No. 126383

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. JOHN CLINE, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-2631 There on Appeal from the Circuit Court of Cook County, Criminal Division, No. 15 CR 18158 The Honorable Vincent M. Gaughan, Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

Defendant concedes that the evidence at trial proved that *someone* burgled Slowinski's apartment, but argues that it was insufficient to prove that *he* burgled the apartment because it did not prove that his fingerprint was on the headphone case that the burglar picked up, emptied, and left on the floor, or that he left his fingerprint on the case while committing the burglary rather than sometime earlier. Def. Br. 9.[1] But defendant's argument that no rational fact-finder could credit the expert testimony that the fingerprint belonged to defendant rests entirely on materials that were never presented at trial and that the fact-finder therefore could not consider as a matter of law. And a rational fact-finder could conclude from the trial evidence that the only fingerprint found on the headphone case handled by a burglar inside a locked private apartment was left there by the burglar. Therefore, when viewed in the light most favorable to the prosecution and drawing all reasonable inferences in favor of the prosecution, the evidence at trial was sufficient to allow a rational fact-finder to find beyond a reasonable doubt that defendant committed residential burglary.

[1] Citations to the common law record appear as "C__"; to the report of proceedings as "R__"; to defendant's brief as "Def. Br. __"; to amici's brief as "Am. Br. __"; and to the People's opening brief as "Peo. Br. __."

I. Dennewitz's Expert Testimony Established that Defendant's Fingerprint Was Found on the Headphone Case in the Burgled Apartment.

Dennewitz was accepted without objection as a forensic expert in the area of fingerprint identification, R163; he testified without objection about fingerprint comparison, R165-69; and he opined without objection that, based on his comparison of the fingerprint recovered from the headphone case in the burgled apartment with two sets of defendant's fingerprints, the fingerprint on the headphone case came from the third finger on defendant's right hand, R171-73. Because nothing in "the record evidence compels the conclusion that no reasonable person could accept" Dennewitz's testimony, *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004), the appellate court erred by rejecting the trial court's credibility determination in favor of its own, *People v. Jackson*, 2020 IL 124112, ¶ 64.

Defendant argues that no rational fact-finder could credit Dennewitz's opinion because Dennewitz did not testify that he "followed the proper latent fingerprint analysis methodology and had another latent print examiner verify his conclusion." Def. Br. 10-11, 18. But defendant does not dispute that the trial record contains no evidence about what fingerprint analysis methodology is "the proper" one or whether the results of fingerprint analysis must be verified by a second examiner to be reliable. *See id.* at 2-5, 18. Rather, defendant challenges credibility of Dennewitz's conclusion based on materials concerning the ACE-V method of fingerprint analysis that were

never presented to the fact-finder at trial. *See id*. at 13-14, 17-18. He asserts that these extra-record materials prove that the ACE-V method is "universally-accepted . . . as the minimally reliable method to match a known print to a latent one," *id.* at 10, and that "[v]erification is considered integral to latent fingerprint identification" under that method, *id.* at 12. But this challenge to Dennewitz's credibility based on extra-record materials is foreclosed by *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), which requires a rational fact-finder to consider only the evidence admitted at trial. Because the trial evidence in this case contained no reference to the ACE-V method at all, much less to its status in the field of fingerprint analysis or what steps are or are not considered integral to its proper application, a rational fact-finder could not have discredited Dennewitz's opinion on the basis that he did not testify he performed the verification step of the ACE-V method.

A. The sufficiency of the evidence presented at trial turns solely on the evidence presented at trial.

Whether a juror in a jury trial or a trial judge in a bench trial, the fact-finder may consider only the evidence admitted at trial. *See People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962) ("This court has held that the deliberations of the trial judge are limited to the record made before him during the course of the trial."); *People v. Rivers*, 410 Ill. 410, 419 (1951) (trial judge in bench trial "is in the identical position of the jury and all the recognized rules for the protection of the defendant's rights apply with equal force"); *see also* Illinois Pattern Jury Instruction, Criminal, Nos. 101 ("It is

[jurors'] duty to determine the facts and to determine them only from the evidence in this case."), 101A ("[Jurors] should not do any independent investigation or research on any subject or person relating to the case."). Therefore, the trial court in its role as fact-finder could not independently consult any of the various extra-record studies, reports, and other materials upon which defendant and *amici* now rely to challenge Dennewitz's credibility any more than a juror could conduct extra-record research into fingerprint analysis to inform his evaluation of fingerprint evidence. *See, e.g.*, *McGee v. City of Chicago*, 2012 IL App (1st) 111084, ¶¶ 29-33 (reversing and remanding for new trial because juror conducted her own research on memory lapses in case where witness's alleged memory lapses bore directly on his credibility).

