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DEC 06 2013  
King County Prosecutor  
Appellate Unit

NO. 69003-5-1

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

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STATE OF WASHINGTON,

Respondent,

v.

M.P.,

Appellant.

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

The Honorable J. Wesley Saint Clair, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED WHEN IT ADMITTED FINGERPRINT IDENTIFICATION EVIDENCE WITHOUT A SUFFICIENT SHOWING UNDER FRYE AND ER 702.

The trial court ruled that no Frye hearing was necessary and, even if necessary, the information before it revealed general scientific acceptance of the methodologies and conclusions. CP 4. Citing State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001), and State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989), the State argues these decisions are subject to an abuse of discretion standard. BOR at 11-12. This is incorrect.

Neither Demery nor Hopson involved a Frye determination. Demery involved the admissibility of a police officer's assertion the defendant had lied during a taped interview. Demery, 144 Wn.2d at 758. Hopson involved denial of a defense motion for mistrial. Hopson, 113 Wn.2d at 284. In contrast, the decision to admit evidence under Frye is reviewed de novo. State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993). This is the standard even where the trial court declines to hold a Frye hearing. See In re Detention of Ritter, \_\_\_ Wn. App. \_\_\_, 312 P.3d 723 (2013); State v. Leuluaialii, 118 Wn. App. 780, 789, 77 P.3d 1192 (2003), review denied, 154 Wn.2d 1013, 113 P.3d 1039 (2005).

The remainder of the State's argument can be summarized as follows: (1) courts from other jurisdictions have unanimously rejected the identical arguments made in this case and (2) neither the opinions of Drs. Lyn and Ralph Haber, nor any other recent developments, signal a significant dispute. Both assertions are incorrect.

The State cites 34 cases from foreign jurisdictions in support of its claim M.P.'s arguments have been unanimously rejected by other courts. See BOR at 14-20. An examination of these cases, however, reveals that not a single one involves precisely the same issues or evidence in this case.

M.P. challenges the admission of fingerprint evidence in his case because (1) under Frye, neither the theory (all latent fingerprint impressions are unique to the person who left them and can be matched – and only matched – to that person), nor the technique (ACE-V) is generally accepted in the relevant scientific communities and (2) under Frye and ER 702, there is not general acceptance regarding how to express the results of ACE-V testing in a manner that is helpful, and not misleading, to the trier of fact.

Issue (1) turns on whether the Brandon Mayfield case (and the resulting 2006 OIG Report), the 2009 NRC Report, and the

writings and other evidence from Drs. Lyn and Ralph Haber constitute “new evidence which seriously questions” continued general acceptance. Cauthron, 120 Wn.2d at 888 n.3.

The State asserts that challenges raised in its cited cases “are similar, if not identical, to the challenge the defendant raises here.” BOR at 14; see also id. (“The following is a review of the recent state cases from across the nation that have all rejected similar defense challenges.”). Several of the cited cases, however, do not even involve a challenge to ACE-V. See People v. Farnham, 28 Cal.4<sup>th</sup> 107, 159-160, 47 P.3d 988 (Cal. 2002) (challenging automated system producing list of possible matches), cert. denied, 537 U.S. 1124, 123 S. Ct. 861, 154 L. Ed. 2d 806 (2003); State v. Cooke, 914 A.2d 1078, 1094-1095 (Del.Super. 2007) (challenging relevancy of evidence defendant’s prints *did not match* any unknown prints on evidence); People v. Burnell, 89 A.D.3d 1118, 1121, 931 N.Y.S.2d 776 (N.Y. 2011) (challenging software program that allows investigators to scan, enlarge, and isolate portions of a print); Earnest v. Commonwealth of Virginia, 61 Va. App. 223, 227-229, 734 S.E.2d 680 (Va.App. 2012) (challenging rejection of defense expert as unqualified to testify at trial regarding fingerprint evidence); Dowdy v. Commonwealth of

Virginia, 278 Va. 577, 600-601, 686 S.E.2d 710 (Va. 2009) (challenging trial court's failure to strike examiner's testimony based on failure to follow standard methodologies and guidelines for examining prints).

