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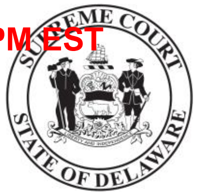

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO,	)	
	)	
Defendant – Below,	)	
Appellant,	)	
	)	
v.	)	**No. 307, 2017**
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: February 12, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

On February 16, 2015, a New Castle County grand jury returned an indictment against John Brisco ("Brisco") and several codefendants alleging *inter alia*, Gang Participation, three counts of Murder First Degree, and related firearm charges for the murders of Ioannis Kostikidis ("Kostikidis"), Devon Lindsey ("Lindsey"), and William Rollins ("Rollins"). A-2. The case was reindicted on November 9, 2015. A-5. After an eight-day trial, a jury found Brisco guilty of Murder First Degree for the murders of Kostikidis and Rollins, Attempted Robbery First Degree, Conspiracy First Degree, Conspiracy Second Degree, Gang Participation and several firearms offenses. A-13. The jury acquitted Brisco of Murder First Degree (Lindsey) and related firearm and conspiracy charges. A-13-14. On July 21, 2017, the Superior Court sentenced Brisco to an aggregate of two life terms plus 35 years incarceration followed by community supervision. Sentence Order; *Amd. Op. Brf*. at 14-21. Brisco appealed. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not abuse its discretion when it permitted Probation Officer Robert Johnson ("Johnson") to testify about the 30-meter range of the ankle bracelet worn by Brisco. The trial judge correctly determined that Johnson's testimony did not qualify as an expert opinion under D.R.E. 702. D.R.E. 701 is likewise inapplicable to Johnson's testimony because he did not offer an opinion as a lay witness based on his perceptions of the reliability or accuracy of the GPS monitoring system and ankle bracelet.

Even if the Court were to find that the Superior Court abused its discretion, Johnson's testimony regarding the GPS device was harmless because of the overwhelming evidence presented at trial that demonstrated that Brisco shot and killed Kostikidis during a failed robbery attempt.[1]

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[1] It appears that Brisco is only challenging his convictions related to Kostikidis's murder. Johnson's testimony only related to the February 6, 2013 murder and Brisco has not alleged that his convictions for Rollins's murder and related charges were affected by Johnson's testimony.

STATEMENT OF FACTS

In February 2015, police arrested Brisco for three separate homicides. On February 6, 2013, Brisco shot and killed Kostikidis in a parking lot at 6th and Tatnall Streets in Wilmington. On January 18, 2015, Lindsey was shot and killed while seated in a minivan in the 700 block of 26th Street in Wilmington. Less than one week later, on January 24, 2015, Brisco shot and killed Rollins at the corner of 21st and Washington Streets in Wilmington.

The February 6, 2013 Murder

On the evening of February 6, 2013, officers from the Wilmington Police Department ("WPD") responded to a 911 call reporting a person "down" in the 600 block of Tatnall Street. A-64-65. When officers arrived, they found Kostikidis laying in a parking lot, unresponsive. A-66. Paramedics arrived on scene, began to render aid, and eventually transported Kostikidis to the hospital, where he was pronounced dead. A-67-68. At the crime scene, police discovered a 9 millimeter shell casing near Kostikidis's feet. A-85.

Jakeem Broomer ("Jakeem"), who was an uncooperative witness, gave three statements to WPD detectives, which were played at trial pursuant to 11 *Del. C.* § 3507. B9-16; *Court Exhibits* 2, 3 and 4. According to Jakeem, he had been with Brisco and Daymere Wisher ("Wisher") on February 6, 2013. He knew they were armed earlier in the day, Brisco had a brown 9 millimeter handgun and Wisher had

