FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

SUPREME COURT OF NEW JERSEY
DOCKET NO. 087251

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification from a Judgment of the Superior Court of New Jersey, Appellate Division.
v.	:	
QUINTIN D. WATSON,	:	Sat Below:
Defendant-Petitioner.	:	Hon. Ronald Susswein, J.A.D. Hon. Richard Geiger, J.A.D. Hon. Richard Hoffman, J.A.D.

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER

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TABLE OF CONTENTS

PAGE NOS.

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY AND STATEMENT OF FACTS 4

LEGAL ARGUMENT 5

POINT I

THE APPELLATE DIVISION ERRED IN FINDING THE CONFRONTATION CLAUSE VIOLATION HARMLESS BEYOND A REASONABLE DOUBT. 6

POINT II

SGT. VITELLI'S TESTIMONY ABOUT WHAT THE SURVEILLANCE VIDEO DEPICTED WAS INADMISSIBLE LAY OPINION, AND ITS IMPROPER ADMISSION WAS HARMFUL ERROR. 16

A. This Court Should Reverse The Appellate Division Decision Regarding Admissibility, Which Guts N.J.R.E. 701's Personal-Perception Requirement And Permits A Host Of Testimony That Is Not Helpful To The Jury And Improperly Invades Its Province. 19

B. The Improper Admission of Sgt. Vitelli's Testimony About The Videos and Stills Was Harmful And Requires Reversal. 31

C. The Court Should Require Notice And A Pre-Trial Admissibility Hearing When Lay Opinion Testimony Is Proffered, And A Jury Charge Whenever Lay Opinion Testimony Is Admitted. 39

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

POINT III

IT WAS PLAIN ERROR TO PERMIT THE STATE TO ELICIT AN IN-COURT IDENTIFICATION FROM GAMBARROTTI, WHO HAD IDENTIFIED A DIFFERENT PERSON OUT OF COURT. IN THE ALTERNATIVE, THE FAILURE TO PROPERLY INSTRUCT THE JURY ON THE FIRST-TIME IN-COURT IDENTIFICATION CONSTITUTED PLAIN ERROR. 41

CONCLUSION 45

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

INDEX TO APPENDIX

PAGE NOS.

Order Granting Certification .... Dsa 1

Bank Surveillance Video (Disk).. Dsa 2

Krauszer's Surveillance Video (Disk) .... Dsa 3

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

TABLE OF AUTHORITIES

PAGE NOS.

Cases

Chapman v. California, 386 U.S. 18 (1967) 34

Neno v. Clinton, 167 N.J. 573 (2001) 24

People v. Sykes, 972 N.E.2d 1272 (Ill. App. 2012) 29

State v. Andujar, 245 N.J. 275 (2021) 23

State v. Bankston, 63 N.J. 263 (1973) 13

State v. Branch, 182 N.J. 338 (2005) 13

State v. Cabbell, 207 N.J. 311 (2013) 14, 34

State v. Derry, 250 N.J. 611 (2002) 20, 21, 24

State v. Douglas, 204 N.J. Super. 265 (App. Div. 1985) 14

State v. Frisby, 174 N.J. 583 (2002) 24

State v. Henderson, 208 N.J. 208 (2011) 35, 42

State v. Irving, 114 N.J. 427 (1989) 13

State v. Lazo, 209 N.J. 9 (2012) 20

State v. McLean, 205 N.J. 438 (2011) 21, 24

State v. Sanchez, 247 N.J. 450 (2021) 20

State v. Simms, 224 N.J. 393 (2016) 28

State v. Singh, 245 N.J. 1 (2021) 20, 23

State v. Torres, 183 N.J. 554 (2005) 24

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Cases (Cont'd)

State v. Trinidad, 241 N.J. 425 (2020) 24

State v. Tung, 460 N.J. Super. 75 (App. Div. 2019) 24

State v. Watson, 472 N.J. Super. 381 (App. Div. 2022)............. 1, 2, 3, 4, 6, 10

United States v. Archibald, 734 F.2d 938, modified on other grounds, 756 F.2d 223 (2d Cir. 1984) 35

Rules

R. 2:10-2 43

Rules of Evidence

N.J.R.E. 104 39

N.J.R.E. 403 39

N.J.R.E. 404(b)... 39

N.J.R.E. 701 .... passim

N.J.R.E. 701(b)... 21, 23

N.J.R.E. 702 .... 19, 21

Constitutional Provisions

N.J. Const. art. 1, ¶ 1 .... 14, 38, 43

N.J. Const. art. 1, ¶ 10 .... 14, 38, 43

U.S. Const. amend. V 14, 38, 43

U.S. Const. amend. VI 14, 38, 43

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Constitutional Provisions (Cont'd)

U.S. Const. amend. XIV 14, 38, 43

Other Authorities

Floris P. de Lange, et al., How Do Expectations Shape Perception?, 22 Trends in Cognitive Science 764 (2018) 22

James E. Coleman, Jr., et al., Don't I Know You? The Effect of Poor Acquaintance/Familiarity On Witness Identification, The Champion 52 (April 2012).. 41

Jonathan P. Vallano et al., Familiar Eyewitness Identifications: The Current State of Affairs, 25 Psychol. Pub. Pol'y & Law 128 (2019)........... 41

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Kristine Osentoski, Note, Out of Bounds: Why Federal Rule of Evidence 701 Lay Opinion Testimony Needs to be Restricted to Testimony Based on Personal First-Hand Perception, 2014 U. Ill. L. Rev. 1999 (2014)......... 30

National Research Council, Strengthening Forensic Science: A Path Forward (2009) 22

Raymond Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Review of General Psychology 175 (1998) 22

Saul Kassin, et al., The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions, 2 J. Applied Research in Memory and Cognition 42 (2013).. 22

Sofia Yakren, Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform, 50 Harv. C.R.-C.L. L. Rev. 359 (Summer 2015)................ 25

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Other Authorities (Cont'd)

Steve D. Charman, et al., Cognitive Bias in the Legal System: Police Officers Evaluate Ambiguous Evidence in a Belief-Consistent Manner, 6 J. Applied Research in Memory and Cognition 193 (2017) 24

PRELIMINARY STATEMENT

A man wearing a baseball hat entered a bank, walked over to the bank teller, Christian Gambarrotti, robbed him using a note, and left. The entire episode lasted less than a minute.

The State had no physical evidence connecting the defendant, Quintin Watson, to this robbery. In fact, the only forensic evidence found excluded him. The State's sole eyewitness, Gambarrotti, had given a vague description of the suspect, and had already identified someone else in an out-of-court identification procedure. There was pixelated surveillance video of the robbery, in which a significant portion of the suspect's face was obscured, and the precise positions of his hands and fingers were unclear. A still from that video was used in a law enforcement bulletin, and ultimately shown to Jennifer Hill, when she was asked whether she thought it was her ex-boyfriend, Mr. Watson. Hill was not an eyewitness to the robbery.

There was thus little evidence against Mr. Watson. There was less than a day of testimony, and the sole defense was misidentification. During this short trial, a series of fundamental errors deprived Mr. Watson of his rights to confront witnesses against him, and to due process and a fair trial.

