
Supreme Court of New Jersey

Docket No. 090275

STATE OF NEW JERSEY,	:	
Plaintiff-Appellant	:	On Motion for Leave to Appeal from an Interlocutory Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
TYBEAR MILES,	:	Sat below:
Miles-Respondent	:	Hon. Jessica R. Mayer, P.J.A.D. Hon. Patrick DeAlmeida

BRIEF ON BEHALF OF TYBEAR MILES IN OPPOSITION TO THE STATE OF NEW JERSEY'S MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

The State of New Jersey (“State”) brings the instant motion to prevent Tyber Miles (“Miles”) from obtaining discovery related to the Facial Recognition Technology (“FRT”) that was used to identify him. The State disingenuously argues that Miles should not be entitled to FRT related discovery because it is “not relevant to anything and will not lead to any relevant evidence.” In making this argument the State fails to tell the Court, as it did the trial court, that it attempted to obtain the requisite FRT discovery and was informed that the responsive agencies have “no file” that relates to Miles in this matter. In essence, the State is utilizing the instant motion to obtain a favorable ruling that will allow them to circumvent the fact that the requisite discovery either never existed or was destroyed thus preventing Miles from being able to impeach the investigation, challenge the results of the FRT and properly defend himself.

Likewise, the State’s instant motion mischaracterizes the evidence. The State’s case is circumstantial. Although the State would like this Court to believe that multiple witnesses identified Miles as the shooter there is not a single witness that has identified Miles as committing any crime. The State’s case against Miles is completely circumstantial. Law enforcement had no leads and built their case on information that they harvested from a Confidential Informant (“CI”) to reverse engineer a case against Miles. The CI was shown Jersey City CCTV surveillance

from before the shooting and identified an individual as “Fat Daddy.” The CI further stated that “Fat Daddy” utilized the Instagram handle “fatzbytheway.” Law enforcement then retrieved a photograph from the corresponding Instagram profile which they claim to have run through FRT software which provided a positive ‘hit’ for Miles.

After receiving the positive ‘hit’ law enforcement retrieved a mugshot of Miles which the CI positively identified as the individual he knows as “Fat Daddy.” With this positive identification in hand, law enforcement then interviewed three individuals who identified Miles in a video from a bodega – not the same video that was shown to the CI - that was captured approximately ninety minutes before the shooting.

On June 7, 2023, the Superior Court of New Jersey, Appellate Division (“Appellate Division,”) in a published opinion, held that a defendant in a case in which the State utilized or relied on FRT is entitled to broad discovery regarding FRT. State v. Arteaga, 476 N.J. Super. 36 (App. Div. 2023). It is Miles’ position that this Court should adopt the Appellate Division’s reasoning and holding. The State concedes that FRT was utilized in identifying Miles as a suspect in this matter. Despite this concession, the State boldly avers that the trial court and Appellate Division abused their discretion in granting Miles’ motion to compel FRT related discovery. The State’s instant argument lacks merit and candor. The Appellate

Division affirmed the trial court's well-reasoned finding that Miles is entitled to discovery related to FRT pursuant to Arteaga. In arriving at this conclusion, the Appellate Division noted that the State conceded that they used FRT in identifying Miles thus entitling him to broad discovery as laid out in Arteaga.

The State has failed to argue, never mind demonstrate, that the trial court or Appellate Division abused their discretion regarding this discovery dispute. Instead, the State argues that Arteaga should not apply, and a defendant should not be entitled to FRT related discovery, where FRT is used "during the course of an investigation." The State's position flies in the face of our well settled law and discovery rules. The State's only support for this bewildering conclusion is the bold assertion that: "FRT is not relevant to anything and will not lead to any relevant evidence." In making this specious argument the State ignores the identity issues that are present in this case and the importance of the FRT discovery that will assist Miles in undermining the State's investigation.

COUNTER STATEMENT OF PROCEDURAL HISTORY

Miles adopts the State's Statement of Procedural History.

COUNTER STATEMENT OF FACTUAL HISTORY

On June 5, 2021, at approximately 10:03 p.m., the Jersey City Police Department ("JCPD") responded to a report of shots fired around 239 Stegman Parkway in Jersey City, New Jersey. Pa1. When the officers arrived on the scene an unidentified individual handed the officers a note which indicated that the "[t]he guy who did the shotting [sic] last name is Collins he has drads [sic]." Pa2.

