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On The Letter-Brief
December 29, 2025

LETTER IN LIEU OF BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Appellant) v.
Tybear Miles, (Defendant-Respondent)
Ind. No.: 22-06-0798-I
App. Docket No.: AM-000216-24
Docket No. 090275; A-41-24
Criminal Action: On Certification to the
Superior Court of New Jersey, Appellate Division.
Sat Below: Hon. Jessica R. Mayer, P.J.A.D.
Hon. Patrick DeAlmeida, J.A.D.

Honorable Justices:

Pursuant to Rule 2:6-2(b) and Rule 2:6-5, this letter in lieu of formal brief is submitted on behalf of the State.

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PROCEDURAL HISTORY

The State adopts the procedural history as set forth in its May 28, 2025 brief.

Additionally, on December 2, 2025, this Court granted the following entities' respective motions for leave to appeal as amicus curiae: (1) the Attorney General of New Jersey ("AG"); (2) the New Jersey State Association of Chiefs of Police ("NJSACOP"); (3) the Public Defender of New Jersey ("OPD"); (4) the Association of Criminal Defense Lawyers of New Jersey; (5) the American Civil Liberties Union, American Civil Liberties Union of New Jersey, Innocence Project, Inc., and Collaborative Research Center for Resilience (collectively, "ACLU"); (6) the Electronic Privacy Information Center, Electronic Frontier Foundation, and National Association of Criminal Defense Lawyers (collectively, "EPIC"); (7) Dr. Michael C. King, Ph.D. ("King"); and (8) Dr. Gary L. Wells, Ph.D. ("Wells").

This Court further ordered that the parties may file briefs in response to amici briefs on or before December 17, 2025. On December 12, 2025, the State moved for an extension to file the brief on or before December 31, 2025.

STATEMENT OF FACTS

The State adopts the statement of facts as set forth in its May 28, 2025 brief and adds the following:

The State provided the investigation report indicating the officer's use of facial recognition technology ("FRT"), the Instagram photograph that was submitted to the facial recognition system (located at the top of each page of the candidate list returned by the facial recognition system), and the candidate list returned by the facial recognition system to defendant Tybear Miles ("defendant") in discovery. (See Pa21-25; Pa28-30).[1]

[1] The State adopts the abbreviations as set forth in its May 28, 2025 brief and additionally adds the following:

AGb – Attorney General of New Jersey amicus brief
NJSACOPb – New Jersey State Association of Chiefs of Police amicus brief
OPDb – Public Defender of New Jersey amicus brief
ACLUb – American Civil Liberties Union et al. amicus brief
EPICb – Electronic Privacy Information Center et al. amicus brief
Kingb – Dr. Michael C. King, Ph.D. amicus brief
Wellsb – Dr. Gary L. Wells, Ph.D. amicus brief
OPDa – Public Defender of New Jersey appendix
ACLUa – American Civil Liberties Union et al. appendix

LEGAL ARGUMENT

To the extent amici raise issues the State has already addressed in its May 28, 2025 brief, the State relies on and incorporates its arguments set forth in its brief.

POINT I

THIS COURT SHOULD NOT ADDRESS ARGUMENTS RAISED BY AMICUS CURIAE THAT WERE NOT RAISED BY THE PARTIES.

"[A]s a general rule, an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties." State v. Dangcil, 248 N.J. 114, 132 n.3 (2021) (quoting State v. O'Driscoll, 215 N.J. 461, 479-80 (2013)).

In this case, several amici raise issues that were not raised by the State or defendant.

First, EPIC argues this Court should grant defendant's motion to compel "to ensure that the First Amendment qualified public right of access will attach to any discovery materials regarding the face recognition search conducted in this case." (EPICb28; see generally EPICb28-36).

The OPD contends that State v. Pressley, 232 N.J. 587 (2018), "needs to be revisited." (OPDb27). Not only is this not an issue raised by the parties, but the OPD inappropriately raises this issue in a footnote. See State v. King, 210

N.J. 2, 22 (2012) ("Additional legal issues may not be raised by footnotes in a brief.").

The OPD also argues the State misinterpreted State v. Washington, 453 N.J. Super. 164 (App. Div. 2018), and that "this Court must take this opportunity to clarify (or amend) the Appellate Division's holding in that case." (OPDb43-44). Considering neither party even cited to Washington in its respective brief, it would be improper for this Court to clarify or amend it based on the whims of an amicus curiae.

