FILED, Clerk of the Appellate Division, August 13, 2024, **A-003125-22**

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3125-22T2
INDICTMENT NOS. 19-01-00012-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division,
FRENCH G. LEE,	:	Burlington County.
Defendant-Appellant.	:	Sat Below:
	:	Hon. Richard J. Nocella, J.S.C., and a Jury.
		DEFENDANT IS CONFINED

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b)

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant French Lee respectfully refers this Court to the procedural history and statement of facts set forth in his brief previously submitted in this matter.

LEGAL ARGUMENT

Lee relies on the arguments made in his previously filed brief, and adds:

POINT I

DESPITE MANY ATTEMPTS BY DEFENSE COUNSEL TO ENSURE THAT THE FINGERPRINT EVIDENCE WAS HANDLED APPROPRIATELY IN THIS CASE, THE TRIAL COURT FAILED IN ITS GATEKEEPING ROLE TO IMPOSE ANY LIMITS ON THE FINGERPRINT TESTIMONY OR TO ENSURE AN UNBIASED AND INFORMED JURY.

The conviction in this case rests almost entirely on expert testimony about fingerprint evidence. Both at trial and on appeal, Lee argued that the fingerprint evidence was not handled properly. In support of these arguments, both at trial and on appeal, Lee presented scientific evidence that demonstrates that (1) fingerprint analysis is subject to error; (2) there are limits to what can be reliably claimed by a fingerprint examiner; and (3) jurors are inclined to believe that fingerprint evidence is infallible. In response, the State is not able to substantively counter these claims. Instead, it resorts to a number of procedural arguments to attempt to stop this Court from answering the only real question in

this case: are Lee's convictions based on a reliable technique, reliably applied and reliably communicated? Because the answer to that question is "No," the convictions must be reversed.

As a threshold matter, the State misrepresents the defense challenge to the reliability of the fingerprint analysis in this case. The defense is not arguing that all fingerprint testimony based on the ACE-V method is unreliable. The defense is arguing that the State failed to demonstrate the reliability of a fingerprint comparison that took place as a result of a database search. The defense spent nine pages of its brief explaining this issue: database searches lead to the discovery of "close non-matches," which have not been demonstrated to be distinguishable from a true match by fingerprint examiners. (Db 14-22)[1] The State does not address this issue at all. In addition to this the broad challenge to the reliability of fingerprint analysis generated by this specific method, Lee argues that because fingerprint analysis, like all disciplines, is not infallible and because jurors are inclined to believe it is, steps needed to be taken throughout trial to make sure the strength of that evidence was not overstated or overestimated.

The first procedural hurdle erected by the State in an attempt to thwart consideration of the substance of the issues Lee raised on appeal is a complaint

[1] Db – Defense brief; Sb – State brief

about the degree to which the defense presented its arguments and evidence below. (Sb 14) This is a remarkable complaint given the persistence with which defense counsel pursued the issue. At trial, defense counsel (1) moved to preclude all fingerprint expert testimony; (2) moved to limit the scope of the expert testimony; (3) requested that prospective jurors be voir dired to determine if jurors have preexisting beliefs about the reliability of fingerprint evidence; and (4) requested that the jury be instructed on how to consider the fingerprint evidence. (1T 6-1 to 32-11, 6T 6-6 to 20) The trial court did not ask for briefing, did not hold evidentiary hearings, and denied each defense request. Lee has renewed each of these issues on appeal. To now argue that the defense should have done more objecting or brought more evidence into the record ignores both the facts of what the defense actually did and the law of who is obligated to prove anything about the reliability of expert evidence: the State. The defense made each request delineated above clear and marshalled evidence to back up its requests. It is the State that bears the burden of proving the reliability of the expert evidence it is admitting into evidence. State v. Cassidy, 235 N.J. 482, 492 (2018). The failure to develop a more fulsome record rests on the proponent of the evidence, the State, or the gatekeeper of evidence, the trial court. It does not rest with Lee.

Relatedly, the State takes issue with the fact that not every single article now cited by the defense was cited in trial court. Again, the failure to make further inquiries after these issues were raised by the defense is the trial court's failure; the failure to make a record to defend the reliability of the expert evidence it sought to admit is the State's failure. But the State's argument on appeal is also contrary the law, which has a proud and robust history of enabling appellate courts to consider scientific resources without any requirement that each resource was presented below. As this Court recently explained, "appellate courts can digest expert testimony as well as review scientific literature, judicial decisions, and other authorities." State v. Rochat, 470 N.J. Super. 392, 436 (App. Div.) (internal quotation marks omitted). Therefore, our appellate courts regularly independently review relevant scientific literature to render reliable decisions about technical or scientific topics. See e.g., In re D.C., 203 N.J. 545, 560-61 (2010) (examining the "new understanding by social scientists" in determining statutory intent); State v. Romero, 191 N.J. 59, 70-72 (2007) (reviewing "identification research" studies with regard to a question of jury instructions). Similarly, our appellate courts regularly inform their understanding of issues with the aid of law review articles and legal treatises that were not presented at trial. See e.g., State v. Long, 173 N.J. 138, 159-160 (citing three separate treatises to guide its opinion). Further, facts Lee relies on

from these materials are facts which come from accurate sources, of which this Court can take judicial notice. See N.J.R.E. 201(b)(3), 202(b). To say that these materials are outside the scope of what this Court can consider flies in the face of the law and practice of our appellate courts.

Harvey itself, which the State relies on in this attempt to stop this Court from substantively considering the issues, undermines the State's position. (Sb 28) In Harvey, our Supreme Court held that it was inappropriate to append to a Supreme Court brief an expert report that opined directly on the facts of the case. State v. Harvey, 151 N.J. 117, 201 (1997). But our Supreme Court explicitly distinguished considering a new expert report from the obligation of an appellate court to consider scientific authorities: "As previously explained, an appellate court may review scientific literature and judicial opinions, including those published after trial, to determine whether a technique is generally accepted. That practice, however, does not constitute an invitation for the parties to supplement the record with additional expert testimony." Id. at 202. Our Court specifically held that appellate courts have an obligation to review scientific evidence, even if that information was not introduced at trial, because "if the result obtained is the product of invalid scientific theory, there is no good reason to accept it simply because we were fooled at the inception of the inquiry[.]" Id. at 168 (internal quotation marks omitted). Lee does not present any new expert

reports. He is relying on exactly the kind of reliable scientific authority this Court is not only allowed to consider but that it must consider.

The second way the State urges this Court not to consider whether the testimony in this case was reliable or whether the jury was properly selected and instructed is by focusing on the mere fact that fingerprint evidence has been allowed in New Jersey for a long time. Putting aside that, as explained above, Lee is not launching a frontal challenge of the reliability of ACE-V as a whole, the mere inertia surrounding the use of a technique does not make it reliable. The rote admission of fingerprint expert testimony is a pattern of habit, not of thoughtful consideration. There has not been a single published opinion in New Jersey that has considered the reliability of fingerprint evidence. Not in the 100 years that evidence has been used. The 1914 case the State cites as the genesis for the admissibility of fingerprint evidence certainly contains no discussion of the reliability of the method, let alone a discussion with modern understandings of reliability, error rates, and wrongful convictions. State v. Cierciello, 86 N.J.L. 309, 314 (E. & A. 1914) ("In principle [the fingerprint's] admission as legal evidence is based upon the theory that the evolution in practical affairs of life, whereby the progressive and scientific tendencies of the age are manifest in every other department of human endeavor, cannot be ignored in legal procedure, but that the law, in its efforts to enforce justice by demonstrating a

fact in issue, will allow evidence of those scientific processes which are the work of educated and skillful men in their various departments, and apply them to the demonstration of a fact, leaving the weight and effect to be given to the effort and its results entirely to the consideration of the jury.").

In short, for 100 years fingerprint evidence has been used to convict and incarcerate people without our courts ever fully considering the reliability of this evidence and its limits. That is a concerning state of affairs. It is even more concerning given the history of reliance on unreliable forensic techniques in the criminal justice system and the fact that there have been documented cases of misattribution based on fingerprint analysis:

> To the untrained eye, and especially the eyes of lawyers and judges, anecdotal forensics look scientific. Phrenologists used highly detailed and specific maps of skulls and the corresponding bumps found on them, and identification experts use methods such as ACE-V. A century from now, however, the anecdotally-based beliefs of forensic experts are likely to survive much as phrenology endures today. They will be no more than abject lessons from the annals of the history of science.
>
> David L. Faigman, Anecdotal Forensics, Phrenology, and Other Abject Lessons from the History of Science, 59 Hastings L.J. 979, 998–99 (2008)

In short, there is no prior precedent that is relevant to the questions before this Court. Because there has never been a published Frye opinion on fingerprint analysis, there is no prior decision to either defer to or disturb, merely tradition. Cf. State v. Olenowski, 253 N.J. 133, 154 (2023) ("Nothing in today's decision

disturbs prior rulings that were based on the Frye standard.). But whatever weight should be given to the past treatment of fingerprint evidence, the past cannot have a veto: our Supreme Court has recently explained that it is appropriate and necessary to consider "challenges to the admissibility of evidence that has previously been sanctioned but the scientific reliability underlying the evidence has changed." Ibid. Certainly much has changed in the last 100 years.

The third non-substantive argument the State makes is that the fingerprint examiner was credible. Therefore, the reliability of the evidence or proper voir dire or instructions, argues the State, does not matter because the defense was able to challenge the State expert through cross-examination and did not put forth its own expert. The State is missing the point. At core, this case is not about whether or not the fingerprint examiner is "credible" or whether his "credibility" was attacked by the defense, as the State seems to suggest. (Sb 27) This case is about the trial court's obligations to limit expert testimony to what is scientifically reliable, to ensure an impartial jury panel, and to properly instruct jurors. None of that has anything to do with how "credible" a witness is. A "credible" Drug Recognition Expert cannot testify to his deeply held belief that a defendant is impaired due to a specific drug because regardless of the honesty of the DRE's belief, such an opinion is beyond the limits of reliable evidence.

As our Supreme Court explained, it is "not usual" to establish "boundaries of reliability" that limit the testimony of a testifying expert: "Some fields of expertise are only sufficiently reliable to be admitted with appropriate restrictions and limitations. The fact that an expert's methodology cannot reliably prove everything a proponent would like it to prove does not mean that it cannot be a reliable and useful tool for a more limited purpose." State v. Olenowski, 255 N.J. 529, 609 (2023) (emphasis added). The limits of N.J.R.E. 702 are not about credibility. They are about reliability. These are two distinct concepts. Just as with DRE evidence, limits must be placed on how fingerprint testimony is presented to the jury.

Moreover, it is not the job of the defense to defuse unreliable testimony through cross examination or by proffering an alternative expert. As the "gatekeeper" of which evidence is allowed in at trial, the trial court is responsible for making sure that superficially appealing but unscientific evidence never makes its way to the jury, even if it is subject to cross-examination. State v. J.L.G., 234 N.J. 307, 208 (2018). Cross-examination or competing expert witnesses are not a match for preexisting juror beliefs. (Db 24-26) Our Supreme Court understood that cross-examination was insufficient to prevent against the admission of unreliable, or even potentially unreliable, evidence in State v. Henderson, 208 N.J. 208 (2011). The fact of cross-

examination did not prevent the Court from creating a scientifically accurate standard for exclusion. And the fact that an identification may be reliable enough to go to the jury did not dispense with the need for trial courts to educate the jury: "[W]e do not rely on jurors to divine rules themselves or glean them from cross-examination or summation. Even with matters that may be considered intuitive, courts provide focused jury instructions." Id. at 296.

Similarly, cross-examination of a person relaying hearsay cannot cure a Confrontation Clause issue. As the Supreme Court of the United States recently reemphasized in Smith v. Arizona, 144 S. Ct. 1785, 1796 (2024), the right to cross-examine an expert about an analysis he did not conduct does not satisfy the constitution. "The real witness against" Lee, in the context of the verification, was the verifier, not the original analyst. Ibid. That is the person who needs to testify about the verification in order to satisfy the Confrontation Clause. The original examiner being available for cross-examination does nothing to cure the constitutional violation of allowing the examiner to convey the substance of the verifier's opinion.

The final obstacle to considering the fairness of the trial that the State attempts to erect is the harmless error doctrine. There is no room for harmless error analysis in this case because the fingerprint analysis was the entire case. Aside from the fingerprints, the State did no investigation—it did not get Lee's

cellphone records to see if the phone was in the vicinity of the Wing King on the night in question, it did not search Lee's house for clothing matching the perpetrator or for proceeds of the burglary. There was no confession, no cooperator, and no corroboration. All there is in this case is an unclear video, which alone could not be a basis for a conviction, and fingerprint evidence. The prosecutor himself acknowledged in closing that the surveillance video was not sufficient to determine the identity of the perpetrator(s), directly contradicting the State's new contention on appeal (Sb 31), but told the jury not to worry because the fingerprint analysis made the case:

> Those are French Lee's fingerprints. The overwhelming evidence presented to you makes it as true that those are French Lee's fingerprints as the fingerprints on his exemplars. Not one fingerprint, not two fingerprints, not three fingerprints, but four prints, ring finger and middle finger and on the left hand under the register, two prints of the middle finger on the right hand under that register. That's the testimony you heard from Lieutenant Wiltsey, an expert in the field of fingerprint analysis who has been doing that work for over two decades. That man is that man, and it's not because what some officer thought looking at a video clip for a few minutes at four o'clock in the morning. It's certainly not what counsel -- what his opinion as to what he sees on these videos, it's the evidence. It's the proof, it's what was presented to you through reliable investigative techniques.
>
> <u>And at the end of the day, ladies and gentlemen, if we just had some grainy video, I wouldn't be here today. We wouldn't be here for this case. This is not a video identification case</u>. As I told you in the opening, the video was a roadmap. The video provided investigators with areas to look to see what that suspect touched, what French Lee touched. And what did he touch? He was all over that register, no gloves.

> What else did he touch? What else did that video provide investigators in terms of a map to where to train their attention? When he came to the pizza shop, here's a pizza oven. Take a look at it. How many prints, how many smudges do you see on that pizza oven? You watched the video, you watched the body-worn camera footage from Officer Burk. I would suggest it jumps off the screen, one print, French Lee's print. That's what the evidence shows, that was the testimony from an expert in the field of latent print analysis.

(7T 10-14 to 11-25) (emphasis added)

In sum, this case was a fingerprint case. And despite defense counsel's repeated attempts to get the court to consider seriously how to handle that central evidence—from voir dire through testimony through jury charges—the court did not act as a gatekeeper and take the steps necessary to ensure that Lee had a fair trial based on reliable evidence before an unbiased jury. The convictions must be reversed.

POINT II

THE PERSISTENT-OFFENDER EXTENDED TERM SENTENCE IS UNCONSTITUTIONAL.

In his original brief, Lee challenged the imposition of an extended-term. (Sb 44-49) The State's substantive response—that 8 years in prison for stealing $168 in change from a closed restaurant through an open window for a person who had two prior fourth-degree convictions is fair—significantly overstates the severity of the crime and Lee's record. But as the State points out, the original

brief was filed in this case before the Supreme Court of the United States issued Erlinger v. United States, 144 S. Ct. 1840 (2024). (Sb 41 n.8) Erlinger makes clear that New Jersey's persistent-offender extended term statute is unconstitutional. Lee's sentence cannot stand.

In order to sentence Lee to an extended term, the court had to find that Lee was eligible as a persistent offender based on the dates of his prior convictions. (8T 41-2 to 9, 9T 5-1 to 7-21) This finding violated Lee's Sixth and Fourteenth Amendment rights because judicial fact-finding increased the minimum term that the court could impose. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime. . . must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 489 (2000). This maxim applies with equal force whether it increases the sentencing range at the top, Blakely v. Washington, 542 U.S. 296, 303 (2004), or at the bottom. Alleyne v. United States, 570 U.S. 99, 103 (2013).

In Erlinger, the Supreme Court applied these well-established rules and held that it violated the defendant's Sixth Amendment rights to sentence him under the Armed Career Criminals Act (ACCA) based on judicial fact-finding. Under the ACCA, if the defendant had "three prior convictions for 'violent felon[ies]' or 'serious drug offense[s]' that were 'committed on occasions different from one another," the sentencing range increased from zero to ten

years to 15 years to life in prison. Id. at 1846 (alterations in original). The sentencing court in Erlinger had determined that the defendant's prior convictions were committed on different occasions and therefore imposed the ACCA mandatory minimum of 15 years. Ibid.

The Supreme Court held that this judicial fact-finding violated the defendant's Sixth Amendment rights. "[T]here is no doubt what the Constitution requires in these circumstances: Virtually any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." Id. at 1851 (internal quotation marks omitted). Thus, the defendant was "entitled to have a jury resolve ACCA's occasions inquiry" – whether the prior convictions were committed on different occasions – "unanimously and beyond a reasonable doubt." Id. at 1852.

In New Jersey, a defendant may be sentenced to an extended term as a "persistent offender" – if he "has been previously convicted on at least two separate occasions of two crimes, committed at different times. . . ." N.J.S.A. 2C:44-3(a). Here, as in Erlinger, whether Lee's prior convictions happened "on at least two separate occasions" and were "two crimes, committed at different times" are facts that increase his sentencing exposure. As such, they must be found by a jury, beyond a reasonable doubt. It violated Lee's Sixth Amendment

rights for the judge, rather than the jury, to make this determination. As with every other new rule announced under the Apprendi framework, Erlinger must be given pipeline retroactivity. See, e.g., State v. Grate, 220 N.J. 317, 335 (2015) (affording pipeline retroactivity to Alleyne); State v. Natale, 184 N.J. 458, 494 (2005) (affording pipeline retroactivity to Blakely claims).

In sum, Lee's extended-term sentence is excessive both for the reasons stated in his original brief and because such a sentence violates Lee's Sixth Amendment and Fourteenth Amendment rights. The sentence should be vacated and remanded for resentencing.

CONCLUSION

For all the reasons set forth in this brief and in Lee's initial brief, his convictions must be reversed. In the alternative, the case must be remanded for a hearing on the appropriate handling of fingerprint evidence. Further, the sentence must be vacated and the matter remanded for resentencing.

Respectfully submitted,

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Dated: August 13, 2024

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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3125-22T2

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v.	:	Burlington County.
FRENCH G. LEE,	:	Sat Below: Hon. Richard J. Nocella, J.S.C.,
Defendant-Appellant.	:	and a jury

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY IN RESPONSE TO THE INNOCENCE PROJECT AMICUS CURIAE BRIEF

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September 27, 2024

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COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS

The State relies on the counterstatements of procedural history and facts set forth in its main response brief, dated July 30, 2024, and its response brief to amicus Dr. Adele Quigley-McBride, also dated July 30, 2024, adding the following.

On August 12, 2024, the Innocence Project filed an amicus curiae letter brief. (IPAb). On September 3, 2024, this Court entered an Order granting the Innocence Project's motion to appear as amicus curiae. The Order also allowed the parties to submit optional supplemental briefs on or before September 27, 2024. (Paa2).[1]

[1] The following citation form is used:

IPAb – The Innocence Project amicus brief
Pb – State's main response brief
PAb – State's response to Dr. Quigley-McBride's amicus brief
Paa – appendix to this brief

LEGAL ARGUMENT

POINT I[2]

THE TRIAL COURT APPROPRIATELY GUIDED THE JURY ON FINGERPRINT-ANALYSIS EVIDENCE.

The trial court's jury instruction on fingerprint-analysis evidence properly reflected New Jersey law on the admissibility of that evidence. Indeed, as argued in the State's opening response brief, the trial court properly determined the scope of Lieutenant Wiltsey's expert testimony. (See Pb at 22-28). Nevertheless, Wiltsey accurately represented the process leading to his conclusion that five latent fingerprints recovered from the scene of the burglary individually matched five of defendant's known exemplar prints. And a remand to a Special Adjudicator is unwarranted and improperly raised. This Court should therefore affirm defendant's conviction.

A. The State's expert properly presented his conclusions and clearly testified that they were his opinion.

The State, the judge, and Lieutenant Wiltsey himself all made clear throughout trial that Wiltsey's expert-opinion testimony was just that—an opinion. Nowhere in his testimony did he invite the jury to "attribute[e]

[2] This point responds to Point IV of the Innocence Project's amicus brief. The State relies on Point I.C.1 of its main response brief to respond to Point III of the Innocence Project's amicus brief regarding voir dire of the jury pool on their purported biases toward the reliability of fingerprint-analysis evidence.

disproportionate weight" to it. (See IPAb at 13). Indeed, the Innocence Project makes no such claim that he did, focusing instead on considerations to be made when experts provide misleading testimony in general. (See IPAb at 11-14). The Innocence Project's contentions are therefore inapplicable and should be rejected.

Lieutenant Wiltsey provided the proper scope for the conclusions and inferences to be drawn from his testimony. He explained for the jury the entire ACE-V process and how he reached each opinion regarding defendant's latent fingerprints. For example, on direct examination, Wiltsey explained what "identification" meant:

> So, ridge formations, when we say "in sequence," which means "in the same position," . . . in your latent [print] as in your known [exemplar], and then with . . . sufficient ability to discriminate . . . one print from another, to determine source identification[,] which in fingerprint examination language and identification means that it is your opinion that the two prints originated from the same source . . . or the same person.
>
> [(6T44-3 to 14).]

And on cross-examination, defense counsel mentioned an aspect of Lieutenant Wiltsey's report regarding the examination process, which Wiltsey agreed contained "subjective" aspects. (6T82-8 to 12). Wiltsey reiterated that examiners' results and conclusions are "[u]ltimately . . . an opinion." (6T82-13 to 18). As an example, he agreed that it was "ultimately [his] decision" whether

the quality of a latent print was clear enough to examine under the "analysis" step of the ACE-V process. (6T82-25 to 83-6).

Indeed, as explained in the State's main response brief, Wiltsey walked the jury through the ACE-V process using demonstrative visual aids depicting each latent print and known exemplar and illustrated how he reached a conclusion on each of the four fingerprint and one thumbprint analyses. (6T56-22 to 74-24). Leaving no doubt that his conclusion was a judgment call, Wiltsey explained during at least one of those lines of questioning that "[a]t this point based upon my training and experience as a fingerprint examiner, I've reached the opinion that Latent 0101 originated from the same source as the Number 3 finger of [defendant]." (6T67-1 to 4).

In addition, the judge's instruction at the opening and close of trial, read directly from the Model Jury Charges—and closely resembling the Third Circuit's model charge cited favorably by the Innocence Project—reaffirmed that the jury was free to reject Lieutenant Wiltsey's opinion testimony. See, e.g., (4T51-9 to 14 ("You are not bound by [Wiltsey's] opinion but you should consider each opinion and give it weight to which you deem it is entitled, whether that be great or slight, or you may reject it."); 7T32-6 to 11 (same); 4T51-18 to 23 ("The value or weight of the opinion of the expert is dependent upon, and is no stronger than, the facts on which it is based. In other words, the

probative value of the opinion will depend upon whether from all of the evidence in the case you find that those facts are true."); 7T32-18 to 23 (same)).

While the Innocence Project focuses its analysis on situations where expert witnesses purportedly attempt to "prove too much," that scenario simply did not occur here. It was explicitly clear to the jury that the ACE-V process is not foolproof and Wiltsey's conclusion was an opinion based on his training and experience—a reliable opinion, as the jury concluded, but an opinion nonetheless.

B. This case does not require appointment of a Special Adjudicator to determine defendant's guilt.

The Innocence Project's suggestion that this Court remand to a Special Adjudicator for hearings to "develop a standardized approach regarding the admission of latent fingerprint testimony" should be rejected for two reasons. First, amicus curiae cannot raise a new issue on appeal not raised by the parties. Second, such a remand for an assessment under State v. Olenowski, 255 N.J. 529 (2023) (Olenowski II) and State v. Henderson, 208 N.J. 208 (2011), would be unnecessary given that fingerprint-analysis evidence has been consistently relied on under both relevant standards for admitting expert testimony. This Court should thus affirm the trial court's admissibility rulings.

Initially, "a party appearing as amicus curiae 'must accept the case before the court as presented and cannot raise issues not raised by the parties.'" State

v. O'Driscoll, 215 N.J. 461, 479 (2013) (quoting State v. Lazo, 209 N.J. 9, 25 (2012)). This simple, clear direction from our Supreme Court preempts the Innocence Project's recommendation. Neither the State nor defendant made any reference to a Special Adjudicator at any point during the proceedings below or in their briefing in front of this Court. The Innocence Project is therefore foreclosed from that suggestion as amicus curiae.

Nevertheless, as explained in detail in the State's main response brief and its response to Dr. Quigley-McBride's amicus brief, fingerprint-analysis evidence has been deemed sufficiently reliable for use in New Jersey criminal trials for a century. (See Pb at 17, PAb at 5-6); see also State v. Cierciello, 86 N.J.L. 309, 313-15 (E. & A. 1914) (holding it would be "no ground for error" if properly obtained fingerprint was offered into evidence and used at trial). The Court, in State v. Olenowski, held that any evidence previously validated under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), would remain admissible and reliable unless "the scientific reliability underlying the evidence has changed." 253 N.J. 133, 154 (2023) (Olenowski I). While there has not been a published New Jersey case explicitly analyzing the ACE-V method under Frye or Daubert v. Merrill Dow Pharms., Inc., 509 U.S. 579 (1993), such evidence has nevertheless been accepted time and time again during the Frye and Daubert eras. See (PAb at 6-7 (collecting cases)).

In addition, at least nine federal appellate courts have deemed reliable expert testimony regarding fingerprint-identification evidence under Daubert, including testimony regarding the ACE-V process. See, e.g., United States v. Mitchell, 365 F.3d 215, 244-46 (3d Cir. 2004) (concluding there were "good grounds" under Daubert to admit expert testimony on fingerprinting evidence); United States v. Crisp, 324 F.3d 261, 266 (4th Cir. 2003) (explaining federal appellate courts have found admissible "expert fingerprint identifications in the post-Daubert era"); United States v. Baines, 573 F.3d 979, 989-92 (10th Cir. 2009) (same); United States v. Abreu, 406 F.3d 1304, 1307 (11th Cir. 2005) (same); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (same); United States v. Spotted Elk, 548 F.3d 641, 663 (8th Cir. 2008) (explaining a Daubert hearing was unnecessary where expert had extensive training and used acceptable methods); United States v. Pena, 586 F.3d 105, 110-11 (1st Cir. 2009) (finding no abuse of discretion because the ACE-V method satisfies Daubert); United States v. Straker, 800 F.3d 570, 631-32 (D.C. Cir. 2015) (same); United States v. Herrera, 704 F.3d 480, 485-87 (7th Cir. 2013) (same).

