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Court of Appeals  
Division I  
State of Washington  
No. 71261-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DeANTHONY FRANKS

Appellant.

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

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APPELLANT'S REPLY BRIEF

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**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY ..... 1

    1. **Mr. Franks’ residential burglary conviction must be reversed because the trial court refused to instruct the jury on the lesser-included offense of criminal trespass in the first degree** ..... 1

    2. **The trial court erred by admitting unreliable latent fingerprint evidence without a Frye hearing**..... 4

        a. This Court is not required to overrule *Piggott* in order to reverse Mr. Franks’ conviction ..... 5

        b. A *Frye* hearing is appropriate when the current relevant scientific community doubts the scientific underpinning of a forensic method..... 7

        c. The National Research Council Report shows a consensus in the scientific community that the current method of fingerprint comparison in the United States lacks a scientific foundation ..... 9

        d. The prosecutor’s lists of cases from other jurisdictions are not helpful ..... 11

        e. The trial court erred by denying a Frye hearing..... 15

    3. **The trial court erroneously admitted the latent fingerprint examiner’s hearsay testimony that they had been qualified as experts in prior cases** ..... 15

B. CONCLUSION ..... 17

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970)..... 6

McCausland v. McCausland, 159 Wn.2d 607, 152 P.3d 1013 (2007)... 6

State v. Buckner, 133 Wn.2d 63, 941 P.2d 63 (1997)..... 8

State v. Cauthron, 120 Wn.2d 879, 846 P.2d 502 (1993)..... 8, 11, 14

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) ..... 2, 3

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), overruled on other grounds, State v. W.R., Jr., 336 P.3d 1134 (2015) ..... 7

State v. Hairston, 133 Wn.2d 534, 946 P.2d 397 (1997)..... 7

State v. Henderson, \_\_\_ Wn.2d \_\_\_, 2015 WL 847427 (No. 90154-6, 2/26/15) ..... 1, 2, 3

State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008) ..... 6

State v. Martin, 101 Wn.2d 713, 684 P.2d 651 (1984)..... 11

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995)..... 15

State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978)..... 2

**Washington Court of Appeals Decisions**

State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011)..... 7

State v. Allen, 150 Wn. App. 300, 207 P.3d 483 (2009), rev. denied, 170 Wn.2d 1014 (2010) ..... 6

State v. Pigott, 181 Wn. App. 247, 325 P.3d 247 (2014) ..... 5

**United States Supreme Court Decision**

Keeble v. United States, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)..... 1

**Federal Circuit Court of Appeals and  
Federal District Court Decisions**

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)..... 11

United States v. Abreu, 406 F.3d 1304 (11<sup>th</sup> Cir. 2005)..... 14

United States v. Baines, 573 F.3d 979 (10<sup>th</sup> Cir. 2009)..... 14

United States v. Collins, 340 F.3d 672 (8<sup>th</sup> Cir. 2003) ..... 14

United States v. Crisp, 324 F.3d 261 (4<sup>th</sup> Cir.), cert. denied, 540 U.S. 888 (2003)..... 14

United States v. George, 363 F.3d 666 (7<sup>th</sup> Cir. 2004)..... 14

United States v. Havvard, 260 F.3d 597 (7<sup>th</sup> Cir. 2001)..... 14

United States v. Janis, 387 F.3d 682 (8<sup>th</sup> Cir. 2004)..... 14

United States v. Mitchell, 365 F.3d 215 (3<sup>rd</sup> Cir. 2004) ..... 14

United States v. Pena, 586 F.3d 105 (1<sup>st</sup> Cir. 2009), cert. denied, 559 U.S. 1021 (2010)..... 13

