A-32-24

STATE OF NEW JERSEY, Plaintiff–Respondent v. TYRELL S. LANSING Defendant–Movant	Supreme Court Docket No. 090121 CIVIL ACTION On Motion for Leave to Appeal from an Interlocutory Order of the Superior Court, Appellate Division Docket No.: A-1592-23 Sat Below: Hon. Greta Gooden Brown, P.J.A.D. Hon. Patrick DeAlmeida, J.A.D. Hon. Robert M. Vinci, J.A.D.

BRIEF OF AMICI CURIAE, CENTER FOR INTEGRITY IN FORENSIC SCIENCE, PERLMUTTER CENTER FOR LEGAL JUSTICE AT CARDOZO LAW, AND THE WILSON CENTER FOR SCIENCE AND JUSTICE AT DUKE LAW

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PRELIMINARY STATEMENT

When forensic experts cannot testify virtually in Daubert hearings, consequences for defendants can be dire. Unlike other types of expert witnesses, forensic experts who both know the area of science and are able and willing to work on behalf of defendants are rare, and some of the small subset of forensic experts who meet these criteria live far outside of New Jersey. Forensic science continues to advance and proliferate in criminal cases, and forensic expert testimony can be extremely valuable in helping juries and courts adjudicate criminal cases. However, faulty forensic expert testimony can be a significant source of wrongful convictions. Unless this Court permits flexibility that will enable defendants to have more equitable access to forensic expert testimony, forensic science will only end up unfairly tipping the scales in favor of the State, rather than toward the truth.

To avoid that result, amici urge the Court to explicitly recognize a new factor when deciding under Rule 1:2-1(b), or any other test, whether to allow an expert to testify virtually in a Daubert hearing: whether there is an alternative expert available to appear in person. If the Court declines to recognize this factor, courts throughout New Jersey will increasingly encounter situations where the State has a qualified forensic expert available to testify but the defendant has no one. This imbalance, which would undermine the search for

truth, is avoidable. The proposed factor codifies a preference for in-person testimony, but also appropriately recognizes that even an imperfect adversarial hearing will do a better job of ascertaining the truth than a one-sided proceeding.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Statement of Facts and Procedural History in Lansing's supplemental brief before this Court. See DBr 3–7.[1]

ARGUMENT

I. COURTS IN NEW JERSEY AND THROUGHOUT THE NATION SUCCESSFULLY ADAPTED TO ALLOW VIRTUAL PROCEEDINGS, INCLUDING IN CRIMINAL CASES.

By necessity, the COVID-19 pandemic prompted a seismic shift in the nature of all work, including the legal field. Courts across the United States were forced to adopt virtual proceedings to prevent an insurmountable backlog of cases. See Alicia L. Bannon & Douglas Keith, Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond, 115 Nw. U. L. Rev. 1875, 1883 (2021) [hereinafter, Bannon, Remote Court: Principles]. New Jersey was no different. Indeed, during the first two years of the pandemic, New Jersey courts held more than 300,000 virtual events involving more than 4 million participants. New Jersey Courts, Judiciary Strategic Plan for COVID Backlog Reduction 3 (Mar. 2024). Furthermore, even after social distancing

[1] DBr refers to the Defendant's Supplemental brief filed on March 31, 2025.

restrictions were lifted, the benefits of virtual hearings—improved accessibility, reduced costs, and increased efficiency—made them a permanent fixture in many jurisdictions. Allie Reed & Madison Alder, Virtual Hearings Put Children, Abuse Victims at Ease in Court, Bloomberg L., June 23, 2020, available at https://news.bloomberglaw.com/us-law-week/virtual-hearings-put-children-abuse-victims-at-ease-in-court. Virtual proceedings come with both costs and benefits, including better access to courts for some (e.g., those who have to travel great distances) and worse access for others (those without access to digital devices). See Bannon, Remote Court: Principles, 115 Nw. U. L. Rev. at 1887–93.

To look at one specific example, during the COVID-19 pandemic, a federal judge in the Southern District of New York considered the health of a witness when deciding to permit a medically vulnerable witness to testify remotely from a courtroom in Dallas. Deniz Ariturk et al., Virtual Criminal Courts, U. Chi. L. Rev. Online 57, 62 (2020). The judge noted that "limiting the spread of COVID-19 and protecting at-risk individuals from exposure to the virus are critically important public policies," and that the witness, "who [was] in his 70s" and suffered from other health conditions, was "at heightened risk of dangerous complications should he contract COVID-19," especially where

testifying in person "would require boarding a plane and spending at least two weeks in New York City." Ibid.

