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No. 85658-8-I

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

STATE OF WASHINGTON,
Respondent,

v.

RICHARD N. PHILLIPS,
Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS

1. Mr. Phillips' conviction of unlawful possession of a firearm based on a decades-old conviction violates his Second Amendment right to keep and bear arms.

Because he possessed a handgun 26 years after he was convicted of second-degree assault, the State charged Mr. Phillips with first-degree unlawful possession of a firearm. CP 222; Ex. 3; 7/19/23 RP 1027. The jury convicted Mr. Phillips as charged. CP 85. But prohibiting Mr. Phillips from possessing a handgun due to a decades-old conviction is not consistent with this Nation's historical tradition of firearm regulation. This conviction violates the Second Amendment as applied to Mr. Phillips.

The right to keep and bear arms under the Second Amendment is among the "fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 U.S. 742, 778, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). The U.S. Supreme Court established a two-step test to determine whether a disarmament violates the Second

Amendment. First, courts must ask whether "the Second Amendment's plain text covers an individual's conduct." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). If so, "the Constitution presumptively protects that conduct" and the court proceeds to the second step. *Id*. The State must then "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*.

The State criminalized Mr. Phillips' possession of a firearm, conduct that is at the heart of the Second Amendment's protection. *United States v. Gailes*, 118 F.4th 822, 826 (6th Cir. 2024); CP 222. Because the U.S. Constitution presumptively protected his conduct, the State must demonstrate a historical tradition of permanently disarming people in Mr. Phillips' circumstance.

The State failed to do so, offering zero analysis at the second step of this test. Instead, the State merely cites

decisions that incorrectly resolve this issue at the first step of the *Bruen* framework.

a. The plain text of the Second Amendment protects Mr. Phillips and his conduct.

At step one of the *Bruen* test, this Court "asks whether the Second Amendment's plain text covers" Mr. Phillips' possession of a handgun following his 1996 second-degree assault conviction. *Gails*, 118 F.4th at 826.

It is undisputed that Mr. Phillips' conduct—simple possession—is covered by the plain text of the Second Amendment. *E.g.*, *id*. ("The Second Amendment unquestionably protects Gailes's conduct (i.e., possession of pistols, as opposed to an unusually dangerous weapon, for example)."). Instead, the State only contends Mr. Phillips is not part of "the people" under the Second Amendment. Resp. Br. at 33–38. It is mistaken.

"The right to bear arms is held by 'the people.'" *United States v. Connelly*, 117 F.4th 269, 274 (5th Cir. 2024) (quoting

U.S. Const. amend. II). That phrase is used throughout the Bill of Rights, and in each instance, it "unambiguously refers to all members of the political community, not an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). "Based on that consistent usage, *Heller* concluded 'the Second Amendment right is exercised individually and belongs to *all* Americans.'" *Connelly*, 117 F.4th at 274 (quoting *Heller*, 554 U.S. at 581) (emphasis in original).

Mr. Phillips, as an American citizen, is thus covered by the Second Amendment. *Id*. (concluding the defendant, a citizen with a felony record, was covered by the Second Amendment). The State ignores this result by focusing on this Court's holdings in *State v. Ross*, 28 Wn. App. 2d 644, 537 P.3d 1114 (2023), and *State v. Bonaparte*, __ Wn. App. 2d __, 554 P.3d 1245 (2024). Resp. Br. at 33–38.

In *Ross* and *Bonaparte*, this Court ruled that "the people" only covers "law-abiding citizens." *Ross*, 28 Wn.

App. 2d at 652; *Bonaparte*, 554 P.3d at 1251–52. It based its reasoning on dicta from the U.S. Supreme Court, which said the Second Amendment protects the "right of law-abiding, responsible citizens" to possess a firearm. *Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 790; *Bruen*, 597 U.S. at 29.

This dicta produces a simple argument: "Felons are not 'law-abiding, responsible citizens,' and felon-in-possession laws are presumptively valid. Thus, the argument goes, the government may disarm individuals who've been convicted of a felony." *United States v. Williams*, 113 F.4th 637, 645 (6th Cir. 2024). But, as many courts—including the Supreme Court—have held, this argument is incorrect.