A Special Adjudicator would thus be unnecessary both in this case and in general to determine that fingerprint-analysis evidence and the ACE-V process are admissible and reliable. Despite the attempt by amici and defendant to suggest that expert testimony regarding that evidence is unreliable or risks

misleading a jury, there is no controversy. No Special Adjudicator is needed to uphold what court after court has determined: such evidence is reliable under Frye and Daubert. Since it does so, fingerprint-analysis evidence therefore satisfies Olenowski as well.

POINT II[3]

CREATION OF A MODEL JURY CHARGE ON FINGERPRINT-ANALYSIS EVIDENCE IS UNNECESSARY AND UNJUSTIFIED.

The trial court's instructions in this case—read directly from the New Jersey Model Criminal Jury Charges—sufficed to guide the jury on how to consider fingerprint-analysis evidence, and no new model jury charge on that subject would be helpful. Even if this Court were to deem a new model jury charge appropriate, the Innocence Project suggests an instruction so expansive that it would risk biasing the jury against such evidence, swallowing whole an entire category of evidence whose reliability is backed historically, scientifically, and legally for the reasons already discussed. This Court should reject the Innocence Project's suggestion.

The Innocence Project asks that this Court adopt (or appoint a Special Adjudicator to recommend) a sprawling jury instruction covering, "at a minimum," topics including specific language an expert can use regarding the source of latent fingerprints, the subjectivity and fallibility of fingerprint analysis in general, whether fingerprints are unique, the accuracy of the ACE-V process specifically, various factors on which fingerprint identification is

[3] This point responds to Point V of the Innocence Project's amicus brief.

dependent, the existing New Jersey model charge on fingerprints, an explanation of circumstantial evidence, and the probativeness of fingerprint-analysis evidence. (See IPAb at 21-23).

To oblige the Innocence Project's request would subsume the admission of fingerprint-analysis evidence by advancing arguments more appropriate for cross-examination or testimony by a defense expert, and it would risk confusing the jury. "Jury charges must provide a 'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" State v. Singleton, 211 N.J. 157, 181-82 (2012) (quoting State v. Green, 86 N.J. 281, 287-88 (1981)). Rather than explain the law, the Innocence Project's suggested instruction, coming from the judge, a neutral arbiter, would risk biasing the jury against fingerprint-analysis evidence in its entirety.

Indeed, at trial, when defense counsel proposed that the judge read a customized fingerprint instruction (one that was less expansive than the instruction proposed by the Innocence Project), the judge declined to do so because the proposed instruction was based on a report not in evidence and because he "anticipated" that defense counsel would "make these arguments in closing." (6T132-12 to 21). This aligns with the assistant prosecutor's concern at the charge conference that reading such a charge "would have [the judge]

testify to perceived weaknesses within the latent print analysis field, which is not what a jury instruction is designed to do." (6T131-16 to 20). As explained in the State's main response brief, the judge read the proper instruction to guide the jury. Neither defense counsel's nor the Innocence Project's requests for a new jury charge should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons stated more fully in the State's main response brief, the State urges this Court to affirm defendant's convictions and sentence.

Respectfully submitted,

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DATED: September 27, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3125-22T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Burlington County.
FRENCH G. LEE,	:	
Defendant-Appellant.	:	Indictment No. 19-01-00012-I
	:	Sat Below:
	:	Hon. Richard J. Nocella, J.S.C. and a Jury.

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I. INTRODUCTION

This case presents an important opportunity to provide guidance to lower courts on the appropriate presentation of fingerprint evidence at trial. Although flawed forensic evidence is a leading cause of wrongful conviction, jurors tend to overvalue forensic expert testimony. See, e.g., Executive Office of the President – President's Council of Advisors on Science and Technology, Report to the President – Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods, at 45 (Sept. 2016) (hereinafter "PCAST Report").[1] Courts, including the U.S. Supreme Court, have recognized that "[e]xpert evidence can be both powerful and quite misleading." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595 (1993) (citation omitted). Due to the power of such evidence, it is critical to select jurors who do not have preconceived, misguided beliefs that forensic evidence is infallible—beliefs that are often driven by misleading and unrealistic media depictions of forensics. See, e.g., Mark A. Godsey & Marie Alao, She Blinded Me with Science: Wrongful Convictions and the "Reverse CSI Effect," 17 Tex. Wesleyan L. Rev. 481, 495 (2011) ("[J]urors in this country often accept state forensic testimony as if each prosecution expert witness is the NASA scientist who first put man on the moon."). Similarly, courts must ensure that the probative

[1] https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

value of forensic evidence is not exaggerated during trial and that jurors are given appropriate instructions to guide their evaluation of scientific evidence.

Jurors place great weight on latent fingerprint "matching" testimony in particular. Brandon L. Garrett & Gregory Mitchell, How Jurors Evaluate Fingerprint Evidence; The Relative Importance of Match Language, Method Information, and Error Acknowledgement, 10 J. Empirical L. Studies 484, 497 (2013). But no forensic technique is infallible, including latent fingerprint analysis. A robust body of scientific research developed in the past 30 years and advanced in the past decade has revealed important limitations on the reliability of fingerprint evidence. See, e.g., Nat'l Rsrch. Council, Comm. on Identifying the Needs of the Forensic Scis. Cmty., Strengthening Forensic Science in the United States: A Path Forward (August 2009) (hereinafter "NAS Report");[2] PCAST Report; Am. Ass'n for the Advancement of Sci., Latent Fingerprint Examination: A Quality and Gap Analysis (2017) (hereinafter "AAAS Report").[3] Indeed, this research has demonstrated that error rates are inherent to fingerprint analysis because it is a subjective technique: it relies on the judgment and experience of an individual examiner. Moreover, latent

[2] https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.
[3] https://www.aaas.org/sites/default/files/s3fs-public/reports/Latent%2520Fingerprint%2520Report%2520FINAL%25209_14.pdf?adobe_mc=MCMID%3D42160555506902829962476536102252964462%7CMCORGID%3D242B6472541199F70A4C98A6%2540AdobeOrg%7CTS%3D1716495408

fingerprint evidence is only as good as the examiner analyzing the evidence and the examiner's application of the technique in a particular case.[4]

Based on these advancements, the scientific community, including the latent fingerprint community, has *unanimously rejected individualization testimony*, i.e., "source attribution to the exclusion of all others in the world." Nat'l Inst. of Standards & Tech. & Nat'l Inst. of Just., Latent Print Examination and Human Factors: Improving the Practice through a Systems Approach (Feb. 2012) (hereinafter "NIST Report")[5] at 72, Recommendation 3.7;[6] see also AAAS Report at 63 ("Because there is no scientific basis for estimating the number of people who might be the source of a particular friction ridge print, we recommend that latent print examiners stop using the terms 'identification' and 'individualization.'"); Organization of Scientific Area Committees for Forensic Science, Standard for Friction Ridge Examination Conclusions (hereinafter "OSAC Report") at 6 ("An examiner shall not assert that a source identification is the conclusion that two impressions were made by the same source or imply an individualization to the

[4] These issues are addressed at length in the defendant's Appellate Division brief. The Innocence Project adopts and incorporates by reference the discussion of these issues contained in Point I of the defendant's brief.

[5] https://nvlpubs.nist.gov/nistpubs/ir/2012/NIST.IR.7842.pdf

[6] This type of testimony gives the jury the false impression that there are no errors associated with latent fingerprint analysis. But that is inconsistent with Olenowski's requirement that scientific techniques that are the subject of expert testimony have valid error rates, even if inconclusive. See State v. Olenowski, 255 N.J. 529, at 595-603 (2023).

exclusion of all other sources.");[7] PCAST Report at 45-46 ("Because the term 'match' is likely to imply an inappropriately high probative value, a more neutral term should be used for an examiner's belief that two samples come from the same sources. We suggest the term '*proposed* identification' to appropriately convey the examiner's conclusion, along with the possibility that it might be wrong."). Likewise, the scientific community, including the latent fingerprint community, has acknowledged that "all laboratory tests and feature-comparison analyses"—including latent print analysis—"have non-zero error rates." PCAST Report at 3; see also AAAS Report at 8, 44-45.

Fingerprint evidence can provide reliable and helpful information if properly presented, but unqualified individualization testimony is always misleading because meaningful error rates exist, despite previous claims by practitioners of "zero error rates." As such, error rates must inform how latent print evidence is presented to a jury, including by preventing experts from testifying that two fingerprints "match."

[7] https://www.nist.gov/system/files/documents/2018/07/17/standard_for_friction_ridge_examination_conclusions.pdf. "OSAC was established in 2014, in collaboration with NIST and the U.S. Department of Justice (DOJ) to help the forensic science community . . . establish standards and best practices within and between disciplines related to terminology, methodologies, and training. . . . OSAC's mission is to strengthen the nation's use of forensic science by facilitating the development of technically sound standards, expanding the OSAC Registry with standards that have completed a technical assessment, and promoting the implementation of those standards by OSAC's stakeholders and the forensic science community." See Nat'l Inst. of Standards & Tech., About Us, https://www.nist.gov/organization-scientific-area-committees-forensic-science/about-us.

Experts "should not report or testify, directly or by implication, to a source attribution to the exclusion of all others in the world." NIST Report at 72, Recommendation 3.7.

It is critical that courts address jurors' preconceived beliefs about the accuracy and reliability of fingerprint evidence. As explained in more detail below, the Innocence Project respectfully requests that this Court (1) hold that it is necessary for trial courts to propound voir dire questions to prospective jurors to ferret out potential bias and preconceived ideas regarding the accuracy of fingerprint examiner testimony; and (2) remand for the appointment of a Special Adjudicator to propose (a) appropriate instructions for trial courts to provide before expert testimony about fingerprint evidence is offered at trial and appropriate guardrails on that testimony and (b) a comprehensive charge on fingerprint evidence to be recommended to the Committee on Model Criminal Jury Charges. These recommendations will ensure that jurors receive accurate information about critical evidence. Moreover, model language will save the courts significant time and resources and prevent the uneven administration of justice through ad hoc determinations regarding complex scientific issues as presented by differently-resourced parties.

II. STATEMENT OF INTEREST

The Innocence Project is a not-for-profit organization that provides pro bono legal services and other resources to indigent prisoners whose innocence may be

established through post-conviction DNA testing. The Innocence Project also researches the causes of wrongful convictions and advocates—both in individual cases and through legislative and administrative initiatives—for changes in the law (and law-enforcement procedures) to reduce the risk of wrongful conviction.

Significantly, our research demonstrates the threats posed by unreliable or exaggerated forensic evidence. More than 50% of the individuals exonerated by post-conviction DNA testing were convicted based at least in part on expert forensic evidence that turned out to be wrong. This research demonstrates the threat that unreliable or exaggerated forensic evidence poses to the truth-seeking function of criminal trials. As a result, the Innocence Project has consistently urged courts to ensure that forensic evidence be admitted only to the extent it has been shown to be scientifically supported. Additionally, to ensure that factfinders have the tools necessary to evaluate potentially unreliable forensic evidence, the Innocence Project has a compelling interest in advocating for the proper introduction of such evidence, beginning with identifying potential jurors' inaccurate beliefs concerning the capabilities of forensic sciences, through accurate presentation at trial and, finally, appropriate jury instructions.

III. COURTS SHOULD CONDUCT VOIR DIRE TO DETERMINE WHETHER JURORS ARE BIASED IN FAVOR OF THE INFALLIBILITY OF FINGERPRINT EXAMINER OPINIONS.

A defendant's ability to conduct effective voir dire is essential to the constitutional right to a fair jury trial guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, paragraph 10 of the New Jersey State Constitution. Meaningful voir dire that probes whether jurors believe forensic science is fallible or infallible helps ensure that right is protected.

As appellant Lee's brief well explains, a "vital aspect" of the constitutional responsibility of courts to ensure the fair and proper administration of criminal trials "is to ensure the impaneling of only impartial jurors by ferreting out potential and latent juror biases." State v. Fortin, 178 N.J. 540, 575 (2004) (citing State v. Williams, 93 N.J. 39, 62-63 (1983)). A key function of voir dire is to root out those potential biases by inquiring "about a juror's ability to follow the trial judge's instructions or to deliberate with an open mind." State v. Little, 246 N.J. 402, 417 (2021) (citing Fortin, 178 N.J. at 577). New Jersey case law consistently endorses voir dire questions that "probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially." State v. Erazo, 126 N.J. 112, 129 (1991).

Despite lay jurors' often unrealistic expectations of conclusive, objective forensic sciences, no forensic technique is infallible. Latent print examination (like

virtually all forensic techniques) is entirely subjective, and subjectivity inevitably introduces the potential for error and bias. See AAAS Report at 96 (noting examiner's judgments and analysis "are made subjectively based on experience rather than by consulting data on the specificity of features").

The need to identify potential juror bias is particularly important in the context of forensic expert testimony like fingerprint examiner opinions. As discussed in the brief of fellow amici, Professor Adele Quigley-McBride, most people have inaccurate pre-existing beliefs about forensic evidence that are difficult to shake. The importance of jurors' ability to properly weigh expert evidence is highlighted by New Jersey's Model Criminal Jury instructions on expert testimony, in which jurors are instructed that "[y]ou are not bound by [the] expert's opinion, but you should consider each opinion and give it the weight to which you deem it is entitled, whether that be great or slight, or you may reject it. In examining each opinion, you may consider the reasons given for it, if any, and you may also consider the qualifications and credibility of the expert." N.J. Model Criminal Jury Charges on Expert Testimony, Non 2C ("Expert Testimony") (Nov. 10, 2003).[8] If a potential juror believes that all fingerprint examiner testimony is infallible, then that juror would be unable to follow both the court's instruction on the consideration of expert evidence and the mandate that "[t]he ultimate determination of whether or not the

[8] https://www.njcourts.gov/sites/default/files/charges/non2c036.pdf?cb=5b9183a5

State has proven defendant's guilt beyond a reasonable doubt is to be made only by the jury" and not an expert's opinion. Id. Potential jurors may also be biased to view defense experts as "hired guns" and to favor prosecution or state crime lab experts. See, e.g., Joel Cooper & Isaac M. Neuhaus, The 'Hired Gun' Effect: Assessing the Effect of Pay, Frequency of Testifying, and Credentials on the Perception of Expert Testimony, Law and Human Behavior, Vol. 24, No. 2 (2000).[9]

New Jersey courts have embraced voir dire precisely along these lines. In State v. Murray, this Court endorsed voir dire on jurors' prior-held beliefs on expert psychiatric testimony, holding that it was appropriate to "probe[] whether the prospective jurors had read or studied about psychology, psychiatry, medicine, or related fields, and inquire[] about the jurors' views on those sciences and whether those views would hinder the ability to follow the law as instructed by the court." 240 N.J. Super. 378, 392 (App. Div. 1990). Similarly, jurors in New Jersey (and nearly every other jurisdiction) can be asked whether they automatically trust police officers or value their testimony above that of other witnesses, allowing the Court to probe potential bias for (or against) police officer testimony. Admin. Off. of the Cts., Jury Selection – Model Voir Dire Questions Promulgated by Directive #21-06 – Revised Procedures & Questions, No. 16 (May 16, 2007) ("As a general

[9] https://web.archive.org/web/20030518010527id_/http://web.jjay.cuny.edu:80/~spenrod/Juries/cooperLHB2000.pdf.

proposition, do you think that a police officer is more likely or less likely to tell the truth than a witness who is not a police officer?")[10]; Id. at No. 17 ("Would any of you give greater or lesser weight to the testimony of a police officer merely because of his or her status as a police officer?").[11]

Indeed, the prosecution has long benefitted from being able to probe juror bias on the subject of forensics. New Jersey courts have consistently allowed them to voir dire on whether jurors would be willing to convict in the *absence* of forensic evidence.[12] Along the same lines, this State's high court has found that voir dire on the absence of key evidence is appropriate. See State v. Little, 246 N.J. 402 (2021)

[10] https://www.njcourts.gov/sites/default/files/administrative-directives/2007/05/dir_04_07.pdf.
[11] Id.
[12] When jurors have been asked questions at voir dire regarding the lack of forensic evidence in a case, courts in New Jersey have reversed convictions when the questions were not appropriately balanced such that jurors knew they could convict based on a lack of forensic evidence and also consider this lack of evidence in acquitting the defendant. In State v. Miranda, the trial court asked all jurors "[d]o you believe that in cases alleging sexual assault the State must produce physical or biological evidence in order to prove its case? Please explain why you believe that?" and asked some jurors, "[d]o you believe that in cases alleging sexual assault the State must produce physical or biological evidence in order to prove its case, or in cases where they don't have physical or biological evidence is it possible that testimony could be enough to convince you beyond a reasonable doubt?" No. A-2243-19, 2023 WL 3991723, at *9 (N.J. Super. Ct. App. Div. June 12, 2023) (unpub. op.; Counsel is unaware of any contrary unpublished opinions. N.J. Ct. R. 1:36-3). In State v. EOFF, the trial court asked jurors, "[s]ometimes prosecutors present cases where there's no forensic evidence such as fingerprints or DNA. Do you believe that the prosecutor, the State of New Jersey can reach its burden of proof beyond a reasonable doubt without any type of scientific proofs?" No. A-0514-18, 2022 WL 628499, at *6 (N.J. Super. Ct. App. Div. Mar. 4, 2022) (unpub. op.; Counsel is unaware of any contrary unpublished opinions. N.J. Ct. R. 1:36-3.), cert. denied, 252 N.J. 121 (2022). In both cases the court reversed the conviction because of these questions, and in EOFF, the court succinctly explained the rationale: "neither the judge nor counsel 'presented the issue to the jurors in [the] balanced manner' required by Little. Jurors were never told they could 'consider the absence of any [forensic] evidence in deciding whether the State has met its burden of proving defendant guilty beyond a reasonable doubt.'" Id. at *7 (alterations in original) (internal citations omitted).

(addressing absence of gun in an unlawful possession of a handgun case). If voir dire on bias against the absence of evidence is appropriate, so must be the inverse: *Would a prospective juror reflexively conclude the State has proven its case beyond a reasonable doubt merely because it proffers purported scientific evidence of guilt? Does scientific evidence trump other forms of evidence in jurors' eyes?* See id. at 419 ("[A] prospective juror unwilling to consider finding a defendant guilty if the State failed to produce the weapon – no matter what other evidence the State presented that the defendant possessed that weapon – may be a biased juror.").

In sum, the State *and the defense* must be able to question a juror's ability – or inability – to consider and appropriately weigh all of the evidence. Failure to do so would constitute a violation of the juror's charge to follow the law as instructed by the court. It is therefore necessary for courts to propound balanced voir dire questions to jurors to ferret out potential bias for or against expert latent fingerprint testimony.

IV. COURTS MUST IMPOSE APPROPRIATE GUARDRAILS ON EXPERT TESTIMONY REGARDING FINGERPRINT ANALYSIS.

A. Expert Witnesses Must Not Exaggerate their Conclusions and Must Phrase their Testimony as Opinions.

As this State's Supreme Court recently confirmed, the harm of exaggerated and misleading expert witness testimony cannot be overstated, and witnesses must not be allowed to provide testimony that goes beyond what the science has

established. See Olenowski, 255 N.J. at 609-10 (holding that drug recognition expert ("DRE") testimony "must not go further than" opining that "the protocol has presented indicia that are 'consistent with' the driver's usage of certain categories of drugs," because permitting otherwise would allow a DRE's testimony "to prove too much"). Where, as here, the scientific community has established that a technique is subjective, that unqualified individualization opinions are scientifically indefensible, and that there is an error rate, jurors must be provided with that information to properly weigh the value of the testimony. Cf. Abruquah v. State, 296 A.3d 961, 997-98 & n.32 (Md. 2023) (reversing criminal conviction where expert testified that bullets were fired from defendant's gun but identification method "did not provide a reliable basis for [expert's] unqualified opinion" even though technique was "until relatively recently, accepted almost entirely without critical analysis"). An expert's testimony is helpful only when juries are given full, honest, and accurate information. Because the public vastly underestimates potential error rates associated with fingerprint evidence, experts must not over-state their conclusions or the inferences that can be drawn from their analyses.

To address these concerns, OSAC has promulgated model standards "for the range of conclusions that may be reached following friction ridge comparisons." See OSAC Report at 4. The foundational premise of those standards is that an expert's "conclusion shall not be communicated as a fact. It is an interpretation of

observations made by the examiner and shall be expressed as an expert opinion." Id. at 5. The Third Circuit's Model Jury Instructions similarly assume that an expert's testimony is in fact offered as an opinion: "The witness was allowed to express *an opinion* in order to help you decide whether the disputed [fingerprint] connected to the crime in question is the [defendant's fingerprint]. You may therefore consider the witness's *opinion* in reaching your independent decision on this issue." Third Cir. Model Jury Instructions 4.13, "Fingerprints, Handwriting, and DNA Evidence" (April 2024) (emphasis added);[13] see also Commonwealth v. Robertson, 489 Mass. 226, 238 (2022) ("If an expert witness does not clarify that his or her fingerprint testimony is an opinion, then the prosecutor must elicit this clarification even if the defendant does not object.").

Requiring testimony in the form of an opinion, however, is insufficient on its own to prevent jurors from attributing disproportionate weight to expert testimony. OSAC therefore also advises experts not to phrase their testimony as "an expression of absolute certainty" or "assert or imply that latent print examination is infallible or has a zero error rate." OSAC Report at 6. The PCAST Report similarly suggests experts should not "state or imply in court that they can draw conclusions with certainty or near-certainty." PCAST Report at 54. Nor should an expert testify "to

[13] https://www.ca3.uscourts.gov/sites/ca3/files/2023%20Chapter%204%20revisions%20final.pdf

a source attribution to the exclusion of all others in the world." NIST Report at 72, Recommendation 3.7.

Accordingly, OSAC recommends experts express their opinions in any of the following ways:

- *Source Exclusion*: "the conclusion that two friction ridge impressions did not originate from the same source."
- *Support for Different Source*: "the conclusion that the observations provide more support for the proposition that the impressions originated from different sources rather than the same source."
- *Inconclusive/Lacking Support*: "the conclusion that the observations do not provide a sufficient degree of support for one proposition over the other."
- *Support for Same Source*: "the conclusion that the observations provide more support for the proposition that the impressions originated from the same source rather than different sources."
- *Source Identification*: "the conclusion that the observations provide extremely strong support for the proposition that the impressions originated from the same source and extremely weak support for the proposition that the impressions originated from different sources."

OSAC Report at 5-6.

As noted above, the New Jersey Supreme Court recently issued similar guidelines on testimony by drug recognition experts to ensure their testimony does not "prove too much." See Olenowski, 255 N.J. at 609-10. The same considerations apply with respect to testimony by latent print examiners.

B. A Special Adjudicator Would Be Well-Positioned to Develop a Standardized Approach Governing the Admissibility of Fingerprint Analysis Expert Testimony.

Since publication of the 2009 NAS Report, significant research has established the limitations of fingerprint evidence, the potential for bias to influence decision-making, and the need for valid error rates.[14] Despite these advancements, the expert in this case gave testimony that has been unanimously rejected by the scientific community. Standardized rules governing testimony about fingerprint evidence would ensure jurors assign appropriate weight to experts' opinions. This Court should remand to the trial court to appoint a Special Adjudicator to conduct hearings centered on this research and develop a standardized approach regarding the admission of latent fingerprint testimony. The Supreme Court has previously requested that the Criminal Practice Committee and the Committee on Model Criminal Jury Charges perform a similar exercise with respect to eyewitness identification based on scientific developments and studies regarding the reliability of eyewitness identification testimony. See State v. Henderson, 208 N.J. 208, 298 (2011). Similar and equally compelling considerations and advancements apply with respect to fingerprint analysis and likewise justify appointing a Special Adjudicator here. Further, a Special Adjudicator would have the opportunity to

[14] See Olenowski, 255 N.J. at 595-603 (noting scientific techniques that are subject of expert testimony must have valid error rates).

assess latent fingerprint analysis in light of the Supreme Court's recent guidance in Olenowski, which laid out a new standard for assessing the reliability and admissibility of expert testimony.

V. BECAUSE JUROR PERCEPTION OF THE ACCURACY OF FINGERPRINT EVIDENCE DOES NOT COMPORT WITH ESTABLISHED ERROR RATES IN THE FIELD, COURTS NEED A COMPREHENSIVE MODEL CRIMINAL JURY CHARGE CONCERNING FINGERPRINT COMPARISON EVIDENCE.

An appropriate model jury charge would allow New Jersey courts to fulfill their duty to instruct jurors about the value of fingerprint comparison evidence, enabling juries to evaluate the evidence critically and objectively. To do otherwise requires ad hoc determinations by individual courts based on uneven representations of differently-resourced counsel and, critically, risks juror misunderstanding and wrongful conviction. As explained above, fingerprint comparison evidence has inherent limitations similar to limitations affecting other types of identification evidence and expert opinion testimony recognized by the courts. Although New Jersey courts have model criminal jury charges for some types of identification and scientific expert opinion testimony, they lack an appropriate model charge for fingerprint comparison evidence. In 2023, the New Jersey Supreme Court in Olenowski held that a Daubert-like standard should be used to determine the reliability of expert testimony proffered in criminal cases. But the courts' role as "gatekeeper" for such evidence requires more than simply accepting or rejecting

proffered testimony. A Special Adjudicator should be appointed to consider deliberation among interested parties and develop a proposed model charge that provides juries the guidance and context they need to evaluate fingerprint comparison evidence appropriately.

A. Model Jury Charges Ensure that Jurors Receive Accurate Instructions, Particularly With Respect to Evidence Like Fingerprint Comparison Testimony that Presents Complex Scientific Issues.

"Accurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial." State v. Concepcion, 111 N.J. 373, 379 (1988). "The charge must provide a 'comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find.'" Id. (citation omitted). "It is the independent duty of the court to ensure that the jurors receive accurate instructions . . . ." State v. Reddish, 181 N.J. 553, 613 (2004). The court must "not rely on jurors to divine rules themselves or glean them from cross-examination or summation." Henderson, 208 N.J. at 296. Rather, "[e]ven with matters that may be considered intuitive," the court must "provide focused jury instructions" in order to "help jurors evaluate evidence critically and objectively to ensure a fair trial." Id. at 296-97.

