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No. 70429-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

J.H.,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON JUVENILE DIVISION FOR KING  
COUNTY

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

A. INTRODUCTION ..... 1

B. ASSIGNMENTS OF ERROR ..... 1

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT ..... 5

Because latent fingerprint evidence is not as reliable as the courts assumed it was and has not been scientifically validated, it should no longer be sufficient, by itself, to support a guilty disposition for burglary. .... 5

    a. Background ..... 5

    b. Cases of misidentifications call into question the reliability of fingerprint identification. .... 10

    c. The National Research Council Report criticizes latent fingerprint analysis as lacking a scientific basis. .... 12

    d. To support a guilty finding, evidence standing by itself must be sufficiently reliable and strongly probative of guilt. Otherwise, corroborative evidence of guilt is required. .... 15

F. CONCLUSION..... 23

**TABLE OF AUTHORITIES**

**United States Supreme Court Cases**

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)..... 21

**Washington State Supreme Court Cases**

City of Bremerton v. Corbett, 106 Wn.2d 569, 723 P.2d 1135 (1986)..... 18

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996)..... 18

State v. Clark, 156 Wash. 543, 287 P. 18 (1930)..... 8

State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010)..... 18

State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983)..... 16, 22

State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982)..... 18

State v. Q.D., 102 Wn.2d 19, 685 P.2d 557 (1984)..... 18

State v. Rodgers, 146 Wn.2d 55, 43 P.3d 1 (2002)..... 23

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 23

**Washington Court of Appeals Cases**

ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 831 P.2d 1133 (1992)..... 22

State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011)..... 22, 23

State v. DuBois, 79 Wn. App. 605, 904 P.2d 308 (1995)..... 18

State v. J.P., 130 Wn. App. 887, 125 P.3d 215 (2005) ..... 23

State v. K.N., 124 Wn. App. 875, 103 P.3d 844 (2004) ..... 22

State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990) ..... 4, 9, 22

### Other Cases

<u>People v. Gonzales</u> , 218 Cal. App.3d 403, 267 Cal. Rptr. 138 (Cal. Ct. App. 1990).....	17
<u>People v. Jennings</u> , 252 Ill. 534, 96 N.E. 1077 (1911) .....	6
<u>State v. Minton</u> , 228 N.C. 518, 46 S.E.2d 296 (1948).....	9

### Statutes

RCW 9A.52.025.....	22
RCW 9A.52.070.....	23
RCW 9A.52.080.....	23

### Other Authorities

81 A.L.R.5th 563 .....	16
<u>A Review of the FBI's Handling of the Brandon Mayfield Case</u> , U.S. Department of Justice, Office of the Inspector General (March 2006) ..	10, 11
Jacqueline McMurtrie, <u>Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification After the NAS Report</u> , 2010 Utah L. Rev. 267 (2010) .....	12, 20
Jennifer L. Mnookin, <u>Fingerprint Evidence in an Age of DNA Profiling</u> , 67 Brook. L. Rev. 13, 17 (2001).....	7, 8
<u>National Research Council Report Strengthening Forensic Science in the United States: A Path Forward</u> (Feb. 2009).....	passim
Simon A. Cole, <u>More Than Zero: Accounting for Error in Latent Fingerprint Identification</u> , 95 J. Crim. L. & Criminology 985 (2005).....	12
The Honorable Harry T. Edwards, <u>The National Academy of Sciences Report on Forensic Sciences: What It Means for the Bench and Bar</u> (2010).....	21

## **A. INTRODUCTION**

When the probative value of evidence is weak or suspect, that evidence is insufficient to sustain a criminal finding of guilt.

Thus in burglary cases where the evidence of guilt consists solely of dog-tracking evidence, a confession, or possession of stolen property, the evidence is insufficient absent corroborating evidence. Appellate courts have, however, allowed findings of guilt for burglary based on latent fingerprint evidence alone. These holdings implicitly assume that fingerprint evidence is especially reliable. Because this assumption is wrong and fingerprint evidence is not actually especially reliable, this Court should hold that fingerprint evidence, by itself, is insufficient to sustain a guilty adjudication for burglary. Accordingly, because the only evidence of guilt was an analyst's opinion that latent prints found at the burglarized home belonged to the appellant, this Court should reverse.

## **B. ASSIGNMENTS OF ERROR**

1. Lacking substantial evidence, the court erred in finding that the appellant burglarized a home and left his prints behind. Finding of Fact (FF) 30; CP 26 (court's oral findings as reflected in the record).

2. In the absence of sufficient evidence, the court erred in concluding that the appellant was guilty of residential burglary.

Conclusions of Law (CL) II, III, IV; CP 26 (court's incorporation of its oral conclusions as reflected in the record).