United States v. Sherwood, 98 F.3d 402 (9<sup>th</sup> Cir. 1996)..... 14

United States v. Stone, 848 F.Supp.2d 714 (E.D.Mich. 2012)..... 14

## Decisions of Other States

<u>Avent v. Commonwealth</u> , 209 Va. 474, 164 S.E.2d 658 (1968).....	13
<u>Barber v. State</u> , 952 So.2d 393 (Ala.Crim.App. 2005), <u>cert. denied</u> , 549 U.S. 1306 (2007).....	13
<u>Burnett v. State</u> , 815 N.E.2d 201 (Ind.App. 2004) .....	13
<u>Commonwealth v. Patterson</u> , 455 Mass. 626, 840 N.E.2d 12 (Mass. 2005), <u>overruled on other grounds</u> , <u>Commonwealth v. Britt</u> , 465 Mass. 87, 987 N.E.2d 558 (Mass. 2013).....	13
<u>Dowdy v. Commonwealth</u> , 278 Va. 577, 686 S.E.2d 710 (Va. 2009) .	13
<u>Earnest v. Commonwealth</u> , 61 Va.App. 223, 723 S.E.2d 680 (Va.App. 2012) .....	13
<u>Johnston v. State</u> , 27 So.3d 11 (Fla.), <u>cert. denied</u> , 131 S. Ct. 459 (2010).....	12
<u>People v. Burnell</u> , 89 A.D.3d 1118, 931 N.Y.S.2d 776 (NYAD 3Dept. 2011), <u>denying leave to appeal</u> , 18 N.Y.3d 922 (2012).....	12
<u>People v. Farnam</u> , 28 Cal.4 <sup>th</sup> 107, 121 Cal.Rptr.2d 106, 47 P.3d 988 (Cal. 2002), <u>cert. denied</u> , 537 U.S. 1124 (2003).....	12
<u>State v. Cooke</u> , 914 A.2d 1078 (Del.Super. 2007) .....	12
<u>State v. Davis</u> , 116 OhioSt.3d 404, 880 N.E.2d 31, <u>cert denied</u> , 555 U.S. 861 (2008).....	12
<u>State v. Escobido-Ortiz</u> , 109 Hawai'i 359, 126 P.3d 402 (Hawai'i App. 2005) .....	13
<u>State v. Langill</u> , 157 N.H. 77, 945 A.2d 1 (N.H. 2008).....	13
<u>State v. Maestas</u> , 299 P.3d 892 (Utah 2012), <u>cert. denied</u> , 133 S. Ct. 1634 (2013).....	12

Webster v. State, 252 P.3d 259 (Okla.Crim.App. 2011) ..... 12

### **Washington Statute**

RCW 10.61.006 ..... 1

### **Washington Court Rule**

RAP 13.4(b)..... 6

### **Other Authorities**

Margaret A. Berger, “Procedural Paradigms for Applying the  
Daubert Test,” 78 Minn. L. Rev. 1345 (1994)..... 4

National Research Council of the National Academy of Sciences:  
Strengthening Forensic Science in the United States: A Path  
Forward (2009) ..... 4, 8, 10, 11

National Research Council, Commission on DNS Forensic Sciences:  
The Evaluation of Forensic DNA Evidence 136 (1996)..... 8

Office of the Inspector General’s Oversight and Review Division:  
A Review of the FBI’s handling of the Brandon Mayfield Case  
(2006)..... 5, 9

A. ARGUMENT IN REPLY

1. **Mr. Franks' residential burglary conviction must be reversed because the trial court refused to instruct the jury on the lesser-included offense of criminal trespass in the first degree.**

At common law, the jury was permitted to find a defendant guilty of a lesser offense necessarily included in the offense charged. State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). This common law rule is codified at RCW 10.61.006. Because of its importance to the criminal justice system, courts must always err on the side of instructing the jury on lesser included offenses:

Giving juries this option is crucial to the integrity of our criminal justice system because when defendants are charged with only one crime, juries must either convict them of that crime or let them go free. In some cases, that will create a risk that the jury will convict the defendant despite having reasonable doubts. As Justice William Brennan explained, "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." To minimize that risk, we err on the side of instructing juries on lesser included offenses.