First, as the Appellate Division recognized, Mr. Watson's Confrontation Clause rights were violated by Sgt. Frank Vitelli's testimony that he consulted

with officers from another law enforcement agency, which then prompted the Middlesex County Prosecutor's Office to file criminal charges against Mr. Watson. Not only did this testimony suggest that the non-testifying officers provided Sgt. Vitelli with significant information inculpating Mr. Watson, but it also exacerbated other testimony and prosecutorial comments suggesting to the jury that Mr. Watson had been implicated in other crimes, and that the robbery was the polished work of an experienced criminal.

Second, over repeated defense objections, Sgt. Vitelli was permitted to opine about what the suspect looked like, where he touched surfaces in the bank, and the significance of his purported actions based solely on his review of the surveillance footage. Not only did this inadmissible testimony improperly vouch for the State's theory of why Mr. Watson's fingerprints were not among those collected at the bank, but it also unfairly bolstered Gambarrotti's description and, ultimately, his problematic in-court identification.

Third, despite the serious risk of misidentification, the trial court erred in admitting Gambarrotti's in-court identification of the defendant, as it was unduly suggestive, unreliable, and far more prejudicial than probative. Particularly when Gambarrotti had selected someone other than the defendant in an out-of-court photo array, and so many other system and estimator

variables were present (such as lack of blind administration, lack of pre-identification instructions, multiple viewings, show-up, stress, duration, disguise (hat), memory decay, cross-racial, degree of attention, level of certainty, time between crime and identification), it was plain error for the court to admit his in-court identification. Further compounding this error was the court's failure to instruct the jury on the particular suggestiveness and potential unreliability of such an identification.

The Appellate Division failed to recognize that these errors, individually and cumulatively, demand reversal of Mr. Watson's conviction.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Except for the following, Mr. Watson relies upon the procedural history and statement of facts set forth in his appellate brief.

On June 6, 2022, the Appellate Division issued the published decision in this case, State v. Watson, 472 N.J. Super. 381 (App. Div. 2022). (Pa 1-166)[1] On July 6, 2022, Mr. Watson filed a petition for certification, which the Court granted in part on November 18, 2022. (Dsa 1) The State did not cross petition.

[1] Dsa: appendix to this brief
Pa: appendix to petition for certification
5T: November 13, 2018 trial transcript
6T: November 14, 2018 trial transcript

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

LEGAL ARGUMENT

Mr. Watson relies upon his appellate briefs, letter submitted to the appellate panel, and petition for certification, and adds the following.

POINT I

THE APPELLATE DIVISION ERRED IN FINDING THE CONFRONTATION CLAUSE VIOLATION HARMLESS BEYOND A REASONABLE DOUBT.

Sgt. Vitelli testified that in January 2017, he sent a TRAKS bulletin with information about the robbery and video stills to other law enforcement agencies, explaining to the jury he did so with the hope that "[a]nother law enforcement agency may see or recognize a suspect from prior dealings, [if] they've known him from — anything from a motor vehicle accident to a crime that's been committed in the past." (5T:159-2 to 106-10) Immediately thereafter, he testified that he was contacted in November 2017 by another law enforcement agency regarding Mr. Watson, and that a consultation with those officers led to the criminal charges and arrest in this case. (5T:160-11 to 18)

The Appellate Division properly held that this testimony violated the Confrontation Clause because it created the inescapable inference that officers in another police department, who did not testify, possessed information that incriminated Mr. Watson. Yet, the court deemed it harmless, characterizing it as "fleeting hearsay testimony." (Pa 3-4, 30-64).

This was wrong. Far from vague or fleeting comment, the testimony communicated that the other police department had significant evidence against Mr. Watson not only about this robbery, but perhaps related to other

crimes as well. In addition, as explained below, the Court cannot cabin its harmless-error review to only whether the precise impermissible testimony was elicited again or repeated in summation. Rather, the Court must fully consider the extent to which that "inescapable inference" was amplified or compounded by other evidence or argument – even if it may have otherwise been fleeting. The proper inquiry in assessing the harmfulness of the Confrontation Clause violation entails considering not just whether the inadmissible testimony itself was repeated. The Court must consider all the jury heard that could be reasonably understood to connect to that inescapable inference, and then determine whether it is convinced, beyond a reasonable doubt, that the inescapable inference played no role during the deliberations.

In this case, the Confrontation Clause violation was serious error demanding reversal. Mr. Watson respectfully relies on his appellate briefs and petition, except to amplify his arguments regarding harm.[2]

First, the Appellate Division was wrong to suggest that the impermissible testimony was vague, brief, or fleeting. Sgt. Vitelli directly told the jury that another police department had contacted him, and that his consultation with them lead to Mr. Watson being charged in the instant

[2] The State did not file a cross-petition from the Appellate Division's decision that the Confrontation Clause was violated.

offense. Sgt. Vitelli went from having a case with no forensic or physical evidence, or apparently any suspects, to hearing from another police department, talking to them, and then having enough information to not only suspect Mr. Watson, but to file criminal charges against him. Obviously, the incriminating evidence from the other department was significant. Also, that Mr. Watson was on the radar of another police department implied that he was suspected of criminal activity in that jurisdiction as well. That the jury was not told the exact words exchanged is of no moment, because the damaging implication was already clear.

In addition, the impermissible testimony must be understood in context, rather than only viewing it as, according to the Appellate Division, "essentially a three-word answer to the prosecutor's problematic question." (Pa 64) Even though Sgt. Vitelli told the jury specifically that he had consulted with another police department which then led him to charge Mr. Watson, the violation cannot be deemed fleeting or brief in the context of everything else the jury heard in the course of this short trial. The State's entire theme was that Mr. Watson committed this bank robbery in a very experienced, savvy, and knowledgeable way. From start to finish, the State emphasized and elicited testimony that either directly stated or strongly implied that (1) the robber was particularly knowledgeable about banks and had committed this offense in an

experienced and professional way, and (2) Watson may have been implicated in other crimes:

- In his opening, the prosecutor told the jury that only someone familiar with banks would know that a teller has both a top and a bottom drawer, both of which contain cash. (5T:23-9 to 13)

- The prosecutor also told the jury that the robber's decision to not park his car outside the bank "goes to the experience of – and how well thought out this was." (5T:26-20 to 22)

- Gambarrotti testified that he initially gave the robber just the top drawer, but the robber knew to ask for the bottom drawer as well. (5T:51-22 to 52-6)

- Jennifer Hill, who lived in the Princeton area, testified that in October 2017, she was reading a newspaper, saw an article and accompanying photograph that she believed was of her ex-boyfriend, Mr. Watson, so she called her local police department to report that information. (5T:93-4 to 22) This was 10 months after the bank robbery at issue in this case, which took place in North Brunswick.

