

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 090275  
INDICTMENT NO. 22-06-0798-I

STATE OF NEW JERSEY,	:	<u>CRIMINAL ACTION</u>
Plaintiff-Appellant,	:	On the Grant of a Motion for Leave
v.	:	to Appeal an Order of the Superior
	:	Court of New Jersey, Appellate
	:	Division.
	:	
TYBEAR MILES,	:	
	:	
Defendant-Respondent.	:	Sat Below:
	:	
	:	Hon. Jessica R. Mayer, P.J.A.D.
	:	Hon. Patrick Dealmeida, J.A.D.

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BRIEF ON BEHALF OF AMICUS CURIAE THE NEW JERSEY  
OFFICE OF THE PUBLIC DEFENDER

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## **PRELIMINARY STATEMENT**

The use of black-box software, including AI software, is proliferating in criminal prosecutions. The programs produce results inculcating a defendant, but most often no one in the criminal justice system really knows how they work. Trusting that these often secretive, often proprietary programs are good enough to rely on to build a prosecution, the State buys some of them from companies, borrows some from other agencies, and develops some in-house.

Although the technology is new and often complicated, the State's discovery obligations are not. The State has to disclose all relevant information. That includes information that sheds light on the reliability of an identification, that impeaches a police investigation, or that points to theories of third-party guilt.

Recognizing those basic principles in the context of facial recognition technology, in 2023 the Appellate Division decided State v. Arteaga, in which it held that the defense was entitled to exactly that: all the information, particularly described, necessary to understand the reliability of the facial recognition technology used by the State and its impact on the case against the defendant.

Although the State did not appeal Arteaga, and now disclaims an intent to undermine it, it is now litigating exactly the issue decided, correctly, by that

court. The State is seeking to be excused from providing even the most basic information about the facial recognition systems used in the case against Tybear Miles, including the name of the system or a report from the operator that ran it. This is unacceptable.

Criminal trials cannot be prosecutions by black box. Defendants are entitled to know, and meaningfully challenge, the evidence against them. And courts and the public are entitled to know how reliable these systems, and the convictions they are used to garner, are. The trial court order compelling discovery about the facial recognition system used in this case must be affirmed.

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**<sup>2</sup>

On June 7, 2023, the Appellate Division decided State v. Arteaga, holding that defendants are entitled to discovery about facial recognition technology (“FRT”) used to develop the case against them. 476 N.J. Super. 38 (App. Div. 2023). The court held that the discovery sought by the defendant in that case—which related to the use of an FRT in 2019—was relevant because it impeaches the police investigation and provides other suspects for consideration: “[t]he reliability of the technology bears direct relevance to the

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<sup>2</sup> Due to the procedural posture of this case, the two sections have been combined for clarity.

quality and thoroughness of the broader criminal investigation, and whether the potential matches the software returned yielded any other viable alternative suspects to establish third-party guilt.” Id. 61. In coming to this conclusion, the Appellate Division relied on an expert report submitted by Mr. Arteaga in which Dr. Derek Riley, the Director of Computer Science at the Milwaukee School of Engineering, “opin[ed] about the accuracy issues associated with FRT and why the defense needed the discovery.” Id. at 49. (OPDa 1-6)

The Hudson County Prosecutor’s Office (HCPO) did not appeal Arteaga to this Court. On remand, HCPO represented that it could not obtain the discovery ordered to be disclosed. Dana DeFilippo, A Hollow Victory in Fight to Bring Transparency to Cops’ Use of Facial Recognition Technology, N.J. Monitor (Aug. 21, 2024). Mr. Arteaga pleaded guilty to an almost time-served sentence. Ibid. The case ended.

On June 5, 2021, there was a shooting death in Jersey City. According to a police report, on June 6, 2021 a confidential informant (“CI”) “that has proved to be true and reliable” was brought into the investigation. (Def. Brief. Mtn. to Compel, Ex. A) The CI watched a video not of the shooting, but of activity of two men apparently near in time and place to the shooting. Ibid. According to the officer, “the CI was immediately able to identify [an] individual on [a] bicycle as a person who is known to him/her as ‘Fat Daddy’

and utilizes the Instagram handle of” Fatzbytheway. Ibid.<sup>3</sup> The CI gave information about Fat Daddy’s residence, girlfriend, and girlfriend’s vehicle.

Ibid.

No information was provided about the CI’s reliability and veracity other than the bare assertion that the CI has given true information in the past and no information was provided about the CI’s basis of knowledge about the shooting or the identity of the shooter.

The officer retrieved a photograph from Fat Daddy’s Instagram. Ibid.

According to the officer, he then ran the image through an FRT and got a “match” to the defendant:

Utilizing the NJ/NY HIDTA Facial Recognition module, a law enforcement database tool for facilitating mug shot profiles and facial recognition software, I was able to import the above mentioned photo of “Fat Daddy.” After importing said photograph into the Facial Recognition Module, a search was conducted for a match which revealed a positive match for Tybear Miles[.]

Ibid.

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<sup>3</sup> That video is not part of the record before this Court, so no comment can be made as to the quality of that video, which would impact the reliability of the identification. See general Vicki Bruce et al., Verification of Face Identities from Images Captured on Video, 5 J. Experimental Psych. 339, 342 (1999); A. Mike Burton et al., Face Recognition in Poor-Quality Video: Evidence from Security Surveillance, 10 Psych. Sci. 243, 245 (1999).

The CI was “[l]ater . . . shown a mug shot” of Miles and “positively confirmed the individual in the photograph as the individual he/she knows as Fat Daddy. Ibid.

As a result of the CI’s confirmation that the person matched through the FRT was the person he believed he saw on the video, the police approached other witnesses familiar with Mr. Miles. (1T 14-4 to 7) It seems that those people identified Mr. Miles in videos other than the one the CI saw. No information is in the record about what the officers said to these other witnesses before, during, or after their identifications.

On June 11, 2024, Mr. Miles filed a motion to compel the same discovery sought in Arteaga. The State made some inquiries about the discovery sought and eventually provided two pieces of discovery. The first piece of discovery seems to be some sort of record of two different FRT searches that were run. One, run through “Matching Engine” NEC seems to have returned many other people as better matches for the probe image than Mr. Miles. (HCPO Supplemental Opp. Mtn to Compel, Ex. A) Mr. Miles is ranked 8 on the list. Ibid. Another search, run through “Matching Engine” Rank One returns five different images of Mr. Miles as well as five other people. Ibid.

The second piece of information provided by the State is a letter from someone who works at the New Jersey State Police. That person says there is absolutely no record of the search:

I have searched our system and we have no record of a request related to this case.

We have been using the same email address and documentation system for requests since the inception of our initiative. We have no record of that defendant's name or the case number you provided. As such, we unfortunately have nothing we can offer to assist you with this case.

(HCPO Supplemental Opp. Mtn to Compel, Ex. B)

Given that NJSP said it has no record of the search, it is very unclear where the search results have come from.