### **C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Courts have assumed that fingerprint analysis, the comparison of latent prints with known prints, is scientifically based and very reliable. This assumption is false. Fingerprint analysis has not been scientifically validated and numerous cases of incorrect fingerprint attribution show it is not as reliable as once thought. With certain other categories of evidence, such as dog-tracking evidence, the courts have required corroborative evidence guilt to sustain a guilty finding. In the absence of corroborative evidence of guilt, is fingerprint evidence insufficient to prove residential burglary beyond a reasonable doubt?

### **D. STATEMENT OF THE CASE**

While away from home, Therese and Chester Pasternak's home was broken into and items were stolen. CP 23-24 (FF 1, 3).<sup>1</sup> During their investigation, police found that screens to windows in the backyard had been removed. CP 25 (FF 11, 13, 18). One window was open. CP 25 (FF 19). An officer attempted to lift prints from the window, but encountered

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<sup>1</sup> The court's Findings of Fact and Conclusions of Law are attached as "Appendix A."

difficulties in getting the prints to lift. RP 73.<sup>2</sup> After calling King County Regional AFIS (Automated Fingerprint Identification System), a person there suggested that the officer use more dust. RP 74. The officer was also advised he could take photos of the prints with a scale. RP 74. Using additional dust, the officer was able to lift prints from inside the windows. CP 25 (FF 22); RP 79. The officer also took photos. CP 25 (FF 22).

Wade Anderson, a latent print examiner employed by King County Regional AFIS, examined the print evidence. See CP 25 (FF 25, 27). Anderson had been a latent print examiner for about four years. CP 25 (FF 25). Using a photo of a print, Anderson ran a search through the Automated Fingerprint Identification System. RP 109. The first “candidate” that the system returned was a fingerprint from J.H. RP 109, 111. Based on that result, Anderson pulled the corresponding fingerprint card on file. RP 109. He had the known and latent prints enlarged. RP 109. He then compared the two by looking at the “ridges” in the prints, moving from the latent print to the known print. RP 109-10. Anderson stated there was not a minimum or maximum number of “detail” that he needed to declare a “match.” RP 110-11; 123. Anderson agreed that one of way putting it was, “you know it when you see it.” RP 124. Anderson

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<sup>2</sup> Unless otherwise noted, the citations to the report of proceedings are to the volume dated April 1 and April 2, 2013.

testified that the “amount of detail” in the latent print he examined was “sufficient,” and concluded that the fingerprint belonged to J.H. RP 110, 113. Anderson also concluded that a different latent print also belonged to J.H. RP 111, 113. Anderson later took J.H.’s prints and compared them to the prints he had obtained from the computer system (AFIS), and concluded they both belonged to J.H. CP 25 (FF 28). The record does not show that Anderson compared any other “candidates” from AFIS to the recovered latent prints.

As part of the process, a “verifier” examined Anderson’s work. RP 122. Despite analyzing thousands of latent prints in his career, Anderson testified that no verifier had ever disagreed with his conclusions. RP 123. He admitted, however, that he knew other examiners in his office had made at least two misidentifications that were discovered by a verifier. RP 123.

The fingerprint evidence was the only evidence linking J.H. to the burglary. During closing argument, the State, citing State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990), argued that the presence of J.H.’s prints at the burglarized home were sufficient, by itself, to find him guilty. RP 130, 134. J.H. countered that the knowledge and science concerning fingerprints had changed considerably since Lucca was decided in 1990. RP 135-36. In particular, he argued that a recent report from the National



Academy of Sciences had since criticized fingerprint evidence as not being scientifically based. RP 136.

The court, recounting that Lucca was still “good law,” found J.H. guilty of residential burglary. RP 146; CP 26. The court ordered J.H. be committed to Juvenile Rehabilitative Administration for 52 to 65 weeks. CP 15.<sup>3</sup> The court also ordered restitution to the Pasternaks. CP 21. J.H. appeals.

## **E. ARGUMENT**

**Because latent fingerprint evidence is not as reliable as the courts assumed it was and latent fingerprint analysis has not been scientifically validated, it should no longer be sufficient, by itself, to support a guilty disposition for burglary.**

### **a. Background**

In the United States, fingerprints have been used to identify people for more than a century. National Research Council Report Strengthening Forensic Science in the United States: A Path Forward, at 136 (Feb. 2009) (“NAS Report”).<sup>4</sup> The use of fingerprints to identify a person is categorized as “friction ridge analysis.” NAS Report at 136. The analysis consists of “comparisons of the impressions left by the ridge structures of

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<sup>3</sup> This detention was to run consecutive to another order of detention of identical length based on a separate disposition. CP 16; 5/29/13 RP 81-82. This disposition, along with two others, are linked on appeal (# 70428-1; # 70427-3; and # 70426-5).