Nor could the appellate court consider these extra-record materials when reviewing the sufficiency of the evidence presented at trial. *Herrera v. Collins*, 506 U.S. 390, 402 (1993) ("[T]he sufficiency of the evidence review authorized by *Jackson* is limited to 'record evidence'" and "does not extend to nonrecord evidence, including newly discovered evidence") (quoting *Jackson*, 443 U.S. at 318); *see People v. Mehlberg*, 249 Ill. App. 3d 499, 532 (5th Dist. 1993) ("A reviewing court must determine the issues before it on appeal solely based on the basis of the record made in the trial court.") (citing *People v. Reimolds*, 92 Ill. 2d 101, 106-07 (1982)). Just as defendant could not challenge Dennewitz's credibility by appending affidavits from uncalled

expert witnesses to his appellate brief, he cannot challenge Dennewitz's credibility by referring the reviewing court to studies, reports, or any other materials not presented at trial. *See People v. Magee*, 374 Ill. App. 3d 1024, 1030 (1st Dist. 2007) (refusing to consider secondary materials that were not presented at trial and striking portion of defendant's brief relying on them in support of his challenge to witnesses' credibility).

Defendant does not address *Jackson*'s limitation of sufficiency review to "record evidence," *Jackson*, 443 U.S. at 318, or explain how a fact-finder could be faulted for not considering evidence that it never heard or saw. Instead, he relies on two cases — *People v. Garrett*, 62 Ill. 2d 151 (1975), and *People v. Wilhoite*, 228 Ill. App. 3d 12 (1st Dist. 1991) — for the proposition that a reviewing court may consider evidence that was not presented at trial when evaluating the sufficiency of the evidence presented at trial. Def. Br. 15-16. But neither *Garrett* nor *Wilhoite* provides a basis to reject *Jackson*'s well-established limits on sufficiency review.

Garrett relied on several treatises on gunshot wounds cited by the parties on appeal and on the coroner's report, which also "w[as] not offered in evidence," to evaluate the sufficiency of the evidence against a murder defendant who argued that the circumstantial evidence against him failed to disprove his hypothesis that the victim committed suicide. 62 Ill. 2d at 163, 165-67. But *Garrett* applied the since-abandoned pre-*Jackson* standard, under which the evidence in wholly circumstantial cases had to not only

prove guilt, but also disprove all reasonable hypotheses of innocence. *See id.* at 163; *People v. Pintos*, 133 Ill. 2d 286, 291 (1989) (abolishing the reasonable-hypothesis-of-innocence standard). To the extent that reliance on extra-record materials to evaluate the sufficiency of the evidence disproving a reasonable hypothesis of innocence may have been proper under the pre-*Jackson* standard, it is no longer proper under the governing *Jackson* standard, *Herrera*, 506 U.S. at 402, and defendant's reliance on *Garrett* therefore is misplaced.

Wilhoite relied on *Garrett* to "consider scholarly authority referred to by the parties in interpreting the evidence" when evaluating whether the trial court's rejection of the defendant's insanity defense was contrary to the manifest weight of the evidence. *Wilhoite*, 228 Ill. App. 3d at 23 (citing generally to *Garrett*). But beyond citing to *Garrett*, *Wilhoite* made no attempt to explain how a fact-finder's verdict could be deemed contrary to the manifest weight of the evidence *at trial* because it was inconsistent with materials *not* presented at trial. Accordingly, this Court should decline to depart from the *Jackson* standard based on *Garrett* and *Wilhoite*.

B. A reviewing court may not take judicial notice of extra-record materials when evaluating the sufficiency of the evidence presented at trial.