- Hill also testified that a year later, in October 2018, a detective from the Middlesex County Prosecutor's office asked her to view a photograph, which she identified as depicting Mr. Watson. (5T:93-23 to 94-9)

- Sgt. Vitelli testified that, when he watched the surveillance video of the robbery, "Something that I picked up on is that he — the suspect was very careful in which [sic] they proceeded in and out of the bank, not attempting to leave any type of evidence behind." (5T:136-13 to 16)[3]

- Sgt. Vitelli testified that he sent a TRAKS bulletin in January 2017 with the hope that "[a]nother law enforcement agency may see or recognize a suspect from prior dealings, [if] they've known him from — anything

[3] Although the judge sustained an objection to this testimony, he did not strike or admonish the jury to disregard it. (5T:136-17 to 137-1)

from a motor vehicle accident to a crime that's been committed in the past." (5T:159-2 to 106-2, 106-5 to 10)

- Sgt. Vitelli testified that he did not get any leads, but in November 2017, he was contacted by another law enforcement agency regarding Mr. Watson, and he consulted with that law enforcement agency "after which criminal complaints were signed against Mr. Watson." (5T:160-3 to 4, 160-11 to 18)

- The prosecutor began his summation by telling the jury that "[t]his bank robbery was carried out in a very polished, experienced manner. It was designed not to leave any evidence." (6T:37-4 to 6)

- Over defense objection, the prosecutor then told the jury that Mr. Watson told Gambarrotti that he wanted both drawers, showing that he knew about the two drawers and had "a familiarity with how banks work." (6T:39-2 to 40-12)

- The prosecutor reminded the jury, "I said to you at the beginning this was a very polished robbery" and that "steps were taken here to avoid any leaving any evidence." (6T:49-13 to 23)

- He repeated this theme, telling the jury that "the police tried, they did their best, and it's just the evidence wasn't there because this defendant was savvy enough not to leave the evidence behind." (6T:50-18 to 21)

- The prosecutor highlighted the TRAKS bulletin in summation, telling the jury that law enforcement officers view them regularly to see if they can assist each other. He then reminded them that the bulletin led to "charges . . . [being] assigned to Mr. Watson for this robbery." (6T:51-14 to 21)

- And finally, one last time, the prosecutor summed up his theory: "Mr. Watson came into the bank that day with a purpose, quickly, quietly, executed that flawlessly, left no DNA, no fingerprints behind." (6T:53-5 to 7)

The theme of the State's case is readily apparent: that Mr. Watson was an experienced bank robber, and he robbed the bank in this case. The State's theme, reinforced throughout the testimony and in summation, dovetailed with Sgt. Vitelli's inadmissible testimony, further compounding its prejudice.

Hill's testimony about the newspaper article and her reaction to it also reinforced the damaging implication of Sgt. Vitelli's testimony. Even though she did not testify about the substance of the article, the only reasonable interference is that it was about a different unsolved crime. Hill told the jury that she was reading a newspaper in Princeton, almost a year after this bank robbery, and that the article and photo she believed was of Mr. Watson prompted her to call the police. People generally don't call the police to state they recognize someone in a newspaper unless they are providing information about an unsolved crime. And local newspapers generally don't have articles about 10-month-old robberies in another jurisdiction. Simply based on common sense, jury could not have reasonably thought that Hill was reading about this crime. Furthermore, that Hill had called her local police department, which was presumably in Mercer County, and then was contacted by the Middlesex County Prosecutor's Office a full year later, also strongly suggested that Mr. Watson was suspected of involvement in multiple other crimes. Then, when Sgt. Vitelli told the jury he had received incriminating evidence about

Mr. Watson from another law enforcement agency, the jury could have drawn no other conclusion about the subject of the newspaper article that Hill had seen.

The Appellate Division's reasoning that no such inference could be drawn because Hill testified before Sgt. Vitelli (Pa 58-59) presumes that the jury considered each witness's testimony in a vacuum and defies common sense, particularly given the lingering questions left by Hill's account of reading the newspaper and calling the police. When Sgt. Vitelli then explained that another police department had incriminating information about Mr. Watson, it provided the answer to the questions about which the jury probably had been wondering, and perhaps speculating, since Hill's testimony: what could that October 2017 Princeton-area article prompting her report to police have been about? And why would it have been a year later that the Middlesex County Prosecutor's Office contacted to try to make an identification? The order of testimony does not lessen the harm; if anything, that Sgt. Vitell's testimony resolved these pre-existing questions makes it even more harmful than if the order had been reversed.

Furthermore, the Court should reject the Appellate Division's crabbed reasoning that because the prosecutor did not repeat the exact phrasing of Vitelli's inadmissible testimony or add information outside the record, his

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

comments did not compound the harm. (Pa 59-60) As illustrated in the preceding pages, the State's opening, questioning of witnesses, and closing repeated the drumbeat that Mr. Watson was an experienced, knowledgeable, savvy criminal who had robbed this bank. While the prosecutor was entitled to argue that the robbery appeared to be executed in a manner that did not leave behind much evidence, he went far beyond that, casting the robber as someone knowledgeable about banks and experienced in committing crimes.

Even if the comments in summation did not rise to misconduct, that is not the standard that the Court should apply in determining whether the prosecutor's comments, along with the testimony at trial, rendered the Confrontation-Clause violation even more harmful. By reviewing each comment in isolation, rather than considering how the jury was reasonably likely to understand the case as a whole based on all that it heard, the Appellate Division missed the mark. The other testimony and comments discussed above may not themselves have been inadmissible, but they all reinforced the inescapable inference at the heart of Sgt. Vitelli's inadmissible statement: they individually and cumulatively unmistakably implied that there was additional information not before the jury that implicated Mr. Watson in this offense, as well as other related ones.

The Confrontation Clause violation was not harmless beyond a reasonable doubt. See State v. Bankston, 63 N.J. 263 (1973). In State v. Branch, 182 N.J. 338, 347-48, 352-54 (2005), this court found **plain error** when an officer testified that he identified the defendant as a suspect and put his photo in an array "based on information received," even though there were two eyewitnesses who identified the defendant in and out of court.[4] Here, Sgt. Vitelli's testimony much more clearly indicated that non-testifying police officers had provided him with information that not only led him to believe Mr. Watson was a suspect, but provided him with sufficient evidence to file criminal complaints against him. And, unlike in Branch, this was the undercurrent to the State's theory of the case, which was echoed through the entire short trial. Especially here, where there was no forensic or any other physical evidence connecting Mr. Watson to the robbery, and where the sole eyewitness identified a different person, the Confrontation-Clause violation

[4] The Appellate Division cited other cases that are similarly inapt because they had much stronger proofs and were also being reviewed under a plain error standard. See, e.g., State v. Irving, 114 N.J. 427, 447-48 (1989) (no plain error in case where detective testified he received some information that he followed up on, and then put defendant's photo in array, when two eyewitness identified defendant both in and out of court, and defendant's work absences were consistent with robbery timing); State v. Douglas, 204 N.J. Super. 265, 273-74 (App. Div. 1985) (no plain error where eyewitness identified defendant both in and out of court, defendant was in possession of weapon used in offense, and defense counsel elicited testimony at issue and did not request it be stricken).

was not harmless beyond a reasonable doubt. Thus, reversal of Mr. Watson's conviction is required. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, ¶¶ 1 and 10; see State v. Cabbell, 207 N.J. 311, 338 (2013) (noting that constitutional error should be considered "a fatal error mandating a new trial," unless it is harmless beyond a reasonable doubt) (citation omitted).

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

POINT II

SGT. VITELLI'S TESTIMONY ABOUT WHAT THE SURVEILLANCE VIDEO DEPICTED WAS INADMISSIBLE LAY OPINION, AND ITS IMPROPER ADMISSION WAS HARMFUL ERROR.