State v. Henderson, \_\_\_ Wn.2d \_\_\_, 2015 WL 847427 at \*1 (No. 90154-6, 2/26/15) (emphasis in original) (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

A defendant is entitled to have the jury instructed on a lesser included offense “when (1) each of the elements of the lesser offense is a necessary element of the offense charged and (2) the evidence in the case supports an inference that the lesser crime was committed.” Henderson, 2015 WL 847427 at \*4; State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The State concedes that the first prong of the Workman test is met, but argues that the trial court did not abuse its discretion in finding the factual prong was not met. Brief of Respondent at 28 n.11, 28-30 (hereafter BOR). The State’s argument, however, addresses the evidence in the light most favorable to the prosecution, not the defendant. This is not the correct standard of review.

In deciding whether to instruct the jury on a lesser-included offense, the court must look at all of the evidence in the light most favorable to the party requesting the instruction. Henderson, 2015 WL 847427 at \*4; State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The trial court in Mr. Franks’ case, however, looked only at the evidence that favored the prosecution – the homeowner’s testimony that doors and drawers were opened and bottle of wine and bag of beef jerky were moved inside the home and Mr. Franks’

fingerprints found the window and beef jerky. 2/28/13 RP 14-15. The trial court ignored evidence supporting the inference that Mr. Franks did not have the intent to commit a crime inside the home, such as the fact that nothing was taken from the home and the lack of evidence of anyone rummaging through the house as the officers explained was common for burglaries. 2/26/13 RP16-17, 20-21, 38, 54-55, 62, 74, 96. The State makes the same mistake in its response brief. BOR at 30.

A trial court abuses its discretion when its decision is based upon the incorrect legal standard. Henderson, 2015 WL 847427 at \*5. The trial court in this case applied the incorrect standard when it failed to look at the evidence in the light most favorable to Mr. Franks.

“If a jury could rationally find a defendant guilty of the lesser offense and not the greater offense, the jury must be instructed on the lesser offense.” Henderson, 2015 WL 847427 at \*1 (citing Fernandez-Medina, 141 Wn.2d at 456). The jury could have rationally concluded that Mr. Franks was guilty of criminal trespass and not burglary. The trial court’s erroneous refusal to instruct on the lesser-included offense of criminal trespass in the first degree requires reversal of Mr. Franks’ conviction for residential burglary and remand for a new trial. Id. at \*7; Fernandez-Medina, 141 Wn.2d at 462.

**2. The trial court erred by admitting unreliable latent fingerprint evidence without a Frye hearing.**

Fingerprint evidence has been admitted by American courts over the years “even though this evidence had ‘made its way into the courtroom without empirical validation of the underlying theory and/or its particular application.’” National Research Council of the National Academy of Sciences, Strengthening Forensic Science in the United States: A Path Forward 102 (2009)<sup>1</sup> (hereafter NRC Report) (citing Margaret A. Berger, “Procedural Paradigms for Applying the Daubert Test,” 78 Minn. L. Rev. 1345, 1354 (1994)).

Prior to trial, Mr. Franks moved to exclude the latent fingerprint examiners’ testimony and requested that the court conduct a Frye hearing to determine the reliability of fingerprint comparison evidence.<sup>2</sup> CP 365-413; 2/25/13 RP 36-43, 46-49. Defense counsel’s memorandum in support of the motion relied in part upon the 2009 NRC Report, and it also the 2006 OIG Report. CP 365-413 (citing NRC report and Office of the Inspector General’s Oversight and Review Division: A Review of the FBI’s handling of the Brandon

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<sup>1</sup> Available at [www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf](http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf) (last viewed 3/10/15).

<sup>2</sup> Washington uses the standard from Frye v. United States, 293 F. 1013, 1014 (D.C.Cir. 1923) to determine the admissibility of scientific evidence. State v. Copeland, 130 Wn.2d 244, 255-60, 922 P.2d 1304 (1996).

