## SUPREME COURT OF NEW JERSEY

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| **STATE OF NEW JERSEY,** | : | <u>**CRIMINAL ACTION**</u> |
| | : | |
| **Plaintiff-Appellant,** | : | **On Certification to the** |
| | : | **Superior Court of New Jersey,** |
| | : | **Appellate Division.** |
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| | : | |
| | : | **DOCKET NO. 090275** |
| | : | **APP. DOCKET NO. AM-000216-24** |
| **-v-** | : | |
| | : | **INDICTMENT NO. 22-06-00798-I** |
| | : | |
| | : | **SAT BELOW:** |
| **TYBEAR MILES,** | : | **Hon. Jessica R. Mayer, P.J.A.D.** |
| | : | **Hon. Patrick DeAlmeida, J.A.D.** |
| | : | |
| **Defendant-Respondent,** | : | **Date: May 28, 2025** |

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## BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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## **PRELIMINARY STATEMENT**

In June 2021, Ahmad McPherson was shot and killed.  The day after his death, officers spoke to a confidential informant ("CI"), who, after viewing CCTV footage recovered from the scene of the shooting, identified a suspect by his street name, "Fat Daddy."  The CI further provided to officers the suspect's and the suspect's girlfriend's Instagram handles, the address of the suspect and his girlfriend, and the color, make, and model of the girlfriend's vehicle.

After obtaining this information from the CI, officers retrieved a photograph from "Fat Daddy's" Instagram profile.  Using facial recognition technology ("FRT"), it was determined that this photograph was a positive match for defendant Tybear Miles ("defendant").  Officers later showed defendant's mugshot photograph to the CI, who confirmed he was "Fat Daddy."

Three days after speaking to the CI, officers interviewed defendant's sister, defendant's ex-girlfriend, and an individual who frequented the area where the shooting occurred.  All three individuals identified defendant in either surveillance footage officers had obtained as part of their investigation of the homicide or in screenshots from the footage.  Defendant's sister and ex-girlfriend both identified defendant by name, while the third individual identified him by the street name "Fats" or "Fat Daddy."  None of these

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identifications involved the use of FRT, and none of these individuals were shown photographs generated through the use of FRT.

The officers' use of FRT is completely removed from the CI's initial identification of defendant and from the three other individuals' identifications. The CI's information about defendant and his girlfriend would have inevitably led officers to speak to defendant's sister, his ex-girlfriend, and the individual who frequented the area regardless of whether officers used FRT. Because FRT is irrelevant, the motion court erred by compelling the State to produce FRT-related discovery.

Nevertheless, in an order and five-sentence opinion, the Appellate Division erroneously found that simply because FRT was used in this case, State v. Arteaga, 476 N.J. Super. 36 (App. Div. 2023), applies, and it was not improper for the motion court to compel the State to produce FRT-related discovery.

In so finding, the Appellate Division misinterpreted Arteaga to require the State to provide FRT-related discovery any time FRT is used during the course of an investigation, regardless of how irrelevant or tangential its use is. Such an interpretation unreasonably extends Arteaga's holding to situations where, as here, FRT is not relevant to anything and will not lead to any relevant evidence.

Accordingly, this Court should reverse the Appellate Division's order and remand this matter for further proceedings.

# PROCEDURAL HISTORY

On June 21, 2022, a Hudson County grand jury returned Indictment 22-06-0798, charging defendant with (1) first-degree murder, N.J.S.A. 2C:11-3(a)(1) (Count One); (2) second-degree possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4(a) (Count Two); and (3) second-degree unlawful possession of a handgun without a permit, N.J.S.A. 2C:39-5(b)(1) (Count Three).  (Pa19-20).[1]

On June 28, 2024, defendant moved to compel discovery relating to FRT, and on July 11, 2024, defendant filed a brief in support.  (Pa17).  On August 15, 2024, the State filed a brief in opposition.

The motion court heard oral argument on August 20, 2024.  (1T).  Following oral argument, the court permitted both parties to file supplemental briefs.  (1T 29:19-22).

On September 17, 2024, the State filed a supplemental brief in opposition.  On October 2, 2024, defendant filed a supplemental brief in support of his motion.