While amici do not argue that virtual hearings are superior to in-person hearings, the knowledge that certain proceedings can be conducted virtually is an important factor for courts to consider when scheduling judicial proceedings in a way that balances all the interests involved.

II. DEFENDANTS' ACCESS TO FORENSIC EXPERTS IS CRITICAL GIVEN HOW OFTEN INCORRECT FORENSIC SCIENCE TESTIMONY LEADS TO WRONGFUL CONVICTIONS.

Forensic science is proliferating in criminal cases and has a major impact in the outcome of these cases. State v. Pickett, 466 N.J. Super. 270, 316 (App. Div. 2021) ("As technology proliferates, so does its use in criminal prosecutions."). While forensic science sometimes reflects advances in scientific understanding that can aid the criminal justice system in fact-finding, like any evolving field of science, it is imperfect. Nat'l Rsch. Council, Strengthening Forensic Science in the United States: A Path Forward (2009) [hereinafter "Nat'l Rsch. Council"]. However, the weight that jurors give forensic evidence means that it can be determinative. Heidi Eldridge, Juror Comprehension of Forensic Expert Testimony: A Literature Review and Gap Analysis, 1 Forensic Sci. Int'l Synergy, 24, 24–34 (Mar. 2019).

Juror acceptance of faulty forensic science leads to tragic results. As early as 2009, the United States Supreme Court cited, "[o]ne study of cases in which exonerating evidence resulted in the overturning of criminal convictions[, which] concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009)). By 2023, the National Registry of Exonerations had documented more than 3,000 cases of wrongful convictions in the United States. Nat'l Inst. of Just., The Impact of False or Misleading Forensic Evidence on Wrongful Convictions, Nov. 28, 2023, available at https://nij.ojp.gov/topics/articles/impact-false-or-misleading-forensic-evidence-wrongful-convictions. Detailed analysis of erroneous convictions tied to "false or misleading forensic evidence" found that in more than 67 percent of the cases analyzed—across several forensic disciplines—errors related to forensic evidence contributed to wrongful convictions. John Morgan, Wrongful Convictions and Claims of False or Misleading Forensic Evidence, 68 J. Forensic Sci. 908, 919 (2023).

Amici acknowledge that even if the defense does not have its own forensic expert, it retains the ability to cross-examine the State's forensic expert. However, studies have shown that cross-examination of the State's forensic

experts is simply not as persuasive to finders of fact as the defense presenting its own rebuttal expert testimony. See Gregory Mitchell & Brandon L. Garrett, Battling to a Draw: Defense Expert Rebuttal Can Neutralize Prosecution Fingerprint Evidence, 35 Applied Cognitive Psych. 1, 5 (2021). Scholars note that even when cross-examination can raise doubts about an expert's opinions, it infrequently elicits directly contrary evidence, which is a much stronger way of showing that forensic evidence is not infallible. Ibid.

III. DEFENDANTS TYPICALLY HAVE LESS ACCESS TO EXPERT WITNESSES IN CRIMINAL CASES THAN THE STATE.

As shown above, forensic science is increasingly influential in determining the outcome of criminal cases, and its significant benefits also come with the risk that faulty forensic science can lead to wrongful convictions. In our adversarial system of criminal justice, the best way to mitigate these risks is to ensure that both sides have equal access to forensic experts and the ability to challenge the other side's experts. Hinton v. Alabama, 571 U.S. 263, 276 (2014) (explaining that the risk of wrongful convictions "is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses").

Unfortunately, that type of equal access to expert testimony does not exist today. While in civil cases, plaintiffs and defendants generally have equal access

to expert testimony, in criminal proceedings, prosecutors are more easily able to present expert testimony than defendants. Nat'l Rsch. Council at 11. Prosecutors in New Jersey have many experts directly at their disposal, including State Police laboratories and police laboratories in many counties. See, e.g., State v. Berezansky, 386 N.J. Super. 84, 87 (App. Div. 2006) (referencing regional State Police laboratories); State ex rel. C.D., 354 N.J. Super. 457, 460 (App. Div. 2002) (referencing local police department's forensic laboratory); Ron Zeitlinger, Hudson County's Top Law Enforcement Agency Gets New Tool in Fighting Crime -- Its Own DNA Lab, NJ.com, Nov. 18, 2024 (noting opening of county DNA lab), available at https://www.nj.com/hudson/2024/11/hudson-countys-top-law-enforcement-agency-gets-new-tool-in-fighting-crime-its-own-dna-lab.html. By contrast, defendants and their attorneys must rely on and retain private forensic experts. See generally, Brandon L. Garrett, Policing Forensic Evidence, 2 Am. J. L. and Equal. 107–121 (2022) (discussing link between crime laboratories and law enforcement). This phenomenon has been long documented. Paul C. Giannelli, "Junk Science": The Criminal Cases, 84 J. Crim. L. & Criminology 105, 118 (1993) (explaining that "[o]btaining expert assistance is generally not a problem for the prosecution, which has access to the services of state, county, or

metropolitan crime laboratories" but noting that comparable services "are not generally available to criminal defendants").