Moreover, even ignoring the very different legal challenges in many of the State's cited cases, 27 of the 34 cases predate or fail to discuss the OIG and NRC Reports. See United States v. Abreu, 406 F.3d 1304, 1305-1307 (11<sup>th</sup> Cir. 2005); United States v. Baines, 573 F.3d 979, 980-992 (10<sup>th</sup> Cir. 2009); United States v. Sherwood, 98 F.3d 402, 408 (9<sup>th</sup> Cir. 1996); United States v. Janis, 387 F.3d 682, 689-690 (8<sup>th</sup> Cir. 2004); United States v. Collins, 340 F.3d 672, 682-683 (8<sup>th</sup> Cir. 2003); United States v. George, 363 F.3d 666, 672-673 (7<sup>th</sup> Cir. 2004); United States v. Havvard, 260 F.3d 597, 600-601 (7<sup>th</sup> Cir. 2001); United States v. John, 597 F.3d 263, 273-276 (5<sup>th</sup> Cir. 2010); United States v. Crisp, 324 F.3d 261, 263-270 (4<sup>th</sup> Cir.), cert. denied, 540 U.S. 888, 124 S. Ct. 220, 157 L. Ed. 2d 159 (2003); United States v. Mitchell, 365 F.3d 215, 234-246 (3<sup>rd</sup> Cir.), cert. denied, 543 U.S. 974, 125 S. Ct. 446, 160 L. Ed. 2d 348 (2004); United States v. Pena, 586 F.3d 105, 109-111 (1<sup>st</sup> Cir. 2009), cert. denied, 559 U.S. 1021, 130 S. Ct. 1919, 176 L. Ed. 2d 390 (2010); United States v. Gutierrez-Castro, 805 F.Supp.2d

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In fact, only 7 of the 34 cases discuss the NRC Report. See United States v. Herrera, 704 F.3d 480, 483-487 (7<sup>th</sup> Cir.), cert.

denied, 134 S. Ct. 175 (2013); People v. Luna, 989 N.E.2d 655, 669-679 (Ill. App. 2013); United States v. Stone, 848 F.Supp.2d 714, 716-719 (E.D. Mich. 2012); Commonwealth v. Gambora, 457 Mass. 715, 720-729, 933 N.E.2d 50 (Mass. 2010); Johnston v. State, 27 So.3d 11, 20-23 (Fla.), cert. denied, 131 S. Ct. 459, 178 L. Ed. 2d 292 (2010); State v. Dixon, 822 N.W.2d 664, 666-676 (Minn. App. 2012); Webster v. State, 252 P.3d 259, 277-278 (Okla.Crim.App. 2011).

None of these 7 cases discuss the OIG Report. And only one case – Luna – also involves the Habers. But there was no Frye hearing in that case (the court took judicial notice of general acceptance), neither Haber testified, and the very general description of an affidavit the Habers submitted raises the possibility that, as compared to M.P.'s case, the Luna court was presented with less evidence demonstrating a significant dispute. See Luna, 989 N.E.2d at 671, 679.

Ultimately, of the State's 34 cases, not a single one involves a discussion of the NRC Report, a discussion of the OIG Report, and the Habers' detailed testimony and affidavit. Moreover, not a single one addresses M.P.'s argument that, even if the theory and technique of fingerprint identification are generally accepted, the

manner in which fingerprint examiners express their results (going beyond a statement “there is some chance the donor of the exemplar is also the donor of the latent print”) satisfies neither Frye nor ER 702.<sup>1</sup>

Even if other cases had addressed the same evidence and the same arguments presented in this case, however, what other courts have done is relevant, but not dispositive. The emphasis must remain on what qualified scientists think. Cauthron, 120 Wn.2d at 887-888.

The State does not argue that Drs. Lyn and Ralph Haber fall outside the relevant scientific community. Nor could they. But this does not prevent the State from mocking the Habers, refusing to acknowledge their “expertise” and “expert” status without the use of quotation marks. BOR at 21, 23 n.11. Yet, the National Academy of Sciences, the preeminent scientific minds of our time, relied extensively on the Habers’ expertise and opinions in their

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<sup>1</sup> The State points out that, after considering the NRC Report and the Habers’ views, a federal district court judge disagreed with the Maryland state court judge regarding the admissibility of fingerprint evidence in the prosecution of Brian Rose. BOR at 21-23 (citing United States v. Rose, 672 Supp.2d 723 (D.Md. 2009)). That two judges disagreed is consistent with a dispute. In any event, the Rose case – like the State’s other cited cases – did not involve a challenge, under Frye and ER 702, to limitations on fingerprint analysts’ ultimate conclusions in court.

discussion of latent fingerprint analysis. NRC Report, at 138-139, 142-144.