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[1] The State designates the following abbreviations:
    Pa – State's appendix
    1T – August 20, 2024 transcript of motion to compel oral argument
    2T – October 11, 2024 transcript of oral opinion of motion to compel
    3T – November 21, 2024 transcript of motion to reconsider oral argument

On October 11, 2024, the motion court issued a written decision, granting defendant's motion to compel discovery. (Pa1-14; 2T).

On October 28, 2024, the State moved for reconsideration of the court's October 11, 2024 order and filed a brief in support. (Pa18). On November 18, 2024, defendant filed a brief in opposition. The court heard oral argument on November 21, 2024. (3T).

On December 5, 2024, the court denied the State's motion for reconsideration. (Pa15-16).

On December 11, 2024, the State moved for a stay pending a motion for leave to appeal. (Pa38-39). On December 19, 2024, the motion court granted the motion for a stay. (Pa40-41).

On December 26, 2024, the State moved for leave to appeal. On January 2, 2025, defendant filed an answer in opposition. On January 13, 2025, the Appellate Division denied the State's motion. (Pa42-43).

On January 29, 2025, the State moved for leave to appeal, and on March 11, 2025, this Court granted the State's motion. (Pa57). This brief follows.

## STATEMENT OF FACTS

At approximately 10:03 p.m. on June 5, 2021, the Jersey City Police Department ("JCPD") responded to the area of 239 Stegman Street in Jersey City based on a report of shots fired. (Pa1; Pa28). Upon arrival, a bystander directed officers to the decedent, Ahmad McPherson, who was lying on the sidewalk in front of 239 Stegman Street. (Pa1; Pa31). Approximately thirty-seven minutes later, McPherson was pronounced deceased at the Jersey City Medical Center. (Pa2). After an autopsy was conducted on June 8, 2021, it was determined that the decedent's cause of death was gunshot wounds to the torso and right upper extremity, and the manner of death was homicide. (Pa2).

At approximately 10:56 p.m., the Hudson County Prosecutor's Office ("HCPO") Homicide Unit was notified of the decedent's demise. (Pa2). Investigators recovered the decedent's clothing, specifically blue-colored Nike shorts and a white t-shirt, as well as two zip lock bags with graphic designs containing suspected marijuana and $180 from the decedent's person. (Pa2).

A concerned citizen, who wished to remain anonymous, gave two handwritten notes to a JCPD officer on scene. One note stated, "The guy who did the shooting last name is Collins he has drads," while the second note simply read "Maude," an apparent reference to the decedent. (Pa2).

On June 6, 2021 a CI went to the HCPO and viewed CCTV footage recovered from the scene of the shooting both prior to and after the homicide. (Pa2; Pa28). After reviewing the CCTV footage, the CI was immediately able to identify a suspect as "Fat Daddy" interacting with the decedent shortly before the shooting. (Pa2; Pa28-29). The CI also provided "Fat Daddy's" Instagram handle "_fatzbytheway," 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. (Pa2; Pa28-29).

Officers subsequently retrieved a photograph from "Fat Daddy's" Instagram profile, saved it as a JPEG, and imported the photograph into the NJ/NY HIDTA Facial Recognition module. (Pa2-3; Pa29). After using the NJ/NY HIDTA Facial Recognition module, it was determined that the photograph was a positive match for defendant, date of birth September 16, 1995. (Pa3; Pa21-25; Pa29). Officers later showed defendant's mugshot photograph to the CI, who confirmed the individual in the photograph was "Fat Daddy." (Pa3; Pa29).

During their investigation, officers examined and collected high-quality video footage from 158 Martin Luther King ("MLK") Drive, which captured the decedent wearing blue Nike shorts and a white t-shirt. (Pa3). The video shows defendant and the decedent walk away from a group of black males that are part

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of the same circle. (Pa3). This group of six black males were seen with defendant earlier in the night at the Kaelyn Grocery Store at 156 MLK Drive. (Pa3).