a silver .32 or .380. *Court Exhibit* 4. Jakeem, Wisher, Brisco, and another associate, Corvan Hammond ("Hammond"), were planning to go to a party that evening and Jakeem went to his father's house to ask him for money. *Court Exhibit* 4. Kina Madric, who lived with Jakeem's father at 612 N. Tatnall Street, testified that Jakeem had come to the house with a friend, and she let them both into the home. A-110; A-113. According to Jakeem, he and Brisco went into the residence while Wisher and Brisco remained outside. *Court Exhibit* 4. Madric testified that a few moments after Jakeem and his friend entered the home the doorbell rang. A-114. When she answered the door, there were two young men on the front porch asking for Jakeem. A-114. She left them outside and went to get Jakeem. A-116. Madric later identified Brisco as one of the young men who rang her doorbell. A-117-18; *State's Trial Exhibit* 29.

Hammond, who was also uncooperative at trial, told WPD detectives that he remained inside the house for a brief time and returned outside with Brisco and Wisher. B1-8; *Court Exhibit* 1. While the trio were waiting for Jakeem, Kostikidis walked past them, and Brisco and Wisher told Hammond they were going to rob him. Hammond was aware that Brisco and Wisher were armed, and told police that Wisher had a small caliber weapon and Brisco had a 9 millimeter gun. *Court Exhibit* 1. Brisco and Wisher followed Kostikidis toward the parking lot on Tatnall Street – out of Hammond's view. *Court Exhibit* 1. Hammond heard a

"boom" and saw Brisco and Wisher run up 6th Street. *Court Exhibit* 1. When interviewed by the police, Hammond identified Brisco and Wisher in separate photo line-ups. *Court Exhibit* 1.

Jakeem, who remained inside his father's residence during the murder, told police that he heard a gunshot and when he went outside, Brisco and Wisher were gone. *Court Exhibit* 4. During a phone conversation later that evening, Brisco told Jakeem that he and Wisher tried to rob Kostikidis. *Court Exhibit* 4. There was a struggle and Brisco shot Kostikidis. *Court Exhibit* 4.

Probation Officer Robert Johnson ("Johnson") testified that on February 6, 2013, Brisco was a juvenile probationer being monitored electronically using a GPS ankle bracelet. A-164. According to Johnson, Sentinel, the company that provided the GPS monitoring equipment, produced a report that indicted Brisco's ankle bracelet was in the area of 641 N. Tatnall Street at the time of the murder. A-17-18; A-167. He testified that he was familiar with the GPS technology used to monitor Brisco, having received training from Sentinel. A-176-77. Based on his training, Johnson was aware that the ankle bracelet worn by Brisco had a 30-meter range. A-170. The report also showed that Brisco's ankle bracelet was in the area of 447 N. Madison Street immediately following the murder. A-17-18; A-177. Johnson testified that he was aware that Brisco's address at the time was 409 N. Madison Street. A-177.

The January 18, 2015 Homicide

On January 18, 2015, WPD officers were dispatched to a report of a shooting in the 700 block of E. 26th Street in Wilmington. B17. When they arrived, officers saw a minivan riddled with bullet holes facing the wrong way on the street. B17-18. The officers discovered a young male, later identified as Devon Lindsey, bent over in the rear seat of the vehicle. B18. It appeared to one of the officers that Lindsey had been shot in the head. B18.

Karel Blalock ("Blalock") testified that he had known Brisco for between seven and eight years. A-128. According to Blalock, Brisco and Kadir McCoy ("McCoy") "cashed a check"[2] on Lindsey. A-145. Brisco told Blalock that he and McCoy followed Lindsey's car from a gas station to the north side of Wilmington. A145-46. When Lindsey pulled over, Brisco and McCoy got out of their car and started shooting – one of the pair shot Lindsey in the head. A-146.

Brisco was acquitted of all charges related to Lindsey's murder.

The January 24, 2015 Murder

On January 24, 2015, Amir Hawkins ("Hawkins") was at a friend's house on Concord Avenue in Wilmington when he heard gunshots at approximately 8:00 pm. B21-22. Soon thereafter, Hawkins received a phone call informing him that his nephew, William Rollins, had just run in the direction of the gunfire. B21-22.