On June 6, 2021, a CI contacted the Hudson County Prosecutor's Office at the behest of the Gang Intelligence Unit ("GIU"). Id. The CI reviewed Jersey City CCTV footage – this is not footage from the shooting - in which the CI identified an individual depicted in the footage as "Fat Daddy." Id. The individual that the CI identified as "Fat Daddy" was wearing gray sweats, a white t-shirt, white sneakers and had dreadlocks. Pa28-29. Law enforcement then located an Instagram profile with the name "fatzbytheway" from which they downloaded an image and imported it into FRT software. Pa3. The FRT revealed a positive match for Miles. Id. The CI was then shown a mugshot of Miles whom he positively identified as the individual he knows as "Fat Daddy." Id.

On June 9, 2021, law enforcement interviewed Howard Jones ("Jones"), Stephanie Miles ("Miles' sister"), and Tanishia Davenport ("Davenport"). Pa31-37.

Jones was shown video footage from 156 Martin Luther King Boulevard in Jersey City, New Jersey. Pa31. At the 8:30 p.m. time marking - approximately 90 minutes before the shooting - Jones identified an individual in the video as “Fats” or “Fat Daddy.” Pa31. Jones was also shown video from the area of 235 Stegman Parkway in Jersey City and stated he recognized an individual in that video as “Fats.” Pa32. The individual that Jones identified as “Fats” or “Fat Daddy” was wearing a white tank top, and sweatpants. Id. On June 9, 2021, law enforcement met with Miles’ sister and Davenport. Pa34, 36. Miles’ sister and Davenport were shown still pictures from Kaelyn Grocery in which they identified the individual shown to them in the still photograph as Miles. Pa34, 36. It is undisputed that Jones, Miles’ sister and Davenport did not identify Miles as the shooter. Pa31, 34, 36.

A) August 20, 2024 – Oral Argument on Miles’ Motion to Compel

On August 20, 2024, the parties appeared before the trial court for oral argument regarding Miles’ Motion to Compel FRT related discovery. 1T. At that time the State represented that it contacted the New York/New Jersey facial recognition unit regarding the requested FRT discovery and was informed that there is “no file.” 1T: 13:1-5. The State also indicated that it submitted a request to the New Jersey State Regional Operations and Intelligence Center Crime Analysis Unit for the requested FRT materials and received no response because there was no file related to Miles. 1T: 13:18-25. The State told the trial court that it would provide

counsel and the trial court with a Certification from the New Jersey Regional Operations and Intelligence Center explaining why, despite utilizing their FRT, no file exists within two weeks. 1T: 22:8-19; 28:5-10. Ultimately, the State failed to provide counsel or the trial court with any such Certification.

B) The Trial Court's Decision

The trial court granted Miles' Motion to Compel FRT related discovery based on Arteaga. In granting Miles' motion the trial court held:

[T]hat the FRT used is relevant, could lead to the discovery of relevant evidence, and has value for impeachment purposes. The Appellate Division in Arteaga found that the request for FRT discovery was relevant because it affected the Miles' ability to impeach both the police officers' identification and the investigation as well as the Miles' overall ability to establish reasonable doubt at trial. See State v. Arteaga, 476 N.J. Super. 36, 61 (App. Div. 2023) ("Miles must have the tools to impeach the State's case and sow reasonable doubt.") Similarly, here, the information regarding the FRT used to discover Miles' identity and date of birth is relevant because the information could be used to assess the reliability of the software or to impeach the police officers' identification and/or investigation. Further, details surrounding the FRT used and the reliability of the facial recognition software itself could allow Miles to test the thoroughness of the State's investigation. Since the requested information regarding the FRT could affect Miles' impeachment capabilities and ability to establish reasonable doubt at trial, this Court finds that the requested FRT information is relevant and could lead to the discovery of relevant information...

[T]he Court finds that, even though the State does not intend to rely on any FRT in trial and did not use the mugshot in a photo array, the State is still obligated to provide the requested FRT discovery pursuant to Arteaga, the New Jersey Court Rules, and the case law. The State's duty to provide discovery is not preconditioned on whether it intends to rely upon that evidence at trial. The State does not dispute that FRT was

used in this case; rather, the State contends that FRT was not relied upon in this investigation to the same extent as in Arteaga. It is undisputed that FRT produced mugshots that included a photo of Miles, his name, and date of birth. It is also undisputed that the CI was shown that FRT photo, and the CI in turn positively identified Miles as “Fat Daddy.” However, based on the oral argument and briefs, the exact timeline of the investigation and the positive identifications of Miles are unclear. Since FRT was utilized as an investigative tool in this case, the Court finds that Miles’ request for FRT discovery is not a “fishing expedition” or an attempt to “transform the discovery process into an unfocused, haphazard search for evidence.” Ramirez, 252 N.J. at 296. Rather, this Court finds that Miles’ request for FRT discovery is 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, Miles may challenge the State’s investigation and use the FRT discovery for possible impeachment purposes. (Pa1-14).