While *Heller*, *McDonald*, and *Bruen* used the phrase, "responsible, law-abiding citizen," those decisions "'said nothing about the status of citizens who were not [law-abiding]'—much less that *only* law-abiding citizens have Second Amendment rights." *Williams*, 113 F.4th at 646

(quoting *United States v. Rahimi*, 602 U.S. 680, 703, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024)).

Imposing such a limitation on "the people" contravenes *Heller* itself, which held the Second Amendment is an individual right that belongs to "all Americans." *Heller*, 554 U.S. at 580. Because this right is an individual right, as opposed to a civic right, the government cannot retract it from citizens—felons or otherwise.

Civic rights "must tie the right to some activity for the collective good, like militia service" or voting. *Williams*, 113 F.4th at 647. But the *Heller* Court made clear that the Second Amendment is not a civic right; "Rather, it's an *individual* right unconnected to any other civic activity." *Id.* (emphasis in original). "The right to self-defense—unlike the rights to vote or serve on a jury—doesn't bear the same connection to a common, community-oriented civic activity that only the virtuous enjoyed." *Id.*

As a point of comparison, while the State can prohibit felons from voting (which is a civic right), it cannot strip a felon of "their right to speak freely, practice the religion of their choice, or to a jury trial." *Id*. The Second Amendment is no different than this latter group of individual rights. *Id*. (citing *Heller*, 554 U.S. at 595); *accord Range v. Attorney Gen. United States*, __ F.4th __, 2024 WL 5199447, at *4 (3d Cir. Dec. 23, 2024) ("We see no reason to adopt a reading of 'the people' that excludes Americans from the scope of the Second Amendment while they retain their constitutional rights in other contexts.").

The U.S. Supreme recently suggested this outcome in *Rahimi*. There, the Government claimed Mr. Rahimi was not a member of "the people" under the Second Amendment because he was charged with violent offenses and thus not a "responsible, law-abiding" citizen. *Rahimi*, 602 U.S. at 772–73 (Thomas, J., dissenting). The Supreme Court discarded that argument. *Id*. at 701–02; *see id*. at 713

(Gorsuch, J., concurring) ("[We do not] purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not responsible.'"); *id*. at 773 (Thomas, J., dissenting) ("Not a single Member of the Court adopts the Government's theory.").

The Court held the Government's proposed limitation was too "vague" to dictate the Second Amendment's applicability and would create an "unclear . . . rule" that does not "derive from [Supreme Court] case law." *Id*. at 701. While it acknowledged the Court used the phrase in *Heller* and *Bruen*, the *Rahimi* Court held those decisions "did not define the term and said nothing about the status of citizens who were not 'responsible.'" *Id*. at 702.

Importantly, the "law-abiding, responsible" limitation does not come from the text of the Second Amendment. *Id*. at 773 (Thomas, J., dissenting). But the text, and the text

alone, controls the inquiry at the first step of the analysis. *Bruen*, 597 U.S. at 32.

Again, the Second Amendment simply says, "the people," without any limitation. U.S. Const. amend. II. "Nothing in the Second Amendment's text draws a distinction among the political community between felons and non-felons—or, for that matter, any distinction at all." *Williams*, 113 F.4th at 649.

For these reasons, numerous post-*Rahimi* courts have held that people with felony convictions remain a part of "the people" under the Second Amendment. *E.g.*, *id*. 649–50; *Range*, 2024 WL 5199447, at *5; *United States v. Gore*, 118 F.4th 808, 813 (6th Cir. 2024); *United States v. Goins*, 118 F.4th 794, 798 n.3 (6th Cir. 2024); *Gailes*, 118 F.4th at 826; *see Connelly*, 117 F.4th at 274 (employing the same reasoning to conclude drug users are part of "the people"). This Court was incorrect to conclude otherwise in *Ross* and *Bonaparte*, and this Court should reject those holdings. *See In re Pers.*

Restraint of Arnold, 190 Wn.2d 136, 148–49, 410 P.3d 1133 (2018) (holding that one panel in the Court of Appeals is not bound by a previous panel's decision).

