SUPREME COURT OF NEW JERSEY
DOCKET NO. 090662

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Petitioner,	:	On Certification Granted from a Final Order of the Superior Court of New
v.	:	Jersey, Appellate Division.
FRENCH G. LEE,	:	
		Sat Below:
Defendant-Respondent.	:	
		Hon. Lisa A. Firko, J.A.D.
	:	Hon. Avis Bishop-Thompson, J.A.D.
		Hon. Lorraine M. Augostini, J.A.D.
	:	

BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, CODES AND RULES

OTHER AUTHORITIES

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., Exec. Office of the President – President's Council of Advisors on Science and Technology, Report to the President – Forensic Science in Criminal Cts: Ensuring Scientific Validity of Feature-Comparison Methods, at 45 (Sep. 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). Indeed, just over two weeks ago, this Court emphasized this concern, explaining that "labeling evidence as 'scientific' or 'expert' creates a 'clear' 'danger of prejudice' -- i.e., the possibility that juries will 'accord excessive weight to unreliable expert testimony' simply because of its label." See State v. Nieves, --- A.3d ---, 2025 WL 3236984, at *30 (N.J. Nov. 20, 2025) (quoting State v. Cavallo, 88 N.J. 508, 518 (1982)).

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

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

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 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 (Aug. 2009) (hereinafter "NAS Report");[2] PCAST Report; Am. Ass'n for the Advancement of Sci., Latent Fingerprint Examination: A Quality and Gap Analysis

[2] https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf.

(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 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.'");

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[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.

[4] These issues are addressed at length in the brief of Defendant-Respondent. 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).

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 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 source. 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.

[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." Nat'l Inst. of Standards & Tech., About Us, https://www.nist.gov/organization-scientific-area-committees-forensic-science/about-us.

Latent fingerprint evidence can provide reliable and helpful information if the evidence is of sufficient quality and 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." 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) affirm the Appellate Division's determination 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; (2) affirm the Appellate Division's remand for a N.J.R.E. 104 hearing on the reliability of the fingerprint analysis evidence and provide guidance to courts on the application of Olenowski; and (3) appoint 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. THE APPELLATE DIVISION CORRECTLY HELD THAT 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.

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). This Court has long endorsed the use of 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 many 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 because of jurors' pre-existing beliefs about forensic evidence. As discussed in the brief of fellow amici, Professor Adele Quigley-McBride, et al., Experts in Decision Making and Judgment in Legal Contexts, 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") (Aug. 18, 2025).[8] If a potential juror believes that all fingerprint examiner testimony is infallible, then that juror would be unable to follow the court's instruction on the consideration of expert evidence and properly give it the weight to which it is entitled. 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, the Appellate Division 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.), cert. denied, 122 N.J. 334 (1990). Similarly, jurors in New Jersey (and nearly every other jurisdiction) can be asked

[8] https://www.njcourts.gov/sites/default/files/charges/non2c036.pdf?cb=5b9183a5.
[9] https://web.archive.org/web/20030518010527id_/http://web.jjay.cuny.edu:80/~spenrod/Juries/cooperLHB2000.pdf.

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 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 the prosecution to voir dire on whether jurors would be willing to convict in the *absence* of forensic evidence.[12] Along the same lines, this Court has found that voir dire on

[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

the absence of key evidence is appropriate. See Little, 246 N.J. 402 (2021) (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. As the Appellate Division concluded, 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.

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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).

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.

This Court recently confirmed that 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 concerns of exaggerated testimonial conclusions, OSAC has promulgated model standards "for the range of conclusions that may be reached following friction ridge comparisons." 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, 181 N.E.3d 1065, 1079 (Mass. 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.").

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

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 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, this 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, including the forensic community. Standardized rules governing testimony about fingerprint evidence would ensure jurors assign appropriate weight to experts' opinions. This Court should appoint a Special Adjudicator to conduct hearings centered on this research and develop a standardized approach regarding the admission of latent fingerprint testimony. This Court has previously requested that the Criminal Practice Committee and the

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

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, 298-99 (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 assess latent fingerprint analysis in light of this 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, this 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.

This Court has previously led the way in reviewing developments in scientific research and ensuring those insights help courts throughout the State administer justice as fairly and accurately as possible. The Court should continue serving as a leader in this area by critically examining recent scholarship evaluating latent fingerprint analysis and developing a model jury charge for fingerprint evidence and testimony.