And defendants face substantial barriers in retaining private sector experts in criminal cases. Defendants must find experts who know the relevant scientific field, do not have preclusive conflicts, and are available and willing to work for the defense at the rates that defendants can pay. Keith A. Findley, Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth, 38 Seton Hall L. Rev. 893, 929–950 (2008). Additionally, for defendants represented by the Office of the Public Defender, the experts must go through state vendor compliance protocols, which do not apply to county prosecutor's offices. Office of the Public Defender, Vendor Contract Compliance Requirements (Jan. 11, 2023).[2] Experts who satisfy all these criteria can live far from New Jersey and may not be able to easily or feasibly travel to the state both for a Daubert hearing and for trial testimony.

This discrepancy of forensic expert availability threatens to create an imbalance in the way that forensic science is used in criminal cases, which will have devastating consequences for the ability of juries to find the truth. The Court should seize the opportunity to create a more level playing field.

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[2] Available at https://www.nj.gov/defender/documents/New%20Professional%20Services%20Vendors%20%20VCC%20Requirements%201%2011%202023.pdf.

IV. CONSIDERING THE AVAILABILITY OF OTHER FORENSIC SCIENCE EXPERTS WHEN DECIDING WHETHER TO PERMIT VIRTUAL TESTIMONY AT A DAUBERT HEARING ALLOWS COURTS TO APPROPRIATELY BALANCE THE INTERESTS INVOLVED.

Given the demonstrated ability of courts to conduct proceedings virtually, the increasing importance of defendants' access to forensic science expert testimony, and the imbalance in access to expert witnesses between defendants and the State, this Court should make clear that the availability of other forensic science experts is an appropriate factor to consider when deciding whether to permit an expert to testify virtually at a Daubert hearing. This would clarify that a Daubert hearing where the defense expert testifies virtually is superior to a one-sided hearing that includes no defense expert testimony at all, but still inferior to a hearing where experts on both sides are available to testify in person. Such an approach aligns with common sense and is a practical resolution to this issue.

Lansing argues that under Rule 1:2-1(b), the existing standard of good cause was met for allowing the defense expert to testify virtually. DBr 20–23. Amici support that reading of the Rule, but also believe that this Court can avoid future uncertainty by making clear that the availability of other experts is a factor that must be considered when deciding whether an expert can testify virtually at a Daubert hearing. Even though this factor would not be dispositive,

it will give future litigants more certainty about when virtual testimony will be permitted.

Amici do not ask in this case for the availability of alternate experts to be considered when determining how to conduct trial proceedings. During the fact-finding portion of a trial, courts place a premium on giving juries the ability to assess the credibility of the witness, lay or expert. However, Daubert hearings are used to assess scientific reliability, and as this Court has noted, "unlike other types of evidentiary rulings, reliability does not turn on witness credibility." State v. Olenowski ("Olenowski II"), 255 N.J. 529, 580 (2023).

In Daubert hearings in New Jersey, four factors are used to assess the reliability of an expert's methodology:

> (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 ("Olenowski I"), 253 N.J. 133, 147 (2023) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993)). Those considerations do not turn on credibility determinations. After all, "[g]ood scientific research simply does not depend on the credibility of individual witness." Olenowski II, 255 N.J. at 580 (internal quotation omitted).

Giving the defendant the ability to confront a witness, lay or expert, at trial, and allowing the jury to make credibility determinations in that context, presents different issues that need not be resolved here. See Bannon, Remote Court: Principles, 115 Nw. U. L. Rev. at 1913 (foreswearing a "one-size-fits-all approach to remote proceedings" and explaining that different types of hearings have "different challenges, benefits, and tradeoffs").

CONCLUSION

For all the reasons above, this Court should reverse the decision of the Appellate Division and declare explicitly that the availability of other forensic science experts is an appropriate factor to consider when deciding whether to permit an expert to testify virtually at a Daubert hearing.

Respectfully submitted,

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