Contrary to defendant's contention, *see* Def. Br. 13-14, judicial notice provides no exception to *Jackson*'s rule that review of the sufficiency of the evidence presented at trial is limited to the evidence actually presented at

trial. Judicial notice is not an evidentiary trump card to be played after trial concludes, but a method of admitting facts into evidence. *See* Black's Law Dictionary 923 (9th ed. 2009) (defining "judicial notice" as "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and reputable fact"); *State Farm Mut. Auto. Ins. Co. v. Grebner*, 132 Ill. App. 2d 234, 237 (2d Dist. 1971) ("[T]he purpose of judicial notice is to dispense with the normal method of producing evidence."); *see also* Ill. R. Evid. 201(b). Accordingly, a trial court acting as the fact-finder "is prohibited from taking judicial notice of facts *sua sponte* after the close of evidence," *People v. Smith*, 2021 IL App (1st) 190421, ¶ 83, and, on appeal, "[j]udicial notice cannot be extended to permit the introduction of new factual evidence not presented to the trial court," *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 9; *see Vulcan Materials Co. v. Bee Constr.*, 96 Ill. 2d 159, 166 (1983); *see also People v. Barham*, 337 Ill. App. 3d 1121, 1130 (5th Dist. 2003) ("A reviewing court will not take judicial notice of critical evidentiary material that was not presented to and was not considered by the fact finder during its deliberations.").

Defendant argues that a court may take judicial notice of generally accepted scientific principles and treatises when reviewing the sufficiency of the evidence presented at trial because it may do so when determining the admissibility of evidence under the *Frye* standard. *See* Def. 14-15 (citing *People v. McKown*, 226 Ill. 2d 245 (2007)); *id.* at 16 (citing *People v. Luna*,

2013 IL App (1st) 072253). But defendant concedes that Dennewitz's testimony was admissible, Def. Br. 22,[2] and the rationale for permitting judicial notice of extra-record materials when a court reviews the admissibility of evidence under *Frye* does not apply to sufficiency review under *Jackson*.

"Under the *Frye* standard," courts are not called upon "to determine the validity of a particular scientific technique," but merely "to determine the existence, or nonexistence, of general consensus in the relevant scientific community regarding the reliability of that technique." *In re Commitment of Simons*, 213 Ill. 2d 523, 532 (2004). Because the focus is "primarily on counting scientists' votes, rather than on verifying the soundness of a scientific conclusion," review of a lower court's *Frye* analysis is *de novo* and consideration of extra-record scientific materials does not raise "the concerns about witness credibility and hearsay normally associated with citations to empirical or scientific studies whose authors cannot be observed or cross-examined." *Id.* (internal quotation marks omitted).

But here, defendant "does not merely rely on the scientific evidence to demonstrate a general acceptance for a particular technique; rather, he

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[2] *Amici* argue that Dennewitz's testimony "should not have been admitted in the first place," Am. Br. 8, but because defendant does not challenge the admission of Dennewitz's testimony, *amici* cannot do so in his stead. *See In re J.W.*, 204 Ill. 2d 50, 73 (2003) (declining to address claims raised only by *amici* because "[a]n *amicus* takes the case as he finds it, with the issues as framed by the parties").

submits the articles for their substance and ultimate findings." *Magee*, 374 Ill. App. 3d at 1030; *see* Def. Br. 14 (asking that "this Court take judicial notice of the ACE-V method as the standard procedure friction ridge analysts should follow, even in a sufficiency analysis"). Judicial notice of extra-record materials for this purpose raises precisely the evidentiary concerns that *Frye*'s limited consensus inquiry avoids, introducing hearsay evidence by authors who "cannot be observed or cross-examined" as substantive evidence. *Magee*, 374 Ill. App. 3d at 1030. Therefore, judicial notice of extra-record materials is improper when evaluating whether the evidence presented at trial was sufficient to convict. *See id.*; *Mehlberg*, 249 Ill. App. 3d at 531-32 (refusing to consider extra-record articles because they were "not mere informational articles intended to assist the court in reviewing issues related to a complicated scientific field but [we]re instead an attempt to interject expert-opinion evidence into the record to impeach the expert testimony of [the prosecution's witnesses]" and so were "never subject to cross-examination by the State" or "considered by the trial court"); *see also Murdy v. Edgar*, 103 Ill. 2d 384, 394 (1984) (declining to take judicial notice of "MAST [Michigan Alcoholic Screening Test], in general, and the significance of plaintiff's score of 15," because they "are not of such a nature as to meet the requirements for judicial notice").