<sup>4</sup> Available at [http://books.nap.edu/catalog.php?record\\_id=12589](http://books.nap.edu/catalog.php?record_id=12589).

volar (hands and feet) surfaces.” NAS Report at 136. “Friction ridge analysis is an example of what the forensic science community uses as a method for assessing ‘individualization’—the conclusion that a piece of evidence (here, a pattern left by friction ridges) comes from a single unambiguous source.” NAS Report at 136.

While not described in forensic literature until 1959, the technique used in friction ridge analysis is described by the acronym ACE-V: “Analysis, Comparison, Evaluation, and Verification.” NAS Report at 137. In the analysis phase, the examiner considers the quality and quantity of detail in the latent and known print for comparison and evaluation. NAS Report at 137-38. Next, the examiner compares the prints, looking for details that correspond. NAS Report at 138. After comparison, the examiner evaluates the agreement of friction ridge formations in the prints and makes a conclusion. NAS Report at 138. The examiner may conclude that the prints come from the same source, do not come from the same source, or that the comparison is inconclusive. NAS Report at 138. Last, a verifier repeats the process; this verifier may be aware of the first examiner’s conclusion. NAS Report at 138.

The first published decision in the United States addressing the use of latent fingerprint evidence is a 1911 appeal in a murder case. People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911); Jennifer L. Mnookin,

Fingerprint Evidence in an Age of DNA Profiling, 67 Brook. L. Rev. 13, 17 (2001). There, four witnesses testified that fingerprints left in paint at the scene of the crime were made by the defendant. Jennings, 252 Ill. at 543. On appeal, the defendant argued that this evidence was improperly admitted. Id. at 546. Without any real analysis of whether comparison of latent prints to known prints was a reliable method of identification, the court rejected the defendant's argument. The court, citing authorities such as the Encyclopedia Britannica and a book on handwriting identification, asserted that "standard authorities on scientific subjects discuss the use of finger prints as a system of identification, concluding that experience has shown it to be reliable." Id. at 546-47. Based on these authorities and testimony of the four witnesses, the court reasoned "there is a scientific basis for the system of finger print identification" and "that this method of identification is in such general and common use that the courts cannot refuse to take judicial cognizance of it." Id. at 549. The court failed to address whether examination of latent prints gathered from a crime scene would pose problems different than with examination of known prints that had been created purposefully. Jennings, 252 Ill. at 546-53; see Mnookin, 67 Brook. L. Rev. at 19-20.

As in Jennings, courts accepted fingerprints "as an evidentiary tool without a great a deal of scrutiny or skepticism." Mnookin, 67 Brook. L.

Rev. at 17. Despite being a matter of probability, the courts did not require fingerprint identification to have a statistical foundation. Id. at 19. “Determining whether there was a match was simply left to the judgment of the expert examiner.” Id. at 19. Fingerprint examiners were also usually allowed to testify about identity as though it were fact, and not opinion. Id. at 30. Following Jennings, courts in other jurisdictions admitted fingerprint evidence with little analysis, relying on precedent such as Jennings. Id. at 21. Jennings was even used to support other types of evidence. For example, in 1930, our Supreme Court cited Jennings as “apt authority” and held that use of tool mark evidence was admissible. State v. Clark, 156 Wash. 543, 550-51, 287 P. 18 (1930). Earlier in the same opinion, without citation to Jennings or other authority, the Clark court recounted that, “Courts are no longer skeptical that by the aid of scientific appliances the identity of a person may be established by finger prints.” Id. at 549-50.

As the law on fingerprint evidence developed, the courts focused not on whether comparison of latent prints with known prints was truly a scientific and reliable method of identifying a person,<sup>5</sup> but whether the print was adequately connected with the crime. For example, as

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<sup>5</sup> The issue of the scientific validity of fingerprint analysis has arisen more recently in admissibility challenges. This Court currently has before it a case on the issue of admissibility of fingerprint evidence under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). State v. M.P. (# 69003-5).

formulated by the North Carolina Supreme Court in 1948, fingerprint evidence was not probative of guilt unless the evidence established the prints could have only been made at the time of crime:

The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could only have been impressed at the time when the crime was perpetrated.

State v. Minton, 228 N.C. 518, 521, 46 S.E.2d 296 (1948). Citing a federal case and legal treatises, this Court formulated a similar rule, but stated that fingerprint evidence alone could support a conviction:

Fingerprint evidence alone is sufficient to support a conviction where the trier of fact could reasonably infer from the circumstances that it could only have been impressed at the time the crime was committed.

State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990) (emphasis added). This rule that fingerprint evidence alone is sufficient to find a person guilty of a crime assumes latent fingerprint analysis is a sufficiently reliable method of identification. Cases of fingerprint misattribution and an examination of the “science” of fingerprint evidence proves this assumption wrong.

**b. Cases of misidentifications call into question the reliability of fingerprint identification.**

Despite its history, the unquestioning acceptance of fingerprint evidence has come to an end. The catalyst for wide-spread skepticism may stem from the infamous case of Brandon Mayfield.

