

No. 123926

IN THE SUPREME COURT OF ILLINOIS

People of the State of Illinois,

Plaintiff-Appellant,

v.

Shadwick King,

Defendant-Appellee.

Appeal from the Appellate Court of

Illinois, Second Judicial District

No. 2-15-1112

Date of Opinion: August 21, 2018

There heard on Appeal from the

Circuit Court of the Sixteenth Judicial

Circuit, Kane County, Illinois

No. 14 CF 1229

The Honorable James C. Hallock,

Presiding Trial Judge.

**BRIEF AMICI CURIAE OF
THE EXONERATION PROJECT AND THE INNOCENCE PROJECT**

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INTEREST OF AMICI CURIAE

The Exoneration Project at the University of Chicago Law School represents indigent clients who are innocent, were wrongfully convicted, and are fighting to secure their freedom. To date, over 85 Exoneration Project clients have been exonerated nationwide. Through its work in the fields of criminal and post-conviction law, the Exoneration Project has firsthand knowledge of common causes of wrongful conviction and the ways in which the introduction of faulty evidence can hinder the truth-seeking objective of the criminal justice system.

The Innocence Project, Inc. (the “Innocence Project”) is a national litigation and public-policy organization dedicated to exonerating wrongfully convicted persons through DNA testing, and improving the criminal justice system to prevent future miscarriages of justice. The Innocence Project is keenly aware of the role that unreliable and improper scientific evidence has played in obtaining wrongful convictions. To date, 365 people in the United States have been exonerated by DNA testing, including 20 who served time on death row. The improper use of forensic science contributed to the original wrongful conviction in approximately half of these cases. Drawing on these lessons, the Innocence Project promotes study and reform designed to enhance the truth-seeking function of the criminal justice system and ensure that future wrongful convictions are prevented.

Amici's interest is in freeing the wrongfully convicted, preventing wrongful convictions in the first place, and ensuring that the criminal justice system operates in a fundamentally fair manner. At issue in the matter currently before the Court is the appropriateness of expert testimony on “criminal profiling” and a form of “crime scene analysis” that was untethered from reliable, verifiable, or scientific procedures.

The misuse of expert testimony and the presentation of inadequate, and often false,

scientific evidence is one of the primary reasons the innocent end up behind bars. On the other hand, when scientific evidence used in a criminal proceeding is accurate and verifiable, it represents a powerful tool in the truth-seeking process, both for convicting the guilty and exonerating the innocent.

The “crime scene analysis” and “criminal profiling” evidence introduced at trial here by the State’s so-called expert is the type of outdated, unreliable, and unscientific forensic evidence prone to convicting innocent defendants. The State was permitted to introduce testimony from an “expert” who fashioned the “science” to fit the accused. This practice undermines the truth-seeking process.

The Exoneration Project and the Innocence Project sought to file this *amici curiae* brief because of our belief that scientific evidence used in criminal proceedings should be reliable and verifiable—it should be *real* science. We submit this brief to share our insight into the ways in which unscientific “crime scene analysis” and “profiling” testimony are unreliable and why this Court should find them inadmissible in criminal prosecutions. In addition, the Exoneration Project and the Innocence Project wish to call the Court’s attention to the ways in which the specific expert witness who testified in this matter embodies the problems inherent in “profiling” and science-free “crime scene analysis.”

ARGUMENT

I. INTRODUCTION

In this case, the circuit court allowed the State to introduce expert testimony on “crime scene analysis.” *People v. King*, 2018 IL App (2d) 151112, ¶ 1. This case is emblematic of the troubling nature of such testimony because the field of “crime scene analysis” is often made as broad as necessary in order for the State to “plug the holes” in the actual evidence. *Id.* ¶ 74. In addition, “crime scene analysis” can be made as devoid of

verifiable, scientific procedures as necessary in order to suggest a particular defendant's guilt. Indeed, here, "crime scene analysis" included expert testimony on medical cause of death, lividity and other physical processes related to death, whether certain vegetation is endemic to the area where the victim's body was discovered, the bra selection a woman would likely make for jogging, the meaning of an upside down sock, criminal profiling, and numerous other disparate subjects. *Id.* ¶ 71. None of this testimony was medical or scientific, as the State acknowledges. (State's Br. 21-22, 25). Rather, it constituted the conjecture of an "expert" with no medical training and no relevant scientific experience. In fact, this expert's only apparent qualification is that he has rendered unscientific conjecture for some time.

Justice requires far more.

In the criminal justice context, the use of faulty scientific evidence is no trivial matter. The testimony of an "expert" can unduly influence a fact-finder. *People v. Perry*, 147 Ill. App. 3d 272, 276 (1st Dist. 1986) ("Expert testimony tends to 'overpersuade'") (quoting *Coffey v. Hancock*, 122 Ill. App. 3d 442, 448 (3d Dist. 1984)). That is especially true with respect to scientific (or, as in this case, impliedly scientific) testimony. *See, e.g., People v. Baynes*, 88 Ill. 2d 225, 244 (1981) ("Polygraph evidence ... 'is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi'") (quoting *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975)); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir. 1973) ("Scientific" and "expert testimony" have "aura of special reliability and trustworthiness"); *United States v. Smith*, 869 F.2d 348, 352 (7th Cir. 1989) ("tendency of testimony on scientific techniques to mislead the jury relates to the fact that, because of the apparent objectivity of opinions with a scientific basis, the

jury may cloak such evidence in an aura of mystic infallibility”) (quotation omitted).

The use of false or misleading scientific testimony contributes to a quarter of all wrongful convictions.¹ The National Academy of Sciences now cautions that “imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.”²

Here, the appellate court properly concluded that it was error to admit, “under the guise of expert ‘crime scene analysis,’” an individual’s “subjective opinion that the State’s evidence was sufficient to convict defendant.” 2018 IL App (2d) 15112, ¶ 74. The court also correctly held that the fuzzy boundaries of what constitutes “crime scene analysis” resulted in the trial court allowing the State’s witness to testify well beyond any expertise he may have actually possessed, and instead opine on scientific topics such as cause of death, lividity, and plant habitats. *Id.* ¶¶ 78-81. The court found the State’s witness’s testimony on the victim’s cause of death “especially egregious” because the “inadmissible” testimony “broke the tie” between two actually-qualified forensic pathologists. *Id.* ¶ 79.