[2] Blalock testified that Lindsey "had a check on his head" which, he explained, meant the person who killed Lindsey would be paid for killing him. A-142.

Hawkins and his friend ran to the corner of 21st and Washington Streets and saw Rollins lying on the corner. B21-22. It appeared to Hawkins that Rollins had "about seven or eight holes in him." B22. Police recovered several 9 millimeter casings from the crime scene. B31-32. An autopsy revealed that Rollins was shot 13 times. B26.

Blalock testified that he knew Brisco was a member of the Touch Money Gang ("TMG") and that TMG's business was selling drugs and shooting people. A-136. Blalock knew that Brisco sold heroin and he was known to carry a gun. A-137; A-140. In 2015, 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. A-141-45. McCoy then walked over to Rollins and shot him in the back of the head with a .357. A-145. Brisco told Blalock that he used a P90 Ruger. A-144. According to Blalock, Brisco told him that Rollins had a "check on his head" because he had killed a person named "Beano." A-142-43. Brisco said that he was paid $13,000 for killing Rollins. A-143.

The following day, McCoy was arrested for the robbery of a WSFS Bank located on Union Street in Wilmington that same day. B42. WPD officers recovered a Ruger P85 9 millimeter handgun in close proximity to the location where police took McCoy into custody. B39; B43. WPD swabbed the weapon for DNA and later sent it for toolmark/ballistics comparison. B40-41.

Carl Rone, a toolmark examiner, compared the 15 shell casings collected from the Rollins homicide and compared them to the 9 millimeter gun recovered from the WSFS bank robbery. B72. Rone determined that all 15 shell casings ballistically matched the weapon recovered from the bank robbery. B72. Lara Adams, a DNA Examiner with the FBI, compared the swabs taken from the 9 millimeter with DNA samples from several individuals, including Brisco. B58. Adams determined that the DNA discovered on the weapon was consistent with Briscoe's DNA profile. B58.

ARGUMENT

THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED A PROBATION OFFICER, WHO WAS FAMILIAR WITH THE GPS ANKLE BRACELET USED TO MONITOR BRISCO, TO TESTIFY THAT THE BRACELET HAD A 30-METER RANGE.

Question Presented

Whether the trial judge abused his discretion by permitting a probation supervisor to testify that the GPS ankle bracelet worn by Brisco had a 30-meter range.

Standard and Scope of Review

This court reviews a trial judge's evidentiary rulings for an abuse of discretion.[3]

Merits of the Argument

At trial, the State introduced, without objection, a report ("Stops Report") produced by Sentinel, the company that provided GPS monitoring for ankle bracelets at the time of Kostikidis's murder.[4] In 2013, Brisco was a juvenile probationer being monitored by the Division of Youth Rehabilitative Services using an ankle bracelet that tracked his location using GPS.[5] The Stops Report

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[3] *Richardson v. State*, 43 A.2d 906, 911 (Del. 2012) (citing *Harris v. State*, 991 A.2d 1135, 1138 (Del. 2010)).
[4] A-17-18; A-165.
[5] A-164.

the time and location of Brisco's ankle bracelet when he was being moitored.[6] The Stops Report for Brisco's ankle bracelet placed the bracelet in the area of 641 N. Tatnall Street[7] at the time Kostikidis was murdered.[8] The report also tracked Brisco's ankle bracelet to the area of 447 N. Madison Street immediately following the murder.[9] Brisco's address at the time was 409 N. Madison Street.[10]

