FILED, Clerk of the Supreme Court, 19 Jun 2025, **090662**

Supreme Court of New Jersey
DOCKET NO. 090662

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Petitioner,	:	On Petition for Certification to the Supreme Court of New Jersey.
v.	:	Sat Below: Hon. Lisa A. Firko, J.A.D.
FRENCH G. LEE,	:	Hon. Avis Bishop-Thompson, J.A.D. Hon. Lorraine M. Augostini, J.A.D.
Defendant-Respondent.	:	

PETITION FOR CERTIFICATION
ON BEHALF OF THE STATE OF NEW JERSEY

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OF COUNSEL AND ON THE PETITION June 19, 2025

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CERTIFICATION

I hereby certify that this application is made in good faith, presents a substantial question, and is not made for purposes of delay.

/s/ *Thomas M. Caroccia*
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Deputy Attorney General

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PRELIMINARY STATEMENT

In State v. Olenowski, this Court explained that its adoption of the Daubert standard for expert testimony in criminal cases was not meant to "disturb[]" accepted admissibility rulings absent a sufficient showing that "the scientific reliability underlying the evidence has changed." One type of evidence whose admissibility has long been settled is fingerprint analysis. Courts in our State and across the country have admitted such evidence for over a century; indeed, a scholarly review of 316 post-Daubert court opinions on the topic found that not a single jurisdiction has contrary precedent. So while the weight of a particular piece of fingerprint evidence remains subject to standard adversarial testing at trial, the basic scientific foundation for treating fingerprint testimony in general as sufficiently reliable to be admitted has never shifted.

The decision below dramatically upends that enduring consensus. In this case, the State sought to admit fingerprint testimony, and while defendant objected to its introduction, he agreed to forgo a hearing on that evidence in the trial court. Yet the Appellate Division ordered a hearing anyway. The panel did not ask whether defendant had showed a sufficient change in the scientific understanding of fingerprint reliability to warrant a Daubert hearing. Instead, it held that Olenowski required such a hearing. That holding badly misreads Olenowski and obligates the State to expend enormous taxpayer resources on

protracted hearings—a sharp contrast with the widespread judicial consensus and decades of science that bear on this evidence.

That issue is worthy of this Court's review, and it is sufficient to reverse the decision below. But the panel also incorrectly found two additional errors in vacating defendant's conviction, and each warrants either this Court's review or a remand for a proper harmlessness analysis. One of the two holdings—that the trial court abused its discretion when it declined to ask jurors if "fingerprint analyses are reliable"—upsets the balance between a court's duty to voir dire potential jurors and its separate responsibilities to instruct the jury and serve as an evidentiary gatekeeper. The other holding imposes an overly broad reading of this Court's opinion in State v. Watson. And at the very least, the Appellate Division failed to adequately explain whether or why these errors would require a new trial alone. This Court should grant certification. (Because the decision below also raises a sentencing issue identical to that pending in State v. Carlton, this Court should hold that issue for Carlton.)

STATEMENT OF THE MATTER INVOLVED

Around 4:00 a.m. on September 28, 2018, an intruder broke into the Wing King restaurant in Moorestown. Michael Babcock, the restaurant owner, arrived after his security company informed him of the break-in. (5T7-1 to 17). Babcock's review of surveillance footage revealed that the intruder climbed

through a kitchen window near the pizza ovens, walked to the cash-register area, stole an unsecured bag of money from atop a safe, and left. (5T9-11 to 10-13, 12-15 to 22, Pa1 at 00:31-00:48; Pa2 at 00:11-00:21).

Thirty minutes later, Moorestown Detective Jason Burk responded to Wing King. (5T32-6 to 33-6). Burk reviewed the video and testified that the intruder "reached underneath" the cash register, "grabbed a bag[,] and walked out." (5T35-10 to 20; Pa1 at 00:37-00:48). Burk also detected a latent fingerprint on the face of a nearby pizza oven, which he photographed, scaled, and processed. (5T36-12 to 37-10, 41-5 to 42-21; Pa3).