The State argued in the trial court that it was not attempting to overturn Arteaga, but rather that this case is different from Arteaga because the CI's information would have inevitably led police to the other witnesses who identified Mr. Miles from different videos. (1T 20-15 to 21-5)

The trial court granted Mr. Miles's motion to compel, holding that Arteaga governed the case. The court found "that Defendant's request for FRT discovery is specifically tailored and in accordance with the same request in Arteaga. This Court further finds that the FRT discovery is important based on its novelty, and as a result, Defendant may challenge the State's investigation and use the FRT discovery for possible impeachment purposes." (Trial court

op. 13-14) The trial court denied the State’s motion for reconsideration. The Appellate Division subsequently denied the State’s motion for leave to appeal, holding that Arteaga governed. This Court granted the State’s motion for leave.

### **LEGAL ARGUMENT**

#### **WITHOUT ANY INFORMATION ABOUT THE FACIAL RECOGNITION TECHNOLOGY, THERE CAN BE NO FAIR TRIAL.**

Throughout the state, prosecutors and law enforcement officers are regularly using FRT to generate leads in their cases. Arteaga correctly grants defendants information about FRT when the State used FRT to develop its case against them. Arteaga is a critical protection for defendants against the proliferating use of completely opaque forensic software, of varying quality, that is relied on in developing prosecutions. Whether or not the State believes FRT to be important to the case or chooses to admit direct evidence of the FRT at trial does not change the fact that FRT is relevant to any case in which it was used.

Each item that the defendant was given access to in Arteaga is relevant to understanding the reliability of the FRT and therefore the reliability of the “match” result that suggested that Mr. Miles is the man on the video seen by the CI. That information is, in turn, relevant to any subsequent identification procedure, theories of third-party guilt, and to the thoroughness of the police

investigation. A trial in which a defendant is denied that information is one in which the defendant is unable to fully investigate his case, meaningfully present a defense, meaningfully cross-examine the witnesses against him, is lacking due process, and is fundamentally unfair. U.S. Const. amend. VI, XIV; N.J. Const. art. I, ¶¶ 1, 10. The trial court order granting Mr. Miles access to that information must be affirmed.

**A. The Reliability of Facial Recognition Technologies Are Highly System and Analyst Dependent.**

Before delving into how FRT works, it is important to understand that not all FRT is created equal. The National Institute of Standards and Technology (NIST)—the federal agency tasked with ensuring accuracy and standardized measurements in technology and science—has found that facial recognition software providers on the market may have error rates several orders of magnitude higher than the leading providers. Nat’l. Inst. of Standards & Tech., Ongoing Face Recognition Vendor Test (FRVT) Part 2: Identification 9 (2018) (OPDa 7-192). “It is not possible to give a one-line answer to the question of how good face recognition is” because the accuracy of these systems are “inextricably linked to the properties of the images (both the search photo and database faces) being used” and “the algorithm.” Nat’l Academy of Sciences, Facial Recognition Technology: Current Capabilities, Future Prospects, and Governance 52 (2024) (OPDa 192-352). In other words,

some systems are unreliable, and some uses of even more reliable systems can yield unreliable results, depending on features of the images and the database.

Although the quality varies greatly, and the details of how the FRT operates do as well, some basic principles apply to all systems. Below is a general sketch of how most facial recognition systems work and concerns about their reliability. The State has never challenged any of the descriptions of these systems and the challenges to their reliability in this case or in Arteaga, arguing instead only that on the facts of the case, discovery about these systems is unnecessary.

First, a “probe,” or target face, must be selected from footage of the crime or perpetrator. NAS, Current Capabilities at 41. The quality of that image varies based on the quality of the camera, lighting conditions, and angles available. Id. at 125. The accuracy of face recognition is directly affected by the quality of the photos being searched — error rates will be greater when two photographs contain different lighting, shadows, backgrounds, poses, or expressions. Id. at 31. See also P. Jonathon Phillips, et al., An Introduction to the Good, the Bad, & the Ugly Face Recognition: Challenge Problem 346, Nat’l Inst. Of Standards & Technology (Dec. 2011) (noting only 15 percent accuracy for face image pairs that are “difficult to match”) (OPDa 353-360). FRT can be extremely poor at identifying a person

in a low-resolution image, Min-Chun Yang, et al., Recognition at a Long Distance: Very Low Resolution Face Recognition and Hallucination, IEEE 2015 Int'l Conf. On Biometrics 237–42 (2015) (OPDa 361-366), or a low-resolution video, Nat'l Inst. Of Standards & Tech., Face in Video Evaluation: Face Recognition of Non-Cooperative Subjects (2017) (OPDa 367-481)

Pictures taken from surveillance videos, such as in this case, are often of low-resolution, are of subjects not deliberately posing for a camera, and lead to less accurate results. Face in Video Evaluation at 2 (“High accuracy recognition of passively-imaged subjects is only achievable with: a) a small minority of the algorithms tested here; b) a dedicated and deliberate design effort that must embed optical, architectural, human factors, operations research, and face recognition expertise; c) galleries limited to small numbers of actively curated images; and d) field tests with empirical quantitative calibration and optimization.”). See also Shahina Anwarul and Susheela Dahiya, A Comprehensive Review on Face Recognition Methods and Factors Affecting Facial Recognition Accuracy, Proceedings of the Int'l. Conf. on Recent Innovations in Computing 2019, 494, 497-98 (2019) (OPDa 482-501) (pictures “taken from surveillance video cameras” have low image resolution, which “drastically degrade[s]” FRT performance).

Second, images are often edited. Some edits are designed to “normalize” the face, artificially rotating it into a frontal, well-illuminated view.” Davide Castelvechi, Beating Biometric Bias, Nature, November 19, 2020. Other edits are less benign and subject to more human judgment, and “often amount to fabricating completely new identity points not present in the original photo.” Clare Garvie, Garbage In, Garbage Out: Face Recognition of Flawed Data, Georgetown Ctr. On Privacy & Tech., May 16, 2019, <https://www.flawedfacedata.com/>. Notable examples by the New York Police Department include pasting other people’s features over the probe’s face, copying and mirroring a partial face over the Y axis, and blurring the photo. Ibid. Such practices lead to less accurate matches. Ibid.

Third, that target image is converted into a searchable file. Older FRTs do this by mapping the distances between certain facial features and distilling that information into a file. NAS, Current Capabilities at 34. More recently, deep convolution neural networks have been developed, which use deep learning techniques to feed an image through a many-layered computation, which eventually creates a “template.” Id. at 35-38. The resultant file or template is commonly referred to as a “faceprint” or a “face template” — “a biometric marker that can be used to recognize or identify a person.” Beating Biometric Bias.

Fourth, the actual search must occur, comparing the file made from the probe photograph to a database of photographs. That is the part of the process in which a computer algorithm compares two images. The algorithm is trained to make that comparison by being given pairs of face images of the same person; “Over time, the algorithm learns to pay more attention to the features that were the most reliable signals that the two images contained the same person.” Clare Garvie et al., The Perpetual Lineup: Unregulated Police Face Recognition in America (2016) (OPDa 502-652). Because the algorithms, which are of varying quality, learn through these training photos, the set of training photos used greatly impacts the accuracy of the system; a system can accurately identify only photos that are similar to those it has trained on. Report of Derek Riley at 4-5 (OPDa 4-5); Sidney Perkowitz, The Bias in the Machine: Facial Recognition Technology and Racial Disparities, Mass. Inst. Tech. (Feb. 5, 2021) (OPDa 653-668). Concerningly, false positive and false negative errors are higher for Black individuals, East Asians, South Asians, and women. NAS, Current Capabilities at 56-62 (2024). As the National Academy of Sciences notes, all “known cases where wrongful arrests have been made on the basis of FRT involve Black individuals identified using FRT.” Id. at 83 (emphasis added).