Thus, because Mr. Phillips is an American citizen and his conduct was covered by the text of the Second Amendment, "the Constitution presumptively protect[ed]" his conduct. *Bruen*, 597 U.S. at 18.

b. The State failed to carry its burden of demonstrating a historic tradition of permanently disarming a person that was previously convicted of a felony.

Because the Second Amendment covers Mr. Phillips and his conduct, the Court proceeds to the second step. At this stage, the State has the burden of proving that permanently disarming Mr. Phillips is consistent with "the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. To carry this burden, the State must prove the current law is "relevantly similar" to "founding-era historical precedent." *Id.* at 21–22, 27.

But the State offers zero historical analysis. It was "well aware that *Bruen* not only placed the burden squarely on it to develop the historical record, but also put it on notice that its failure to do so might be decisive." *United States v. Stambaugh*, 650 F. Supp. 3d 1227, 1234 (W.D. Okla. 2023). The State nevertheless only focuses on the step one analysis without mentioning any historical precedent. Resp. Br. at 33–39. More is required to justify disarmament under the Second Amendment. *Bruen*, 597 U.S. at 19 ("[T]he government *must affirmatively prove* that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.") (emphasis added).

Nevertheless, there are several indications the State could not meet its burden with the permanent disarmament at issue here. Various courts have concluded the potential historical analogs do not support a permanent disarmament of someone convicted of a felony. *E.g., Range*, 2024 WL

5199447, at *7–8; *United States v. Hale*, 717 F. Supp. 3d 704, 711–13 (N.D. Ill. 2024); *United States v. Williams*, 718 F. Supp. 3d 651, 677–79 (E.D. Mich. 2024); *United States v. Daniel*, 701 F. Supp. 3d 730, 743–44 (N.D. Ill. 2023); *United States v. Neal*, 715 F. Supp. 3d 1084, 1092–93 (N.D. Ill. 2024); *United States v. Leblanc*, 707 F. Supp. 3d 617, 631 (M.D. La. 2023); *see* App. Br. at 29–31. While there may be a basis to temporarily disarm an individual that poses a danger, there is no historical basis to permanently disarm that person. *E.g.*, *Williams*, 718 F. Supp. 3d at 677 ("[N]one of the historical regulations offered by the government permanently disarm a group of people."); *Range*, 2024 WL 5199447, at *8 ("So in the Founding era, a felon could acquire arms after completing his sentence and reintegrating into society."); *see Rahimi*, 602 U.S. at 699 (affirming disarmament largely because it was only temporary).

Because the State failed to prove otherwise, it failed to carry its burden. This Court must vacate and dismiss Mr. Phillips unlawful possession of a firearm conviction.

2. The State failed to present sufficient evidence that Mr. Phillips committed drive-by shooting.

To prove drive-by shooting, the State must prove beyond a reasonable doubt that: 1) the defendant discharged a gun from "from a motor vehicle or from the immediate area of a motor vehicle" *and* 2) the motor vehicle transported "the shooter or the firearm, or both, to the scene of the discharge." RCW 9A.36.045(1). The State failed to prove either, meaning it failed to prove the offense beyond a reasonable doubt.

The State did not offer any evidence about what happened before the shooting. Instead, its case consisted of testimony from people that heard several gunshots and then saw a moving truck speeding away from the motel. *E.g.*, Ex. 1. This evidence does not prove Mr. Phillips fired the gun

inside or around the moving truck, and it certainly does not prove the truck transported Mr. Phillips or the gun to the scene of the shooting.

The State responds by hyper-focusing on the timeline of events. It argues that, since Shawna Svenkerud estimated that she saw a moving truck speeding eastward 15 to 20 seconds after the shooting, Mr. Phillips must have fired the shots from inside the truck. Resp. Br. at 16–19; *see* 7/12/23 RP 335. This theory fails.

Evidence is only sufficient "if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004). "However, inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). These inferences must be drawn from "the evidence as a whole," and not from "isolate[d] discrete acts." *State v. Jameison*, 4 Wn. App. 2d 184, 198, 421 P.3d 463 (2018).