To the extent amici raise arguments that were not raised by the parties, including those set forth above, this Court should not consider or address them. See Dangcil, 248 N.J. at 132 n.3.

POINT II

THIS COURT SHOULD GIVE LITTLE TO NO CONSIDERATION OF THE OPD'S, ACLU'S, EPIC'S, AND WELLS'S BRIEFS BECAUSE THEIR ARGUMENTS ARE PREMISED UPON FACTS AND CIRCUMSTANCES THAT ARE NOT PRESENT IN THIS CASE.

The OPD's, ACLU's, EPIC's, and Wells's briefs all focus on situations where a person unfamiliar with a suspect makes an identification that is directly linked to an officer's use of FRT, whether that identification is made after the

witness reviews a photo array, or it is made by the human analyst using FRT. (OPDb23-27; ACLUb14-20; EPICb14-16; Wellsb7-8, 13-19).[2]

But as Wells concedes, "this appeal involves different facts and circumstances." (Wellsb20). Here, defendant was not identified in a photo array, nor was he identified by a stranger. Rather, he was identified by multiple people who know him, and their identifications were made after viewing surveillance footage or screenshots taken from surveillance footage, not from a photograph generated using FRT. Even the OPD acknowledges these identifications were made by people who know defendant despite its poor attempts to gloss over the fact that two of these identifications were made by defendant's sister and ex-girlfriend, respectively. (See OPDb5, 31). And it is because this case involves confirmatory identifications that are untethered from the use of FRT that makes the OPD's contention that additional FRT-related discovery may be relevant to a Wade[3] hearing unpersuasive. (See OPDb37-38).

[2] The OPD appears particularly concerned with what it calls the "photographic showup" that officers conducted with the CI in this case. (OPDb26-28). It notes that "there should never be such a thing as a photographic showup" and cites to an article published on behalf of the American Psychological Association in support. (OPDb27 (quoting Gary Wells et al., Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence, 44 L. & Hum. Behav. 3 (2020) (OPDa687)). But the focus of that article is on situations where the witness is unfamiliar with the suspect. Thus, the article is not on point for this case, where all identifications were confirmatory.

[3] United States v. Wade, 388 U.S. 218 (1967).

These amici's focus on situations where a person unfamiliar with a suspect makes an identification that is directly linked to an officer's use of FRT have no bearing on the issue in this case. Thus, this Court should give little to no weight to their arguments.

In addition to making arguments that are not premised on the facts and circumstances of this case, Wells attempts to link the reliability of FRT to the reliability of the eyewitness identifications in this case by creating facts without any basis to support them. For example, Wells assumes the surveillance video was of "relatively poor quality" because officers used a photograph from "Fat Daddy's" Instagram profile as the probe photograph instead of a screenshot from surveillance footage. (Wellsb21). Wells further contends the CI's identification is unreliable because the record does not explain the CI's relationship with "Fat Daddy." (Wellsb21-22). Wells also baldly asserts that FRT is relevant to the identifications of the sister, ex-girlfriend, and person from the neighborhood because "the reason that investigators focused on [d]efendant as a suspect ultimately rests on the results of the FRT. If the FRT had generated someone other than [d]efendant as a 'match,' these witnesses would likely never have even been interviewed." (Wellsb28).

Wells undervalues the significance of the information the CI provided to officers. The CI did not just view surveillance footage and say this person was

"Fat Daddy." The CI also provided "Fat Daddy's" Instagram handle, the Instagram handle of his girlfriend, their address, and the color, make, and model of the vehicle "Fat Daddy's" girlfriend was known to operate. This information not only is indicative of the CI's familiarity with "Fat Daddy," who was later identified as defendant, but it also provided enough information for officers to investigate "Fat Daddy" even without knowing his legal name. To say that officers would not have interviewed these witnesses but for FRT generating defendant as a match simply ignores this additional information provided. Wells's further claim that FRT somehow played a role in multiple people, including defendant's own sister and ex-girlfriend, mistakenly identifying defendant in surveillance footage borders on absurdity. For these reasons, this Court should give little to no consideration of Wells's brief.