The Kaelyn Grocery Store video provides a clear view of defendant, his clothing and his dreadlocks. (Pa3). The video captures the group interacting with both defendant and the decedent while outside the grocery store. (Pa3). Defendant and the decedent appear to be engaged in a heated argument or conversation prior to the homicide. (Pa3). The decedent is gesturing, stands facing defendant, and appears to be shouting or speaking loudly. (Pa3). At one point, defendant walks away but later returns. (Pa3). The decedent can be seen lighting up a cigarette, and defendant proceeds to ride away on a scooter shortly thereafter. (Pa3).

Homicide detectives tracked defendant leaving 165 MLK Drive at approximately 9:55 p.m. and riding a small scooter to an unidentified address on the north side of Wegman Parkway. (Pa3-4). He later returns to Dwight Street and MLK Drive, where he and the decedent again engage in a verbal dispute. (Pa4). The decedent then walks to the area of 239 Stegman Street, and defendant joins him shortly after. (Pa4). A Ring doorbell video from 235 Stegman Street captures the continuation of the verbal dispute from MLK Drive. (Pa4). Although neither defendant nor the decedent is visible on the Ring video,

the same six or so black males from earlier in the night can be seen, and they can clearly be heard saying, "no, no, no, no" in an attempt to diffuse the situation. (Pa4).

The video footage captures two gunshot sounds followed by defendant leaving the area with an object in his right hand that appears to be a handgun. (Pa4). As the gunshots are fired, all the males, other than defendant, can be seen scattering east on Stegman Street. (Pa4). Notably, defendant is the only individual not running away from the gunshots. Instead, he is seen calmly walking west on Stegman Street while the other males walk east. (Pa4). Within seconds, the males return to the decedent and appear unsure about how to proceed. (Pa4). The Ring video contains audio of male voices saying, "Call an ambulance." (Pa4). Video footage also shows defendant climbing over a metal gate or fence between 242 and 244 Stegman Street and running through the backyard of 242 Stegman Street into the yard of 229 Wegman Parkway. (Pa4).

On June 9, 2021, officers conducted recorded interviews with three individuals: (1) defendant's sister, Stephanie Miles; (2) defendant's ex-girlfriend, Tanashia Davenport; and (3) Howard Jones III, who has frequented the area around where the incident occurred for approximately twenty years. (Pa31-37). Officers showed three screenshots from surveillance footage recovered from Kaelyn Grocery to Ms. Miles, and she identified an individual

as defendant. (Pa34-35). Officers similarly showed three screenshots from surveillance footage to Ms. Davenport, who also identified an individual as defendant. (Pa36-37). Finally, officers showed surveillance footage to Mr. Jones, who identified defendant by the street name "Fats" or "Fat Daddy." (Pa31-32).

On June 10, 2021, officers generated a complaint-warrant, charging defendant with murder and related offenses.

Defendant filed a motion to compel the State to provide discovery pertaining to FRT. (Pa18).

On August 20, 2024, the court heard oral argument on defendant's motion. (1T). Defendant contended he was entitled to FRT discovery pursuant to State v. Arteaga, 476 N.J. Super. 36 (App. Div. 2023). (1T 3:21 to 6:20). By contrast, the State argued Arteaga was distinguishable based in part on the fact that unlike in Arteaga, three people identified defendant in surveillance footage from around the time of the incident, and the photographs generated by FRT were not used during those identifications. (1T 14:8 to 15:16). Moreover, the three people who identified defendant from the surveillance footage knew defendant, meaning they were confirmatory identifications. (1T 15:18-21). Additionally, the State argued these identifications would have inevitably occurred during the course of the investigation regardless of the results of FRT because officers had

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defendant's Instagram handle and, thus, would have spoken to people who knew defendant based off of that information. (1T 20:20 to 22:7).

After hearing oral argument and considering the parties' briefs and supplemental briefs, the court granted defendant's motion. (Pa1). In doing so, the court, relying on Arteaga, found FRT "is relevant, could lead to the discovery of relevant evidence, and has value for impeachment purposes." (Pa9). Thus, it held the State is required to provide defendant with the requested FRT discovery materials consistent with Arteaga. (Pa14).

The State moved for reconsideration. (Pa18).