C) November 21, 2024 - State’s Motion for Reconsideration

The State conceded that the only discovery that it was able to obtain regarding FRT are the photographs that were generated in the search, but the remaining required items are not available. 3T: 15:18-16:7.

D) The Appellate Division’s Decision

In reviewing the trial court’s decision, the Appellate Division held:

The trial court is afforded substantial deference in its ongoing management of discovery or other pretrial matters. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 559 (1997). The court rules provide a criminal Miles with broad pretrial discovery. State v. Scoles, 214 N.J. 236, 251-52 (2013).

Additionally, the issue raised in the State’s motion was addressed in State v. Arteaga, 476 N.J. Super. 36 (App. Div. 2023)(holding a Miles entitled to discovery in matters where the State uses or relies on facial recognition technology (FRT)). The State does not dispute it used FRT in this case. Therefore, Arteaga applies and the judge did not abuse his

discretion in compelling the State to produce the relevant FRT related discovery.” (Pa42-43).

The State sought leave to appeal from this Court, rearguing the same arguments that were soundly rejected by the courts below.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION AND TRIAL COURT'S DECISIONS ORDERING THE STATE TO PRODUCE FRT RELATED DISCOVERY SHOULD NOT BE OVERTURNED

A) The State has Failed to Satisfy the Requisite Standard of Review

Courts of review “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.” State v. Ramirez, 252 N.J. 277, 298 (2022) (quoting State v. Brown, 236 N.J. 497, 521 (2019)). “A trial court can abuse its discretion ‘by failing to consider all relevant factors.’ [This Court should only] ... set aside or modify such decisions if they do not comport with the applicable law or do not give sufficient regard to pertinent considerations.” Ibid.

The State’s argument flunks at its inception. The State continually suggests that the courts below “erred.” First, the courts below did not “err.” The courts below considered all the relevant factors and issued salient, well thought out opinions. Second, and more importantly, the standard of review is not error but abuse of discretion. The State fails to articulate, never mind demonstrate, that the trial court or the Appellate Division abused their discretion. As such, the State fails to satisfy the requisite standard of review that would justify reversal.

B) The ‘so Ordered’ FRT Discovery is within the State’s Discovery Obligations as they are integral in Miles’ defense.

To guarantee fair and just trials and promote the search for truth, the New Jersey court rules provide a criminal defendant with broad pre-trial discovery. See State v. Scoles, 214 N.J. 236, 251–52 (2013) (noting that the courts’ “open-file approach to pretrial discovery in criminal matters post-indictment” aims to advance the goal of providing fair and just criminal trials). Courts have emphasized that “[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 Int. of A.B., 219 N.J. 542, 556 (2014)(quoting Ake v. Oklahoma, 470 U.S. 68, 77 (1985)).

Nevertheless, despite a criminal defendant's general and automatic right to “broad discovery,” . . . “criminal discovery has its limits.” State v. Ramirez, 252 N.J. 277, 295 (2022). Defendants are not permitted to conduct a “fishing expedition,” or “transform the discovery process into an unfocused, haphazard search for evidence.” Id. at 296. Hence, information must be shown to be relevant to the issues in the case to be subject to disclosure. Relevant information has “‘a tendency in reason to prove or disprove [a] fact of consequence to the determination of the action[.]’” State v. Gilchrist, 381 N.J. Super. 138, 146 (App. Div. 2005) (quoting N.J.R.E. 401), or will lead to the discovery of relevant evidence. State v. Ballard, 331 N.J. Super. 529, 538 (App.

Div. 2000). Where discovery is sought but not provided, “the question is whether in the absence of the undisclosed evidence the defendant received a fair trial, ‘understood as a trial resulting in a verdict worthy of confidence.’” State v. Nelson, 155 N.J. 487, 500 (1998) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

A court’s “power to order discovery is not limited to the express terms of the automatic discovery provisions of Rule 3:13-3(b).” State v. Richardson, 452 N.J. Super. 124, 132 (App. Div. 2017). Indeed, “courts have ‘the inherent power to order discovery when justice so requires.’” Ibid. (quoting State in Interest of A.B., 219 N.J. 542, 555 (2014)).

