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SUPREME COURT OF NEW JERSEY
Docket No. 087251

STATE OF NEW JERSEY, Plaintiff-Respondent, v. QUINTIN D. WATSON, Defendant-Petitioner.	Appeal from a Final Order of the Superior Court of New Jersey, Appellate Division Docket No. A-000235-19 **Criminal Action** Sat Below: HON. RONALD SUSSWEIN, J.A.D. HON. RICHARD GEIGER, J.A.D. HON. RICHARD HOFFMAN, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

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PRELIMINARY STATEMENT

Proposed amicus curiae Association of Criminal Defense Lawyers of New Jersey (ACDL) is particularly concerned about the Appellate Division's expansion of N.J.R.E. 701, the lay opinion Rule, to generally authorize investigating police officers, with no particular familiarity with the content of a surveillance video, to narrate that video for the jury, State v. Watson, 472 N.J. Super. 381, 448 (App. Div. 2022), holding in addition that the "perception" prong of Evidence Rule 701 will ordinarily be satisfied simply by the police officer, or other lay witness, reviewing the surveillance video before trial. Id. at 463.

ACDL strongly disagrees with the Appellate Division's interpretation and application of N.J.R.E. 701 in the Watson case, and is concerned that the Opinion, if not reversed and the intended application of the Rule clarified, will lead to the unrestrained use by Prosecutors of surveillance video narrations by law enforcement officers whose testimony will be tailored to support the prosecution's trial strategy and inevitably will influence and intrude upon the jury's assessment of the video.

ACDL-NJ also takes note of the Office of the Public Defender's argument that the Appellate Division erred in concluding that the trial court's admission into evidence of an investigating officer's testimony that, about a year after the

bank robbery, he was contacted by another law enforcement agency and that a consultation with officers from that agency led to the arrest of and filing of criminal charges against Watson, constituted a violation of defendant's Confrontation Clause rights, but that the error was harmless. Id. at 441.

Amicus agrees with the Office of the Public Defender's contention that the error was not harmless. Amicus notes that the Prosecutor explained that the testimony was essential to its case so that the jury understood the reason why defendant was indicted and charged. That explanation clearly was flawed. The State's obligation at trial is to prove defendant's guilt beyond a reasonable doubt, not to explain why it decided to arrest and charge defendant. Moreover, in this case identification was the only issue and the evidence of defendant's guilt was hardly overwhelming. The only evidence incriminating Watson was a lay-witness identification by an ex-girlfriend of a photo from the bank surveillance video in which Watson's face was partially obscured, and an uncertain in-court identification by the bank teller after the teller had identified someone else out of court as the perpetrator. Clearly, the Sixth Amendment error was not harmless beyond a reasonable doubt.

Amicus also agrees with the Office of the Public Defender's contention that the trial court's in-court identification charge constituted plain error. The teller, who had made the in-court identification after having selected a different

person as the suspect from a photo array that included defendant, acknowledged that the prosecuting attorney had told him in advance that defendant would be in the courtroom. The Appellate Division agreed that the teller's in-court identification was analogous to an out-of-court "show up" identification and acknowledged that the trial court's Model Charge on in-court identification was silent about its suggestiveness. The Appellate Division also requested the Model Jury Charge Committee to update the in-court identification Model Charge by using language from the "show up" ID charge to explain the suggestiveness of in-court identifications. Id. at 503-06. The trial court's failure to modify the charge on its own clearly constituted plain error. See State v. Montalvo, 229 N.J. 300, 323 (2017) (holding that trial court's use of Model Jury Charge for unlawful possession of a weapon was clearly capable of producing an unjust result and constituted plain error).

STATEMENT OF INTEREST OF AMICUS CURIAE

Proposed amicus curiae Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such

cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has more than 500 members across New Jersey. Our courts have found that ACDL-NJ has the special interest and expertise to serve as an amicus curiae per Rule 1:13-9 in numerous cases throughout the years. See, e.g., State v. Ramirez, 246 N.J. 61 (2021); State v. Garcia, 245 N.J. 412 (2021); State v. Williams, 244 N.J. 327 (2020); State v. Andrews, 243 N.J. 447 (2020); State v. Greene, 242 N.J. 530 (2020).