POINT III

DEFENDANT HAS NOT DEMONSTRATED HE HAS A PARTICULARIZED NEED FOR ADDITIONAL FRT-RELATED DISCOVERY BECAUSE THE STATE IS NOT SEEKING TO ADMIT FRT INTO EVIDENCE.

Several amici conflate the State's discovery obligations with its necessity to demonstrate a technology is reliable before the results or findings made utilizing such technology may be admitted into evidence. (See, e.g., OPDb18; ACLUb45-46; EPICb17-21). Indeed, as the NJSACOP argues, (NJSACOPb9,

12-13), and the State will further argue below, the Arteaga[4] court made the same error. To that end, the ACLU urges this Court to adopt a bright-line rule requiring the State to provide FRT-related discovery as set forth in Arteaga to the defense whenever law enforcement uses FRT in the actual process of identifying a defendant as a suspect. (ACLUb22).

Initially, the State does not dispute that it should – and did – provide defendant the report indicating FRT was used, the probe photograph, and the candidate list generated as a result of using FRT. It has those items in its possession, and so it provided all of those materials to defendant, just like it would provide the filler photos in a six-pack photo array. But, as the AG and NJSACOP correctly argue, (AGb22-25; NJSACOPb4-5), the remaining materials defendant seeks are well beyond what is required under our discovery rules.

Although "[a] court may exercise its inherent power to order discovery outside the court rule," "the defendant bears the burden of establishing need." State v. Kane, 449 N.J. Super. 119, 133 (App. Div. 2017). In instances where the defendant seeks propriety information, such as a "software's source code and supporting software development and related documentation," he must "first satisf[y] the burden of demonstrating a particularized need for such discovery."

[4] State v. Arteaga, 476 N.J. Super. 36 (2023).

State v. Pickett, 466 N.J. Super. 270, 279 (App. Div. 2021). To determine whether that burden has been met, a trial court should consider:

> (1) whether there is a rational basis for ordering a party to attempt to produce the information sought, including the extent to which proffered expert testimony supports the claim for disclosure; (2) the specificity of the information sought; (3) the available means of safeguarding the company's intellectual property, such as issuance of a protective order; and (4) any other relevant factors unique to the facts of the case.
>
> [Ibid.]

Thus, in Pickett, where the defendant proffered expert testimony supporting his claim for disclosure, the Appellate Division concluded defendant demonstrated a particularized need for discovery. Id. at 311, 324. By contrast, in State v. Ghigliotty, the Appellate Division vacated the trial court's order directing the State to turn over algorithms because defense counsel's mere request for such discovery was not sufficient to demonstrate his need for it. 463 N.J. Super. 355, 384-85 (App. Div. 2020). Notably, in both cases, the State intended to introduce expert testimony using novel software to prove the defendant's guilt.

However, in Arteaga, the court relied on Pickett and Ghigliotty to order the State to turn over proprietary information about FRT, including the source code, even though the State was not seeking to rely on FRT as a basis for expert

testimony.[5] 476 N.J. Super. at 57, 63. Because Arteaga's holding unreasonably extends Pickett and Ghigliotty, this Court should reverse Arteaga or at least limit its holding to cases with substantially similar facts.

Applying the particularized-need standard here, it is clear that defendant has not met his burden because the State is not seeking to introduce FRT evidence at trial. Thus, whether or not FRT is reliable enough to be admitted into evidence is not at issue.

In fact, it is because the State is not seeking to introduce FRT evidence at trial and is not otherwise relying on FRT to prove its case that makes the ACLU's and EPIC's reliance on State v. Archambault, No. 62-CR-20-5866 (Minn. Dist. Ct. 2d. Jud. Dist. Sept. 13, 2024), misplaced. (ACLUb28-29; EPICb19-20). There, the State was seeking to rely on FRT in its case in chief, and, thus, the court conducted a Frye[6] hearing to determine its admissibility. Archambault, slip op. at 1; (ACLUa1). Based on the Frye hearing, the court noted that "[a]ll experts agree that FRT can be used in a reliable and consistent

[5] In the only amicus brief submitted on behalf of an expert in biometrics and identity intelligence, including FRT, King acknowledges that items number two (the source code) and three (a "list of what measurements, nodal points, or other unique identifying marks are used by the system in creating facial feature vectors") in the list of FRT-related discovery materials set forth in Arteaga "would not be particularly useful because contemporary [FRT] uses artificial intelligence techniques (DCNNs) that are not readily interpretable by humans." (Kingb30 n.47).