On November 21, 2024, the court heard oral argument for the State's motion. (3T). The State contended the court overlooked facts that make Arteaga distinguishable. (3T 4:4-8). Specifically, the court failed to consider the fact that the CI identified the suspect as "Fat Daddy," provided the Instagram handles for "Fat Daddy" and his girlfriend, provided their address, and described the color, make, and model of the girlfriend's vehicle prior to officers using FRT at all. (3T 5:17 to 6:10). Thus, the State argued, even if officers did not have FRT, the CI's information would have led them to defendant. (3T 6:19-25).

The State also argued that unlike in Arteaga, the three other individuals who identified defendant did so from surveillance footage, not from a photograph generated using FRT. (3T 26:24 to 27:2). The State concluded that

for these reasons, FRT is not relevant in this case, and the State is not required to provide any more discovery relating to FRT's usage than what was already provided to defendant. (3T 16:1-8; 3T 18:10-13; see Pa21-25).

Defendant responded that Arteaga controls, and pursuant to Arteaga, he is entitled to discovery relating to FRT. (3T 22:10 to 23:24).

After considering the parties' submissions and hearing oral argument, the court denied the State's motion to reconsider. (Pa15-16). In doing so, the court reiterated that Arteaga controls, and pursuant to Arteaga, the State must provide discovery relating to FRT because the State used and relied on FRT during the course of its investigation for this case. (Pa16).

The State moved for a stay, which the court granted. (Pa38-41).

In its motion for leave to appeal, the State argued the court erred by granting defendant's motion because FRT is not relevant and, therefore, not subject to disclosure. The State also distinguished Arteaga from this case, as, unlike in Arteaga, the identifications are not tied to the officers' use of FRT.

In response, defendant reiterated he is entitled to discovery under Arteaga.

In a five-sentence opinion, the Appellate Division denied leave to appeal because "Arteaga applies and the judge did not abuse his discretion in compelling the State to produce the relevant FRT related discovery." (Pa43).

This Court granted the State's motion for leave to appeal. (Pa57).

## LEGAL ARGUMENT

## POINT I

### THIS COURT SHOULD REVERSE THE MOTION COURT'S ORDER COMPELLING THE STATE TO PRODUCE FACIAL RECOGNITION TECHNOLOGY-RELATED DISCOVERY BECAUSE THE FACIAL RECOGNITION TECHNOLOGY IS NOT RELEVANT, AND THEREFORE IT IS NOT SUBJECT TO DISCLOSURE. (Pa1-16; Pa42-43).

Generally, the standard of review of a trial court's disposition of discovery matters is abuse of discretion. State v. Ramirez, 252 N.J. 277, 298 (2022). "[A]ppellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" Ibid. (alteration in original) (quoting State v. Brown, 236 N.J. 497, 521 (2019)). If a trial court fails to "comport with the applicable law or do[es] not give sufficient regard to pertinent considerations," then an "appellate court[] will set aside or modify such decisions" accordingly. Ibid.

"In New Jersey 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). Our "open-file approach to pretrial discovery in criminal matters post-indictment" aims "[t]o advance the goal of providing fair and just criminal trials." State v. Scoles, 214 N.J. 236, 252 (2013).

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Rule 3:13-3(b)(1) codifies the criminal defendant's "right to automatic and broad discovery of the evidence the state has gathered in support of its charges." State v. Stein, 225 N.J. 582, 594 (2016) (quoting Scoles, 214 N.J. at 252). That Rule "obligates the State to provide full discovery…when an indictment is returned or unsealed," State v. Robinson, 229 N.J. 44, 72 (2017), "[e]xcept for good cause shown," R. 3:13-3(b)(1). Full discovery, under Rule 3:13-3(b)(1), "shall include exculpatory information or material." "The Rule thus explicitly renders automatic the turnover of exculpatory evidence mandated by the United States Supreme Court's holding in Brady v. Maryland, 337 U.S. 83 (1963)." State v. Desir, 245 N.J. 179, 193 (2021).