Thus, ACDL-NJ has the requisite interest to participate as amicus curiae and its participation will be helpful to this Court. Accordingly, ACDL-NJ asks that its motion for leave to participate as amicus curiae be granted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

ACDL-NJ accepts the Statement of Facts and Procedural History found in the briefs of defendant, but would expand on defendant's description in his brief to the Appellate Division about the scope and content of Officer Vitelli's testimony while he narrated the surveillance video obtained from Garden State Community Bank.

At the outset of his narration testimony, the Prosecutor asked Officer Vitelli, "What do you see?", and the Officer responded that "this would be our suspect entering the bank right here. You'll see him come in the front door . . ." When the Prosecutor then asked Officer Vitelli, "Can you make any observation

about his hands?", it was apparent that Officer Vitelli was going to be asked by the prosecution to narrate the entire bank surveillance video. Defense counsel immediately objected, on the ground that that narration constituted impermissible lay opinion testimony. Without any explanation, the trial court overruled the objection. (5T132:19-133:17).

Officer Vitelli, who on the day of the robbery had arrived at the bank about an hour after the robbery, then proceeded to narrate both the bank surveillance video and another surveillance video obtained from a Krauser's market located near the bank. In the course of Officer Vitelli's narration, and in direct response to questions from the Prosecutor, he made the following specific observations about the surveillance videos' content:

a. He stated that when he entered the suspect was wearing gloves on both hands. (5T133:21-134:8).

b. From the teller's viewpoint, it then appeared that the suspect removed the glove from his right hand, placed the glove in his left hand, and put his right hand in his jacket or sweatshirt pocket. The suspect then placed his left hand on the note that he handed to the teller. He stated that the suspect held the note on the teller's counter by placing two fingers on it. (5T134:22-136:2).

Officer Vitelli, in response to specific inquiry from the Prosecutor about how the suspect opened the door to exit the bank, stated that his hand did not

make contact with the door handle but that instead he used his left elbow to open the door and leave the bank. (5T139:5-140:17). Officer Vitelli also noted that the suspect appeared to be running when he left the bank. (5T140:18-23).

The Prosecutor then questioned Officer Vitelli about exhibits that were still photographs of the surveillance video taken inside the bank. He testified that the photographs showed that the suspect wore gloves when he entered the bank, that the suspect's hands were on the note he gave to the teller, and that the note separated his hands from the counter. (5T143:4-144:4). He also testified based on those photographs, that the suspect was wearing "a black jacket or sweatshirt or coat," a hat and what looked like jeans. (5T144:11-144:16).

Finally, Officer Vitelli testified that the teller had described the suspect to him and, based on the video, that the suspect was a dark-skinned male, larger than Officer Vitelli, and taller than 5 feet, 10 inches, which was Officer Vitelli's height. (5T149:5-150:5). Officer Vitelli's description was consistent with the teller's description of the suspect.

LEGAL ARGUMENT[1]

POINT I

THE APPELLATE DIVISION'S OPINION IS FAR TOO PERMISSIVE IN ITS ACCEPTANCE OF LAY WITNESS TESTIMONY AND CONSTRUES EVIDENCE RULE 701 MORE BROADLY THAN ANY OF THIS COURT'S DECISIONS. MOREOVER, THE PRECEDENTS ON WHICH IT RELIES DO NOT SUPPORT ITS CONCLUSIONS.

N.J.R.E. 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences may be admitted if it:
>
> (a) is rationally based on the witness' perception; and
>
> (b) will assist in understanding the witness' testimony or determining a fact in issue.

The word "perception" in the first prong of Rule 701 was defined in predecessor rules, Evid. R. 56(1) and 1(14), as "the acquisition of knowledge through one's own senses." State v. Sanchez, 247 N.J. 450, 466 (2021). See also State v. McLean, 205 N.J. 438, 456 (2011) ("[P]erception . . . . rests on the acquisition of knowledge through use of one's sense of touch, taste, sight, smell or hearing.").

[1] Although ACDL comments in the Preliminary Statement on two collateral issues addressed in the Brief of the Office of the Public Defender, the Argument portion of this brief deals only with the lay opinion Rule and its application to the narration of surveillance videos.

The second requirement is that lay opinion "is limited to testimony that will assist the trier of fact either by helping to explain the witness' testimony or by shedding light on the determination of a factual issue." McLean, 205 N.J. at 458.

The Appellate Division's discussion of the admissibility of testimony by a law witness narrating a video begins by noting that "there is comparatively little case law that discusses the parameters of video narration testimony." Watson, 472 N.J. Super. at 448. But its Opinion then authoritatively asserts that

> Courts in other jurisdictions that have addressed this practice have generally held that this type of testimony is permissible, with limitations.
>
> [Ibid.]