The State also argues it is improper to consider Dr. Ralph Haber's trial testimony. According to the State, his testimony could be considered had there been a Frye hearing, but because the defense request for a hearing was denied, the testimony is off limits. BOR at 23-25. The State cites no authority for its proposed distinction. Case law is to the contrary. See Leuluaialij, 118 Wn. App. at 789-790 (no Frye hearing, but court considers materials not in record). Moreover, the State's hypothetical scenario (an ill intentioned defense attorney might unfairly save for appeal the best evidence supporting a Frye hearing) can be dealt with in a case where that actually happens.

The State also seeks to downplay the significance of the NRC Report. The State indicates that "the report specifically stated that it was not questioning the admissibility of fingerprint identification evidence." BOR at 17. Although the State does not provide a citation, it is likely referring to the following statement in the report's summary:

The committee decided early in its work that it would not be feasible to develop a detailed evaluation of each discipline in terms of its scientific underpinning,

level of development, and ability to provide evidence to address the major types of questions raised in criminal prosecutions and civil litigation.

NRC Report, at 7. It would have been odd had the NRC strayed from the scientific issues before it and proclaimed fingerprint evidence inadmissible. Admissibility is a legal question for the courts. But this does not mean the report's conclusions are irrelevant to whether there are significant disputes concerning aspects of fingerprint comparison science. The NRC Report confirms these disputes.

The State also quotes the NRC Report as indicating "a careful comparison of two impressions can accurately discern whether or not they have a common source." BOR at 32 (citing NRC Report, at 142. This is not precisely correct. The actual statement is: "Because of the amount of detail available in friction ridges, it seems plausible that a careful comparison of two impressions can accurately discern whether or not they had a common source." NRC Report, at 142 (emphasis added). The report then continues:

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. . . .

NRC Report, at 142. In context, this discussion also supports a significant dispute regarding ACE-V.

Finally, regarding M.P.'s challenge to the examiner's conclusions, the State attempts to reframe the issue as merely falling under ER 403. BOR at 34. But the issue is one of Frye and ER 702; i.e., whether expert testimony that a latent print is "positive to a known print" or has been "identified" is based on a generally accepted theory under Frye and is helpful to the trier of fact under ER 702.<sup>2</sup> Compare Cauthron, 120 Wn.2d at 906-908 (although theory and technique for DNA comparisons generally accepted, testimony that samples "matched" inadmissible under Frye and ER 702 in light of dispute concerning population frequencies).

As discussed at length in M.P.'s opening brief, the NRC Report warns of the dangers of overstating scientific evidence.

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<sup>2</sup> This Court will recall that Betty Newlin testified that she "identified" the latent prints from the Brunelle burglary as belonging to M.P. 3RP 231. An "identification" or "individuation" or "match" is commonly understood to mean the examiner is confident two different sources could not have produced the prints. NRC Report, at 7, 141. For the Pritchard burglary, Kelli Anderson testified the lone latent print "was positive" to M.P., a conclusion conveying the same level of unbridled confidence. 3RP 131.

Testimony must include limitations of the analyses and should not imply uniqueness unless science excludes all other possible sources. Both the NRC and the IAI acknowledge the possibility of developing population statistics for latent print examination. See Brief of Appellant, at 43-45. And, until that happens, at best a conclusion of “identification” currently supports “only a probability statement that there is some chance the donor of the exemplar is also the donor of the latent print.” CP 149. Yet, Kelli Anderson and Betty Newlin offered conclusions without this limitation.

Even if this Court is unwilling to find, based on the current record, a significant dispute concerning latent print examinations and the resulting conclusions, at the very least, M.P. has demonstrated the need for a Frye hearing. M.P. has presented “new evidence which seriously questions” general acceptance in Washington. Cauthron, 120 Wn.2d at 888 n.3.

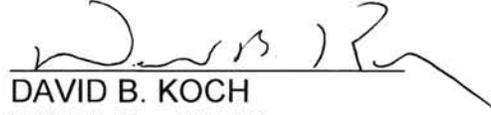
C. CONCLUSION

For the reasons discussed in M.P.'s opening brief and above, this Court should reverse and remand for a Frye hearing.

DATED this 6<sup>th</sup> day of December, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69003-5-1
	)	
MICHAEL PIGOTT,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 6<sup>TH</sup> DAY OF DECEMBER, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     MICHAEL PIGOTT  
          6020 S. 127<sup>TH</sup> PLACE  
          SEATTLE, WA 98178

**SIGNED** IN SEATTLE WASHINGTON, THIS 6<sup>TH</sup> DAY OF DECEMBER, 2013.

X *Patrick Mayovsky*

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