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). Rule 3:13-3(b)(1) “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).

Importantly, R. 3:13-3(b)(1) provides that post-indictment discovery “shall also include, but is not limited to, [a list of] relevant material[s].” R. 3:13-3(b)(1). “Relevance is measured in terms of the opportunity of the defendant to present a complete defense.” Pressler & Verniero, Current N.J. Court Rules,

cmt. 3.2 on R. 3:13-3 (2020). “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’” State v. Richardson, 452 N.J. Super. 124, 132 (App. Div. 2017) (quoting State v. Gilchrist, 381 N.J. Super. 138, 146 (App. Div. 2005)), (quoting N.J.R.E. 401), or will lead to the discovery of relevant evidence. State v. Ballard, 331 N.J. Super. 529, 538 (App. Div. 2000). The types of items listed as discoverable in R. 3:13-3(b)(1) include video and audio recordings, police reports, and lab reports. See R. 3:13-3(b)(1)(A), (C), (E), and (H); See also State v. Desir, 245 N.J. 179, 193 (2021).

Furthermore, a court’s “power to order discovery is not limited to the express terms of the automatic discovery provisions of Rule 3:13-3(b).” State v. Richardson, 452 N.J. Super. 124, 132 (App. Div. 2017). Indeed, “courts have ‘the inherent power to order discovery when justice so requires.’” Ibid.(quoting State in the Interest of A.B., 219 N.J. 542, 555 (2014)).

Here, the FRT-related discovery undoubtably satisfies the standing law and Rules governing discovery. The State presents the Court with a one-sided ‘open and shut’ recitation of the facts that would lead this Court to believe that Miles has no defense. There is **no one** that identifies Miles as the shooter. Law enforcement and the State married themselves to pinning the case against Miles as soon as the FRT, by and through the CI, identified Miles. The identification process is even more

tortured by the fact that law enforcement showed the CI Jersey City CCTV footage, and showed Jones, Miles' sister and Davenport footage from Kaelyn Grocery. Law enforcement did not show the CI, Jones, Miles' sister or Davenport footage of the actual shooting. The reason law enforcement did not show these witnesses any footage of the actual shooting was because they were locked in on Miles as soon as the FRT hit came back and did not want to jeopardize closing the case regardless of whether they were right or wrong.

The FRT-related discovery is imperative to Miles' defense. At trial Miles anticipates pointing out the glaring deficiencies in the identification process and intends to educate the jury on how the State's case was reverse engineered on a false reliance on FRT. The FRT-related discovery is essential to properly litigate Miles' case. In the absence of the FRT-related discovery that the trial court ordered Miles loses his ability to properly attack the investigation and the identification process by showing the jury any errors or omissions in the way FRT was used and relied upon.

Miles has a good faith basis to believe there are significant issues with the way FRT was used. At the forefront of this issue is the fact that the NJSP unequivocally indicate that they have no records of FRT being used in Miles' case. This is a bewildering fact. It is presently unknown who administered the FRT and whether it was done properly. The only FRT related discovery that the State has provided are two print outs, Pa22-25, that have a low-quality thumbnail of a

photograph on the top that is listed as the ‘probe’ photograph and then ten potential matches.

One need not look further than the potential matching photograph in the sixth position on Pa22 to see the pitfalls of FRT. The photograph in the sixth position, which the FRT deemed a match, does not even appear to be an actual person. Id. The second search, Pa24, contains five photographs that all purport to be Miles. Although one may argue that five photographs is better than one a human must ultimately decide what, if any, photographs match. Here, Miles has absolutely no clue who made this ultimate determination and how the multiple photographs of Miles may have influenced the decision. The FRT-related discovery is critical to Miles’ defense and ability to challenge the investigation and show that he was misidentified.

These issues are compounded by the fact that the State repeatedly told the trial court that they attempted to obtain the requisite FRT materials and were informed by the responsive agencies that ‘no file’ exists. The State fails to tell this Court it failed to produce a Certification that it offered to produce, from the agency or agencies that administered the FRT regarding the unavailability of FRT related

discovery. The destruction and or absence of the requisite FRT related discovery is tantamount¹.

To obfuscate this issue the State attempts to use this Court as a shield and a sword. The State argues that Miles is not entitled to FRT related discovery because it is irrelevant while at the same time failing to inform this Court, as it did the trial court, that ‘no file’ exists with respect to the FRT in this case. The State’s position cannot be reconciled. The State cannot say that it would have provided Miles with the requisite materials but for the fact they were unable to obtain them while at the same time arguing that the materials are irrelevant and therefore need not be provided.