Amici urge the Court to find inadmissible in Illinois “criminal profiling” and the type of “crime scene analysis” introduced at trial in this case, which was based solely on an individual’s subjective interpretation of evidence and unmoored to any scientific or verifiable principles.

¹ Nat’l Reg. of Exonerations, *Exonerations in the United States, 1989-2012*, 40 (2012) available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

² Nat’l Research Council of the Nat’l Acad. of Sci., *Strengthening Forensic Science in the United States, A Path Forward* 4 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

II. CRIMINAL PROFILING IS UNSCIENTIFIC, UNRELIABLE, AND SHOULD BE INADMISSIBLE

The Court should take this opportunity to answer the question left open in *People v. Mertz*, 218 Ill. 2d 1, 73 (2005), and deem criminal profiling evidence inadmissible because it is *per se* unreliable.

In *Mertz*, this Court noted that:

The question of admissibility of profiler testimony in criminal cases has been a matter of some controversy; however, recent decisions by state supreme courts seem to come down on the side of exclusion, at least where the evaluative testimony of the profiler is not supported by evidence of reliable databases and methodologies. See [*New Jersey*] *v. Fortin*, 178 N.J. 540, 587-90 [...] (2004) (finding reversible error where a retired FBI profiler was permitted to testify on violent sexual crimes without producing a reliable database of violent sexual assault cases he had investigated, studied and analyzed); [*Tennessee*] *v. Stevens*, 78 S.W.3d 817, 836 (Tenn. 2002) (rejecting an ex-FBI profiler's testimony because of insufficient evidence of methodology and inadequate indicia of reliability). Indeed, there appears to be an implicit recognition in some professional circles that the development of supporting databases of systematic and rigorous case studies will be necessary in order to "enhance the credibility of profiling as a discipline in the legal profession and enhance the prospects of profiles being admissible as evidence." 10 Psychol. Pub. Pol'y & L. at 80. Several years ago, the FBI itself conceded that there had been few systematic efforts to validate its profile-derived classifications. 10 Psychol. Pub. Pol'y & L. at 73.

Id. at 72-73.

However, the Court decided to leave for another day the question of whether profiler testimony is admissible in Illinois:

It would be helpful to see supporting statistics when profiling testimony is proffered in future cases. In this case, however, we need not decide whether its absence renders Wright's testimony inadmissible. We need not determine whether Wright's "profiler" testimony was properly before the jury because any error in its admission was harmless beyond a reasonable doubt. ... The testimony of Wright was, for the most part, cumulative of testimony given by other witnesses, and any inferences drawn by Wright were

commonsense ones that the jurors no doubt had already drawn for themselves.

Id. at 73-74.

The facts and circumstances of this case suggest that the Court should consider answering—once and for all—the question of whether “profiler” testimony is admissible. The State’s expert, Mark Safarik, relied heavily on criminal profiling in his testimony before the jury and the introduction of that testimony was anything but harmless.

A. Safarik offered expert testimony on criminal profiling.

The State disputes that Safarik engaged in criminal profiling. *Amici* submit that Safarik’s testimony in this case represents a quintessential example of “criminal profiling.”

Profiling is when “a witness describe[s] common practices, habits or characteristics of a group of people.” *People v. Vasser*, 331 Ill. App. 3d 675, 687 (1st Dist. 2002). Profiling “indicates the kind of person most likely to have committed a crime by focusing on certain behavioral and personality characteristics.”³

Safarik’s testimony included topics that are certainly within the ambit of criminal profiling. For example, according to Safarik, the prosecutor asked him to determine whether the crime scene was “staged,” the offender’s motive, and the “behavioral manifestations at the scene.” 2018 IL App (2d) 151112, ¶ 69. That is profiling.

At trial, Safarik testified to the offender’s motive, “the habits and characteristics of people who stage crime scenes,” that staging is always done by someone close to the victim, and that staging occurred in this case. *Id.* ¶¶ 45, 71, 73. That is profiling.

Notably, Safarik was trained as an FBI profiler and has testified as a profiler

³ John Douglas, *Criminal Profiling and Crime Scene Analysis*, 4 BEHAV. SCI. & L. 401, 402 (1986).

previously. 2018 IL App (2d) 15111, ¶¶ 36, 45; *New Jersey v. Fortin*, 917 A.2d 746 (N.J. 2007). Indeed, his own website holds him out as a criminal profiler.⁴

B. Profiling testimony is inherently unreliable, has no probative value, and should be inadmissible.

This Court recently reiterated that unreliable expert testimony is inadmissible. *People v. Lerma*, 2016 IL 118496, ¶ 23 (“In addressing the admission of expert testimony, the trial court should balance the probative value of the evidence against its prejudicial effect to determine the reliability of the testimony”) (emphasis added).

As described above, this Court observed fourteen years ago that “decisions by state supreme courts seem to come down on the side of exclusion” of criminal profiling testimony. *Mertz*, 218 Ill. 2d at 72. The Court noted that “[i]t would be helpful to see supporting statistics when profiling testimony is proffered in future cases.” *Id.* at 73. No such supporting statistics were offered in this case.

In *Mertz*, the Court explained that “there appears to be an implicit recognition in some professional circles that the development of supporting databases of systematic and rigorous case studies will be necessary in order to enhance the credibility of profiling as a discipline in the legal profession and enhance the prospects of profiles being admissible as evidence.” *Id.* (quotation omitted). Fourteen years after *Mertz*, there are still *no* databases or statistics supporting profiling’s purported reliability.

Recent empirical studies show the opposite. A survey of all scientific research on profiling from 1976 to 2016 found no reason to believe that profilers are any “better than

⁴ <https://fbsinternational.com/associates/mark-safarik> (last visited July 11, 2019).

bartenders” at predicting the traits and features of offenders.⁵ Studies show that the conclusions of “expert” profilers (*i.e.*, teachers of profiling) are no more accurate than those of undergraduate students “drawn from several general psychology classes” and who are “naive to both personality profiling and criminal investigations.”⁶ Other analyses have concluded that “[p]rofilers’ empirical record is barely visible; the little research generated fails to substantiate the premises that support its continued existence.”⁷ Recent research further determined that, “[a]t worst, offender profiling is based on a system of flawed assumptions At best, the underlying theoretical framework ought to be envisaged anew and refined to provide a sounder foundation to the practice of profiling.”⁸

Criminal profiling’s inherent lack of reliability is further revealed by some of the sources profilers have drawn on: magicians and psychics. Magician Ian Rowland reports that he was flown to Virginia by the FBI in order to provide training for members of their Behavioral Analysis Program.⁹ Similarly, a former FBI profiler has said, “[i]f there’s a

⁵ Bryanna Fox and David Farrington, *What Have We Learned From Offender Profiling? A Systemic Review and Meta-Analysis of 40 Years of Research*, Amer. Psych. Assoc., 144 PSYCHOL. BULL. 1247, 1247-48 (2018).