"While discovery in criminal cases is broad," however, "it is not unlimited." Hernandez, 225 N.J. at 463. The discovery process is not "a fishing expedition," State v. Broom-Smith, 406 N.J. Super. 228, 239 (App. Div. 2009), aff'd, 201 N.J. 229 (2010), nor is it "an unfocused, haphazard search for evidence," State v. D.R.H., 127 N.J. 249, 256 (1992). Therefore, "information must be shown to be relevant to the issues in the case in order to be subject to disclosure." Ramirez, 252 N.J. at 296; see R. 3:13-3(b)(1) (providing that post-indictment discovery "shall . . . include, but is not limited to [a list of] relevant material").

"Relevance is measured in terms of the opportunity of the defendant to present a complete defense." Pressler & Verniero, <u>Current N.J. Court Rules</u>, cmt. 3.2 on <u>R.</u> 3:13-3 (2025). "To qualify as 'relevant material,' the evidence must have 'a tendency in reason to prove or disprove [a] fact of consequence to the determination of the action.'" <u>State v. Richardson</u>, 452 N.J. Super. 124, 132 (App. Div. 2017) (alteration in original) (quoting <u>State v. Gilchrist</u>, 381 N.J. Super. 138, 146 (App. Div. 2005)).

For the reasons set forth below, the motion court in this case erred by finding FRT is relevant, could lead to the discovery of relevant evidence, and has value for impeachment purposes. Furthermore, the Appellate Division erroneously applied <u>Arteaga</u>'s holding when it denied the State's motion for leave to appeal.

Here, the CI provided defendant's street name "Fat Daddy," his Instagram handle, the Instagram handle of his girlfriend, their address, and the color, make, and model of the vehicle his girlfriend was known to operate. (Pa28-29). Notably, the CI provided this information prior to the officers' use of FRT. (Pa28-29). This information alone could have and would have led officers to investigate defendant.

Moreover, three people who knew defendant identified him in surveillance footage from around the time of the incident and/or in screenshots

taken from said surveillance footage. (Pa31-37). Those three people included defendant's ex-girlfriend and sister, who both knew him by his name, as well as an individual who frequents the area of the incident and who knew defendant by his street name of "Fats" or "Fat Daddy." (Pa31-37). None of these three identifications involved the use of FRT, and none of these individuals were shown photographs generated through the use of FRT. And it was only after these three individuals identified defendant from surveillance footage that he was finally charged relating to this incident.

When officers did use FRT, they obtained defendant's name and date of birth. (Pa29). They subsequently showed the CI defendant's mugshot photograph, and the CI confirmed defendant was "Fat Daddy." (Pa29). This confirmatory identification is not suggestive and does not affect the reliability of the identification in any way. See State v. Pressley, 232 N.J. 587, 592-93 (2018) (noting that a confirmatory identification, which "occurs when a witness identifies someone he or she knows from before but cannot identify by name," is "not considered suggestive"); see also State v. Watson, 254 N.J. 558, 587 (2023) (observing that "[f]riends or associates, among others, could identify someone [in court whom] they have known for some time").

In sum, officers received a lead from a CI, which ultimately led to them speaking to defendant's ex-girlfriend, sister, and a person from the

neighborhood.  All four of these individuals identified defendant in surveillance footage from around the time of the incident or in screenshots taken from said surveillance footage.  These identifications are completely removed from the officers' use of FRT, and the lead from the CI pre-dated their use of FRT.  Furthermore, the State will not be relying on FRT at trial.  Thus, under these circumstances, the officers' use of FRT simply is not relevant, will not lead to the discovery of relevant evidence, and has no value for impeachment purposes.  Therefore, it is not discoverable.

State v. Arteaga, 476 N.J. Super. 36 (App. Div. 2023), does not support a different conclusion.  There, an armed robbery occurred in a West New York store.  Id. at 42.  After reviewing the surveillance footage, the store manager indicated she recognized the actor as someone who had entered the store on a prior occasion.  Ibid.  Officers subsequently sent all the raw footage to a New York-based organization for facial recognition analysis.  Id. at 43.  A detective from that organization captured a still image from the footage, compared it against the center's databases, and indicated the defendant was a possible match.  Ibid.  West New York detectives then created two different photo arrays comprising of five filler photos and one photo of the defendant, which was provided by the New York-based organization's database.  Ibid.  Detectives

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showed one array to the victim of the robbery and one array to the store manager. Ibid. Both identified the defendant's photo as the actor. Ibid.