Overnight on September 30, 2018—just two days after the first burglary—Babcock received another call from his security company about another break-in. (5T15-3 to 8). Based on that night's footage, Babcock testified that "the same individual … decided to come back," but he did not recognize the man. (5T16-21 to 17-3; Pa4 at 00:37-00:48). Babcock noted that the intruder returned to the cash-register area, but this time, the money bag was secured inside the safe. (5T18-11 to 19-25; Pa4 at 00:37-00:42; Pa5 at 00:04-00:30).

Detective Burk returned and reviewed that night's surveillance footage. He saw the intruder lift the cash register without gloves while failing to open it. (5T51-9 to 20, 53-10 to 24, 56-12 to 18; Pa5 at 00:04-00:30; Pa6). He also noted that in both the September 28 and September 30 videos, the intruder wore a

distinctive "two-tone sweatshirt" with "dark-colored sleeve[s]" and a "light-colored chest[-]and[-]hood area." (5T66-13 to 24, 67-11 to 19). And he noticed a "black object" on the intruder's hip in both videos that "appeared to be a cell phone" or cell-phone case. (5T53-25 to 54-13, 67-20 to 68-22).

From underneath the cash register, Detective Burk retrieved four latent fingerprints. (5T63-1 to 8; Pa6). He submitted those prints, plus the September 28 print, to the State Biometric Unit Lab for comparison within the Automated Fingerprint Identification System (AFIS), the database of previously collected fingerprint samples—often referred to as "exemplar" prints—maintained by the State. (5T63-9 to 15). The Lab retrieved defendant's exemplar prints from AFIS, and both the latent and exemplar prints were provided to Burlington County Prosecutor's Office Lieutenant Michael Wiltsey. (6T50-24 to 51-4). Lieutenant Wiltsey proceeded to perform the fingerprint analysis known as ACE-V, which stands for its four steps: Analysis, Comparison, Evaluation, and Verification. In applying ACE-V, Wiltsey concluded that each latent print originated from the same source as defendant's exemplar prints. (6T46-5 to 14, 52-23 to 56-21).

Before trial, defendant moved to exclude Lieutenant Wiltsey's fingerprint testimony. At oral argument, he relied on two reports: a 2009 National Academy of Sciences report, Strengthening Forensic Science in the United

States: A Path Forward (NAS Report), and a 2016 report by the President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (PCAST Report). (1T7-2 to 13-2). Based on those two reports, defendant argued that ACE-V is insufficiently repeatable, "subjective," and risks confirmation bias, rendering it unreliable and thus inadmissible. (1T6-2 to 13-13).

When questioned by the trial judge, defendant admitted that "courts, including the Third Circuit, ha[ve] held that the ACE-V method is reliable," and defendant failed to cite a single contrary case. (1T19-4 to 19). He also stated his intent only to cross-examine Lieutenant Wiltsey using the two reports—not to present his own fingerprint witnesses on the motion to exclude or at trial. (1T20-19 to 21-15). The State then informed the judge of the parties' agreement, given that the issue had "been litigated many times before," to forgo "a full Rule 104 hearing," including "any testimony." (1T21-20 to 22-4).

The judge denied defendant's motion to exclude. He explained that fingerprint evidence "has been accepted by the New Jersey [c]ourts for over [one-hundred] years" and that "numerous federal courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable." (1T20-3 to 18). Because the State established ACE-V's ongoing reliability and defendant "presented [no]thing to the contrary,"

including any binding or persuasive precedent questioning or rejecting its reliability, the judge admitted Wiltsey's testimony. (1T22-5 to 12).