Accuracy issues arise not only based on the training photos and the algorithm used, but also based on the database a probe photo is searched against. Facial recognition systems have an increased risk of a false positive match when searching larger databases, in part because so many people within a given population look like one another. NAS, Current Capabilities, at 50-53. This problem is exacerbated if pictures are not regularly purged and updated within the database, as older photos lead to less accurate results. NIST, Part 2, at 7. In some cases, certain people's faces appear multiple times within the database, as Mr. Miles's seems to have appeared, skewing the results in favor of them appearing as a match.

Fifth, once the algorithm has compared the probe image with the thousands of other images contained within the database, it produces a list of potential matches, which is commonly referred to as a "candidate list." NAS, Current Capabilities, at 9. The candidate list generally includes a ranked score, generated by the algorithm, "ranked in order of likelihood of correct identification[.]" Id. at 6. "Importantly, similarity scores cannot be interpreted as likelihoods, probabilities, or a 'percentage match.'" Id. at 40. "[E]ach developer emits scores on their own propriety interval . . . [a]s such, there is no universal interpretation of when a similarity between two faces is 'strong'[".]" Ibid.

FRTs used in criminal investigations are made to return a set number of matches, without any requirement that the returned images need to meet a certain threshold of similarity. Id. at 48-49. Because an FRT being used in a criminal investigation will always return multiple matches, some of which will necessarily not be the correct match, “the false positive identification rate (FPIR) of the FRT engine is 100 percent.” Id. at 48 (emphasis added).

Moreover, FRTs return results even when the target is not actually in the database. Therefore, “[t]he primary source of false matches is when the person in a search photo has no match in the database.” Id. at 46. In criminal investigations, “[t]he system is configured without a threshold, so the algorithm returns candidates whether the subject is in the database or not.” Ibid. In other words, if the perpetrator is not in the database, an innocent person who looks like the perpetrator will be returned as a match. Therefore, the composition of the database is crucially important. A driver’s license database will return an innocent person if the perpetrator does not have a driver’s license. A mugshot database of people arrested in New York or New Jersey will return an innocent person if the perpetrator has never been arrested in New York or New Jersey. FRTs “do not yet have the capability to report ‘search photo does not exist in the database’ without downgrading their ability to find true matches.” Id. at 42.

Sixth, a human must choose which photo from the candidate list will be forwarded to the investigating agency as the “match.” Deciding which candidate is a possible match is a decision made by person. Because of this, operator training is essential to managing the risks of facial recognition systems. NAS, Current Capabilities, at 16, 129. However, there is no specific degree or training for this role. Because the degree of expertise in conducting facial comparisons is highly variable, the accuracy of this process is highly variable. Subjective protocols or methods, such as facial recognition, are “more susceptible to human error, bias, and performance variability across examiners.” President’s Council of Advisors on Sci. & Tech., Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 5, 47 (2016) (“PCAST Report”). Such methods must be subject to “careful scrutiny.” The Facial Identification Scientific Working Group (FISWG), a group, of which the FBI and DHS are part, designed to develop standards and best practices for FRT, recommends a significant amount of training for FRT operators. FISWIG, Minimum Training Criteria When Using Facial Recognition Systems (2021). We have no information about what training, if any, the operators in this case received.

The human is an essential part of the FRT process but also is a significant source of error. Humans are better at face matching when “there are

no constraints on review duration, there are multiple images of a person, the images are of standardized high quality, and the reviewer has had adequate sleep[,]” and when they are the same race as the people whose faces they are reviewing. NAS, Current Capabilities, at 62. “When humans review long lists of candidate photos, there are typically tens of opportunities for false matches: the human review must correctly reject all of them” to avoid a false positive error. Ibid. Therefore, even if a reviewer’s false match rate was 1 percent, the chance of a false positive in reviewing any one of 50 images would be 40%. Ibid.<sup>4</sup> See also David White et al., Error Rates in Users of Automatic Face Recognition Software, 10 PLoS ONE e0139827 1, 6-7 (2015) (OPDa 669-682) (performance of people in a face matching test using FRT-produced candidate lists under close to operational conditions “was very poor,” which suggests that in operational settings, the reliability of FRT systems “would be half that

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<sup>4</sup> When we say that “a reviewer’s false match rate [is] 1 percent,” that means that for any given non-match, there is a 1%, or 0.01, chance the reviewer will incorrectly say it’s a match. The probability that the reviewer will correctly say it’s not a match is therefore  $1 - 0.01$ . For a list of 50 candidates that are all non-matches, the probability that the reviewer will correctly say that **all** of them are non-matches is  $(1 - 0.01)^{50}$ . Subtracting this total from 1 gives the probability of the opposite outcome: that the reviewer fails to correctly reject **all** candidates and instead selects one of them as a “match,” resulting in a false positive error. Thus, the chance of falsely accepting any one of 50 would be  $1 - (1 - 0.01)^{50}$ , or approximately 40%. NAS, Current Capabilities, at 62.

reported in benchmark tests of the machine component in FR systems”)  
(emphasis added)

In sum, facial recognition systems vary in their reliability, many produce unacceptably high levels of false positives, and all of them perform significantly worse under real-world conditions. This has significant implications for law enforcement. The system used by the Detroit police, if used on its own, would misidentify someone “96% of the time,” according to Detroit’s own police chief. Elaisha Stokes, Wrongful Arrest Exposes Racial Bias in Facial Recognition Technology, CBS NEWS, Nov. 19, 2020. Because each step of the process as implemented by each entity using FRT impacts the reliability of the output, FISWG and NIST recommend that testing an FRT for real-world “deployment should be conducted with agency data and algorithms.” FISWIG, Facial Recognition Systems Operation Assurance: Lessons Learned in Investigative Searches 4 (2023). We have no information as to whether that was done for the FRT used in this case.

Because of the variability in FRT reliability and use, it is critical for the defense to know exactly which tools were employed and how they were used in order to evaluate the reliability of the methods that were used to bring the defendant into a criminal case.

**B. The Discovery Sought Is Necessary To Assess The Reliability Of The “Match” Generated by Facial Recognition Technology.**

Mr. Miles sought the same exact discovery that the Appellate Division in Arteaga found necessary to assess the reliability of an FRT, its use in the case, and its impact on the police investigation. As that court explained, “defendant through his expert, and the secondary sources cited by defense counsel and amici, provide[d] us convincing evidence of FRT’s novelty, the human agency involved in generating images, and the fact FRT’s veracity has not been tested or found reliable on an evidential basis by any New Jersey court.” Arteaga, 476 N.J. Super. at 57.<sup>5</sup> “The defense expert explain[ed] the source code and related materials are necessary to analyze the software’s design and training methods for inherent structural flaws in the software that could introduce bias compromising the accuracy of the results generated by the software.” Id. at 59.

OPD will not relitigate the necessity of all of the items explored in Arteaga. The State has not disputed that each item is relevant to determining the reliability of an FRT. Rather, it has simply maintained that the reliability of the FRT does not matter in this case. OPD will briefly emphasize how little discovery has been provided and highlight why some of it is so important.