In 2004, the Federal Bureau of Investigation arrested Mayfield in connection with the terrorist attacks on commuter trains in Madrid Spain. A Review of the FBI's Handling of the Brandon Mayfield Case, U.S. Department of Justice, Office of the Inspector General, 1 (March 2006) (“OIG Report”).<sup>6</sup> Using a fingerprint recovered from a bag connected with the attacks, the FBI identified Mayfield as one of twenty candidates through a computerized search of the FBI’s Integrated Automated Fingerprint Identification System. OIG Report at 1. An examiner concluded that Mayfield was the source of the print. OIG Report at 1. Two other examiners concurred with the conclusion. OIG Report at 2. After arresting Mayfield, an independent expert agreed that the print was Mayfield’s. OIG Report at 2. Spanish authorities, however, identified the print as belonging to an Algerian national. OIG Report at 2. Eventually, the FBI concluded it had erred in determining that the print belonged to Mayfield’s. OIG Report at 2.

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<sup>6</sup> Available at [http://www.justice.gov/oig/special/s0601/PDF\\_list.htm](http://www.justice.gov/oig/special/s0601/PDF_list.htm).

The OIG Report concluded that the misidentification was caused by at least six factors: (1) Mayfield's print was similar to the Algerian's National; (2) bias by the examiners (after finding some similar features in the prints, examiners began to "find" additional features that were not actually there); (3) faulty reliance on extremely tiny details (examiners misinterpreted distortions in the print as real features that corresponded to tiny details in Mayfield's print); (4) inadequate explanations for differences in appearance (rationalizations explaining differences were cumulatively too many and required acceptance of extraordinary coincidences); (5) failure to assess the poor quality of similarities; (6) and overconfidence despite disagreement by Spanish authorities, who had concluded the prints were not Mayfield's. OIG Report, at 6-10. The OIG Report also identified other factors that may have caused the error, including, (1) lack of an objective standard and (2) failure in the verification process to use an analyst who was not aware of the earlier conclusion. OIG Report at 11.

While the Mayfield incident is likely the most famous case of fingerprint identification gone wrong, there are numerous other accounts of erroneous latent fingerprint identification. In 2005, one author recounted 22 cases (including the Mayfield case) of known mistaken fingerprint misattributions. Simon A. Cole, More Than Zero: Accounting

for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 1001-16 (2005). Plainly, the full extent of misattribution remains unknown. “[N]o records document how many criminal prosecutions in federal and state courts in the United States are based totally or partially on fingerprint evidence.” Jacqueline McMurtrie, Swirls and Whorls: Litigating Post-Conviction Claims of Fingerprint Misidentification After the NAS Report, 2010 Utah L. Rev. 267, 268 (2010). Further, fingerprint misattributions are largely unnoticed because there is no process for reviewing the cases. Id. Thus, there are good reasons to believe that the known cases of fingerprint misattribution are likely the “tip of the iceberg.” Cole, 95 J. Crim. L. & Criminology at 1017.

**c. The National Research Council Report criticizes latent fingerprint analysis as lacking a scientific basis.**

In 2005, Congress authorized the National Academy of Sciences to conduct a study on forensic science. In 2009, the council issued its groundbreaking report. National Research Council Report Strengthening Forensic Science in the United States: A Path Forward (Feb. 2009) (“NAS Report”). With the exception of nuclear DNA analysis, the report criticized the use of forensic evidence in the courtroom to support conclusions of “individualization”:



Often in criminal prosecutions and civil litigation, forensic evidence is offered to support conclusions about “individualization” (sometimes referred to as “matching” a specimen to a particular individual or other source) or about classification of the source of the specimen into one of several categories. With the exception of nuclear DNA analysis, however, no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.

NAS Report at 7 (emphasis added).

The report specifically recognized the growing controversy and skepticism toward the assumed scientific foundation and reliability of fingerprint analysis:

For nearly a century, fingerprint examiners have been comparing partial latent fingerprints found at crime scenes to inked fingerprints taken directly from suspects. Fingerprint identifications have been viewed as exact means of associating a suspect with a crime scene print and rarely were questioned. Recently, however, the scientific foundation of the fingerprint field has been questioned, and the suggestion has been made that latent fingerprint identifications may not be as reliable as previously assumed. The question is less a matter of whether each person’s fingerprints are permanent and unique—uniqueness is commonly assumed—and more a matter of whether one can determine with adequate reliability that the finger that left an imperfect impression at a crime scene is the same finger that left an impression (with different imperfections) in a file of fingerprints.

NAS Report at 43 (footnotes omitted).