⁶ Anthony Pinizzotto and Norman Finkel, *Criminal Personality Profiling, An Outcome and Process Study*, 14 LAW & HUM. BEHAV. 215, 219, 224-25 (1990).

⁷ Craig Cooley, *Criminal Profiling on Trial, The Admissibility of Criminal Profiling Evidence* in Brent Turvey, CRIMINAL PROFILING: AN INTRODUCTION TO BEHAVIORAL EVIDENCE ANALYSIS 627, 636 (4th ed. 2012).

⁸ Pascale Chifflet, *Questioning the validity of criminal profiling: An evidence-based approach*, 48 AUSTL. & N.Z. J. CRIMINOLOGY 238, 251 (2015).

⁹ See Applied Cold Reading, Training the FBI, available at <http://www.appliedcoldreading.com/index.php?p=FBI> (last visited July 11, 2019).

psychic component to this, I won't run from it.”¹⁰

Ultimately, there is “no compelling scientific evidence that [profiling] is reliable, valid, or useful.”¹¹ Research on criminal profiling has found that its “approaches are based on typologies that lack empirical support and are often based on an outdated understanding of human behavior.”¹²

Prior to *Mertz*, many jurisdictions had held profiling testimony inadmissible in many, if not all, circumstances. *E.g.*, *Fortin*, 178 N.J. at 587-90 (finding reversible error where a retired FBI profiler was permitted to testify on violent sexual crimes without producing a reliable database of violent sexual assault cases he had investigated, studied and analyzed); *Stevens*, 78 S.W.3d at 836; *Missouri v. Jaco*, 156 S.W.3d 775, 779 (Mo. 2005) (“profile evidence is not admissible to show a defendant’s responsibility”); *Ryan v. Wyoming*, 988 P.2d 46, 55 (Wyo. 1999) (collecting cases and noting that “[t]hose jurisdictions that have considered profiles of battering parents, pedophiles, rapists, and drug couriers unanimously agree that the prosecution may not offer such evidence in its case-in-chief as substantive evidence of guilt”); *California v. Castaneda*, 55 Cal. App. 4th 1067, 1072 (Cal. Ct. App. 1997) (“every defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile”); *Commonwealth v. Day*, 409 Mass. 719, 723 (Mass. 1991) (“Evidence of a ‘child battering profile’ does not meet the

¹⁰ Malcolm Gladwell, *Dangerous Minds: Criminal Profiling Made Easy*, THE NEW YORKER (Nov. 12, 2007) available at <https://www.newyorker.com/magazine/2007/11/12/dangerous-minds>.

¹¹ Brent Snook, et al., *The Criminal Profiling Illusion: What’s Behind the Smoke and Mirrors?*, 35 CRIM. JUST. & BEHAV. 1257 (2008).

¹² Snook at 1263.

relevancy test, because the mere fact that a defendant fits the profile does not tend to prove that a particular defendant physically abused the victim.”); *United States v. Gillespie*, 852 F.2d 475, 480 (9th Cir. 1988) (“testimony of criminal profiles is highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial”); *Duley v. Maryland*, 56 Md. App. 275, 281 (Md. Ct. Spec. App. 1983) (error to admit “child battering profile” because it was “totally irrelevant” to defendant’s guilt and had no probative value); *Louisiana v. Brown*, 370 So. 2d 547, 554 (La. 1979) (drug courier profiling testimony “impermissibly prejudicial”).

Since *Mertz*, additional jurisdictions have held profiling evidence inadmissible. *See, e.g., Washington v. Crow*, 438 P.3d 541, 551 (Wash. Ct. App. 2019) (“Profile evidence cannot be used as substantive proof of guilt because of the risk that a defendant will be convicted not for what he did but for what others are doing.... The major premise of profile evidence is faulty.”) (citations omitted); *South Carolina v. Huckabee*, 419 S.C. 414, 425 (S.C. Ct. App. 2017) (“While criminal profiling may have a legitimate function in law enforcement investigations, such information constitutes propensity evidence and, therefore, has no place in a trial”); *Arizona v. Ketchner*, 339 P.3d 645, 647-48 (Ariz. 2014) (“Although there may be legitimate uses for profile evidence, such as at suppression and probable cause hearings when the justification for making a stop or arrest is at issue, profile evidence may not be used as substantive proof of guilt because of the risk that a defendant will be convicted not for what he did but for what others are doing.”) (quotation omitted); *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 364 (5th Cir. 2010) (drug courier profiling evidence insufficient to prove guilt because it “may amount to the functional equivalent of an expert opinion that the defendant knew he was carrying drugs, ... and also

because profile evidence is likely to be overinclusive and its probative value low in relation to its prejudicial effect”) (citations omitted).

Many jurisdictions find profiling testimony inadmissible when, like Safarik’s testimony here, it describes a particular category of people who the expert believes are likely to commit a specific crime. For example, in *Brunson v. Arkansas*, the Arkansas Supreme Court found it to be an abuse of discretion to admit profiling evidence similar to what Safarik offered here. 79 S.W.3d 304 (Ark. 2002).

In *Brunson*, the trial court admitted “expert” testimony regarding the likelihood that a domestic batterer would commit murder. *Id.* at 306. The “expert” possessed a bachelor’s degree in political science and journalism, a master’s degree in public administration, and over ten years of experience in the field of domestic violence. *Id.* at 306-08. The Arkansas Supreme Court held that the admission of such “expert” testimony was erroneous for three reasons: (1) the witness did not have the type of “specialized psychological expertise” needed to predict human behavior; (2) even though the witness did not specifically point to the defendant as the murderer, her testimony encouraged that conclusion by providing a profile of abusers-turned-murders and placing the defendant into that category; and (3) the testimony was unduly prejudicial because “[t]estimony regarding a criminal profile is nothing more than an expert’s opinion as to certain characteristics which are common to some or most of the individuals who commit particular crimes” and “the danger of unfair prejudice ... outweigh[s] the probative value” of the testimony. *Id.* at 310-12.