The first request, for the name(s) and manufacturer(s) of the facial recognition software used to conduct the search in this case, and the algorithms, version numbers, and years developed, is basic (Item 1). We have

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<sup>5</sup> That report has now been provided to this Court. N.J.R.E. 201.

no information about the system used in this case. NIST reviewed the accuracy of a huge number of facial recognition systems and concluded that “[r]ecognition accuracy is very strongly dependent on the algorithm” used. “[A]lgorithms from some developers are quite un-competitive and should not be deployed.” NIST, Part 2, supra at 8 (emphasis added). The State also has failed to disclose key metrics of performance requested by the defense, including the error rates for the facial recognition system used, false accept and false reject rates, as well as documentation as to how the error rates were calculated (Item 4). It also failed to provide the system’s performance on the NIST Face Recognition test (Item 5). Due to the lack of discovery in this case, we have no idea where on the spectrum of reliability this system falls.

We don’t know what picture was actually submitted to the FRT. That is why the defense seeks the original copy of the query or “probe” photo submitted (Item 6). It is also possible that the original photo was edited before being submitted to the FRT, which is why the defense asks for any edited copies of the probe photo with a list of any edits or other modifications made to the probe (Item 7). If the probe was edited, the way in which that image differs from the actual image is critical to the reliability of the match. And regardless of whether it was edited, because the characteristics of the probe

can lead to more or less accurate matches, a clear image of the probe is necessary to begin to grasp the reliability of the match.

The defense also seeks information about the database that was searched (Item 11). Mr. Miles requested information about how large the database is, how its photos are obtained, how long they are stored, and how often the database is purged, in addition to questions about access to the database. This information is essential because the universe of possible matches that can be returned by the FRT is contingent on what is included in the database. Is it a small one? A large one? Is it a diverse one? Is it populated by all residents of a state or only people with criminal histories? The narrower the universe that Mr. Miles's photo was in, the higher his odds were of being selected. Understanding how high those odds are and whether only certain populations are included in the database is essential to understanding why Mr. Miles's image was returned as match. On the other hand, the larger the database, the higher the risk of someone else looking very similar to the target. Moreover, as can be seen by the return, though Mr. Miles was in the database many times, how many times is uncertain. A person who is in the database more than others has a higher probability of being returned as a match. Thus, results were skewed to inculcate Mr. Miles, but by how much is unknown.

The defense also seeks information about the value of the “match” returned by the FRT. Currently, the match list contains no score. The defense sought a list or description of the rank number or confidence scores produced by the system, including the scale on which the system is based (Item 9). We need to know the relative scores for both Mr. Miles and other people that the police did not investigate.

Because of how important human judgment is to the operation of facial recognition software, the defense sought items related to the person who used his judgment to inculcate Mr. Miles. To that end, he sought the report produced by the analyst who ran the facial recognition software, any notes made about the possible match relative to any other individuals on the candidate list, and basic information on the analyst’s qualifications (Items 12 and 13). Some FRTs apparently have the capability to allow an operator to know if potential candidates have a history of recidivism, “[c]riminal behavior correlations,” or “[g]ang or other affiliations.” FISWIG, Minimum Training Criteria at 3. A report that disclosed what the operator knew about Mr. Miles—including extraneous but biasing information about supposed gang affiliation—would provide important information about the match.

In sum, the defense knows almost nothing about the FRT used. As explained in Subsection A, the quality of FRTs run the gamut and particular

features of the system, the target photo, and the analyst impact the accuracy of the alleged match. The defense sought only the information necessary to assess that accuracy.

**C. The Accuracy Of The Facial Recognition System Used Relates Directly To The Reliability Of An Identification Of A Defendant From A Subsequent Identification Procedure And The Thoroughness Of The Police Investigation.**

The State argues that because it is not intending to use the match and because it believes it has a strong case without reliance on the match, the defense is not entitled to any discovery about the FRT. This is wrong for three reasons, as recognized by Arteaga. First, the details of how the system operates relate directly to the risks of Mr. Miles being misidentified in the photographic showup. Second, the details about how the system operates are exculpatory evidence because they can be used to impeach the police investigation in this case and provide avenues for a third-party guilt defense. Third, the State is mistaking the relevance of evidence for its materiality. If the FRT evidence is not ultimately particularly significant to the case, the remedy for failure to provide discovery about that evidence will reflect that—perhaps a minor remedy, such as a curative jury instruction, would be all that is required. But what remedy a defendant is entitled to is a separate question than what discovery a defendant is entitled to.

**1. The details of how a defendant was selected by the facial recognition technology is essential to understanding the reliability of a subsequent identification.**

Often, as in this case, an FRT match is the basis of a subsequent identification procedure. The use of the FRT is a system variable, a factor within the State's control that impacts the reliability of an identification. State v. Henderson, 208 N.J. 208, 247 (2011). Just as with any other system variable, the defense is entitled to explore it both when the admissibility of the identification is being decided and also before the jury that is tasked with deciding whether the identifications are accurate. Arteaga, 476 N.J. Super. at 61 ("The FRT's reliability has obvious implications for the accuracy of the identification process because an array constructed around a mistaken potential match would leave the witness with no actual perpetrator to choose."). The use of an FRT impacts the reliability of an identification made from a photo array, discussed first, as well as from a photographic showup, discussed next.

One of the main reasons the accuracy of the FRT used impacts the accuracy of the identification is because if the FRT is not good at identifying an accurate match from its database, there is a higher likelihood that an innocent suspect will be placed in and selected from any array created using the results generated by the FRT. The American Psychological Association (APA) has explained this danger and the concomitant importance of lowering

the risk of culprit-absent arrays in its 2020 recommendations on eyewitness identifications. Gary Wells et al., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence, 44 L. & Hum. Behav. 3 (2020) (OPDa 683-716). As the APA explains, for procedures in which the true culprit is absent, “there exists some probabilistic jeopardy for an innocent suspect” who is put into an array. Id. at 12. The higher the odds that the true culprit is missing, the higher the odds of “mistaken identifications of innocent suspects.” Id. at 11. Logically, “[t]herefore, minimizing the chances of presenting witnesses with culprit-absent lineups is one way to reduce the problem of wrongful convictions.” Id. at 11.

Tellingly, the APA found it “unclear why so many” of those who investigate crimes “do not seem to be concerned about the problem with having little or no evidence before placing someone in a lineup. Perhaps this lack of concern stems from an assumption that an eyewitness would not pick an innocent individual and would only pick someone if they remembered the person committing the crime.” Id. at 12. But as the APA explains, that assumption is mistaken: because people tend to make identifications during identification proceedings, if the true culprit is absent someone innocent will likely be picked. Ibid. Thus, using an unreliable FRT to produce an array increases the chance of a false positive identification being made.

Even a more accurate FRT system brings with it risks of misidentification, due in large part to the database it is drawing from, the meaning of its match scores, and the human analyst's ability to assess those. An FRT system is always going to return results. But the results can be comprised only of people in the FRT database. Depending on the database — how large it is, who is in it, etc.—there may be a significant risk of a culprit-absent array, which increases the risk of a false positive misidentification.

