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SUPREME COURT OF NEW JERSEY
DOCKET NO. 090662

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	On Certification Granted from a Final Judgment of the Superior Court of New Jersey, Appellate Division.
Plaintiff-Petitioner,	:	
v.	:	
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.
	:	

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT-RESPONDENT

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TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

TABLE OF AUTHORITIES

PAGE NOS.

Cases

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

Rules

Rules of Evidence

Constitutional Provisions

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Constitutional Provisions (Cont'd)

Other Authorities

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Authorities (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Authorities (Cont'd)

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Authorities (Cont'd)

TRANSCRIPT LEGEND

Defendant adopts the State's transcript convention with the addition of "Sb" to refer to the State's supplemental brief before this Court.

PRELIMINARY STATEMENT

Forensic evidence is a powerful type of evidence used to convict defendants every day. At its best, our court system makes sure that such evidence is reliable before it is admitted. At its worst, our court system refuses to engage with a reliability inquiry because of preconceived notions about the reliability of that evidence or because doing so would take time and energy.

Unfortunately for French Lee, he encountered our system at its worst. Faced with a trial at which the only evidence against him would be the opinion of a fingerprint examiner, he argued to the trial court that fingerprint analysis is unreliable. He argued to the court that the examiner's testimony should at least be limited so as to not mispresent the strength of his opinion. And he argued to the court that jurors should be asked if they have a preexisting belief in the infallibility of fingerprint evidence that would prevent them from considering that the examiner could be wrong and Lee might be innocent. The trial court refused to substantively consider any of these arguments and refused to act as a gatekeeper to this evidence in any way. Lee was then convicted on the word of the fingerprint examiner.

What Lee asked for—and what the Appellate Division held was necessary—was that New Jersey courts engage in an inquiry they have never engaged in: the assessment of the reliability of fingerprint analysis. The State

has argued at every stage of this case that learning whether fingerprint analysis is reliable and, if so, learning how reliable it is and under what conditions it is reliable is a "waste" of time. In so doing, it has forgotten its job: to make sure that trials are fair, not merely to secure convictions by whatever means possible.

This Court knows better. It knows that the integrity of our criminal legal system is damaged by the admission of evidence whose reliability is unknown. It knows that it takes time to maintain the integrity of that system and that that time is well spent. In the face of a request to look away from objective data about the reliability of the evidence used to convict French Lee—and scores of other defendants regularly—this Court knows that looking deeper is the only way to move forward to a more just and more fair system. The Appellate Division's decision must be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

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

[1] These two sections have been combined for ease of reading.

at the relevant time. No one confessed. In the absence of all these forms of proof, the only evidence of identity presented by the State was the opinion of a fingerprint examiner that French Lee left latent fingerprints at the scene.

A. Basics of Fingerprint Analysis

Fingerprint analysis is an exercise in which an expert attempts to detect whether two impressions have been left by the same source. Even assuming that no two people have the same fingerprints—an assumption that cannot feasibly be tested, see generally Michael J. Saks & Jonathan J. Koehler, The Individualization Fallacy in Forensic Science Evidence, 61 Vand. L. Rev. 199, 208-14 (2008)—the mere fact that each fingerprint is unique does not mean that "anyone can reliability discern whether or not two friction ridge impressions were made by the same person." National Research Council, Strengthening Forensic Science in the United States: A Path Forward 144 (2009) ("NRC Report").[2] See also President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 85 (2016) ("PCAST Report")[3] ("The issue is how well and under what circumstances examiners applying a given metrological method can

[2] available at https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf
[3] available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf

reliably detect relevant differences in features to reliably identify whether they share a common source.").

Examiners generally compare a "latent print," which is a "transferred impression" of a fingerprint that is "unintentionally deposited," to a "known print," which is "[t]he print[] of an individual, associated with a known or claimed identity, and deliberately recorded." Eric Holder et al., Nat'l Inst. Just., Fingerprint Sourcebook, 6-20 (2011).[4] The most common method used is known as "ACE-V," which stands for analysis, comparison, evaluation, and verification. Id. at 9-3. "[L]atent print analysis . . . depends on subjective judgment." PCAST Report at 101. See also NRC Report at 140 ("[F]riction ridge analysis relies on subjective judgments by the examiner."). Subjective judgments are "more susceptible to human error, bias, and performance variability across examiners." PCAST Report at 47.

In 2009, the National Research Council concluded that "there is limited information about the accuracy and reliability of friction ridge analysis[.]" NRC Report at 142. Given that there is no "validated method" for fingerprint analysis, "merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results." Ibid.[5] In 2016, PCAST noted

[4] available at https://www.ojp.gov/pdffiles1/nij/225320.pdf

[5] See also Adele Quigley-McBride and T.K. Blackall, On the Continuum of Foundational Validity: Lessons from Eyewitness Science for Latent Print

that there were "only two black-box studies that were intentionally and appropriately designed to assess validity and reliability." PCAST Report at 91. In one, there was a false positive rate of "1 error in 604 cases, with the upper bound [of the 95% confidence interval] indicating that the rate could be as high as 1 error in 306 cases." Id. at 94. The second study found 42 false positives among 995 conclusive examinations, for an upper-bound of the 95% confidence interval false positive rate of 5.4%, or 1 in 18.[6] Id. at 95.

B. Defense Motions About the Fingerprint Testimony.

Before trial, Lee made a number of requests to ensure that only reliable evidence, reliably presented, was put in front of an unbiased and properly instructed jury. First, Lee moved to preclude any testimony about fingerprint analysis, arguing that it is unreliable. (1T 6-1 to 13-12) In support of that motion, Lee relied on the NRC and PCAST Reports to demonstrate that fingerprint analysis is a subjective discipline without a uniform set of guidelines or standards. (1T 6-1 to 10-19) The court denied that motion without a hearing, holding that because ACE-V has been used "for over 100 years" and other courts

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Examination, 15 Behav. Sci. (2025) ("[T]he most significant barrier to advancing foundational validity in [latent print examination] is the lack of a consistent methodological approach to examinations. Without consensus on a sufficiently detailed set of procedures and criteria—or even several clearly defined approaches—foundational validity cannot be established[.]").

[6] The State neglects to mention this upper bound in its brief. (Sb at 23)

have found fingerprint evidence to be reliable, that the evidence would be admissible in this case. (1T 20-10 to 24)

Once the motion to exclude the fingerprint testimony in its entirety was denied, Lee asked to limit the testimony: to testify only that "the latent print and the known exemplar have similar characteristics, but that he not use language to suggest that there is an identification match, a source identification or that the latent print is from the same source as the known print[.]" (1T 23-19 to 24-4) The defense argued that such a limitation was necessary in order for the expert not to overstate the value of his opinion. The court initially ruled that the examiner must qualify his testimony "with language such as within a reasonable degree of probability as opposed to a 100 percent match" (1T 29-2 to 8), but then reversed itself, holding that it was not "limiting the testimony of the expert." (4T 14-12 to 13)

Having failed to get any limits on the examiner's testimony, Lee then requested that the prospective jurors be asked during voir dire if they "believe that fingerprint analyses are reliable." (1T 32-1 to 11) He noted that "people are of the belief that fingerprint analysis is infallible" due to exposure to that assertion in pop culture and police procedurals. (1T 10-20 to 11-3) A decision was not made on the record, but no question about jurors' beliefs about the reliability of fingerprint analysis was posed during voir dire. (2T) Lee also

requested that the trial court issue a jury charge about the reliability of fingerprint evidence. (Da 198; 1T 10-20 to 25) The trial court did not give this instruction nor any kind of instruction about how to consider the fingerprint evidence.