The defendant moved to compel discovery of FRT, id. at 49, which the motion court denied, id. at 51. On appeal, the Appellate Division reversed the motion court's denial, finding that FRT was relevant because it was used to identify the defendant as a potential suspect and resulted in officers using his photograph in the two photo arrays. Id. at 57, 62-63. The court further observed, "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." Id. at 61.

By contrast, here, the CI identified defendant by his street name in surveillance footage before officers used FRT. At the time the CI identified him, the CI also provided defendant's Instagram handle, his girlfriend's Instagram handle, their address, and the color, make, and model of the vehicle the girlfriend was known to operate. Three days later, officers interviewed defendant's ex-girlfriend, defendant's sister, and an individual from the neighborhood, and all of them identified defendant in surveillance footage or in screenshots taken from the surveillance footage.

Thus, unlike in Arteaga, where the witnesses did not know the defendant and where the only information that led officers to identify the defendant as a

potential suspect was through the use of FRT, the officers here received information from the CI.  Furthermore, neither the CI's initial identification of defendant nor the identifications made by the three other individuals were tied to the officers' use of FRT.  In other words, FRT's reliability does not implicate the accuracy of the identification process because all four identifications were confirmatory in nature, and the individuals identified defendant from surveillance footage rather than from anything generated through the use of FRT.  This case is thus distinguishable from Arteaga.  To hold otherwise – as the Appellate Division has done so here – would unreasonably extend Arteaga's holding and force the State to provide much more than what is required in this case under Rule 3:13-3(b)(1).

Indeed, Arteaga's opinion itself is problematic.  For example, the Arteaga court relied on State v. Ghigliotty, 463 N.J. Super. 355 (App. Div. 2020), and State v. Pickett, 466 N.J. Super. 270 (App. Div. 2021), in support of its holding that the State was required to provide FRT-related material, including source code material, to the defense.  See Arteaga, 476 N.J. Super. at 55-56.  In Pickett, the Appellate Division determined the defendant had demonstrated a particularized need for the source code material and related discovery and, thus, required the State to provide it to the defense.  466 N.J. Super. at 279. By contrast, in 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. at 384-85.

Notably, in both Pickett and Ghigliotty, the State intended to introduce expert testimony using novel software to prove the defendant's guilt, and a hearing was required to establish the scientific reliability of the technology upon which the expert relied. Pickett, 466 N.J. Super. at 279-80; Ghigliotty, 463 N.J. Super. at 360. The Arteaga court recognized both cases involved potential expert testimony and a hearing regarding the scientific reliability of technology, whereas the Arteaga case involved eyewitnesses whose identifications of the defendant were found admissible. 476 N.J. Super. at 57. Nevertheless, the Arteaga court broadened the reach of Pickett and Ghigliotty to a case where the State did not even intend to introduce expert testimony using novel software to prove the defendant's guilt.

The Arteaga opinion also includes a numbered list of FRT-related discovery materials that it determined the State was required to provide to the defendant in that case. 476 N.J. Super. at 43-44. This list has since become the blueprint for FRT-related discovery demands made by criminal defendants. However, some of the materials requested in Arteaga either relate to outdated FRT or simply do not exist. Thus, in practice, requiring the State to produce

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FRT-related materials based off of a static list is unworkable because it does not account for how quickly technology evolves and develops.

The <u>Arteaga</u> court also offered little guidance as to what an appropriate remedy would be if the State is unable to provide FRT-related discovery when it is compelled to do so. There, the defendant argued barring the State from introducing the witnesses' identifications into evidence would be a proper remedy if the State failed to produce the discovery requested because the identifications stemmed from the use of FRT. <u>Id.</u> at 59-60. The Appellate Division explicitly rejected this argument, finding instead that the analysis for determining the admissibility of the identifications stood separate and apart from the discovery dispute. <u>Id.</u> at 60-61. Yet the court did not consider or discuss any other potential remedy, and this lack of guidance only further exacerbates issues that will arise if and when the State is inevitably unable to produce all or some of the requested FRT-related discovery materials.