At trial, Lieutenant Wiltsey testified as an expert in fingerprint collection, preservation, comparison, and identification. (6T18-14 to 17, 21-11 to 13). He explained the ACE-V method generally before demonstrating the specific process on each latent fingerprint, beginning with the four September 30 prints. (6T31-7 to 45-7). In total, Wiltsey found (1) twenty matching points of identification between a September 30 print and the exemplar of defendant's right middle finger;[1] (2) eighteen matching points between a September 30 print and defendant's left ring finger; (3) nineteen matching points between a September 30 print and defendant's left middle finger; (4) twenty matching points between another September 30 print and defendant's right middle finger; and (5) twenty-six matching points between the September 28 print and defendant's right thumb. (6T55-7 to 73-13).

The jury convicted defendant of two third-degree burglary charges, and he was sentenced to a total of six years in prison as a persistent offender with a discretionary two-year parole disqualifier. (Da3-6). On appeal, defendant

[1] For demonstration purposes at trial, Wiltsey identified fourteen more matching points, totaling thirty-four matching points between defendant's right middle finger and one of the September 30 latent prints. (6T67-7 to 68-8).

raised multiple claims. He argued that the trial court erred both by admitting Lieutenant Wiltsey's testimony and by declining to ask potential jurors, at voir dire, "Do you believe that fingerprint analyses are reliable, why or why not?" (Db7-39; Ppa25). He contended that Babcock and Detective Burk improperly testified, based on the surveillance footage, that the same person broke in twice, (Db39-43)—testimony to which defendant had not objected at trial, (5T16-21 to 17-3, 53-25 to 54-25, 66-1 to 69-6). And he argued on reply that New Jersey's persistent-offender statute is unconstitutional under Erlinger v. United States, 602 U.S. 821 (2024). (Db44-49, Drb12-15).

The Appellate Division, in an unpublished opinion, reversed defendant's convictions. (Ppa1-37). The panel held that the trial court abused its discretion by admitting Lieutenant Wiltsey's testimony "without the fundamental principles of ACE-V methodology being challenged beforehand," a decision that the panel believed necessarily "fail[ed] to sufficiently adhere to" Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and State v. Olenowski, 253 N.J. 133 (2023) (Olenowski I). (Ppa24). The panel held the court's reliance on the fact that fingerprint evidence "has been used for over 100 years and other courts have determined it to be reliable" did "not comport" with Olenowski and thus ordered the trial court "to conduct a Daubert hearing and to provide a detailed and complete factor-by-factor Daubert analysis." (Ppa25).

The panel also made a number of other holdings. The panel reasoned, on abuse-of-discretion review, that the trial court's failure to ask about fingerprint reliability during voir dire "was a 'serious error' and a 'significant component of the deficiencies' at this trial in light of the significance of the fingerprint evidence," (Ppa29), and directed the trial court on remand to question potential jurors "on whether their knowledge, and perhaps preconceived notions about fingerprint evidence, may impact their ability to be fair and impartial jurors," (Ppa29-30). The panel, without discussing the plain-error review standard, also found that it was error to admit Babcock's and Detective Burk's testimony "that the suspect was the same individual depicted in the surveillance video footage" on both dates, emphasizing that the identity of the intruder was the "key" issue. (Ppa30-36). The panel wrote that "[t]he cumulative effect of the inadmissible testimonies deprived defendant of a fair trial," before summing up on the same page that the "cumulative effect of" all three trial errors it perceived (Daubert, voir dire, and video testimony) "deprived defendant of a fair trial" and "[i]n combination," required vacatur of defendant's convictions. (Ppa36).

Finally, in a footnote, the panel held that defendant's sentence violated Erlinger and State v. Carlton, 480 N.J. Super. 311 (App. Div. 2024). (Ppa36-37 n.4).

This Petition follows. (Ppa38-39).

ISSUES PRESENTED

1. Whether the trial court was required to hold a Daubert hearing on fingerprint evidence absent any sufficient showing that the scientific reliability underlying such long-admissible evidence has changed.

2. Whether the trial court abused its discretion in declining to ask potential jurors whether they believed fingerprint analysis to be "reliable[.]"

3. Whether allowing Detective Burk's and Babcock's testimony that the surveillance videos appeared to feature the same person was plain error.