C. Trial Testimony

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

On September 30 at 4:51 a.m., Officer William Mann of the Moorestown Police Department received a call for service and went to the Wing King. (4T 88-1 to 6) When he arrived a few minutes later, there was an alarm going off, no sign of forced entry, and no one in the vicinity. (4T 88-10 to 89-6) Footage retrieved from a camera inside the Wing King showed that at 4:42 a.m. on September 30, a person climbed in through a window and lifted up the cash

register. (4T 90-25 to 93-25) The intruder went to the safe but did not obtain anything. (5T 19-4 to 24)

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

Officer Jason Burk of the Moorestown Police Department arrived at the scene on September 28 and tried to develop latent prints. (5T 32-9 to 37-10) He lifted a print from the pizza oven. (5T 45-9 to 13) Burk arrived at the Wing King again on September 30. (5T 51-13 to 18) He viewed the surveillance footage from that morning, which, in his opinion, depicted a similar intruder. (5T 54-1 to 3) Burk was able to lift four latent prints from the bottom of the cash register. (5T 61-21 to 23) All five prints lifted on both nights were submitted to the New Jersey State Biometric Unit Laboratory for comparison in an Automatic Fingerprint Identification Search (AFIS) system. (5T 46-19 to 21)

Lieutenant Michael Wiltsey of the Burlington County Prosecutor's Office testified as an expert in latent fingerprints. Wiltsey had no degree in biology, statistics, or forensic science, and he was not certified by any forensic body. (6T

19-5 to 21-6) He compared the latent prints found at the scene to Lee's patents. He made this comparison only after AFIS had returned a match and after Lee had already been indicted. (6T 51-1 to 16, 76-13 to 21) He was not asked to compare the latent prints to any other potential matches, including an unknown number of other candidates suggested by AFIS. (6T 110-3 to 19)

After explaining the basics of ACE-V, Wiltsey testified the "science of fingerprints" allows him to "determine source identification[,] which . . . means that it is your opinion that the two prints originated from the same source." (6T 32-17, 44-8 to 14) He opined that "all four of these latent impressions were identified as originating from the same source as the known exemplars of French Lee," repeating this "same source" conclusion multiple times. (6T 55-24 to 56-1, 67-1 to 6, 72-1 to 5, 73-10 to 13) Wiltsey also testified that he identified each latent print as coming from a specific finger "of French Lee." (6T 74-1 to 24) When asked by the prosecutor, "[D]id the defendant French Lee make the latent impressions" found at the scene, Wiltsey said "yes." (6T 56-17 to 21) Wiltsey also testified that his conclusions were reviewed independently by a verifier, that he has "never been involved in a situation where the verification process resulted in someone refuting the findings of the original examiner[,]" and that studies show that the verification process catches all false positive errors. (6T 45-4 to 7, 74-74-25 to 75-1, 111-8 to 15)

No other evidence of the identity of either intruder was produced at trial.

D. Sentencing and Appeal

On March 15, 2023, Lee was convicted of two counts of third-degree burglary. (7T 42-1 to 14; Da 3) On May 1, Lee was sentenced to two concurrent terms of six years in prison with a two-year period of parole ineligibility. (5T 13-16 to 22; Da 4-6)

On appeal, Lee argued that the trial court erred in its handling of the fingerprint evidence by: (1) admitting the evidence without the State demonstrating its reliability; (2) failing to limit the fingerprint examiner's testimony to that which is empirically supportable; (3) failing to voir dire prospective jurors about their belief in the infallibility of fingerprint evidence; (4) allowing the examiner to relay testimonial hearsay; and (5) failing to charge the jury on how to consider the reliability of fingerprint evidence. Lee also argued that Babcock and Burk improperly gave lay-opinion testimony that both intruders were the same person, that his sentence was excessive, and that his persistent offender extended-term sentence is illegal under Erlinger v. United States, 602 U.S. 821 (2024).

On April 4, 2025, the Appellate Division reversed Lee's convictions in an unpublished opinion. It held that the trial court committed reversible error in three ways. First, it was reversible error to refuse to hold a hearing on the

reliability of fingerprint evidence. The Appellate Division explained that the trial court wrongly failed to "address the second prong of N.J.R.E. 702—whether Wiltsey's opinion was based on a reliably sound methodology—and instead focused on the historical acceptance of fingerprint evidence without considering the studies and reports defendant presented." State v. Lee, slip op. at 22-23. As the court explained, the failure to consider actual evidence of the reliability of the field and to instead simply conclude that fingerprint analysis "is reliable because it has been used 'for over 100 years' and other courts have determined it to be reliable does not comport with the Daubert analysis" and required reversal of Lee's convictions. Id. at 24.

The Appellate Division also held that the failure of the trial court to inquire into prospective jurors' views on fingerprint analysis evidence was reversible error. Id. at 29. The Appellate Division concluded that a fair trial required that prospective jurors be "question[ed] on whether their knowledge, and perhaps preconceived notions about fingerprint evidence, may impact their ability to be fair and impartial jurors." Id. at 29-30.

Last, the Appellate Division held that Burk's and Babcock's testimony that the same person broke into the Wing King on two separate dates was improper lay-opinion testimony that, together, required reversal. Id. at 32. As the panel

explained, neither witness had personal knowledge of the suspect that would enable them to give such an opinion. Id. at 35.

In light of finding three separate reversible errors, the panel did not rule on the failure to limit the examiner's testimony, on the examiner's recitation of hearsay evidence, on the failure to charge the jury on the proper consideration of fingerprint evidence, or on Lee's multiple challenges to his sentence. This Court granted the State's petition, filed as within time, on September 16, 2025.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S ADMISSION OF EXPERT FINGERPRINT ANALYSIS WITHOUT ANY ANALYSIS OF ITS RELIABILITY VIOLATED THIS COURT'S CASE LAW AND DEFENDANT'S RIGHT TO A FAIR TRIAL.

The only evidence in this case that inculpated Lee was the fingerprint expert's opinion. After first moving to exclude any fingerprint expert testimony in its entirety, defense counsel attempted to ensure that this evidence was handled appropriately by the judge, and at every turn counsel was rebuffed. The Appellate Division correctly recognized that the trial court abdicated its gatekeeping role in this case. Contrary to the State's claims, there is no robust precedent confirming the reliability of fingerprint evidence. Indeed, there has never been any published decision on the reliability of fingerprint analysis that

came after any sort of hearing on that reliability in New Jersey. The admissibility of fingerprint evidence, rather than being based on the type of reliable science this Court has required, is thus based on history, inertia, and a judicial echo chamber that has been elevated above judicial truth-seeking.

This Court has made clear, again and again, that trial courts have a job to do when faced with expert evidence. That job is to make sure the evidence is actually reliable before it is admitted. The failure to do so in this case, compounded by the failure to ensure that the jury could impartially assess that critical evidence, violated Lee's rights to a fair trial and to due process, requring reversal. U.S. Const. amends. V, VI, and XIV; N.J. Const. art. I, ¶¶ 1, 9, 10.

A. The Reliability Of Any Forensic Discipline Must Be Demonstrated, Not Assumed.

This Court has consistently emphasized that reliability is the first and foremost determinant of whether an expert opinion is admissible. "[A]n expert opinion that is not reliable is of no assistance to anyone." State v. Olenowski, 253 N.J. 133, 150 (2023) (Olenowski I) (internal quotation marks omitted); see also In re Accutane Litig., 234 N.J. 340, 378 (2018) (explaining that adopting Daubert helps to ensure "that only reliable and reliably applied expert testimony enters New Jersey's courts"). The reliability of forensic evidence cannot be assumed; it must be proven through objective facts about "the soundness of the methodology used to validate a scientific theory or technique, the strength of the

reasoning underlying it, and the accuracy of the theory or technique in practice." Olenowski I, 234 N.J. at 150. And the party that bears the burden to "clearly establish" that reliability is the proponent of the evidence. State v. Cassidy, 235 N.J. 482, 492 (2018).