Model jury charges are "helpful to trial courts performing this important function." Concepcion, 111 N.J. at 379. "[E]rroneous instructions on material issues are presumed to be reversible error." Reddish, 181 N.J. at 613 (quoting State

v. Marshall, 173 N.J. 343, 359 (2002)). "[W]hen a jury instruction follows the model charge, although 'not determinative, it is a persuasive argument in favor of the charge as delivered.'" State v. Watson, 472 N.J. Super. 381, 488 n.45 (App. Div. 2022) (quoting State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000)), rev'd on other grounds, 254 N.J. 558 (2023).

Where, as here, certain types of evidence present "complicated issues," the New Jersey courts have developed model jury charges that are "consistent with accepted scientific findings." Henderson, 208 N.J. at 297. Enhanced model charges have "a number of advantages: they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on [the forensic issue]." Id. at 298. In the absence of a model charge, each court is left to sort through the scientific debate anew and based on the relative resources of the particular parties before it, opening the door to error and the risk of misleading the jury. Thus, appropriate and comprehensive model jury charges promote consistent administration of fair trials as well as efficient use of judicial resources.

B. Given the Complexities of the Field, New Jersey Courts Should Develop Model Criminal Jury Charges Concerning Fingerprint Comparison Opinion Testimony.

As discussed above, jurors tend to overvalue forensic testimony in general, and fingerprint comparison testimony, in particular. However, there is currently no model jury charge in New Jersey that instructs jurors about evaluating fingerprint comparison evidence. The only instruction in the New Jersey Model Criminal Jury Charges that directly addresses fingerprint evidence at all is an instruction that a law enforcement agency's possession of a person's fingerprints does not mean that person has a criminal record. See N.J. Model Jury Charges (Criminal), Non 2C, "Fingerprints" (rev. Jan. 6, 1992).[15]

The New Jersey Supreme Court and Appellate Division have called for the development of model charges that instruct juries about evaluating other types of identification and expert opinion testimony, to address concerns much like those that exist for fingerprint evidence. In Henderson, the New Jersey Supreme Court directed the preparation of model jury charges for eyewitness identification, taking into account scientific evidence about how a witness's memory works. 208 N.J. at 283, 298. Now, New Jersey courts have model charges that explain factors that are relevant to the reliability of eyewitness identifications and inform jurors that

[15] https://www.njcourts.gov/sites/default/files/charges/non2c009.pdf?cb=5b9183a5.

"research has shown that there are risks of making mistaken identifications." Model Jury Charges (Criminal), "Out-of-Court Identification Only" at 2 (rev. May 18, 2020).[16]

New Jersey appellate courts have similarly directed the development of jury charges that instruct juries about how to evaluate drug recognition expert testimony, Olenowski, 255 N.J. at 614, and testimony that narrates or comments on video recordings, Watson, 472 N.J. Super. at 405-06, 474-75, 506. Other courts have also required jury instructions about similar types of comparative identification evidence that explain limitations of that evidence analogous to the limitations of fingerprint comparisons. See, e.g., United States v. Starzecpyzel, 880 F. Supp. 1027, 1049-51 (S.D.N.Y. 1995) (requiring jury instructions that explain limitations of handwriting comparison expert testimony).

The rationale underlying these decisions applies with equal force to fingerprint identification. Much like eyewitness testimony and handwriting comparison, fingerprint analysis is identification evidence that can be unjustifiably persuasive to jurors who believe such evidence to be more reliable than scientific studies prove it actually is. See supra Section I. Given jurors' pre-conceived misconceptions regarding fingerprint evidence and the well-demonstrated power

[16] https://www.njcourts.gov/sites/default/files/charges/idinout.pdf.

and potential prejudicial effect of forensic testimony, a comprehensive model jury charge about evaluating fingerprint comparison evidence is needed.

At least one state has published a model jury charge that, although incomplete, directly addresses the reliability and evaluation of fingerprint evidence. See Council of Super. Ct. Judges of Ga., Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, 4th ed. (2021), 1.35.20 Fingerprints (hereinafter "Georgia Fingerprint Instruction").[17] Other jurisdictions have published model jury charges that, while failing to directly address how fingerprint evidence should be evaluated, at least implicitly acknowledge that fingerprint identification is fallible opinion testimony. See, e.g., Third Cir. Model Jury Instructions 4.13, "Fingerprints, Handwriting, and DNA Evidence" (April 2024).

In order to address the inherent limitations of fingerprint evidence, jurors should be instructed, at a minimum, that:

- Fingerprint examiners offer an opinion about whether two fingerprints (or palm prints) "could have originated from the same source." AAAS Report at 71; see also PCAST Report at 88.
- Fingerprint comparison is a subjective discipline. Regardless of what preconceptions a juror may have about fingerprinting, fingerprint comparison is not infallible, and there is a risk of error in the examiner's conclusion. See NAS Report at 87, 143.
- An examiner cannot determine that two fingerprints "originated from the same source to the absolute exclusion of all other sources." AAAS

[17] https://georgiasuperiorcourts.org/wp-content/uploads/2021/08/criminal_pattern_jury_instructions_July_2021.pdf.

Report at 71. Even if an examiner can exclude a significant number of individuals as potential sources of a latent fingerprint, "it is not possible to determine how many people would not be excluded, nor is it possible to determine when the pool of possible sources is limited to a single person." Id.

- Although there is some scientific evidence that human fingerprint patterns are unique, the assertion remains unproven. See NAS Report at 143-44. Moreover, "[u]niqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source." Id. at 144. "[L]atent prints in criminal cases are often incomplete and of variable quality (smudged or otherwise distorted), with quality and clarity depending on such factors as the surface touched and the mechanics of touch." PCAST Report at 88.

- The Analysis, Comparison, Evaluation and Verification or ACE-V method "provides a broadly stated framework for conducting friction ridge analysis. However, this framework is not specific enough to qualify as a validated method for this type of analysis." NAS Report at 142. Only limited information exists as to the accuracy of latent print analysis. Id.

- Identification by fingerprint comparison is opinion evidence and is dependent upon: (1) the credibility (or believability) and accuracy of the expert witness(es) called for that purpose; (2) the validity of the theory of identification by fingerprint comparison; (3) the credibility of any other witnesses who perform necessary functions in making the comparison (such as inked finger impressions and latent lifts); and (4) the accuracy of procedures in identifying, preserving, recording, and maintaining integrity of the physical evidence. See Georgia Fingerprint Instruction.

- "The fact that the (law enforcement agency) is in possession of a person's [known] fingerprints does not mean that the person has a criminal record. [Known] [f]ingerprints come into the hands of law enforcement agencies from many legitimate sources. These include, but are not limited to: birth certificates, grade school child identification programs, military service, many forms of employment, including municipal, county, state and federal jobs, casino license applications,

private security guard applications, firearms and liquor license applications, passport applications, as well as other sources totally unconnected with criminal activity." N.J. Model Jury Charges (Criminal), Non 2C, "Fingerprints" (rev. Jan. 6, 1992).

- Fingerprint evidence is also governed by the rules on circumstantial evidence. If a juror believes that fingerprints corresponding to those of the accused were found and identified, their evidentiary value, if any, would be diminished to the extent that they could reasonably have been left (at the scene or on the article(s) alleged) at a time or under circumstances that would be consistent with innocence. See Georgia Fingerprint Instruction.

- A verdict of guilty may not rest upon fingerprint identification alone, unless the jury is satisfied beyond a reasonable doubt that fingerprints left by the accused were in fact found and that they could only have been impressed by the accused (at the scene of the crime or on the article(s) alleged) at the time of the commission of the crime and that such identification under all of the facts and circumstances of the case is sufficient to satisfy the jurors' minds of the guilt of the accused to the exclusion of any other reasonable theory and beyond a reasonable doubt. See id.

A Special Adjudicator is best situated to consider deliberation among interested parties and develop a comprehensive jury charge about evaluating fingerprint comparison evidence. See, e.g., In re Proportionality Rev. Project, 161 N.J. 71, 81-82, 95-96 (1999) (approving model jury instructions recommended by a special master and ordering trial courts to give an instruction generally in that form while formal model charges were formulated). This Court should remand to the trial court to appoint a Special Adjudicator to conduct hearings and develop a jury charge on fingerprint evidence to be recommended to the Committee on Model Criminal Jury Charges. A model criminal jury charge about evaluating fingerprint

comparison evidence will promote consistent and proper jury instruction in New Jersey cases where fingerprint evidence is at issue and reduce the burden on the trial and appellate courts.

VI. CONCLUSION

New Jersey courts have an obligation to adequately address the indisputable power of forensic evidence and an opportunity to better fulfill that obligation by developing processes and rules regarding latent fingerprint evidence and testimony. This Court should (1) hold that trial courts must screen jurors for potential bias through targeted voir dire questions and (2) remand for the appointment of a Special Adjudicator (a) to propose appropriate instructions and guardrails governing expert testimony and (b) to draft a comprehensive jury charge regarding fingerprint evidence to be recommended to the Committee on Model Criminal Jury Charges. Upon remand, *amicus* The Innocence Project will participate in developing the record for the Special Adjudicator to accomplish this mandate. These reforms will help to safeguard a defendant's constitutional right to a fair trial and ensure that New Jersey courts administer fair and impartial justice to all individual defendants.

Dated: August 12, 2024

Respectfully submitted,

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Re: *State v. French G. Lee*
Docket No.: A-3125-22T2

Honorable Judges of the Appellate Division:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *amicus curiae* Adele Quigley-McBride in the above-captioned matter.

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PRELIMINARY STATEMENT

Dr. Adele Quigley-McBride, an expert in decision making and judgment in legal contexts, seeks to participate as *amicus curiae* in this case to explain how ordinary people learn about forensic evidence and to identify common misconceptions about forensic evidence that ordinary people hold, including jurors. Dr. Quigley McBride explains that jurors have significant exposure to information about forensic evidence (from the news, media, and social media posts), and the opinions they form as a result, will frame with perception, interpretation, and evaluation of evidence they are asked to consider during a trial. (Point I). Because jurors' misconceptions about forensic evidence will affect their understanding of new information about or associated with forensic science, courts should consider strategies to screen for those misconceptions or mitigate those preexisting beliefs in other ways. This brief discusses five incorrect preexisting beliefs about forensic evidence common in the general population. (Point II). The research-based strategies developed to counteract these misconceptions are beyond the scope of this brief but are addressed in the relevant academic literature and by parties and other *amici*. This brief explains how misconceptions are formed, which misconceptions about forensic evidence are most prevalent, and the impact these misconceptions can have on jurors' understanding of forensic evidence in cases.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus Dr. Adele Quigley-McBride adopts the statement of facts and procedural history contained in French's brief.

ARGUMENT

I. Ordinary people form misconceptions about forensic science through learning that occurs outside their awareness.

When people think about "learning," they often think about purposeful, effortful learning that might happen by taking a class, reading a book, or otherwise seeking out information. But often learning will occur outside of our awareness. Learning can also be accomplished through exposure to various information that people encounter in their everyday lives or information that is readily available. Information about forensic science is available to ordinary people though news media, entertainment media (television shows and movies), and social media posts. Frequent exposure to this sort of information results in the formation of knowledge structures and beliefs about forensic science without any effort or intention on the part of the person receiving the information. Simon A. Cole, *A surfeit of science: The "CSI effect" and the media appropriation of the public understanding of science*, 24 Pub. Understanding of Sci. 130 (2015).

Of course, the value of the knowledge gained from this type of incidental learning turns on the validity and accuracy of the information: if the information people encounter is not accurate or balanced, any resulting knowledge or beliefs will also be inaccurate or skewed. News and entertainment media provide a mixed bag with some accurate information about forensic evidence and methods mixed in with misleading information or misinformation. *Id.* Because these mediums aim for entertainment value, newsworthiness, or attention, they cannot be relied upon to help people form accurate knowledge and beliefs. Disseminating the truth about forensic evidence does not always make for an exciting narrative—in reality, forensic science can be complicated and time consuming, with elements of science and significant limitations. Ordinary people are not well equipped to critique such information, so they are more likely to accept incorrect information about those topics and form misconceptions. Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 Psych. Rev. 674 (1989).

Psychologists accept that people's preexisting beliefs, knowledge, and expectations will bias any subsequent judgments or decisions about relevant information. This effect takes many names, including "confirmation bias" (Raymond S. Nickerson, *Confirmation bias: A ubiquitous phenomenon in many guises*, 2 Rev. Gen. Psych. 175 (1998)), "top-down processing" (Shelly

Chaiken & Durairaj Maheswaran, *Heuristic Processing Can Bias Systematic Processing: Effects of Source Credibility, Argument Ambiguity, and Task Importance on Attitude Judgment*, 66 J. Personality & Soc. Psych. 460 (1994)), "heuristics", and "System 2 processing." Daniel Kahneman, *Thinking, Fast and Slow* (2011). In the context of forensic science, these effects are ubiquitous. Saul M. Kassin, Itiel E. Dror, & Jeff Kukucka, *The forensic confirmation bias: Problems, perspectives, and proposed solutions*, 2 J. Applied Rsch. in Memory & Cognition 42 (2013). So, what an investigator, legal professional, or fact finder already believes they know about forensic evidence will frame their interpretation and evaluation of any new forensic information encountered.

An example can be used to illustrate here. Imagine, for example, a juror believes that fingerprint evidence is infallible. If prosecutors later present that juror with incriminating fingerprint evidence, even very explicit statements about the limitations of that evidence or clear evidence that the expert in the case was unreliable might not be enough to sway that juror's judgment about that evidence. Because the juror believes fingerprint results cannot be inaccurate, they find ways to discount or disregard evidence that does not correspond with that view. Any subsequent decisions made about the relevant evidence are more likely to align with their preexisting beliefs about

fingerprint evidence. Lauren Hudachek & Adele Quigley-McBride, *Juror Perceptions of Opposing Expert Forensic Psychologists: Preexisting Attitudes, Confirmation Bias, and Belief Perseverance*, 28 Psych., Pub. Pol'y, & L. 213 (2022). Given the important role that preexisting knowledge plays in juror decision making, the Court should understand what misconceptions about forensic evidence jurors are likely to bring with them into a trial.

II. Common misconceptions plague ordinary people's view of forensic evidence.

The following five misconceptions represent the knowledge and understanding that most jurors and other lay individuals without a scientific background start with—the "preexisting beliefs" people have about forensic science. So, whenever forensic results and expert opinions are admitted in a trial, courts should be aware that these misconceptions are going to impact how that forensic evidence is interpreted and evaluated.

A. People believe that forensic analysis is objective and was created by scientists.

People who do not have a scientific background tend to be impressed by science and advanced technology. Cary Funk, Meg Hefferon, Brian Kennedy, & Courtney Johnson, *Trust and Mistrust in Americans' Views of Scientific Experts*, Pew Research Center (2019). Most ordinary people lack the knowledge and skills needed to evaluate the quality of forensic methods and

results. Scientific information and information from someone labelled as a "forensic expert" appears very compelling to lay individuals (i.e., knowing this person was deemed an "expert" by the court or has an advanced degree leads to a presumption that they are accurate), and most people will rely on their assessment of these superficial elements rather than a careful evaluation of the content of the forensic analyst's testimony to judge the quality of the information provided. Barbara A. Spellman & Adele Quigley-McBride, *Reasoning about Forensic Science Evidence*, *in* LEGAL REASONING AND COGNITIVE SCIENCE: TOPICS AND PERSPECTIVES 439 (Marco Brigaglia & Corrado Roversi eds., 2023) . However, just because something is labeled as a "science" and is presented by an "expert" does not mean it is objective, reliable, or accurate—that type of evaluation requires a more rigorous look at the examiner's proficiency, the information that was made available to the forensic scientist, and the methods and tools used in that particular case.

Indeed, one of the main reasons that many forensic disciplines are not "scientific" is the lack of sufficient safeguards and standardized, detailed, validated protocols typically used by scientists, which reduce the number of subjective judgments that the decisionmaker is responsible for and improve the consistency of judgments between decisionmakers. With the exception of DNA, though, most forensic techniques were not developed by scientists.

Forensic "sciences" were usually developed in the context of law enforcement out of a need to provide incriminating evidence against someone charged with crimes, rather than because the evidence was independently theoretically interesting to scientists. Brandon L. Garrett, *Autopsy of a Crime Lab: Exposing the Flaws in Forensics* (2022) [hereinafter "Garrett, *Autopsy of a Crime Lab*"]; *see also* National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) [hereinafter "National Research Council"]. Most forensic disciplines lack sufficient scientific safeguards and do not use objective criteria, and instead rely on the forensic examiner's subjective judgment and experience.[1]

Latent print examination, in particular, has long been portrayed as scientific and objective. News and entertainment media have fostered this belief, but so too have individuals working in law enforcement and the latent fingerprint community, often unwittingly. In fact, there are very few objective criteria used in latent print examination, and there are no standardized training programs or protocols that are consistently used among practicing latent fingerprint examiners across the United States. Even those working in the

[1] Note that forensic examiners are not typically at fault—they are using the methods and skills they were trained to use, but the United States lacks widespread development of objective and standardized criteria in many forensic science disciplines.

same laboratory might approach the task of analyzing the same latent and suspect fingerprint pairing in different ways due to ambiguous or vague laboratory procedures or subjective aspects of fingerprint examination that are inherent to the task. For instance, one study showed that latent print examiners varied considerably in terms of the number of corresponding features they thought were sufficient before forming an opinion that two fingerprints originated from the same person. Bradford T. Ulery, R. Austin Hicklin, Maria Antonia Roberts & JoAnn Buscaglia, *Measuring What Latent Fingerprint Examiners Consider Sufficient Information for Individualization Determinations*, 9 PLOS ONE 1 (2014). Even when given a standard to work with (a minimum of 12 points), the number of points examiners identified and reported still varied. *Id.*

The impression of forensic disciplines as scientific can be exacerbated by algorithmic and technological tools that forensic analysts use to speed up processing or perform tasks that a person cannot reasonably do (*e.g.*, use of algorithms to search large databases for similar looking candidates). Sophisticated technology has a similar effect on lay individuals as do complicated sciences beyond the average person's understanding—it is very persuasive. People tend to believe that the use of algorithms, databases, and technology could only increase the accuracy and probative value of forensic

evidence. Again, though, just because an analysis was supported or facilitated by sophisticated technology does not make it correct or reliable.

In fact, the use of these technologies can increase some kinds of error. For example, database searches make latent print examiners' tasks much more difficult by providing them with a list of very similar looking prints, all of which could be from a suspect. Itiel E. Dror & Jennifer L. Mnookin, *The use of technology in human expert domains: challenges and risks arising from the use of automated fingerprint identification systems in forensic science*, 9 L., Probability & Risk 47 (2010); *see also* Itiel E. Dror, Kasey Wertheim, Peter Fraser-Mackenzie & Jeff Walajtys, *The Impact of Human-Technology Cooperation and Distributed Cognition in Forensic Science: Biasing Effects of AFIS Contextual Information on Human Experts*, 57 J. Forensic Scis. 343 (2012). Jonathan J. Koehler & Shiquan Liu, *Fingerprint error rate on close non-matches*, 66 J. Forensic Scis. 129 (2021).

Thus, most people—including forensic examiners themselves—may harbor their own, problematic misconceptions about foundational validity and objectivity associated with many forensic disciplines, including latent fingerprint examination which was used as an example here. This lack of objectivity can mean that examiners are vulnerable to inconsistencies or mistakes during the examination process, but those tasked with judging

fingerprint evidence are likely to harbor beliefs that fingerprint evidence, especially fingerprint evidence amplified by algorithmic or technological tools, has a strong scientific basis and objective means of comparing fingerprints.

B. People believe that forensic results are very rarely inaccurate.

Most people believe that the error rate associated with forensic disciplines is negligible or very, very low. Some may even believe some well-known disciplines, such as DNA and fingerprint evidence, are infallible. This is due to the questionable information sources ordinary people draw on for information about forensic techniques (*see supra*, Point I and Point II, A) as well as the fact that forensic analysts used to claim that mistakes were extremely rare or impossible without evidence to support those claims. In fact, most forensic disciplines do not have the foundational science necessary to establish an error rate at all. Garrett, *Autopsy of a Crime Lab*; *see also* National Research Council.

In scientific disciplines, error rates are established by accruing a large body of literature that can demonstrate "repeatability" (the same examiner makes similar decisions across time and cases) and "reproducibility" (different examiners make similar decisions with the same data). In the context of

forensic science, this could include "black box" studies,[2] blind proficiency tests,[3] or other controlled, empirical approaches to estimating the rate of incorrect identifications and exclusions in forensic examinations.

There are now several disciplines that have one or two black box studies or blind proficiency tests (*e.g.*, fingerprints and firearms analysis), but this is not a "body of literature" that can be used to opine about error rates in real casework. Furthermore, the rate of error in most of these studies is likely to be lower than would be seen in real cases because the samples used in the studies are better quality than the evidence typically obtained from crime scenes. Sharon Kelley, Brett O. Gardner, Daniel C. Murrie, Karen D. Pan & Karen Kafadar, *How do latent print examiners perceive proficiency testing? An analysis of examiner perceptions, performance, and print quality*, 60 Sci. & Just. 120 (2020); *see also* Anthony J. Koertner & Henry J. Swofford, *Comparison of Latent Print Proficiency Tests with Latent Prints Obtained in Routine Casework Using Automated and Objective Quality Metrics*, 68 J. Forensic Identification 379 (2018). Moreover, study participants know they are taking part in an experiment which is likely to change their decision strategy or

[2] Black box studies look at the outcomes of analyses conducted by expert forensic examiners from the relevant filed, but not the process through which they came to those decision outcomes.

[3] Blind proficiency tests are fake, realistic-looking cases for which ground truth is known, which are embedded in a laboratory's workflow.

criteria. Christina Steindl, Eva Jonas, Sandra Sittenthaler, Eva Traut-Mattausch & Jeff Greenberg, *Understanding Psychological Reactance: New Developments and Findings*, 223 Zeitschrift fur Psychologie 205 (2015). Thus, the existing error rate studies are merely the beginning of a field of science that has been needed for some time.

Again, forensic fingerprint evidence is an excellent example of a discipline that is less accurate and reliable than it is perceived to be. As discussed above (*supra*, Point II, A), most people are familiar with fingerprint examination and believe that it is accurate and reliable, including investigators, judges, and latent fingerprint examiners themselves. Brandon L. Garrett, *The Reliable Application of Fingerprint Evidence*, 66 UCLA L. Rev. Discourse 64 (2018). In a relative sense, this is correct—fingerprint evidence has more underlying evidence than most forensic disciplines, including black box studies (*see, e.g.*, Koehler & Liu, *supra*, at 129-134) and blind proficiency tests. *See, e.g.*, Kelley, Gardner, Murrie, Pan, & Kafadar, *supra*, at 121. That said, there are only a small number of existing studies and no standardization in methodology across the discipline, so there is no assurance that the error rates in these studies reflect the accuracy and reliability of a fingerprint examination performed for any particular case. This is compounded by the varied use of black box algorithms that are not well understood but can

increase inaccurate examination outcomes. *See supra*, Point II, A; Dror & Mnookin, *supra*, at 63.

C. People believe that forensic science reliability does not vary much across types of evidence.

Forensic disciplines lie on a continuum from least to most reliable. For example, single-source DNA profile comparisons tend to be very accurate and have a body of literature that has established an error rate. Fingerprint comparisons are comparatively reliable, but tend not to be as reliable as single-source DNA profile comparison. Other disciplines such as bitemarks, voice analysis, or even other types of DNA analysis (such as mitochondrial DNA comparisons or DNA mixture analyses) are far less reliable because they are more difficult and require more subjective decisions on the part of the analyst. Garrett, *Autopsy of a Crime Lab*; National Research Council.

Each discipline also includes a potentially dizzying array of limitations, unstandardized procedures, training, and discretion that needs to be considered when judging reliability. So, the reliability of an analysis in any particular case will depend on the discipline, the particular jurisdiction or laboratory and what procedures are used there, and whether the analyst followed those procedures when performing this examination. Ordinary people can often tell when evidence is very reliable, but they struggle to sufficiently adjust when faced with evidence that is less reliable, such as bitemarks or hair analysis. Spellman

& Quigley-McBride, *supra*, at 449. Most people tend to think forensic disciplines have similar levels of repeatability and reproducibility and, even when they realize a discipline is less reliable, they think the difference is substantially smaller than it truly is. Jason M. Chin & Carlos M. Ibaviosa, *Beyond CSI: Calibrating public beliefs about the reliability of forensic science through openness and transparency*, 62 Sci. & Just. 272 (2022); *see also* Garrett, *Autopsy of a Crime Lab*.

Even within evidence types there can be substantial variation in error and reliability. As discussed above, (*supra*, Point II, B) fingerprint evidence has a stronger scientific basis than most other forensic techniques, and studies that suggest very low error rates. However, when the nature of the fingerprint task changes, so does the error rate. For example, when examining close non-matches (fingerprints that share many similar features but are not from the same source), error rates are substantially higher. *Compare* Koehler & Liu, *supra*, at 131 (error rates between 15.9% and 18.1% in close non-match cases) *with* Bradford T. Ulery, R. Austin Hicklin, JoAnn Buscaglia & Maria Antonia Roberts, *Accuracy and reliability of forensic latent fingerprint decisions*, 108 Proceedings Nat'l Acad. of Scis., 7733 (2011) (error rate of less than 1% in other fingerprint cases). Moreover, the increased use of algorithms to search large fingerprint databases for potential suspects increases the chance that

latent print examiners will face close non-matches in casework. Thomas Busey, Arch Silapiruti & John Vanderkolk, *The relation between sensitivity, similar non-matches and database size in fingerprint database searches*, 13 L., Probability & Risk 151 (2014); *see also* Kang Li, Diling Wu, Le Ai & Yaping Luo, *The influence of Close Non-Match fingerprints similar in delta regions of whorls on fingerprint identification*, 66 J. Forensic Scis. 1482 (2021).

These concerns are compounded by other information available when conducting database searches that can bias examiners towards an identification decision such as rankings from the algorithm or the candidate's demographic information and criminal history. Dror, Wertheim, Fraser-Mackenzie, & Walajtys, J., *supra*, at 350.

D. People believe that forensic evidence is commonly available in criminal cases.

Forensic evidence is certainly more commonplace now than it was in the past, particularly given that there is now a much wider range of different forensic methods that can be called upon by investigators and legal professionals. Forensic evidence and results also appear more often in entertainment and news media than they did before the 2009 National Research Council report. As a result, ordinary people tend to think that the availability of forensic evidence in the information sources they learn from are reflective of real cases—a phenomenon known as the availability heuristic. Amos

Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases: Biases in judgments reveal some heuristics of thinking under uncertainty*, 185 Sci. 1124 (1974).

