IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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

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

ORDER AND OPINION

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

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

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

Jones, J.

INTRODUCTION

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

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

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

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

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

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

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

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

A. Postconviction Relief Procedural Filters

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

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

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

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

B. Ineffective Assistance of Counsel

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trial Counsel's Affidavit

In his affidavit, trial counsel states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On cross-examination, trial counsel asked Adams:

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

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

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

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

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

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

During closing arguments trial counsel stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Trial Counsel was Ineffective at Sentencing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At sentencing trial counsel stated:

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

In his affidavit trial counsel stated:

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

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

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

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

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

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

/jb
Original to Prothonotary

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