

*State's Attorney*

STATE OF MARYLAND

CRIMINAL CASE NO. K-01-1368

v.

IN THE CIRCUIT COURT

DWAYNE CORNELIUS NICHOLSON

FOR WICOMICO COUNTY

Defendant

STATE OF MARYLAND

**Motion in Limine to Exclude Fingerprint Evidence**

Dwayne Cornelius Nicholson, Defendant, through his attorney, John K. Phoebus, moves this honorable Court *in limine* to exclude the testimony of the State's proffered expert witness, Alexander Mankevich, a latent print examiner employed by the Maryland State Police, pursuant to Rule 5-702 and the authorities cited herein, and, in support thereof, states that:

1. The State's case against the Defendant herein is substantially based upon an alleged "identification" of the Defendant from fingerprint evidence purportedly recovered from the crime scene.
2. It is expected that, if called to testify herein, the State's proffered expert, Alexander Mankevich, will testify consistently with one of his reports dated May 18, 2001, October 3, 2001, or February 27, 2002, copies of which are attached hereto, collectively, as **Exhibit A**. The Defendant objects to the admission of this opinion evidence and does not intend to waive his objection to this evidence's introduction by providing this Court with a copy of the contested reports.
3. Serious doubt about the reliability of fingerprint evidence was raised in the recent decision of the United States District Court for the Eastern District of Pennsylvania in the case of *United States v. Plaza*, 179 F.Supp.2d 492 (E.D. Pa. Jan. 7, 2002) (hereinafter "*Plaza*"). A copy of this opinion is attached hereto as **Exhibit B**. In this case, the esteemed Judge Louis H. Pollak, former Dean of Yale Law School, held that "experts" may not testify that a defendant's fingerprints "match" latent fingerprints lifted from a crime scene. This holding was made under the more liberal federal *Daubert* standard, suggesting that a even a stricter holding may be appropriate under Maryland's *Frye-Reed* test.
4. Judge Pollak's decision limited the government to offering evidence as to the examination of an unknown fingerprint and the examiner's comparison of that

JOHN K. PHOEBUS  
904 W. MAIN ST.  
CRISFIELD  
MARYLAND 21817  
(410) 968-9200

print to a known fingerprint, but precluded the examiner from testifying that an unknown fingerprint "matched" that of a known suspect. While Judge Pollak's decision certainly is not binding on this honorable Court, it is persuasive authority that raises grave questions on the validity of latent fingerprint analysis. Such concerns warrant a new look at what has previously been a routine admissibility of expert opinion testimony on the "matching" of fingerprints.

5. Rule 5-702 sets for the standard for the admission of scientific evidence in Maryland:

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

Rule 5-702. The admissibility of scientific evidence in Maryland is governed by the *Frye-Reed* test, named after the leading Maryland case on this matter, *Reed v. State*, 283 Md. 374 (1978), which adopted the then-controlling federal standard stated in *Frye v. United States*, 293 F. 1013 (1923). Under this test, general acceptance within the relevant scientific community must be demonstrated or judicially noted before new or unsettled scientific evidence may be received.

6. While challenges under the *Frye-Reed* test are ordinarily reserved for scientific techniques that are new and unsettled, the revelations exposed in the *Plaza* decision merit a fresh look at the field of latent fingerprint analysis. This is especially so given the concerns that Judge Pollak raised about the lack of objectivity in latent print examination and questions raised about whether latent print analysis has been accepted by any community, including scientific communities, other than law enforcement.

7. Under the *Frye-Reed* test, before a scientific opinion will be received at trial, the basis for that opinion must be generally accepted within the expert's scientific field. See *Reed*, 283 Md. at 380-81. While the federal courts no longer adhere to the "general acceptance" requirement first set forth in *Frye*, the current *Daubert* standard encompasses what was the litmus test for admissibility under *Frye*—general acceptance—as one of four factors to be considered. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526

U.S. 137 (1999). The *Daubert* analysis is generally considered to be a more liberal test than *Frye-Reed* and more likely to favor admissibility of evidence that has not yet reached general acceptance. The Court of Appeals has rejected any suggestion that Maryland adopt this more liberal federal standard. See *Burrall v. State*, 352 Md. 707, 737 (1999) (rejecting an hypnotically enhanced testimony and declining an opportunity to overrule *Reed* in favor of the *Daubert* standard).