In fact, during oral argument in this case, the trial court asked defense counsel what an appropriate remedy would be if the State were unable to produce the disputed discovery. (1T 6:23 to 7:1; 1T 7:18-23). In response, defense counsel seemed to hesitate for a moment, then indicated sanctions would be appropriate, and then suggested that since they "haven't got to that point [of remedies] yet," they should first determine whether defendant was entitled to

the requested discovery and then "decide where to go from there." (1T 7:3 to

8:17). This exchange demonstrates that neither trial courts nor the parties know

what an appropriate remedy would be in the event of an FRT-related discovery

violation. It may be helpful to trial courts to have more guidance; however, the

potential remedy issue in this case should not be reached because the State is

not required to provide the irrelevant FRT-related materials.

For the reasons set forth above, the State should not be compelled to

produce FRT-related discovery here, and several out-of-state cases support the

State's position. See, e.g., People v. Reyes, 69 Misc. 3d 963, 967-68 (N.Y. Sup.

Ct. 2020) (denying the defendant's application for the government to produce

FRT-related discovery where FRT was used as an investigative lead, but the

identification was based off surveillance videos of the incident, and the

government had no intention of relying on FRT); People v. Shah, 85 Misc. 3d

1235 (N.Y. Sup. Ct. 2025) (finding the government was not required to produce

FRT-related discovery where FRT was used as an investigative tool, and the

victim was able to positively identify the defendant in a photo array); Geiger v.

State, 174 A.3d 954, 960-61, 964-65 (Md. Ct. Spec. App. 2017) (recognizing

that the use of FRT is merely one of many investigative tools that police may

use to develop a suspect and a tool's use to develop a suspect does not bar the

State from relying on identification evidence uncovered as a result); People v.

Johnson, 139 Cal. App. 4th 1135, 1150-51 (Ct. App. 2006) (observing in dicta that the use of FRT "is simply a starting point for the investigation," and whether FRT "is discerning and accurate enough to select the perpetrator," or whether multiple possible matches were generated as a result of the use of FRT, "is immaterial"); Lynch v. State, 260 So. 3d 1166, 1170 (Fla. Dist. Ct. App. 2018) (determining there was no Brady violation when the State only provided FRT matches to the defendant because neither party relied on FRT at trial and the jury's guilty verdict was not based on the use of FRT); People v. Moore, 2022 WL 15525819, at *2 (Mich. Ct. App. Oct. 27, 2022) (rejecting an ineffective assistance of counsel claim where officers only used FRT for investigatory purposes to obtain a name for the photographs retrieved, and the victim identified the defendant from a photo array).

People v. Knight, 69 Misc. 3d 546 (N.Y. Sup. Ct. 2020), provides compelling, persuasive authority for this Court to consider. There, the defendant moved to compel discovery relating to FRT where an investigating detective used FRT to compare images from video surveillance of the incident to images in a police database. Id. at 548. The software generated a list of possible matches, of which, the detective only looked at and preserved the first thirteen listed. Ibid. However, the defendant was ultimately identified and arrested independently from the detective's use of FRT, and the government had no

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intention of relying on the FRT-related discovery in its case. <u>Id.</u> at 549. Under these circumstances, the court found the government had complied with its discovery obligations by providing the defense with the first thirteen photographs. <u>Ibid.</u> In reaching this conclusion, the court observed: "It perhaps bears underscoring that <u>none</u> of the images at issue were shown to any witness; thus, they are as attenuated as can be not simply from having <u>exculpatory value</u> but from having <u>relevance</u> to any matter concerning the correct identification of defendant." <u>Id.</u> at 550.

Similarly here, the CI's initial identification, as well as the other three individuals' identifications, were made independently from the officers' use of FRT. Moreover, the State does not intend to rely FRT in its case. Nevertheless, the State has already provided defense counsel with a list of possible matches generated through the officers' use of FRT. (<u>See</u> Pa22-25). To the extent defendant seeks more FRT-related materials, the State has no obligation to provide them because they are not "relevan[t] to any matter concerning the correct identification of defendant." <u>Knight</u>, 69 Misc. 3d at 550.

## <u>CONCLUSION</u>

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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>
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