LEGAL ARGUMENT

POINT I

THIS COURT SHOULD ADDRESS WHETHER ITS DECISION IN OLENOWSKI COMPELS A HEARING EVEN FOR FINGERPRINTS. (Ppa16-25).

The panel's decision to require a Daubert hearing for fingerprint evidence without a compelling showing of a change in scientific reliability—or, indeed, a request to the trial court for such a hearing at all—is one of "general public importance" that "conflict[s]" not only with this Court's decisions in Olenowski, but also with prior New Jersey lower-court decisions and uniform precedent across the country. See R. 2:12-4. This Court should grant certification.

In shifting to an admissibility standard of reliability, this Court explained that "[n]othing" in its decision "disturbs prior rulings that were based on" the previous general-acceptance standard. Olenowski I, 253 N.J. at 154. That is, while "new types of evidence should be assessed under the new standard" of reliability, future "challenges to the admissibility of evidence that has previously

been sanctioned" require a showing that "the scientific reliability underlying the evidence has changed." Ibid. And when applying the new reliability standard to Drug Recognition Experts, this Court reiterated that "a change in the law" of admissibility is appropriate only when "new scientific research emerges that calls into question the wisdom" of prior precedent. State v. Olenowski, 255 N.J. 529, 582-83 (2023) (Olenowski II).

This limitation makes sense. In Daubert hearings, the parties "should present all relevant scientific and technical evidence and published studies." Id. at 582. Such presentations, this Court appreciated, require enormous records and accompanying efforts by parties and expert witnesses alike "to sift through the documentary exhibits presented." Ibid. For instance, Olenowski I itself began with a routine traffic stop in February 2015, while Olenowski II was not decided until November 2023, see id. at 561; the proceedings before the Special Master alone lasted forty-two days, with testimony from sixteen witnesses and hundreds of exhibits, id. at 563. So when asked to revisit the well-settled admissibility of certain types of evidence, courts should demand a sufficient showing before requiring the State and its taxpayers to undergo that enormous undertaking. See Olenowski I, 253 N.J. at 154; Olenowski II, 255 N.J. at 582-83. Other courts agree, explaining that trial judges do not abuse their discretion "by dispensing with a Daubert hearing if no novel challenge is raised." E.g.,

State v. Pena, 586 F.3d 105, 111 n.4 (1st Cir. 2009).

The ruling below conflicts with this precedent and breaks from a general consensus across our courts and other jurisdictions. The panel did not ask whether defendant had shown that the longstanding scientific evidence regarding fingerprint evidence had meaningfully changed; instead, the panel simply required such an intensive undertaking as a matter of course.

But New Jersey courts have admitted fingerprint evidence for over a century. See, e.g., State v. Cerciello, 86 N.J.L. 309, 313-15 (E. & A. 1914). Over the years, this Court has recognized fingerprint evidence's "unquestioned value," State v. Cary, 49 N.J. 343, 355 (1967), and even its reliability, see State v. Fortin, 189 N.J. 579, 602 n.12 (2007) ("[T]he more points of comparison[,] the more reliable a fingerprint identification."). Until the Appellate Division's decision in this case, that court had been in accord. See, e.g., State v. Armour, 446 N.J. Super. 295, 299-300 (App. Div. 2016) (recognizing "advances in fingerprint science" and AFIS); see also, e.g., State v. Monell, No. A-4499-18 (App. Div. Nov. 15, 2021) (slip op. at 24-26) (Ppa63-65) (finding no abuse of discretion "in determining that the ACE-V method was scientifically reliable" when "[e]vidence relating to fingerprint analysis has been accepted by the New Jersey courts for over 100 years" and defendant had "not pointed to any cases

holding that the ACE-V method is unreliable").[2]