[6] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

way." Id. at 11; (ACLUa11). However, the FRT program utilized in that case "does not consistently and reliably produce accurate results as is required by law." Id. at 11; (ACLUa11). Thus, the FRT evidence was not admissible evidence of an individual's identification. Id. at 22; (ACLUa22). In so holding, the court recognized the value of FRT "in the course of investigative work" as it "could very well lead to arrests and the remedy of cases that would otherwise have gone unsolved." Id. at 21; (ACLUa21). The court also determined it did not need to address the alleged discovery violations – including the failure to preserve the initial list of potential matches, which could have exculpatory value – because they "exclusively relate to information about the technology used in this case," and the court had found such evidence was not admissible. Id. at 22; (ACLUa22). The court further refused to dismiss the case for lack of probable cause because there was an independent identification of the defendant made unrelated to the use of FRT. Id. at 23; (ACLUa23).

Here, the State is not seeking to rely on FRT evidence in its case in chief. Thus, it is not necessary to determine whether FRT is reliable under Daubert.[7] Rather, FRT was used in this case as an investigative tool, which the Archambault court recognized as a valid and valuable use of FRT. Additionally, as in Archambault, the State has multiple independent identifications that are

[7] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

not tied to its use of FRT. Given that the State is not seeking to admit FRT-related results into evidence, and given that the State has provided the list of potential matches generated by FRT, this Court should find the other requested FRT-related information is not relevant and that defendant has otherwise not demonstrated a particularized need to obtain such information. Thus, the State is not required to turn it over.

For similar reasons, two other cases that EPIC relies on, Florida v. Harris, 568 U.S. 237 (2013), and Ohio v. Tolbert, No. CR-24-689572-A (Cuyahoga Cty. of Common Pleas Jan. 9, 2025), are inapposite. (EPICb17-18, 20-21).

Initially, EPIC misstates the Harris Court's findings. Contrary to EPIC's claims otherwise, the Court rejected the "strict evidentiary checklist" the Florida court had created, as it is "the antithesis of a totality-of-the-circumstances analysis." Harris, 568 U.S. at 244-45. The Court further stated that "a finding of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements." Id. at 245. Additionally, in Harris, the State was relying on the dog sniff as the basis of giving officers probable cause to search the defendant's vehicle. Id. at 248. Thus, whether officers had probable cause to search the vehicle turned on whether the dog sniff was reliable. Id. at 247-48.

Meanwhile, in Tolbert, the trial court suppressed evidence obtained pursuant to a search warrant because the warrant relied in part on possible matches generated through the use of FRT. But the Court of Appeals of Ohio has since reversed the trial court's holding. See State v. Tolbert, No. 114748, 2025 WL 2734507 (Ct. App. Oh. Sept. 25, 2025); (Pa57-64). The court reasoned that the trial court "never made findings regarding whether [the officer] made any knowingly, intentionally false statements or made false statements with reckless disregard for the truth," and did not determine "whether the search warrant affidavit's remaining content is sufficient to establish probable cause." Id. at *7; (Pa63).

Unlike in Harris and Tolbert, the State is not seeking to rely on FRT to identify defendant as the actor. Rather, it used FRT as an investigatory tool. Thus, unlike in Harris, the State does not need to demonstrate FRT's reliability for the purpose of admitting it into evidence. With regards to Tolbert, that case simply is not helpful in determining whether the additional FRT-related information defendant seeks is relevant and whether defendant has established a particularized need under the circumstances of this case.

Another reason why defendant has not demonstrated a particularized need is because he has not provided a certification, report, or other proffer from an expert explaining why he would need such proprietary, FRT-related

information. At least in Arteaga, the defendant tried to meet his burden by providing an expert certification. 476 N.J. Super. at 49. But it is not sufficient for defendant to piggyback off of the expert report relied upon in Arteaga in support of his argument that he is entitled to that discovery now.