Indeed, defendant concedes that the purpose for which he submits these extra-record materials — to challenge Dennewitz's credibility by

exploring whether he properly applied the allegedly correct methodology — concerns the weight of the evidence, not its admissibility. Def. Br. 18. Thus, it was incumbent on defendant to explore on cross-examination whether and how Dennewitz applied the ACE-V methodology if he believed doing so would expose flaws or omissions in Dennewitz's conclusion that were not otherwise apparent from his testimony on direct examination and thereby undermine his credibility. *See People v. Murray*, 2019 IL 123289, ¶ 30 (purpose of cross-examination "is to highlight the flaws and omissions in the evidence presented during direct examination"); *Mehlberg*, 249 Ill. App. 3d at 538-39 (challenges to the reliability of an expert's specific application of a scientific method, rather than to the general acceptance of the method itself, "are properly held in front of the jury by cross-examination of prosecution witnesses and presentation of defendant's own witnesses") (citing *People v. Thomas*, 137 Ill. 2d 500, 518 (1990)); *Murdy*, 103 Ill. 2d at 394 (explaining that "if the Secretary [of State] wished to rely upon the MAST test and the score plaintiff received, explanation of its relevance should have been introduced by way of expert testimony" rather than judicial notice on appeal). The prosecution then would have had the opportunity to rebut that challenge to Dennewitz's credibility on redirect or with other evidence.[3]

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[3] This adversarial testing is just as essential when evidence is admitted at trial through judicial notice rather than through cross-examination or the testimony of witnesses, for the fact-finder in a criminal case "may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g). Accordingly, in the "rare instances" when a court *sua sponte* takes

Contrary to defendant's assertion, requiring that he challenge the credibility of Dennewitz's conclusion through cross-examination at trial rather than through the introduction of extra-record materials on appeal, does not improperly shift the burden of proof under *People v. Murray*. Def. Br. 22-24. *Murray* does not absolve the defense from cross-examining witnesses. *See* 2019 IL 123289, ¶ 30. Rather, *Murray* held that "[i]f the State fails to present evidence that establishes the elements of the charged offense, cross-examination by the defendant is not required" because "cross-examination of the State's witness is not intended to serve as an alternative means of establishing the elements of the offense beyond a reasonable doubt." *Id.* In *Murray*, the prosecution had to prove that a particular group was a "street gang" within the statutory definition, which itself had multiple elements. *Id.* ¶¶ 22-24. But the only evidence presented that the group was a "street gang" was the testimony of an expert on gang activity, who offered only his conclusory opinion that the group *was* a street gang but did not explain how the group satisfied the statutory elements necessary to reach that opinion. *Id.* ¶¶ 21-26. Accordingly, *Murray* held that because the prosecution presented no evidence on an element of the charged offense, it

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judicial notice of factual matters during trial, it must "make[] clear . . . what facts and sources are included in the *sua sponte* notice" so that the parties have "a fair opportunity to confront and rebut any evidence that might be damaging to their position," for "[a] party has the same right to rebut evidence admitted by *sua sponte* judicial notice as it does to rebut evidence introduced by the opposing party." *Barham*, 337 Ill. App. 3d at 1129; *see* Ill. R. Evid. 201(e).

failed to bear its burden of proof and the defendant had no obligation to confirm the insufficiency of the evidence through cross-examination. *Id.* ¶ 30.