Other jurisdictions agree, including throughout the thirty-two years since Daubert was decided. See, e.g., Pena, 586 F.3d at 110-11. In federal court, "[f]ingerprint comparison has long been accepted as a field worthy of expert opinions." United States v. Ware, 69 F.4th 830, 847-48 (11th Cir. 2023) (collecting cases); see also United States v. Mitchell, 365 F.3d 215, 222, 244-46 (3d Cir. 2004) (admitting print evidence after a "marathon hearing" comprising "nearly one[-]thousand pages of testimony" and a "voluminous array of exhibits"). State high courts have come to the same conclusion. See, e.g., Commonwealth v. Honsch, 226 N.E.3d 287, 304-05 (Mass. 2024) (acknowledging ACE-V's "established" reliability); People v. Daveggio, 415 P.3d 717, 748-50 (Cal. 2018) (denying hearing because print evidence "has for many years been universally accepted"); State v. Harris, 895 N.W.2d 592, 607-08, 608 n.36 (Minn. 2017) (citing fingerprints as a "most obvious" example of reliable circumstantial evidence); State v. Belton, 74 N.E.3d 319, 346-47 (Ohio 2016) (finding no error in admitting print expert because "numerous federal and state courts have reached the same conclusion"); State v. Favela, 323 P.3d 716, 718-19 (Ariz. 2014) ("[E]xpert testimony on matching fingerprint evidence is

[2] The only contrary unpublished authority of which the State is aware is the opinion in this case. (Ppa1-37); see R. 1:36-3.

admissible because it is reliable."); State v. Maestas, 299 P.3d 892, 934-36 (Utah 2012) (finding no abuse of discretion because print evidence is "widely accepted"). Indeed, one scholar who recently reviewed the 316 post-Daubert state and federal cases addressing fingerprint-evidence admissibility found that not a single jurisdiction treats it as inadmissible: only two trial judges came to opposite conclusions, in rulings that are no longer on the books. See Brandon L. Garrett, Judging Fingerprint Experts, Duke L. Sch. Pub. L. & Legal Theory Series, at 6, 13-14, 36-37 (2024), https://tinyurl.com/w5xsamy6, (Ppa75, 76-77, 78-79).[3]

Against this rich backdrop, defendant failed to make a sufficient showing that the scientific reliability underlying fingerprint evidence has changed. See Olenowski I, 253 N.J. at 154. Initially, defendant declined to present testimony of his own, agreed to dispense with a full Rule 104 hearing, and relied only upon the 2009 NAS and 2016 PCAST Reports. (1T20-25 to 22-4). Nor did defendant point to any case law deeming fingerprint evidence unreliable after those reports' release. (1T19-4 to 10). That is unsurprising: those reports did not lead to a sea change in the scientific consensus on fingerprint reliability.

[3] See United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002), vacated on reconsideration, 188 F. Supp. 2d 549 (E.D. Pa. 2002); State v. Rose, No. K06-0545, 2007 Md. Cir. Ct. LEXIS 14 (Cir. Ct. Md. 2007) (Ppa80-95). (subsequently withdrawn).

To the contrary, as defendant admitted, the PCAST Report acknowledged that fingerprint analysis has at least "some foundational validity." (Db19); see also PCAST Report at 101-02, https://tinyurl.com/mn2dr6pn (Ppa98-99). And the NAS Report neither "question[s] the underlying theory which grounds fingerprint evidence" nor "conclude[s] that courts should no longer admit it"—"as the report states, there is scientific evidence supporting the theory that fingerprints are unique to each person and do not change over a person's life." Commonwealth v. Gambora, 933 N.E. 2d 50, 57-60 (Mass. 2010); see also NAS Report at 142-45, https://tinyurl.com/46k68pym (Ppa103-106).

So even if the PCAST and NAS Reports could be read to "cast doubt on the error rate of fingerprint analysis and comparison," those critiques "go to the weight that ought to be given fingerprint analysis, not to the legitimacy of the practice as a whole," such that "[t]he science could not possibly have been so unreliable as to be inadmissible." Ware, 69 F.4th at 847-48. And the uniform consensus finding fingerprint evidence reliable under Daubert has continued since the issuance of those reports. See, e.g., United States v. Aceituno, 699 F. Supp. 3d 179, 189-93 (D.N.H. 2023); United States v. Wright, No. 19-230, 2022 WL 3928391, at *6-10 (E.D. Pa. Aug. 31, 2022) (Ppa117-127).