The State played a brief video[5] of the robber entering the bank, completing the robbery, and leaving. There was no dispute that a robbery occurred, or that the footage was from the bank's surveillance cameras during the time immediately before, during, and after the robbery.

The case was entirely about the identification of the suspect on the video so, of course, the jury was asked to look at this silent, pixelated video and determine whether the person whose face was partially obscured was Mr. Watson. But here, the single eyewitness, Gambarrotti, had selected someone else in a photo array, and the State had zero physical evidence, or even circumstantial evidence, connecting Mr. Watson to the robbery. In fact, the only physical evidence pointed elsewhere: out of seven useable fingerprints from the areas the robber had been in the bank, not a single one was linked to Mr. Watson.

Gambarrotti testified at trial. Yet, the State opted not to play the surveillance video during his testimony, although he was the victim who had

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[5] The video consists of six clips totaling just over three minutes. (See Dsa 2)

seen and interacted with the robber. Gambarrotti had the opportunity to observe what the suspect looked like, what he said, and what he did during the robbery itself. As such, Gambarrotti could have potentially pointed out moments in the surveillance video that illustrated his testimony, or even provided an opinion about things depicted in the video that he personally witnessed.

Instead, the State waited to play the video until the testimony of a law enforcement officer, Sgt. Vitelli. The State had Sgt. Vitelli provide a lay opinion on what he thought was happening in the video and what he thought the suspect looked like – despite the fact that Vitelli had not witnessed the robbery, observed the suspect, or even met Quinton Watson.

Sgt. Vitelli was also permitted, over defense objection, to give a description of the suspect based on the video surveillance and stills from it. (5T:144-11 to 16, 149-19 to 150-5) Even worse, Sgt. Vitelli testified that Gambarrotti had given him a description of the suspect, and then that, based on his review of the video surveillance, he could tell that the suspect was a dark-skinned, well-built man who was taller than 5’10 – corroborating Gambarrotti’s description. (5T:149-5 to 150-5) He also testified regarding a video taken from a convenience store 50-75 yards away, opining that it showed a person walking toward the bank before the robbery, and then the same person

jogging or running in the opposite direction from the bank, retracing their steps, two minutes later. (5T:131-8 to 19, 153-23 to 154-24, 155-20 to 157-8; Dsa 3 (Time Stamp 11:48:05-11:50-56 (files 20170114_114000 and 20170114_115000))[6]

Sgt. Vitelli's lay opinion testimony on the surveillance videos was not admissible under N.J.R.E. 701 because it was based exclusively on his review of the video itself and did not assist the jury, but instead, usurped the jury's function. Because the Appellate Division's interpretation of the evidence rules is contrary to this Court's long-standing jurisprudence, guts the personal-perception requirement, and unfairly advantages the State, it should be rejected. The admission of Sgt. Vitelli's inadmissible lay opinion testimony regarding what the most important piece of evidence meant unfairly bolstered the State's witnesses, vouched for its theory of the case, and was harmful error. That the jury was given no guidance about how to assess this testimony only compounded its harmful effect, and reversal is required.

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[6] Based on the transcripts and review of the Krauszer's surveillance video files, undersigned counsel believes that this timeframe is the clip shown to the jury during Sgt. Vitelli's testimony.

A. This Court Should Reverse The Appellate Division Decision Regarding Admissibility, Which Guts N.J.R.E. 701's Personal-Perception Requirement And Permits A Host Of Testimony That Is Not Helpful To The Jury And Improperly Invades Its Province.

There is no question that Sgt. Vitelli was not present for the robbery, nor did he have any prior experience with Mr. Watson. His testimony about what he thought the video and stills depicted of the robbery and the suspect, based solely on watching the video, was inadmissible lay opinion under N.J.R.E. 701 for the reasons expressed in Mr. Watson's appellate briefs and his petition, and as expanded upon here.

The Appellate Division incorrectly concluded that a police officer may provide a lay opinion based exclusively on viewing a video, even if he had not personally witnessed the events depicted or even had prior first-hand experience with the purported subject of the video, so long as he has watched the video, is applying his training and experience or making deductions or inferences from other evidence, or just providing "neutral" or "objective" information. As explained below, the Appellate Division misconstrued N.J.R.E. 701 and this Court's prior lay opinion cases, which have always (1) required first-hand, in-person perception; (2) distinguished opinion based on specialized knowledge or expertise which is governed by N.J.R.E. 702; and (3) required that the opinion assist the jury and not usurp its function. Moreover, the new admissibility standard proposed by the Appellate Division permits the

prosecutorial authority to bolster its fact witnesses and vouch for the State's theory of the case, by virtue of the special status law enforcement witnesses enjoy as opposed to a civilian witness or members of the defense team. This is especially true in a case like this, where Sgt. Vitelli was introduced to the jury with his experience in investigation and crime scene processing, making it even more likely the jury would defer. In addition, the Appellate Division's proposed rule unfairly favors the State. The State is always the first party to speak to the jury in opening, and the first to present witnesses, so confirmation bias will always redound to its benefit.

As discussed at length in Mr. Watson's prior submissions, while this Court has permitted lay opinion from a witness who did not observe the crime itself, it has never permitted a lay witness to opine about what a video or photograph depicts **unless** the witness's opinion was grounded in their real-life observations of the subject of their opinion. See, e.g., State v. Lazo, 209 N.J. 9, 24 (2012); State v. Singh, 245 N.J. 1, 17-20 (2021); State v. Sanchez, 247 N.J. 450, 469 (2021). For example, the lay witness in Sanchez **had personally seen the defendant more than 30 times in real life** and was basing her opinion that he was depicted in the photograph on having seen him in real life and comparing that first-hand personal perception to the photograph. And the detective in Singh was permitted to opine that the sneakers worn by the robber

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

in the surveillance video were similar to those **he had personally seen on the defendant when he arrested the defendant on the evening of the robbery**. Thus, Sanchez and Singh both require the lay witness to have the unique insight of a person who had observed the person, item, or event depicted in the video or photograph, and that the witness' specific opinion be founded (i.e., rationally based) on his personal perception of the person, item, or event. See also State v. Derry, 250 N.J. 611, 635-36 (2002) (case agent's testimony about what certain words meant in phone calls and text messages between defendants, based on having listened to thousands of prior conversations, inadmissible under N.J.R.E. 701).