The trial court's role as gatekeeper is essential to ensuring that only reliable evidence is presented in court. "Properly exercised, the gatekeeping function prevents the jury's exposure to unsound science through the compelling voice of an expert. . . . Difficult as it may be, the gatekeeping role must be rigorous." Accutane, 234 N.J. at 346, 390. This Court has made clear that the gatekeeping role of New Jersey courts cannot be supplanted by decisions made by other courts, which "can be persuasive but . . . not controlling." Olenowski I, 253 N.J. at 154. Thus, this Court has adopted a "Daubert-type standard in criminal cases," which requires our courts to directly assess "the soundness of the methodology and reasoning used to validate the expert opinion or technique" before allowing the admission of expert opinions. Id. at 153-54.

This Court had good reason to double down on its commitment to reliability in Olenowski I. Forensic evidence, either shoddy at inception or used improperly, is a leading case of wrongful convictions. Melendez–Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) (discussing study finding "that invalid forensic testimony contributed to" 60 percent of analyzed wrongful

convictions). The realization that forensic methods previously assumed to be reliable are, in fact, deeply unreliable and barely scientific is by now a well-known story. See e.g., Federal Bureau of Investigation, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (April 20, 2015) (acknowledging the unreliability of microscopic hair testimony after multiple individuals were exonerated through later DNA testing); Federal Bureau of Investigation, FBI Laboratory Announces Discontinuation of Bullet Lead Examinations (Sept. 1, 2005) (FBI retires bullet-lead analysis, which had been used in approximately 2,500 criminal cases, because its foundational assumptions could not be proven).[7]

Part of the reason the courts are constantly learning that long-used methods are unreliable is because these methods are not actually scientific methods developed by scientists. Instead, they are forensic methods developed "primarily within law enforcement environments or at the behest of law enforcement." Suzanne Bell et al., A Call for More Science in Forensic Science,

[7] See also David L. Faigman, Anecdotal Forensics, Phrenology, and Other Abject Lessons from the History of Science, 59 Hastings L.J. 979, 980 (2008) (tracing the history of the development of forensic fields that require a high amount of subjective judgment that have no solid scientific basis, such as "firearms, toolmarks, bitemarks, and non-DNA hair comparison" and positing that they "will almost certainly join phrenology and similar notorious beliefs in the annals of abject lessons learned in the history of science").

115 Proc. Nat'l Acad. Sci. U.S. 4541, 4542 (2018). "Disciplines such as fingerprints . . . matured largely outside of the traditional scientific community during a time when admissibility standards for scientific evidence had yet to be formulated." Ibid. "Thus, admissibility of such evidence rightly or wrongly created judicial precedent in decisions that often did not, or could not, involve the level of research that would today be needed to establish scientific validity." Ibid.[8]

The problem of committing to precedent developed without actual proof of a method's reliability can only be stopped by the courts themselves. Yet, "[n]ot only are judges" often "willing to admit this evidence but they will frequently do so after denying a defense request for a hearing on the admissibility of such evidence under either the Frye or Daubert standards and, more often than not, without any critical analysis." Katie Kronick, Forensic Science and the Judicial Conformity Problem, 51 Seton Hall L. Rev. 589, 593 (2021). Fortunately, against this history of the lax development and acceptance of many forensic disciplines, this Court has correctly recognized that the

[8] See also Simon A. Cole, Grandfathering Evidence: Fingerprint Admissibility Rulings from Jennings to Llera Plaza and Back Again, 41 Am. Crim. L. Rev. 1189, 1224 (2004) ("The history of science is littered with examples of beliefs that existed for long periods of time and were subsequently shown to be false. Indeed, 'the discoverer says a belief is credible because it has endured for centuries' is listed as number five of physicist Robert L. Park's 'seven warning signs of bogus science.'").

criminal legal system must be ready to examine the reliability of untested techniques and reassess decisions about the admissibility of expert testimony when "the scientific reliability underlying the evidence has changed." Olenowski I, 253 N.J. at 154.

Another problem that comes with admitting expert testimony simply because it has previously been admitted is that it prevents courts from determining the limits of a field's reliability. Reliability is not a binary. Even if a field is generally reliable, that does not mean it is always reliable. It doesn't mean that it can be reliably applied in every context, it doesn't mean that it was reliably applied in a specific case, and it doesn't mean that it was reliably communicated to the jury. Olenowski I, 253 N.J. at 147 (courts must determine not only whether a field is foundationally valid, but also "whether that reasoning or methodology properly can be applied to the facts in issue," and were in fact reliably applied.") (emphasis added). Because reliability is a nuanced issue, wrongful convictions are not just caused by the admission of "junk science." Wrongful convictions are caused by "examiners whose examinations or testimony do not conform to science-based standards," by "forensic examiner variability," by "cognitive bias," by "the limitations of forensic conclusions [being] poorly understood," or by "alternative interpretations" not being presented. John Morgan, Wrongful Convictions and Claims of False or

Misleading Scientific Evidence, 68 J. Forensic Sci. 908, 953 (2023). No method is appropriate for use in all circumstances all the time, and not all ways of conveying the weight of the output of a generally reliable method is appropriate. This Court recognizes that: that's why it limited the opinions of Drug Recognition Experts, for instance, so that assertions of certainty that are not supported by the scientific evidence do not come in front of the jury. State v. Olenowski, 255 N.J. 529, 610 (2023) (Olenowski II). But the only way to know the limits of a method is to actually examine the evidence that supports the method's reliability, not to merely assume that something that works okay some of the time works well enough all the time.

In sum, this Court has recognized that reliability must be demonstrated, that the opinions of other courts are not a substitute for our own gatekeeping obligation, that science evolves, and that all scientific methods have limits that must be established and adhered to.

B. The Reliability Of Fingerprint Evidence Has Never Been Established To This Court's Standards.

Against this backdrop—this Court's rigorous commitment to the demonstration of the reliability of forensic evidence through actual empirical evidence of reliability—comes the State's appeal here. The State complains that the Appellate Division upended a century of precedent by ordering a hearing on the reliability of fingerprint evidence. The truth, however, is much more

concerning: there is no precedent on the reliability of fingerprint evidence in New Jersey. And that is because no New Jersey court has ever held an evidentiary hearing on the reliability of fingerprint evidence that has reached a reported opinion (or, perhaps, ever). Such a hearing would be necessary to demonstrate the reliability of fingerprint evidence.

1. No New Jersey court has ever actually inquired into the reliability of fingerprint evidence.

The three cases the State uses to argue that such a precedent exists are stunning in their complete irrelevance to either the issue of fingerprint evidence or to modern-day admissibility standards. First comes the 1914 case that supposedly started it all: State v. Cerciello, 86 N.J.L. 309 (E. & A. 1914). Of course, Cerciello comes not only before Daubert, but before any modern principles of scientific validation were applied to forensic cases. The "rule" that was applied to allow for the admission of fingerprint evidence in that case was: "Cuilibet in sua arte perito est credendum." Id. at 313-315. The Latin translates to "Any person skilled in his peculiar art or profession is to be believed." The Law Dictionary, https://thelawdictionary.org/cuilibet-in-arte-sua-perito-est-creden-duin/ (last visited Nov. 14, 2025). Although an interesting aphorism, this reasoning bears no resemblance to the "direct[] examin[ation] of reliability of expert evidence" required by our courts under Olenowski or any time in the

modern era. Olenowski I, 253 N.J. at 139. Nor was there a hearing on the reliability of fingerprint analysis in Cerciello.