Moreover, while a more accurate FRT system will present as a possible match someone who looks like the suspect, that does not necessarily lessen the risk of misidentification. With an accurate system, it is guaranteed that the person the FRT picks has a resemblance to the perpetrator. If the FRT is used only to choose one person who then becomes the suspect and not to choose any of the fillers, then the FRT-chosen suspect is going to be most similar to the perpetrator of all the options in the array. This biases the array in favor of the person selected by the FRT. The array now has an increased chance of false positives because the suspect is the closest look-alike to the perpetrator. If it was revealed in discovery that the FRT used is an accurate one, and that none of the fillers were picked through the FRT system, that would mean that the array was biased towards person selected by the FRT.

It is impossible to know how inaccurate a match produced by an FRT is without the information requested above. As explained, because of how different the performance of each FRT is, its accuracy is a highly fact-specific inquiry. Why Mr. Miles was rated higher than others who were strong matches will come down to the specifics about which measurements are weighed over others and how the software works. If the difference is created by a shadow or blemish in the photo, artificially inflating the match score for Mr. Miles, the defense must understand that. Further, the discovery requested would reveal if Mr. Miles was selected by the FRT as a result of algorithmic bias or by an untrained operator who did a bad job in the final selection. It could reveal that edits made to the probe photo made the target resemble Mr. Miles more strongly. Information that Mr. Miles received a high score for faulty or idiosyncratic reasons means the risk of misidentification is higher. Defendants are entitled to the discovery that would reveal how inaccurate the FRT used is and what the corresponding risk of misidentification is, a risk that is relevant both at a potential Wade hearing and in front of the jury.

The fact that in this case there was a photographic showup and not a photographic array does not render the relationship between the FRT and the identification somehow irrelevant. Photographic showups are a kind of photographic array, which are “inherently suggestive.” Henderson, 208 at 259.

See also State v. Pressley, 232 N.J. 587, 595 (2018) (Albin, J., concurring) (explaining that “the showing of a single photograph” is a “photographic ‘showup’” and “ordinarily should result in a Wade hearing).<sup>6</sup> The APA agrees that such a procedure is suggestive, and its recommendations make clear the risk of misidentification because of this suggestiveness. The APA explains that “it should be apparent that there should never be such a thing as a photographic showup.” Wells at 7 (emphasis added). “If investigators are merely in possession of a photo of a suspect,” as opposed to having a live suspect detained for an identification procedure, “there is no reasonable excuse for not taking the time to embed the photo among filler photos and conduct a proper photo lineup.” Ibid.

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<sup>6</sup> Pressley noted that a “confirmatory” identification “is not considered suggestive.” Pressley, 232 N.J. at 592. In this case, it is unclear whether there was a “confirmatory identification” because we have no information about the CI’s relationship with and knowledge of Mr. Miles. But Pressley also needs to be revisited. In asserting that a “confirmatory identification” is not considered suggestive, this Court cited only one scientific source, National Research Council, Identifying the Culprit: Assessing Eyewitness Identification 28 (2014) (“Confirmatory Photograph: Police will, on occasion, display a single photograph to a witness in an effort to confirm the identity of a perpetrator. Police typically limit this method to situations in which the perpetrator is previously known to or acquainted with the witness.”). Pressley, 232 N.J. at 593. But the next paragraph of the report dispels the suggestion in Pressley: “All of these additional procedures (i.e., confirmatory photo, field view, mug books, yearbooks) have the potential to introduce biases of the sort that blind lineup procedures are designed to avoid.” Identifying the Culprit at 28.

In sum, whether the State makes an array or conducts a photographic showup based on an FRT match, the FRT directly impacts that identification. Without information about the reliability of the FRT algorithm, the way it was operated, what database it searches, and the other information sought by the defense, it is impossible to fully assess the reliability of that identification.

**2. Information about the facial recognition technology used is exculpatory because it impeaches the thoroughness of the investigation and presents possibilities for third-party guilt.**

Not only is the discovery sought necessary to understand the reliability of an identification when one is made based on an FRT match, but the discovery is exculpatory because it is directly relevant to impeach the thoroughness of the investigation. Arteaga, 476 N.J. Super. at 61 (“The reliability of the technology bears direct relevance to the quality and thoroughness of the broader criminal investigation, and whether the potential matches the software returned yielded any other viable alternative suspects to establish third-party guilt.”)

A defendant is entitled to information to “attack[] the reliability of the investigation in failing even to consider [an alternate suspect’s] possible guilt.” Kyles v. Whitley, 14 U.S. 419, 446 (1995). In assessing the police investigation, jurors have the ability “to count the sloppiness of the investigation against the probative force of the State’s evidence.” Id. at n.15.

As this case illustrates, the information sought would highlight flaws both in the decision to pursue a defendant and in the decision not to pursue other leads.

First, the discovery requested could reveal that officers knew, or should have known, that the FRT system that chose Mr. Miles's photo was not an accurate one. If the system used is a less reliable one, this fact not only relates to the reliability of the identification, discussed above, but relates to the police's decision to move forward with Mr. Miles as a suspect at all. Similarly, if the image was knowingly edited in a way that leads to less reliable results, that too would undermine the decision to move forward with prosecuting Mr. Miles once he was returned as a match. Because the FRT match was the first step in Mr. Miles becoming a suspect in this case, if that first step is shown to be unsound, then the jury might conclude that the whole series of events culminating in the trial was unsound as well.

Moreover, it seems that two different algorithms were used with one returning Mr. Miles as a significantly weaker match. Because no information was provided about how the system(s) operated, it is impossible to say with confidence what occurred. The State seems to have ignored that second search engine. That decision might be dubious depending on what the discovery reveals about the relative accuracies of each system. What if the system that

did not return Mr. Miles as a top match was the more accurate one? Why were the results of that system ignored by the human operator? That would be exculpatory information that jurors, and the State, would be interested in.

Second, other people were selected by the FRT as potential matches. The strength of these other matches and the reasons the human operator did not choose any of them could be exculpatory. As explained above, if Mr. Miles was ranked more highly than these other people due to algorithmic bias, editing of the probe photo, or any number of the other issues with FRT identified above, it is quite possible that one of the other people should have been ranked higher than Mr. Miles. The information sought might help develop a third-party guilt theory. It certainly would help the defense cross-examine the officers on other leads suggested by the FRT that they did not pursue, which goes directly to the “sloppiness” of the investigation. And it could be used to argue that Mr. Miles should never have been in the showup in the first place, and that this mistake set into motion a series of unfortunate events leading to the trial.

Given that once officers zero in on a suspect it is almost impossible to get them to consider alternate suspects, Keith A Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291 (2006), the reason the police zeroed in on Mr. Miles is important. A

reasonable defense attorney might very well want to tell the jury that Mr. Miles was picked by an unreliable FRT system and untrained human analyst, if discovery reveals those facts to be true. Mr. Miles might even want to present the other matches that were not pursued. Therefore, even if the State does not admit FRT evidence at trial, understanding how Mr. Miles was selected and what leads suggested by the facial recognition were not followed is essential evidence for developing a defense strategy and likely for presenting a compelling case to the jury.