Assessed in its entirety, the evidence does not prove Mr. Phillips was inside, or even immediately outside, the truck during the shooting. The State argues the contrary by ignoring a significant amount of evidence.

There were no shell casings found inside the passenger compartment of the truck. 7/17/23 RP 806. As Detective Robert Allen testified, he would expect to find shell casings inside the compartment if a gun was fired therein. 7/17/23 RP 806. He explained that, when a gun fires a bullet, it discards the casing either directly below or immediately beside the gun. 7/17/23 RP 807.

Instead, all six shell casings were found on or next to the street. 7/13/23 RP 468. Two of the casings were on the south side of the road near the grass, while the four others were farther south on the grass. 7/13/23 RP 468. The State did not provide any evidence about where the truck was on the street, so there is no way to know if these cartridges were close to or in the vicinity of the truck.

Mr. Phillips drove east after the shooting. 7/12/23 RP 348. And the shots were fired at the motel, which was north of the street. 7/13/23 RP 456. So, if Mr. Phillips fired the shots from the vehicle, the casings should have at least been in the middle of the street, not on the south side of it (where the passenger seat of the truck would be located). 7/13/23 RP 469.

Likewise, when Mr. Phillips was driving east, the passenger-side door of the truck was wide open. 7/12/23 RP 334–35. The truck did not have a door handle on the driver-side door, so the only way to get inside was through the passenger door. 7/17/23 RP 772. This suggests Mr. Phillips fired the shots and then ran into the truck.

This evidence is inconsistent with the State's argument. The State disregards it and instead focuses on the timeline, but that timeline is not dispositive.

As a preliminary matter, the State deduces Mr. Phillips had "11.52 seconds" to travel from the scene of the

shooting to Ms. Svenkerud's residence. Resp. Br. at 17–18. It makes this calculation based on a map that was not admitted at trial. RP 459–66. "[A] reviewing court assesses the sufficiency of the evidence that was actually presented to the jury, not the evidence that . . . was not admitted at trial." *United States v. Staggers*, 961 F.3d 745, 756 (5th Cir. 2020). The State's calculation is thus irrelevant here.

While the State focuses on Ms. Svenkerud's estimation of "15" to "20 seconds," 7/12/23 RP 334, other witnesses offered different time approximations. For instance, Sandi Hamilton estimated that 60 seconds elapsed between the shots and her seeing the truck driving east. 7/12/23 RP 348. Ms. Hamilton heard the shots, spoke to her husband and a neighbor, ran from the kitchen to her office, and then started dialing 911 before she saw the truck speed down the street. 7/12/23 RP 346–47. Ms. Svenkerud's husband, Carl Svenkerud also testified that "everything seemed to be going pretty fast because it was a pretty

stressful situation[.]" 7/12/23 RP 331. All this evidence must be considered here, not just Ms. Svenkerud's isolated testimony. *Jameison*, 4 Wn. App. 2d at 198.

When considered in its totality, the evidence does not prove that Mr. Phillips was inside the truck when he fired the shots. It would also be speculative to conclude he was near the truck or that there were no obstacles between him and the truck. *See State v. Locklear*, 105 Wn. App. 555, 561–63, 20 P.3d 993 (2001) (noting that, to sustain a drive-by shooting conviction, the defendant must be immediately near the car, and there cannot be any obstacles between the defendant and the car).

However, even if the State is correct that Mr. Phillips fired the shots from within the truck, that still does not mean the truck transported either Mr. Phillips or the firearm to the scene of the shooting. To prove this offense, the State must prove the moving truck "transport[ed] the shooter or the gun

to the 'scene' of the shooting." *Locklear*, 105 Wn. App. at 560 (quoting RCW 9A.36.045(1)).