In fact, uncontaminated trace evidence that is high enough quality to submit for analysis is not often obtained from crime scenes and, when it is, is not always useful or admissible. Forensic testing also takes time (weeks or months, not an hour-long episode as seen on television) and is expensive, so usually only the most serious cases make use of it. Spellman & Quigley-McBride, *supra*, at 449-50.

Because the true availability of forensic evidence does not mirror people's expectations, prosecutors worry that jurors would expect forensic evidence in every case before they would render a guilty verdict. Chin & Ibaviosa, *supra*, at 273. Defense attorneys also worry they will be unable to succeed in cases where incriminating forensic evidence was available. *Id.* These views are two sides of the same coin—concern about the effect that preexisting beliefs will have, something that lawyers intuitively seem to understand in this context.

E. People believe that forensic evidence can tell you whether a specific person committed a crime.

In addition to assumptions about the accuracy and reliability of forensic methods and results, people also struggle to understand what can be inferred

from forensic results. What can be "proven" by a piece of evidence and any associated analyses will vary depending on the type of evidence, where it was found, and the alleged crime. Ultimately, though, all physical evidence is circumstantial. Traces indicating that someone was, at some time, physically present in a location where a crime occurred is not, in itself, direct evidence that the contributor of that evidence committed a crime.

Several factors, including the quality of the evidence, layers of traces, and the location where the evidence was found can result in some inferences about *when* that evidence was left at a scene. Severely degraded evidence or other trace evidence found on top of a sample might suggest the passage of time, and DNA found under a deceased individual's fingernails might provide additional, circumstantial information. Recovering traces of a particular person at a crime scene can also indicate that they were physically present in that location, though that is not definitive. Though it is more likely that someone who was present at the crime scene at some time is guilty than someone who was never present at the crime scene, that is merely inferred from the evidence, not proved by it. Spellman & Quigley-McBride, *supra*, at 450.

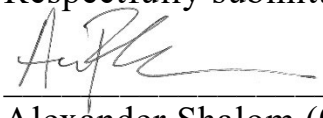
A piece of trace evidence, like a fingerprint, is only a small piece of the puzzle. There would need to be other reasons to believe that the person who left the fingerprint was also the cause of a crime. Most forensic evidence, on

its own, is fairly weak evidence that someone is guilty.

CONCLUSION

Dr. Quigley-McBride seeks to participate as *amicus curiae* because most people have misconceptions about forensic science. Courts cannot ignore the existence of inaccurate preexisting beliefs held by jurors, nor their impact on fair trials. There exists no "quick cure" for these preexisting beliefs once they are formed, but their effect on trials can be mitigated with research-based approaches to voir dire, cautionary and limiting instructions, and imposing limits on how forensic results are communicated.

Respectfully submitted,



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Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3125-22T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division,
v.	:	Burlington County.
FRENCH G. LEE,	:	Sat Below: Hon. Richard J. Nocella, J.S.C., and a
Defendant-Appellant.	:	jury

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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July 30, 2024

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2T – February 28, 2023 jury-selection transcript
3T – March 1, 2023 trial transcript
4T – March 7, 2023 trial transcript
5T – March 8, 2023 trial transcript
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PRELIMINARY STATEMENT

Defendant burglarized a restaurant in Moorestown in 2018, entering through an open window and stealing money from an unsecured change bag on top of the safe. He returned two nights later with the same intent but left empty-handed after failing to open the cash register. After a fair trial, a jury convicted defendant of two counts of third-degree burglary. His effort to overturn his convictions and sentence should be rejected.

First, the trial judge properly handled the admissibility of fingerprint-analysis evidence at each stage of trial. Defendant attempts to introduce a host of scientific studies not in evidence in support of his point that fingerprint-analysis evidence is unreliable and the testimony from the State's expert should have been excluded. None of these studies should be considered by this Court. Regardless, defendant's argument lacks any support in the relevant case law and should be denied. Further, the judge properly rejected defendant's requests: (1) for a question during jury selection regarding prospective jurors' opinions on the reliability of fingerprint-analysis evidence; (2) to limit expert testimony on fingerprint evidence to a reasonable degree of probability; and (3) for an alternative jury charge (crafted by defense counsel relying on a scientific report not in evidence) and instead relying on the model jury charge on fingerprints.

Second, the trial judge properly allowed lay-opinion testimony by the

owner of the restaurant as well as an investigating officer about the similarities between the intruder depicted in the surveillance videos on each night. Defendant argues for the first time on appeal that the burglaries may have been perpetrated by different intruders. Contradictorily, both his opening and closing arguments below relied on a recurring theme: "that man" in the surveillance videos "is not this man," meaning defendant. Trying a new approach on appeal, defendant misapplies the relevant case law, as both witnesses' testimonies were based on their perception and were helpful for the jury. In any event, neither witness's testimony related to a fact at issue. That testimony was therefore admissible.

Finally, the trial judge properly exercised his discretion by imposing an extended prison term and extended period of parole ineligibility on defendant. Defendant comfortably falls within the ambit of the persistent-offender statute, as he had two indictable convictions in the decade prior to his conviction for the current offense. And the judge reasonably found that the aggravating factors substantially outweighed the mitigating factors in light of defendant's extensive history of criminal activity and municipal offenses. This Court should thus affirm defendant's convictions and sentence in their entirety.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On January 3, 2019, a Burlington County Grand Jury returned Indictment No. 2019-01-0012-I, charging defendant with two counts of third-degree commercial burglary, N.J.S.A. 2C:18-2(a)(1) (counts one and two). (Da1 to 2).

On February 28, 2023, the Honorable Richard J. Nosella, J.S.C., denied defendant's motion to preclude the State from introducing fingerprint-analysis evidence. (1T19-20 to 22-12). He also granted in part and denied in part defendant's motion to preclude any expert from stating that there was a fingerprint match or identification. (1T29-2 to 8). Following a five-day jury trial, the jury found defendant guilty of both charges. (7T42-24 to 43-13; Da3).

On the day of sentencing, the prosecutor requested that the trial judge make a finding on Warrant 2018-183-0323, a disorderly persons offense of theft, N.J.S.A. 2C:30-3(a). Based on the evidence presented to the jury at trial on the indictable charges, the judge found defendant guilty of that offense. (8T29-2 to 30-1). Defendant was sentenced to two concurrent discretionary extended terms of six years in prison on each count with an extended two-year period of parole ineligibility, in addition to restitution and all statutory fines. (8T41-2 to 46-25; Da4 to 6). Two weeks later, the judge held another hearing to "clarify some of the Court's rulings" and further explain his reasoning. (9T3-18 to 23).

Defendant filed a notice of appeal on June 15, 2023. (Da7 to 9).

COUNTERSTATEMENT OF FACTS

The following facts were elicited at defendant's trial:

On September 28, 2018 at around 4:00 a.m., Michael Babcock responded to a call from his security company indicating that someone had broken into Wing King, the restaurant he owned in Moorestown. (5T7-1 to 17). Arriving at the restaurant a few minutes later, Babcock noted that the alarm was on and a window screen had been removed and discarded on the ground outside. (5T8-1 to 16). Babcock reviewed the surveillance footage, which revealed that an intruder climbed into the kitchen window between the pizza ovens and walked to the area containing the cash register, stealing an unsecured bag containing $168 in coins from atop the restaurant's safe before leaving.[1] (5T9-11 to 10-13, 12-15 to 22; Pa1 at 00:31-00:48; Pa2 at 00:11-00:21).

Moorestown Officer Daniel Pascal arrived shortly thereafter. (4T60-21 to 23, 61-9 to 20, 61-11 to 22). His investigation confirmed that the screen on one of the windows had been removed, and he noticed footprints and fingerprints on a prep table in the kitchen. (4T62-12 to 19, 71-1 to 7). After reviewing the surveillance video, Pascal described the suspect as "a white or Hispanic male wearing a two-tone sweat jacket with camo pants." (4T76-6 to 9; Pa1; Pa2).

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[1] Babcock explained at trial that it was his practice to keep the windows cracked overnight for ventilation purposes. (4T110-17 to 25, 116-1 to 5).

At around 4:30 a.m., Moorestown Detective Jason Burk responded to the restaurant. (5T32-9 to 16). His review of the surveillance video aligned with Babcock's. (5T34-12 to 35-9). He further noted that the intruder only touched the cash-register area, and that it "looked like the suspect reached underneath and grabbed a bag and walked out." (5T35-10 to 20; Pa1 at 00:37-00:48). Burk then noticed a latent fingerprint on the face of one of the pizza ovens. (5T36-12 to 37-10). Reviewing his body-worn camera footage for the jury, Burk shared his conclusion that the intruder stepped on the prep table to enter and exit the window because the table had a "Timberland[-]boot[-]type shoe print" on it. (5T40-8 to 23). At that time, Burk photographed, scaled, and processed the fingerprint on the oven. (5T41-5 to 42-21; Pa3).

Just two days later, on September 30, 2018, Babcock received another call of the same nature in the middle of the night from his security company. (5T15-3 to 8). Again reviewing surveillance footage to find an intruder, Babcock stated that the intruder appeared to be the same intruder from two days prior, but that he did not recognize the burglar personally. (5T16-23 to 17-3; Pa4 at 00:37-00:48). This time, the intruder went to the safe where the change bag was located two days prior; finding no such bag, he attempted and failed to open the cash register before leaving empty-handed. (5T19-5 to 20; Pa5 at 00:04-00:30).

Moorestown Corporal William H. Mann arrived around the same time as

Babcock, and he also secured the area and reviewed surveillance footage. (4T86-23 to 87-1, 87-25 to 88-6, 88-20 to 89-15). He explained that one camera angle showed the intruder entering from the same area as on September 28 and returning to the cash register area. (4T90-7 to 19, 91-4 to 93-18; Pa4 at 00:37-00:42; Pa5 at 00:04-00:30). He saw the intruder lift the register before leaving with nothing. (4T93-19 to 94-1; Pa5 at 00:04-00:30; Pa4 at 01:19-01:24).

Detective Burk again responded to the restaurant and conducted the same investigation as he did on the first occasion. (5T51-9 to 25; Pa6). Watching the surveillance footage, he stated that the intruder lifted the cash register without gloves to find the release button but did not succeed in opening it. (5T53-10 to 24, 56-12 to 18; Pa5 at 00:04-00:30). Burk retrieved the latent fingerprints from the bottom of the register and submitted them to the New Jersey State Biometric Unit Lab for comparison within the Automated Fingerprint Identification System (AFIS), the state fingerprint database. (5T63-1 to 15; Pa6). He also noted his belief that the same burglar entered the restaurant both times because he appeared to wear the same two-toned sweatshirt with a dark-colored sleeve area and light-colored chest and hood area. (5T66-13 to 14, 67-11 to 19). Detective Burk also noticed a black object on the suspect's hip in both videos, which he believed to be a cellphone or cellphone case. (5T67-20 to 68-22).

Burlington County Prosecutor's Office Lieutenant Michael Wiltsey

testified as an expert in fingerprint collection, preservation, comparison, and identification at trial. (6T9-10 to 16, 18-14 to 17, 21-11 to 23). He explained that he evaluated the latent prints recovered from both burglaries, concluding that they originated from the same source as defendant's known fingerprints in the AFIS database. (6T46-5 to 14, 52-23 to 53-22, 54-7 to 56-21). He first explained ACE-V,[2] the process by which he reached his conclusion. (6T31-16 to 21, 32-3 to 17, 33-9 to 45-7). Wiltsey also demonstrated how he examined the latent thumbprint recovered on September 28 and one of the latent prints recovered on September 30, walking the jury through the entire ACE-V process. He showed twenty-six separate points of identification when comparing the September 28 thumbprint with the known exemplar and thirty-four separate points of identification when comparing the September 30 print with the known exemplar. (6T66-25 to 67-24, 72-19 to 73-13).

As noted, the jury convicted defendant of both charges. (7T42-24 to 43-13; Da3). This appeal follows.

[2] ACE-V is an acronym for the four steps comprising the process: analysis, comparison, evaluation, and verification.

LEGAL ARGUMENT

POINT I

THE JUDGE PROPERLY ADDRESSED THE FINGERPRINT EVIDENCE BEFORE AND DURING TRIAL.

At each step of the trial process, the judge properly admitted evidence of the analysis of defendant's fingerprints. First, defendant's wholesale attack on fingerprint evidence lacks support from any caselaw. The court thus correctly denied defendant's motion to preclude expert testimony regarding fingerprint analysis. And the court properly handled each issue regarding the fingerprint-analysis evidence throughout trial: (1) by denying defendant's request to ask at voir dire whether prospective jurors believed fingerprint analysis was reliable; (2) by denying defendant's request to limit the expert testimony on fingerprint evidence; and (3) by rejecting defendant's alternative and unfounded jury charge and instead issuing the model jury charge on fingerprint evidence.

Appellate courts review a trial court's evidentiary rulings with deference. State v. Hyman, 451 N.J. Super. 429, 441 (App. Div. 2017). Generally, admissibility of evidence rests within "the sound discretion of the trial court." State v. Willis, 225 N.J. 85, 96 (2016). An abuse of discretion is found only when the court has made a "clear error of judgment." State v. Koedatich, 112 N.J. 225, 313 (1988). The court's evidentiary decision should be sustained

unless it resulted in a "manifest denial of justice." State v. Perry, 225 N.J. 222, 233 (2016) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

A. No court has adopted defendant's view that fingerprint analysis is unreliable.

Despite defendant's attempt to discredit over one-hundred years of fingerprint-analysis usage in New Jersey criminal trials, the trial court correctly handled Lieutenant Wiltsey's expert testimony. Indeed, defendant cites no judicial authority in support of his contention. And the studies appended on appeal were not introduced into evidence at trial and should not be considered now for the first time. Defendant's convictions thus should be affirmed.

Defendant readily admitted at the motion hearing and during a pretrial hearing on the issue that no caselaw supports his view that fingerprint evidence is unreliable. (1T19-4 to 10; 4T11-25 to 12-17). He further conceded that courts, including the Third Circuit, have deemed the ACE-V method reliable. (1T19-7 to 19); see also United States v. Mitchell, 365 F.3d 215, 244-46 (3d Cir. 2004). And in a six-page discussion of the purported unreliability of fingerprint evidence in his appellate brief, he cites no case—New Jersey or otherwise, published or unpublished—to support his argument. (Db8 to 14). Any inquiry into whether the trial court abused its discretion in admitting fingerprint analysis evidence obtained using the ACE-V method should thus end there.

Nevertheless, defendant has appended a host of studies—none of which

were entered into evidence at trial—purporting to support his conclusion that fingerprint analysis is unreliable. The studies defendant inappropriately injects here should not be considered because they were not provided to or considered below. See Hisenaj v. Kuener, 194 N.J. 6, 25 (2008) (deeming unconstrained review and reliance on material from supplemented appellate record inappropriate because it included material not part of record and "argument that went beyond that which was advanced before the trial court"). Because defendant never presented these studies below, the State had no opportunity to examine their methodologies and data through testimony at any stage of trial.

Defense counsel, on cross-examination, referred to other reports and case studies he cites (without appending) on appeal—such as the 2016 report of the President's Council of Advisors on Science and Technology (PCAST) and the Madrid bombings case, see (Db10-13, 19, 28-29)—indicating that he was aware of and could have attempted to introduce the studies he now appends on appeal. See (6T88-5 to 91-13; 99-9 to 100-20, 102-12 to 103-13). Defendant inappropriately asks this Court to render a decision based in part on documents submitted for the first time on appeal when there was no opportunity to develop the record in the trial court to ensure the information was accurate and complete.

And despite defendant's belated assertions otherwise, many scientific studies have reached the same conclusion as the courts: that ACE-V is a reliable

method of fingerprint analysis. See, e.g., Philip J. Kellman et al., Forensic Comparison and the Matching of Fingerprints: Using Quantitative Image Measures for Estimating Error Rates through Understanding and Predicting Difficulty, 9 PLOS ONE 5, 1, 10-13 (2014) (despite a three-minute time limit, fifty-six fingerprint examiners "highly accurate" with false-positive rate of 3% and false-negative rate of 14%; in light of logistical constraints, authors "would suspect that error rates in forensic laboratory settings could well be lower"); Jason M. Tangen et al., Identifying Fingerprint Expertise, 22 Psych. Sci. 8, 995 (2011) (concluding trained, qualified examiners far more accurate—a false-positive rate of 0.68% and a false-negative rate of 8%—than novices with little training—55.18% false-positive rate and 25% false-negative rate); Matthew B. Thompson et al., Human Matching Performance of Genuine Crime Scene Latent Fingerprints, Law & Hum. Behav. at 1 (2014) (following up on Tangen 2011 study to determine experts and "intermediate trainees" were far more accurate than novices in close non-match scenarios; experts had 1.65% false-positive rate while novices had 56.73% false-positive rate; "qualified, court-practicing fingerprint experts were exceedingly accurate at discriminating prints compared with novices"); Bradford T. Ulery et al., Accuracy and Reliability of Forensic Latent Fingerprint Decisions, 108 Procs. of the Nat'l Acad. of Scis. 19, at 7733 (2011) (finding after 17,121 decisions on fingerprint matches from AFIS-style

database, examiners made correct identifications 99.8% of time and correct exclusion decisions 88.9% of time, with false-positive rate of 0.1% and false-negative rate of 7.5%); Bradford T. Ulery et al., Repeatability and Reproducibility of Decisions by Latent Fingerprint Examiners, 7 PLOS ONE 3, 1 (2012) (following up on Ulery 2011 study and finding after a seven-month interval, examiners repeated their decisions 92% of time on mated pairs and 86% of time on non-mated pairs, and examiners reproduced others' decisions on 87% of mated pairs and 80% of non-mated pairs); Bradford T. Ulery et al., Factors Associated with Latent Fingerprint Exclusion Determinations, Forensic Sci. Int'l 275, 65 (2017) (following up on 2011 and 2012 studies and determining after 3,730 valid responses, identifications were correct 99.9% of time and exclusions were correct 76.6% of time, with false-positive rate of 0.2% and false-negative rate of 5.5%).

Nonetheless, defendant failed to introduce his own expert or any other witness to challenge the validity of fingerprint analysis generally or the ACE-V method specifically. The State had no opportunity to cross-examine any expert, let alone one the authors of any study now cited on appeal.[3] Defendant cannot

[3] Adele Quigley-McBride, Ph.D, the co-author of Juror Perceptions of Opposing Expert Forensic Psychologists: Preexisting Attitudes, Confirmation Bias, and Belief Perseverance, 28 Psychol. Pub. Pol'y & L. 213 (2022), a study cited by defendant for the first time on appeal, see (Da93-105), appears as amicus curiae

introduce for the first time on appeal evidence he believes calls the State's expert's opinion into doubt, and his attempt to do so should be rejected.

B. The trial court properly denied defendant's motion to bar expert testimony regarding fingerprint analysis.

Lieutenant Wiltsey's expert testimony concerning fingerprint analysis was properly admitted at trial, and the trial court was not required to directly address defendant's claim that fingerprint analysis is unreliable when admitting that testimony. The trial court's reliance on a century of fingerprint-analysis usage in New Jersey and that federal courts have deemed reliable fingerprint-expert testimony based on the ACE-V method was proper. Defendant's argument should therefore be rejected.

N.J.R.E. 702 allows an expert who is qualified "by knowledge, skill, experience, training, or education" to testify in the form of an opinion "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact" in understanding the evidence. Our Supreme Court has explained that expert testimony is admissible under N.J.R.E. 702 when:

> (1) the intended testimony . . . concern[s] a subject matter that is beyond the ken of the average juror; (2)

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in this case. As noted, Dr. Quigley-McBride did not testify at trial, nor did any other defense expert. The State's response to amicus, filed along with this brief, does not function as a concession of its argument that introduction of such evidence at this stage is inappropriate because the State had no chance to cross-examine an expert at trial.

> (2) the field testified to . . . [is] at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness . . . [has] sufficient expertise to offer the intended testimony.
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> [State v. Rosales, 202 N.J. 549, 562 (2010) (quoting State v. Jenewicz, 193 N.J. 440, 454 (2008)).]

The Court expounded that these requirements are construed "liberally in light of [N.J.R.E.] 702's tilt in favor of the admissibility of expert testimony." Ibid.

First, while a typical challenge to an expert opinion under N.J.R.E. 702 should be resolved at an N.J.R.E. 104 hearing, see State v. J.R., 227 N.J. 393, 409 (2017), the trial court properly disposed of defendant's argument without holding one. Indeed, the prosecutor explained that both he and defense counsel were "of the position that this matter, considering the nature of it, that it's been litigated many times before . . . that there was no requirement for a full [N.J.R.E.] 104 hearing or any testimony from anyone." (1T21-20 to 22-4). To this end, the trial judge noted on the record that "the Court and counsel did have a discussion in chambers regarding a[n N.J.R.E.] 104 hearing," and that because "the steps followed by Wiltsey" were not at issue, an N.J.R.E. 104 hearing was not necessary. (1T28-21 to 29-1). Defendant therefore waived a hearing and should not be granted a remand for that purpose.

Nevertheless, a hearing on this issue is, as the parties and the trial judge agreed, unnecessary. The trial judge's decision should be reviewed under the

plain error standard, where any alleged error must have been "clearly capable of producing an unjust result." R. 2:10-2; see also State v. Santamaria, 236 N.J. 390, 404 (2019) (holding where party "does not object or otherwise preserve an issue for appeal at the trial court level, [courts] review the issue for plain error").

The trial court's denial of defendant's motion without an evidentiary hearing did not deprive defendant of valuable opportunities to undermine Wiltsey's credibility in front of the jury. Indeed, he cross-examined Wiltsey on his expert report and even elicited an admission that he worked at the same office with the prosecutor and that he received defendant's exemplar prints as the only comparison with the latent prints after defendant had already been indicted. (6T75-8 to 24, 76-10 to 21, 109-15 to 110-19). And the jury heard Wiltsey agree that portions of the fingerprint analysis are subjective and that while criteria exist to determine whether the latent print matches the exemplar, the minimum thresholds for quality and quantity of the prints vary from examiner to examiner. (6T81-11 to 83-6, 84-7 to 15). Defendant also discussed the PCAST study and the Madrid bombings case with Wiltsey in front of the jury in an attempt to establish the unreliability of fingerprint-analysis evidence.

Defendant advanced essentially the same arguments in front of the jury that he made to the trial court at the motion hearing. He also did not call an expert to testify at trial and does not claim that he would have called an expert

to testify at an N.J.R.E. 104 hearing. Under the circumstances, the trial court's denial of defendant's motion to exclude Wiltsey's testimony was not "clearly capable of producing an unjust result." R. 2:10-2. This Court should therefore affirm the trial court's decision not to hold an evidentiary hearing on that issue.

Further, defendant's argument that the court abused its discretion by rejecting his request to exclude Wiltsey's testimony without an analysis under State v. Olenowski, 253 N.J. 133, 147 (2023), misapplies that case. The Olenowski Court explained that moving forward, courts would analyze "testimony based on scientific knowledge" under the factors outlined in Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993). Olenowski, 253 N.J. at 151-54. Where an expert is offered to testify to "scientific knowledge" that "will assist the trier of fact to understand or determine a fact in issue," Daubert laid out four non-exhaustive factors to help guide that determination:

> (1) whether the scientific theory or technique can be, or has been, tested; (2) whether it "has been subjected to peer review and publication"; (3) "the known or potential rate of error" as well as the existence of standards governing the operation of the particular scientific technique; and (4) general acceptance in the relevant scientific community.
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> [Olenowski, 253 N.J. at 147 (quoting Daubert, 509 U.S. at 593-94).]

But the Olenowski Court made clear that any evidence previously validated under the former "general acceptance in [a] particular field" test, laid

out in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), remains admissible and reliable unless "the scientific reliability underlying the evidence has changed." Olenowski, 253 N.J. at 154. As noted, fingerprint-analysis evidence has been admissible in New Jersey criminal trials for over a century. See, e.g., State v. Cierciello, 86 N.J.L. 309, 313-15 (E. & A. 1914) (holding it would be "no ground for error" if properly obtained fingerprint was offered into evidence and used at trial). And although some of the studies cited by defendant are close to two decades old, neither the courts nor the Legislature have adopted any of the conclusions defendant puts forth. Defendant cites no contrary authority.

And as the trial court explained, "numerous federal courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable," even after Daubert. See, e.g., Mitchell, 365 F.3d at 244-46; United States v. Crisp, 324 F.3d 261, 266 (4th Cir. 2003) (explaining that federal appellate courts addressing the "admissibility of expert fingerprint identifications in the post-Daubert era" have "found such evidence admissible"); United States v. Baines, 573 F.3d 979, 989-92 (10th Cir. 2009) (same); United States v. Abreu, 406 F.3d 1304, 1307 (11th Cir. 2005) (same); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (same); United States v. Spotted Elk, 548 F.3d 641, 663 (8th Cir. 2008) (explaining that a Daubert hearing was unnecessary where the prosecutor established that the expert had extensive

training and used acceptable methods); United States v. Pena, 586 F.3d 105, 110-11 (1st Cir. 2009) (finding no abuse of discretion because the ACE-V method satisfies Daubert); United States v. Straker, 800 F.3d 570, 631-32 (D.C. Cir. 2015) (same); United States v. Herrera, 704 F.3d 480, 485-87 (7th Cir. 2013) (same).[4]

Ample existing caselaw thus supports the trial court's well-reasoned decision to permit expert testimony regarding fingerprint analysis. Fingerprint evidence, especially using the ACE-V method, has repeatedly been accepted and deemed reliable under both the Frye and Daubert-like standards. And, as noted, defendant has not and cannot provide caselaw to the contrary. Expert testimony on fingerprint analysis clearly "assist[ed] the trier of fact to understand the evidence," satisfying N.J.R.E. 702. The court thus properly exercised its role as gatekeeper when it denied defendant's motion to exclude Wiltsey's testimony.