Nor is it proper for the OPD to include the expert report relied upon in Arteaga in its appendix for this case. (See OPDa1-6). By doing so, the OPD seems to imply but does not actually request that this Court take judicial notice of the report based on its footnote. (See OPDb18 n.5 (citing N.J.R.E. 201)). First, this Court should not take judicial notice of the report because a fleeting reference to N.J.R.E. 201 in a footnote is not the proper way to raise such a request. See King, 210 N.J. at 22. Second, this report was not submitted to the trial or appellate court; thus, it is inappropriate for the OPD to produce an expert report from an unrelated case and rely on it here. See State v. Harvey, 151 N.J. 117, 201-02 (1997); cf. RWB Newton Associates v. Gunn, 224 N.J. Super. 704, 711 (App. Div. 1988) ("[A] court may not take judicial notice of the contents of a certification for the purpose of determining the truth of what it asserts simply because the certification has been filed with a court and thus is part of a court record."). Finally, as noted above, whether or not FRT is reliable enough for it to be admissible in court has not, as of the State's submission of this brief, been

tested in New Jersey, and it is not at issue in this case. Accordingly, this Court should disregard this expert report.

POINT IV

DEFENDANT HAS A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE, IMPEACH THE INVESTIGATION, AND PURSUE THIRD-PARTY GUILT THEORIES BASED ON THE DISCOVERY ALREADY PROVIDED TO HIM.

Several amici express concerns about defendant being able to present a complete defense without more information about FRT, and they further contend such information is exculpatory and, therefore, discoverable pursuant to Brady v. Maryland, 337 U.S. 83 (1963). (See OPDb28-38; ACLUb21-26; EPICb26-27; Wellsb9).

It is well settled that a defendant must have a meaningful opportunity to present a complete defense. State v. Cotto, 182 N.J. 316, 332 (2005). To that end, the State is required to provide exculpatory information or material to defendant. See R. 3:13-3(b)(1); State v. Desir, 245 N.J. 179, 193 (2021).

What the amici ignore is that in this case, the State provided defendant an investigation report explaining how FRT was used to further the investigation, provided the probe photograph, and provided the list of potential matches that were returned by the facial recognition software. (Pa21-25; Pa28-30). Using the discovery provided, defendant is able to impeach the investigation and

pursue third-party guilt theories because defense counsel can show the list of potential matches to testifying officers and ask them why they focused on defendant and did not investigate any of the other potential matches generated by FRT.

Defense counsel could further impeach the investigation and argue third-party guilt based on the fact that one of the handwritten notes provided by a concerned citizen indicated the shooter's last name is Collins. (Pa2). Defense counsel could also question officers about their investigations into the other individuals who were present at the time of the shooting. (Pa3-4). Or they could focus on the fact that defendant's sister and ex-girlfriend identified defendant in screenshots from surveillance footage recovered from a grocery store from earlier in the evening rather than the surveillance footage either immediately preceding or immediately following the shooting. (Pa34-37).

This case is not like United States v. Delisfort, No. ARMY MISC 20240488, 2025 WL 1305323 (Army Crim. App. May 5, 2025), which the ACLU erroneously relies upon to support its position. There, the government's only identification of the defendant was based on its use of FRT, and the government admitted it did not have "independent avenues of identification other than the [FRT] search." Delisfort, 2025 WL 1305323, at *4, *4 n.5; (ACLUa27, 29). Despite such reliance, the government never provided the

defendant the list of other potential matches that were returned by the facial recognition software; tried to rely on the FRT results during trial without calling the individual who conducted the search using FRT and failed to include that individual as a witness on the witness list; belatedly turned over CCTV surveillance to the defendant on the eve of trial; and was otherwise unprepared, which caused both discovery violations and actual prejudice to the defendant. Id. at *1-*3; (ACLUa26). Under these circumstances, the court dismissed the case without prejudice. Id. at *5; (ACLUa28).

By contrast, here, there are multiple confirmatory identifications unrelated to the use of FRT, the State has no intention of relying on the FRT evidence at trial, and the State has nevertheless provided the list of potential matches generated by the facial recognition software to defendant. Thus, Delisfort is distinguishable.

In sum, the FRT-related information that has already been provided, along with the non-FRT-related discovery, is more than sufficient to provide defendant a meaningful opportunity to present a complete defense, impeach the investigation, and pursue third-party guilt theories.

CONCLUSION

Based on the foregoing, the State submits that the trial court's orders granting defendant's motion to compel and denying the State's motion to reconsider should be **REVERSED**, and the matter should be **REMANDED** for further proceedings.

Respectfully submitted,

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