There is no evidence the truck was used as such here. The truck resembled the other trucks at the nearby Careful Movers parking lot. 7/13/23 RP 403; 7/12/23 RP 326. The shell casings were close to that parking lot, which was just south of the motel. 7/13/23 RP 456, 468, 553. The State offered no evidence, such as tire marks, testimony, or video footage, to demonstrate Mr. Phillips drove to the scene in the truck. And the evidence it offered is equally consistent with Mr. Phillips walking to the truck with the gun and then firing it. *See Jameison*, 4 Wn. App. 2d at 198 ("When evidence is equally consistent with two hypotheses, the evidence tends to prove neither.").

Again, the driver-side door of the truck lacked a handle, so the only way to enter the passenger compartment of the truck was through the passenger-side door. 7/17/23 RP 772. But when Ms. Svenkerud saw the truck driving east,

the passenger door was wide open. 7/12/23 RP 334–35. This suggests Mr. Phillips fired the shots and then ran into the truck, and then drove away without having enough time to close the door. This conclusion explains both the open door and the quick timeline.

Especially given the open passenger-side door, there is no basis to conclude the truck drove either Mr. Phillips or the firearm to the scene. *See Jameison*, 4 Wn. App. 2d at 198 ("We are not justified in inferring, from mere possibilities, the existence of facts."). The State does not directly address this argument. Instead, it only claims Mr. Phillips was inside the truck at the time of the shooting. Resp. Br. at 19–21. Even if the State is correct, that does not mean the truck transported the firearm or Mr. Phillips to the scene. By not responding, the State "concedes this point." *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005).

Because the State failed to prove Mr. Phillips fired the gun in or immediately around the truck, or that the truck

transported Mr. Phillips or the gun to the scene, it failed to prove drive-by shooting. This Court must reverse and dismiss this conviction.

3. The trial court reversibly erred by admitting Ms. Coric's unqualified toolmark identification testimony.

The State's toolmark identification expert, Diana Coric, repeatedly testified the EAA pistol in the truck was the same pistol that fired the shots near the motel. 7/18/23 RP 935, 937, 939, 1011. In justifying this claim, Ms. Coric vaguely asserted there was "sufficient agreement" between marks found on the cartridges near the motel and the test-fired cartridges from the EAA pistol. 7/18/23 RP 939.

Ms. Coric's methodology was based on the AFTE's "sufficient agreement" theory. 7/18/23 RP 951–52. In line with that theory, Ms. Coric defined "sufficient agreement" as "better than the best agreement between two toolmarks being fired by different tools." 7/18/23 RP 952. This was a purely subjective standard, and Ms. Coric was unable to

provide an objective, quantifiable reason for why she reached her conclusion, nor could she say what specifically matched between the cartridges. 7/18/23 RP 950–51, 997–98. She likewise could not provide an error rate for her conclusions. 7/18/23 RP 967. Sidestepping those concerns, Ms. Coric repeatedly justified her conclusions due to her training and experience. 7/18/23 RP 950, 956, 1014–15.

The trial court erroneously admitted Ms. Coric's unqualified testimony that the gun police found in the truck was the same gun that fired the shots at the motel. Because the scientific community does not generally agree with the methodology that Ms. Coric used to reach her unqualified conclusion, her testimony was inadmissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In addition, Ms. Coric employed an unreliable methodology, meaning the

admission of her unqualified testimony violated ER 702 and *Frye*.[1] This error was not harmless, so reversal is required.

a. The relevant scientific community does not generally agree about the methodology underlying Ms. Coric's unqualified toolmark identification testimony.

To be admissible under *Frye*, an expert must rely on a methodology that has gained general acceptance in the relevant scientific community. *State v. Copeland*, 130 Wn.2d 244, 263, 922 P.2d 1304 (1996). The relevant community does not generally accept the methodology underlying Ms. Coric's unqualified opinion that the gun found in the truck was the same gun that fired the shots near the motel.

In making this assessment, the first step is to determine who constitutes the relevant scientific

[1] As explained in Mr. Phillips' opening brief, there is uncertainty about whether a methodology's reliability is assessed under *Frye* or ER 702. App. Br. at 67–68 (comparing *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994), with *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 919, 296 P.3d 860 (2013)). Mr. Phillips accordingly argues under both frameworks.

community. It includes both toolmark practitioners as well as "scientists familiar" with toolmark identification. *State v. Russell*, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). This group includes the scientists that authored the PCAST and NRC reports, who "are preeminent scientists and scholars and are undoubtedly capable of assessing the validity of a metrological method." *United States v. Shipp*, 422 F. Supp. 3d 762, 782–83 (E.D.N.Y. 2019). The State does not disagree.