Here, by contrast, the prosecution presented evidence on every element of residential burglary: Slowinski's testimony that someone broke into his apartment, picked up his headphone case, removed the headphones, and dropped the case on the floor, together with Dennewitz's testimony that the headphone case bore defendant's fingerprint, established that defendant entered Slowinski's apartment without authority and with intent to commit theft. *See* 720 ILCS 5/19-3(a) (2015). Thus, defendant does not attack an absence of evidence on the elements of the charged offense, but instead the credibility of the evidence presented on those elements. And attacks on witnesses' credibility based on alleged flaws and omissions that were not apparent from their testimony on direct examination are *exactly* the sort that a defendant is obliged to levy through cross-examination. *See Murray*, 2019 IL 123289, ¶ 30.

Nor did Dennewitz, like the expert in *Murray*, offer his opinion — that the fingerprint on the headphone case matched defendant's fingerprint — without explaining how he reached that opinion. *See id.* ¶ 31. Dennewitz explained that a fingerprint is the permanent and unique pattern of friction ridges on a finger, and that a latent print is the replication of that pattern imprinted by a finger on surface. R165-66. To determine whether a latent fingerprint was left by a particular finger, the latent fingerprint is compared

side by side with a known fingerprint, R166-67, based on up to three levels of detail: first, the pattern of the ridges, R167; second, minute details within the ridges, R167-68; and third, the individual pores on the finger (although this level of detail is rarely available in a latent print), R168-69. Dennewitz explained that detail of a latent print must rise to at least the second level to allow identification. R167. After he determined that one of the lifts taken of the latent fingerprint on the headphone case included sufficient detail to permit comparison, R170, Dennewitz performed this side-by-side comparison between that lifted latent fingerprint and a known fingerprint taken from the third finger on defendant's right hand, R170-71, and concluded, based on the approximately 20 points of comparison that he found between the two (nine of which were shown to the fact-finder through a demonstrative exhibit, R171-72), that the fingerprint on the headphone case matched that of the third finger on defendant's right hand, R171. He then repeated this analysis by comparing the lifted print with a second known fingerprint taken from defendant's right middle finger and reached the same conclusion. R172-73. Because Dennewitz explained the basis for his opinion, and that basis was not incredible on its face, *see Cunningham*, 212 Ill. 2d at 280, defendant was obliged to expose any flaws in that opinion through cross-examination. *Murphy*, 2019 IL 123289, ¶ 30.

In effect, defendant seeks to cross-examine Dennewitz on appeal, challenging the validity of his opinion based on materials never presented at

trial and then pointing to the prosecution's failure to rebut the unraised challenge as evidence that the opinion was invalid. But a rational fact-finder may not discredit a witness based on evidence that was never presented at trial, *see* Peo. Br. 12-14, and so defendant's and *amici*'s factual assertions founded entirely on extra-record materials are irrelevant to the sufficiency of the evidence inquiry.

C. Even if judicial notice of extra-record materials were permissible when reviewing the sufficiency of the evidence, defendant's assertions about the ACE-V method do not satisfy the requirements for judicial notice.

Even if judicial notice of extra-record materials were generally permissible when analyzing sufficiency claims on appeal, defendant's assertions that the results of fingerprint analysis are invalid unless verified by a second examiner and that the ACE-V method is the *only* valid method of fingerprint analysis, Def. Br. 17-18, are not judicially noticeable because they are neither indisputable nor capable of accurate and ready determination by consultation with unquestionably authoritative sources. *See* Ill. R. Evid. 201(b). Indeed, courts have rejected defendant's assertion that results of fingerprint identification are necessarily invalid unless a second examiner agrees with them. *See Forward v. State*, 406 S.W.3d 601, 606 (Ct. App. Tx. 2013) ("The jury was free to take the lack of verification into account when it determined whether to believe the expert's testimony; however, the lack of verification did not render the expert's testimony unreliable."); *United States v. John*, 597 F.3d 263, 275 (5th Cir. 2010) (rejecting defendant's challenge to

reliability of fingerprint evidence based on lack of verification). And defendant's assertion that the ACE-V method is "universally-accepted as the minimally reliable method," Def. Br. 14, is belied by *amici*'s statement that the method is "'not specific enough to qualify as a validated method for this type of analysis,'" Am. Br. 11 (quoting National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward* 142 (Aug. 2009)); *see also Luna*, 2013 IL App (1st) 072253, ¶¶ 69-84.