The five cases cited to support that novel proposition of law simply cannot carry that weight. In U.S. v. Torralba-Medina, 784 F.3d 652 (9th Cir. 2015), defendant was convicted of smuggling undocumented immigrants into the United States. Trial testimony established that drivers working for defendant would meet migrants in the desert and drive them to Genro Shuttle (GS), a Tucson company from which other drivers would "shuttle" migrants to safe houses where they were held until family members paid for their release. Id. at 657. At trial, Agent Frazier of the Immigration and Customs Enforcement Agency (ICE), with nine years' experience patrolling the borders for ICE,

narrated surveillance videos showing vehicles delivering and retrieving migrants from GS, pointing out identifying marks on vehicles and connecting vehicles arriving at and leaving GS to specific members of the conspiracy. Id. at 657-58. Frazier testified that he had watched each video "roughly" fifty times, and that he often "watched the live video feed while it was being recorded." He described special characteristics of the vehicles "that helped the jury identify the same cars in subsequent videos," and was able to connect different cars to specific conspirators. Id. at 659-60.

Agent Frazier's lay testimony narrating the videos was challenged as plain error. The Ninth Circuit, citing U.S. v. Begay, 42 F.3d 486, 502-03 (9th Cir. 1994), in which an officer narrated a video of a riot that he had watched "nearly a hundred times," concluded that Agent Frazier had offered "appropriate lay testimony" when he narrated the video." Id. at 659-61.

Obviously, the video narration testimony of Agent Frazier in Torralba-Medina, and the officer's testimony in U.S. v. Begay, on which the Ninth Circuit relied, bear no similarity to the lay testimony of Officer Vitelli in the case at bar. In both those cases the lay witnesses, relying on fifty studies of the video in Torralba-Medina and nearly one hundred in Begay, actually relied on their perception of the video to explain details that the jury could not possibly discern from their limited exposure to the videos at trial.

The Appellate Division opinion also quotes from U.S. v. Young, 745 F.2d 733, 761 (2nd Cir. 1984), for the principle that "a trial judge has broad discretion in deciding whether or not to allow narrative testimony." Watson, 472 N.J. Super. at 448. But all of the video narrative testimony in Young, a prosecution for conspiracy to distribute heroin and for conducting a continuing criminal enterprise, among other offenses, was rendered by witnesses who had been qualified as experts, and the admissibility of their testimony was based on Fed. R. Evid. 702, not on the lay testimony Rule. Id. at 760-61. Young's holding clearly is not relevant precedent for the case at bar.

Ellis v. State, 312 GA 243 (2021), is another inapposite precedent relied on by the Appellate Division. During defendant's trial for murder, a detective narrated the content of a video interview he himself had conducted with defendant during which defendant asserted that his gun had gone off accidentally and that he had intended to hit the victim with the gun, not to shoot him. Id. at 247. After his conviction, defendant moved for a new trial based on his counsel's failure to object to the narration of the interview at trial. At the hearing on the Motion for a new trial, defense counsel explained that she did not object to the narration because the video's content was consistent with her trial strategy, which was to contend that the shooting was accidental. The Georgia

Supreme Court rejected defendant's claim of ineffective assistance of counsel. Id. at 249-50.

Similarly irrelevant is State v. Holley, 327 Conn. 576 (2018), in which the Connecticut Supreme Court reinstated a felony murder conviction that a Connecticut appellate court had reversed. One ground for reversal was the trial court's ruling that a lay witness could narrate a video and identify an object in defendant's backpack as a shoebox. Without deciding whether or not the trial court erred in admitting the lay narrative testimony, the Connecticut Supreme Court concluded that even if the ruling had been erroneous, the error was harmless. Id. at 613-19.

Finally, the Appellate Division's reliance on Gales v. State, 150 So. 3d 632 (Miss. 2014), also is wide of the mark. In Gales, the Mississippi Supreme Court affirmed Gales' convictions for armed robbery and conspiracy to commit armed robbery. At trial, a police officer was permitted to narrate surveillance footage of the supermarket that had been robbed. Id. at 645. That narration was challenged on appeal as a violation of the lay opinion rule, but at trial counsel's objection was based instead on the best evidence rule. Ibid. On appeal, the Mississippi Supreme Court ruled that although the trial court improperly had allowed the officer to narrate the video, defense counsel had waived reliance on the lay opinion rule by asserting a different objection. The Court also concluded

that the trial court's ruling "did not amount to plain error because it did not result in a miscarriage of justice." Id. at 646-47.