The report states what most courts had failed to appreciate, that the process whereby latent print examiners determine that two different

sources could not produce impressions with the same degree of agreement among details is a “subjective assessment.” NAS Report at 141. Despite the obvious subjectivity involved, latent fingerprint analysts commonly fail to acknowledge any uncertainty in their opinion. NAS Report at 47. Addressing claims by fingerprint examiners that their method of individualization has an error rate of zero, the report dismissed these claims as “not scientifically plausible.” NAS Report at 142.

As recognized by the report, impressions left by a given finger will inevitably vary and the problems this may cause have not been adequately studied:

Uniqueness and persistence are necessary conditions for friction ridge identification to be feasible, but those conditions do not imply that anyone can reliably discern whether or not two friction ridge impressions were made by the same person. Uniqueness does not guarantee that prints from two different people are always sufficiently different that they cannot be confused, or that two impressions made by the same finger will also be sufficiently similar to be discerned as coming from the same source. The impression left by a given finger will differ every time, because of inevitable variations in pressure, which change the degree of contact between each part of the ridge structure and the impression medium. None of these variabilities—of features across a population of fingers or of repeated impressions left by the same finger—has been characterized, quantified, or compared.

NAS Report at 144.

Finally, the report was critical of the ACE-V methodology, stating that following the framework does not imply that “one is proceeding in a scientific manner or producing reliable results”:

ACE-V provides a broadly stated framework for conducting friction ridge analyses. However, this framework is not specific enough to qualify as a validated method for this type of analysis. ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results. For these reasons, merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results. A recent paper . . . presents a thorough analysis of the ACE-V method and its scientific validity. Their conclusion is unambiguous: “We have reviewed available scientific evidence of the validity of the ACE-V method and found none.”

NAS Report at 142-43 (footnotes and citation omitted).

Ultimately, the report recommends that more scientific research and study on friction ridge analysis be conducted. NAS Report at 143. Until that is done, latent print analysis does not rest on a scientific foundation and its reliability remains questionable.

**d. To support a guilty finding, evidence standing by itself must be sufficiently reliable and strongly probative of guilt. Otherwise, corroborative evidence of guilt is required.**

Where a class of evidence is probative of guilt, yet weak or of questionable reliability, Washington courts require other corroborative evidence of guilt to find a person guilty of a crime. Two examples are

dog-tracking evidence and confessions. Another example, particular to burglary cases, is evidence of possession stolen property. Because fingerprint evidence lacks a scientific foundation and is not as reliable as once assumed, this Court should hold that, absent corroborating evidence of guilt, fingerprint evidence alone is insufficient to sustain a guilty disposition for burglary.

Unlike the courts unquestioning acceptance of the reliability of identification based on latent fingerprint analysis, courts have questioned the reliability of identifications based on dog-tracking evidence. In most jurisdictions, dog-tracking evidence is admissible because of its perceived accuracy. 81 A.L.R.5th 563 (Originally published in 2000). However, courts allowing dog tracking evidence still “regard its probative value with some suspicion.” State v. Loucks, 98 Wn.2d 563, 567, 656 P.2d 480 (1983). In all jurisdictions allowing dog-tracking evidence, certain foundational requirements must be met first. 81 A.L.R.5th 563. Further, “[m]ost courts allowing dog tracking evidence restrict its use to corroborative purposes only.” Loucks, 98 Wn.2d at 567. Adopting this rule, our Supreme Court held that dog tracking evidence by itself is insufficient to support a conviction absent corroborating evidence. Id. at 566. Applying the rule, the Court reversed a burglary conviction because

it was premised solely upon a tracking dog's identification of the defendant. Id. at 569.

In adopting the rule requiring corroborative evidence, the Loucks court reasoned that dog-tracking evidence had inherent dangers of error that could only be mitigated by requiring corroborative evidence. Id. at 567. The court noted that police dogs cannot be conclusively relied on to follow the trail of one person and that a dog trainer cannot answer many questions on the reliability of the dog's conclusions. Id. at 567. As further explained by the California Court of Appeals, the concern is that dog-tracking evidence is not infallible, and because of its fallibility, corroborative evidence is required to validate it:

What we are concerned with is the possibility that the dog could have erred. Obviously, if we were convinced of the infallibility of the dog, the evidence would speak for itself and would not, as a matter of law, require corroboration. The circumstances of the dog tracking would determine the conclusiveness of the evidence on the question of the identification. . . . The difficulty is that we want to assure ourselves the dog did not err either in picking up the scent of the person who handled the [evidence] or in following that scent to the person found. It is not a question of trustworthiness, it is a question of substantiality—while the evidence might be trustworthy, we are not willing to rest our verdict on that evidence alone. We want other evidence that will validate its veracity.

People v. Gonzales, 218 Cal. App.3d 403, 412, 267 Cal. Rptr. 138, 143-44 (Cal. Ct. App. 1990).