8. In the portion of his opinion addressing the “general acceptance” factor under *Daubert*, Judge Pollak questioned whether latent print analysis has ever been accepted by a relevant scientific community. While acknowledging that “law enforcement officials uniformly place strong reliance on the fingerprint examiner community’s acceptance [of latent print analysis]”, *Plaza*, 179 F.Supp.2d at 515, Judge Pollak doubted that the community of persons engaged in latent print examination actually constituted a “scientific community” in the sense required under the fourth *Daubert* factor (and, by extension, the sole *Frye-Reed* test). Judge Pollak’s review of comprehensive evidence about latent print analysis disclosed only that other fingerprint examiners, whom he referred to as technicians—not scientists, accepted latent print analysis. No evidence was offered or found that a “scientific community” had accepted this process. See *Plaza*, 179 F.Supp.2d at 514-15.

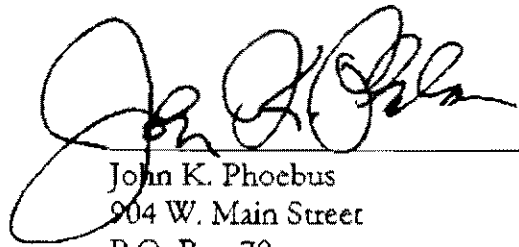
9. Significantly, the *Plaza* court found that latent print analysis was not an “objective” process when it reached the stage of identifying a suspect. Troubling to the court was a study conducted by Mr. Stephen Meagher, the supervisor of the FBI’s fingerprint unit. In a controlled experiment, Mr. Meagher sent latent fingerprints similar to those routinely recovered from a crime scene, along with a “ten-print card” of rolled, inked fingerprints from the person who left the latent print, to the fingerprint labs of all 50 states. Of the 34 responses received by Mr. Meagher, 9 failed to make an identification of lifted print to the known prints provided. This error rate of 26% was disputed by the Government, but given weight by Judge Pollak. See *Plaza*, 179 F.Supp.2d at 496-97 and 512-13. The lack of scientific studies proving the validity of fingerprint analysis is exemplified by the recent solicitation of the federal government’s National Institute of Justice of research testing the “validity of individuality in friction ridge examination [fingerprints]” *Id.* at 506 n.17, suggesting that such research does not currently exist.

10. The Defendant requests that this honorable Court take judicial notice of the evidence presented to the *Plaza* court as summarized by Judge Pollak in his opinion. Such troubling questions about the validity of latent print analysis certainly would seem to require the State of Maryland to submit to this honorable Court proof that latent print analysis has the general acceptance required by Rule 5-702 and *Frye-*

*Reed.* Absent such a showing, the Defendant requests that any testimony as to the matching of a latent print from the alleged crime scene herein to the Defendant be excluded.

11. The State will likely request that this honorable Court take judicial notice of the reliability of fingerprint evidence. The Defendant points out that Rule 5-201 permits a court to take judicial notice of a fact "capable of accurate and ready determination by resort to sources *whose accuracy cannot reasonably be questioned.*" Judge Pollak's well-researched opinion in *Plaza* demonstrates that the accuracy of fingerprint evidence is certainly capable of reasonable questioning. It is thus, post-*Plaza*, not a proper subject of judicial notice.

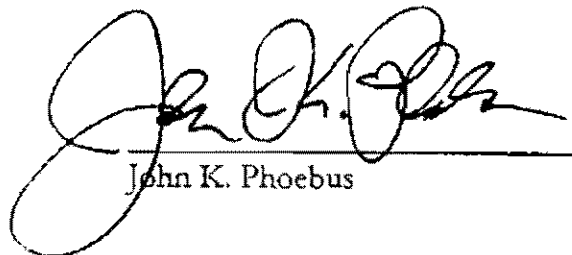
WHEREFORE, the Defendant respectfully requests that this honorable Court exclude any testimony as to the matching of fingerprints or the identification of the Defendant from latent fingerprints in this matter.



John K. Phoebus  
904 W. Main Street  
P.O. Box 70  
Crisfield, Maryland 21817  
(410) 968-9200  
Attorney for the Defendant

**Certificate of Service**

I hereby certify that on this 28th day of February, 2002, an exact copy of the foregoing document was hand delivered to Andrew M. MacDonald, Esquire, Assistant State's Attorney for Wicomico County, P.O. Box 1006, Salisbury, Maryland 21803.