Accordingly, the Appellate Division's novel conclusion, 472 N.J. Super. at 448, that "[c]ourts in other jurisdictions . . . . have generally held that [video narration] testimony is permissible, with limitations," is flawed and unsupported by the cases on which it relies. It also constitutes a significant departure from the decisions of New Jersey Courts on the issue.

Another unsupported and unprecedented conclusion reached by the Appellate Division is that "it is sufficient, for purposes of satisfying the 'personal knowledge' prong [of Evidence Rule 701], that the police witness reviewed the surveillance video before trial." Id. at 463.

According to the Appellate Division, its conclusion was supported by excerpts from this Court's opinions in State v. Sanchez, 247 N.J. 450 (2021) and State v. Singh, 245 N.J. 1 (2021). The specific quotes from those opinions relied on by the Appellate Division were these:

> The witness need not have witnessed the crime or been present when the photograph or video recording was made in order to offer admissible testimony.
>
> [Sanchez, 247 N.J. at 469.]
>
> That Rule [N.J.R.E. 701] does not require the lay witness to offer something the jury does not possess.
>
> [Singh, 245 N.J. at 19.]

A careful review of both Sanchez and Singh clarifies whether or not those quotations are consistent with and supportive of the Appellate Division's conclusion.

In Sanchez, defendant had been indicted for felony murder, armed robbery, and other counts including weapons possession offenses. The indictment was based on a homicide that occurred in September 2017 in Pennsauken, New Jersey, when two men broke into the victim's apartment, shot and killed the victim and left the apartment carrying a small safe containing approximately $10,000.00. Sanchez, 247 N.J. at 460. The victim's girlfriend told police that the two men, one of whom she described as a stocky, 5'9" Hispanic man, drove away in a red or burgundy older model Buick. A surveillance video taken soon after the homicide and robbery showed a burgundy Buick Century with a driver and two passengers leave the parking lot of the apartment building. Ibid.

Two days later, a flyer was circulated to law enforcement agencies by the Camden County Prosecutor's Office entitled "Attempt to Locate." It stated that a "red/burgundy" Buick Century was possibly used in a homicide in Pennsauken on September 8, 2017, and included a still photograph extracted from the surveillance video. The photograph showed the faces of two male passengers,

one in the right front seat and the other in the right rear seat. The photograph did not include the driver. Ibid.

Cheryl Annese, defendant Sanchez' parole officer, saw the flyer and told a detective investigating the homicide and robbery that she had met with Sanchez more than thirty times while supervising his parole, and that Sanchez was one of the men depicted in the photograph. Id. at 461. Defendant moved to exclude her testimony as lay opinion testimony barred by N.J.R.E. 701. The trial court granted the motion, reasoning that Annese's proposed testimony was not based on her "perception" because she had not witnessed the crime nor observed defendant first-hand as a passenger in the Buick. Id. at 462.

On the State's interlocutory appeal, the Appellate Division reversed, concluding that Annese could testify because her identification of defendant was indeed based on her perception of him during her duties as his parole officer. Id. at 463.

This Court granted certification and affirmed. In an opinion by Justice Patterson the Court held that the "perception" prong of N.J.R.E. 701 was satisfied, reasoning that

> Annese became familiar with defendant's appearance by meeting with him on more than thirty occasions during his period of parole supervision. Her identification of defendant as the front-seat passenger in the surveillance photograph was 'rationally based on [her] perception,' as N.J.R.E. 701 requires.

[Id. at 469.]

State v. Singh, 245 N.J. 1, involved the robbery of a Metuchen, New Jersey gas station on January 20, 2015. The cashier, Kamlesh Shah, testified at defendant's trial that around 10:20 p.m. a man entered the cashier's area at the station, wielding a machete and wearing dark clothes and gloves. Shah complied when the intruder demanded money, and the individual fled. Id. at 5.

Officer Jean Rastegarpanah, one of the responding officers, proceeded to an apartment complex near the gas station, and observed a man wearing dark clothing who fled when he saw the officer. While searching a nearby area, Officer Rastegarpanah saw a man wearing dark clothing who was about the same size as the man who had run away. Detective Jorge Quesada, who also responded to the report of a robbery, arrived on the scene and the two officers subdued and arrested the suspect, who was taken to a hospital. Id. at 6-7.