The Court should reject the proposition that the personal-perception requirement can be satisfied by something less than first-hand, in-person experience upon which the particular opinion is based. For example, viewing a video multiple times (Pa 91-92) does not imbue the viewer with any first-hand sensorial perception of what was recorded; the witness's knowledge would still only come from the video itself rather than real-life observation. To the extent a police officer applies their training and experience to make inferences and deductions (Pa 98), that is an expert opinion that requires the procedural protections of N.J.R.E. 702, as recently reaffirmed in Derry, 250 N.J. at 632-

36. State v. McLean, 205 N.J. 438, 461 (2011) (rejecting hybrid, quasi-expert opinion by police lay witness).

The Court should also decline to adopt the Appellate Division's framework for N.J.R.E 701(b) concerning whether the testimony assists the jury. In addition to the reasons explained in Mr. Watson's prior submissions, first-hand knowledge is a critical component of 701 because it is the witness's first-hand knowledge that makes the testimony helpful to the jury, especially when considered alongside the risk of cognitive bias. Here, the video was short, straightforward, and uncomplicated, but it was far from clear, and thus susceptible to multiple interpretations.[7] When presented with ambiguous visual stimuli, people see what they expect to see, even though they are consciously aware that they are being influenced by this expectation; this is confirmation bias. See, e.g., Floris P. de Lange, et al., How Do Expectations Shape Perception?, 22 Trends in Cognitive Science 764 (2018) (explaining how expectation can affect what is perceived, particularly "[w]hen sensory input is weak, noisy, or ambiguous"); Raymond Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Review of General Psychology 175, 176 (1998) (explaining that "people can and do engage in case-building

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[7] If the video is clear, just like an opinion on contested but straightforward facts or on the defendant's guilt, an opinion on its contents is unhelpful because it merely unfairly bolsters the State's case.

unwittingly, without intending to treat evidence in a biased way or even being aware of doing so"); Saul Kassin, et al., The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions, 2 J. Applied Research in Memory and Cognition 42, 44 (2013) (explaining "wealth of [scientific] evidence" that indicates that an observer's expectations can impact visual and auditory perception); National Research Council, Strengthening Forensic Science: A Path Forward, at 122-24 (2009) (explaining cognitive bias). And of course, this Court has recognized the role that implicit biases, or "attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner," can play. State v. Andujar, 245 N.J. 275, 302-03 (2021) (quotation marks and citations omitted),

Naturally, although an eyewitness is also subject to all forms of cognitive bias, the eyewitness's testimony is nonetheless helpful, and therefore admissible, because they can provide a unique perspective that would be impossible for the jury to replicate. The jury can never see what happened in real life, but the eyewitness did. Thus, the eyewitness's lay opinion about a video or photograph that draws on the witness's real-life perceptions can assist the jury. See Singh, 245 N.J. at 19-20 (noting that detective's opinion "that the sneakers on the video looked like those he witnessed defendant wearing the night he helped arrest defendant" was helpful to jury). In contrast, an opinion

from a witness who only watched the video runs the risk of being unreliable due to cognitive bias, without any countervailing benefit to the jury's assessment of the evidence. Thus, a lay witness's opinion about what a video shows that is not based on any real-life perception cannot assist the jury and therefore is inadmissible. N.J.R.E. 701(b).

In the context of a criminal investigation, the effects of cognitive biases may be even more profound with law enforcement witnesses, especially given all the officers may already know about the investigation and/or the defendant. First, in terms of the officer's own bias, investigators who believe that a suspect is guilty based on their knowledge of the evidence tend to "interpret subsequent ambiguous evidence as being particularly incriminating, further bolstering their belief in the suspect's guilt, further biasing the evaluation of additional evidence." Steve D. Charman, et al., Cognitive Bias in the Legal System: Police Officers Evaluate Ambiguous Evidence in a Belief-Consistent Manner, 6 J. Applied Research in Memory and Cognition 193, 193-94, 198-99 (2017). And second, there is a significant danger that the jury will be more likely to defer to a police officer's opinion. See, e.g., Derry, 250 N.J. at 633-34 (citing State v. Torres, 183 N.J. 554, 580 (2005); State v. Trinidad, 241 N.J. 425, 446 (2020) (quoting Neno v. Clinton, 167 N.J. 573, 586 (2001) ("[J]uries 'may be inclined to accord special respect to' police testimony.")); State v.

Tung, 460 N.J. Super. 75, 102 (App. Div. 2019) (quoting State v. Frisby, 174 N.J. 583, 595 (2002) ("'[T]he effect of the police testimony essentially vouching for' the version of events contrary to defendant 'cannot be overstated.'")). This risk is magnified when it is an investigating officer offering his opinion, and compounded by any introductory testimony the prosecutor elicits regarding the officer's years of training and experience. See McLean, 205 N.J. at 454.

The preferential treatment of law-enforcement testimony is a serious problem with the Appellate Division's proposed changes to our lay-opinion jurisprudence. But, it's just one of the ways it produces lopsided results. Permitting such testimony also unfairly, and unjustly, benefits the State because the prosecution will always receive the undue advantage of confirmation bias, as the first party to speak to the jury in opening, and the first to present witnesses. Social science research suggests that once an individual's expectation has been primed, they are more likely to subsequently interpret ambiguous evidence differently due to that priming. In other words, once a jury hears an opinion of what a video depicts, it becomes more difficult to interpret the video differently, even after repeat viewings. See, e.g., Sofia Yakren, Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform, 50 Harv. C.R.-C.L. L.

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

Rev. 359, 382 (Summer 2015) ("Once expectations, among other factors, have led us to conclude we perceived one thing rather than another, it becomes more difficult to perceive details that contradict the original perception."). Thus, if the defense subsequently offers another interpretation of the video, or even its own opinion witness, the jury's perception of the video will have already been shaped by the State's testimony.

In this case, particularly with video that is not clear, there was a substantial risk that the jury's perception of the video was unduly influenced by Sgt. Vitelli's opinion of what and who the video depicted. Once he told the jury that the video showed the suspect avoiding, and in many cases, not making contact with touch points, the jury would be more likely to expect to see that on video, and to interpret the video in the same way. So too with Sgt. Vitelli's opinions regarding the appearance of the suspect and whether it matched Gambarrotti's description. And once the jury had watched the video with Sgt. Vitelli's gloss, they were less likely to be able to see anything different on subsequent viewings. Thus, Sgt. Vitelli's testimony about the videos and stills were inadmissible lay opinion, and the Court should decline to adopt the radical alterations to N.J.R.E. 701 proposed by the Appellate Division.

However, to the extent that the Court believes that there are some limited circumstances where an officer should be allowed to offer testimony about a video or photograph that is not based on his personal, first-hand observation of what is depicted therein, the testimony should be sharply limited only comments that are a neutral and objective description undisputed by the defense.

Although the Appellate Division framed its analysis as six overlapping "factors" for courts to consider (Pa 95-100), this portion of the opinion departs from prior jurisprudence, conflates testimony that should always come from a fact witness, and sanctions a host of testimony that improperly invades the province of the jury. First, portions of the factors, most notably one and two, address purely fact testimony that should always come in through a fact witness. For example, when a video is introduced in evidence, information about the location and angles of cameras, the circumstances under which the video was retrieved, when a recording was made, and the accuracy of any date/timestamps can certainly assist the jury in understanding a witness's testimony about the video or determining a fact at issue. However, the person who retrieved the video and observed the camera angles himself is the proper fact witness for such testimony and, in most cases, this will be the same person who authenticated the video. Similarly, if a video has been edited, spliced,

composited or otherwise modified, this should be explained to the jury by the person who made the alterations of the original, so that they can be subject to cross-examination on what they did, and the impact that may have had on the video quality.