C. The trial court correctly denied defendant's requests regarding the fingerprint evidence at each stage of trial.

At every step of the trial, the court properly disposed of defendant's

[4] Further, while the State acknowledges that unpublished opinions cannot "constitute precedent or be binding on any court," R. 1:36-3, recent New Jersey cases addressing ACE-V and latent-print analysis in the context of reliability challenges found them sufficiently reliable. See State v. McKoy, No. A-2553-19 (App. Div. Nov. 28, 2022); State v. Monell, No. A-4419-18 (App. Div. Nov. 15, 2021); State v. Davis, No. A-4176-17 (App. Div. July 15, 2020). (Pa7-85). The State is not aware of any contrary unpublished authority. See R. 1:36-3.

efforts to limit or exclude admissible evidence of fingerprint analysis. First, the court correctly declined to ask the prospective jurors their opinions on the reliability of fingerprint evidence at voir dire during jury selection. Next, the court facilitated the proper scope of expert testimony when it chose not to limit that testimony other than reference to a non-testifying verifier of Wiltsey's fingerprint analysis. Finally, the court rightly instructed the jury using the model fingerprinting jury charge instead of defendant's proposed charge. This Court should thus affirm the trial court's decisions at each stage of trial.

1. The court properly denied defendant's request to include a question on voir dire concerning prospective jurors' opinions on the reliability of fingerprint analysis.

The trial court made the correct decision when it declined to ask the prospective jury to opine on the reliability of fingerprint analysis. It was well within the court's discretion to deny defendant's request, and an impartial jury was selected. Defendant's convictions should be affirmed.

Shortly before trial, defense counsel requested that the court ask one open-ended question to the prospective jury: "Do you believe that fingerprint . . . analyses are reliable, why or why not?" (1T32-7 to 11). The prosecutor objected, arguing that such a question would improperly introduce the idea that jurors have "certain preconceived notions about the reliability of that evidence," and that because the judge was already issuing a jury instruction on expert

testimony, it would be unnecessary "to highlight a specific narrow slice of . . . expert testimony." (1T32-12 to 33-20). Defense counsel maintained that defendant was "completely in the dark regarding prospective jurors' views on fingerprint analysis" and that the court could avoid the prosecutor's concerns by discussing the open-ended questions at sidebar. (1T33-25 to 34-23). In response, the State explained that under State v. Little, 246 N.J. 402 (2021), "hearing multiple potential jurors discussing their thoughts on fingerprint evidence could potential[ly] indoctrinate jurors as to the outcome of the case" rather than show their biases. (1T35-16 to 36-25). While the trial judge did not announce his ruling on the record or with a written opinion, no open-ended question regarding fingerprint analysis was asked at jury selection.

"The trial court's duty 'to take all appropriate measures to ensure the fair and proper administration of a criminal trial' must begin with voir dire." State v. Fortin, 178 N.J. 540, 575 (2004) (quoting State v. Williams, 93 N.J. 39, 62 (1983)). Trial courts have the authority to conduct voir dire while also allowing parties to supplement the court's voir dire questions within the trial court's discretion. State v. Manley, 54 N.J. 259, 282 (1969). This process serves to "eliminat[e] the efforts [of parties] to indoctrinate, to persuade, [or] to instruct by favorable explanation of legal principles that may or may not be involved" in the case. Id. at 280. Trial courts are "allotted reasonable latitude when

conducting voir dire and, therefore, a reviewing court's examination should focus only on determining whether 'the overall scope and quality of the voir dire was sufficiently thorough and probing to assure the selection of an impartial jury.'" State v. Winder, 200 N.J. 231, 252 (2009) (quoting State v. Biegenwald, 106 N.J. 13, 29 (1987)). "Generally, a trial court's decisions regarding voir dire are not to be disturbed on appeal, except to correct an error that undermines the selection of an impartial jury." Ibid.

The trial court did not abuse its discretion by denying defendant's request to ask a question during voir dire to prospective jurors regarding their beliefs on fingerprint evidence. The main case cited by defendant, State v. Murray, 240 N.J. Super. 378 (App. Div. 1990), does not apply. There, this Court found it appropriate that the trial court asked questions at voir dire "to determine if any jurors had biases for or against mental health professionals and mental state defenses." Id. at 392. Yet it also acknowledged that a "judge's refusal to interrogate jurors on a particular form of prejudice does not necessarily constitute reversible error" and the facilitation of voir dire "rest[s] within the sound discretion of the trial court." Ibid. (citations omitted); see also State v. Long, 137 N.J. Super. 124, 131-32 (App. Div. 1975) (requiring discussion of "the factual underpinning of the case itself, the characteristics of the principals involved in the crime, and a realistic assessment of the prejudice potential which

may be introduced thereby" in analysis of whether to determine a court abused its discretion by not asking a voir-dire question on racial prejudice); State v. Kelly, 118 N.J. Super. 38, 46-47 (App. Div. 1972) (finding no abuse of discretion in rejecting voir-dire challenge where proposed questioning would risk "subverting the objective of Manley" and could "commit or pledge jurors to a point of view or a result before they have heard any evidence, argument of counsel[,] or instructions of the court) (quoting Manley, 54 N.J. at 280-81).

There was no risk of a biased jury based on the judge's decision. To the contrary, adding a question of that nature would have risked biasing the jurors against the reliability of fingerprint evidence, which the judge had already deemed to be inappropriate based on his ruling on the motion to exclude Lieutenant Wiltsey's testimony. See id. at 280. Voir dire was thorough and probing, as each juror confirmed that they would view the case in a fair and impartial manner after answering a host of questions by the judge. There is no reason to believe that the jury was partial in any way. Because the trial judge did not abuse his discretion, defendant's argument regarding the absence of a question on fingerprint evidence at voir dire should thus be rejected.

2. The court limited the expert testimony on fingerprint analysis to the proper extent.

By limiting Lieutenant Wiltsey's expert testimony only to exclude any conclusions of the non-testifying verifier, the trial court allowed a permissible

scope of testimony. It was not required to have Wiltsey qualify his opinion to any degree of probability or stop short of testifying to his conclusion that that defendant was the source of the latent fingerprints. Wiltsey's testimony was therefore admissible and the court's decisions in electing whether to limit that testimony should be affirmed.

Defendant moved before trial to preclude Wiltsey from testifying that the latent print originated from the same source as defendant's known exemplar. (1T22-18 to 23-7). He argued that Wiltsey should be limited to testifying that "the latent print and the known exemplar have similar characteristics," but not that they matched or originated from the same source. (1T23-19 to 24-4). In response, the prosecutor countered that "originating from the same source is the language still commonly used and that's the language used in his report," but he noted that he had no issue with qualifying Wiltsey's testimony as within "a reasonable degree of scientific certainty" rather than referring to it as a definite match. (1T24-17 to 25-15). The trial judge granted in part and denied in part defendant's motion, ruling that Wiltsey's testimony be "qualified with language such as within a reasonable degree of probability as opposed to a [one-hundred] percent match." (1T29-2 to 8).

The State requested reconsideration of that ruling prior to the beginning of its case-in-chief. (4T7-12 to 25). The prosecutor argued it would be "contrary

to the training of Lieutenant Wiltsey and all fingerprint analysis experts to couch their findings in the language of 'to a degree of scientific probability or to scientific certainty'" because such language was "not consistent with what his opinion ultimately is," and that it would be inconsistent to find that fingerprint analysis is reliable, have an experienced expert testify, and then "step back all the way to a reasonable degree of scientific probability." (4T7-20 to 10-15). Defense counsel claimed Wiltsey could not claim any degree of scientific certainty because his opinion is not based on science, but rather "pattern matching." (4T10-18 to 12-21). The State then pointed out that defendant had no caselaw, expert, or expert report to support his argument, which could not defeat "a hundred years of published opinions" in New Jersey "accepting this sort of expert testimony." (4T12-23 to 14-3).

The trial judge vacated his prior ruling and did not require Wiltsey to qualify his testimony. (4T14-4 to 6). The judge explained his decision "to allow the expert, assuming he's qualified as an expert, to testify accordingly," and expressed his confidence that defense counsel "will raise these issues during cross[-]examination of that expert." (4T14-7 to 11). Finally, he clarified that he was "not requiring or limiting the testimony of the expert . . . to the reasonable probability" standard. (4T14-7 to 11).

Because defendant did not object at all during Wiltsey's testimony at trial,

this Court's standard of review is plain error, whether any alleged error was "clearly capable of producing an unjust result . . . ." State v. Whitaker, 200 N.J. 444, 465 (2009) (quoting R. 2:10-2). "Not any possibility of an unjust result will suffice as plain error, only 'one sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.'" State v. Coclough, 459 N.J. Super. 45, 51 (App. Div. 2019) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

Lieutenant Wiltsey's testimony was proper and its admission did not amount to error at all, let alone plain error. The court did nothing improper by allowing Wiltsey to testify that defendant was "the source" of the fingerprints. Wiltsey testified on both direct- and cross-examination that there was no set number of identification points required because it was a subjective decision based on quantity of identifiers and quality of prints. (6T66-25 to 67-24, 68-9 to 69-3, 81-11 to 83-6). Indeed, a fingerprint analyst's job is to determine whether two prints match; if a print expert could not exercise his judgment to do so, there would be little reason for the expert to testify at all. A jury is free to disagree with the expert's conclusion, particularly when he is subject to extensive cross-examination as Wiltsey was here.

And Lieutenant Wiltsey's testimony did not imply that the error rate for fingerprint-analysis evidence is zero. He explained that the ultimate judgments

on whether a latent print matches a known exemplar vary from examiner to examiner, a fact that opened his testimony up for cross-examination, which is exactly the strategy defense counsel chose to highlight any purported deficiencies in his testimony. Indeed, defense counsel pointed out that examiners require "no set number of data points" to determine whether a latent print matches a known exemplar. And through Lieutenant Wiltsey's testimony, he introduced to the jury the PCAST report and the facts of the Madrid bombings case in an attempt to show the jury that false-positive fingerprint identifications occur (and, by extension, that the fingerprint identification in this case was incorrect). (6T83-20 to 85-4, 86-2 to 21, 88-5 to 91-13).

Lieutenant Wiltsey never stated or implied that his conclusion in this case had been verified by a non-testifying examiner. Defense counsel recognized as much. Before Wiltsey's testimony, he explained to the prosecutor and the judge that if Wiltsey testified regarding the opinion of the independent verifier, "there's going to be an immediate objection to that." (6T5-1 to 15). But on both occasions that defendant now cites in support of his argument, defense counsel chose not to object. See (Db29; 6T44-17 to 45-12, 111-6 to 24). Indeed, both instances involved a break immediately after the questioning; after the second time, defense counsel was directly asked whether he had a response on re-cross-examination. He did not. (6T111-16 to 24).

Nor would it have changed the result had defense counsel objected to Wiltsey's testimony. While he now argues that Wiltsey testified by implication that his conclusions were verified by an independent examiner, defendant had the opportunity to—and did, in fact—cross-examine Wiltsey regarding the verification step of the ACE-V process. This included questioning on the absence of evidence of another analyst's verification of his conclusion, discussion of the PCAST report, introduction of the fact that Wiltsey worked with the prosecutor and was only given one set of exemplar prints—defendant's—after defendant had been indicted, and the reliability of fingerprint analysis techniques generally and the ACE-V method specifically. Defendant's counsel posed numerous questions to Wiltsey in an attempt to cast doubt on the validity of his opinion. The jury apparently decided that Wiltsey's testimony was credible, and, quite simply, reasonably found defendant's attempt at cross-examination unpersuasive.

Also, because the studies on which defendant now relies are not part of the record, this Court should not consider them.[5] Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436, 452 (2007) ("Our appellate courts will not

[5] Indeed, during a discussion over an objection by the prosecutor to defendant's introduction of the PCAST report at trial on cross-examination of Lieutenant Wiltsey, defense counsel conceded that he "wouldn't be allowed" to move that report into evidence. (6T93-11 to 94-2).

ordinarily consider evidentiary material that is not in the record below."); State v. Harvey, 151 N.J. 117, 202 (1997) ("The place to introduce expert testimony is at trial, where the expert is subject to cross-examination, the opposing party can introduce contradictory expert testimony, and the trial court can assess the experts' credibility."). Thus, because defendant did not make a record below and is precluded from doing so on appeal, defendant has failed to show that a print expert is precluded from opining that two prints match. For all of these reasons, Lieutenant Wiltsey's testimony was proper.

3. The court correctly issued the model jury charge on fingerprint analysis instead of defendant's proposed charge.

The trial court properly instructed the jury using the model jury charge on fingerprint-analysis evidence. Defendant's proposed jury charge, which would have introduced claims from a study that defendant did not move into evidence at trial, would have been improper and prejudicial. Instead, the model charge accurately guided the jury in the precise manner envisioned by the courts and the Committee on Model Criminal Jury Charges, and this Court should not disturb the jury's verdict on this basis.

Prior to the charge conference, defendant submitted a proposed jury instruction to the trial court. (Da198). Citing entirely from a report not in evidence but advanced in support of his denied motion to exclude Wiltsey's testimony, defendant sought a limiting instruction that included information

about the purported fallibility of fingerprint evidence and the lack of ability to present testimony on the ACE-V method "with any particular degree of accuracy." (Da198).

At the charge conference, the prosecutor objected, arguing that defendant's proposed instruction was "an inappropriate attempt to put evidence in front of the jury through the guise of the jury instruction" and would essentially force the trial judge to "testify to perceived weaknesses within the latent[-]print analysis field, which is not what a jury instruction is designed to do." (6T131-8 to 21). Defense counsel maintained that he modeled the proposed charge after the eyewitness charge derived from State v. Henderson, 208 N.J. 208, 296 (2011), "to give the jury the full picture in regards to fingerprint analysis and what the recent scientific research on the ACE-V process has shown." (6T132-6 to 11; Da199 to 207). The trial judge rejected the proposed instruction, noting that the report upon which it was based was not in evidence and that he had neither received nor reviewed it, opting for the model charge and suggesting that defendant make the proposed argument in his closing. (6T132-12 to 21).

Proper jury charges are "essential for a fair trial." State v. Koskovich, 168 N.J. 448, 507 (2001) (citation omitted). This Court is required to view the alleged error "in the totality of the entire charge." State v. Chapland, 187 N.J.

275, 289 (2006). A jury charge is presumed to be proper when it tracks the model jury charge verbatim because the process to adopt model jury charges is "comprehensive and thorough" as the charges are "reviewed and refined by experienced jurists and lawyers." State v. R.B., 183 N.J. 308, 325 (2005) (instructing trial courts to follow model jury charges and read them "in their entirety to the jury").

The model jury charge on fingerprints sufficed to inform the jury of the law. It would have been error to instruct the jury regarding any purported unreliability of fallibility of fingerprint evidence, as defendant introduced no evidence—testimonial or otherwise—establishing those opinions. Defendant has not pointed to a single court that has provided a similar instruction, especially an instruction based on reports not acknowledged by the Committee on Model Criminal Jury Charges.

The difference between defendant's proposed instruction and a Henderson identification instruction is that the Henderson Court relied on a variety of case law from across the country that supported a change based on scientific evidence about memory and existing identification techniques. 208 N.J. at 283-85. No such support exists here; indeed, as noted, no case has adopted defendant's position regarding any deficiencies in fingerprint-analysis evidence. Thus, a jury charge informing the jury of those conclusions would have been

inappropriate. The model jury charge on fingerprints told the jury all it needed to know in order to reach a verdict in this case.

4. Any error in the admission of fingerprint-analysis evidence was harmless.

Even if this Court concludes that the judge's handling of the fingerprint-analysis evidence was improper in any way, any error was harmless because the jury was able to identify defendant from the surveillance videos as the person who committed the burglaries. Defendant's convictions should thus be affirmed regardless of the admissibility of the fingerprint-analysis evidence.

"[E]ven though an alleged error was brought to the trial judge's attention, it will not be grounds for reversal if it was 'harmless error.'" J.R., 227 N.J. at 417 (quoting Macon, 57 N.J. at 337–38). "'Convictions after a fair trial, based on strong evidence proving guilt beyond a reasonable doubt, should not be reversed because of a technical or evidentiary error that cannot have truly prejudiced the defendant or affected the end result.'" Ibid. (quoting State v. W.B., 205 N.J. 588, 614 (2011)).

Here, the jury watched videos from both burglaries depicting defendant stealing or attempting to steal money from the restaurant. The jury spent six days in the same courtroom as defendant over the course of two weeks and reasonably could have identified him from the September 30 video footage alone; he looks at the camera for a moment, affording the jury a full look at his

face to compare with the man with whom they shared the courtroom. (Pa4 at 00:37-00:40). As discussed further in Point II, whether the burglar was the same person on both nights was not at issue based on lay-opinion testimony of Babcock and Detective Burk, as well as defense counsel's own concessions. A reasonable jury thus certainly could have convicted defendant of both charges without evidence of fingerprint analysis. Accordingly, even if the admission of fingerprint-analysis evidence in this case was erroneous, it was harmless beyond a reasonable doubt and defendant's convictions should be affirmed.

POINT II

THE TRIAL COURT PROPERLY ADMITTED LAY-OPINION TESTIMONY REGARDING THE SURVEILLANCE VIDEOS.

The trial judge correctly admitted Babcock and Detective Burk's testimonies regarding their observations that both surveillance videos depicted the same intruder. Defendant's belated argument to the contrary does not change the fact that both witnesses' testimonies were properly before the jury to determine their credibility. Defendant's convictions should thus be affirmed.

At trial, Babcock (the restaurant owner) and Detective Burk testified that they believed the same person burglarized the restaurant on both nights. Babcock testified that on September 30, it "looked like the same individual that was there two days prior decided to come back." (5T16-23 to 25). And Detective Burk stated that the September 30 burglar wore "the same dark-colored sleeve, light-colored chest-and-hood-area sweatshirt" as on September 28, and he also wore a similar cellphone or phone case on the "same right hip, same location." (5T54-2 to 3, 66-16 to 24, 67-17 to 69-6). Defense counsel did not object to any portion of this testimony.

"Generally, issues not raised below, even constitutional issues, will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest." State v. Walker, 385 N.J. Super. 388,

410 (App. Div. 2006). "An issue not raised below may be considered by the court if it meets the plain error standard or is otherwise of special significance to the litigant, to the public, or to achieving substantial justice, and the record is sufficiently complete to permit its adjudication." Ibid. As noted, evidence that went unchallenged will constitute plain error if it was "clearly capable of producing an unjust result." R. 2:10-2. "Thus, the error will be disregarded unless a reasonable doubt has been raised whether the jury came to a result that it otherwise might not have reached." State v. Singh, 245 N.J. 1, 13 (2021) (citing State v. R.K., 220 N.J. 444, 456 (2015)).

Under N.J.R.E. 701, lay-opinion testimony is admissible if it: "(a) is rationally based on the witness's perception; and (b) will assist in understanding the witness's testimony or determining a fact in issue." To satisfy these conditions, the "witness must have actual knowledge, acquired through his or her senses, of the matter to which [they] testif[y]." State v. Sanchez, 247 N.J. 450, 466 (2021) (quoting State v. LaBrutto, 114 N.J. 187, 197 (1989)). And the second condition precludes "lay[-]opinion on a matter 'as to which the jury is as competent as [the witness] to form a conclusion.'" Id. at 469-70 (alteration in original) (quoting State v. McLean, 205 N.J. 438, 459 (2011)). Lay-witness testimony also needs to assist the jury. "An investigator who has carefully analyzed a video and can draw a jury's attention to particular spots," such as the

suspect's appearance, "can be quite helpful to the finder of fact." State v. Watson, 254 N.J. 558, 601 (2023).

"[I]nvestigators may not offer their views on factual issues that are reasonably disputed. Those issues are for the jury to decide." Id. at 603 (citation omitted). "[A] witness cannot testify that a video shows a certain act when the opposing party reasonably contends that it does not." Ibid. In Watson, the Court held that an officer who provides video narration is not considered an eyewitness to the crime but a witness who is "commenting on an independent source of evidence": here, the restaurant's surveillance video. Id. at 601. An investigator who has reviewed the surveillance video many times prior to trial, who then offers testimony based on their perception of the video, has satisfied N.J.R.E. 701's "perception" and "personal knowledge" requirements. Ibid.

Defendant did not argue the possibility of two suspects before the jury, and no such possibility was at issue. Indeed, both his opening and closing argument conceded that the two videos showed the same person. First, his opening statement, in its entirety, consisted of: "That man is not this man. That man is white, possibly Hispanic, definitely not [B]lack. That man is not this man. You don't need an expert to tell you that." (4T58-6 to 9) (emphases added). And, in closing, defense counsel added more about the investigation and the reliability of fingerprint evidence, but his view that the man in the two

videos were the same remained:

> That man is not this man. You don't need an expert to tell you that. The prosecutor wants you to disregard common sense and your own two eyes. As you saw on the video, that man is white, possibly Hispanic, definitely not [B]lack, definitely not [defendant]. The police saw that too. They reviewed the video and they developed a suspect. That suspect was white, possibly Hispanic.
>
> [(7T5-14 to 21) (emphases added).]

Defendant's argument, advanced for the first time on appeal, should therefore be deemed waived. See Walker, 385 N.J. Super. at 410.

Regardless, as part of his investigation, Detective Burk watched the videos to find evidence and identify the suspect. (5T34-19 to 25). He described the person seen in the videos but stated he did not know who the suspect was at the time. His description included characteristics like the individual's sweatshirt and cellphone or cellphone case on his hip, which were the same in both surveillance videos. Detective Burk never identified defendant as the individual in the videos, but instead provided descriptions of the suspect and his opinion that the perpetrator wore similar clothing during both burglaries. As in Singh, "the jury was capable, having seen the surveillance video," of comparing the clothing worn by the intruder, as well as his appearance, build, and other physical characteristics in each video. See 245 N.J. at 19. The jury had to—and did—decide whether it was defendant in the videos.

Singh disposes of defendant's argument. There, our Supreme Court held that the detective's testimony regarding the similarity of Singh's shoes and the shoes in the surveillance video was properly admitted under N.J.R.E. 701. 245 N.J. at 19-20. The Court concluded that the detective's "lay[-]witness opinion as to the similarities between the sneakers from the surveillance footage and the sneakers he saw that night was rationally based on his perception . . . ." Ibid. The Court noted that "[s]imply because the jury may have been able to evaluate whether the sneakers were similar to those in the video does not mean that [the detective]'s testimony was unhelpful." Id. at 20. Importantly, the Court explained, "the jury was free to discredit [the detective]'s testimony and find that the sneakers in evidence were dissimilar to those on the surveillance video." Ibid. Indeed, the jury here was instructed on witness credibility, and the judge explained, along with the model credibility charge as a whole, that the jury must "weigh the testimony of each witness and then determine the weight to give it" in order to "accept all of it, a portion of it, or none of it." (7T30-9 to 31-9).

Defendant's argument that Singh is distinguishable because neither Babcock nor Detective Burk had independent knowledge of the clothing worn by the perpetrator in the videos misapplies the principles outlined in that case. The purpose of both witnesses' testimonies to this end was to express the uncontroversial—and, in fact, unchallenged—point that the same person entered

the restaurant through the same entrance and went to the same area of the restaurant to steal money on both nights. As in Singh, the lay-opinion testimonies of Babcock and Detective Burk were rationally based on their perceptions and helped the jury by tying together a simple fact—unquestioned by defendant—that the intruder on September 28 returned two days later.

Detective Burk's testimony also satisfies Watson. Our Supreme Court in Watson explicitly explained that "an investigator who carefully reviewed a video in advance could draw attention to a distinctive shirt . . . which a jury might otherwise overlook," particularly in a case where the fact is not in dispute. 254 N.J. at 604. That defendant here wore similar clothing—a two-toned, black-and-white sweatshirt—as well as a black cellphone or cellphone case on his hip was precisely to what Burk testified. As noted, he did not identify defendant from the surveillance videos. Burk testified to an undisputed fact, thus satisfying Watson's threshold requirement to offer lay-opinion testimony about what he saw in the surveillance videos.[6] There was no error, let alone plain error, in admitting these statements, and defendant's convictions should be affirmed on this basis as well.

[6] The Watson decision repeatedly refers to "investigators" and appears to apply predominantly to police witnesses, but for the same reasons, Babcock's testimony was admissible as well.

POINT III

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN IMPOSING AN EXTENDED SENTENCING TERM AND PAROLE DISQUALIFIER.

By sentencing defendant to an extended term of six years with two years of parole ineligibility—a sentence shorter on both counts than the State sought—it imposed a fair penalty for defendant's crimes. The judge acknowledged defendant's extensive history of indictable convictions and disorderly persons offenses, placing great weight on that history in his finding that the aggravating factors substantially outweighed the mitigating factors, which was all that was required to impose a discretionary prison term and parole disqualifier. Defendant's reasonable sentence should therefore be upheld.

At sentencing, the prosecutor argued in favor of a discretionary extended term of seven years in prison subject to an extended term of three years of parole ineligibility on each burglary count, to run concurrently. (8T30-4 to 17). Defendant opposed that term, instead seeking fines, probation, or a minimum concurrent sentence of three years on each count. (8T38-6 to 16).

The trial judge sentenced defendant as a persistent offender to a concurrent discretionary extended term of six years in prison with a two-year period of parole ineligibility on each count. (8T43-13 to 21). First, he explained

that defendant was eligible for an extended term as a persistent offender under N.J.S.A. 2C:44-3. (8T41-2 to 7). The judge then applied three aggravating factors—N.J.S.A. 2C:44-1(a)(3), (6), and (9)—and found two mitigating factors, N.J.S.A. 2C:44-1(b)(1) and (6). (8T41-11 to 42-2). As a result, he placed "great weight" on defendant's prior criminal history, which clearly convinced him that the aggravating factors "substantially outweigh[ed]" the mitigating factors.[7] (8T46-19 to 24).

At a hearing two weeks later, the judge further clarified his reasoning. (9T). Regarding defendant's designation as a persistent offender, the judge stated that defendant had committed fourth-degree criminal trespass in October 2013 and fourth-degree criminal sexual contact in June 2015. (9T6-4 to 18). Thus, defendant would fall under the ambit of the persistent offender statute on either date, even though the statute specifies the later date. (9T7-5 to 13). The judge thus found that as a persistent offender, defendant was subject to a five-to-ten-year prison sentence pursuant to N.J.S.A. 2C:43-7(a)(4), and a parole-ineligibility period of no more than one-half of the aggregate prison sentence

[7] Earlier in the hearing, the judge misspoke by saying that he was "clearly convinced that the aggravating factors slightly outweigh[ed] the mitigating factors," but he corrected himself after the prosecutor asked for a clarification. (8T43-13 to 21, 46-5 to 17).

pursuant to N.J.S.A. 2C:43-6(b) and 2C:43-7.[8] (9T7-16 to 8-18).