Investigators who arrived at the scene found a machete and a plastic bag with the robbery proceeds. At the hospital, police retrieved the suspect's sweatshirt, one glove, and sneakers with a white sole and stripes. Id. at 7.

At trial, the gas station's surveillance video depicting the robbery was narrated in part by the cashier Kamlesh Shah, and in part by Detective Quesada, who a few times referred to the perpetrator shown on the video as "the defendant." During his testimony, Detective Quesada identified Exhibit S-4 at

trial as "the sneakers that the defendant was wearing at the time of his arrest," and defense counsel's objection to that testimony was overruled. Detective Quesada testified that the sneakers were "similar to the sneakers that . . . . we observed here in court today on video." Id. at 7-8.

Officer Rastegarpanah also testified and identified defendant as the person he initially had chased and whom he saw drop the machete and a plastic bag with cash. Id. at 10.

Except for being convicted of a lesser-included offense on the resisting arrest count, defendant was convicted of all charges. On appeal, among other contentions, defendant argued that the testimony of Detective Quesada was improper lay witness testimony, and also that his references to the suspect on the video as "the defendant" constituted prejudicial error. Id. at 11. The Appellate Division, without addressing the detective's testimony concerning the sneakers, concluded that although Detective Quesada should not have been permitted to narrate the film, or to refer to the suspect on the video as "the defendant," those errors did not constitute plain error. Ibid.

This Court affirmed. Although agreeing that "it was error for Detective Quesada to refer to an individual depicted in the surveillance video as "the defendant," the Court reasoned that that error was harmless given the fleeting

nature of the comment and the fact that the detective referenced defendant as "the suspect" for the majority of his testimony. Id. at 17-18.

Concerning Detective Quesada's testimony about the sneakers, defendant argued that that testimony violated the lay opinion rule because the sneakers had been admitted as an exhibit, and the Detective therefore had no advantage over the jury in determining whether the sneakers admitted as evidence were the same as the sneakers depicted on the video. This Court rejected defendant's contention:

> There is no requirement in N.J.R.E. 701 that the testifying lay witness be superior to the jury in evaluating an item. The Rule simply states, in subsection (b), that the witness's testimony must 'assist' in understanding the witness' testimony or determining a fact in 'issue.' N.J.R.E. 701. That Rule does not require the lay witness to offer something that the jury does not possess. Nor does it prohibit testimony when the evidence in question has been admitted, as it was here. Such a construction of N.J.R.E. 701 would even prohibit questions asked by defense counsel as to whether shoes a family member saw defendant leave the house in resembled the shoes in evidence. We decline to write such an additional requirement into that rule of evidence.
>
> We conclude that Detective Quesada's testimony satisfied N.J.R.E. 701 as written. First, Detective Quesada had first-hand knowledge of what the sneakers looked like, having seen them on defendant when he was assisting Officer Rastegarpanah. Therefore, his lay witness opinion as to the similarities between the sneakers from the surveillance footage and the sneakers he saw that night was rationally based on his

> perception, in accordance with the principles enunciated in [State v. Lazo, 209 N.J. 9, 22 (2012)].
>
> Second, his testimony was helpful to the jury. Having had first-hand knowledge of what the sneakers looked like, Detective Quesada permissibly testified that the sneakers on the video looked like those he witnessed defendant wearing the night he helped arrest defendant.
>
> Simply because the jury may have been able to evaluate whether the sneakers were similar to those in the video does not mean that Detective Quesada's testimony was unhelpful. Nor does it mean that Detective Quesada's testimony usurped the jury's role in comparing the sneakers. Indeed, the jury was free to discredit Detective Quesada's testimony and find that the sneakers in evidence were dissimilar to those on the surveillance video.
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> [Id. at 19-20.]

After reviewing the facts and holdings in Sanchez and Singh, it is evident that neither decision authorizes or supports the sweeping conclusion reached by the Appellate Division here. To reiterate, citing only Sanchez and Singh, the Appellate Division concluded that

> it is sufficient, for purposes of satisfying the 'personal knowledge' prong [of N.J.R.E. 701], that the police witness reviewed the surveillance video before trial. Accordingly, we assume that, in a majority of cases, this prong will likely be satisfied.
>
> [472 N.J. Super. at 463.]