When the prosecutor asked Johnson whether the ankle bracelet had a "range of where a person could be stopped" within a particular area, Brisco objected, claiming that the officer was not "qualified as an expert to talk about the [ankle bracelet's] range of accuracy or the degree of reliability."[11] The trial judge sustained Brisco's objection, but permitted the prosecutor to lay a foundation that would permit Johnson to testify about the range of the ankle bracelet based on the officer's training and experience.[12] Johnson testified that he was a supervisor of two units, the street monitoring unit and the GPS electronic monitoring unit.[13] He received training and instruction from Sentinel for the type of ankle bracelet worn

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[6] A-166.
[7] Johnson testified that 641 N. Tatnall Street is not an extant address. A-167. He explained that the report generates an approximate address with map software used by Sentinel. A-167.
[8] A-17-18.
[9] A-177; A-17-18.
[10] A-177.
[11] A-168.
[12] A-169.
[13] A-169.

by Brisco.[14] Johnson testified that, based on his training, the ankle bracelet worn by Brisco had "a 30-meter maximum range from location."[15]

Brisco renewed his objection the following day and asked the court to strike Johnson's testimony about the 30-meter range of the ankle bracelet because it amounted to an expert opinion that was not in the Stops Report and was "not something a layman can testify about."[16] The trial judge denied Brisco's request, stating:

> I didn't view the State as offering Mr. Johnson as an expert in regards to GPS or the system that was in place at the time. . . . I don't believe during his testimony that he offered an opinion that it was accurate up to 30 meters. It's simply, he testified that as part of their utilization of the system, that they were told that the location could be up to 30 meters off. . . . So, it wasn't being offered as an expert report, it was simply as what they relied upon as probation officers in utilizing the system. Certainly, there was cross-examination and questioning of his expertise, which became clear to the jury he wasn't certifying that the system was accurate in that manner, it was simply that he had been advised that that could be utilized in his role as a probation officer.
>
> So, I understand the objection, but I don't believe it is one that the Court did view as an expert that I need to make an evaluation as to his training, experience to give that expert opinion. I didn't take it as an opinion. It was simply how a probation officer utilized the system and to determine whether or not their probationer was within the range of areas which they were allowed to be.[17]

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[14] A-169; A-176-77.
[15] A-170.
[16] B75. Brisco specifically argued, "[t]o the extent [Johnson] commented that it was accurate within 30 meters of any direction is outside his expertise and I don't think it's admissible." B75.
[17] B75.

On appeal, Brisco claims the trial judge abused his discretion when he admitted Johnson's testimony because "the witness's background, experience, education and training did not provide the necessary foundation for him to provide expert testimony concerning the range of accuracy of the GPS device."[18] He contends that Johnson's "unsupported opinion that the range of accuracy of the device showed that the defendant could be at the scene of the crime was grossly unfair, prejudicial, incriminated the defendant unfairly and eviscerated his alibi."[19] Brisco's argument is unavailing.

D.R.E. 702 addresses "expert" testimony, and provides: "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[20]

Under D.R.E. 701 lay opinion testimony must meet three requirements: (1) the testimony must be "rationally based on the perception of the witness"; (2) the testimony must be "helpful to a clear understanding of the witness' testimony or

[18] *Op. Brf.* at 12.
[19] *Op. Brf.* at 13.
[20] D.R.E. 702.

the determination of a fact in issue;" and (3) not based on scientific, technical or other specialized knowledge within the scope of Rule 702."[21] The rule "permits a lay witness to testify as to his own impressions when they are based on personal observation and 'form a collection of facts that can most effectively be communicated in the 'shorthand' version of an opinion.'"[22]

Here, Brisco quotes D.R.E. 701, but he appears to argue that the Johnson's testimony was not admissible because it was an opinion being presented by an expert who "cited no learned treatises, studies, records, reports, or even manufacturer's statements that supported his opinion."[23] In other words, Brisco is claiming that Johnson's testimony was inadmissible under D.R.E. 702. His argument conflates D.R.E. 701 and D.R.E. 702. Moreover, his reliance on D.R.E. 702 is misplaced.