Regarding the findings of aggravating factors three, the risk that defendant will commit another offense; six, defendant's criminal record and the seriousness of those offenses; and nine, the need to deter defendant and the public, the trial judge explained that he placed "great weight" on defendant's criminal history. (9T11-25 to 12-1). In doing so, he outlined defendant's lengthy history of municipal offenses, including: (1) an April 6, 2010, adjudication for lewdness; (2) a June 15, 2010, adjudication of possession of a controlled dangerous substance (CDS) and failure to give the CDS to police; (3) an April 24, 2013, adjudication for serving or making available alcoholic beverages to a person under the legal age; (4) a June 9, 2016, adjudication for possession of a controlled dangerous substance and criminal trespass; (5) a February 20, 2018, adjudication for prohibited acts in Gloucester Township; (6) an October 29, 2019, adjudication for defiant trespass; (7) a December 20, 2022,

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[8] After defendant's brief was filed here, the Supreme Court of the United States decided Erlinger v. United States, 602 U.S. ___ (2024). Assuming Erlinger applies to New Jersey's persistent-offender statute, unlike Erlinger, defendant here did not argue below that the Fifth and Sixth Amendments required the jury to find beyond a reasonable doubt that his predicate offenses were committed on separate occasions. In any event, there is no plain error because there is ample proof in the record that defendant committed the predicate offenses at separate times—criminal trespass in October 2013 and criminal sexual contact in June 2015, see PSR at 6—and defendant never contested this issue below.

bench warrant for an allegation of possession of a CDS and failure to give that CDS to police; (8) a February 7, 2023, adjudication for lewdness; (9) "a matter out of Berlin Township which is pending"; and (10) "a failure to appear notice dated September 28, 2022." (9T10-8 to 11-24).

The trial judge found mitigating factor one, that "defendant's conduct neither caused nor threatened serious harm," because defendant entered the restaurant on both occasions in the middle of the night without anyone in the building. (9T9-3 to 11). And regarding mitigating factor six, that defendant will compensate the victim, the judge noted that under the disorderly persons offense of theft that he adjudicated before sentencing, he ordered that defendant provide restitution. (9T9-12 to 19). He then explained that although the aggravating factors slightly outweighed the mitigating factors numerically, "from a substantive standpoint, . . . the aggravating factors substantially outweigh[ed] the mitigating factors because [he] place[d] great weight on aggravating factor [six]." (9T9-20 to 10-7).

Appellate courts review a judge's sentencing decision under an abuse of discretion standard. State v. Fuentes, 217 N.J. 57, 70 (2014). Under that standard, a sentence should not be disturbed unless the trial judge failed to follow the sentencing guidelines, the judge's findings regarding the aggravating and mitigating factors are not supported by "competent and credible evidence in

the record," or the judge's "application of the guidelines" renders the sentence "clearly unreasonable so as to shock the judicial conscience." Ibid. (quoting State v. Roth, 95 N.J. 334, 364-65 (1984)). Whether a defendant meets the statutory eligibility criteria for an extended-term sentence, however, is a question of law reviewed de novo. State v. Pierce, 188 N.J. 155, 166 (2006).

N.J.S.A. 2C:44-3 provides that on a prosecutor's application, a court may sentence a person who has been convicted of a first-, second-, or third-degree crime to an extended term of imprisonment if one of the statutory grounds are satisfied. N.J.S.A. 2C:44-3(a) provides one such ground, where a defendant has committed a first-, second-, or third-degree crime "and is a persistent offender." Such an offender is twenty-one years old at the time of the commission of the crime and "has previously been convicted on at least two separate occasions of two crimes, committed at different times," while he was eighteen years or older. Ibid. "[T]he latest in time of those crimes or the date of the defendant's last release from confinement, whichever is later," must be within ten years "of the date of the crime for which the defendant is being sentenced." Ibid.

When evaluating whether a defendant is a "persistent offender," courts examine a defendant's criminal record and their age when they were previously convicted, "facts that the State asserts are the 'who, what, when and where' of those prior convictions and that do not entail any additional findings related to

the offense for which the defendant is being sentenced." Pierce, 188 N.J. at 162 (quoting State v. Dixon, 346 N.J. Super. 126, 140 (App. Div. 2001)).

N.J.S.A. 2C:43-6 authorizes courts to impose a period of parole ineligibility not to exceed one-half of the term of imprisonment, "[a]s part of a sentence for any crime, where the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors." N.J.S.A. 2C:43-7, in pertinent part, authorizes courts to impose a term of parole ineligibility not to exceed one-half of the term of imprisonment when the court imposes a discretionary extended term of imprisonment. Our Supreme Court has held that the standard set forth in N.J.S.A. 2C:43-6 applies when judges impose a discretionary term of parole ineligibility under N.J.S.A. 2C:43-7. State v. Dunbar, 108 N.J. 80, 92-93 (1987), abrogated in part by Pierce, 188 N.J. at 902.

The trial judge did not abuse his discretion when he sentenced defendant to an extended prison term with an extended period of parole ineligibility. Defendant concedes that his criminal history satisfies the standard for a persistent offender laid out in N.J.S.A. 2C:44-3(a). (Db46 to 47). Indeed, as the trial judge found, defendant had been convicted of fourth-degree criminal trespass on April 14, 2014, and fourth-degree criminal sexual contact on September 21, 2015. Both convictions fall within the timeline of "within [ten] years of the date of the crime for which the defendant is being sentenced" under

N.J.S.A. 2C:44-3(a). The Legislature intended for a sentencing judge to have discretion to sentence convicted defendants to an extended term in this exact scenario.

The judge also properly concluded that the aggravating factors substantially outweighed the mitigating factors. Regarding aggravating factor three, "it cannot be disputed" that a sentencing court can base its finding "on assessment of a defendant beyond the mere fact of a prior conviction, or even in the absence of a criminal conviction." State v. Thomas, 188 N.J. 137, 154 (2006); see also State v. Varona, 242 N.J. Super. 474, 491 (App. Div. 1990) (finding aggravating factor three where defendant had no criminal record). The judge's reliance on defendant's extensive municipal-court record for the thirteen years prior to sentencing therefore constituted a "qualitative assessment" of defendant's history. See Thomas, 188 N.J. at 153.

The judge also exercised reasonable discretion in finding aggravating factor six. N.J.S.A. 2C:44-1(a)(6) refers not only to a defendant's "prior criminal record" but also to "the seriousness of the offenses of which defendant has been convicted." The definition of "offense" under N.J.S.A. 2C:1-14(k) includes "a disorderly persons offense or a petty disorderly persons offense." See State v. Ross, 335 N.J. Super. 536, 542 (App. Div. 2000) (finding "four disorderly persons convictions" contributed to application of aggravating factor

six). Defendant's prior municipal record runs the gamut through a variety of offenses from lewdness to probation violations to defiant trespass, thus establishing that aberrant and illegal conduct is not new to defendant. Thus, the court properly considered defendant's municipal court record when assigning great weight aggravating factor six.

It was entirely consistent for the judge to find both aggravating factor six and mitigating factor one. While mitigating factor one asks whether the conduct for which a defendant has been convicted caused or threatened serious harm, aggravating factor six refers to a defendant's prior record. Thus, the fact that there was no physical harm in this instance does not conflict with the fact that defendant has an extensive prior record which includes drug offenses, multiple lewdness and trespassing adjudications, giving alcohol to a minor, a trespassing conviction, and a criminal sexual contact conviction, all of which justify placing great weight on aggravating factor six.

The judge also did not abuse his discretion in applying aggravating factor nine. Even where a defendant has no criminal record—unlike this defendant, who has two prior indictable convictions—a sentencing court may seek to deter future criminal behavior. See Fuentes, 217 N.J. at 80 ("Neither the statutory language nor the case law suggest that a sentencing court can find a need for deterrence under N.J.S.A. 2C:44-1(a)(9) only when the defendant has a prior

criminal record."). As noted, defendant's long history of a variety of municipal offenses, in addition to his two prior indictable convictions, thus supported a finding of aggravating factor nine.

As the trial judge found, those aggravating factors substantially outweighed mitigating factors one and six. As defendant notes in his brief on appeal, "the purpose of repeat-offender statutes is deterrence." (Db47). Defendant's conduct leading to his most recent convictions here, while neither causing nor threatening harm, continued a pattern of illegal behavior dating back over a decade. And while defendant attempts to downplay the theft of $168 from a small-business owner, nothing in the record indicates that he would not have stolen hundreds, if not thousands of dollars had Babcock not properly secured the remainder of any money in the store, as evidenced by defendant's failed attempt to break into the cash register during the second burglary. Mitigating factor six thus was properly afforded little consideration.

Defendant also argues that the judge used the wrong sentencing range to impose an aggregate six-year prison term. Even were this the case, which the State does not concede, defendant was still sentenced within the proper range and below the range requested by the State on both the extended prison term and extended term of parole ineligibility. A remand on this basis would thus be inappropriate. Assessing defendant's conduct in light of his extensive history

of indictable convictions and municipal adjudications, the judge did not abuse his discretion by imposing extended terms of imprisonment and parole ineligibility. Defendant's six-year prison sentence with a two-year parole-ineligibility period is reasonable and should be affirmed.

CONCLUSION

For these reasons, the State urges this Court to affirm defendant's convictions and sentence.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

DATED: July 30, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3125-22T2

		CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of New Jersey, Law Division,
v.	:	Burlington County.
FRENCH G. LEE,	:	Sat Below: Hon. Richard J. Nocella, J.S.C., & a jury
Defendant-Appellant.	:	

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY IN RESPONSE TO THE ACLU-NJ AMICUS CURIAE BRIEF

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July 30, 2024

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COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS

The State relies on the counterstatements of procedural history and facts set forth in its main response brief, dated July 30, 2024, adding the following.

On May 23, 2024, the American Civil Liberties Union – New Jersey (ACLU) filed an amicus curiae letter brief on behalf of Dr. Adele Quigley-McBride. (Ab). On June 20, 2024, this Court entered an Order granting Dr. Quigley-McBride's motion to appear as amicus curiae and file a brief in this case. The Order also allowed the parties to submit response briefs on or before July 5, 2024. (Paa1).[1] The State filed an extension motion on July 5, 2024.

[1] The following citation form is used:

Ab – Dr. Quigley-McBride's amicus brief
Pb – State's main response brief
Paa – appendix to this brief

LEGAL ARGUMENT

POINT I

AMICUS'S BRIEF IMPROPERLY FUNCTIONS AS INTRODUCTION OF EXPERT EVIDENCE FOR THE FIRST TIME ON APPEAL.

Dr. Quigley-McBride's amicus brief, citing approximately twenty studies outside the record and on which no opportunity for cross-examination was available—in addition to the studies cited in defendant's brief which are outside the record—expands on defendant's arguments relating to fingerprint analysis that were properly rejected by the trial court. See Pb 8-13. Like the citation of those studies by defendant for the first time on appeal, Dr. Quigley-McBride's brief functions to introduce expert testimony for the first time on appeal and should not influence this Court's review of defendant's trial.

Appellate courts typically "confine[] [themselves] to the record." State v. Harvey, 151 N.J. 117, 201-02 (1997). In Harvey, our Supreme Court granted the State's motion to strike a letter from a professor (outside the trial record) appended to defendant's appellate brief regarding a margin of error and confidence interval related to statistical analysis, which was at issue in that case. Id. at 201. The Court reasoned that appellate courts "may review scientific literature and judicial opinions . . . to determine whether a technique is generally accepted," but such a review does not "invit[e] the parties to supplement the

record with additional expert testimony." Id. at 202. It clarified that "[t]he place to introduce expert testimony is at trial, where the expert is subject to cross-examination, the opposing party can introduce contradictory expert testimony, and the trial court can assess the experts' credibility." Ibid.

Dr. Quigley-McBride's brief here exists for the same purpose as the professor's letter in Harvey and the studies appended to defendant's principal brief: to introduce expert evidence without the potential pitfalls of calling an expert witness to the stand in front of the jury. Indeed, defendant called no such witness to testify in support of his argument—raised and rejected repeatedly by judge and jury—that fingerprint-analysis evidence is unreliable to identify the perpetrator of a crime. Dr. Quigley-McBride, the co-author of a study defendant cites for the first time on appeal, cannot now inject expert testimony into a cold record. Thus, her brief should not impact this Court's decision as to whether the trial court below erred at any stage of trial with regard to fingerprint-analysis evidence. As explained more fully in the State's principal response brief, the court admitted that evidence to the proper extent at trial.

POINT II[2]

FINGERPRINT EVIDENCE HAS BEEN DEEMED RELIABLE IN NEW JERSEY FOR OVER A CENTURY AND REMAINS SO.

Dr. Quigley-McBride's amicus brief regarding people's attitudes toward forensic evidence finds absolutely no support in the extensive judicial history in which courts have used fingerprinting evidence to identify the perpetrator of a crime. Indeed, Dr. Quigley-McBride acknowledges that no support in the law exists by choosing not to cite to a single legal document—no case, statute, court rule, or any other legal source, apart from one law-review article—over her eighteen-page amicus brief. Instead, she cites to books and scholarly articles in support of her position that fingerprint-analysis evidence (and forensic evidence as a whole) is unreliable.[3] Because Dr. Quigley-McBride's cited documents have not been adopted by any New Jersey court, the Legislature, the Committee on Model Criminal Jury Charges, or any other legally authoritative body, this

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[2] This point responds to both Point I and Point II of the amicus brief.

[3] As noted in Point I of this brief, Dr. Quigley-McBride cites approximately twenty books and studies not cited in defendant's principal brief. None of those documents have been appended to her brief. While abstracts were publicly available for most, the State was only able to locate through an independent search about half of the documents in full. The State has thus been unable to review the methodologies used and conclusions reached in many of those studies in order to properly respond to their purported findings.

Court should instead find that fingerprint-analysis evidence remains reliable.

First, Dr. Quigley-McBride's amicus brief fails to put forth a legal argument. The purpose of an amicus curiae is to "assist in the resolution of an issue of public importance." R. 1:13-9(a); see also State v. Tedesco, 214 N.J. 177, 188 (2013). Amicus briefs "shall comply with all applicable rules" governing parties' briefs, R. 1:13-9(b), which include that such briefs contain a legal argument. See R. 2:6-2(a)(6) ("[T]he brief of the appellant shall contain . . . [t]he legal argument for the appellant . . . ."); R. 2:6-4(a) ("[T]he respondent's brief shall conform . . . to the requirements of R. 2:6-2."). The amicus brief contains only a sole amorphous suggestion in her conclusion that the effect of jurors' purported "preexisting beliefs" on forensic evidence "can be mitigated with research-based approaches to voir dire, cautionary and limiting instructions, and imposing limits on how forensic results are communicated." (Ab18). Instead, as explained, the brief only functions as an attempt to introduce expert testimony for the first time on appeal. Without any legal contention or concrete suggestion, amicus does not provide "the court with information pertaining to matters of law about which the court may be in doubt." Keenan v. Bd. of Chosen Freeholders, 106 N.J. Super. 312, 316 (App. Div. 1969).

Nevertheless, Dr. Quigley-McBride cannot use legal support to refute the trial judge's decisions because New Jersey has a long history of deeming

fingerprint evidence reliable. See, e.g., State v. Cierciello, 86 N.J.L. 309, 313-15 (E. & A. 1914) (finding "no ground for error" if properly obtained fingerprint was used as trial evidence). Our Supreme Court has also repeatedly found such evidence reliable for decades after Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), which announced a requirement that the "science underlying the proposed expert testimony has 'gained general acceptance in the particular field in which it belongs.'" State v. J.L.G., 234 N.J. 265, 280 (2018) (quoting Frye, 293 F. at 1014); see also State v. Cary, 49 N.J. 343, 355 (1967) ("New Jersey was an early state in the recognition of fingerprint evidence, a type of investigative aid which now possesses unquestioned value.") (citation omitted).

In Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993), the United States Supreme Court replaced Frye. After Daubert, where an expert is offered to testify to "scientific knowledge" to "assist the trier of fact to understand or determine a fact in issue," four non-exhaustive factors help guide the jury:

> (1) whether the scientific theory or technique can be, or has been, tested; (2) whether it "has been subjected to peer review and publication"; (3) "the known or potential rate of error" as well as the existence of standards governing the operation of the particular scientific technique; and (4) general acceptance in the relevant scientific community.
>
> [State v. Olenowski, 253 N.J. 133, 147 (2023) (quoting Daubert, 509 U.S. at 593-94).]

Even after Daubert, courts around the country continued to affirm the

reliability of fingerprinting evidence. See, e.g., United States v. Mitchell, 365 F.3d 215, 244-46 (3d Cir. 2004); United States v. Crisp, 324 F.3d 26, 266 (4th Cir. 2003) (stating federal appellate courts addressing fingerprint evidence admissibility after Daubert have "found such evidence admissible"); United States v. Baines, 573 F.3d 979, 989-92 (10th Cir. 2009) (same); United States v. Abreu, 406 F.3d 1304, 1307 (11th Cir. 2005) (same); United States v. Sherwood, 98 F.3d 402, 408 (9th Cir. 1996) (same); United States v. Spotted Elk, 548 F.3d 641, 663 (8th Cir. 2008) (finding Daubert hearing unnecessary where expert had extensive training and used acceptable methods); United States v. Pena, 586 F.3d 105, 110-11 (1st Cir. 2009) (finding the ACE-V method satisfies Daubert); United States v. Straker, 800 F.3d 570, 631-32 (D.C. Cir. 2015) (same); United States v. Herrera, 704 F.3d 480, 485-87 (7th Cir. 2013) (same).[4]

In Olenowski, our Supreme Court clarified that moving forward in criminal cases, courts would analyze "testimony based on scientific knowledge" under the factors outlined in Daubert. 253 N.J. at 151-54. However, the Court

[4] Further, while the State acknowledges that unpublished opinions cannot "constitute precedent or be binding on any court," R. 1:36-3, recent New Jersey cases addressing ACE-V and latent-print analysis in the context of reliability challenges found them sufficiently reliable. See State v. McKoy, No. A-2553-19 (App. Div. Nov. 28, 2022); State v. Monell, No. A-4419-18 (App. Div. Nov. 15, 2021); State v. Davis, No. A-4176-17 (App. Div. July 15, 2020). (Pa7-85). The State is not aware of any contrary unpublished authority. See R. 1:36-3.

explained that any evidence previously validated under the former Frye "general acceptance in [a] particular field" test remains admissible and reliable unless "the scientific reliability underlying the evidence has changed." Id. at 154.

Dr. Quigley-McBride cites one law-review article in her entire brief which references a single out-of-state case, State v. McPhaul, 808 S.E.2d 294 (N.C. Ct. App. 2017), and fails to bolster her position. See Brandon L. Garrett, The Reliable Application of Fingerprint Evidence, 66 UCLA L. Rev. Discourse 64 (2018); (Ab12). In McPhaul, the North Carolina Court of Appeals ruled that the trial court abused its discretion by admitting expert latent-fingerprint testimony. 808 S.E.2d at 305. There, as Garrett notes, "[t]he defendant did not challenge the general reliability of fingerprinting evidence." Garrett, The Reliable Application of Fingerprint Evidence, at 74. Instead, the McPhaul panel held that the expert failed to explain how she applied her general methodology to make "her actual conclusions in this case," violating the North Carolina evidence rule requiring same. 808 S.E.2d at 305 (quoting N.C.R.E. 702(a)(3)). It determined that in doing so, the expert "implicitly asked the jury to accept her expert opinion that the prints matched." Ibid. The panel nevertheless found that the error was harmless and affirmed defendant's relevant convictions. Ibid.

Here, Lieutenant Wiltsey demonstrated for the jury exactly how he reached his conclusions by comparing the latent fingerprints with defendant's

known exemplar at trial. There is thus no "analytical gap between the data and the opinion proffered" that concerned the McPhaul panel. Id. at 303-04. Indeed, Garrett laments McPhaul's limited application, suggesting that the panel "could have been more detailed in its reasoning" by discussing "the PCAST report . . . [and] studies of error rates in latent fingerprinting." The Reliable Application of Fingerprint Evidence at 76. While the parties briefed and argued the impact of those reports before the panel, id. at 75, the court tellingly chose not to address them. The Garrett article—the sole legal document cited by amicus—is therefore undergirded by a distinguishable out-of-state case predicated only on its facts and does not undercut a century of law finding such evidence reliable.

Over and over, for decades, courts have deemed fingerprint-analysis evidence generally, and the ACE-V method specifically, to be reliable. Olenowski did not change that determination. Dr. Quigley-McBride cites studies and reports going back to the 1970s and yet cannot point to a single case, legislative action, or even an indication from a body like the Committee on Model Jury Charges, in New Jersey or anywhere else, that has accepted her view. Her amicus brief should therefore not affect this Court's decision as to whether Lieutenant Wiltsey's testimony was properly admitted under N.J.R.E. 702. As explained in the State's main response brief, the trial judge did not abuse his discretion by admitting that testimony to the extent he did at trial.

CONCLUSION

For the foregoing reasons, and for the reasons stated more fully in the State's main response brief, the State urges this Court to affirm defendant's convictions and sentence.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

DATED: July 30, 2024

ORDER ON MOTION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003125-22

STATE OF NEW JERSEY
V
FRENCH G. LEE

MOTION NO.: M-005127-23
BEFORE: PART I
JUDGE(S): HEIDI W. CURRIER

MOTION FILED: 05/23/2024 BY: ADELE QUIGLEY-MCBRIDE
ANSWER(S) FILED: BY:

SUBMITTED TO COURT: June 20, 2024

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 20th day of June, 2024, HEREBY ORDERED AS FOLLOWS:

MOTION BY MOVANT

MOTION TO APPEAR AS AMICUS CURIAE LIMITED TO THE SUBMISSION OF THIS BRIEF GRANTED AND OTHER

SUPPLEMENTAL: Optional responsive briefs are due July 5, 2024 not to exceed ten pages.

FOR THE COURT:

Heidi W Currier

HEIDI W. CURRIER, P.J.A.D.

19-01-00012-I BURLINGTON
ORDER - REGULAR MOTION
EB

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3125-22T2

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Burlington County.
FRENCH G. LEE,	:	
Defendant-Appellant.	:	Indictment No. 19-01-00012-I
	:	Sat Below:
	:	Hon. Richard J. Nocella, J.S.C. and a Jury.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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DEFENDANT IS CONFINED

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6T – March 14, 2023 (trial)
7T – March 15, 2023 (trial)
8T – May 12, 2023 (sentencing)
9T – May 26, 2023 (sentencing)
PSR – presentencing report

PRELIMINARY STATEMENT

On two separate occasions in September of 2018, the Wing King in Moorestown was entered without permission. The first time, on September 28, a bag of change was stolen. The second time, on September 30, nothing was taken. No one saw the intruders. No clear surveillance captured their faces, and no one identified them from the surveillance. No one's home was ever searched for the proceeds, and no one's phone was ever searched to reveal if that person had been around the Wing King at the relevant time. No one confessed to the crimes.

In the absence of all of these forms of proof, the only evidence of identity presented by the State was the opinion of a fingerprint examiner that defendant French Lee left latent fingerprints at the scenes. The defense first moved to exclude the evidence as unreliable. The trial court erred in summarily denying this motion without considering the correct legal test. This error alone requires reversal.

After the motion to exclude was denied, counsel attempted to make sure the fingerprint evidence was handled in a way that comported with our knowledge of the reliability of fingerprint evidence and its effect on a jury. But the defense attempts were rebuffed. First, the defense requested that prospective jurors be asked about their beliefs about the reliability of fingerprint evidence.

It was essential to discern if any jurors had a preexisting belief that fingerprint evidence is infallible, because that belief is both mistaken and prevalent. Further, studies show that cross-examination cannot deter jurors who already believe in the infallibility of such evidence. Failing to make sure that the jury as empaneled did not have people on it who would automatically assume that the fingerprint examiner's opinion was correct and be unable to consider any information to the contrary violated Lee's right to a fair trial.

Second, the defense requested that the fingerprint examiner not testify beyond the bounds of what is demonstrably reliable. There is no basis to claim that a fingerprint examiner's conclusion is absolutely correct. Fingerprint examination is subjective and subject to error. However, the fingerprint examiner testified over and over again that Lee "was the source" of the fingerprints found at the scene, that Lee "made" those fingerprints, and that his work was checked by another examiner, which eliminates all possibility of error. This testimony significantly overstated the reliability of the examiner's opinion and understated the risk of error in fingerprint analysis, also violating Lee's right to a fair trial.

Last, the defense requested an instruction that would guide the jury's consideration of the fingerprint evidence. The defense suggested that the jury be told that fingerprint examination is a subjective discipline, that it is not

infallible, and that there is a risk of error in the examiner's conclusion. The trial court declined to give any instruction about the fingerprint evidence. The refusal to do so deprived the jury of the crucial guidance it needed to assess the State's case and violated Lee's right to a fair trial.

At each step along the way, the fingerprint evidence was mishandled in this case. Each error in handling this evidence unduly bolstered the State's case, leaving a jury already predisposed to believe conclusions reached by a fingerprint expert (as is the population at large) with testimony that made it seem like this specific fingerprint expert's conclusion that Lee was the source of the fingerprints at the scene was unassailable. Lee did not have a fair trial. His convictions must be reversed.