Mayfield Case (2006)<sup>3</sup>). Defense counsel also had a possible expert witness, Dr. Ralph Haber, but the trial court ruled Dr. Haber could not testify because defense counsel had not provided the prosecutor with a summary of his testimony.<sup>4</sup> CP 36; 2/15/13 RP 11, 13-15.

The trial court erred in denying Mr. Franks' request for a Frye hearing concerning the fingerprint comparison testimony, and he asks this Court to reverse his conviction. AOB at 15-28. As will be shown below, the State's arguments in response should be rejected.

a. This Court is not required to overrule *Piggott* in order to reverse Mr. Franks' conviction.

The State begins by incorrectly framing the issue before this Court. This Court addressed the denial of a Frye hearing for fingerprint evidence in Piggott and concluded the court in that case did not err in denying the hearing. State v. Piggott, 181 Wn. App. 247, 325 P.3d 247 (2014). The deputy prosecuting attorney argues that this Court must overrule Piggott in order to rule in Mr. Franks' favor and that Mr. Franks has not shown that Piggott is incorrect and harmful. BOR at 7-22. The prosecutor has incorrectly framed the task before this Court.

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<sup>3</sup> Available at [www.justice.gov/oig/special/s0601/final.pdf](http://www.justice.gov/oig/special/s0601/final.pdf) (last viewed 3/13/15).

<sup>4</sup> Dr. Haber is a scientist whose studies on the scientific validity of latent fingerprint examination are cited and quoted in the National Research Council report. NCR Report at 139, 142-43.

The prosecutor's argument is based upon the doctrine of stare decisis, and he cites two Washington Supreme Court cases holding that the Supreme Court may overrule its own precedent when the existing rule is incorrect and harmful. BOR at 8 (citing In re Stranger Creek, 77 Wn.2d 649, 652-53, 466 P.2d 508 (1970) ("If the law is to have current relevance, courts must have and exert the capacity to change a rule of law when reason so requires.") and State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008)). These cases address en banc Supreme Court decisions and thus do not provide precedent requiring a three-judge panel of the Court of Appeals to "overrule" decisions reached by other panels in order to reach a different result.

Court of Appeals opinions are not always in agreement. See RAP 13.4(b)(2) (one of four reasons Supreme Court will accept review of a Court of Appeals decision is if it is in conflict with another decision of the Court of Appeals); McCausland v. McCausland, 159 Wn.2d 607, 617-21, 152 P.3d 1013 (2007) (noting disagreement between three divisions of Court of Appeals in interpreting RCW 26.19.020); State v. Allen, 150 Wn. App. 300, 308 n.1, 207 P.3d 483 (2009) (disagreeing with two opinions of different three-judge panels of same division), rev. denied, 170 Wn.2d 1014 (2010); State v. Abuan,

161 Wn. App. 135, 160 n.13, 257 P.3d 1 (2011) (Hunt, J. dissenting) (recognizing internal split of authority within division and noting the lack of authority for division to sit en banc to resolve issue).

The prosecutor does not cite to a controlling Supreme Court decision, which this Court must follow in deciding if the trial court erred in denying Mr. Franks' request for a pre-trial hearing on the admissibility of fingerprint evidence. See State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997) (Court of Appeals compelled to follow decisions of the Supreme Court). A three-judge panel of this Court need not overrule Pigott in order to conduct an independent analysis of the issues in Mr. Franks' case.

b. A Frye hearing is appropriate when the current relevant scientific community doubts the scientific underpinning of a forensic method.

The purpose of a Frye hearing is to ensure that evidence admitted in court is "based upon established scientific methodology." State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006), overruled on other grounds, State v. W.R., Jr., 336 P.3d 1134 (2015). "Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community." Id.