Likewise, in *Ohio v. Lowe*, a court held that testimony from a member of the FBI’s Behavioral Analysis Unit regarding the offender’s alleged motive and other “criminal investigative analyses” was inadmissible where the witness did not possess the appropriate

academic credentials. 75 Ohio App. 3d 404, 408 (Ohio Ct. App. 1991). In that case, the so-called expert’s proposed testimony was based largely on “the behavioral science of clinical psychology,” but the witness had “no formal education, training or license” in that field. *Id.* More fundamentally, “the purported scientific analytical processes to which [he] testified are based on intuit[ion] honed by his considerable experience in the field of homicide investigation,” and not on any scientific or otherwise reliable methods. *Id.* The Ohio court found that there was not “sufficient evidence of reliability adduced to demonstrate the relevancy of the testimony or to qualify [the witness] as an expert[.]” *Id.*

* * * *

This Court’s call in *Mertz* for data and statistics supporting the reliability of criminal profiling has gone unanswered. As outlined above, continued empirical research into the purported reliability of criminal profiling finds it lacking. When one balances “the probative value” of profiling evidence (i.e., none) “against its prejudicial effect” (i.e., potentially enormous) “to determine the reliability of the testimony,” one must conclude that such “expert” testimony is unreliable and inadmissible. *Lerma*, 2016 IL 118496, ¶ 23. Illinois should exclude profiling testimony unless and until there is research showing that it is reliable.

C. Profiling testimony is never harmless.

In its brief, the State disputes that Safarik offered profiling testimony, but does not dispute that, to the extent profiling testimony was offered, it was *not* harmless. (*See* State Br. 26-29). The State’s decision not to dispute non-harmlessness makes sense.

Allowing an expert to testify on the ultimate issue of guilt and innocence is never harmless because it invades the province of the jury. *United States v. Wells*, 879 F.3d 900, 920 (9th Cir. 2018) (improper to use profiling testimony “to substantively connect the

strands of circumstantial evidence in such a way as to fit [the defendant] into the criminal profile”); *Washington v. Steward*, 34 Wash. App. 221, 223-24 (Wash. Ct. App. 1983) (error to allow expert to testify “on the basis of experience in a few cases that serious injuries to children were often inflicted by either live-in or babysitting boyfriends [where] [t]here was no scientific basis for that testimony and it was certainly highly prejudicial”); *United States v. Sosa*, 897 F.3d 615, 619 (5th Cir. 2018) (holding that if “profile testimony itself makes that connection [to guilt or innocence], then it crosses into the forbidden territory in which testimony with the ‘expert’ imprimatur is allowed to opine on the ultimate issue of guilt,” but finding defendant had waived the argument).

Profiling testimony of the sort introduced in this case is fundamentally testimony about the ultimate issue of guilt and innocence. Safarik testified—as an “expert”—about the type of person likely to have committed the underlying crime and he described for the jury the characteristics of the offender in such a way that the defendant was the only possible culprit.

Furthermore, the admission into evidence of criminal profiling testimony has directly contributed to wrongful convictions in other jurisdictions. In New York, Jeffrey Deskovic was convicted of murder. However, after DNA proved Deskovic was not the offender, the prosecuting district attorney’s office undertook an analysis of “what went wrong” in the case.¹³ It concluded that the defendant was wrongfully convicted in part due to an overreliance on a criminal profile that “was wrong in almost all critical respects” and “marked the first step—actually the first misstep—down” a path of focusing the

¹³ Westchester, NY District Attorney’s Office, Report on the Conviction of Jeff Deskovic (June 2007), *available at* <https://www.westchesterda.net/Jeffrey%20Deskovic%20Comm%20Rpt.pdf>.

investigation solely on Deskovic, while the actual killer avoided apprehension. *Id.*

The utter unreliability of criminal profiling is further shown by two other high-profile examples. After three women were murdered near Yosemite National Park in 1999, the FBI provided local police with a specific profile of the killers: drug-dealing biker gang members.¹⁴ Eventually, a local handyman who did not deal drugs or belong to a biker gang confessed and was convicted. *Id.* “To give [another] well-known example of an inaccurate FBI profile, the FBI profile of the Unabomber described him as uneducated. The actual Unabomber had a Ph.D. in mathematics.” *People v. Fletcher*, No. B183712, 2007 WL 3072864, at *21 (Cal. Ct. App. Oct. 23, 2007).

For these reasons, *amici* respectfully disagree with this Court’s finding in *Mertz* that any error in the admission of the particular profiling evidence at issue there “was harmless beyond a reasonable doubt.” *Mertz*, 218 Ill. 2d at 73. There, and unlike here, the profiling testimony “was, for the most part, cumulative of testimony given by other witnesses, and any inferences drawn by [the profiler] were commonsense ones that the jurors no doubt had already drawn for themselves.” *Id.* For that reason, the Court’s conclusion in *Mertz* is distinguishable, but more fundamentally, *amici* believe that the harms associated with the introduction of criminal profiling evidence are enormous and that the data demonstrating its inherent lack of reliability prove it.

Although profiling is entirely unscientific and unreliable, it is understandably persuasive to a jury. The only purpose of profiling evidence is to tip the scales in favor of the State by allowing an “expert” to guide a jury toward conviction based on his or her

¹⁴ Scott Gold and Greg Krikorian, *Profiling Not Always Model of Accuracy Forensics*, L.A. TIMES, July 18, 2002, A. 26, available at <https://www.latimes.com/archives/la-xpm-2002-jul-18-me-profile18-story.html>.

personal conjecture and intuition. That is anything but harmless.

D. The introduction of profiling testimony violates due process.

The admission of unreliable testimony can render a criminal proceeding so fundamentally unfair so as to violate the defendant's due process rights. *See Gimenez v. Ochoa*, 821 F.3d 1136, 1145 (9th Cir. 2016) (“habeas petitioners can allege a constitutional violation from the introduction of flawed expert testimony at trial if they show that the introduction of this evidence undermined the fundamental fairness of the entire trial”) (quotation omitted); *Han Tak Lee v. Glunt*, 667 F.3d 397, 407 (3d Cir. 2012) (“allegations, if proven, set forth a *prima facie* case for granting Lee habeas relief on his due process claim by showing that the admission of the Commonwealth's fire expert testimony undermined the fundamental fairness of Lee's entire trial because the testimony was premised on unreliable science”); *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967) (“The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial.”); *People v. DeJesus*, 163 Ill. App. 3d 530, 532 (1st Dist. 1987) (“the Due Process Clause precludes a jury from convicting a defendant on identification evidence that is unreliable”) (citing *Manson v. Braithwaite*, 432 U.S. 98 (1977)).