John K. Phoebus

STATE OF MARYLAND \* IN THE CIRCUIT COURT  
 \*  
 V. \* FOR WICOMICO COUNTY  
 \*  
 DWAYNE NICHOLSON \* STATE OF MARYLAND  
 \*  
 \* CASE NO. K011368

\* \* \* \* \*  
RESPONSE TO MOTION IN LIMINE TO EXCLUDE  
FINGERPRINT EVIDENCE

The State of Maryland by Andrew M. MacDonald, Assistant State's Attorney, respectfully requests this Honorable Court deny the Defendant's Motion In Limine and take judicial notice that fingerprint identifications are reliable and states in support thereof:

1. In Reed v. State the Maryland Court of Appeals stated: "On occasion, the validity and reliability of a scientific technique may be so broadly and generally accepted in the scientific community that a trial court may take judicial notice of its reliability. Such is commonly the case today with regard to ballistics tests, fingerprint identification, blood tests, and the like." Reed v. State, 283 Md. 374, 380 (1978).

2. In Murphy v. State The Maryland Court of Appeals took judicial notice of the fact that "... the use of fingerprints is an infallible means of identification." Murphy v. State, 184 Md. 70, 85-86 (1944).

3. Other state courts have held that fingerprint identification procedures are reliable and admitted fingerprint identifications into evidence as far back as 1911. People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911); State v. Cerciello, 86 N.J.L. 309, 90 A. 1112 (1014); People v. Roach, 215 N.Y. 592, 109 N.E. 618 (1915).

4. Maryland courts have routinely permitted fingerprint identifications to be admitted into evidence. Debinski v. State, 194 Md. 355 (1950); McNeil v. State, 227 Md. 298, 300 (1961); Breeding v. State, 220 Md. 193, 199 (1959); Hall v. State, 69 Md. App. 37 (1986); Lawless v. State, 3 Md. App. 652, 656-60 (1968); Rogers and Hawkins v. State, 7 Md. App. 155 (1969).

5. The Plaza opinion cited by the defense notes that all other federal courts that have addressed the issue of whether fingerprint identifications are admissible as expert

testimony under Federal Rule of Evidence 702 since the Supreme Court's Daubert ruling have concluded that fingerprint testimony should be admitted and some have taken judicial notice of this fact without a hearing. United States v. Plaza, 179 F. Supp. 2d 492, 500-501 (E.D. Pa. Jan. 7, 2002).

6. The Plaza opinion is a single aberration contradicting years of judicial decisions accepting the reliability of fingerprint identifications and the opinion is not binding on this Court.

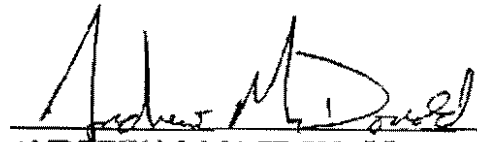
7. Judge Louis Pollak is currently reconsidering his own ruling in Plaza.

8. Fingerprint identifications are so reliable and generally accepted in the scientific community and in the courts that this Court should take judicial notice of the reliability of fingerprint identifications without a hearing.

9. The expert in the captioned case used the widely accepted ACE-V method of fingerprint identification.

Wherefore, the State respectfully requests this Honorable Court deny the Motion In Limine without a hearing and take judicial notice that fingerprint identifications are reliable.

Respectfully submitted,

  
ANDREW M. MACDONALD  
Assistant State's Attorney

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st day of March, 2002, I faxed and mailed an exact copy of the foregoing to John Phoebus, 904 W. Main Street, Crisfield, Maryland 21817.

  
ANDREW M. MACDONALD

STATE OF MARYLAND	*	IN THE CIRCUIT COURT
	*	FOR WICOMICO COUNTY
V.	*	STATE OF MARYLAND
DWAYNE NICHOLSON	*	CASE NO. K011368

\* \* \* \* \*

**ORDER**

Having considered the Defendant's Motion In Limine and the State's response, it is this \_\_\_\_ day of March, 2002, by the Circuit Court for Wicomico County, Maryland, hereby ORDERED that the Defendant's Motion In Limine to Exclude Fingerprint Identification is DENIED and the Court takes judicial notice of the following facts:

1. Fingerprints are unique;
2. Fingerprints are permanent;
3. The ACE-V fingerprint identification method is a reliable scientific procedure.

\_\_\_\_\_  
 JUDGE