The State is correct that a Frye hearing is not required every time scientific evidence is presented at trial. BOR at 9-10. Trial courts may “generally rely” upon a Washington Supreme Court determination that Frye is met as to a new scientific principal.” State v. Cauthron, 120 Wn.2d 879, 888 n.3, 846 P.2d 502 (1993). But “trial courts must still undertake the Frye analysis if one party introduces new evidence which seriously questions the continued general acceptance or lack of acceptance as to that theory within the relevant scientific community.” Id. The Supreme Court, for example, later overruled part of its decision in Cauthron, based upon a report from a new NRC Commission on DNA Forensic Evidence. State v. Buckner, 133 Wn.2d 63, 66-67, 941 P.2d 63 (1997) (citing National Research Council, Commission on DNS Forensic Sciences: The Evaluation of Forensic DNA Evidence 136 (1996)).

In the present case, Mr. Franks showed that a prestigious group of scientists and forensic scientists concluded in 2009 that the fingerprint comparison method, ACE-V, lacks measures or a standard protocol and is essentially subjective. NRC Report at 142 (“merely following the steps of ACE-V does not imply that one is proceeding in a scientific manner or producing reliable results.”). He showed that

there is no scientific support for the fingerprint community's claim to have a zero error rate. *Id.* at 41-42, 143-44. And he showed that the fingerprint community's assumption that all fingerprints are unique has not been scientifically tested and that uniqueness does not guarantee that prints from two different people might not be sufficiently similar to be confused. *Id.* at 143-44. This Court need not follow legal precedent admitting fingerprint print evidence if it requires ignoring 21<sup>st</sup> Century scientific principles and denying Mr. Franks the opportunity to contest the fingerprint comparisons in his case in a pre-trial hearing.

c. The National Research Council Report shows a consensus in the scientific community that the current method of fingerprint comparison in the United States lacks a scientific foundation.

In an internationally publicized case, the FBI crime laboratory incorrectly identified an Oregon citizen as the source of a fingerprint found on a plastic bag containing detonators used in the bombing of a Spanish railroad train. *OIG Report at 1; 2/27/14 RP 80-81.* When the Department of Justice later reviewed the process and identified various reasons for the misidentification, it called for the FBI to research and develop more objective criteria. *Id.* at 10.

Concerned about the need for significant improvement in various aspects of forensic science, Congress directed the National

Research Council (NCR) of the National Academy of Sciences to undergo a study to chart an agenda for improving forensic science. NRC Report at xix, 1-2. The National Research Council gathered members of the forensic science community, members of legal community, and a diverse group of scientists to study and make recommendations as the Committed on Identifying the Needs of the Forensic Science Community. Id. at 2. The Committee issued a number of recommendations designed to further the forensic sciences, beginning with the formation of a new government agency to establish best practices, standards for accreditation, and promote research designed to improve forensic science. Id. at 18-33.

The Committee chose some specific fields for in depth review, including friction ridge analysis. NRC Report at 127-28, 136-45. The Committee found many areas for improvement and research in the field of fingerprint comparison. Id. at 136-45. Notably, the Committee concluded that there is no scientific evidence to support the validity of the ACE-V method, which has no measurement criteria and produces inherently subjective results. Id. at 139-41, 142-43.

The State downplays the importance of the NRC report, asserting it does not raise any new issues and “simply provided the

defense with a platform to raise the same arguments anew.” BOR at 14 n.9. The Frye test, however, looks to a scientific principle’s “general acceptance in the relevant scientific community.” Cauthron, 120 Wn.2d at 886 (quoting State v. Martin, 101 Wn.2d 713, 719, 684 P.2d 651 (1984)); see Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (“the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs”). The NRC Committee was composed of experts from various scientific and forensic fields. NRC Report at 287-99. The committee members reviewed the available literature and listened to experts, many from fingerprint community. Id. at 307, 309, 313-14. Rather than the opinion of a single expert, the NRC Report provides the consensus of the scientific community concerning fingerprint evidence.

d. The prosecutor’s lists of cases from other jurisdictions are not helpful.

The State provides lists of cases from other jurisdictions in which it asserts challenges similar to Mr. Franks’ have been rejected. Many of the cited cases, however, do not involve a challenge to the ACE-V method or are not decided on the merits. See People v. Farnam, 28 Cal.4<sup>th</sup> 107, 159-60, 121 Cal.Rptr.2d 106, 47 P.3d 988 (Cal.