The fundamental fairness of a criminal trial is further undermined when unreliable testimony is provided by an “expert.” *See Perry*, 147 Ill. App. 3d at 276 (“Expert testimony tends to ‘overpersuade’”); *Amaral*, 488 F.2d at 1152 (“Scientific or expert testimony” have “aura of special reliability and trustworthiness.”).

As discussed above, there is no basis to conclude that criminal profiling is reliable. On the contrary, every available study indicates it is unreliable. Testimony based on criminal profiling should be inadmissible because its introduction violates a defendant's constitutional right to due process.

III. “CRIME SCENE ANALYSIS” OF THE SORT INTRODUCED BELOW IS UNSCIENTIFIC AND UNRELIABLE

In Illinois, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Ill. R. Evid. 702. Inherent in that Rule is a principle that expert testimony in fact be based on “scientific, technical, or other specialized knowledge.” *Id.* All too often, “crime scene analysis” testimony is based on none of those things.

As this Court has noted, “[a]n expert’s opinion is only as valid as the bases and reasons for that opinion.” *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 151 (1999). The appellate court here was correct to conclude that the type of “[c]rime-scene analysis’ testimony” offered by the State “does not rest on scientific principles.” 2018 IL App (2d) 151112, ¶ 75. The State, understandably, does not dispute that holding. (*See generally* State’s Br. 18). Presumably, the State therefore contends that the expert testimony in this case was based on “technical” or “specialized knowledge.” The problem is that the type of “expert” testimony at issue in cases like this one is not based on any valid “technical” or “specialized knowledge.”

A. “Crime scene analysis” is presented to the fact-finder as a scientific endeavor, even when it is not.

As an initial matter, this case demonstrates how a jury can be led to believe that “crime scene analysis” is a scientific field, rather than what it too often really is: conjecture based solely on an investigator’s subjective experience. Here, Safarik was a paid consultant who testified that “he conducts ‘analyses and interpretations’ of complex violent crime scenes and violent crimes to ‘understand essentially what happened in the crime, how it

happened[,] and why the events unfolded the way that they did.’ Safarik testified that he also conducts ‘equivocal death evaluations’ in cases where the ‘manner of death is not well established.’” 2018 IL App (2d) 151112, ¶ 69. That description *sounds* scientific and a reasonable juror could be forgiven for concluding Safarik’s opinions were based on something more than supposition. But the type of analysis Safarik performed was conjecture, plain and simple.

As a general rule, Illinois courts do not admit expert testimony without an adequate foundation for the expert’s opinion. *See Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2d Dist. 2000) (“the trial court must look behind the expert’s conclusion and analyze the adequacy of the foundation... Such scrutiny is required because an expert’s opinion bears an aura of reliability and trustworthiness”) (internal citations omitted). Trial courts therefore must exclude testimony that “does not bear an adequate foundation of reliability.” *Id.* at 147; *Baley v. Fed. Signal Corp.*, 2012 IL App (1st) 093312, ¶ 127 (“the trial court must look beyond an expert’s conclusion to assess the adequacy of its foundation, as an expert’s opinion is only as valid as the reasons and bases for his opinion”).

The appellate court here appropriately concluded that Safarik was unqualified to testify on specific scientific topics—such as lividity, cause of death, and botany—that were included in his “crime scene analysis.” 2018 IL App (2d) 151112, ¶¶ 78-81. It found the remainder of his testimony “prejudicial because it consisted of conclusions that the jurors could draw for themselves.” *Id.* ¶ 82. The appellate court’s analysis is correct and reveals a fundamental reason why non-scientific crime scene analysis testimony should be inadmissible: Safarik was *not* qualified to testify on the scientific topics that may have actually been helpful to the jury, but apparently *was* qualified to testify on topics where the

jury did not need his help and about which expert testimony was therefore inadmissible. *See* Ill. R. Evid. 702; *Lerma*, 2016 IL 118496, ¶ 23 (“Expert testimony addressing matters of common knowledge is not admissible unless the subject is difficult to understand and explain.”) (quotation omitted).

Safarik’s testimony in this case is the perfect example of why this Court should not permit non-scientific—but still purportedly “expert”—“crime scene analysis” testimony based on nothing more than an individual witness’ conjecture.

Amici urge the Court to hold that proposed crime scene analysis testimony must, consistent with Rule 702, be based on actual “scientific, technical, or other specialized knowledge” and be delivered by a witness actually “qualified as an expert by knowledge, skill, experience, training, or education[.]”

B. “Assisting the trier of fact” means more than “encouraging the jury to return a guilty verdict.”

The State urges the Court to conclude that Safarik’s conclusions are reliable because they “unquestionably assisted the jury in determining” the victim’s cause of death, among other things. (State Br. 20). Implicit in the State’s analysis, though, is an unfounded belief that Safarik’s conclusions were actually correct. The State’s analysis essentially goes like this: assuming the victim died in the way Safarik said she did and assuming the Defendant is guilty of killing her, then Safarik assisted the jury in making those conclusions and returning a guilty verdict. Above, we discuss the ways in which the testimony of an individual cloaked as an “expert”—especially in a scientific field—is unduly persuasive to a fact-finder. The State itself appears to have fallen victim to this phenomenon. The State’s assumptions about the reliability of Safarik’s conclusions exemplify why the admission of science-free “crime scene analysis” testimony is so pernicious.

“When an expert testifies simply that [a party] should win but is unable to support that conclusion with reasoned analysis, the expert’s testimony is worthless, provides no assistance to the jury, and should be stricken.” *Baley*, 2012 IL App (1st) 093312, ¶ 127 (quoting *Kleiss v. Cassida*, 297 Ill. App. 3d 165, 174 (4th Dist. 1998)). “Crime scene analysis” of the sort introduced at trial here is based on nothing more than conjecture and has no place in Illinois’ courts.