**3. If the fruits of the facial recognition technology are to be used in court, then the defense must be able to fully understand and confront the use of that technology.**

In sum, the facial recognition technology led directly to the State focusing its investigative resources on Mr. Miles. To argue, as the State does, that the fruits of the system's use are admissible but that the system itself can remain totally opaque violates all standard notions of fair play. Imagine that no FRT was used. Rather, the CI gave police Mr. Miles's name. Then the case proceeded in the same manner: other images were shown to people who know Mr. Miles and he was identified by those people. The State would be required to turn over information about that CI.<sup>7</sup> What is the basis for the assertion of

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<sup>7</sup> The State might also be required to turn over more information about the CI in the case, but that is beyond the grant of leave to appeal.

his reliability? Does he have any bias against Mr. Miles? Was he promised anything for cooperating? The defense would be required to investigate that information and quite possibly to explain to the jury that the very core of the investigation against Mr. Miles was rotten and biased even if other witnesses later identified him. There is no reason in law or logic that using the FRT to get Mr. Miles's name entitles the defense to any less than full information about the reliability of the procedure that put him in the frame of this case.

“A criminal trial where the defendant does not have ‘access to the raw materials integral to the building of an effective defense’ is fundamentally unfair.” State in Interest of A.B., 219 N.J. 542, 556 (2014) (quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)). Without this information, but with the fruits of the FRT being used at trial, the trial cannot be a fair one. Our court rules and case law do not require Mr. Miles to face such an unfair trial.

**D. The Defendant Is Entitled To The Discovery Sought Under Our Court Rules And Case Law.**

As explained above, information about the facial recognition technology used in this case is essential to impeach the police investigation, to pursue third-party guilt theories, and to assess the reliability of the identification, both before a judge and before a jury. Because of the necessity of this information, Mr. Miles is entitled to it under our court rules and case law.

Arteaga, which the State claims it is not seeking to overturn, has settled this matter. In Arteaga, the court held that the failure to disclose the FRT discovery would deprive the defendant of due process. The court held “the items sought by the defense have a direct link to testing FRT’s reliability and bear on defendant’s guilt or innocence.” Arteaga, 476 N.J. Super. at 62. The Arteaga Court reviewed both regimes that govern discovery in New Jersey—our court rules and the constitution—to reach this correct decision.

**1. The State is obligated to disclose this Information, which is relevant and exculpatory.**

Two regimes govern the State’s discovery obligations in this case. Any defendant facing a prosecution in which FRT was used is entitled to this discovery under both.

First is our discovery rules. The State’s discovery obligation to the defense is set forth in Rule 3:13-3(b). That rule states that “[d]iscovery shall include exculpatory information or material.” Ibid. The Rule also mandates that discovery include “relevant material,” in ten categories, which are not exhaustive. Our court rules mandate the disclosure of both exculpatory information “and all other information relevant to a legitimate defense.” Hernandez, 225 N.J. at 466, n.5. “No one questions that discovery in a criminal case is appropriate if it will lead to relevant information.” Id. at 462 (internal quotation marks omitted). Such discovery, whether inculpatory or

exculpatory in nature, must be turned over by the State so that defense counsel “may intelligently advise as to the defense and properly prepare for trial.” State v. Cook, 43 N.J. 560, 569 (1965). Under our discovery rules, an accused has a right to broad discovery after the return of an indictment in a criminal case. State v. Hernandez, 225 N.J. 451, 461 (2016). New Jersey’s “open-file approach to pretrial discovery in criminal matters is intended to advance the goal of providing fair and just criminal trials.” Id. at 461-62 (internal quotation marks and alterations omitted).

The second regime governing discovery is constitutional. These constitutional protections “guarantee criminal defendants ‘a meaningful opportunity to present a complete defense.’” State v. Smith, 224 N.J. 36, 48 (2016). “Those basic elements of due process enable defendants to face and challenge the State’s evidence.” Ibid. Under that constitutional regime, anchored by Brady v. Maryland, 373 U.S. 83 (1962), the prosecution has an “affirmative duty to disclose evidence favorable to a defendant.” Kyles v. Whitley, 514 U.S. 419, 432 (1995). Impeachment evidence is favorable, exculpatory evidence that the State must disclose. State v. Nash, 212 N.J. 518, 544 (2013) (“[A] prosecutor’s obligation to turn over material, exculpatory evidence . . . extends as well to impeachment evidence[.]”).

Defendants are entitled to the information sought about FRTs under both our court rules and our constitutional law, for three reasons.

One, defendants are entitled to the information sought because it is exculpatory. Rule 3:13-3(b)(1) mandates that “[d]iscovery shall include exculpatory information or material.” (emphasis added). Brady likewise requires the disclosure of exculpatory evidence. Brady, 373 U.S. at 87. As explained above, evidence about the FRT and how it was used can impeach the thoroughness of the police investigation. See also Bowen v. Maynard, 799 F.2d 593, 613 (10th Cir. 1986) (“A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation.”); Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985) (withheld Brady evidence “carried within it the potential” for “discrediting” police investigation)

Evidence that impeaches the reliability of an eyewitness identification is also exculpatory. Smith v. Cain, 565 U.S. 73, 75-77 (2012). See also Maynard, 799 F.2d at 611 (in a case in which two eyewitnesses picked defendant out at identification procedures, evidence that someone who resembled defendant was a suspect was Brady material because had the defense known he was a suspect “the frailties of these identification procedures would not have been

difficult to demonstrate”). Because information about the FRT is information that impeaches the identification, it is required to be disclosed.

Material that suggests that third parties may have been responsible for the crime is also exculpatory and must be disclosed. See e.g., Bowman v. Commonwealth, 445 S.E.2d 110, 112 (Va. 1994) (evidence that an officer eyewitness who had selected defendant from an array had originally described the perpetrator very differently was Brady evidence because “with additional potential support for a mistaken identity defense,” counsel could “have undertaken such actions as subpoenaing at least some of the persons in the pictorial lineup to determine their height, weight, and the amount of time they spent in the area”).

In short, in every single FRT case, the officers will have looked at an FRT return that suggested other individuals and picked the defendant. Evidence that goes to the weakness of that decision and the strength of the potential guilt of other individuals is exculpatory. The discovery requested consists of that very evidence. Defendants are entitled to it.

Two, defendants are entitled to the discovery as “results or reports of . . . scientific tests or experiments made in connection with the matter,” R. 3:13-3(b)(1)(C), as “papers, documents, or copies thereof,” R. 3:13-3(b)(1)(E), and/or as “police reports.” R. 3:13-3(b)(1)(H). Those rules relate to materials

“in the possession, custody, or control” of the State. As discussed further below, NJSP or whatever agency is actually in control of the FRT is part of the prosecution team.

In the case where there is an identification, such as this one, defendants are also entitled to these materials as a record “relating to an identification procedure.” R. 3:13-3(b)(1)(j). The plain language of this subsection entitles a defendant to all information about the identification made by the FRT itself and by the FRT technician as well as all of the materials about the FRT that relate to the reliability of the subsequent identification procedure that takes place with a witness.

A defendant has the right, at trial, to explore the system variables present in his case and to argue that they led to an unreliable, mistaken misidentification. As this Court explained in Henderson, “[j]uries will continue to hear about all relevant system and estimator variables at trial, through direct and cross-examination and arguments by counsel.” Id. at 296. Counsel cannot bring these system variables to light without the knowledge about how the materials presented in the identification procedure were generated: the FRT. The discovery may also be relevant to the decision to seek Wade hearing, or to the outcome of a Wade hearing, because, as discussed above, the construction of the array is a systems variable that directly impacts the reliability of a

resultant identification. Without discovery about the FRT, the defense will “be left in the uncomfortable position of having to decide whether to ask speculative questions at trial” about the reliability of the FRT, how it was operated, where its pool of candidates draws from, if the operator knew that the pool was only people with criminal histories, etc. State v. Anthony, 237 N.J. 213, 234 (2019).