2002) (challenge to automated fingerprint identification system), cert. denied, 537 U.S. 1124 (2003); State v. Cooke, 914 A.2d 1078, 1095 (Del.Super. 2007) (relevance objection to evidence that defendant's prints did not match any prints found on evidence); Johnston v. State, 27 So.3d 11, 20-23 (Fla.) (NRC report is not newly discovered evidence for purposes of motion for post-conviction relief), cert. denied, 131 S. Ct. 459 (2010); People v. Burnell, 89 A.D.3d 1118, 1121, 931 N.Y.S.2d 776 (NYAD.3Dept. 2011) (challenge to computer software program that permits police to scan, print, enlarge, and adjust the contrast of fingerprint), denying leave to appeal, 18 N.Y.3d 922 (2012); State v. Davis, 116 OhioSt.3d 404, 424-25, 880 N.E.2d 31 (no need for pre-trial hearing to determine reliability of fingerprint evidence where defendant did not object), cert denied, 555 U.S. 861 (2008); Webster v. State, 252 P.3d 259, 277-78 (Okla.Crim.App. 2011) (defendant did not object to fingerprint evidence at trial and acknowledges he failed to preserve issue); State v. Maestas, 299 P.3d 892, 935-36 (Utah 2012) (issue waived when defense counsel conceded that issue controlled by appellate case holding that fingerprint identification is inherently reliable), cert. denied, 133 S. Ct. 1634 (2013); Earnest v. Commonwealth, 61 Va.App. 223, 225-28, 723

S.E.2d 680 (Va.App. 2012) (appeal of trial court's exclusion of defense fingerprint expert as unqualified); Dowdy v. Commonwealth, 278 Va. 577, 601, 686 S.E.2d 710 (Va. 2009) (appeal of defendant's challenge to trial court's failure to strike fingerprint examiner's testimony based on failure to take bench notes or undergo blind verification). The two Virginia cases simply cite a 1968 Virginia Supreme Court case, and it is the source of the quote provided by the prosecutor in his synopsis of one. Avent v. Commonwealth, 209 Va. 474, 478, 164 S.E.2d 658 (1968).

In addition to the above cases, many of the cases mentioned by the State either predate the 2009 NRC report or do not address it. Barber v. State, 952 So.2d 393 (Ala.Crim.App. 2005), cert. denied, 549 U.S. 1306 (2007); State v. Escobido-Ortiz, 109 Hawai'i 359, 126 P.3d 402 (Hawai'i App. 2005); Burnett v. State, 815 N.E.2d 201 (Ind.App. 2004); Commonwealth v. Patterson, 455 Mass. 626, 840 N.E.2d 12 (Mass. 2005), overruled on other grounds, Commonwealth v. Britt, 465 Mass. 87, 987 N.E.2d 558 (Mass. 2013); State v. Langill, 157 N.H. 77, 945 A.2d 1 (N.H. 2008); United States v. John, 597 F.3d 263, 274-75 (5<sup>th</sup> Cir. 2012); United States v. Pena, 586 F.3d 105, 109-11 (1<sup>st</sup> Cir. 2009), cert. denied, 559 U.S. 1021 (2010); United States v. Baines, 573