It is not acceptable that the State is unable to even provide elementary discovery like the actual photograph that it claims to have been used in applying the FRT, how large the database is, where the database photos came from, how many photos of Miles were contained in the database. What is more, there is a human component to the administration of the FRT. The State has failed to provide any identification or qualification of the individual that administered

¹ The State’s Appendix includes an email, Pa27, from the New Jersey State Police (“NJSP”) which indicates that the NJSP “searched [their] 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 Miles’ name or case number... we unfortunately have nothing we can offer to assist you with this case.” Although the State included this email in their appendix, it does not appear to be cited or referenced in their brief.

the FRT and what, if any, information was provided to the individual prior to the administration of the software.

The State further argues that they do not need FRT to prove their case because they have witnesses that identified Miles in video surveillance that was shown. This argument was soundly rejected by the trial court. In rejecting this argument, the trial court saliently noted that there was no consensus on whether the “[d]etectives spoke to the three witnesses because of the lead from HIDTA, and there was some uncertainty as to the exact chronology of events during that part of the investigation.” Pa12. The trial court’s finding is correct and is exacerbated by the fact that the State concedes that the FRT related documents appear not to exist. These FRT documents, in addition to potentially being submitted to an expert, would unequivocally paint a timeline that would allow Miles to potentially impeach the investigation and call into question the identification process including, but not limited to, it being suggestive.

The Attorney General’s amicus argument is even less compelling. The Attorney General’s claim that the identifications in this case are clearly reliable and there is “no reasonable risk” of misidentification, ignores both the science, as explained by preeminent identification expert Gary Wells, and the facts of this case. As laid out above, no one has identified Miles as the shooter. The CI and the civilian witnesses were not shown the same videos. The CI was shown Jersey City CCTV footage while the other witnesses were shown video from a

Kaeylin Grocery. Just because someone identified someone in one video does not mean they would agree it is the same person in a different video. The Attorney General's argument related the reasonable risk of misidentification is unpersuasive as it is not based on fact.

The Attorney General puts the cart before the horse in claiming that FRT-related discovery (all of it, apparently) is discoverable only if a defendant "establishes a significant risk that an innocent person has been misidentified as the culprit." (AG Brief at 14). First, this position turns our well-settled discovery rules on their head. Second, and more importantly, the defense is seeking the information it would need to demonstrate the possibility of Miles' innocence. Not just because of the misidentification, but because of the possibility of third-party guilt as discussed above, and because of the sloppiness of the police investigation, fueled by tunnel vision.

The Attorney General seems to say, in essence, "well we've reviewed what we want to admit at trial and think that Miles is guilty, so there's nothing to see here." It creates a fundamentally unfair situation: if, before discovery is complete, the prosecutorial agency is convinced of a defendant's guilt, then a defendant will not get discovery that can challenge that belief. To take the Attorney General's hypothetical situation, (AG Brief 17) if there is an identification, DNA evidence, fingerprint evidence, and CSLI evidence that the

prosecutor believes supports a defendant's guilt and corroborates each other, is the defendant not entitled to the DNA case file because the defendant, the judge, and the jury should just trust that the reported statistic is correct and is therefore not entitled to the underlying data to assess the reliability of that conclusion, because obviously the defendant is guilty? Or if the State decides it does not feel like admitting the DNA evidence because there is enough evidence to convict, then a defendant is not entitled to any information about DNA testing. The answer is that the defendant is obviously entitled to the electropherograms and all other information in the DNA case file. So why would the Miles not be entitled to evidence about the FRT? There is no logical answer.

The Attorney General's assertion that "tools used as investigative leads . . . are not typically relevant for discovery" is completely incorrect. (AG Brief 2) The investigation of the case is extremely relevant to the defense and is therefore discoverable, even if the State does not seek to admit all its investigation into trial. It's why the defense is entitled to information about NIBIN hits for purported ballistics matches that won't be admitted into evidence, about anonymous calls that drove the police in a certain direction, about self-serving statements made by a defendant, or about an identification made by a witness the State does not believe to be credible, even if the evidence itself will not be admitted at trial by the State.

There is no “investigative tool” exception to the discovery rules. And there is no logical defense of the idea that just because a tool was used for an investigation that the reliability of the investigation, which lead to the prosecution of a defendant, is somehow irrelevant. If that were the case, there would be no such thing as Brady evidence—Brady evidence is, by definition, favorable evidence that the State learned of during an investigation and did not use at trial and did not turn over. If our discovery rules and constitution required the State to turn over only what it was planning on using at trial, there would be no such thing as a Brady violation. A defendant would be forced to go to trial with overwhelming inculpatory evidence and none of the information the State might chose not to believe or consider relevant: everything that would help a defendant.