The next case relied on by the State, State v. Cary, 49 N.J. 343 (1967), has nothing to do with fingerprints. That case was about whether a defendant can be compelled to submit to blood and voice tests. Id. at 355. Although this Court noted in Cary that New Jersey recognized "fingerprint evidence, a type of investigative aid which now possess unquestioned value," ibid. (citing Cerciello, 86 N.J. at 90), it had neither evidence of fingerprint evidence's value nor a challenge to the admissibility of fingerprint evidence before it. There was no hearing on the reliability of fingerprint analysis in Cary.[9]

State v. Fortin, 189 N.J. 579, 601 (2007), also had nothing to do with fingerprint analysis. It was about whether bite mark evidence was admissible as evidence of a signature crime. In any event, the dissent analogized fingerprint evidence to bite mark evidence in order to argue that bite mark evidence was admissible to demonstrate the identity of a perpetrator. Id. at 612–13 (Rivera-Soto, J., dissenting).[10] There was no hearing on the reliability of fingerprint analysis in Fortin.

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[9] Voice printing, which the defendant had to submit to under Cary, has since been found to be insufficiently reliable to be admissible in criminal cases. Windmere, Inc. v. Int'l Ins. Co., 105 N.J. 373, 387 (1987).

[10] Bite mark evidence is now widely regarded as junk science. PCAST Report at 83-87.

In short, a few cases that assume the reliability of fingerprint analysis without the court having argument or data or evidence before it does not make a valid inquiry into the reliability of a field. And certainly there is no precedent in New Jersey that is (1) actually about the reliability of fingerprint analysis, let alone one that (2) stemmed from a hearing in which all evidence about the reliability of that analysis was presented, and (3) applied anything approaching a modern standard of reliability. Therefore, there is no status quo establishing the reliability of fingerprint evidence that Lee had to present any change from to get a hearing.

2. Out-of-state opinions cannot be a substitute for actual engagement with the current state of evidence of the reliability of fingerprint analysis.

The out-of-state opinions about the admissibility of fingerprint evidence that the State asserts are "precedent" that needs to be respected are, of course, not precedential. Precedent is binding. Out-of-state opinions are not binding on our courts. Therefore, they are not precedent. And, as explained above, specifically in the context of expert evidence, this Court has made crystal clear that we are not "embrac[ing] the full body of Daubert case law as applied by State and federal courts." Olenowski I, 253 N.J. at 154. In other words, New Jersey courts must assess the reliability of a forensic method themselves.

And there is a great reason not to rely on the out-of-state opinions cited in this case: they are mostly a house of cards built upon other precedent, which is built upon old assumptions. As Brandon Garrett, whom the State quotes, explains, after reviewing all opinions about fingerprint evidence that he could find since 1993, when Daubert was decided: "Many judges did not carefully examine whether fingerprint evidence was admissible, because they took judicial notice of its admissibility, or relied on prior precedent. Of the 316 rulings in the database, 241, or over two-thirds, relied on prior precedent or judicial notice." Brandon L. Garrett, Judging Fingerprint Evidence, Duke L. Sch. Pub. L. & Legal Theory Series, at 20 (2024). This, Garrett explains, is a cause for concern, because there is a "broader need to examine both the strengths and the limitations of forensic methods, as well as more specifically, an inquiry regarding scope of conclusions regarding fingerprint evidence, as well as disclosures regarding reliability and error rates." Id. at 46. But most courts do not do that, instead relying on other courts without further inquiry or analysis.

Fingerprint evidence, like many forms of evidence described in subsection A, supra, made it into court without ever proving it belongs there. Fingerprint evidence was first used in a 1902 burglary trial in England, where it "was admitted without any substantive analysis of the field despite concerns" about the "discipline's potential for error—concerns still at issue today." Maneka

Sinha, Radically Reimagining Forensic Evidence, 73 Ala. L. Rev. 879, 882 (2022). From that inauspicious start, "[f]ingerprint evidence was first admitted in an American court eight years later in a similarly uncritical fashion. In the years following, courts continued to admit fingerprint evidence readily without scrutiny." Id. at 883.

Fingerprint testimony continued to be admitted without scrutiny for close to 100 years. Indeed, there was almost no research about the reliability of fingerprint evidence until 2009, 16 years after Daubert and 99 years after it was first admitted in the United States.[11] The out-of-state case law that State relies on largely admits fingerprint testimony without a hearing or doing so years before most of the literature discussing the reliability of the testimony was developed. These cases are not a meaningful substitute for a decision under our standards after a real hearing.

3. Reliability of a forensic technique must be assessed at an evidentiary hearing, not in appellate briefing.

The State claims that not only does case law require the admission of fingerprint evidence, so does the scientific literature. (Sb 25-26) The very fact

[11] As one lead commentary explained in 2004, fingerprint evidence has been effectively "grandfathered in" to the modern courtroom because it has "enjoyed long-term legal acceptance" and "judges intuitively feel" it is accurate. Simon A. Cole, Grandfathering Evidence: Fingerprint Admissibility Rulings from Jennings to Llera Plaza and Back Again, 41 Am. Crim. L. Rev. 1189, 1274 (2004).

that the State is asking this Court to parse these articles, after refusing to engage in any attempt to demonstrate the reliability of its evidence at trial, shows the need to closely evaluate the reliability of fingerprint evidence in the appropriate forum: at a hearing. As this Court has explained, in "admissibility disputes applying the Daubert factors, the parties . . . should present all relevant scientific and technical evidence and published studies" "preferably at the trial level[.]" Olenowski II, 255 N.J. at 582. Such presentations in the trial court "will enable appropriate witnesses to properly contextualize those materials, and testify about their significance or insignificance, for the trial court's and ultimately the appellate court's benefit." Ibid. Instead, in this case, this Court is being asked to decide, on the papers, what to make of the studies the State is citing.

The State's suggestion that this issue can be decided based on the studies it is presenting is particularly concerning because the State misunderstands or mispresents most of the papers it cites:

The first study cited by the State, Kellman et al., is egregiously misrepresented. The State's parenthetical reads: "despite a three-minute time limit, fifty-six fingerprint examiners were 'highly accurate' with a false-positive rate of 3%; the authors 'suspect[ed] that error rates in forensic laboratory settings could well be lower.'" (Sb 25) The State left out the next sentence, in which the authors note that the error rate may also be higher and then conclude:

"Our data do not permit us to assess either of these possibilities; but this example illustrates why taking these data as offering an ''error rate'' would be both misleading and inappropriate." Philip J. Kellman et al., Forensic Comparison and the Matching of Fingerprints: Using Quantitative Image Measures for Estimating Error Rates through Understanding and Predicting Difficulty, 9 PLOS ONE 1, 13 (2014) (emphasis added). This is not a study about the false positive rate of fingerprint comparison, contrary to the State's claims.

The next study cited, known as the "Miami-Dade study," has not, to this day, been published in any peer-reviewed journal, which raises significant concerns about its reliability. See Olenowski II, 255 N.J. at 589 ("[S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected.") (internal quotation marks omitted).

The next study the State cites, by Tangen et al., was dismissed by PCAST as "interesting" but not a "a black-box validation study of latent fingerprint analysis because its design did not resemble the procedures used in forensic practice." PCAST Report at 99-100. Therefore, it was not considered relevant to inform an assessment of the field's error rate.