F.3d 979, 980-992 (10<sup>th</sup> Cir. 2009); United States v. Abreu, 406 F.3d 1304 (11<sup>th</sup> Cir. 2005); United States v. Janis, 387 F.3d 682 (8<sup>th</sup> Cir. 2004); United States v. Mitchell, 365 F.3d 215 (3<sup>rd</sup> Cir. 2004); United States v. George, 363 F.3d 666 (7<sup>th</sup> Cir. 2004); United States v. Collins, 340 F.3d 672 (8<sup>th</sup> Cir. 2003); United States v. Crisp, 324 F.3d 261 (4<sup>th</sup> Cir.), cert. denied, 540 U.S. 888 (2003); United States v. Havvard, 260 F.3d 597 (7<sup>th</sup> Cir. 2001); United States v. Sherwood, 98 F.3d 402 (9<sup>th</sup> Cir. 1996); United States v. Stone, 848 F.Supp.2d 714, 717 (E.D.Mich. 2012) (district court references NRC report, but the defendants did not provide the report to the court and instead relied upon journal articles and a dissenting opinion); United States v. Llera Plaza, 188 F.Supp.2d 549 (E.D.Pa. 2002)Sta. All of the federal cases and many of the state cases utilize the Daubert standard for scientific testimony and not the Frye standard utilized by Washington.

In the end, however, whether other jurisdictions admit fingerprint evidence is not dispositive. In reviewing the admissibility of scientific evidence, Washington courts must make a “searching review” of the scientific evidence and law reviews in hearing from the witnesses. Cauthron, 120 Wn.2d at 888. “Decisions of other jurisdictions may be examined as well, but the relevant inquiry is the

general acceptance by the scientists, not the court.” Id. The relevant scientific community, moreover, is not just the forensic community but also “the wider scientific community familiar with the theory and the underlying technique.” State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

e. The trial court erred by denying a Frye hearing.

Mr. Franks provided the superior court with new information from the wider scientific community that showed that the theory of fingerprint comparison evidence and the mention used lack scientific validity. The trial court, however, denied his request for a Frye hearing based only upon the acceptance of fingerprint evidence in Washington courts. This Court should reverse the trial court and remand for a Frye hearing.

**3. The trial court erroneously admitted the latent fingerprint examiner’s hearsay testimony that they had been qualified as experts in prior cases.**

Two latent fingerprint examiners testified over objection that each had been qualified as expert witness in numerous prior trials. Prior to trial, however, the court stated that testimony that a witness had been found to be an expert was an assertion of past fact and thus hearsay. 2/26/13 RP 6. The testimony was hearsay, and the court

should have sustained Mr. Franks' objections to the fingerprint examiners' statements that they had qualified as expert witnesses in prior cases. 2/27/13 RP 26-27, 125.

The State argues the testimony was not hearsay because the witness was testifying about him or herself. BOR at 24-27. In making its point, the State misrepresents the witnesses' testimony. The witnesses did not simply tell the jury that they had testified as experts in the past, they said they had been "accepted" as expert witnesses:

Q: And those 40 and 50 times [that you testified], were you accepted as an expert in King County:

A (Swihart): Yes.

...

Q: And have you been accepted as an expert those 20 or 25 times [that you testified]?

A (Verbonus): Every time I have.

2/27/13 RP 26-27, 125.

The experts were relaying prior court decisions finding they were qualified as expert witnesses to bolster their credibility and expertise. The trial court erred, and Mr. Franks' conviction should be reversed.

B. CONCLUSION

The trial court improperly refused to instruct the jury on a lesser-included offense as requested by Mr. Franks, admitted unreliable fingerprint comparison evidence after denying his request for a Frye hearing, and permitted the State to bolster the fingerprint examiners' testimony with evidence that other courts had found them to be experts.

For the reasons stated above and in the Brief of Appellant, Mr. Franks' residential burglary conviction should be reversed and remanded for a new trial.

DATED this 16th day of March 2015.

Respectfully submitted,

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Washington Appellate Project  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 71261-6-I
	)	
DEANTHONY FRANKS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **REPLY 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:

<p>[X] DENNIS MCCURDY, DPA [paoappellateunitmail@kingcounty.gov] [dennis.mccurdy@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>( ) ( ) (X)</p>	<p>U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL</p>
<p>[X] DEANTHONY FRANKS 345832 WASHINGTON STATE PENITENTIARY 1313 N 13<sup>TH</sup> AVE WALLA WALLA, WA 99362</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF MARCH, 2015.

X \_\_\_\_\_ 

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