As with dog-tracking evidence, there is a long history of judicial distrust of confessions. See City of Bremerton v. Corbett, 106 Wn.2d 569, 575-76, 723 P.2d 1135 (1986). Accordingly, the “corpus delicti rule was established by the courts to protect a defendant from the possibility of an unjust conviction based upon a false confession alone.” Id. “Corpus delicti” means “body of the crime.” State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996). In general, the corpus delicti doctrine “is a principle that tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession.” State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). It “prevents a defendant from being convicted based on his or her confession alone and requires independent evidence sufficient to establish every element of the crime charged.” Id. at 250-51. The corpus delicti rule has been applied in cases of burglary. See e.g., State v. DuBois, 79 Wn. App. 605, 612, 904 P.2d 308 (1995) (reversing juvenile’s disposition for burglary based on juvenile defendant’s confession; evidence was insufficient to establish corpus delicti).

Finally, in a rule generally applied in burglary cases, possession of stolen property, unless accompanied with other corroborative evidence of guilt, is insufficient to prove burglary. State v. Q.D., 102 Wn.2d 19, 28, 685 P.2d 557 (1984); State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). In essence, possession of stolen property is insufficient by itself to

sustain a guilty adjudication for burglary because it does not firmly establish that the possessor unlawfully entered a building or dwelling. Thus in Mace, our Supreme Court reversed a conviction for burglary for lack of sufficient evidence because the evidence proved only that the defendant might have recently possessed stolen bank cards. Mace, 97 Wn.2d at 842-43.

In summary, dog-tracking evidence, confessions, and evidence of possession of stolen property are three classes of evidence that, while probative of guilt, are alone insufficient to prove a person guilty of burglary beyond a reasonable doubt. Concerned with inaccurate adjudications of guilt, the courts have required corroborative evidence. Thus, fashioning a rule requiring corroborative evidence of guilt in cases consisting solely of latent fingerprint evidence is consistent with Washington law.

Here, a rule requiring corroborative evidence of guilt in cases consisting only of latent fingerprint evidence is justified. The NAS Report and the instances of wrongful identifications prove that findings of guilt resting only on latent fingerprint analysis pose an unacceptable risk of erroneous identification. Latent fingerprint analysis is a subjective form of evidence that has not been scientifically validated. Requiring

corroborative evidence of guilt would substantially mitigate the risk of finding the innocent guilty.

The dog-tracking evidence cases are particularly analogous. Just as a fact finder has to trust in a dog's capability to accurately identify and follow a scent, the fact finder must trust a fingerprint analyst's capability to accurately compare prints. With appropriate training, experience, and under the right conditions, a fingerprint analyst or a scent-smelling dog may be able to accurately identify a person. But neither are infallible in exercising their skill and both must operate under conditions that may not be ideal. While tracking a scent, a dog may mistakenly follow another scent. Similarly, a fingerprint analyst may mistakenly conclude that features on the two prints are the same. In some ways, the danger of error with a fingerprint analyst is greater because the examiner is human and subject to bias. See *McMurtrie*, 2010 Utah L. Rev. at 280 (recounting studies showing that fingerprint examiners were susceptible to common cognitive bias that influenced their conclusions); NAS Report at 142 (“ACE-V does not guard against bias . . .”). Both dog tracking evidence and fingerprint evidence present an unacceptable risk of misidentification. Thus, just as with dog-tracking evidence, this Court should require corroborative evidence of guilt in latent fingerprint cases.



It is true that a fingerprint analyst, unlike a dog, can be cross-examined. But this is only one rationale for requiring corroborative evidence in dog-tracking cases. Further, confrontation does not guarantee reliability. Confrontation is only “one means of assuring accurate forensic analysis.” Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (emphasis added). “In other words, cross-examination is a minimal constitutional safeguard that helps to test the reliability of forensic evidence that is offered in criminal trials. But it is far from adequate.” The Honorable Harry T. Edwards, The National Academy of Sciences Report on Forensic Sciences: What It Means for the Bench and Bar 10 (2010).<sup>7</sup>

This Court should hold that guilty adjudications cannot rest solely on latent fingerprint evidence. Absent corroborating evidence of guilt, fingerprint evidence should be deemed insufficient to find a person guilty of burglary.

This Court is free to adopt this holding. While this Court’s 1990 decision in Lucca held that fingerprint evidence alone is sufficient to support a guilty finding, the Court did not address the reliability of fingerprint evidence or whether the Court should adopt a rule requiring

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<sup>7</sup> Available at [http://www.law.yale.edu/documents/pdf/Alumni\\_Affairs/Stith\\_Edwards\\_NAS\\_Report\\_Forensic\\_Science.pdf](http://www.law.yale.edu/documents/pdf/Alumni_Affairs/Stith_Edwards_NAS_Report_Forensic_Science.pdf).

corroborative evidence. Lucca, 56 Wn. App. at 599. If an earlier appellate opinion does not consider the issue raised in a current appeal, the opinion is not dispositive and may be reexamined without violating stare decisis:

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court.

ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992); see also State v. K.N., 124 Wn. App. 875, 877, 103 P.3d 844 (2004) (reasoning that because earlier decision “did not consider the due process implications of its holding, its value as a precedent is minimal.”). Lucca also preceded the NAS Report and other scholarly criticism of fingerprint evidence. Accordingly, Lucca is not dispositive.

Here, there was no corroborative evidence linking J.H. to the burglary. Thus, under the rule proposed by J.H., the evidence was insufficient.<sup>8</sup> See Loucks, 98 Wn.2d at 569. His guilty disposition should

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<sup>8</sup> “Due process requires the State to prove beyond a reasonable doubt every essential element of a crime.” State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). “A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.” RCW 9A.52.025. In a sufficiency of the evidence challenge, the test is whether after viewing the evidence in the light most favorable to the State, a rational trier of fact could have

be reversed and ordered dismissed with prejudice. State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002). Because this means that there is insufficient evidence that J.H. entered the Pasternak premises, the Court should decline any request by the State to remand for entry of guilt for the lesser offense of criminal trespass.<sup>9</sup> See State v. A.M., 163 Wn. App. 414, 421, 260 P.3d 229 (2011) (after reversing a disposition for insufficient evidence, the appellate court may remand for entry on judgment on a lesser included offense which was necessarily proven).

#### **F. CONCLUSION**

Because latent fingerprint analysis has not been validated by science and rests on an unwarranted assumption of strong reliability, this Court should hold latent fingerprint evidence, by itself, is insufficient to support a finding of guilt. Other corroborative evidence should be necessary. Because the finding of guilt rested entirely on fingerprint evidence, this Court should reverse and order the charge of burglary dismissed.

---

found all the elements of the offense beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

<sup>9</sup> Criminal trespass is a lesser included offense of burglary and requires one enter or remain unlawfully in a building or upon the premises of another. State v. J.P., 130 Wn. App. 887, 895, 125 P.3d 215 (2005); RCW 9A.52.070, 9A.52.080.

DATED this 4th day of February, 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard W. Lechich".

Richard W. Lechich – WSBA #43296  
Washington Appellate Project  
Attorneys for Appellant

# Appendix A

The Honorable Judge Barbara Mack  
Hearing Date April 24, 2013 at 1 30 pm  
Hearing Location Courtroom 2

**FILED**  
STATE COURTS WASHINGTON  
JUN 24 2013  
CLERK  
BY JOVELITA V AVILA  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs

JAHAD V D HILL,  
B D 04/18/95

Respondent

No 13-8-00201-1

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
PURSUANT TO CrR 6 1(d)

THE ABOVE-ENTITLED CAUSE having come on for fact finding on April 1, 2013, and April 2, 2013, before the Honorable Judge Barbara Mack in the above-entitled court, the State of Washington having been represented by Eric Shelton, the respondent appearing in person and having been represented by Dennis McGuire, the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law

**FINDINGS OF FACT**

- 1 On September 14, 2012, between 11 00 am and 1 00 pm, someone broke into the home of Therese and Chester Pasternak and stole family heirlooms, jewelry, and other personal items
- 2 The Pasternak's home is in Des Moines, in King County, Washington
- 3 When the burglary occurred Mrs Pasternak was at work and Mr Pasternak was out running errands She had left for work early that morning, he left later, at about 11 30

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO CrR 6 1(d) - 1

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**ORIGINAL**

- 1
- 2 4 When Chester left at about 11 30, the Pasternaks' home was completely secured—that is,
- 3 the doors and windows were both closed and locked and their alarm system set Their
- 4 dresser drawers in their bedroom were also closed, with their family heirlooms, jewelry, and
- 5 other personal items inside
- 6
- 7 5 Additionally, all of their windows had window screens on them
- 8
- 9 6 The Pasternaks have a keyed deadbolt, so the front door cannot be opened from either
- 10 inside or outside their home without a key
- 11
- 12 7 Sometime after 11 30 that morning, the Pasternak's alarm company called Ms Pasternak to
- 13 report that their alarm was going off Therese then called her neighbor, Barbara Headley,
- 14 to check and see if she could tell whether someone had broken into their home
- 15
- 16 8 Headley's home is right behind the Pasternak's and looks out into their backyard
- 17
- 18 9 While on the phone with Therese, Headley left her home and saw that almost all of the
- 19 screens in the Pasternak's backyard had been ripped off their windows
- 20
- 21 10 The Pasternak's backyard is away from the street and is not accessible to the public In
- 22 order to get into their backyard, you have to go through either an alleyway or climb over
- 23 a fence
- 24
- 11 Headley called 911 Moments later, several police officers arrived at the Pasternak's
- home
- 12 Headley told officers what she had witnessed, gave officers the code to open the
- Pasternak's garage door, and returned to her home
- 13 Using the code that Headley gave, Officer Langhofer (with several other officers) opened
- the Pasternak's garage and entered their home
- 14 The Pasternaks have double-paned windows to block out noise generated from the nearby
- airport While the Pasternaks' alarm was barely audible from outside their home, the
- sound of the alarm as officers entered was extremely loud
- 15 Aside from the Pasternaks' bedroom, no other room had been disturbed
- 16 Inside their bedroom, the dresser drawers had been thrown open and their clothes and
- other personal items had been tossed onto the floor
- 17 A butter knife had also been moved from the Pasternaks' kitchen and left in their
- bedroom