Nor was there any other basis for the panel to order a Daubert hearing sua sponte, where defendant had failed to show that "the scientific reliability

underlying the evidence has changed" and had even agreed to forgo a Rule 104 hearing. See Olenowski I, 253 N.J. at 154. Precedent is clear that a trial court does not abuse its discretion by declining to reinvent the wheel where "no novel challenge [i]s raised." See Mitchell, 365 F.3d at 246; see also Pena, 586 F.3d at 111 n.4 (same where defendant relied only on then-new law-review note). And it only follows that a trial court cannot have done so where the defendant did not request such a hearing. In short, the ruling below breaks with precedent both within and beyond New Jersey, requires the State to expend enormous resources to re-litigate a question on which there is universal agreement in the absence of any showing to justify unsettling that consensus, and risks working the same mischief in scores of future cases. This Court should grant certification.

POINT II

THIS COURT SHOULD REVIEW THE OTHER TWO TRIAL ISSUES OR REMAND FOR A PROPER HARMLESSNESS ANALYSIS. (Ppa25-36).

The panel incorrectly found two other errors in defendant's conviction, but it failed to make sufficiently clear whether or why either or both of those errors could have been serious enough to warrant a new trial absent the court's mistaken Daubert holding. These two errors are straightforward and worthy of review: the first concerns the proper line between voir dire and invading the trial court's own distinct role, and the second concerns the scope of this Court's

decision in State v. Watson, 254 N.J. 558 (2023). But even if this Court were to review only the Daubert question, that alone would justify certification—as this Court could then remand for a proper harmlessness analysis, see, e.g., State v. Burney, 255 N.J. 1, 29-31 (2023), or a retrial without a costly Daubert hearing, see (Ppa25) (requiring such a hearing under this holding alone).

A. A Trial Court Does Not Abuse Its Discretion By Declining To Ask About The Reliability Of Anticipated Testimony. (Ppa25-30).

At voir dire, defendant sought to ask whether potential jurors "believe[d] that fingerprint analyses are reliable, [and] why or why not?" (Ppa25). The Appellate Division held that in excluding such a question, the trial court abused its discretion, thus "direct[ing] the court to inform the prospective jurors that fingerprint evidence will be presented in the case and to question them on whether their knowledge, and perhaps preconceived notions about fingerprint evidence, may impact their ability to be fair and impartial jurors." (Ppa29-30). An instruction that courts must ask jurors for thoughts on evidentiary reliability where fingerprint evidence (or perhaps other kinds of expert evidence) will likely be introduced merits this Court's review.

While defendants are entitled to voir dire potential jurors to ensure their impartiality and ability to follow court instructions, such an inquiry may not "improperly indoctrinate jurors as to the outcome they should reach in a given case." State v. Little, 246 N.J. 402, 414 (2021). Trial courts are thus "charged

to scrutinize the language of a question proposed by counsel and to reject or reformulate that question if it crosses the line from inquiry to advocacy." Id. at 417. Questions on a "legitimate area of inquiry in voir dire" must still be presented "in a neutral, non-partisan manner." Id. at 419-20. To that end, "questions on subjects usually covered in a court's charge should be supervised carefully and rarely allowed." State v. Manley, 54 N.J. 259, 270 (1969).

Asking jurors their thoughts on the reliability of expert evidence crosses the line into advocacy, as it invades trial courts' "role as gatekeepers [to] make decisions about the reliability of expert testimony." Olenowski I, 253 N.J. at 148; see also id. at 154. Here, the trial court correctly issued the model jury charges on fingerprint and expert testimony in both its opening and closing instructions, which properly informed the jurors on the law and avoided any risk of bias against the reliability of fingerprint evidence. (7T31-19 to 34-3). Instead of acknowledging that a question already covered by the trial court's gatekeeping function and subsequent jury charge is "rarely allowed," Manley, 54 N.J. at 270, the panel held that the court abused its discretion by not asking the question. (Ppa25-30). That erroneous holding risks shifting the locus of expert-testimony reliability from judges to jurors, and warrants certification.