In Sanchez, Cheryl Annese, defendant's parole officer, had never reviewed the surveillance video showing the Buick exiting the apartment lot.

Sanchez, 247 N.J. at 462. But she had seen the photograph showing two passengers in the Buick that was included in the "Attempt to Locate" flyer circulated by the Camden County Prosecutor's Office. Id. at 469. This Court's opinion upholding her lay opinion testimony identifying defendant as one of the men in the photograph determined that her testimony was based on her "perception" of defendant during the approximately thirty times she met with him as his parole officer. Ibid. Nothing in Sanchez remotely suggests that a police officer who simply reviews a surveillance video is thereby authorized to narrate it in conformity with N.J.R.E. 701.

Similarly, in Singh, although Detective Quesada did review the surveillance video of the gas station robbery before narrating it, this Court's opinion determined that his testimony did not violate N.J.R.E. 701 because it was based on his perception, since he actually saw defendant wearing the sneakers when he was arrested. Singh, 245 N.J. at 19-20. His review of the surveillance tape prior to testifying was not relied on by the Court in upholding his testimony.

This Court must categorically reject the Appellate Division's unfounded assertion that any police officer who reviews a surveillance video before trial may narrate it without violating N.J.R.E. 701. Nothing in this Court's decisions, or in the decisions of other courts, supports that conclusion.

Amicus contends that this Court should reject the Appellate Division's permissive application of the lay opinion Rule, and hold that Officer Vitelli's narration of the surveillance videos was not authorized by or consistent with N.J.R.E. 701. In this case, there simply was no justification for the trial court to allow Officer Vitelli to narrate the video. He had arrived at the Bank about an hour after the robbery and had no first-hand familiarity with what the video portrayed. (5T137:3 - 138:15). If the trial court believed that a narration was necessary, the teller, who had observed the robbery, could have narrated the bank video, just as the cashier in Singh had been permitted to narrate part of the video in that case. Moreover, the key points of Officer Vitelli's narration – that the suspect wore gloves when he entered the bank, that he kept his hand on the note he gave to the teller without allowing his hand to contact the counter, and that on leaving the bank he opened the door with his elbow – were not so complex or subtle that they needed to be pointed out by a narrator. The Prosecutor could have emphasized each of those facts during closing argument, and even urged the jury to review the video during its deliberations to confirm that the Prosecutor's observations were accurate.

Amicus does not contend that no one can narrate or comment about the content of a crime surveillance video unless he or she was present during the crime. As this Court held in Sanchez, it was permissible for defendant's parole

officer, who had met with defendant on numerous occasions, to identify defendant based on a still photograph extracted from a surveillance video because her identification of him, consistent with N.J.R.E. 701, clearly was based on her perception. Similarly, two cases decided by the Ninth Circuit illustrate that in certain circumstances the critical aspects of a surveillance video may be so difficult to identify that only someone who has exhaustively studied the video can explain the content and highlight for the jury its critical components.

Accordingly, in U.S. v. Begay, supra, thirty-two individuals were charged with various criminal offenses arising out of a riot that occurred in July 1989 at the Navajo Nation Administration and Finance Building in Window Rock, Arizona. 42 F.3d at 489. Supporters of the former Chairman of the Navajo Tribal Council of Delegates engaged in a violent confrontation with tribal police. Several tribal police officers were assaulted and injured, police vehicles were vandalized, the Navajo Nation Administration Building was ransacked, and two demonstrators were killed. Ibid. At trial, the trial court allowed a Navajo Police Office to narrate Exhibit 105, an enhanced portion of the videotape of the riot, for the jury. Id. at 502. The officer had prepared for his testimony by reviewing the videotape over 100 times and also had reviewed over 800 photographs taken during the uprising. Id. at 502-03. On appeal, the

officer's testimony was challenged as prejudicial, cumulative and improper expert testimony.

The Ninth Circuit upheld the trial court's ruling that permitted the narration testimony, holding that the testimony was proper lay opinion testimony under Fed. R. Evid. 701, and explaining:

> Moreover, we agree with the District Court that Calnimptewa's testimony about Exhibit 105 was likely to have been helpful to the jury in evaluating Exhibit 1. Although the jury viewed Exhibit 1 in its entirety, it is reasonable to assume that one viewing a videotape of a demonstration involving over 200 people would likely not see certain details, given the tremendous array of events all occurring simultaneously. Officer Calnimptewa spent over 100 hours viewing Exhibit 1. To have the jury do likewise would be an extremely inefficient use of the jury's and the court's time. Therefore, Calnimptewa's testimony concerning which persons were engaged in what conduct at any given moment could help the jury discern correctly and efficiently the events depicted in the videotape.
>
> [Id. at 503.]