All but one of the articles cited by the State in its footnote 7 were also all rejected as being an inappropriate basis to assert the reliability of the method by

PCAST because of their study design: all of the Ulery papers are white-box studies, which cannot be used to establish an error rate. PCAST Report at 88. The Thompson study, which is co-authored by Tangen, has the same flaw as the first Tangen study: using a scoring scale that bears no resemblance to casework. Matthew B. Thompson et al., Human Matching Performance of Genuine Crime Scene Latent Fingerprints, Law & Hum. Behav. at 3 (2014).

The only article that PCAST did not reject as a basis to estimate the error rate of fingerprint analysis was published after the PCAST report was published. That study, the 2017 Ulery study, which the State presents as proof of an extremely low false-positive rate, didn't actually study false positive rates at all: it was a reanalysis of data presented in previous studies, focused exclusively on presenting evidence on false negative rates. Bradford T. Ulery et al., Factors Associated with Latent Fingerprint Exclusion Determinations, Forensic Sci. Int'l 275, 66 (2017) ("[W]e have conducted additional analyses of data from the Black Box and White Box studies to understand the associations between a variety of factors and exclusion determinations, particularly factors associated with erroneous exclusions."). This is also not a study about the false positive rate of fingerprint comparison, contrary to the State's claims.

The State also fails to mention any of the studies of "close non-matches," which demonstrate that error rates skyrocket in circumstances like those present

in this case. Close non-matches (CNMs) arise when "two prints from different people have many common features and few discernible dissimilar features." Jonathan J. Koelher & Shiquan Liu, Fingerprint Error Rate on Close Non-matches, 66 J. Forensic Sci. 129, 130 (2020) (Da 10-15). "The risk of encountering a CNM is heightened when large databases are searched for the source of a print." Ibid. Such a database was used in this case: the latent print was sent through AFIS, a match to Lee was presented by that program, and only then did Wiltsey conduct a comparison. (6T 51-1 to 16, 76-13 to 21) "The use of these databases, particularly large ones, may increase the risk of a false identification because they may contain hard-to-distinguish CNM prints." Koehler, Fingerprint Error Rate at 130. A study of close non-match comparisons found a false-positive error rate of 15.9% in one set of prints and 28.1% in another. Id. at 131.

Studies also show that when the source of a latent print is missing from a database, a database search nonetheless produces candidates that score very high, and sometimes even higher, than the actual source of the print. Simon Cole et al., Beyond The Individuality Of Fingerprints: A Measure Of Simulated Computer Latent Print Source Attribution Accuracy, 7 L. Prob. & Risk 165, 173–75 (2008) (Da 21-45). See also Kang Li et al., The Influence of Close Non-Match Fingerprints Similar in Delta Regions of Whorls on Fingerprint

Identification, 66 J. Forensic Sci. 1482, 1487-1491 (2020) (Da 46-58) (a study running latent prints through AFIS in which both the true source and a CNM were in the database found that in 9.7% of the searches, the databank returned a close non-match but not the true match within the search results).

Parsing scientific literature is difficult. Perhaps, for example, it is unclear why PCAST determined that the white-box studies were not an appropriate basis to determine the field's error rate. That is an important question that should be addressed in the appropriate way: by experts at a hearing, as the Appellate Division ordered, not in the briefing before this Court.

4. Fingerprint evidence, even if sometimes reliable enough to be admissible at trial, is not reliable enough in all circumstances and in all presentations.

Learning, at a hearing, about if and when and how fingerprint evidence is reliable would inform not only the general question of admissibility, but the questions of appropriate language that an examiner can use and appropriate jury charges. Without any information about how and when fingerprint analysis is reliable and the reliable way to present that evidence, our courts will never know if they are handling this evidence appropriately.

Many factors impact the accuracy of a particular fingerprint analysis. The fingerprint itself matters. The quality and quantity of detail in the latent print may be affected by many different factors, including the robustness of the ridge

structure, the presence of oil or sweat, the mechanics of touch, and the nature of the surface touched. NRC Report at 137. That is why "[a] single overall 'error rate' for latent fingerprint comparison would be insufficiently granular, as it would fail to recognize that some comparisons are likely far easier than others, and thus far less prone to error." Kellman et al., Forensic Comparison and the Matching of Fingerprints at 2. The proficiency of the individual examiner matters. PCAST Report at 101. And an examiner's exposure to potentially biasing information matters. Ibid. One study showed that information about the police investigation surrounding a case impacts the likelihood that an examiner will find a match. Itiel Dror et al., Contextual Information Renders Experts Vulnerable To Making Erroneous Identifications, 74 Forensic Sci. Int'l 74 (2006) (Da 16-20).

It is also essential to make sure the information transmitted by the expert to the jury about the reliability of fingerprint evidence does not go beyond what is supported by the data. That is why judges are beginning "to engage more with the limitations of the evidence," by for example not "permit[ting] an unqualified assertion of a 'match' by the fingerprint expert, such as through an assertion of 100% certainty, or a claim of infallibility, or an error rate of zero." Garrett, Judging Fingerprint Evidence at 7, 41. But the limits cannot be established if the data about the field is never examined.

5. New Jersey courts' commitment that only reliable evidence be admitted at trial extends to all evidence—even fingerprint evidence.

What Lee asked the trial court to do is assess whether fingerprint evidence is reliable and, if so, determine what an appropriate presentation of the probative value of fingerprint analysis is. What the State is asking this Court to do is refuse to learn any of this information. The State is telling the Court that it is a waste of time to find out if fingerprint analysis is reliable, what the limits of that reliability are, and how those limits should be reflected in testimony, voir dire, and jury instructions. The State is telling the Court it's a waste of time because for 111 years, we haven't learned any of these things. But it's never too late to learn.

Our courts have never turned away from squarely examining the reliability of a method or belief, even when it's been used and admitted for decades. This Court just did so in State v. Nieves, No. 088682 (Sup. Ct. Nov. 20, 2025), when it held that Shaken Baby Syndrome is too unreliable to be admitted at trial despite decades of use and its acceptance by courts around the country. Nieves, slip op. at 90-108. This Court did so in State v. Henderson, 208 N.J. 208 (2011), when it rejected the entire framework for the admissibility of eyewitness identifications after learning that that framework did not comport with the science, despite being the first jurisdiction in the country to do so. And that willingness has had ripple effects throughout the country. Kronick, The Judicial

Conformity Problem at 635 ("The way in which the Henderson decision has changed how courts approach eyewitness identification exemplifies the reversibility of the conformity problem: the social science research was there long before Henderson, defense attorneys were challenging this evidence long before Henderson, but it took Henderson for other courts to resist conforming with the norm and change admissibility standards.").

Our courts have never let tradition substitute for engagement with the data. Parroting the conclusions of others, "without further scrutiny, creat[es] an authority house of cards." State v. Pickett, 466 N.J. Super. 270, 316 (App. Div. 2021). See also ibid. (the value of prior decisions admitting scientific testimony are only as good as the basis for those decisions; "a laundry list of admissibility rulings" that do not actually consider the underlying science is not a basis for admitting a scientific technique). The Appellate Division was right to refuse to rest a conviction on just such a house of cards. This Court should do the same.

C. The Trial Court Abdicated Its Gatekeeping Duty In This Case.

Facing a trial in which the only evidence against him was fingerprint analysis, Lee asked the trial court to exclude it because the State had not demonstrated its reliability. Lee argued that the methodology "is wholly unreliable and that it is the Court's duty as the gatekeeper of junk science evidence to preclude that jury from learning about this evidence." (1T at 5-16 to

25) The trial court dismissed the motion out of hand because fingerprint analysis "has been accepted by the New Jersey courts for over 100 years," while recognizing that "there's no reported New Jersey cases having specifically addressed the reliability" of the methodology. (1T at 20-10 to 18) In other words, the defense raised concerns about the reliability of the State's evidence and the court dismissed them out of hand. That was error.