B. Given the Complexities of the Field, the Court 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. One study measuring perceptions of the possibility of error in fingerprint identifications showed that lay people believed the possibility for error was 1 in 5.5 million. Jonathan J. Koehler, Intuitive Error Rate Estimates for the Forensic Sciences, 57 Jurimetrics 153 (2017). The actual potential for error, as demonstrated by two studies discussed in the PCAST Report, demonstrate dramatically higher error rates. Indeed, in one study, the "false positive rate was 4.2 percent (upper 95 percent confidence bound of 5.4 percent). The estimated rate corresponds to 1 error in 24 cases, with the upper bound indicating that the rate could be as high as 1 error in 18 cases." PCAST Report at

95 (citing Igor Pacheco, Brian Cerchiai & Stephanie Stoiloff, Miami-Dade Research Study for the Reliability of the ACE-V Process: Accuracy & Precision in Latent Fingerprint Examinations (2014)).[15] In a second study, the "estimated rate corresponds to 1 error in 604 cases, with the upper bound indicating that the rate could be as high as 1 error in 306 cases." Id. at 94. (citing Bradford T. Ulery et al., Accuracy and Reliability of Forensic Latent Fingerprint Decisions, 108:19 PNAS 7733 (2011)).[16]

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).[17]

This Court and the Appellate Division have previously 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, this Court directed the preparation of model jury charges for eyewitness identification, taking into account scientific

[15] https://www.ojp.gov/pdffiles1/nij/grants/248534.pdf.
[16] https://pmc.ncbi.nlm.nih.gov/articles/PMC3093498/pdf/pnas.1018707108.pdf.
[17] https://www.njcourts.gov/sites/default/files/charges/non2c009.pdf?cb=5b9183a5.

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 "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).[18]

This Court has also 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, State v. Watson, 254 N.J. 558, 605 (2023). 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

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

misconceptions regarding fingerprint evidence and the well-demonstrated power 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. (2025), 1.35.20 Fingerprints, GAJICRIM 1.35.20 (hereinafter "Georgia Fingerprint Instruction"). 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 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 analyses. 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 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. THE APPELLATE DIVISION CORRECTLY HELD THAT LEGAL PRECEDENT IS NOT A PROXY FOR SCIENTIFIC VALIDITY.

That a forensic technique such as latent fingerprint identification has been long-accepted by courts does not mean it is forever thereafter immune from scrutiny and exempt from Olenowski. "Science moves inexorably forward and hypotheses or methodologies once considered sacrosanct are modified or discarded. The judicial system, with its search for the closest approximation to the 'truth,' must accommodate this ever-changing scientific landscape." State v. Behn, 375 N.J. Super. 409, 429 (App. Div. 2005). Because "[s]cience is constantly evolving," courts should consider "scientific evidence and research, both old and new" when evaluating whether a forensic discipline is sufficiently reliable to be presented as evidence against an accused to the jury. See Nieves, 2025 WL 3236984, at *39 (conducting extensive review of history of Shaken Baby Syndrome/Abusive Head Trauma and prohibiting expert testimony because underlying research was not sufficiently reliable); see also People v. Williams, 147 N.E.3d 1131, 1143 (N.Y. 2020) (rejecting legal precedent as a basis for precluding admissibility hearings in light of "[r]ecent questioning of previously accepted techniques related to hair comparisons, fire origin, comparative bullet lead analysis, bite mark matching, and bloodstain-pattern analysis illustrates that point; all of those analyses have long been

accepted within their relevant scientific communities but recently have come into varying degrees of question"); PCAST Report at 144 ("When new facts falsify old assumptions, courts should not be obliged to defer to past precedents: they should look afresh at the scientific issues.").

Courts, including the U.S. Supreme Court, have recognized modern studies revealing that long-accepted forensic techniques have, incredibly, contributed to over half of known wrongful convictions established through DNA evidence. See, e.g., Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) ("One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.") (citing Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009))[19]; United States v. Green, 405 F. Supp. 2d 104, 109 (D. Mass. 2005) (citing Michael Saks and Jonathan Koehler, The Coming Paradigm Shift in Forensic Identification Science, 309 Science 892 (2005)).[20] The NAS Report, commissioned by Congress in 2006 and published by the National Academy of Sciences in 2009, stunned the legal and forensic community, rejecting claims that commonly used forensic techniques are capable of identifying *the* source of crime evidence without error, and has since been

[19] https://scholarship.law.duke.edu/faculty_scholarship/3861/.
[20] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=962968.

buttressed by additional research and "black box" studies conducted to establish valid error rates. See supra Section I. In response to shifting scientific consensus, a growing chorus of courts has reexamined long-established precedent on the unqualified admissibility of forensic techniques and testimony.

