason."[77] Similarly, "mere contradictions in a witness's testimony may not require reversal because those contradictions may not constitute knowing use of false or perjured testimony."[78] Rather, such contradictions are a credibility question for the jury.[79]

Here, as the Superior Court found, there is simply nothing in the record establishing perjury by Greene. His inconsistent testimony does not demonstrate that he intentionally lied. Greene testified on direct examination regarding how he came to testify at trial. He explained that his colleague Ellison, who wrote the original detailed forensic report in this case, received a subpoena. A631. Because Ellison was pregnant and due to give birth the same month as Thomas's trial, Ellison

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[76] *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

[77] *Lambert v. Blackwell*, 387 F.3d 210, 249 (3d Cir. 2004).

[78] *Romeo v. State*, 2011 WL 1877845, at *3 (Del. May 13, 2011); *State v. Jones*, 2005 WL 2249525, at *2 (Del. Super. Ct. Sept. 8, 2005).

[79] *Romeo*, 2011 WL 1877845, at *3.

and ShotSpotter did not believe she would be able to testify. A631-32. Greene explained that he took the case over from Ellison and wrote a new forensic report because ShotSpotter policy required that a testifying analyst must write his own report. A632. He testified that the State and Wilmington Police Department did not specifically request that he create a new report. A632-33. He also testified that he created his report "strictly on the data and data alone" without obtaining any information about this case from the State, explaining that it was normal company policy to not "have any prior knowledge of any of this information before we perform the analysis." A654-55. He also stated that he first met with prosecutors only a few days before trial. A655. During cross-examination, Greene clarified that before creating his report, he spoke with the prosecutors to obtain the pertinent incident details, which he explained as the time, date, and location of the incident. A680-84.

The inconsistences between Greene's statements on direct and cross-examination do not establish perjury.[80] Rather, they present a credibility question for the jury.

Moreover, Greene's inconsistent statements in this case were helpful to the defense. Specifically, his admission during cross-examination that he had talked to

[80] *Benson v. State*, 2020 WL 6554928, at *8 (Del. Nov. 6, 2020) ("Inconsistencies in the Child's statements do not show that the prosecutor knowingly suborned perjury.").

the prosecutors much earlier than he initially testified and that he did, in fact, obtain case-specific information from the State allowed trial counsel to argue that his report was consistent with the State's case because he was provided with case-specific information directly by the State. A1012. Thus, Thomas's convictions were not obtained using false testimony, nor did he suffer prejudice. As such, Thomas cannot prove that trial counsel was deficient or that he suffered prejudice under *Strickland*.

To the extent Thomas claims cause exists because he belatedly learned about the "perjury" after trial since he was not privy to the sidebar discussion about the issue (Opening Br. 51), he overlooks that he could have raised the claim on direct appeal. As the Superior Court found, Thomas has failed to demonstrate that appellate counsel's performance was deficient or that he suffered prejudice from the failure to raise this "perjury" claim on direct appeal.[81] As appellate counsel recognized, the alleged "perjury" claim is not "clearly stronger" than the one that counsel presented.[82] B106-13. Because Thomas's trial counsel did not raise any objections at trial, any arguments regarding Greene's testimony would have been reviewed for plain error.[83] "[P]lain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their

[81] *Thomas*, 2024 WL 5117117, at *15, *19.

[82] *Neal v. State*, 80 A.3d 935, 946 (Del. 2013).

[83] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[84] Thomas cannot demonstrate plain error because, as appellate counsel (B107-13) and the trial court recognized, Greene's inconsistent answers concerning the nature and extent of his contact with the State do not establish perjury but were solely a credibility question for the jury.

3. Thomas has failed to establish prejudice.

Thomas contends he was prejudiced because "[h]ad the jury known the truth, that the State reached out to [Greene], it is reasonably likely that the jury would have discredited Greene's testimony." (Opening Br. 51). His claim is unavailing. Thomas cannot show actual prejudice because his due process/perjury claim lacks merit for the reasons discussed above. As the Superior Court found, trial counsel "fully laid out the lack-of-credibility charge she had leveled at [Greene] and the jury was unimpeded in considering it."[85]

Thomas also claims, for the first time, that he was prejudiced because "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." (*Id.*). Because he did not fairly raise this argument

[84] *Id.*

[85] *Thomas*, 2024 WL 5117117, at *13-14.

below, it is waived unless he can show plain error.[86] He cannot. Thomas's argument is speculative and without evidentiary support in the record. Neither Greene's testimony nor any other evidence of record establishes that law enforcement contacted ShotSpotter and pressured it to change its opinion in this case.

4. Thomas has failed to establish Rule 61(i)(5)'s exceptions.

Rule 61(i)(5)'s exceptions cannot assist Thomas, because he does not allege a lack of jurisdiction, a new constitutional law applicable to his claims, or anything approaching a claim of newly discovered evidence of actual innocence.[87] His claim is, therefore, barred without exception under Rule 61(i)(3).

[86] Supr. Ct. R. 8.

[87] R. 61(i)(5), (d)(2).

IV. THOMAS IS NOT ENTITLED TO RELIEF BASED ON THE CUMULATIVE ERROR DOCTRINE.

QUESTION PRESENTED

Whether several errors cumulatively resulted in an unfair trial.

STANDARD OF REVIEW

See standard in Argument I.

MERITS

Thomas argues that the cumulative impact of errors deprived him of a fair trial. (Opening Br. 52-54). He is mistaken. For a "cumulative error" claim to succeed, appellant must identify multiple errors in the proceedings below that caused actual prejudice.[88] Here, Thomas's cumulative error claim fails because each of his claims individually lack merit.

[88] *Prince v. State*, 2022 WL 4126669, at *5 (Del. Sept. 9, 2022).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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Dated: January 30, 2026

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KASHIEM THOMAS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 530, 2024
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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DATE: January 30, 2026