PROCEDURAL HISTORY

Burlington County Indictment Number 2019-01-12-I charged French Lee with two counts of third-degree burglary, contrary to N.J.S.A. 2C:18-2a(1), which allegedly occurred on two separate dates. (Da 1-2)

Trial began before the Hon. Richard J. Nocella, J.S.C., and a jury on March 7, 2023. (4T) On March 15, Lee was convicted of all counts. (7T 42-1 to 14; Da 3) On May 1, 2023, Lee was sentenced to two concurrent terms of six years in prison with a two-year period of parole ineligibility. (5T 13-16 to 22; Da 4-6) A notice of appeal was filed on February 23, 2023. (Da 7-9)

STATEMENT OF FACTS

On September 28, 2019, at 3:51 a.m., Office Daniel Pascal of the Burlington City Police Department responded to a call for service and arrived a restaurant in Moorestown called Wing King. (4T 61-9 to 20) Pascal arrived five minutes after he received the call, observed that the lights were on and that a screen had been removed from a window, but did not see anyone inside. (4T 62-1 to 68-24) Footage retrieved from a camera inside the Wing King showed that at 3:40 in the morning on September 28, a person climbed in the window, went to the counter area, and took a bag that contained $168 in change from the top of the safe. (5T 10-8 to 11-16)

Two days later, on September 30 at 4:51 a.m., Officer William Mann of the Moorestown Police Department received a call for service and went to the Wing King. (4T 88-1 to 6) When he arrived a few minutes later, there was an alarm going off, no sign of forced entry, and no one in the vicinity. (4T 88-10 to 89-6) Footage retrieved from a camera inside the Wing King showed that at 4:42 in the morning on September 30, a person climbed in through a window and lifted up the cash register. (4T 90-25 to 93-25) The intruder went to the safe, but did not obtain anything either from the safe itself and there were no unsecured items around the safe. (5T 19-4 to 24)

The owner of the Wing King, Michael Babcock, watched the video and opined that the footage of the second night "looked like the same individual that was there two days prior decided to come back." (5T 16-12 to 25) Babcock did not recognize the individual on either video but testified that he thought they were the same. (5T 17-1 to 18-24) This inappropriate opinion testimony is the subject of Point II, infra. Officers did not go to any other businesses nearby to retrieve any other surveillance footage. (5T 75-15 to 78-17)

Officer Jason Burk of the Moorestown Police Department arrived at the scene on September 28 and tried to develop latent prints. (5T 32-9 to 37-10) He lifted a print from the pizza oven. (5T 45-9 to 13) Burk arrived at the Wing King again on September 30. (5T 51-13 to 18) He viewed the surveillance footage from that morning, which, in his opinion, depicted a similar intruder: "The shirt was similar and so was the phone on the hip." (5T 54-1 to 3) This inappropriate opinion testimony is also the subject of Point II, infra. Burk was able to lift four latent prints from the bottom of the cash register. (5T 61-21 to 23) All five prints lifted on both nights were submitted to the New Jersey State Biometric Unit Laboratory for comparison in an Automatic Fingerprint Identification Search system. (5T 13-15)

Lieutenant Michael Wiltsey of the Burlington County Prosecutor's Office testified as an expert in latent fingerprints. His testimony and other issues about

the fingerprint evidence is the subject of Point I, infra. Wiltsey has no degree in biology, statistics, or forensic science, and he is not certified by the International Association of Identification. (6T 19-5 to 21-6) He compared the latent prints found at the scene after AFIS had returned a match and after Lee had already been indicted. (6T 51-1 to 16, 76-13 to 21) He was not asked to compare the latent prints to any other potential matches, including the other candidates suggested by AFIS. (6T 110-3 to 19)

After explaining the ACE-V methodology he uses when undertaking fingerprint comparison, Wiltsey testified the "science of fingerprints" allows him to "determine source identification[,] which in fingerprint examination language and identification means that it is your opinion that the two prints originated from the same source." (6T 32-17, 44-8 to 14) He went on to opine that "all four of these latent impressions were identified as originating from the same source as the known exemplars of French Lee." (6T 55-24 to 56-1) He repeated this "same source" conclusion multiple times. (6T 55-24 to 56-1, 67-1 to 6, 72-1 to 5, 73-10 to 13) Wiltsey also testified that he identified each latent print as a specific finger "of French Lee." (6T 74-1 to 24) When asked by the prosecutor, "[D]id the defendant French Lee make the latent impressions contained on S-34(a) through S-34(d)?", Wiltsey said "yes." (6T 56-17 to 21) Wiltsey also testified that his conclusions were reviewed independently by a

verifier, that he has "never been involved in a situation where the verification process resulted in someone refuting the findings of the original examiner[,]" and that studies show that the verification process catches all false positive errors. (6T 45-4 to 7, 74-74-25 to 75-1, 111-8 to 15)

No other evidence of the identity of either intruder was produced by the State.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S IMPROPER HANDLING OF FINGERPRINT EVIDENCE DENIED DEFENDANT A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTIONS. (1T 6-1 to 32-11, 6T 6-6 to 20)

The only evidence in this case that inculpated Lee was the fingerprint comparison. After first moving to exclude any fingerprint expert testimony in its entirety, defense counsel attempted to ensure that this evidence was handled appropriately by the judge, and at every turn counsel was rebuffed. Fingerprint analysis is a subjective discipline that has errors. If the expert testimony was to be admitted at all, it had to be carefully managed, which was not done in this case. The failure to ensure that the jury would be capable of considering evidence of the discipline's unreliability, to ensure that the examiner did not testify beyond the bounds of reliable science, and the failure to guide the jury's

considering of the weight of the supposed match through an appropriate jury charge violated Lee's rights to a fair trial and to due process. U.S. Const. amends. V, VI, and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10. The convictions must be reversed.

A. Fingerprint analysis is a subjective technique that is vulnerable to error.

Fingerprint analysis generally compares a "latent print," which is a "transferred impression" of a fingerprint that is "unintentionally deposited," to a "known print," which is "[t]he print[] of an individual, associated with a known or claimed identity, and deliberately recorded." Eric Holder et al., Nat'l Inst. Just., Fingerprint Sourcebook, 6-20, D-3 (2011), available at https://www.ojp.gov/pdffiles1/nij/225320.pdf . The goal is to determine whether the latent print came from the same person as the known print.

"The examination method of analysis, comparison, evaluation, followed by verification (ACE-V) is the established method for perceiving detail in two prints and making decisions." Id. at 9-3. "ACE gives the expert specific phases of examination that can be used to document the perception, information gathering, comparison, and decision-making that takes place during an examination of prints." Id. at 9-12.

Under the ACE-V methodology, the first step is the analysis phase, in which the examiner assesses each print by "systemically separating the

impression into its various components." Id. at 9-13. That means that the friction ridge details of both the latent and the known print are determined.

The next step is comparison, where the latent and exemplar are compared "to determine whether the details in two prints are in agreement based upon similarity, sequence, and spatial relationship." Ibid. "The examiner makes comparative measurements of all types of details and their sequences and configurations." Ibid. "Comparative measurements of first, second, and third level details are made along with comparisons of the sequences and configurations of ridge paths." Ibid.

The third step is evaluation, where the examiner reaches a conclusion about the relationship between two prints. "Whereas in the comparison phase, the examiner makes determinations of agreement or disagreement of individual details of the prints in question, in the evaluation phase the examiner makes the final determination as to whether a finding of individualization, or same source of origin, can be made." Ibid. There is no objective standard for how much similarity is needed for an examiner to find a match. Rather, "[t]he examiner bases decisions made during the examination upon expertise or the knowledge and beliefs from previous training, experience, understanding, and judgments of his or her own and in collaboration with other scientists." Id. at 9-16.

The final step is verification, in which the whole process is repeated by a different examiner. Id. at 9-17. Verification must be conducted in a manner "not improperly influenced by the original examiner's decisions or work products. The verifier must be able to reach an unbiased conclusion." Ibid.

Even assuming that no two people have the same fingerprints—an assumption that cannot feasibly be tested, see generally Michael J. Saks & Jonathan J. Koehler, The Individualization Fallacy in Forensic Science Evidence, 61 Vand. L. Rev. 199, 208-214 (2008)—the mere fact that each fingerprint is unique does not mean that "anyone can reliability discern whether or not two friction ridge impressions were made by the same person." National Research Council, Strengthening Forensic Science in the United States: A Path Forward 144 (2009), available at https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf. "Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused[.]" Ibid. See also President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 61 (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf ("The issue is not whether objects or features differ; they surely do if one looks at a fine enough level. The issue is

how well and under what circumstances examiners applying a given metrological method can reliably detect relevant differences in features to reliably identify whether they share a common source.").

Moreover, the ACE-V method is inherently subjective. There is no objective determination for how many or what kinds of similarities are sufficient to declare a "match" between two prints. NRC Report at 140 ("[F]riction ridge analysis relies on subjective judgments by the examiner."); PCAST Report at 101 ("[L]atent print analysis . . . depends on subjective judgment."). Subjective judgments are "more susceptible to human error, bias, and performance variability across examiners." PCAST Report at 47.

"[T]he only way to establish the scientific validity and degree of reliability of a subjective forensic feature-comparison method—that is, one involving significant human judgment—is to test it empirically by seeing how often examiners actually get the right answer." President's Council of Advisors on Science and Technology, An Addendum to PCAST Report on Forensic Science in Criminal Courts 1 (2017) (emphasis in original), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf . Such empirical testing has been done to a somewhat limited degree for fingerprint analysis. In 2016, PCAST noted that there were "only two black-box studies that were intentionally and

appropriately designed to assess validity and reliability." PCAST Report at 91. In one study, there was a false positive rate of "1 error in 604 cases, with the upper bound [of the 95% confidence interval] indicating that the rate could be as high as 1 error in 306 cases." Id. at 94. The second study found 42 false positives among 995 conclusive examinations, for an upper-bound of the 95% confidence interval false positive rate of 5.4%, or 1 in 18. Id. at 95. "To be considered reliable, the [false positive rate] should certainly be less than 5 percent and it may be appropriate that it be considerably lower, depending on the intended application." PCAST Report at 152.

The error rates for fingerprint analysis skyrockets when "close non-matches" (CNMs) are considered. Close non-matches arise when "two prints from different people have many common features and few discernible dissimilar features." Jonathan J. Koelher & Shiquan Liu, Fingerprint Error Rate on Close Non-matches, 66 J. Forensic Sci. 129, 130 (2020) (Da 10-15). "The risk of encountering a CNM is heightened when large databases are searched for the source of a print." Ibid. Such a database was used in this case: the latent print was sent through AFIS, a match to Lee was presented by that program, and only then did Wiltsey conduct a comparison. (6T 51-1 to 16, 76-13 to 21) "The use of these databases, particularly large ones, may increase the risk of a false identification because they may contain hard-to-distinguish CNM prints." Ibid.

A study of close non-match comparisons found a false-positive error rate of 15.9% in one set of prints and 28.1% in another. Id. at 131. Concerningly, "[d]atabase simulations show that the number of [close non-matches] increases faster than the chance that the suspect print will be in the database." Id. at 132. In other words, the risks of false positives cannot be mitigated by expanding the pool of latents available for comparison. Such an expansion actually increases the risk of false positives.

Other than the use of a database, discussed further in subsection B, infra, many factors impact the accuracy of a particular fingerprint analysis. The fingerprint itself matters. The quality and quantity of detail in the latent print may be affected by many different factors, including the robustness of the ridge structure, the presence of oil or sweat, the mechanics of touch, and the nature of the surface touched. NRC Report at 137. The proficiency of the individual examiner matters. PCAST Report at 101. And an examiner's exposure to potentially biasing information matters. Ibid. Examiners' judgments can be influenced by knowledge about other forensic examiners' decisions, for instance. One study showed that information about the police investigation surrounding a case impacts the likelihood that an examiner will find a match. Itiel Dror et al., Contextual Information Renders Experts Vulnerable To Making Erroneous Identifications, 74 Forensic Sci. Int'l 74 (2006) (Da 16-20).

In sum, fingerprint analysis is a technique that, like all techniques, is subject to error. Nonetheless it is admitted into our courts unabated, without there ever having been a single published decision finding fingerprint analysis reliable after a full evidentiary hearing. The risk of error is particularly high in cases such as this one, in which the fingerprint comparison stemmed from a database search. As explained below, the trial court failed to appreciate these facts in first determining that the fingerprint evidence would be admissible at trial and then failing to handle the evidence in a measured manner, assuring that the limitations of that evidence are understood by the jury and conveyed by the examiner.

B. Because the State failed to carry its burden to demonstrate the reliability of fingerprint analysis that originates with a database search, no fingerprint analysis testimony should have been admitted at trial.

As with much forensic evidence, fingerprint examination evidence has been admitted for decades without its fundamental assumptions being assessed by our courts. This lack of scrutiny is contrary to our courts' "important role as gatekeepers," in which they are entrusted with preventing unreliable expert testimony from entering our courtrooms. State v. Olenowski, 253 N.J. 133, 154 (2023). "Reliability is critical to the admissibility of expert testimony. Indeed, an expert opinion that is not reliable is of no assistance to anyone." Id. at 150. (internal quotation marks omitted). The proponent of expert testimony has the

burden to "clearly establish" that the testimony is sufficiently reliable to be admitted under N.J.RE. 702. State v. Cassidy, 235 N.J. 482, 492 (2018). The State failed to meet that burden here.

The defense moved to preclude any testimony about fingerprint analysis, arguing that it is a subjective and unreliable method. (1T 6-1 to 13-12) In these arguments, the defense relied on the NRC and PCAST reports to demonstrate that ACE-V is a subjective discipline without a uniform set of guidelines about when a fingerprint examiner should declare a match and that the "standard is simply you know it when you see it and that's a problem." (1T 6-1 to 9-5) The defense argued that the error rates reported by PCAST undermined the asserted reliability of the field. (1T 10-11 to 19) The court denied that motion without a hearing, merely holding that because ACE-V has been used "for over 100 years" and other courts have found fingerprint evidence to be reliable, that the evidence would be admissible in this case. (1T 20-10 to 24) That analysis was insufficient, failing to actually examine the reliability of the method upon which the State's entire case rests.

A court should hold a testimonial hearing whenever "the qualification of a person to be a witness, or the admissibility of evidence. . . is in issue." N.J.R.E. 104(a). This is especially true when the reliability of a proposed topic of expert testimony or the reliability of an individual expert's testimony is at issue. State

v. Torres, 183 N.J. 554, 567 (2005); State v. Mervilus, 418 N.J. Super. 138, 139 (App. Div. 2011). "If a party challenges an expert opinion pursuant to N.J.R.E. 702, the "trial court should conduct a hearing under N.J.R.E. 104 concerning the admissibility of the proposed expert testimony." State v. J.R., 227 N.J. 393, 409 (2017) (internal quotation marks and alterations omitted). "In that setting, the proponent of the expert testimony may demonstrate that the expert's methodology meets the benchmark of N.J.R.E. 702, and the opposing party may challenge the reliability of the expert's opinion." Ibid. Denying the motion without assessing the scientific basis of the State's evidence was error requiring reversal or, at the very least, a remand to develop an evidentiary record about the reliability of the field.

Moreover, instead of merely dismissing the request to exclude the testimony out of hand, the court was required to analyze the Olenowski factors: (1) whether the technique has been tested; (2) the error rate and the existence of standards governing the technique; (3) whether the technique has been subjected to peer review and publication; and (4) whether the technique is generally accepted in the relevant scientific communities. Olenowski, 253 N.J. at 147. The court's failure to consider these factors is an abuse of discretion, requiring reversal.

Further, there is serious cause for concern about the reliability of fingerprint analysis that stems from a database search. As explained above, the use of a database search to find a candidate for analysis leads to "close non-matches" (CNMs), fingerprints that look very similar to the one left behind at a scene, but are nonetheless left by another person. In other words, not only are database searches likely to give rise to the most complicated prints to analyze, but they will give rise to a fingerprint that looks very similar to the latent. To make matters worse, if the actual person who left the fingerprint is not in the database, the fingerprint of an innocent person will not only be presented as a match, but it will be incredibly difficult for an examiner to realize he is dealing with a false positive. In short, the method used in this case—developed suspect prints for ACE-V comparison through a database search—is unreliable and inadmissible under N.J.R.E. 702 and Olenowski.

The highest-profile wrongful identification of a suspect based on fingerprint analysis, the case of Brandon Mayfield, dramatically shows the risks with this method. After terrorists detonated bombs in trains in Madrid, the FBI ran a fingerprint found on a bag of detonators through the FBI's Integrated Automated Fingerprint Identification System (IAFIS). Office of the Inspector General, U.S. Dep't. of Justice, A Review of the FBI's Handling of the Brandon Mayfield Case 1 (March 2006), available at

https://oig.justice.gov/sites/default/files/archive/special/s0601/final.pdf. A list of 20 candidate prints was returned by IAFIS. Ibid. An FBI examiner concluded that the latent print on the detonator was Mayfield's. Ibid. A second examiner verified this conclusion and agreed. Id. at 2. The Spanish National Police conducted a comparison that showed that Mayfield was excluded as the person who left the print, but the FBI then retained an "independent expert to review the FBI's fingerprint identification," who "concurred with the FBI's identification." Id. at 2-3. Even when faced with, in the words of a federal investigator, "no corroborating evidence linking Mayfield to the bombing," no evidence that Mayfield traveled, and the fact that Mayfield had an expired passport, the FBI contained to commit to his guilt due to the fingerprint, speculating that Mayfield touched the item in the United States and then it was transported abroad. Id. at 58. The Spanish police, undeterred by the FBI's fixation on Mayfield, developed a different, and correct suspect, leading to the proceedings against Mayfield to be withdrawn after he had been incarcerated for two weeks. Id. at 3, 75.

Although many issues led to the wrongful identification and pursuit of Mayfield—including the cognitive bias of the reviewers—the Office of the Inspector General concluded that the use of a database search was one of them. OIG explained that "[w]orking with databases containing the fingerprints of

more than 47 million individuals (i.e., more than 470 million separate prints), IAFIS is designed to find not only the source of the print (if it is in the database), but also the closest possible nonmatches." Id. at 137 (emphasis added). Although the OIG maintains that each person's fingerprints are unique, it conceded that at the very least, some "may be sufficiently close to confuse an examiner dealing with a latent of imperfect clarity." Ibid. Unfortunately for the reliability of a field that often relies on database searches to initiate an investigation, a "search of a huge database is designed to find those prints most likely to confuse an examiner." Ibid. The OIG cautioned that "[t]he likelihood of encountering a misleadingly close non-match through an IAFIS search is therefore far greater than in a comparison of a latent print with the known prints of a suspect whose connection to a case was developed through an investigation." Ibid. See also ibid. ("IAFIS is designed to find not only the source of the print (if it is in the database), but also the closest possible non-matches.").

This critical question of the reliability of fingerprint analysis that stems from a database search was not addressed in the wo studies PCAST relied on to find that latent print analysis had some foundational validity ("albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis"). PCAST Report at 101. In other words, there has been very meager

testing of the reliability of this kind of fingerprint analysis. The limited studies that do exist show significant cause to conclude that fingerprint analysis is not reliable under these circumstances. In addition to the study discussed above, which revealed staggering false positive rates of 15.9% and 28.1% by experienced, high-level fingerprint examiners who compared a CMN generated by a database to a latent print, Koelher & Liu, supra, other studies show that when the source of a latent print is missing from a database, a database search nonetheless produces candidates that score very high in their similarity to the latent, sometimes scoring as high or higher than the highest scoring candidate when the source of latent was in the database. Simon Cole et al., Beyond The Individuality Of Fingerprints: A Measure Of Simulated Computer Latent Print Source Attribution Accuracy, 7 L. Prob. & Risk 165, 173–75 (2008) (Da 21-45). See also Kang Li et al., The Influence of Close Non-Match Fingerprints Similar in Delta Regions of Whorls on Fingerprint Identification, 66 J. Forensic Sci. 1482, 1487-1491 (2020) (Da 46-58) (a study running latent prints through AFIS in which both the true source and a CNM were in the database found that in 9.7% of the searches, the databank returned a close non-match but not the true match within the search results, and in another 5.3% of the searches, the database produced both the close non-match and the true match as candidates. In the latter cases, the close non-match sometimes ranked higher than the true match.);

Thomas Busey et al., The Relationship Between Sensitivity, Similar Non-Matches and Database Size in Fingerprint Database Searches, 13 L. Probability & Risk 151, 152 (2014) (Da 59-76) (determining that the risk of a false identification varies with database size, because the size changes the both the risk that a close non-match will be in the database, and the probability that the correct fingerprint will be in the database).

In sum, database searches, such as occurred in this case, create an unacceptably high risk of misidentification. Database searches will frequently produce close non-matches to the actual source of the fingerprint, which a human examiner will have a hard time differentiating from the actual source, especially with cognitive bias that encourages the examiner to agree with the database search. The true error rates in these situations are unknown, because there has been insufficient testing of these circumstances. What is known about the risks of misidentification is sufficient to find that the State has failed to meet its burden to demonstrate reliability and admissibility.

"Properly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert . . . . Difficult as it may be, the gatekeeping role must be rigorous." In re Accutane Litig., 234 N.J. 340, 346, 390 (2018). The trial court erred in dismissing Lee's motion out

of hand. Lee's convictions must be reversed. In the alternative, the matter must be remanded for an evidentiary hearing.

C. The failure to properly address the fingerprint testimony at voir dire, to limit the examiner's testimony at trial, and to charge the jury on the limits of such testimony deprived defendant of his rights to an impartial jury and a fair trial.

Because the State failed to demonstrate the reliability of fingerprint comparisons that are generated from database searches, the evidence should have been excluded in its entirety. However, given that the fingerprint evidence was admitted, it needed to be handled with nuance throughout the trial in order to ensure that the trial was fair. The failure to do so at each junction—voir dire, trial testimony, and jury charges—requires reversal of Lee's convictions.

i. The refusal to voir dire prospective jurors about their preconceived ideas about the reliability of fingerprint examination requires reversal.

Before trial, Lee requested that the prospective jurors be asked during voir dire if they "believe that fingerprint analyses are reliable." (1T 32-1 to 11) He noted that "people are of the belief that fingerprint analysis is infallible" due to exposure to that assertion "through pop culture and CSI." (1T 10-20 to 11-3) A decision was not made on the record, but no question about jurors' beliefs about the reliability of fingerprint analysis was not during voir dire. (2T) The failure to ask any sort of question that would allow defense counsel to assess whether

a juror had any preexisting bias that would prevent him from considering whether the fingerprint analysis in this case was deprived Lee of a fair trial.

A defendant is entitled to be tried "before an impartial jury." State v. Loftin, 191 N.J. 172, 187 (2007). As part of that entitlement, a defendant is allowed to ask questions that enable him to determine whether a juror is not impartial. "Our case law consistently endorses voir dire questions that probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially." State v. Little, 246 N.J. 402, 417 (2021) (internal quotation marks omitted). "[I]nquiring about a juror's ability to follow the trial judge's instructions or to deliberate with an open mind" is entirely appropriate, "so long as the questions do not indoctrinate prospective jurors about the issues that the jury will decide." Ibid. See also State v. Williams, 93 N.J. 39, 61 (1983) (the trial court's obligation "to take all appropriate measures to ensure the fair and proper administration of a criminal trial" begins with voir dire. "A vital aspect of that responsibility is to ensure the impaneling of only impartial jurors by ferreting out potential and latent juror biases").

Voir dire is appropriately used to determine whether jurors harbor preexisting notions about certain scientific fields. In a case in which testimony from a psychiatric expert was presented by the defense, this Court has held that

it was appropriate and essential in voir dire "to probe[] whether the prospective jurors had read or studied about psychology, psychiatry, medicine, or related fields, and inquire[] about the jurors' views on those sciences and whether those views would hinder the ability to follow the law as instructed by the court." State v. Murray, 240 N.J. Super. 378, 392 (App. Div. 1990). See also State v. O'Brien, 377 N.J. Super. 389, 414 (App. Div. 2004), aff'd in part relevant part, 183 N.J. 376 (2005) (approving of a judge asking in voir dire whether "they could 'accept the concept that psychiatry is a credible medical science'").

The failure to probe whether jurors already believed that fingerprint analysis was infallible or could consider evidence to the contrary requires reversal. It is very likely that prospective jurors had a preexisting, and inflated, belief in the reliability of fingerprints. One study of juror insight of scientific error rates found that a pool of jury-eligible participants estimated the misidentification rate for fingerprints to be "1 in 5.5 million." Jonathan J. Koehler, Intuitive Error Rate Estimates for the Forensic Sciences, 57 Jurimetrics 153, 162 (2017) (Da 77-92).

Thus, there is a significant risk that many jurors who were eventually impaneled would automatically assume that the fingerprint analysis is correct, regardless of any cross-examination by defense counsel. Studies have shown that "it is difficult to overcome the tendency for people to trust information from

an expert in a relevant field." Lauren Hudachek & Adele Quigley-McBride, Juror Perceptions of Opposing Expert Forensic Psychologists: Preexisting Attitudes, Confirmation Bias, and Belief Perseverance, 28 Psychol. Pub. Pol'y & L. 213, 213–14 (2022) (Da 93-105). Not only do people tend to trust that experts are correct, but "[e]xisting attitudes are persistent and difficult to change and can result in belief perseverance effects." Ibid. (emphasis in original). In other words, "[w]hen people interact with an opinion contrary to their own, they tend to discredit the opposing argument and strengthen their preexisting view. Also, they will subsequently feel even more favorable toward any new opinions they encounter that do align with their existing opinions." Ibid.

Studies demonstrate that, in fact, even robust and pointed cross-examination that is well-designed to expose weaknesses in forensic practitioners' methods has little to no power to do so, especially when experts phrase their conclusions in unshakable terms like "identification." Jonathan Koehler, Northwestern University Faculty Working Papers, If the Shoe Fits They Might Acquit: The Value of Forensic Science Testimony 25 (2011) (Da 106-152) ("There was no effect for cross examination on source confidence, source probability, guilt confidence, guilty probability, or verdict. Likewise there was no effect for cross examination across the two individualization conditions on any of the dependent measures."); Joseph Sanders, The Merits of the

Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence, 33 Seton Hall L. Rev. 913, 934-36 (2003) (concluding that multiple studies show that even robust cross examination of experts affects neither ultimate verdicts nor even juror confidence in said verdicts); Dawn McQuiston-Surrett & Michael J. Saks, The Testimony of Forensic Identification Science: What Expert Witnesses Say & What Factfinders Hear, 33 Law & Hum. Behav. 436, 439 (2009) (Da 153-170) (explain that studies find "little or no ability of cross-examination to undo the effects of an expert's testimony on direct examination, even if the direct testimony is fraught with weaknesses and the cross is well designed to expose those weaknesses.").

In short, people have a pre-existing belief in the reliability of fingerprint evidence that is not shaken by cross-examination. Therefore, the only way to make sure a jury could actually consider that the fingerprint analysis in this case might be wrong was to make sure no jurors were empaneled who had a preexisting bias that prevented them from considering the possibility of error. The trial court's refusal to do so necessitates reversal Lee's convictions.

ii. The fingerprint examiner's testimony strayed beyond the boundaries of reliability and relayed testimonial hearsay, requiring reversal.

After improperly failing to ask the jury anything about their preexisting beliefs about fingerprint testimony, the trial court further erred by denying the

defense motion to bar the fingerprint examiner from opining, without any limitation, that the latent fingerprints were left by Lee.