"Lay and expert testimony are distinguishable in that 'lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in

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[21] D.R.E. 701.
[22] *State v. Washington*, 2007 WL 2297092, at *4 (Del. Super. Aug. 13, 2007) (quoting Barbara E. Bergman & Nancy Hollander, 3 Wharton's Criminal Evidence § 12.2 (15th Ed.2006)).
[23] *Op. Brf.* at 8-9.

the field.'"[24] In *People v. Odom*, the Michigan Court of Appeals considered and rejected an argument similar to Brisco's.[25] At the defendant's trial for armed robbery and bank robbery, the prosecution called the "custodian of records for the agency that administered the monitoring program for the GPS device that defendant wore as part of his parole, to testify concerning information on a computer disk put together by his staff and Pro–Tech, an internet computer application."[26] The witness testified that after the signal from the defendant's device was lost for a period of time, a signal from the device bounced off a cellular telephone tower near an intersection close to a check cashing business that had been robbed.[27] The device also indicated that defendant subsequently returned to his apartment.[28] On appeal, the defendant argued that the trial court abused its discretion by "allowing the prosecution to introduce the results of the GPS device without laying a proper foundation as to its accuracy and without establishing that [the witness] was qualified to testify regarding the functionability of the device

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[24] *United States v. Thompson*, 393 F. App'x. 852, 858 (3d Cir. 2010) (citing Fed. R. Evid. 701 Advisory Committee's Notes (2000); *Donlin v. Philips Lighting North America Corp*., 581 F.3d 73, 81 (3d Cir. 2009)).
[25] *People v. Odom*, 2014 WL 61238 (Mich. Ct. App. Jan. 7, 2014) *rev'd in part on other grounds*, 870 N.W. 2d 575 (Mich. 2015).
[26] *Id.* at *7.
[27] *Id.* at *20.
[28] *Id.*

under MRE 701 and 702."[29] The appeals court disagreed, finding MRE 702 did not apply because the witness "did not provide the jurors with any opinions based on scientific, technical, or other specialized knowledge that would help them understand the evidence and did not apply any principles and methods to the facts of the case."[30] The appeals court also rejected the defendant's "passing reference" to MRE 701, finding the witness "simply testified as to the role of his agency and defendant's GPS tracking devices in general. He did not testify to any opinions

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[29] *Id.* D.R.E. 701 and D.R.E. 702 are identical to MRE 701 and MRE 702, which provide:

> **Rule 701. Opinion testimony by lay witnesses**
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based in scientific, technical, or other specialized knowledge within the scope of Rule 702.
>
> **Rule 702. Testimony by experts**
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[30] *Id.* at *20.

based on his perceptions. Thus, MRE 701 also has no application to [the witness's] testimony."[31]

While not controlling, the Michigan court's analysis is nonetheless persuasive and directly applicable to the issue presented here. The Superior Court correctly found that Johnson's testimony did not fall within the expert testimony category of D.R.E. 702. Johnson simply detailed the information he relied upon as a probation officer utilizing the GPS monitoring system. "Because [Johnson] did not provide the jurors with any opinions based on scientific, technical, or other specialized knowledge that would help them understand the evidence and did not apply any principles and methods to the facts of the case, [D.R.E.] 702 does not apply to [his] testimony.[32]

Although Brisco makes no substantive argument under D.R.E. 701, it is likewise inapplicable to Johnson's testimony. As noted above, Johnson testified about his role as a GPS electronic monitoring unit supervisor and the report generated by Sentinel in Brisco's case. He received training from Sentinel and had general knowledge of how the GPS monitoring system worked based on his training. "He did not testify to any opinions based on his perceptions."[33] Indeed, the trial judge did not think Johnson's testimony amounted to an opinion, and

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[31] *Id.* at *21.
[32] *Id.* at *20.
[33] *Id.* at *21.

found that “[i]t was simply how a probation officer utilized the system and to determine whether or not their probationer was within the range of areas which they were allowed to be.”[34] Thus, D.R.E. 701 also has no application to Johnson’s testimony.