In terms of testimony on content of the video (i.e., lay opinion on what is depicted in the video), the appellate panel attempted to distinguish so-called "purely neutral and objective description"/sportscaster testimony from "subjective analysis"/"color commentary." First, it is readily apparent that an officer's "subjective analysis," including any significance the officer ascribes to certain actions they believe are depicted, should be inadmissible, as in this case, where Sgt. Vitelli opined that the suspect was trying to avoid leaving fingerprints. So too, any testimony that "serves to piece together facts from different sources in the trial record," (Pa 98) through a police officer's opinion on what a video depicts, is essentially a mid-trial summation that invades the province of the jury, unfairly bolsters the State's case, and is fundamentally unfair to the defendant. See State v. Simms, 224 N.J. 393, 409 (2016). To the extent that the State wants to piece together evidence in the record, and ask the jury to make inferences, it already has the advantage of both being the first to speak to the jury, and the last, in its opening and closing arguments.

Furthermore, what makes testimony "neutral, purely descriptive" and "objective" is almost entirely based on whether it is undisputed in a given case. Take the example provided by the Appellate Division: "that is the green car appearing on the left side of the screen and travelling left to right." (Pa 96) In Case A, the only dispute is about whether the car in the video was being driven recklessly. In Case B, the police arrested the defendant based on an anonymous tip that a green car was driven recklessly; the defendant admits he was arrested in a green car but denies that it was the same green car that was the subject of the tip. In Case C, there is no dispute that the car on the video was involved in a hit and run, but whether the car was green or blue was essential to determining whether it was the defendant's car. In Case A, the description of the green car as traveling left to right may help orient the jury so they can keep their eye on that particular car, but does not invade their role as fact-finders. In Case B, that a green car was traveling left to right in that location is "neutral," but the testimony that it was "the green car" could invade the province of the jury depending on whether, in context, it is the officer's opinion that this particular green car is the green car from the tip. And in Case C, an opinion about the color of the car bears directly on the key finding the jury must make. In each case, whether any part of that narration or description

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

invades the province of the jury by opining on the ultimate issue or improperly bolsters an eyewitness's testimony depends on the particulars.

Here, the identity and appearance of the suspect was in dispute, as was whether the suspect made contact with the surfaces that the police dusted for fingerprints. Thus, none of Sgt. Vitelli's testimony on these topics assisted the jury because it improperly bolstered eyewitness Gambarrotti's testimony and was an opinion on guilt, invading the province of the jury. Moreover, this was a straightforward, uncomplicated, short video. The jury did not need anyone to orient them to the video or draw their attention to a particular person. See, e.g., People v. Sykes, 972 N.E.2d 1272, 1274, 1281 (Ill. App. 2012) (concluding that trial court improperly allowed loss prevention officer to narrate because video was "only approximately three minutes in duration and defendant is the only person portrayed," and finding that proffered opinion testimony invaded province of jury because "[t]he only issue the jury needed to determine was whether defendant removed money from the cash register" and officer "was in no better position" to answer that question than jury).

Of course, if any "narration" or "description" could have truly assisted the jury, the State could have called upon Gambarrotti to provide such testimony when he was on the stand. After all, he was the eyewitness-victim

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

and testified about his experience and observations.[8] Yet, as is so often the case, the State did not even show him the video, and instead relied on the opinion testimony of a law enforcement witness to bolster its other witnesses' testimony, benefit from the enhanced credibility law enforcement enjoy, and vouch for the State's theory of the case. This Court should reverse the Appellate Division and hold that Sgt. Vitelli's testimony regarding what the videos and stills depicted was inadmissible.

B. The Improper Admission of Sgt. Vitelli's Testimony About The Videos and Stills Was Harmful And Requires Reversal.

Sgt. Vitelli told the jury that the bank surveillance video depicted the robbery suspect: wearing gloves as he entered the bank; keeping, his fingers on the note instead of the countertop once he removed his glove(s); being careful

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[8] Notably, cross-examination could have effectively probed the reliability of Gambarrotti's opinion about what was depicted, by asking him questions about how far he was from the suspect or whether he was focused on the suspect's face, hands, or the money drawers he was emptying in the brief, stressful encounter. Cross-examination of Vitelli could only point to the fact he was not present. Further questioning of the basis of his opinion would likely have elicited testimony about how many times he watched the video or the conditions under which he did so, or other information he knew from the investigation, exacerbating the problems inherent in "police narration" cases, and would not have been able to effectively probe cognitive bias. See, e.g., Kristine Osentoski, Note, Out of Bounds: Why Federal Rule of Evidence 701 Lay Opinion Testimony Needs to be Restricted to Testimony Based on Personal First-Hand Perception, 2014 U. Ill. L. Rev. 1999, 2029 (2014); Kim Channick, Note, You Must be this Qualified to Offer an Opinion: Permitting Law Enforcement Officers to Testify as Laypersons under Federal Rule of Evidence 701, 81 Fordham L. Rev. 3439, 3477 (2013).

to avoid leaving evidence behind; appearing to use his elbow to open the door; and then running away upon leaving. (5T:133-21 to 140-23) He then opined on the contents of the stills, again concluding that the suspect's hand touched the note but not the countertop, with the paper acting as "a barrier between his fingertips and the surface," and reiterating that the suspect was wearing gloves at some portions. (5T:143-4 to 144-4) Sgt. Vitelli also testified that "Something I picked up on is that he – the suspect was very careful in which they proceeded in and out of the bank, not attempting to leave any type of evidence behind." (5T:136-13 to 16)[9]

Sgt. Vitelli also provided his opinion that an individual seen on surveillance from a Krauszer's store 50-75 yards away walked in the direction of the bank before the robbery, disappeared from the view of the screen, and then jogged, ran, or walked at an expedited pace in the opposite direction from the bank, immediately after the robbery. Sgt. Vitelli provided this opinion despite the store's time stamp having "been off by a couple of minutes in terms of — in regards to actual time and the time documented on the video," and not remembering whether he compared the time-stamps of the two videos.

[9] Although the judge ultimately sustained defense objection to this testimony on the basis that he had not "explained the underlying facts as to what informed that opinion," the judge did not strike it from the record or instruct the jury they could not consider it. (5T:136-17 to 137-1)

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

(5T:151-16 to 152-4; Dsa 3 (Time Stamp 11:48:05-11:50-56 (files 20170114_114000 and 20170114_115000))

The lay opinion testimony about the suspect's contact with various physical surfaces improperly bolstered the State's explanation for why Mr. Watson's fingerprints were not among those present at the scene. It asked the jury to disregard one of the critical weaknesses in the case — that the only physical evidence from the robbery scene pointed to perpetrators other than Mr. Watson. The prosecutor also used it, along with Sgt. Vitelli's testimony that the suspect was careful to avoid leaving fingerprints, to present his central thesis that "this bank robbery was carried out in a very polished, experienced manner. It was designed to not leave any evidence." He repeatedly referred to the robbery as "very polished;" he argued that Mr. Watson was the robber, and that he was "very savvy," "familiar" with how banks work because he knew to ask for both of the teller's drawers and did not park in the lot, but instead, came and left on foot. The prosecutor also emphasized how experienced Sgt. Vitelli was. (6T:37-4 to 6, 39-2 to 40-12, 47-19 to 22, 49-13 to 25, 51-1 to 9) This improper argument, supported by the inadmissible lay opinion testimony, also harkened back to the Confrontation Clause violation discussed in Point I.

Even if the improper lay opinion testimony was limited to Sgt. Vitelli's opinion about the suspect's conduct on the video, reversal would be required.