C. Engaging in the same type of faulty analysis over and over again does not render it reliable.

In an effort to salvage the reliability of the type of work Safarik performed here, the State points out that Safarik has done this type of analysis in a large number of cases. (State’s Br. 12, 20). As an initial matter, the actual number of cases Safarik has analyzed is a matter of some uncertainty. (*Infra* 24-25). But, the simple fact that Safarik has evaluated a lot of crimes does not in and of itself mean that he is particularly likely to be correct in his conclusions.

For example in *Kleiss*, the plaintiffs’ only evidence that their crops suffered damage because of the defendants’ herbicides was the testimony of an “expert” who was “unable to support [his] opinions by any reasoning other than his 20 to 30 years’ experience. [The expert] only provided unsupported, conclusory opinions.” 297 Ill. App. 3d at 176-77. Therefore, the Fourth District, affirmed judgment for the defendants. *Id.* at 177. “Expert” testimony regarding scientific topics, but based only the “expert’s” subjective experience and with no underlying reliable methodology is problematic because “[t]here is no objectively ascertainable or empirically supportable measure of personal experience.”¹⁵

¹⁵ Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 30 (2004).

Moreover, “[c]asework is not research Unlike planned research, casework does not permit the development of careful controls, defined independent variables, or structured and directed focus. Also, and critically, in casework, ground truth is not known and cannot simply be inferred by a conviction, a confession, or the consensus judgment of experts.”¹⁶

How often are Safarik’s conclusions actually correct? There is simply no way to know. However, in at least one case, his conclusions were proven false. (*Infra* 27-30).

Regardless of the number of other cases Safarik has investigated, the fact that he has engaged in a flawed analytical process a great many times does not somehow imbue his work with credibility.

D. The introduction of non-scientific “crime scene analysis” testimony violates due process.

As discussed above, the admission of unreliable testimony—particularly from an “expert”—may render a criminal proceeding fundamentally unfair and violate due process. *See Gimenez*, 821 F.3d at 1145; *Han Tak Lee*, 667 F.3d at 407; *Spencer*, 385 U.S. at 563-64; *DeJesus*, 163 Ill. App. 3d at 532; *Manson*, 432 U.S. at 97.

The type of “crime scene analysis” testimony at issue here was introduced via an “expert” who based his conclusions not on verifiable scientific techniques, but on his own conjecture and suppositions. Flawed testimony by “experts” is particularly prone to jeopardizing a trial’s fundamental fairness because of the way a jury over-credits such testimony. *See Perry*, 147 Ill. App. 3d at 276 (“Expert testimony tends to ‘overpersuade’”); *Amaral*, 488 F.2d at 1152 (“Scientific or expert testimony” have “aura of special reliability and trustworthiness.”).

¹⁶ Jennifer Mnookin, et al., *The Need for Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725, 745, 749 (2010).

Because the type of “crime scene analysis” testimony at issue here is unreliable, its introduction at trial violates a defendant’s constitutional right to due process.

E. Non-scientific “crime scene analysis” testimony is reminiscent of other now-debunked forms of evidence.

This Court has long recognized the importance of admitting only reliable scientific in criminal prosecutions. *See, e.g., Lerma*, 2016 IL 118496, ¶ 24 (reversing prior holding disallowing expert testimony on eyewitness memory and identification because “today we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony”); *People v. Kidd*, 147 Ill. 2d 510, 538 (1992) (prohibiting evidence of statements made during dreams because “we are not aware of any scientific agreement, at present, that dreams can be explained in purely psychological, rather than physiological, terms”); *People v. Zayas*, 131 Ill. 2d 284, 294-95 (1989) (prohibiting evidence acquired via hypnosis because “its reliability is suspect, and it is not amenable to verification”); *People v. Eyler*, 133 Ill. 2d 173, 215 (1989) (“electrophoresis is generally accepted by forensic scientists as a reliable method of detecting genetic markers in blood”); *Baynes*, 88 Ill.2d at 241 (disallowing polygraph evidence and explaining that “while courts will go a long way in admitting expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established”) (quotation omitted).

The “expert” testimony at issue here lacked any scientific basis. Safarik and the State point out that the type of “crime scene analysis” he undertook in this case has been performed in many other cases, including by Safarik himself. But, to the extent non-scientific “crime scene analysis” testimony was ever considered reliable, we now know it is not. (*Supra* 16-20, *infra* 25-30).

This would be far from the first time that a form of “scientific” evidence was, at one time, used in criminal prosecutions, but later determined to be wholly unreliable. “Hair-comparison analysis” is a good example.

Hair-comparison analysis involved comparing a hair recovered from a crime scene with the hair of a suspect. A recent Department of Justice review of 3,000 criminal cases involving such analysis determined that the conclusions of FBI examiners were “scientifically invalid” 95% of the time.¹⁷ There have now been dozens of exonerations in which the original conviction rested on faulty hair-comparison analysis but DNA ultimately proved the defendant innocent.¹⁸

Arson science is another example. Historically, experts—often firefighters without scientific training—testified that features such as “deep charring, alligator charring (charring shaped like alligator skin), and crazed glass (finely fractured glass)” were proof of “a fire deliberately started with accelerant fluids.” *Han Tak Lee v. Houtzdale SCI*, 798 F.3d 159, 166 (3d Cir. 2015). It was also previously believed that “arson fires burn at higher levels of heat and intensity.” *Id.* at 167. But, “scientific developments” have shown that “the basis for all of this evidence is now invalid.” *Id.* These scientific developments have led to exonerations nationwide, including those of several Exoneration Project and Innocence Project clients.

The type of “crime scene analysis” evidence introduced in this case is unverifiable

¹⁷ President’s Council of Advisors on Sci. and Tech., *Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 3 (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf.

¹⁸ Gerald LaPorte, *Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science*, *NIJ JOURNAL* 279 (2018), available at <https://nij.gov/journals/279/pages/wrongfulconvictions-and-dna-exonerations.aspx>.

and unreliable. It is a form of evidence that is contrary to this Court’s prior holdings regarding the necessity that scientific evidence be credible. Like hair-comparison and outmoded arson “science,” it is the type of evidence prone to causing wrongful convictions.

* * * *

Illinois courts should exclude both criminal profiling and science-free “crime scene analysis” testimony due to their inherent unreliability. To the extent expert testimony is permitted regarding “crime scene analysis,” it should satisfy the requirements for scientific testimony under Rule 702. Justice requires no less.