This broader community does not generally agree with the methodology employed by Ms. Coric and the AFTE. *Abruquah v. State*, 296 A.3d 961, 994 (Md. 2023) (finding no evidence "of general acceptance of the methodology by any group outside of firearms identification examiners and law enforcement"). Multiple courts have recently held the same. *E.g.*, *United States v. Adams*, 444 F. Supp. 3d 1248, 1266 (D. Or. 2020); *United States v. Briscoe*, 703 F. Supp. 3d 1288, 1307 (D.N.M. 2023); *Shipp*, 422 F. Supp. 3d at 783 ("[T]he AFTE

Theory has not achieved general acceptance in the relevant community.").

The State fails to respond to the recent shift in how scientists and courts view the field of toolmark identification. Instead, it merely cites this Court's now-dated decision in *State v. DeJesus*, 7 Wn. App. 2d 849, 436 P.3d 834 (2019). Resp. Br. at 23–26. Because the *DeJesus* Court found toolmark identification evidence can satisfy *Frye*, the State suggests toolmark identification evidence will always satisfy *Frye*. Resp. Br. at 23–26. This claim falls apart under closer scrutiny.

This Court is not bound by *DeJesus*. There is no "'horizontal stare decisis' between or among the divisions of the Court of Appeals." *Arnold*, 190 Wn.2d at 148. As a result, "one panel of the Court of Appeals [is not] bound by another panel, even in the same division." *Matter of Marriage of Snider & Stroud*, 6 Wn. App. 2d 310, 315, 430 P.3d 726 (2018).

There are good reasons to depart from *DeJesus* here. Most importantly, the situation has changed since this Court decided *DeJesus*. There, the Court noted that courts "from around the county have universally" found that toolmark analysis is generally accepted. *DeJesus*, 436 P.3d at 865. That is no longer true. Since *DeJesus*, multiple courts—both federal and state—have determined that recent advancements (such as the Ames II study) have significantly eroded the scientific community's confidence in toolmark identification evidence. *Supra* at 23–24; App. Br. at 61–67.

Likewise, the Court in *DeJesus* did not address the argument Mr. Phillips raises here. In *DeJesus*, the defendant broadly claimed that the community disagreed about the entire field of "ballistic identification methodology." 7 Wn. App. 2d at 860. Mr. Phillips does not raise that argument.

Instead, he only argues that the scientific community does not generally agree with the methodology that permits a toolmark examiner to say a cartridge came from a specific

gun. As courts have acknowledged since *DeJesus*, the scientific community does not agree with that methodology. *E.g.*, *People v. Ross*, 129 N.Y.S.3d 629, 641 (N.Y. Sup. Ct. 2020); *Briscoe*, 703 F. Supp. 3d at 1307.

The State does not respond to the more recent cases, nor does it address Mr. Phillips' specific argument. It simply contends *DeJesus* resolves the matter. As the foregoing demonstrates, however, it does not. The State therefore failed to demonstrate the scientific community agrees about Ms. Coric's methodology. The admission of her unqualified testimony was improper under *Frye*.

b. The trial court erred under Frye *and ER 702 because the methodology underlying Ms. Coric's unqualified testimony lacks reliability.*

Even if there is general acceptance within the relevant community, the court still erred by admitting Ms. Coric's testimony. Her unqualified opinion that the cartridges were fired by the gun in Mr. Phillips' truck rested on an unreliable

methodology and should have been excluded under ER 702 and *Frye*.

"Unreliable evidence is not helpful to the jury," and should be excluded under ER 702. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). Likewise, to be admissible under *Frye*, an expert's methodology must be "capable of producing reliable results." *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013).