Defendant argues that the Court may accept his assertion that unverified results are necessarily invalid because "Illinois courts have consistently determined that verification is a standard step in the identification process." Def. Br. 17. But defendant's cited authority does not support his conclusion. Defendant primarily cites to summaries of the trial evidence in other cases, in which the appellate court reported that various experts testified at trial that other examiners had verified their results. *See id.* (providing string cite of Illinois cases); *People v. Negron*, 2012 IL App (1st) 101194, ¶ 21 (stating that expert witness "[William] Kovacs testified that his opinion was independently reviewed and verified by latent fingerprint examiner Fred Scott"); *People v. Mitchell*, 2011 IL App (1st) 083143, ¶ 84 (Gordon, J., dissenting) (opining that the trial evidence was similar to that in *People v. Safford*, where the expert's "conclusion was then verified by another examiner"); *People v. Safford*, 392 Ill. App. 3d 212, 220 (1st Dist. 2009)

(stating that expert witness Brent Cutro "testified that each of his print identifications was verified by another examiner"); *People v. Yancy*, 368 Ill. App. 3d 381, 383 (1st Dist. 2005) (stating that expert witness "[Anastasia] Petruncio testified that the quality assurance department randomly reidentified the prints and agreed with her conclusion"); *People v. Prince*, 362 Ill. App. 3d 762, 776 (1st Dist. 2005) (stating that "latent fingerprint examiner Deborah McGarry[] testi[fied] that her work is peer reviewed and verified by another researcher"). These summaries of trial testimony are legally irrelevant, for they are not judicial holdings (or even dicta), and they are factually irrelevant because no rational fact-finder could discredit Dennewitz's identification of the fingerprint in this case based on testimony offered in other cases by other expert witnesses about their identification of other fingerprints.

Defendant's reliance on *People v. Jennings*, 252 Ill. 2d 534 (1911), is misplaced for the same reason: *Jennings* does not discuss the importance of verification in fingerprint identification at all. Rather, *Jennings* considered whether fingerprint identification evidence was generally admissible, *id.* at 546-47, and concluded, after considering written sources on the history of fingerprint identification and the testimony of four witnesses regarding the basis of fingerprint identification, *id.* at 546-48, that "there is scientific basis for the system of finger-print identification and that courts are justified in admitting this class of evidence," *id.* at 549. Contrary to defendant's

assertion that *Jennings* "approved fingerprint evidence when it was *verified*," Def. Br. 9 (emphasis in original), *Jennings* merely summarized the evidence that it considered in reaching its conclusion that fingerprint identification evidence was admissible; it did not hold or even suggest that a fingerprint identification by one expert witness, though admissible, was incredible as a matter of law unless verified by another examiner. *See Jennings*, 252 Ill. at 543-53.

Nor does *Luna* support defendant's assertion that "the law" has "emphasize[d] time and again that verification is a critical and necessary step" that an expert must complete for a fact-finder to afford his fingerprint identification any weight. Def. Br. 18 (citing *Luna*, 2013 IL App (1st) 072253, ¶ 61). The sole reference to verification in the cited paragraph is the court's explanation that the term ACE-V "signifies analysis, comparison, evaluation, and verification," and that "'[v]erification occurs when another qualified examiner repeats the observations and comes to the same conclusion, although the second examiner may be aware of the conclusion of the first.'" *Luna*, 2013 IL App (1st) 072253, ¶ 61 (quoting National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 137 (2009)).[4] This description of the ACE-V

[4] Nor does any other paragraph in *Luna* support defendant's position. The only other references to verification appear in the summary of the trial evidence, where an expert testified that he used "a technique known as ACE-V (analysis, comparison, evaluation, and verification)," 2013 IL App (1st) 072253, ¶ 27; in a quote from the prosecution's closing remark that the expert

method is not a legal determination that verification is a "critical and necessary step" upon which the credibility of an examiner's fingerprint identification depends, as defendant asserts. Def. Br. 18. To the contrary, in evaluating whether the ACE-V method is admissible under *Frye*, *Luna* recognized that the inquiry was limited to "the general acceptance of the methodology, not the particular conclusion reached by an examiner or the application of the methodology in a particular case," 2013 IL App (1st) 072253, ¶ 50, and emphasized that questions concerning an examiner's conclusion and application of the underlying methodology go to the weight of the evidence and are for the fact-finder to decide, *id.* ¶¶ 70-72.