Now the State blames the defense for the failure to assess the reliability of this evidence. It does so in two ways, both of which must be dismissed. The first is to say that the defense failed to meet an unarticulated burden to demonstrate a "change" in the "science" that would call for a "new" evaluation of the reliability of fingerprint analysis. (Sb 2, 16, 24) As explained in subsection B, infra, there was not then (and there is still not now) any binding precedent, following a hearing, on the reliability of fingerprint evidence in New Jersey. Thus, there is no need for the defense to show any "change" in the science. That hearing must be held in the first instance so that that precedent can be developed. And the defense pointed to two different publications that were released by two different federal organizations that made extremely clear that claims of the reliability of fingerprint analysis have little to no basis in actual scientific evidence: the NRC report and the PCAST report. Whatever is required to make a trial court consider the reliability of a forensic field, pointing out that there is

no binding law and clear concerns in credible scientific literature is certainly enough.

The State's second deflection is to blame the defense for not having a hearing because the defense said it didn't want a hearing. (Sb 13) Yes, the defense didn't want a hearing; it wanted the evidence wholly excluded because the State had not proven its reliability. But faced with a well-founded request to address the reliability of the evidence, the trial court had a gatekeeping duty: to determine the reliability of that evidence. If the trial court couldn't do so on the papers, it needed to hold a hearing, regardless of what the parties wanted. State v. J.R., 227 N.J. 393, 409-10 (2017) ("If a party challenges an expert opinion pursuant to N.J.R.E. 702, the trial court should conduct a hearing under N.J.R.E. 104 concerning the admissibility of the proposed expert testimony. In that setting, the proponent of the expert testimony may demonstrate that the expert's methodology meets the benchmark of N.J.R.E. 702 and the opposing party may challenge the reliability of the expert's opinion. A hearing pursuant to N.J.R.E. 104 is a favorite means to create a record for appellate review of a disputed decision.") (internal quotation marks omitted); State v. Torres, 183 N.J. 554, 567 (2005) (same). And to be clear, without a hearing, the reliability of the State's evidence cannot be and was not established. Therefore, the error was in the admission of this evidence at all.

In short, Lee unambiguously challenged the reliability of the State's evidence. It was then incumbent upon the trial court to substantively engage with that challenge. The trial court failed to do so. And, as the party bearing the burden, the State failed to demonstrate that the evidence it proffered was reliable. The defense did its job: raising legitimate concerns supported by evidence. That neither the court nor the State did its job cannot be the fault of the defense.

D. Assuring That A Jury Can Actually Determine The Weight To Give Forensic Science Is A Necessary Component Of A Fair Trial.

Faced with a trial that centered completely on a fingerprint match, Lee asked for a voir dire question to ascertain whether any potential jurors had preexisting biases that would prevent them from being able to impartially assess that evidence. The refusal to do so deprived Lee of his rights to due process and a fair trial.

A defendant is entitled to be tried "before an impartial jury." State v. Loftin, 191 N.J. 172, 187 (2007). As part of that entitlement, a defendant is allowed to ask questions that enable him to determine whether a juror is not impartial. "Our case law consistently endorses voir dire questions that probe the minds of the prospective jurors to ascertain whether they hold biases that would interfere with their ability to decide the case fairly and impartially." State v. Little, 246 N.J. 402, 417 (2021) (internal quotation marks omitted). "[I]nquiring

about a juror's ability to follow the trial judge's instructions or to deliberate with an open mind" is entirely appropriate, "so long as the questions do not indoctrinate prospective jurors about the issues that the jury will decide." Ibid.

Voir dire is appropriately used to determine whether jurors harbor preexisting notions about certain scientific fields. In a case in which testimony from a psychiatric expert was presented by the defense, the Appellate Division has held that it was appropriate and essential in voir dire "to probe[] whether the prospective jurors had read or studied about psychology, psychiatry, medicine, or related fields, and inquire[] about the jurors' views on those sciences and whether those views would hinder the ability to follow the law as instructed by the court." State v. Murray, 240 N.J. Super. 378, 392 (App. Div. 1990). See also State v. O'Brien, 377 N.J. Super. 389, 414 (App. Div. 2004), aff'd in relevant part, 183 N.J. 376 (2005) (approving of a judge asking in voir dire whether "they could 'accept the concept that psychiatry is a credible medical science'"). There is no reason that preconceived notions about psychiatry are any more important to root out than preconceived notions about any other kind of forensic evidence.

The failure to probe whether jurors already believed that fingerprint analysis was infallible or could consider evidence to the contrary requires reversal. It is very likely that prospective jurors had a preexisting, and inflated, belief in the reliability of fingerprints. One study of juror insight into scientific

error rates found that a pool of jury-eligible participants estimated the misidentification rate for fingerprints to be "1 in 5.5 million." Jonathan J. Koehler, Intuitive Error Rate Estimates for the Forensic Sciences, 57 Jurimetrics 153, 162 (2017) (Da 77-92).[12]

Thus, there is a significant risk that many jurors who were eventually impaneled would automatically assume that the fingerprint analysis is correct, regardless of any cross-examination by defense counsel. Studies have shown that "it is difficult to overcome the tendency for people to trust information from an expert in a relevant field." Lauren Hudachek & Adele Quigley-McBride, Juror Perceptions of Opposing Expert Forensic Psychologists: Preexisting Attitudes, Confirmation Bias, and Belief Perseverance, 28 Psychol. Pub. Pol'y & L. 213, 213–14 (2022) (Da 93-105). Not only do people tend to trust that experts are correct, but "[e]xisting attitudes are persistent and difficult to change and can result in belief perseverance effects." Ibid. In other words, "[w]hen people interact with an opinion contrary to their own, they tend to discredit the opposing argument and strengthen their preexisting view. Also, they will

[12] See also Am. Ass'n Advancement Sci. Forensic Science Assessments, A Quality and Gap Analysis: Latent Print Examination 71 (2017) ("Public perceptions of latent print examination have undoubtedly been shaped by decades of overstatement. One of the problems that examiners now face when attempting to convey a more realistic and appropriate sense of the value of latent print evidence is that people generally think a reported association between a latent and reference print constitutes a virtually infallible identification.").

subsequently feel even more favorable toward any new opinions they encounter that do align with their existing opinions." Ibid.

Studies demonstrate that, in fact, even robust and pointed cross-examination that is well-designed to expose weaknesses in forensic practitioners' methods has little to no power to do so, especially when experts phrase their conclusions in unshakable terms like "identification." Jonathan Koehler, Northwestern University Faculty Working Papers, If the Shoe Fits They Might Acquit: The Value of Forensic Science Testimony 25 (2011) (Da 106-52) ("There was no effect for cross examination on source confidence, source probability, guilt confidence, guilty probability, or verdict. Likewise there was no effect for cross examination across the two individualization conditions on any of the dependent measures."); Joseph Sanders, The Merits of the Paternalistic Justification for Restrictions on the Admissibility of Expert Evidence, 33 Seton Hall L. Rev. 913, 934-36 (2003) (concluding that multiple studies show that even robust cross examination of experts affects neither ultimate verdicts nor even juror confidence in said verdicts); Dawn McQuiston-Surrett & Michael J. Saks, The Testimony of Forensic Identification Science: What Expert Witnesses Say & What Factfinders Hear, 33 Law & Hum. Behav. 436, 439 (2009) (Da 152-70) (explaining that studies find "little or no ability of cross-examination to undo the effects of an expert's testimony on direct

examination, even if the direct testimony is fraught with weaknesses and the cross is well designed to expose those weaknesses."). Cross-examination could not fix the error in failing to make sure an unbiased jury was impaneled.