In this case, however, Sgt. Vitelli did far more. He additionally opined, based on the content on the surveillance video and stills, that the suspect was wearing a black sweatshirt, a hat, and jeans. (5T:144-11 to 16) The prosecutor then immediately asked Sgt. Vitelli about whether Gambarrotti had given him a description of the suspect, which he had, and whether the video was consistent with Gambarrotti's testimony. (5T:144-19 to 145-1) Although the judge ultimately sustained the defense objection to the question outside of the jury's presence, this question – and the affirmative response it implied – was the last thing the jury heard before its recess for lunch, and the judge never told the jury the objection was sustained or the question improper. (5T:145-2 to 148-25) In fact, after the lunch recess, the prosecutor repeated almost the same sequence of questions, reiterating Sgt. Vitelli's testimony that Gambarrotti had given him a description of the suspect, and then that, based on his review of the video surveillance, he could tell that the suspect was a dark-skinned, taller than 5'10, and well-built man. (5T:149-5 to 150-5)

This testimony improperly bolstered Gambarrotti's description of the suspect, and his hedging in-court identification. As this Court held in Lazo, "neither a police officer nor another witness may improperly bolster or vouch for an eyewitness' credibility and thus invade the jury's province." 209 N.J. at 24. Here, though he did not identify the suspect in the video as Mr. Watson,

Sgt. Vitelli opined as to what he believed the perpetrator looked like based on his review of surveillance footage that was available to the jury, and strongly implied that Mr. Watson matched the description that he and the eyewitness shared. Not only did this testimony repeatedly violate N.J.R.E. 701, but it was highly prejudicial.

The violation of a defendant's constitutional rights, such as the right to due process and a fair trial, is a "fatal error" unless a court is "'able to declare a belief that it was harmless beyond a reasonable doubt.'" Cabbell, 207 N.J. at 338 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Here, the prejudicial impact of Sgt. Vitelli's inadmissible opinion testimony was staggering, particularly in light of the weakness of the State's case.

This was a second-degree robbery case with less than a day's worth of testimony. The State offered no physical evidence connecting Mr. Watson to the robbery, and in fact, none of the seven prints found at the scene by police matched Mr. Watson. The sole eyewitness, Gambarrotti, gave a vague description of the suspect, and identified a different person out of court. And even when he saw Mr. Watson at trial, sitting at counsel table, obviously the person on trial for robbing him, he could only offer that he was 80% sure that the defendant was the culprit. See, e.g., United States v. Archibald, 734 F.2d 938, 941, modified on other grounds, 756 F.2d 223 (2d Cir. 1984) ("[A]ny

witness, especially one who has watched trials on television, can determine which of the individuals in the courtroom is the defendant, which is the defense lawyer, and which is the prosecutor.").

On the pixelated video of the robbery, the suspect's face is partially obscured by his hat, a factor known to reduce accuracy of identifications. See State v. Henderson, 208 N.J. 208, 266 (2011). While the defendant's ex-girlfriend testified that she believed the person in a still of that video was Mr. Watson, she was neither at the bank that day, nor did she ever even see the video itself. Ultimately, in this weak case, who the jury believed was depicted in that video, and what that person did or didn't do, was central to the trial.

As explained above, once the jury had watched the video with Sgt. Vitelli opining about the appearance of the suspect, whether it matched Gambarrotti's description, and about how the suspect was avoiding or not making contact with touch points, the jurors were much less likely to be able to see anything different upon watching the video themselves. This prejudice was exacerbated by the face that, of course, Sgt. Vitelli was introduced to the jury with testimony detailing his decade of experience as a patrol officer, followed by experience as a detective with additional special training in crime scene investigation who had collected fingerprints in over 50 cases. (5T:106-4 to 109-6) The jury also heard about the investigatory steps he undertook prior

to him providing his opinions on the video and stills. This testimony strongly implied that Sgt. Vitelli was better and more experienced that the jury at evaluating and interpreting evidence, especially in this particular case.

Moreover, the jury was not given any limiting instruction regarding the lay opinion testimony. For example, the jury was never told that: it was free to reject Sgt. Vitelli's testimony about the video and stills; it was for them to decide any factual disputes as to the content of the video or stills; it was for them to decide the significance or import of anything shown on the video; they were not bound by Sgt. Vitelli's opinion and should only give it the weight it deserves, whether that be great, slight, or none at all; and that they alone must determine the ultimate issues. (See Pa 106-07). Instead, as part of the general model final charge, the jury was told that Sgt. Vitelli's opinion, as testimony at trial, was evidence they could consider. (6T:63-17 to 19, 65-6 to 9) And the witness credibility instruction they received also suggested that Sgt. Vitelli, as an experienced police sergeant, might have a better "means of obtaining knowledge of the facts" or ability to "observe [and] recollect" evidence. (6T:68-10 to 12) That charge further told the jury that it should consider, in assessing the credibility of witnesses, the extent to which the witnesses corroborate or support each other. (6T:68-13 to 16) In other words, the jury

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

was instructed that it could consider the extent to which Sgt. Vitelli's opinion corroborated or supported (in other words, bolstered) Gambarrotti's.

Under these circumstances, there was a significant risk that the jury deferred, or at least was strongly influenced, by Sgt. Vitelli's pseudo-expertise. That the jury asked to watch the video again before rendering its verdict more than 40 minutes afterwards (6T:101-13 to 102-2) only establishes that they believed the video was important, not that their ability to rewatch the video negated any harm from Sgt. Vitelli's improper testimony. The State used this inadmissible opinion testimony from an experienced police sergeant to put a thumb on the scale in a case that was far from overwhelming, and ultimately based on the video and stills, and what the witnesses thought these images depicted. Sgt. Vitelli gave an opinion, based on apparent professional expertise, on what the most important evidence meant, unfairly bolstering the State's witnesses and vouching for its theory of the case. The prosecutor then relied heavily on the testimony at closing. Finally, the jury was not given appropriate guidance on how to assess Sgt. Vitelli's opinion testimony, nor were they admonished that factual determinations related to Sgt. Vitelli's testimony were theirs alone to make.

Thus, for the reasons expressed here and in Mr. Watson's prior submissions, Sgt. Vitelli's inappropriate opinion testimony went to the heart of

the State's case, violating Mr. Watson's constitutional rights to due process and a fair trial. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, ¶¶ 1 and 10. This error cannot be characterized as harmless, requiring reversal of his convictions, and remand for retrial.

C. The Court Should Require Notice And A Pre-Trial Admissibility Hearing When Lay Opinion Testimony Is Proffered, And A Jury Charge Whenever Lay Opinion Testimony Is Admitted.

One need only look to this Court's current docket to see both the ubiquity of lay opinion testimony in the form of video "narration" (i.e., lay opinion testimony), and the necessity for pretrial procedures to ensure that only those comments that meet the requirements of N.J.R.E. 701 are admitted. Mr. Watson agrees with the Appellate Division that procedural safeguards are needed to ensure that impermissible opinion testimony does not come before the jury. The prosecutor should move to introduce opinion testimony regarding video evidence, and establish how and why specific comments (a) are rationally based on the witness's personal perception, (b) how and why each of those comments would assist the jury, and (c) why they are not inadmissible under other evidence rules such as N.J.R.E. 403 or 404(b).