IV. MARK SAFARIK’S WORK IS A PRIME EXAMPLE OF THE FRAILTIES OF “CRIMINAL PROFILING” AND NON-SCIENTIFIC “CRIME SCENE ANALYSIS”

Mark Safarik has testified as an expert in numerous cases. Indeed, that appears to be his primary qualification. 2018 IL App (2d) 151112, ¶ 78. An analysis of his work and his past testimony reveals him to be a prime example of the unreliability of “criminal profiling” and science-free “crime scene analysis.” It also reveals an apparent history of dissembling.

A. Safarik appears to inflate his qualifications in order to conceal that he has—at best—limited relevant credentials.

1. Safarik has seemingly misrepresented his education.

Safarik’s only scientific background is a bachelor’s degree in physiology, and even that has been overstated. Safarik has testified that he has a degree in *human* physiology. *Wisconsin v. Swope*, 762 N.W.2d 725, 733 (Wis. Ct. App. 2008). But, that is not true. Defense attorneys in 2009 “pulled Mr. Safarik’s college transcripts” and “discovered that

he did not have a degree in human physiology at all.”¹⁹ Instead his degree was in physiology from the agriculture and environmental department of a school where he took classes in *animal* physiology. *Id.* Even *after* that falsehood was revealed, Safarik continued to claim to have a degree in human physiology. *People v. Jackson*, 221 Cal. App. 4th 1222, 1228 (Cal. Ct. App. 2013) (2012 trial).

2. The fuzzy number of cases Safarik has analyzed.

While the State mentions Safarik’s work in 4,000 cases multiple times in its brief, there is reason to question that number. Safarik’s testimony about the number of investigations he has worked on has differed markedly in different cases.

In 2002 Safarik claimed to have been “involved in investigating over 3,000 homicides.” *Duvarado v. Giurbino*, 649 F. Supp. 2d 980, 993 (N.D. Cal. 2009); *see also* *Washington v. Carlson*, 132 Wash. App. 1058, at *24 (Wash. Ct. App. 2006) (“personally been involved in 3,000 homicide investigations”).

Two years later, in 2004, it was “over 5,000 homicide cases.” *Fortin*, 917 A.2d at 760 n.13 (N.J. 2007).

Two years after that, it was “more than 1,000 crime scenes.” *Swope*, 762 N.W.2d at 733.

By 2012, he was up to 4,000 homicide investigations. *Jackson*, 221 Cal. App. 4th at 1228.

And, six years later, at the 2015 trial in the instant case, he was still at 4,000 homicide investigations. (State’s Br. 12, 20.)

The fact that Safarik apparently cannot consistently state the number of cases he

¹⁹ Brent Turvey, *Criminal Profiling: Evidence, Experts, and Miscarriages of Justice*, THE PSYCHOLOGY AND SOCIOLOGY OF WRONGFUL CONVICTIONS 42 (2018).

has reviewed is a strong reason to question the reliability of conclusions purportedly based on that alleged experience.

B. Safarik has a history of molding the evidence to fit the accused.

The extent to which Safarik’s testimony is unreliable and unscientific is confirmed by the fact that, in different cases, he has drawn the exact opposite conclusion from identical evidence—inculping the accused each time.

1. The variable significance of a victim’s partial nudity.

In the instant case, Safarik concluded “there was *no* sexual motive in the crime, because Kathleen’s bra was covering half her breasts.” 2018 IL App (2d) 15111, at ¶ 71 (emphasis added). However, at a California trial, Safarik concluded that, because the victim’s top was pulled down to partially expose her breasts, “the motive for this crime was sexual assault.” *People v. Jennings*, No. B222959, 2011 WL 6318468, at *10 (Cal. Ct. App. Dec. 19, 2011) (emphasis added).

2. The variable significance of the ransacking of a crime scene.

In *People v. Lazarus*, Safarik testified that a crime scene had been staged to look like a burglary. 238 Cal. App. 4th 734, 745 n.10 (Cal. Ct. App. 2015). He based that conclusion on “the fact that little property had been taken or set aside and that very little inside the condominium had been disturbed, [which] suggested the motivat[ion for the] crime was not burglary.” *Id.* Likewise, in *Jackson*, “the lack of ransacking and theft ... [were] inconsistent with a motive of financial gain.” 221 Cal. App. 4th at 1232. However, in *Fletcher v. Dobson-Davis*, Safarik reached the contrary conclusion, finding that the exact opposite condition of a crime scene, one showing “an excessive amount of searching and excessive ransacking,” *also* meant that the crime scene was staged to look like a burglary. No. CV 09-9107, 2013 WL 5591940, at *9 (C.D. Cal. Oct. 10, 2013), *aff’d sub*

nom. Fletcher v. Soto, 693 F. App'x 724 (9th Cir. 2017).

3. The variable significance of a stolen car.

Sometimes, according to Safarik, the fact that a victim's vehicle was *not* stolen means that the crime must not have been financially motivated. *Jackson*, 221 Cal. App. 4th at 1232 (“the failure to take her vehicle ... is inconsistent with a financial gain crime”). However, the theft of a victim's vehicle *also* means that the crime was *not* financially motivated. *Lazarus*, 238 Cal. App. 4th at 745 n.10 (“burglars do not generally steal vehicles”).

4. The variable significance of a victim's clothing being in disarray.

To Safarik, the fact that a victim's clothing “was not in disarray” indicates that the offender's motive was not sexual assault. *Jackson*, 221 Cal. App. 4th at 1232.

But, the fact that the victim's clothing *was* in disarray *also* means that the motive was not sexual assault. 2018 IL App (2d) 151112, ¶ 71 (no sexual motive where victim's bra out of place, bra strap twisted, and sock twisted).

Except, of course, when the victim's clothing being in disarray actually *does* mean the motive was sexual assault. *Jennings*, 2011 WL 6318468, at *10 (“based on O'Keefe's tube top having been pulled down, there was ‘a sexual assault piece to this homicide’”).