The State's assertion that the trial court's instructions that had nothing to do with the reliability of fingerprint analysis could cure a defect in jury selection not only fails to address the substantive concerns with the jury selection process, but is ironic given the trial court's refusal to give an instruction that would actually guide jurors in their consideration of the fingerprint evidence. The "fingerprint charge" merely tells the jury that it cannot speculate as to why Lee's fingerprints were on file. Model Jury Charge (Criminal), Fingerprints (Rev. 1/6/92) (7T 33-10 to 34-3) The model expert testimony charge tells the jury to give the opinion "the weight to which you deem it entitled," but provides no substantive guidance as to how to determine that weight. Model Jury Charge (Criminal), Expert Testimony (Rev. 8/18/25) (7T 32-6 to 14). We don't let phrenologists testify and assume that the model charge on expert testimony would cure any harm in the unreliable testimony. We don't let DREs testify that they could determine that the defendant was impaired due to a certain drug and assume that that misstatement would be solved because of the model charge on expert testimony. We first pick an impartial jury. Then we make sure that expert testimony is reliable and reliably communicated by the expert. Then we make

sure that the jury has a charge sufficient to guide its deliberations. The trial court skipped the first three steps here. The model charges on experts and fingerprints did nothing to cure those failures.

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

E. Mr. Lee Did Not Have A Fair Trial.

French Lee was convicted at a trial that was fundamentally unfair. The State relied on compelling forensic evidence without demonstrating its reliability. Compounding that issue, the trial court refused to determine if the jury could even consider that the fingerprint analysis was incorrect. Given the centrality of the fingerprint evidence to the case, these errors, both individually and together, require reversal.

The fingerprint examiner's testimony left the jury with no doubt that Lee was the source of the latent print. There was no qualification that expressed the possibility of error or the possibility that someone else would have a very similar fingerprint. This repeated conclusion that Lee was "the source" of the fingerprint

and that the fingerprints were "his" communicated a total certainty in that conclusion. To make matters worse, Wiltsey implied that fingerprint analysis has a zero error rate. Wiltsey stated that he "has never been involved in a situation where the verification process resulted in someone refuting the findings of the original examiner" and that studies reveal that verification "would have caught" any "false positives" that have been noted. (6T 45-1 to 7, 111-6 to 18) This testimony amounts to an assertion that fingerprint examinations that contain the final verification step never produce an inaccurate conclusion—a zero error rate. There is, of course, an error rate to all disciplines, including fingerprint examination. See United States v. Mitchell, 365 F.3d 215, 246 (3d Cir. 2004) ("[S]ome latent fingerprint examiners insist that there is no error rate associated with their activities. . . . This would be out-of-place under Rule 702.").[13] Wiltsey

[13] The Organization of Scientific Area Committees expressly disapproves of any examiner implying that there is a zero error rate to fingerprint analysis or that it is an infallible method. OSAC, Guideline for the Articulation of the Decision-Making Process Leading to an Expert Opinion of Source Identification in Friction Ridge Examinations 9 (2017) (Da 178-194) ("A claim of a zero-error rate for the method is demonstrably false; errors have occurred. Because the friction ridge comparison process takes place within the mind of the examiner, there is no way to separate a method error rate from a practitioner error rate. Furthermore, as with 100% certainty, the concept of a zero-error rate is incompatible with the practice of science."). See also Department of Justice, Approved Uniform Language for Testimony and Reports for the Forensic Latent Print Discipline 2-3 (Da 195-196) (prohibiting DOJ experts from testifying that "two friction ridge impressions originated from the same source to the exclusion of all others," or from asserting "that latent print examination is infallible or has a zero error rate.")

also inappropriately testified that a verifier independently reviewed his conclusion and implied that this verifier agreed with him, given that he has "never been involved" in a situation where a verifier did not. (6T 45-1 to 7, 111-6 to 18)[14] Wiltsey's testimony certainly gives the jury, which is already prone to believe the expert, reason to think that there is no room for doubt or error in his conclusion.[15] In short, not only was an opinion given by an expert that Lee's fingerprints matched the fingerprints at the scene, but that opinion was given without any qualification that would signal to the jury that his opinion is subjective and subject to error.

The uncritical admission of fingerprint analysis in this case, over the defense's vigorous objection, cannot be considered harmless because this case rested entirely on the reliability of that analysis. There was no other evidence of identity. No one identified Lee, either from the videotape or at the scene, and

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[14] The defense moved to preclude this testimony before it was given (6T 5-1 to 6-2) and challenged this testimony before the Appellate Division, but the panel did not reach that issue.

[15] The testimony also exceeded the bounds of what even believers in the reliability of fingerprint analysis think is appropriate. OSAC has made clear that "[a]n examiner shall not assert that a source identification is the conclusion that two impressions were made by the same source or imply an individualization to the exclusion of all other sources." OSAC, Proposed Standard for Friction Ridge Examination Conclusions 3 (2018) (Da 171-177). PCAST went further, recommending that opinions regarding source attribution by examiners should be given in conjunction with information on the limitations of latent print analysis. PCAST Report at 149.

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

In short, the fingerprint evidence was mishandled at every turn. Having determined that the evidence would come in without any sort of engagement with the law or science assessing the reliability of that evidence, the court then failed to address it appropriately throughout trial. Without asking prospective

jurors about their pre-existing beliefs in the reliability of fingerprint evidence, the trial court failed to ensure that the jury impaneled would actually be able to consider the possibility that Wiltsey was wrong. These failures, separately and cumulatively, were not harmless beyond a reasonable doubt. State v. Macon, 57 N.J. 325, 336 (1971). Lee's convictions were correctly reversed.

F. It Is Not A Waste Of Time, Energy, Or Money To Make Sure That The Forensic Evidence Used To Convict People Is Sufficiently Reliable And Properly Presented To A Properly Selected And Instructed Jury.

In its petition and in its supplemental brief, the State asserts that finding out whether and when fingerprint analysis is reliable is a "waste" of "judicial and party resources." (Sb 25) It is hard to think of what could be less of a waste to the criminal legal system than determining the reliability of a forensic methodology used to convict defendants and deprive them of their liberty.

The State urges this Court not to look under the hood because fingerprint analysis has been used to convict people for a long time and other jurisdictions are content with not knowing how reliable it is. But New Jersey courts understand the dangers of trial courts failing to embody their gatekeeping position to truly scrutinize the reliability of a technique, instead deferring to the fact that courts have admitted the evidence previously, making its future admission a fait accompli. As our courts have warned, "a long line of decisions uniformly in favor of a legal proposition suggests that a legal proposition is

generally accepted. We are mindful, however, that in science, the repetition of authority does not automatically establish reliability[.]" Pickett, 466 N.J. Super. at 316.

This Court should appoint a Special Adjudicator to preside over a hearing about the reliability of fingerprint analysis. Rule 4:41-1. However, this hearing should not cause further delay of the relief Lee is entitled to: reversal of his convictions and an opportunity to resolve his case. Lee put the trial court on notice that it had to determine the reliability of fingerprint evidence and the court refused to do it. That error rendered his trial fundamentally unfair. This Court should learn whether fingerprints are reliable, under what circumstances they are reliable, and any limits on their reliability, separate and apart from Lee's resolution of the third-degree burglary charges from 2019. In the alternative, such a hearing should happen in this case.