After the motion to exclude fingerprint expert testimony in its entirety was denied, defendant requested that the examiner be limited in his language and testify only that "the latent print and the known exemplar have similar characteristics, but that he not use language to suggest that there is an identification match, a source identification or that the latent print is from the same source as the known print[.]" (1T 23-19 to 24-4) The defense argued that such a limitation was necessary in order for the expert not to overstate the value of his opinion. The trial court initially ruled that the examiner must qualify his testimony "with language such as within a reasonable degree of probability as opposed to a 100 percent match." (1T 29-2 to 8) The trial court later reversed itself and held that it not "is not requiring or limiting the testimony of the expert." (4T 14-12 to 13) As a result, the fingerprint examiner repeatedly opined that the fingerprint "originated from the same source as the known exemplars of French Lee," and that "French Lee made the latent impression" found at the scene. (6T 55-24 to 56-1, 67-1 to 6, 72-1 to 5, 73-10 to 13)

The examiner's testimony went beyond what is scientifically supportable. His testimony gave the impression that Lee was the source of the latent print without any doubt. There was no qualification that expressed the possibility of

error or the possibility that someone else would have a very similar fingerprint. This repeated conclusion that Lee was "the source" of the fingerprint and that the fingerprints were "his," implied a total certainty in that conclusion. The Organization of Scientific Area Committees for Friction Ridge Analysis has made clear that "[a]n examiner shall not assert that a source identification is the conclusion that two impressions were made by the same source or imply an individualization to the exclusion of all other sources." OSAC, Proposed Standard for Friction Ridge Examination Conclusions 3 (2018) (Da 171-177).[1] PCAST went further, recommending that opinions regarding source attribution by examiners should be given in conjunction with information on the limitations of latent print analysis. PCAST suggested that any fingerprint testimony be "accompanied by accurate information about limitations on the reliability of the conclusion—specifically, that (1) only two properly designed studies of the foundational validity and accuracy of latent fingerprint analysis have been conducted, (2) these studies found false positive rates that could be as high as 1 error in 306 cases in one study and 1 error in 18 cases in the other, and (3)

[1] OSAC, administered by the National Institute of Standards and Technology (NIST) "and part of NIST's Forensic Science Program, was created in 2014 to address a lack of discipline-specific forensic science standards." Nat'l Institute of Standards and Technology, The Organization Of Scientific Area Committees For Forensic Science, https://www.nist.gov/organization-scientific-area-committees-forensic-science .

because the examiners were aware they were being tested, the actual false positive rate in casework may be higher." PCAST Report at 149. The testimony in this case went beyond what is supported by any relevant organization and by the evidence about the reliability of fingerprint analysis. By not limiting his testimony to that which is scientifically defensible, and not making the jury aware of the limitations of his own field and analysis, Wiltsey unfairly bolstered the weight of his conclusion.

To make matters worse, Wiltsey implied that fingerprint analysis has a zero error rate. Wiltsey stated that he "has never been involved in a situation where the verification process resulted in someone refuting the findings of the original examiner," and that studies reveal that verification "would have caught" any "false positives" that have been noted. (6T 45-1 to 7, 111-6 to 18) This testimony amounts to an assertion that fingerprint examinations that contain the final verification step never produce an inaccurate conclusion—a zero error rate. There is, of course, an error rate to all disciplines, including fingerprint examination. See United States v. Mitchell, 365 F.3d 215, 246 (3d Cir. 2004) ("[S]ome latent fingerprint examiners insist that there is no error rate associated with their activities. . . . This would be out-of-place under Rule 702."). OSAC expressly disapproves of any examiner implying that there is a zero error rate to fingerprint analysis or that it is an infallible method. As OSAC explains, "A

claim of a zero-error rate for the method is demonstrably false; errors have occurred. Because the friction ridge comparison process takes place within the mind of the examiner, there is no way to separate a method error rate from a practitioner error rate. Furthermore, as with 100% certainty, the concept of a zero-error rate is incompatible with the practice of science." OSAC, Guideline for the Articulation of the Decision-Making Process Leading to an Expert Opinion of Source Identification in Friction Ridge Examinations 9 (2017) (Da 178-194) See also Department of Justice, Approved Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline 2-3 (Da 195-197). (prohibiting DOJ experts from testifying that "two friction ridge impressions originated from the same source to the exclusion of all others," or from asserting "that latent print examination is infallible or has a zero error rate.")

Asserting that a discipline has a zero error rate is misleading and prejudicial. Simon A. Cole, More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1049 (2005) ("The potential to mislead a fact-finder by saying, 'My methodological error rate is zero, and my practitioner error rate is negligible,' is extremely high."). Wiltsey severely downplayed the well-documented risk of error in fingerprint analysis.

Given that this case rose and fell on whether the jury thought his conclusion was correct, his inappropriate testimony requires reversal.

Wiltsey also inappropriately relayed the opinion of the non-testifying verifier. Before Wiltsey's testimony, the defense objected in advance to any testimony by Wiltsey that his opinion was verified by an independent examiner, arguing that such testimony would be "a major confrontation issue." (6T 5-1 to 6-15) The trial court ruled that "if there was an independent verification or analysis, I think that person should be here to testify because obviously [the defense attorney] would have the right to question what did he do, how did he do it." (6T 6-6 to 20) Wiltsey nonetheless testified that a verifier independently reviewed his conclusion and implied that this verifier agreed with him, given that he has "never been involved" in a situation where a verifier did not. (6T 45-1 to 7, 111-6 to 18) This testimony was testimonial hearsay that should not have been admitted.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial, . . . offered in evidence to prove the truth of the matter asserted," and is inadmissible unless a recognized hearsay exception applies. N.J.R.E. 801, 802. Hearsay is testimonial when its primary purpose is to establish facts potentially relevant to later criminal prosecution. State ex rel.

J.A., 195 N.J. 324, 345 (2008). Forensic work done on behalf of the prosecution is testimonial. Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011).

Wiltsey testified that another forensic expert reviewed the fingerprints and agreed with his conclusion. That is testimonial hearsay used to establish a fact: that Lee left the fingerprint at the scene. Courts addressing this issue overwhelmingly agree. See, e.g., State v. Kiser, 2019 WL 2402962, at *8 (Tenn. Crim. App. June 6, 2019) ("[T]he import of a statement that the identification has been verified is that the identification has been deemed correct by an expert who reached the same conclusion. Moreover, the value of the verification lies in its truth. The State essentially gets two expert opinions from the testimony of one testifying expert."); People v. Pearson, 116 N.E.3d 304, 311 (Ill. App. Ct. 2018) (holding that the "verification was an out-of-court statement and it was offered to prove the truth of the matter asserted"); People v. Griffin, 985 P.2d 15, 17-18 (Colo. App. 1998) (same). Wiltsey's testimony that two other experts examined the print and agreed with his conclusion was testimonial hearsay that should not have admitted.

In sum, Wiltsey's testimony went beyond the bounds of what is scientifically reliable when he testified, without any limitation, that the prints at the scene were a "match" for Lee's and when he implied that fingerprint analysis has no error rate. His testimony that another examiner agreed with this

conclusion that the fingerprints were a match for Lee's was also beyond the bounds of permissible testimony because it was testimonial hearsay. The unfair bolstering of Wiltsey's opinion requires reversal of Lee's convictions.

iii. The trial court's refusal to charge the jury on how to consider the reliability of the fingerprint comparison requires reversal.

The defense asked that the trial court issue a jury charge about the reliability of fingerprint evidence. (Da 198) Relying on language from the NRC report, the requested instruction informed the jury that:

- "[T]he analyst employing the ACE-V method 'must make subjective assessments throughout' the process." (Da 198) (quoting the NRC Report at 142).
- "You should be aware that, regardless of what preconceptions you may have about the infallibility of fingerprinting, latent print identification is not infallible, as 'errors can occur with any judgment-based method.'" (Da 198) (quoting the NRC Report at 87, 143).
- "Even if all human fingerprint patterns are unique, 'uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source.'" (Da 198) (quoting the NRC Report at 177).

The trial court did not give this instruction nor any kind of instruction to the jury about how to consider the fingerprint evidence. The failure to give any kind of instruction to guide the jury's consideration of the reliability of this critical evidence requires reversal of Lee's convictions.

One of the most basic principles of New Jersey criminal law is that "[a]ccurate and understandable jury instructions in criminal cases are essential to a defendant's right to a fair trial." State v. Concepcion, 111 N.J. 373, 379 (1988). The charge must provide a "comprehensible explanation of the questions that the jury must determine, including the law of the case applicable to the facts that the jury may find." Ibid. (internal quotation marks omitted).

When scientific knowledge is necessary to the proper evaluation of a key piece of evidence, the court is required to instruct the jury on the relevant scientific principles. For instance, in Henderson, our Supreme Court created an obligation on trial courts to focus "the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification." State v. Henderson, 208 N.J. 208, 296 (2011). Jurors cannot be left to "divine" how to assess these identifications themselves or "glean them" through trial. Ibid. As with all jury instructions, especially as to crucial matters, it is the "court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial." Ibid. (emphasis added). See also State v. Olenowski, 255 N.J. 529, 614 (2023) (requesting that the Committee on Model Criminal Jury Charges create a charge explaining the limitations of Drug Recognition Expert testimony); State v. Townsend, 186 N.J. 473, 500 (2006) (requesting that the Committee on Model Criminal Jury Charges create a charge for the use of expert testimony concerning

the characteristics of battered women and battered woman's syndrome). Jurors are now told what the factors that are relevant to the reliability of an eyewitness identifications are, as well as that eyewitness identifications are "not foolproof" and that "research has shown that there are risks of making mistaken identifications." Model Criminal Jury Charge, Out-of-Court Identification 2 (Da 199-207).

The principles of Henderson apply here. Just like with eyewitness testimony, fingerprint analysis is a method of identification. Both forms of identification evidence can be quite compelling and believed by jurors to be far more reliable than scientific studies reveal the evidence is. Even if the trial court did not believe the defense's proposed charge was the appropriate one to give, it was obligated to determine what the appropriate charge was. Leaving the jury alone to consider the weight of the fingerprint expert testimony—especially when jurors who may have been biased to believe fingerprint analysis was infallible were not discovered during voir dire and the examiner overstated the strength of the conclusions he could reach—was inappropriate. The jury, at the very least, should have been informed that ACE-V is a subjective framework that is subject to error, and the court should have told the jury the relevant factors that lead to error, as discussed above: the quality of the print, the proficiency of the examiner, and the presence of any biasing information.

D. The inappropriate handling of the fingerprint evidence requires reversal of defendant's convictions.

This case rested entirely on the reliability of the fingerprint comparison. There was no other evidence of identity. No one identified Lee, either from the videotape or at the scene, and the police did not bother to check for any information that would corroborate or disprove that Lee was the perpetrator. Police did not seek a search warrant for Lee's house—in which proceeds from the burglary or the clothing shown on the video could be searched for—or for Lee's phone—which could reveal his location history at the time of the entries. (5T 84-17 to 87-24) Instead, the case rested entirely on Wiltsey's assertion that the prints left at the scene were Lee's. In the word of the prosecutor, "Those are French Lee's fingerprints. The overwhelming evidence presented to you makes it true that those are French Lee's fingerprints. . . . That's the testimony you heard from Lieutenant Wiltsey, an expert in the field of fingerprint analysis who has been doing that work for over two decades." (7T 10-22 to 24; See also 7T 12-1 to 5 ("The source of that print was the same source as those known exemplars, there's no dispute. There's no question that those ten prints, those ten fingerprints on the known exemplar are French Lee's. That's not in question); 7T 13-5 to 7 ("[Every print, that's what the testimony was, every print came from that man's hand. He was the source, that's what Lieutenant Wiltsey testified to.")

Despite the centrality of the fingerprint evidence, it was not handled with the nuance and care required to assure that Lee received a fair trial. First, the trial court denied a motion to exclude the testimony, without considering the appropriate legal test, without reviewing the materials put forth by Lee, and without having an evidentiary hearing. The trial court based its decision almost entirely on the fact that courts have allowed in fingerprint evidence for decades. But this Court has recently warned of the dangers of trial courts failing to embody their gatekeeping position to truly scrutinize the reliability of a technique, instead deferring to the fact that courts have admitted the evidence previously, making its future admission a fait accompli. As now-Justice Fasciale warned, "a long line of decisions uniformly in favor of a legal proposition suggests that a legal proposition is generally accepted. We are mindful, however, that in science, the repetition of authority does not automatically establish reliability[.]" State v. Pickett, 466 N.J. Super. 270, 316 (App. Div. 2021). Justice Fasciale also emphasized that the value of prior decisions admitting scientific testimony are only as good as the basis for those decisions; "a laundry list of admissibility rulings" that do not actually consider the underlying science is not a basis for admitting a scientific technique. Ibid. The trial court did not consider whether any of these other rulings considered the underlying science and failed to consider the underlying science presented by the defense.

Having determined that the evidence would come in, the court then failed to address it appropriately throughout trial. Without asking prospective jurors about their pre-existing beliefs in the reliability of fingerprint evidence, the trial court failed to ensure that the jury empaneled would actually be able to consider the possibility that Wiltsey was wrong. Without limiting Wiltsey's testimony to what is scientifically supported and without preventing him from including testimonial hearsay, the trial court allowed the State's case to be inappropriately bolstered. Without instructing the jury to approach the fingerprint testimony with some amount of scrutiny, the trial court failed to give the jury the guidance it needed as to how to approach this scientific-sounding, very confident testimony. These failures, separately and cumulatively, were not harmless beyond a reasonable doubt. State v. Macon, 57 N.J. 325, 336 (1971). Lee's convictions must be reversed.

Fingerprint analysis is subject to error. It is particularly subject to error in two of the circumstances present here: (1) where the exemplar the examiner is given for comparison was found through a search in a large database; and (2) where the examiner has biasing information available during his comparison. Wiltsey knew AFIS returned a match for Lee and he knew Lee was the suspect, at the very least. This information biases an examiner into confirming what the computer system and the prosecutors already believe.

The risk of mistaken fingerprint "matches" is not merely theoretical. In 2005, one scholar found twenty-two reported cases of misattribution and suggested they are "merely the tip of the iceberg." Cole, supra at 1017. The match in this case might be a false attribution or it might be correct. But the jury was not properly equipped to make that determination.

Lee's convictions must be reversed. In the alternative, a remand must be ordered for a full evidentiary hearing on the issues surrounding fingerprint analysis that stems from database searches and the appropriate scope of voir dire, testimony, and jury instructions that should accompany any fingerprint testimony.

POINT II

INAPPROPRIATE LAY-OPINION TESTIMONY THAT THE VIDEO OF EACH INCIDENT DEPICTED THE SAME PERPETRATOR REQUIRES REVERSAL OF DEFENDANT'S CONVICTIONS. (Not Raised Below)

During their testimony, Officer Burk and the owner of the Wing King, Babcock, opined that the two different surveillance videos of the two burglaries depicted the same man. This testimony exceeded the bounds of proper lay opinion testimony and went to the only issue in the case: the identity of the burglar. Therefore, the testimony violated our evidence rules and Lee's rights to due process and a fair trial. U.S. Const., amends. VI and XIV; N.J. Const., art.

I, ¶¶ 1, 9 and 10; N.J.R.E. 701. This Court must reverse Lee's convictions and remand for a new trial.

Throughout their testimony, Burk and Babcock shared their opinion that the September 28 intruder and the September 30 intruder were the same person:

- Babcock opined that the surveillance footage he viewed on September 30 "looked like the same individual that was there two days prior decided to come back." (5T 16-23 to 25)
- Burk testified that "[t]he shirt was similar and so was the phone on the hip" in both videos. (5T 54-2 to 3)
- Burk testified that "[t]he sweatshirt, it appears to be a two-tone sweatshirt -- the sleeves appear to be a different color than the body area which also appears to be the exact same clothing worn two nights prior." (5T 66-16 to 19) (emphasis added). The prosecutor then asked, "In your opinion, the sweatshirt [on September 30 footage] was of a similar design as the sweatshirt from the 28th?" (5T 66-20 to 23) Burk responded "Yes." (5T 66-24)
- Burk testified that on both videos, the intruders are "both appearing to be wearing the same dark-colored sleeve, light-colored chest and hood area sweatshirt." (5T 67-17 to 19)
- Burk opined that both intruders had an object he believed to be a phone "[o]n the same right hip, same location[.]" (5T 67-20 to 69-6)

It is improper for witnesses who have no personal knowledge of who or what is depicted on surveillance footage to opine as to the identity of a suspect or the identity of items seen in the footage. State v. Singh, 245 N.J. 1, 17 (2021). Video narration testimony from a lay witness must satisfy two fundamental requirements in order to be admissible: it must (1) be based upon the witness' "firsthand knowledge" and (2) it must be helpful to the jury. State v. Watson,

254 N.J. 558, 592 (2023) (citing N.J.R.E. 701, 602, and 403). In light of the first requirement – that witnesses have firsthand knowledge – the extent to which a lay witness may testify about the content of a video is largely dependent upon their prior experience. Witnesses who participated in the depicted events can provide "opinion testimony about [those] parts of [the video] recording that depict what they perceived in real time." Id. at 599. So, for example, a "bank employee can testify about the portion of a [video] recording that depicts their encounter with a robber." Ibid.

Witnesses who did not experience the actual events depicted on camera, such as Babcock and Burk, are subject to substantial limitations in their video narration testimony. One limitation is unyielding: witnesses "should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence." Id. at 604. Such comments are "appropriate only for closing argument." Ibid.

Neither Burk nor Babcock had any personal knowledge of what was depicted in the videos. Therefore, their testimony was inappropriate. Singh, which was recently reaffirmed by the Court in Watson, demonstrates how the personal knowledge required to render such an opinion admissible is lacking in this case. In Singh, a detective opined that the shoes worn by the suspect in a video were similar to the shoes defendant was wearing when he was arrested by

the detective, as well as the same shoes presented as an exhibit at trial. Id. at 8. Our Supreme Court held that the officer's testimony was admissible because the detective had seen the defendant wearing those shoes, and so the testimony was based on the detective's own perception. Id. at 19-20. Further, the detective's testimony was helpful to the jury because the detective had first-hand knowledge of what the sneakers looked like on the night defendant was arrested. Id. at 20. "Having had first-hand knowledge of what the sneakers looked like, Detective Quesada permissibly testified that the sneakers on the video looked like those he witnessed defendant wearing the night he helped arrest defendant." Id. at 20.

Unlike the detective in Singh, neither Burk nor Babcock had seen the intruders before or had seen the clothing in person. Therefore, their opinions on the resemblance between the two men and their clothing was not based on personal knowledge, was not helpful to the jury, and should not have been admitted.

The admission of this inappropriate testimony requires reversal of Lee's convictions. The identity of the intruders was the only issue in the case. It was up to the jury to determine if it was convinced, beyond a reasonable doubt, that the person who entered on each date was the same person. The Wing King was empty and had an open window, through which the intruders entered. While it might be possible to infer the same person must have entered both nights, there

are other explanations. Maybe the September 28 intruder told someone else about his success and that other person decided to try. Maybe the sight of an open window tempted more than one person to enter. One fingerprint was lifted on September 28, and four were lifted on September 30. (6T 56-22 to 57-1) Although the jury may have determined that the single fingerprint was enough to convict Lee, it might have deemed such evidence insufficient. To remove any lingering doubt, it was essential to State's case for multiple people to tell the jury that the two men were the same.

In sum, Burk and Babcock's opinion testimony impermissibly "invaded the fact-finding province of the jury." State v. McLean, 205 N.J. 438, 443 (2011). Lay opinion testimony is "not a vehicle for offering the view of the witness about a series of facts that the jury can evaluate for itself or an opportunity to express a view on guilt or innocence." Id. at 462. The admission of this inappropriate and prejudicial testimony was clearly capable of producing an unjust result. Rule 2:10-2. Lee's convictions must be reversed.

POINT III

IMPOSITION BOTH OF A DISCRETIONARY EXTENDED TERM AND A DISCRETIONARY PAROLE DISQUALIFIER WAS INAPPROPRIATE AND RESULTED IN AN EXCESSIVE SENTENCE. (8T 41-11 to 18 to 43-21)

Although the ordinary term for third-degree burglary is a custodial term of three to five years, Lee was subjected to both a discretionary extended term and a discretionary parole disqualifier, resulting two concurrent sentences sentence of six years with a two-year period of parole ineligibility. (8T 43-13 to 20) The trial court overweighed the aggravating factors and underweighed the mitigating factors, leading to a palpably excessive sentence: Lee, who has never spent a day in prison before, is serving six years in custody for stealing $168 in coins from an empty restaurant that had an open window. This sentence cannot stand.

When the State makes an application for a discretionary extended term, the trial court must first determine whether the defendant has the appropriate prior convictions to establish his eligibility for an extended-term sentence. State v. Pierce, 188 N.J. 155, 161 (2006). Once a court has determined that a defendant is eligible for discretionary extended-term sentencing as a persistent offender, it should shift its focus to the length of the sentence to be imposed. In setting the length of the extended-term sentence, courts should "perform their sentencing

function by using the traditional approach of finding and weighing aggravating and mitigating factors." Pierce, 188 N.J. at 170. Even where the predicates for persistent-offender status have been proven, a court is not required to impose an extended-term sentence, and our Supreme Court has anticipated that "relatively few convictions will warrant" persistent-offender extended terms. State v. Dunbar, 108 N.J. 80, 89 (1987). As always, the ultimate determination of the appropriate sentence requires an evaluation of the relevant aggravating and mitigaing factors.

In applying the aggravating and mitigating factors to determine the length of a sentence, a trial court must always "identify the aggravating and mitigating factors and balance them to arrive at a fair sentence." State v. Natale, 184 N.J. 458, 488 (2005). Simply enumerating the applicable aggravating and mitigating factors is insufficient. State v. Case, 220 N.J. 49, 65 (2014). Rather, a court's sentencing decision must follow not from a quantitative, but a qualitative analysis. Ibid. The finding of any factor "must be supported by competent, credible evidence in the record." Id. at 64.

In this case, the court found aggravating factors (3), the risk that defendant will commit another offense, (6), the extent of defendant's prior record, and (9) the need for deterrence. N.J.S.A. 2C:44-1(a). (8T 43-13 to 20) It also found mitigating factor (1), the defendant's conduct neither caused nor threatened

serious harm, and (6), the defendant will compensate the victim. (8T 41-19 to 22). N.J.S.A. 2C:44-1(b). After considering these factors, but not explicitly assigning weight to each, the court set an extended-term sentence with a discretionary parole disqualifier. The sentence is too long for the offense and the offender.

As a threshold matter, the trial court wrongly believed that because Lee met the predicates for an extended term, the relevant sentencing range was only the extended range, 10 to 20 years. (9T 6-15 to 21 ("[U]nder N.J.S.A. 2C:43-7 because he is a persistent offender he is subjected to an extended term. And pursuant to N.J.S.A. 2C:43-7(a)(4) in the case of a crime of the third degree for which a term shall be fixed by the Court it may be between five and ten years.") However, once the determination that an extended term is possible is made, "the range of sentences, available for imposition, starts at the minimum of the ordinary-term range and ends at the maximum of the extended-term range." Pierce, 188 N.J. at 169. Therefore, the range the trial court should have considered was three to ten years. The failure to consider the appropriate sentencing range alone necessitates a remand.

Moreover, Lee's prior convictions do not merit an extended term. To be eligible for an extended term, two indictable convictions are necessary, and the date of the most recent incident must be within 10 years of the date of the crime

for which the defendant is being sentenced. N.J.S.A. 2C:44-3a. Lee had exactly that, barely meeting the legal requirement for an extended term. Lee had one conviction for a 2013 incident for fourth-degree criminal trespass. (PSR 6) He received probation for that offense. (PSR 6) Lee had another conviction stemming from a 2015 incident for fourth-degree criminal sexual contact, for which he also received probation. (PSR 6) The trial court overweighed this minor criminal record in sentencing him to an extended term.

Weighing such a minor prior record heavily enough to push Lee into an extended term does not serve the purpose of the statute. Our Supreme Court has explained that the purpose of repeat-offender statutes is deterrence. State v. Hawks, 114 N.J. 359, 365 (1989). The people the Legislature sought to deter are "those criminals from society who demonstrate an inability to refrain from repeated commission" of crime. State v. Galiano, 349 N.J. Super. 157, 165 (App. Div. 2002) (discussing the similar goals of N.J.S.A. 2C:44-3a, N.J.S.A. 2C:43-7c, and N.J.S.A. 2C:43-7.1, all repeat-offender statutes). "[T]he reason for the infliction of severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists in violating the law after conviction of previous infractions." State v. Johnson, 109 N.J. Super. 69, 75 (App. Div. 1970). At 26 years old at the time of the offense, with two prior fourth-degree convictions, it is too soon to deem Lee

"incorrigible" and therefore subject him to an extended term. Even the top of the ordinary term would be too severe for these two offenses.

Moreover, the court inappropriately imposed a discretionary parole disqualifier under N.J.S.A. 2C:43-6(b). "[P]eriods of parole ineligibility are the exception and not the rule. They are not to be treated as routine or commonplace." State v. Kruse, 105 N.J. 354, 359 (1987) (internal quotation marks omitted). This trial court failed to justify the imposition of this parole of parole ineligibility.

N.J.S.A. 2C:43-6(b) provides for the imposition of such a disqualifier when the court is "clearly convinced that the aggravating factors substantially outweigh the mitigating factors." The trial court did not make this at the initial sentencing finding, instead finding that "aggravating factors slightly outweigh the mitigating factors." (8T 43-5 to 7) At a later date, the trial court clarified its belief that "the aggravating factors substantially outweigh[] the mitigating factors because the Court does place great weight on aggravating factor 6, the extent of defendant's prior criminal record and the seriousness of the offenses of which the defendant has been convicted." (9T 10-1 to 7) As discussed above, Lee's prior history is minor and the offense was not particularly "serious"—the trial court acknowledged this by finding mitigating factor (1). When a court applies "seemingly contradictory aggravating and mitigating factors" as it did

in this case, it must "explain how it reconciles those two findings" by providing greater detail as to the weight assigned to each aggravating and mitigating factor and how those factors are balanced with respect to the defendant." State v. Rivera, 249 N.J. 285, 300–01 (2021) (internal quotation marks and citations omitted). The failure to offer any such explanation requires a remand for resentencing.

In sum, this sentence is too long for a person who had never been in prison before, who had stolen $168 in change from a closed restaurant, who had never threatened any harm of any kind to any person. In setting the sentence, the court seems to have entirely focused on Lee's prior criminal history. That history is minor and does not justify the sentence imposed here. The sentence must be vacated, and the matter remanded for resentencing.

CONCLUSION

For the reasons set forth in Points I and II, Lee's convictions must be reversed. Alternatively, for the reasons set forth in Point III, his sentence must be vacated, and the matter remanded for resentencing.

Respectfully submitted,

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