Likewise, defendant misreads *Luna* when he argues that it establishes that the ACE-V method is "universally-accepted . . . as the minimally reliable method to match a known print to a latent one." Def. Br. 10; *see id.* at 14-15, 17. *Luna* merely evaluated whether the ACE-V method was generally accepted as required for admission under *Frye*, *see Luna*, 2013 IL App (1st) 072253, ¶ 50, and concluded "that the trial court properly took judicial notice of the general acceptance of the ACE-V methodology within the relevant scientific community," *id.* ¶ 84, even if the method was subject to criticism and *not* universally accepted, *id.* ¶¶ 80-81. Thus, *Luna* does not support

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had his results "verified by someone else," *id.* ¶ 127; and in a summary of the prosecution's closing remarks, *id.* ¶ 28 (concluding that the prosecution did not improperly vouch for the expert's credibility by "emphasiz[ing] his experience, and point[ing] out that his identification was verified").

either of the "facts" that defendant asks this Court to judicially notice as indisputable and capable of accurate and ready determination by consultation with unquestionably authoritative sources. *See* Ill. R. Evid. 201(b).

II. The Evidence that Defendant's Fingerprint Was Found on the Headphone Case that the Burglar Picked Up, Emptied, and Discarded on the Floor Was Sufficient to Prove that Defendant Left His Fingerprint on the Case During the Burglary.

Viewed in the light most favorable to the prosecution, the evidence that defendant's fingerprint was found on the headphone case that the burglar had picked up, emptied, and dropped on the floor of Slowinski's apartment was sufficient to allow a fact-finder to conclude beyond a reasonable doubt that defendant left his fingerprint on the case during the burglary. The evidence here is materially indistinguishable from that which this Court found sufficient in *People v. Rhodes*, 85 Ill. 2d 241, 246-47, 251 (1981) (defendant's single fingerprint found on a clock radio handled by the burglar was sufficient to prove that he left his fingerprint on the radio while committing burglary); *see also Stevenson v. United States*, 380 F.2d 590, 592 (D.C. Cir. 1967) (defendant's single fingerprint on the bottom of tea canister in burglarized home was sufficient to prove that he left his fingerprint while committing burglary).

Defendant's attempt to distinguish *Rhodes* is unavailing. He argues that *Rhodes*'s sufficiency determination did not rest only on the fingerprint evidence, but also on an eyewitness's testimony that "she saw a man

matching [the defendant's] description carrying a TV while running from the back of the burgled house." Def. Br. 33 (citing *Rhodes*, 85 Ill. 2d at 251-52 (Simons, J., concurring in part and dissenting in part), and *People v. Van Sant*, 84 Ill. App. 3d 355, 357 (3d Dist. 1980) (appellate court opinion reviewed in *Rhodes*)). But there is no reference to this testimony in the majority opinion, and it strains credulity to believe that this Court decided the sufficiency claim based on evidence that it did not even mention in its decision. Nor was it surprising that *Rhodes* did not mention this testimony, for it came from "an inconclusive eyewitness identification from an 8-year-old," *id.* (Simon, J., concurring in part and dissenting part), and the appellate court had found the child's description of the burglar — "a young, heavyset black man" whose face she "could not see" — so general that it "would probably not have supplied sufficient probable cause to arrest the defendant," *Van Sant*, 84 Ill. App. 3d at 357. Accordingly, "[i]n *Rhodes*, [the] defendant was convicted of burglary solely on the basis of a latent fingerprint, matching his, which was lifted from a clock radio," and this Court "conclude[d] that 'the evidence reveals that the defendant's fingerprint left on the clock radio could only have been impressed at the time of the commission of the offense.'" *People v. Summers*, 100 Ill. App. 3d 170 (1st Dist. 1981) (quoting *Rhodes*, 85 Ill. 2d at 251). The Court should reach the same conclusion here. *See* Peo. Br. 20.