Certain once-common forensic identification techniques have been largely rejected by courts, such as:

- *bitemark analysis*, see, e.g., Howard v. State, 300 So. 3d 1011, 1013 (Miss. 2020) (vacating conviction and sentence based on "new scientific understanding that an individual perpetrator cannot be reliably identified through bite-mark comparison"); Ex parte Chaney, 563 S.W.3d 239, 257 (Tex. Crim. App. 2018) (granting habeas relief because "the body of scientific knowledge underlying the field of bitemark comparisons evolved in a way that discredits almost all the probabilistic bitemark evidence at trial");

- *microscopic hair comparisons*, see, e.g., Redmond v. United States, 339 A.3d 1274, 1291 (D.C. 2025) (granting habeas relief because "[s]cientists have concluded that microscopic hair analysis is 'highly unreliable' and 'cannot uniquely identify one person'"); Commonwealth v. Chmiel, 173 A.3d 617, 627 (Pa. 2017) (granting habeas relief because "[t]he accepted understanding in the forensic science community … has shifted" and there is now "a recognition of the flawed scientific premise that microscopic hair comparison could be used definitively to link a criminal defendant to a crime"); and

- *comparative bullet lead analysis* ("CBLA"), see, e.g., Ragland v. Commonwealth, 191 S.W.3d 569, 580 (Ky. 2006) (reversing and remanding murder conviction and holding CBLA inadmissible under Daubert standard).

But – contrary to the State's implication – admissibility of expert testimony based on a forensic discipline does not need to be "all-or-nothing" under Olenowski.

Courts reexamining some forensic techniques that were once commonly accepted have, where appropriate, limited testimony to scientifically defensible conclusions, without excluding the disciplines entirely. See, e.g., Abruquah, 296 A.3d at 997 (reversing and remanding homicide conviction because evidence adduced in Daubert hearing demonstrated "the methodology of firearms identification . . . did not provide a reliable basis for [the examiner's] unqualified opinion that [fired ammunition] were fired from [the same firearm]"). For good reason. Faulty forensic science causes wrongful convictions when expert witnesses exaggerate or mischaracterize evidence derived from otherwise valid disciplines, not just in cases where the entire underlying field lacks scientific foundation. See, e.g., PCAST Report at 54. At the conclusion of a Daubert hearing, the court, rather than exclude an entire field, can exercise its gatekeeping function by limiting testimony to scientifically defensible statements, such as excluding individualization conclusions and compelling admission of error rates.

In State v. Raynor, the Connecticut Supreme Court reversed and remanded a murder conviction because the trial court abused its discretion by denying a motion for a Porter hearing (Connecticut's Daubert standard) without considering the NAS Report and other scientific literature challenging the expert's toolmark and firearm analysis methodology. 254 A.3d 874, 887 (Conn. 2020). Likewise, the Appellate Division correctly reversed and remanded here. Because there has never been an

actual evidentiary hearing on the admissibility of fingerprint evidence that has resulted in a published opinion in New Jersey, a hearing is necessary to establish the bounds of the reliability of the technique, taking into consideration recent research challenging the accuracy of latent fingerprint analysis.

Accordingly, the Appellate Division's remand for a N.J.R.E. 104 hearing on the reliability of the fingerprint analysis evidence under Olenowski and Daubert should be affirmed. This Court should also take this opportunity to provide crucial guidance to courts tasked with applying Olenowski, and, specifically, to instruct that (1) because science is constantly evolving, courts are not bound forever by a prior court's Olenowski ruling; (2) a prior court's ruling may be evidence of admissibility only where a Daubert hearing was actually held; and (3) reliance on a prior court's ruling may be improper where a party submits new evidence bearing on the challenged technique's reliability. See Olenowski, 253 N.J. 133.

VII. CONCLUSION

This Court should address the indisputable power of forensic evidence and develop processes and rules regarding latent fingerprint evidence and testimony. This Court should (1) affirm the Appellate Division's determination that trial courts must screen jurors for potential bias through targeted voir dire questions, (2) affirm the Appellate Division's remand for a N.J.R.E. 104 hearing on the reliability of the fingerprint analysis evidence and provide guidance to courts on the application of

Olenowski, and (3) appoint 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. 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.

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Respectfully submitted,

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