Similarly, as noted supra, in U.S. v. Torralba-Medina, the Court upheld a trial court ruling allowing an experienced Agent of the U.S. Immigration and Custom Service to narrate surveillance videos, each of which the Agent had watched about fifty times, showing vehicles delivering to and retrieving migrants from a Tucson, Arizona company that "shuttled" migrants to safe houses where they remained until family members paid for their release. 784

F.3d at 659. The Ninth Circuit held that the Agent's lay opinion testimony had been properly admitted and was based on his extensive perception of the surveillance video that helped the jury to understand the interactions of various individuals shown on the video. Id. at 659-61.

Amicus concurs with the Office of the Public Defender's contention that the trial court's error in admitting Officer Vitelli's narration testimony requires reversal of defendant's conviction. The Court's ruling erroneously allowed Officer Vitelli to offer observations about the videos that prejudicially encouraged the jury to infer that the suspect, whom Officer Vitelli emphasized was careful not to leave fingerprints, was an experienced bank robber, a point the Prosecutor emphasized in his summation. As the Public Defender's brief points out, other than the video narration testimony the only evidence linking defendant to the bank robbery was identification testimony from an ex-girlfriend, based on surveillance footage in which the suspect's face is partially obscured.

Moreover, that the lay witness testimony in this case was offered by a police officer only increases the likelihood of prejudice. Officer Vitelli's testimony emphasizing, based on the video, that the suspect's hands did not touch the counter when he handed a note to the teller, and that he used his elbow to open the door when leaving the bank, provided the foundation for the

Prosecutor, in summation, to argue that "this bank robbery was carried out in a very polished, experienced manner. It was designed to not leave any evidence." As this Court often has acknowledged, juries are clearly susceptible to being influenced unduly by a police officer's testimony. See State v. Trinidad, 241 N.J. 425, 446 (2020) (quoting Nemo v. Clinton, 167 N.J. 573, 586 (2001) ("[J]uries 'may be inclined to accord special respect' to police testimony.")

The importance of clarifying the standard for admission of lay opinion testimony, especially concerning narration of surveillance videos, is highlighted by the number of recent cases on this Court's docket that raise this issue. Subject to the exception Amicus has noted for surveillance videos of riots or similarly complex video depictions, lay opinion video narration testimony should be based only on the lay witness's

> opinion or interpretation of an event when she has some personal knowledge of that incident' in order to provide the jury an 'accurate reproduction of the event' and describe[e] something that the jurors could not otherwise experience for themselves by drawing upon the witness's sensory and experiential observations that were made as a first hand witness to a particular event.
>
> [United States v. Fulton, 837 F.3d 281, 291 (3d Cir. 2016).]

Of critical importance is that the Court reverse the expansive and unrestricted scope of lay witness narration testimony authorized by the opinion below. The Appellate Division's opinion would authorize virtually unlimited

video narration testimony by law enforcement officers subject only to the pre-condition that the officer review the video before testifying. That unwarranted and expansive interpretation of N.J.R.E. 701 must be corrected.

Amicus ACDL-NJ is supportive, however, of the proposals made in Watson concerning additional safeguards for the admission of lay opinion video narration testimony. Those safeguards include a pre-trial Rule 104 hearing, out of the jury's presence, to verify that any proposed lay opinion narration testimony satisfies both prongs of Rule 701. Additionally, the Watson Court proposed that the Model Jury Charge Committee draft a model jury instruction to address testimony that narrates or otherwise comments on video recordings being played for a jury. 472 N.J. Super. at 405. Amicus agrees that those proposals could be salutary. Of even greater importance, however, is that this Court reject the Appellate Division's expansive holding that permits virtually unlimited video narration testimony by lay witnesses. That clarification by this Court may obviate or limit the need for implementation of the Appellate Division's proposals for a Rule 104 hearing and a Model Jury Charge.

CONCLUSION

For the reasons stated, Amicus ACDL-NJ urges this Court to reverse the Appellate Division's unwarranted expansion of N.J.R.E. 701 and clarify for the

lower courts and the bar its intended application to lay narration of surveillance videos, and to reverse defendant's conviction and remand for a new trial.

Respectfully submitted,

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