The court should then address the matter at a N.J.R.E. 104 hearing. This would put the court, and defense counsel, on notice of what the prosecutor intends to elicit from the witness, and allow the court to make a determination

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

regarding which proposed comments are admissible, if any, prior to trial; allow for the witness to be properly instructed on the boundaries of his testimony; and reduce or eliminate the need for defense counsel to place multiple objections on the record only after the jury has heard the objectionable comments. Mr. Watson also agrees with the Appellate Division that if video narration/opinion testimony is admitted, jury instructions should be provided to help lessen the risk that the jury will defer to the lay witness's opinion over their own assessment of the video evidence. Had these safeguards been in place in Mr. Watson's case, the outcome likely would have been different.

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

POINT III

IT WAS PLAIN ERROR TO PERMIT THE STATE TO ELICIT AN IN-COURT IDENTIFICATION FROM GAMBARROTTI, WHO HAD IDENTIFIED A DIFFERENT PERSON OUT OF COURT. IN THE ALTERNATIVE, THE FAILURE TO PROPERLY INSTRUCT THE JURY ON THE FIRST-TIME IN-COURT IDENTIFICATION CONSTITUTED PLAIN ERROR.

Mr. Watson respectfully relies on his appellate briefs, supplemental letter, and petition, except to amplify his arguments regarding harm.

Even when he saw Mr. Watson sitting at counsel table, obviously the person on trial, Gambarrotti testified that he was only 80-85% certain Mr. Watson was the person who robbed him. This lack of certainty made his in-court identification even less probative than it would have been had he been sure that he was getting it right. But any moderating effect this lack of certainty could have had on the prejudicial impact of the in-court identification was more than negated by the prosecutor's summation, which misled the jury in its evaluation of the identification evidence. First, the prosecutor improperly bolstered Gambarrotti's in-court identification, arguing without support that it was more reliable than his out-of-court identification of another person:

> And I would submit, ladies and gentlemen, a photograph is far more difficult to identify someone in person. It's one dimensional. It's a flat image on a page versus you see someone in

> the flesh you have three dimensions. You have all of it. You can see better.
>
> And he's — his testimony, he's in this courtroom for much longer than he ever had to interact with him at the bank, and certainly longer than looking at a photograph, a flat photograph. So Mr. Gambarrotti's ability to identify and recall cannot be jettisoned, it cannot be just swept under the rug[.]
>
> [(6T:42-21 to 43-6)]

The prosecutor also repeatedly told the jury that "any possibility of misidentification" had been "eliminate[d]. . . completely" based on Hill's identification. (6T:47-5 to 18, 53-12 to 13) This was inaccurate for several reasons. First, a person who claims that someone is familiar to them is not necessarily correct, and familiar identifications are susceptible to the same factors that affect reliability of stranger identifications. See, e.g., Jonathan P. Vallano et al., Familiar Eyewitness Identifications: The Current State of Affairs, 25 Psychol. Pub. Pol'y & Law 128, 129-30 (2019) ("[F]amiliar identification accuracy is additionally impacted by system and estimator variables, including familiarity itself."); James E. Coleman, Jr., et al., Don't I Know You? The Effect of Poor Acquaintance/Familiarity On Witness Identification, The Champion 52, 53 (April 2012) ("Scientifically-designed research studies have consistently shown that prior familiarity can adversely affect the reliability of an eyewitness identification in nuanced, complex, and often counterintuitive ways."). Second, even more troubling than Hill's

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

possible bias against Mr. Watson, her identification was made from a video still in which a quarter of the suspect's face was partially obscured with a hat (5T:94-13 to 95-9, 98-6 to 100-19) Yet again, the prosecutor improperly reassured the jury, despite the jury instruction and social science to the contrary, that the suspect's wearing of a hat "isn't going to impede [the witness]'s ability to identify him... That doesn't obscure anything." (6T:46-8 to 47-4, 53-8 to 13) See Henderson, 208 N.J. at 266 (recognizing that "[d]isguises as simple as hats have been shown to reduce identification accuracy") (citation omitted).

The sole defense raised at trial was misidentification. Gambarrotti's in-court identification was the only evidence the State presented that directly inculpated Mr. Watson. The other evidence was the blurry video of the suspect with his face partially obscured, and Hill's opinion derived from a still taken from that same video. There was no physical evidence tying Mr. Watson to the crime: no DNA, only fingerprints of other people, no clothing found matching the description, no cell site data, or any other evidence at all. And when presented with a photo array before trial, Gambarrotti, the only eyewitness, selected a different man.

Given the above, Gambarrotti's in-court identification of Mr. Watson was a linchpin of the case. Its wrongful admission, particularly coupled with

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

the prosecutor's summation and the lack of instruction to the jury warning them that an in-court identification is highly suggestive and therefore may be unreliable, was clearly capable of producing an unjust result. R. 2:10-2. Thus, for the reasons expressed here and in Mr. Watson's prior submissions, Mr. Watson's constitutional rights to due process and a fair trial were violated, and his conviction should be reversed. U.S. Const. amends. V, VI and XIV; N.J. Const. art. 1, ¶¶ 1 and 10.

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

CONCLUSION

The trial court erred in admitted Gambarrotti's first-time in-court identification, and in failing to instruct the jury regarding its particular suggestiveness and unreliability. Compounding this error, Sgt. Vitelli was permitted to repeatedly opine on what the video surveillance depicted, even though he was not an eyewitness to the robbery and was in no better position than the jury to identify the perpetrator or the actions taken by him. Moreover, in the course of the trial, the jury also learned that non-testifying police officers had evidence incriminating Mr. Watson in this case and many others. Particularly in this weak case, in which the State's theory was that Mr. Watson committed the robbery in a professional, experienced way, these errors individually and cumulatively denied Mr. Watson his right to a fair trial. For the reasons expressed herein and in prior submissions, he respectfully urges the Court to vacate his conviction and remand for a new trial.

Respectfully submitted,

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Public Defender
Attorney for Defendant-Petitioner

BY: /s/ Lauren S. Michaels
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Date: January 20, 2023

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

SUPREME COURT OF NEW JERSEY
C-259 September Term 2022
087251

State of New Jersey,
Plaintiff-Respondent,
v.
Quintin D. Watson,
Defendant-Petitioner.

ORDER

A petition for certification of the judgment in A-000235-19 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted, limited to the issues addressed in the petition for certification, specifically defendant's confrontation clause argument; challenge to narration testimony (i.e., "play-by-play" video narration by lay witnesses); and first-time, in-court identifications. Certification is denied as to any additional issues presented in the Appellate Division briefs that were not squarely addressed in the petition; and it is further

ORDERED that the appellant may serve and file a supplemental brief on or before January 3, 2023, and respondent may serve and file a supplemental brief thirty (30) days after the filing of appellant's supplemental submission, or, if appellant declines to file such a submission, on or before February 2, 2023.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 17th day of November, 2022.

CLERK OF THE SUPREME COURT

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

Bank Surveillance Video (Disk)

FILED, Clerk of the Supreme Court, 20 Jan 2023, **087251**

Krauszer’s Surveillance Video (Disk)