Three, even if the discovery sought does not fall under the court rules or Brady, our courts have the power to compel additional discovery. Because of the importance of a defendant’s ability to mount a complete defense, our courts can order discovery outside of the court rules “when justice so requires.” State ex rel. W.C., 85 N.J. 218, 221 (1981). In determining whether a defendant is entitled to discovery outside of the scope of the rule, a court must weigh “whether the evidence sought could contribute to an adequate defense of the accused person and cannot practicably be obtained from other sources against whether there is a likelihood of subjecting witnesses to intimidation, unnecessary annoyance, harassment or embarrassment.” A.B., 219 N.J. at 555. Thus, a defendant can, and will, get discovery outside of the prosecutor’s control when he demonstrates his need for that discovery. Id. at 556. This Court has not hesitated to order discovery outside the court rules “which may lead to relevant material evidence and assist in preparation of the defense.”

W.C., 85 N.J. at 221. As explained above, the materials sought are relevant and will assist in preparation of the defense. See also State v. Pickett, 466 N.J. Super. 270, 277-78 (App. Div. 2021) (when the reliability of a forensic technology is at issue, our courts have recently made clear that the defense is entitled to all information necessary to test that reliability so long as it presents a rational basis to require it).

**2. Whoever possesses the information about the facial recognition technology is part of the prosecution team.**

The Prosecutor's Office has indicated that it does not have the requested materials. But when the State decided to rely on this resource for investigative resources, and built its investigation on those resources, it made the agency that does have those materials part of its team for discovery purposes. As with all members of the prosecution team, the State is in constructive control of those items. The State has the non-delegable duty to disclose the information sought. A prosecutor's constitutional obligation to provide exculpatory information "extends to documents of which it is actually or constructively aware, including documents held by other law enforcement personnel who are part of the prosecution team," State v. Robertson, 438 N.J. Super. 47, 69 (App. Div. 2014), because they are "acting on the government's behalf in the case," Kyles, 514 U.S. at 437. The requirement in subsections (C),(E), and (H) that materials be in the custody and control is read in light of this case law defining

the prosecution team for Brady purposes.<sup>8</sup> State v. W.B., 205 N.J. 588, 608 (2011) (the language requiring disclosure of items “in possession, custody and control of the prosecutor” includes “any police officer” and any “local law enforcement.”). Thus, whatever agency or entity ran the FRT in this case is part of the law enforcement team and the State is required to disclose the relevant materials about the FRT.

This interpretation of the Court Rule is in line with courts around the country, which have consistently held that prosecutors have the obligation to disclose information possessed by other law enforcement agencies that have undertaken investigation on the case at the behest of the prosecution or law enforcement office that initiated the case. See, e.g., In re Steele, 85 P.3d 444, 453 (Cal. 2004) (“The individual prosecutor is presumed to have knowledge of all information gathered in connection with the government’s investigation. Thus, the prosecution is responsible not only for evidence in its own files but also for information possessed by others acting on the government’s behalf that were gathered in connection with the investigation.”) (internal quotation marks omitted, emphasis added).

This obligation extends to forensic examinations undertaken at the behest of the prosecution. Forensic labs are on the prosecution team when the

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<sup>8</sup> Note that this requirement is missing from subsection (j).

prosecution is dependent on the results of those entities for their data and analysis. Harridge v. State, 534 S.E.2d 113, 116 (Ga. Ct. App. 2000). The holding is consistent throughout jurisdictions. See, e.g., McCormick v. Parker, 821 F.3d 1240, 1247–1248 (10th Cir. 2016) (sexual assault nurse examiner “was part of the prosecution team because she acted at the request of law enforcement in the prearrest investigation of a crime”); Commonwealth v. Ware, 27 N.E.3d 1204, 1212 (Mass. 2015) (agents of prosecution team “include not only prosecutors and police, but also chemists working in State drug laboratories who analyze purported drug samples and report their findings to the prosecutor’s office”); State v. Davila, 357 P.3d 636, 644 (Wash. 2015) (“[T]he Crime Lab is an arm of the State whose knowledge is imputed to the prosecution for purposes of Brady.”); People v. Uribe, 76 Cal. Rptr. 3d 829, 846 (Ct. App. 2008) (sexual assault report and “the collection of data necessary for the report” was discoverable because the medical center that created the report was “acting on the government’s behalf” or “assisting the government case”) (internal quotation marks omitted); State v. Farris, 656 S.E.2d 121, 123, 126 (W.V. 2007) (private, out-of-state forensic psychologist who interviewed potential witness to child sexual assault was part of prosecution team because interview took place at request of prosecution and was monitored remotely by police officer); State v. Meza, 50 P.3d 407, 416 (Ariz. Ct. App. 2002) (“[A]

law enforcement agency participating in a criminal investigation operates as an arm of the prosecutor in matters of discovery.”); Damian v. State, 881 S.W.2d 102, 107 (Tex. App. 1994) (evidence held by county crime lab “was within the effective care and control of the prosecution; as such, it could have and should have been disclosed to the appellant if it was favorable to his defense”).

In short, the Hudson County Prosecutor apparently used the New Jersey State Police Regional Operations Intelligence Center and/or HIDTA and/or some other unknown entity to further its investigation. As such, the Prosecutor’s Office made those entities part of its prosecution team and now is obligated to produce the discovery it is constructively aware and in control of. Any other result would allow the State to dodge discovery obligations by outsourcing portions of its investigation. Such a holding “would enable the prosecutor to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial.” Bracamontes v. Superior Court, 255 Cal. Rptr. 3d 53, 65 (Ct. App. 2019) (internal quotation marks omitted). Such an outcome cannot be permitted. See also Carey v. Duckworth 738 F.2d 875, 878 (7th Cir. 1984) (“[A] prosecutor’s office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.”).

The State cites to State v. Washington, 453 N.J. Super. 164, 184 (App. Div. 2018), to argue that “[t]he New Jersey State Police (hereinafter “NJSP”) Lab is not considered to be under the control of the prosecutor” and that therefore the prosecutor is not required to turn over any discovery. (OPDa 24) This misinterpretation of Washington has caused significant trouble with disclosure of forensic evidence and OPD submits that this Court must take this opportunity to clarify (or amend) the Appellate Division’s holding in that case.

Contrary to the use of Washington by the State, Washington is primarily about the proper remedy for the failure to disclose evidence that does not yet exist, and thus should be read narrowly. In Washington, a trial court held that the State could not use DNA evidence at trial because the DNA report had not been disclosed sufficiently in advance of trial. Id. at 178-79. The report was finalized by the NJSP lab on November 8 and disclosed to the prosecutor, who immediately disclosed it to the defense, on November 16. Id. at 183-85. In reversing the order excluding the DNA evidence, the Appellate Division relied largely on the fact that the Prosecutor’s Office could not have controlled a DNA report that did not exist, and that preclusion was therefore not the proper remedy for the belatedly turned-over report. Id. at 184-86. Washington does not stand for the broader principle that a Prosecutor’s Office has no discovery obligation with regard to the State Forensic Laboratory that investigated

evidence at the Prosecutor's Office's request. Such a holding would violate Brady, all the case law cited above, and be entirely illogical, especially given that both NJSP and the Hudson County Prosecutor's Office have the same boss: the Attorney General. N.J.S.A. 52:17B-103 (the Attorney General "shall maintain a general supervision over said county prosecutors"); N.J.S.A. 52:17B-106 ("[T]he Attorney General may supersede the county prosecutor[.]"); In re Attorney Gen. Law Enf't Directive Nos. 2020-5 & 2020-6, 246 N.J. 462, 501 (2021) ("The Attorney General oversees the Department of Law and Public Safety, of which the State Police is a part.").