- 1 18 Langhofer eventually made his way into the Pasternak's backyard and saw the window  
2 screens had been removed from the windows. Some of the window screens had been  
ripped or torn apart
- 3 19 Only one of the Pasternaks' windows was open—all other entrances into their home were  
4 closed
- 5 20 Some of the closed windows had handprints on them
- 6 21 There was also a handprint on the inside of the only open window. The blinds on the  
7 inside this window were disheveled and a plant from inside was poking through the  
blinds. The window, blinds, and plant were not in this condition when Mr. Pasternak left  
at 11:00
- 8 22 Initially, Langhofer had difficulty lifting the fingerprints from inside the point of entry  
9 reflected in State Exhibit #11. After he called both a detective and an AFIS print expert,  
10 however, he was able to successfully lift the prints from inside the window by applying  
more fingerprint dust than usual. He also placed a ruler next to the prints and took several  
photographs
- 11 23 Based on the height of the window and the placement of the prints on the inside of the  
12 window frame, the fingerprints were left by someone when he reached into the window  
to pull himself inside
- 13 24 Langhofer secured both the latent print cards and the photographs into evidence
- 14 25 Wade Anderson is a Latent Print Examiner for King County Regional AFIS. He has been  
15 a latent print examiner for four years. Before his current position, he worked as a  
Tenprint Examiner for King County for ten years
- 16 26 Anderson does not have a preference for analyzing either latent print cards or  
17 photographs of fingerprints, as both methods depend on the clarity and the quality of  
either the lifted print or the photograph—and are equally reliable
- 18 27 Anderson determined that the prints left on the Pasternaks' window belonged to the  
19 fingerprints in AFIS reportedly collected from the respondent
- 20 28 On March 5, 2013, Anderson met the respondent at the Youth Services Center and took  
21 his fingerprints. He compared the prints he took from the respondent in person to the  
respondent's prints stored in AFIS, and concluded that both fingerprints belonged to the  
respondent
- 22 29 Aside from Anderson, no other experts testified at the respondent's trial
- 23 30 The respondent's prints were left when he burglarized the Pasternak's home on  
24 September 14, 2012



1  
2 31 Neither Therese nor Chester know the respondent, they have never given him permission  
to enter their home or to take their family heirlooms, jewelry, or other personal property

3 32 The court finds that the State's witnesses are credible

4 **CONCLUSIONS OF LAW**

5 I

6 The above-entitled Court has jurisdiction of the subject matter and of the respondent in  
7 the above-entitled cause

8 II

9 The following elements of Residential Burglary, contrary to RCW 9A 52 025, have been  
proven by the State beyond a reasonable doubt

10 (1) That on or about September 14, 2012, the respondent, together with others,  
11 unlawfully entered or remained unlawfully in a dwelling,

12 (2) That the entering or remaining was with intent to commit a crime against a person or  
property therein, and

13 (3) That this act occurred in the State of Washington

14 III

15 The respondent is guilty of the crime of Residential Burglary as charged in the  
16 Information

17 IV

18 Judgment should be entered in accordance with Conclusion of Law III


19 In addition to these written findings and conclusions, the Court hereby incorporates its  
oral findings and conclusions as reflected in the record

20 DONE IN OPEN COURT this 24 day of June, 2013

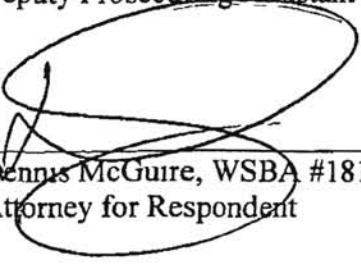
21   
22 THE HONORABLE JUDGE BARBARA MACK

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Presented by



Eric G Shelton, WSBA #44788  
Deputy Prosecuting Assistant Attorney



Dennis McGuire, WSBA #18114  
Attorney for Respondent

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70429-0-I
v.	)	
	)	
J. H.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] J. H. 24513 27 <sup>TH</sup> AVE S APT 2 DES MOINES, WA 98198	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2014.

X \_\_\_\_\_ 

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