If this Court finds that D.R.E. 701 is applicable, Johnson’s testimony nonetheless satisfies the rule’s requirements. The trial judge could have found that Johnson’s testimony regarding the 30-meter range of the ankle bracelet was rationally based on his training, knowledge and perception, that it was helpful to a clear understanding of his testimony regarding the ankle bracelet’s location at the time of Kostikidis’s murder, and it was not otherwise based on scientific, technical or other specialized knowledge.[35]

Even if this Court were to find that the Superior Court erred by permitting Johnson to testify about the 30-meter range of the ankle bracelet, any such error was harmless. “Harmless error is ‘[a]ny error, defect, irregularity or variance which does not affect substantial rights.’”[36] When reviewing claims for harmless error, “[t]he reviewing court considers the probability that an error affected the

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[34]B75.

[35] *See State v. Jackson,* 748 S.E.2d 50, 56, (N.C. Ct. App. 2013) (trial court properly admitted police officer testimony regarding GPS tracking data from defendant’s electronic monitoring device as lay witness testimony).

[36] *Williams v. State*, 98 A.3d 917, 922 (Del. 2014) (quoting Super Ct. Crim. R. 52)

jury's decision. To do this, it must study the record to ascertain the probable impact of error in the context of the entire trial."[37]

Given the overwhelming and convincing evidence introduced at trial, it is highly probable that any error in admitting Johnson's testimony did not contribute to the jury's decision. The State produced witnesses who identified Brisco and placed him in the 600 block of N. Tatnall Street immediately prior to Kostikidis's murder. Jakeem was with Brisco and Wisher prior to the murder and was aware that Brisco had a brown 9 millimeter handgun. Hammond told police that while he was waiting with Brisco and Wisher outside of Jakeem's house in the 600 block of N. Tatnall Street, Brisco and Wisher told him they were going to rob Kostikidis. Hammond knew Brisco had a 9 millimeter gun. Hammond saw Brisco and Wisher follow Kostikidis into the parking lot, heard a "boom," and saw Brisco and Wisher run up 6th Street. During a phone conversation later that evening, Brisco told Jakeem that he and Wisher tried to rob Kostikidis, there was a struggle, and Brisco shot Kostikidis. The police found a 9 millimeter shell casing at Kostikidis's feet when they processed the crime scene. The eyewitness statements and Brisco's admission were the strongest evidence of Brisco's guilt. Johnson's testimony about the 30-meter range of the ankle bracelet did not influence the jury's decision

[37] *Van Arsdall v. State,* 524 A.2d 3, 9–10 (Del. 1987).

in light of the other evidence presented.[38] As a result, if the trial judge committed any error in admitting Johnson's testimony, the error was harmless.

[38] *United States v. Muhammad*, 512 F. App'x. 154, 162 (3rd Cir. 2013) (even assuming *arguendo* that admission of testimony regarding GPS tracking devices was improperly admitted as lay witness opinion under F.R.E. 701, such error was harmless given overwhelming evidence of defendants' guilt).

CONCLUSION

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

/s/ Andrew J. Vella
ANDREW J. VELLA (ID No. 3549)
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

DATE: February 12, 2018

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STATE OF DELAWARE,	)	
	)	
Plaintiff – Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 4,100 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
ID No. 3549

DATE: February 12, 2018

CERTIFICATION OF SERVICE

The undersigned, being a member of the Bar of the State of Delaware, hereby certifies that on this 12th day of February, 2018, he caused one copy each of the attached *State's Answering Brief* to be delivered electronically via File&Serve to the following persons:

Michael C. Heyden, Esq.
1201 North King Street
Wilmington, DE 19801

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella

Andrew J. Vella
Deputy Attorney General
ID No. 3549
Department of Justice
820 North French Street
Wilmington, DE 19801
(302) 577-8500