Washington stands only for the proposition that the prosecution cannot be penalized for not turning over what did not yet exist. The case is, at core, about the proper remedy for late disclosure, not about the obligation to disclose. Id. at 187.

At this juncture, it is worth nothing what is often said by the State when the defense seeks discovery of this nature: go subpoena it yourself. However, the State cannot foist its discovery obligations onto a defendant. Whoever ran the FRT is part of the prosecution team. The suggestion that the defense go get information from parts of the prosecution team ignores the well-established rule, explained above, that prosecutors have the obligation to disclose information possessed by other law enforcement agencies that have undertaken

investigation on the case at the behest of the prosecution or law enforcement office that initiated the case. The suggestion is also illogical and counterproductive. To allow the State to refuse to obtain information from members of its own prosecution team would allow any one entity of the State to divest itself of all discovery obligations through purposeful cooperation with other law enforcement agencies. Given the myriad municipal, county, and State law-enforcement agencies in New Jersey that regularly cooperate and coordinate with each other, as well as the out-of-state agencies that they apparently work with as well, such an outcome would render the State's discovery obligations a mere shell game.

The suggestion also misallocates the burden of getting discovery to the party less likely to succeed. Be it another agency or a private company, the State chooses who to work with, often pays for products, and is in relationship with that entity. The State is best-positioned to ask for these materials, or even to demand access to them as part of the procurement process. This case reveals just how Kafka-esque it would be to make the defense hunt for these documents: the State has no record of the FRT use at all. Who exactly would the defense ask for these materials? And why shouldn't the entity that asks be the entity that decided to use the technology and decided to use the results of that technology to further its case? There is simply no reason. As to NJSP in

particular, the Prosecutor's Office works with them every day. The relationship is so close that in at least one case, NJSP has informed an OPD pool attorney that it would not release documentation without prosecution approval. (OPDa 720)

**3. The defense's right to these materials is separate from the remedy for the failure to disclose them.**

The State's main argument against disclosure of this information is that it's not particularly important to the State's case. But defendants are not entitled to discovery that the State believes is important to the State's own case. Defendants are entitled to any relevant material. As demonstrated above, this material is relevant. Therefore, the defense is entitled to it.

That the State feels that it has a strong case putting aside the use of the FRT is irrelevant. A "defendant's right to discovery is not dependent upon an appraisal of the beneficial value of the material sought to be discovered." State v. Polito, 146 N.J. Super. 552, 556 (App. Div. 1977). The standard for discovery to the defendant is not and cannot be "the State turns it over if the State thinks it's important enough to the defense." It is that the State turns it over if it's relevant to the case. See also People v. Torres, 188 N.Y.S.3d 919 (N.Y. Crim. Ct. 2023) (New York's open-file discovery statute "leaves no room for the People to pick and choose which documents in their case file, or the police's case to disclose. . . . To permit the single-minded counsel for the

accused to only see the police file as filtered through the prosecution impinges on counsel's ability to represent the accused . . . .The People do not choose what the accused's defense will be.") (internal quotation marks, alterations, and citations omitted).

Contrary to the State's argument there is no "inevitable discovery" exception to discovery obligations. However, when the State fails to comply with these obligations, the question of the appropriate remedy will take into account the materiality of the missing evidence. Arteaga correctly holds that the failure to provide FRT discovery deprives a defendant of due process. Due process is, of course, a prerequisite to a fair trial. But the question of the remedy for a due-process violation is separate from the question of whether a violation has occurred.

When a party has failed to comply with a discovery order, the trial court has discretion to craft the appropriate remedy. State v. Dabas, 215 N.J. 114, 140 (2013); R. 3:13-3(f). Some of the remedies suggested in Rule 3:13-3(f), such as granting a continuance so the opposing side can inspect the discovery or barring the admission of the belated discovery, clearly do not apply to discovery that has been lost or destroyed or if the State for any other reason cannot comply with its obligations. But a range of other remedies are possible, from an adverse-inference charge to the exclusion of certain evidence

inextricably linked to the missing discovery, to dismissal of the charges. The remedy for a discovery obligation must “balance the scales of justice[.]” Dabas, 215 N.J. at 140. The degree of materiality of the missing discovery to the specifics of the case would be essential to crafting the appropriate remedy. See, e.g., State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) (in crafting a remedy for the loss of evidence, “the central objective is to protect the defendant’s right to a fundamentally fair trial. If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Dismissal is, however, but one of the trial judge’s options. The trial judge may craft such orders as may be appropriate to protect the defendant’s fair trial rights.”); Cf., State v. M.B., 471 N.J. Super. 376, 383 (App. Div. 2022) (vacating conviction and finding warrant invalid where the police department destroyed the record of the warrant application and there was therefore an insufficient factual basis to determine if the warrant was based on probable cause); United States v. Elliott, 83 F. Supp. 2d 637, 649 (E.D. Va. 1999) (ordering exclusion of the results of a forensic test, rather than dismissal of the indictment, when the State destroyed the item before the defense could run further testing).

It cannot be overstated that the degree of materiality of the evidence to

the case goes only to the remedy for a discovery violation, not to the State's discovery obligation. Otherwise the State could refuse to turn over anything it did not plan on using at trial that it felt was not particularly important. The State cannot define the contours of the defense right to information in this manner. If it's relevant, it gets disclosed. If it can't be disclosed, that is a different question for another day.

### CONCLUSION

Mr. Miles is charged with a homicide. In coming to the decision to charge Mr. Miles, the State used facial recognition technology. But the State has not disclosed the necessary building blocks to understand how the FRT technology operates and what its reliability is. The lack of information leaves Mr. Miles facing a serious criminal charge while operating in the dark. This situation is incompatible with this Court's "policy concerning pretrial discovery," which is to "promote[] the quest for truth." W.C., 85 N.J at 221. This quest is no less important when software is used by the State. Rather, "[a]s technology proliferates, so does its use in criminal prosecutions. Courts must endeavor to understand new technology. . . and allow the defense a meaningful opportunity to examine it." Pickett, 466 N.J. Super. at 323.

The quest for truth cannot be thwarted by outsourcing a police department's investigation to another agency and then disclaiming responsibility for what happened, at its own behest, in the second police agency. It cannot be thwarted by relying on a technology to inculcate defendant and then, by not admitting it at trial, by deciding not to use it at trial, disclaiming any responsibility for that reliance. The State made a decision on how to proceed in this case, and the defense is requesting that the State be held accountable for that decision. Without that accountability, no fair trial can be had. The order of the trial court compelling this discovery must be affirmed

Respectfully Submitted,

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