B. There Was No Plain Error Under Watson. (Ppa30-36).

The panel also misapplied this Court's Watson decision in holding that

Babcock and Detective Burk improperly testified from surveillance footage that the same intruder broke in on both nights. Watson explained that while "there are times when narration testimony can help jurors better understand video evidence and aid them in determining a fact in issue," video-narration testimony may not "improperly intrude on the jury's domain." 254 N.J. at 601, 603. To that end, a witness "may not offer their views on factual issues that are reasonably disputed." Id. at 603. For example, he may not testify "'that's the same blue car' or 'that's the defendant,' if those facts were disputed" because "[i]t is for the jury to draw those conclusions." Id. at 604. But Watson allows "an investigator who carefully reviewed a video in advance [to] draw attention to a distinctive shirt … that appear[s] in different frames, which a jury might otherwise overlook." Ibid. Here, defendant did not object to the relevant testimony, and there was no error at all, let alone plain error sufficient to require a new trial.

Neither Babcock's nor Detective Burk's testimony violated Watson. For one, their testimony that the same man burglarized Wing King on both nights was undisputed; defendant emphatically claimed "[t]hat man"—singular—was not him, and never suggested that there were multiple intruders. (4T58-6 to 9; 7T5-14 to 21). For another, neither witness testified that the intruder was defendant, leaving the jury to decide the sole disputed issue: whether defendant

was the intruder. Finally, Burk, by emphasizing the distinctive sweatshirt and black object worn by the intruder in both videos, offered precisely the kind of helpful testimony this Court sanctioned in Watson. Compare (5T66-13 to 24, 67-11 to 19), with 254 N.J. at 604. To the extent the panel read Watson to find this testimony impermissible, this Court should clarify that Watson's "limiting principles" are not so broad, 254 N.J. at 605, or at a minimum not so broad as to render this testimony plain error necessitating a new trial.

C. There Was No Error Warranting Reversal. (Ppa29, 35-36).

The ruling below was not clear as to whether either of these errors alone (or in tandem but without the Daubert error) would have justified reversal of defendant's conviction. As to the voir-dire issue, the panel stated that the trial court's "refusal to question jurors was a 'serious error' and a 'significant component of the deficiencies' at this trial in light of the significance of the fingerprint evidence." (Ppa29). On the Watson issue, the panel stated that because the "issue of identity was key in this case," the "cumulative effect of the inadmissible testimonies deprived defendant of a fair trial," (Ppa35-36), but then in the very next paragraph it stated that "[i]n combination," all three of the errors just discussed required a new trial, (Ppa36). And it never conducted a fulsome harmlessness analysis as to either error specifically or to its cumulative-error holding. Compare, e.g., Burney, 255 N.J. at 29-31. Nor could either of

these asserted errors, assuming they were errors at all, have served to render the trial itself unfair, whether in isolation or in tandem. See id. at 29. This Court should either review these issues alongside the Daubert question or remand for a proper harmlessness analysis.

POINT III

THIS COURT SHOULD HOLD THE SENTENCING ISSUE FOR CARLTON. (Ppa36-37).

In State v. Carlton, No. 090241 (May 16, 2025), this Court will consider whether an Erlinger error can be excused under ordinary harmlessness principles where defendant never disputed that he qualified as a persistent offender. So too here, the panel vacated defendant's extended-term sentence despite uncontested evidence that he qualified. See (Ppa 36-37 n.4). As Carlton will presumably resolve whether the Erlinger error was harmlessness here as well, this Court should grant certification and hold this issue pending Carlton.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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Dated: June 19, 2025