5. The variable significance of the degree of violence employed.

Safarik has repeatedly opined that an offender's use of a high degree of violence in committing a homicide indicates that he or she personally knew the victim. *Duvarado*, 649 F. Supp. at 995 (“excessive level of violence, or overkill, suggested that the anger was personalized”); *Fletcher v. Small*, No. CV 09-9115, 2013 WL 5524816, at *10 (C.D. Cal. Oct. 4, 2013) (“ferocity of the attack ... indicates that the offender came to this residence

for the express purpose of killing him. The nature and style of this murder was a personal one”); *New Jersey v. Lenin*, 406 N.J. Super. 361, 378 (N.J. App. Div. 2009) (“In Safarik’s view, whoever killed Fowler was very angry, because her killer struck her many more times with a blunt object than was necessary”).

However, according to Safarik, using a low degree of violence *also* means that the victim was familiar with the offender. *Jackson*, 221 Cal. App. 4th at 1231 (“When victims of strangulation have minimal or no blunt force injuries, it indicates that the victim did not perceive the risk to which she was exposed until it was too late”).

C. Safarik’s conclusions have proven false.

Unsurprisingly, based on their lack of reliable foundation, Safarik’s conclusions have been exposed as incorrect in at least one other case.

1. The wrongful conviction of Raymond Jennings.

In 2000, Michelle O’Keefe was murdered in a Los Angeles parking garage.²⁰ Raymond Jennings, an Iraq war veteran and the security guard who found her body, was arrested, but the case against him was weak. *Id.*

Enter Mark Safarik.

Safarik concluded that the only possible motive for the murder was sexual assault, notwithstanding the fact that no forensic evidence actually suggested a sexual assault occurred. *Jennings*, 2011 WL 6318468, at *7, 8, 10. Via convoluted reasoning based on the facts that O’Keefe had no boyfriend or criminal record, her car window was rolled down a few inches, \$100 was in the car, blood spatter suggested that the shooter was outside

²⁰ Marisa Gerber, *How an Ex-FBI Profiler Helped Put an Innocent Man Behind Bars*, L.A. TIMES (July 20, 2017), available at <http://documents.latimes.com/read-top-prosecutors-letter-judge-explaining-new-evidence-casting-doubt-raymond-lee-jennings-guilt>.

of the car, and the victim's top was partially pulled down, Safarik told the jury there could be no motive other than sexual assault—the motive was certainly not financial. *Id.* at 9-10. The jurors were highly focused on Safarik's testimony, specifically requesting a copy during deliberations. Jennings was convicted and sentenced to forty years in prison. *Id.*

Six years later, the same District Attorney's Office that prosecuted Jennings wrote a letter to a judge asking that he be released from prison because “[n]ewly discovered evidence has been revealed that suggests a person or persons other than Mr. Jennings may have murdered Ms. O’Keefe.”²¹

It turns out that DNA recovered from under the victim's fingernails excluded Jennings, but matched another unknown male; ballistics testing confirmed that the murder weapon was not Jennings', Jennings' clothing had no blood or gunshot residue on it, and “no physical evidence collected from Ms. O’Keefe, [her] Mustang, the area around the Mustang, or from Mr. Jennings connected him to the murder.” *Id.* at 11. Indeed, instead of a sexually-motivated attack, the District Attorney's Office concluded that the evidence actually indicated that “Ms. O’Keefe may have been killed by gang members during a robbery”—the exact opposite of what Safarik had surmised. *Id.* at 18.

In granting Jennings post-conviction relief, the California court explained that “Safarik's expert testimony regarding a sexual motive was the cornerstone of a case based purely on circumstantial evidence.” *In re Raymond Lee Jennings*, MA033712 at 10 (Super. Ct. of Cal., Jan. 30, 2017). “There is no doubt that the prosecution's case would have been decidedly different without Safarik's testimony regarding a possible sexual motive.” *Id.*

²¹ Letter from Chief Deputy District Attorney John Spillane to the Honorable James R. Brandlin, June 22, 2016, *available at* <http://documents.latimes.com/read-top-prosecutors-letter-judge-explaining-new-evidence-casting-doubt-raymond-lee-jennings-guilt>.

Notably, when Safarik was told of the District Attorney's new conclusion, he withdrew his previous opinion and filed a declaration in support of Jennings' habeas petition. *Id.* at 8. Safarik admitted his analysis was based on assumptions. Specifically, he stated he had "assumed" the police investigation was "comprehensive" and "thorough," but that he now doubted that that was the case.²² He concluded, "if I had been provided with the entirety of the information ... I am not confident I would have reached all of the same conclusions or opinions that I expressed in my report or on the witness stand." *Id.*

It is certainly admirable that Safarik admitted that he was wrong and admitted that he based his earlier opinions on certain faulty assumptions. But, his effort to deflect blame onto law enforcement is troubling. Indeed, it comes close to an admission that his "expert" opinions are based on what the prosecution has decided his opinions should be: when law enforcement and the State were seeking to convict Jennings, it was Safarik's "expert" opinion that crime scene analysis evidence supported that conviction; but after law enforcement and the State went to a judge seeking to have Jennings' conviction overturned, Safarik's opinion shifted to align with the State's new position.

The same could prove true here. As in *Jennings*, Safarik's testimony in this case was based entirely on his subjective interpretation of the results of investigative work performed by law enforcement and the State. Also like *Jennings*, there appears to have been no direct evidence linking the Defendant to the crime charged. Safarik was wrong in the *Jennings* case. He engaged in the exact same type of non-scientific "crime scene analysis" here. There is no reason to believe he got it right this time.

²² Dec'1 of Mark Safarik in Support of Jennings Petition for Habeas Corpus (Aug. 24, 2016), *available at* <http://bit.ly/Safarik>.

CONCLUSION

Criminal profiling and non-scientific “crime scene analysis” testimony are unreliable. Their admission subverts the truth-seeking process and instead encourages a fact-finder to convict a defendant based on nothing more than the conjecture of an “expert” witness.

For all of the reasons outlined in this brief, *amici* the Exoneration Project and the Innocence Project respectfully urge this Court to:

1. Affirm the appellate court’s ruling that the criminal profiling testimony offered in this case was inadmissible;
2. Answer the question left open in *Mertz* and hold that all criminal profiling testimony is inadmissible in Illinois;
3. Affirm the appellate court’s ruling that the “crime scene analysis” testimony offered below was inadmissible;
4. Hold that “crime scene analysis” testimony must have a scientific basis and satisfy the standard for scientific, expert testimony under Rule 702.

Dated: July 12, 2019

Respectfully submitted,

THE EXONERATION PROJECT and
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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statements of points and authorities, the Rule 341(c) certification of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 30 pages.

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