Either framework leads to the same conclusion: Ms. Coric's unqualified testimony, which rested entirely on the AFTE theory, was based on an unreliable methodology. In his opening brief, Mr. Phillips highlighted several issues with Ms. Coric's methodology:

- Ms. Coric's methodology is based on a purely subjective standard, and there are no quantitative criteria to determine whether two cartridges match or

whether something is an individual or a subclass characteristic. App. Br. at 68–72.

- The studies relied on by Ms. Coric and the AFTE are not scientifically sound and indicate a shockingly high false positive rate. App. Br. at 72–75.
- Because the methodology used by Ms. Coric and the AFTE employs a purely subjective standard for "sufficient agreement," it is not replicable. Indeed, based on the Ames II study, different examiners reach startlingly different results when examining the same sample cartridges. App. Br. at 75–79.
- The methodology used by Ms. Coric and the AFTE is incapable of rendering a statistical error rate, unlike other valid sciences. App. Br. at 79–80; *cf. Anderson*, 172 Wn.2d at 608 ("[F]or a scientific finding to be accepted, it is customary to require a 95 percent probability that it is not due to chance alone." (internal quotation omitted)).

- Ms. Coric did not know anything specific about EAA firearms, such as how they are created or whether any toolmark studies focused on EAA firearms. Studies reveal that examiners have dramatically different error rates for different types of firearms. App. Br. at 81–82.

For these reasons, courts from around the county and the Department of Justice have considerably limited the permissible scope of toolmark identification evidence. *E.g.*, *Briscoe*, 703 F. Supp. 3d at 1307–09; App. Br. at 83– 85.

The State does not respond to any of this. Instead, it merely argues that Ms. Coric did not deviate from the AFTE theory, and that her work is independently reviewed in her office. Resp. Br. at 29–31. That is all beside the point.

Mr. Phillips does not claim Ms. Coric's testimony was unreliable because it strayed from the AFTE theory. Instead, Mr. Phillips claims Ms. Coric's methodology—which is the same methodology espoused by the AFTE—lacks reliability. A growing chorus of scientists and jurists agrees with that

claim. App. Br. at 83–85. The State does not respond to these broader issues.

It argues Mr. Phillips can only address these broader issues through a *Frye* argument. Resp. Br. at 31. This ignores the fact that Mr. Phillips raises this issue under ER 702 *and Frye*. App. Br. at 67–68, 85. The State's argument also misconstrues the nature of ER 702.

When courts consider whether expert testimony is reliable and thus helpful to the jury under ER 702, they must "assess the reliability of the theory, methodology, procedure or principle propounded by the expert and the probative value of his testimony." *State v. Maule*, 35 Wn. App. 287, 295, 667 P.2d 96 (1983). This is broader than simply determining whether a proposed expert deviates from a specific methodology. *See Reese v. Stroh*, 128 Wn.2d 300, 315, 907 P.2d 282 (1995) (Johnson, J., concurring) ("Under . . . ER 702, the trial court acts as gatekeeper, assessing the

reliability and relevance of *all* scientific evidence." (emphasis added)).

Likewise, affirming the State's theory would essentially sanitize most expert testimony from judicial review. As the State claims, only novel methodologies are subject to *Frye*. Resp. Br. at 23. Once a methodology is no longer novel, the State suggests expert testimony is admissible unless the expert deviates from the methodology. Resp. Br. at 31

If that was the case, recent advancements in a particular field could never render an outdated methodology legally unreliable. Expert testimony based on even an outdated methodology would almost always be admissible. But science does not produce methodologies that are trapped in amber. *See Anderson*, 172 Wn.2d at 607 ("[S]cience never stops evolving and the process is unending."). New perspectives commonly illuminate problems with dated methodologies. The evidentiary rules are designed to remain

current with current science, and those rules are far more potent in excluding outdated, unreliable science than the State implies. *See id*. at 606 ("Evidentiary rules provide significant protection against unreliable, untested, or junk science.").

Here, newer perspectives about the field of toolmark identification have illuminated its pitfalls. Given these advances, a growing number of courts prohibit examiners from testifying that a cartridge came from a particular gun. *E.g.*, *Briscoe*, 703 F. Supp. 3d at 1307–09; *United States v. Cloud*, 576 F. Supp. 3d 827, 845 (E.D. Wash. 2021); *Shipp*, 422 F. Supp. 3d at 783; *Adams*, 444 F. Supp. 3d at 1267.