Defendant's remaining authority — *Travillion v. Superintendent Rockview SCI*, 982 F.3d 896 (3d Cir. 2020), and *Mikes v. Borg*, 947 F.2d 353 (9th Cir. 1991) — is unpersuasive given that this Court rejected a sufficiency challenge on materially indistinguishable facts in *Rhodes*. *See generally People v. Ward*, 2011 IL 108690, ¶ 34 ("[We] need not look to federal case law because existing Illinois law supplies the necessary answers."). In any event, both cases are readily distinguished.

In *Travillion*, a store manager testified that a masked man carrying a manila folder in his left hand ripped the sliding door to the shop from its hinges, robbed her, and left. 982 F.3d at 898-99. He left the folder behind, and police recovered three fingerprints from it and one print from the sliding door. *Id.* at 899. The prints on the folder matched fingers from the defendant's left hand, but the print on the door did not belong to the defendant. *Id.* at 898-99. The Pennsylvania Superior Court found the evidence sufficient to prove the defendant committed robbery, *id.* at 902, but the United States Court of Appeals for the Third Circuit, on federal habeas review, concluded that the evidence was insufficient because the defendant's fingerprints were found only on "easily movable objects," and no evidence established that the defendant did not touch the folder before the robber carried it into the store. *Id.* Here, unlike in *Travillion*, where the object bearing the defendant's fingerprints was brought *to* the crime scene by the lone perpetrator such that anyone could have handled it before the

perpetrator brought it there, the object bearing defendant's fingerprint was inside a locked and private home, and handled by the burglar inside the home. Moreover, Slowinski testified that he did not know defendant, R144, and defendant denied that he had ever been in the area of Slowinski's apartment building, further supporting the fact-finder's reasonable inference that defendant left his fingerprint on the headphone case while committing burglary, rather than during some chance encounter at some unknown time in the past. *See State v. Wade*, 639 S.E.2d 82, 86 (N.C. Ct. App. 2007) (defendant's fingerprint found on microscope box in locked closet of burglarized house was sufficient to prove that defendant left the print while committing burglary because "[s]tatements by the defendant that he had never been at the crime scene are sufficient to show that a fingerprint lifted from the premises could only have been impressed at the time of the crime").

Similarly, in *Mikes*, the object on which the defendant's fingerprints were found had been accessible to the general public and likely handled by multiple individuals before it was used in the crime. *See* 947 F.2d at 358-59. The owner of a fix-it shop was beaten to death in the basement of his shop with one of three pieces of a disassembled turnstile that he bought from a hardware store's going-out-of-business sale four months earlier. *Id.* at 355. Police recovered dozens of fingerprints; four of the 17 fingerprints found on two pieces of the turnstile matched the defendant. *Id.* at 355-56. But the turnstile had been handled by potentially hundreds of people at the hardware

store before it was purchased at the going-out-of-business sale and placed in the fix-it shop's basement, where it remained, inaccessible to the public and apparently undisturbed, until the murder. *Id.* at 358-59. And an expert testified that fingerprints remain indefinitely. *Id.* The United States Court of Appeals for the Ninth Circuit therefore found that the defendant's fingerprints on the turnstile were insufficient to prove that he impressed them while committing murder rather than while he was at the hardware store. *Id.* In contrast, defendant's fingerprint here was not found on an object routinely handled by the general public, then locked away until the day of the crime, but on the case of a $500 pair of headphones, R46, which was locked inside Slowinski's private residence when it was picked up and emptied by the burglar, R139, R143-44, R147. And no other prints were found on the case, not even prints too smudged or faint for comparison, R153, further supporting the fact-finder's reasonable inference that defendant left his fingerprint on the case while committing burglary.

Accordingly, viewed in the light most favorable to the prosecution and drawing all reasonable inferences in the prosecution's favor, a rational fact-finder could conclude beyond a reasonable doubt that defendant left his fingerprint on the headphone case inside Slowinski's apartment while committing burglary. *See Rhodes*, 85 Ill. 2d at 251.

CONCLUSION

For these reasons, and those stated in their opening brief, the People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court.

October 28, 2021

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,933 words.

/s/ Joshua M. Schneider
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 28, 2021, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided notice to the following registered email address:

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