The State ends its legal argument in Point I by saying: "This Court should therefore reverse the panel's order to conduct a brand new Daubert hearing under Olenowski I." (Sb 27) An important correction to that statement is needed: it would not be a "brand new" hearing, but rather the "first" hearing. So, this Court should affirm the order to conduct the first-ever Olenowski hearing about the reliability of fingerprint evidence. All actors in the criminal legal system—defendants, judges, victims, and even prosecutors—should want to know the

quality of the evidence that is being used in court every day. Because we should all want to maintain the integrity of the criminal legal system.

POINT II

INAPPROPRIATE LAY-OPINION TESTIMONY THAT THE VIDEO OF EACH INCIDENT DEPICTED THE SAME PERPETRATOR DEPRIVED DEFENDANT OF A FAIR TRIAL.

During their testimony, Officer Burk and the owner of the Wing King, Babcock, opined that the two different surveillance videos of the two burglaries depicted the same man. The Appellate Division correctly recognized that the testimony exceeded the bounds of proper lay opinion testimony and went to the only issue in the case: the identity of the burglar(s). Therefore, the testimony violated our evidence rules and Lee's rights to due process and a fair trial, requiring reversal of his convictions. U.S. Const., amends. VI and XIV; N.J. Const., art. I, ¶¶ 1, 9 and 10; N.J.R.E. 701.

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

- Babcock opined that the surveillance footage he viewed on September 30 "looked like the same individual that was there two days prior decided to come back." (5T 16-23 to 25)
- Burk testified that "[t]he shirt was similar and so was the phone on the hip" in both videos. (5T 54-2 to 3)
- Burk testified that "[t]he sweatshirt, it appears to be a two-tone sweatshirt—the sleeves appear to be a different color than the body area which also

appears to be the exact same clothing worn two nights prior." (5T 66-16 to 19) (emphasis added). The prosecutor then asked, "In your opinion, the sweatshirt [on the September 30 footage] was of a similar design as the sweatshirt from the 28th?" (5T 66-20 to 23) Burk responded "Yes." (5T 66-24)

- Burk testified that on both videos, the intruders are "both appearing to be wearing the same dark-colored sleeve, light-colored chest and hood area sweatshirt." (5T 67-17 to 19)

- Burk opined that both intruders had an object he believed to be a phone "[o]n the same right hip, same location[.]" (5T 67-20 to 69-6)

It is improper for witnesses who have no personal knowledge of who or what is depicted on surveillance footage to opine as to the identity of a suspect or the identity of items seen in the footage. State v. Singh, 245 N.J. 1, 17 (2021). Video narration testimony from a lay witness must satisfy two fundamental requirements in order to be admissible: it must (1) be based upon the witness's "firsthand knowledge" and (2) it must be helpful to the jury. State v. Watson, 254 N.J. 558, 592 (2023) (citing N.J.R.E. 701, 602, and 403). In light of the first requirement – that witnesses have firsthand knowledge – the extent to which a lay witness may testify about the content of a video is largely dependent upon their prior experience. Witnesses who participated in the depicted events can provide "opinion testimony about [those] parts of [the video] recording that depict what they perceived in real time." Id. at 599.

Witnesses who did not experience the actual events depicted on camera, such as Babcock and Burk, are subject to substantial limitations in their video

narration testimony. One limitation is unyielding: witnesses "should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence." Id. at 604. Such comments are "appropriate only for closing argument." Ibid.

Neither Burk nor Babcock had any personal knowledge of what was depicted in the videos. Therefore, their testimony was inappropriate. Singh demonstrates how the personal knowledge required to render such an opinion admissible is lacking in this case. In Singh, a detective opined that the shoes worn by the suspect in a video were similar to the shoes defendant was wearing when he was arrested by the detective, as well as the same shoes presented as an exhibit at trial. Id. at 8. This Court held that the officer's testimony was admissible because the detective had seen the defendant wearing those shoes, and so the testimony was based on the detective's own perception. Id. at 19-20. Further, the detective's testimony was helpful to the jury because the detective "had first-hand knowledge of what the sneakers looked like" on the night defendant was arrested. Id. at 20. Unlike the detective in Singh, neither Burk nor Babcock had seen the intruders before or had seen their clothing in person. Therefore, their opinions on the resemblance between the two men and their clothing was not based on personal knowledge. It should not have been admitted.

The narration was also not helpful to the jury because there is no suggestion that the videos were difficult to parse or understand. Although the testimony of a witness without firsthand knowledge may be helpful if the video is "potentially confusing, complex, or unclear," the State has never claimed that the videos in this case meet that standard. Watson, 54 N.J. at 602.

The admission of this inappropriate testimony requires reversal of Lee's convictions. It is true that the defense did not object to this testimony at trial, but its improper admission meets the plain error standard: it was clearly capable of producing an unjust result. Rule 2:10-2. The identity of the intruders was the only issue in the case. The State had the burden to prove the identity of the person who committed each burglary. Just because Lee denied committing either burglary does not mean the State's burden to prove that he committed both can be diluted by multiple witnesses' opinions that the perpetrator was one and the same. It was up to the jury to determine if it was convinced, beyond a reasonable doubt, that the person who entered on each date was the same person.

In sum, Burk and Babcock's opinion testimony impermissibly "invaded the fact-finding province of the jury." State v. McLean, 205 N.J. 438, 443 (2011). The Appellate Division correctly recognized the harm from this testimony and reversed Lee's convictions.

POINT III

CARLTON WILL DECIDE THE LEGALITY OF LEE'S SENTENCE, BUT IT WILL NOT DECIDE THE PROPRIETY OF LEE'S SENTENCE.

Lee, who had never spent a day in prison before, received an extended term sentence and discretionary period of parole disqualification for being convicted of stealing $168 in change from a pizzeria in the middle of the night. Before the Appellate Division, Lee argued that the extended term was illegal under Erlinger. Lee agrees with the State that Carlton (No. 090241) will resolve that issue. But it won't resolve the remaining issues regarding Lee's sentence.

In addition to the Erlinger issue, Lee pointed out two other issues with his sentence. First, the trial court wrongly believed that because Lee met the predicates for an extended term, the relevant sentencing range was only the extended range, 5 to 10 years. The range the trial court should have considered, however, was three to ten years. Second, Lee's prior convictions do not merit an extended term. Lee barely met the minimum requirement for an extended term. Lee had two prior fourth-degree convictions, from 2013 and 2015, for which he received probation. (Sb 41) The trial court overweighed this minor criminal record in sentencing him to an extended term.

The Appellate Division did not address these arguments, having reversed Lee's convictions. Therefore, in the event that this Courts reverses the Appellate

Division and affirms Lee's convictions, this Court must remand to the Appellate Division to address the remaining issues regarding his sentence.

CONCLUSION

The Appellate Division properly reversed Lee's convictions. The State had one job to do in this case: to prove the identity of the person or persons who entered the Wing King on September 28 and 30. It did that through expert testimony whose reliability was unscrutinized, presented to a jury that was not properly asked about its ability to assess that evidence, and with the improper testimony of two different witnesses that the same person committed both crimes. Even if none of these issues is deemed sufficient on its own to warrant reversal, together they deprived Lee of due process and a fair trial, as guaranteed by the Fourteenth Amendment and the corresponding provisions of the state constitution. State v. Sanchez-Medina, 231 N.J. 452, 469 (2018).

In the alternative, if this Court reverses the Appellate Division decision, it must remand for that court to address a number of issues left unaddressed in its opinion: the appropriateness of the testimony presented by the fingerprint examiner, including his relaying of testimonial hearsay, the necessity of a jury instruction that would guide the jury's assessment of the reliability of the fingerprint evidence, and the soundness of Lee's sentence.

Respectfully Submitted,

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