Indeed, this Court recently indicated this limitation was proper. In *State v. Beal*, 31 Wn. App. 2d 1061, 2024 WL 3342496, at *3 (July 9, 2024) (*see* GR 14.1(a)), the Court suggested the trial court could have excluded the toolmark examiner from "from stating his testimony in unqualified terms." It declined to reach this issue, however, because the

defendant did not argue it below. *Id*. The Court nevertheless stated, "'empirical foundation does not currently exist to permit [ballistic identification] examiners to opine with certainty that a specific bullet can be matched to a specific gun.'" *Id*. (quoting *Williams v. United States*, 210 A.3d 734, 742 (D.C. 2019)).

This Court should hold the same. The trial court erroneously allowed Ms. Coric to testify that the gun in the truck was the same gun that fired the shots at the motel. Because the methodology underlying Ms. Coric's unqualified opinion lacked reliability, it was error to admit her testimony under ER 702 and *Frye*.

c. The admission of Ms. Coric's unqualified testimony was not harmless.

The admission of Ms. Coric's unqualified testimony significantly prejudiced Mr. Phillips. There was no direct evidence that Mr. Phillips was the drive-by shooter, and

there was no conclusive evidence that linked the gun in Mr. Phillips' truck to the shooting at the motel.

For example, there was no gunshot residue evidence to suggest Mr. Phillips recently shot the gun. 7/17/23 RP 840–45. Similarly, law enforcement did not find cartridges in the truck, which could have indicated the gun had been shot by Mr. Phillips. 7/17/23 RP 806. There was also no surveillance footage or eyewitness testimony that depicted Mr. Phillips shooting the gun. 7/13/23 RP 488; 7/17/23 RP 833–34.

While Mr. Phillips told an arresting officer that "he's going to get five years for the gun," this was not an admission to drive-by shooting. 7/14/23 RP 640. Rather, this was Mr. Phillips' admission that he faced liability for possessing a firearm due to his previous felony conviction. *See* 7/19/23 RP 1084.

There was also evidence that another person was in the truck after the shooting. 7/12/23 RP 333. This person

may have fired the shots at the motel and then left the truck before Mr. Phillips was pulled over by the police.

The State disregards these issues and instead claims this error was harmless because Ms. Coric's testimony was cumulative of other evidence. Resp. Br. at 32–33. However, if Ms. Coric's testimony was merely cumulative, the prosecutor would not have emphasized it during his closing argument. 7/19/23 RP 1069–70, 1110–11.

At trial, the State highlighted Ms. Coric's testimony as the reason the jury should not have a reasonable doubt about whether Mr. Phillips committed drive-by shooting. 7/19/23 RP 1110–11. In doing so, the prosecutor emphasized Ms. Coric's expertise in the field and that she is duty-bound to "follow[] the science, and [get] it right." 7/19/23 RP 1111. Such appeals to a witness' expertise are exactly why jurors overvalue expert testimony. *See Abruquah*, 296 A.3d at 990–91; *Briscoe*, 703 F. Supp. 3d at 1308. It is also why the improper admission of Ms. Coric's unqualified testimony

was not harmless. Reversal of the drive-by shooting conviction is required.

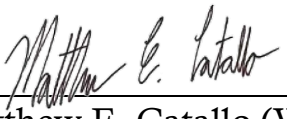
B. CONCLUSION

This Court must reverse and dismiss the unlawful possession of a firearm conviction because it violates the Second Amendment as applied to Mr. Phillips. The Court must also reverse and dismiss the drive-by shooting conviction because the State did not prove that charge beyond a reasonable doubt. Finally, the Court should reverse the drive-by shooting conviction and remand for a new trial because the jury relied on inadmissible and unreliable toolmark identification evidence to fill in the gaps in the State's case.

This brief is 5,848 words long and complies with RAP 18.17.

DATED this 2nd day of January 2025.

Respectfully submitted,



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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 85658-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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