The idea, asserted by the Attorney General, that the State is not obligated to provide discovery about a CI “simply because investigators spoke to one” is baffling and a red herring. (AG Brief at 8). Miles has not sought any information concerning the CI in this case. The annals of wrongful convictions are filled with cases in which tips that the State did not believe were not disclosed to the defense or other evidence that did not fit the State’s narrative of guilt was not disclosed to the defense. John C. Navarro and Michael A. Hansen, An Experimental Study on the Effect of Prosecutorial Brady Violations on

Confidence in Exonerating Individuals Wrongfully Convicted of Murder, J. of Experimental Criminology 4-5 (Jan. 14, 2025) (official misconduct, the most frequent of which is the failure to discovery Brady material, contributed to wrongful convictions in 74% of exonerations). See also Brian Gregory, Brady is the Problem: Wrongful Convictions and the Case for ‘Open File’ Criminal Discovery, 46 U. S.F. L. Rev. 820, 845 (“Because determining whether prosecutorial “tunnel vision” exists involves proving a negative, there is no way to determine whether it is a factor in an investigation without full knowledge of the information available to the police and prosecution in a given case. In order to show that leads were not followed or simply ignored, for example, one would necessarily need access to all the information gathered by investigating authorities.”).

The standard that governs a defendant’s right to discovery is relevance. Relevant evidence is generally admissible, other than when the Rules of Evidence or the law bar the admission of that relevant evidence. N.J.R.E. 402. The Rules of Evidence, therefore, are designed to exclude relevant evidence at trial for reasons other than a lack of relevance.

Relevant evidence is always discoverable under Rule 3:13-3. “The fact that information sought may not be admissible at trial as evidence does not bar its discovery.” State v. Williams, 403 N.J. Super. 39, 45 (App. Div. 2008), aff’d as

modified, 197 N.J. 538 (2009) (internal quotation marks omitted). See also State v. Clark, 381 N.J. Super. 41, 47 (App. Div. 2005), aff'd, 191 N.J. 503 (2007) (“We note, moreover, the posture of the case at which the issue before us arose, i.e., the question presented is one of pre-trial discovery and preparation, not admissibility at trial. Because the statements have not been produced, and the contents are known only to the ACJC, it is impossible to predict whether those statements, or any portion of them, may properly be used at defendant’s trial. That is a determination that the trial court must make when and if the question is presented at trial.”). Whether evidence is admissible or going to be admitted is thus a separate matter from whether the defendant is entitled to it in discovery.

C) The Arteaga Decision Should Not be Disturbed

In State v. Arteaga, 476 N.J. Super. 36 (App. Div. 2023) the Appellate Division held that a defendant in case in which the State utilized or relied on FRT to identify a defendant is entitled to the following discovery regarding the FRT:

1. The name and manufacturer of the facial recognition software used to conduct the search in this case, and the algorithm(s) version number(s) and year(s) developed;
2. The source code for the face recognition algorithm(s);
3. A list of what measurements, nodal points, or other unique identifying marks are used by the system in creating facial feature vectors including, if those marks are weighted differently, the scores given to each respective mark;
4. The error rates for the facial recognition system used, including false accept and false reject rates (also called false match and false non-match rates—

- FMR and FNMR), as well as documentation as to how the error rates were calculated, including whether they reflect test or operational conditions;
5. The performance of the algorithm(s) used on applicable Face Recognition Vendor Tests, if available;
 6. The original copy of the query or "probe" photo submitted;
 7. All edited copies of the query or "probe" photo submitted to the facial recognition system, noting if applicable, which edited copy produced the candidate list that the Miles was in, and a list of edits, filters, or any other modifications made to that photo;
 8. A copy of the database photo matched to the query or "probe" photo and the percentage of the match, rank number, or confidence score assigned to the photo by the facial recognition system in the candidate list;
 9. A list or description of the rank number or confidence scores produced by the system, including the scale on which the system is based (e.g. percentage, logarithmic, other);
 10. A copy of the complete candidate list returned by the face recognition or the first [twenty] candidates in the candidate list if longer than [twenty], in rank order and including the percentage of the match or confidence score assigned to each photo by the facial recognition system;
 11. A list of the parameters of the database used, including:
 1. How many photos are in the database;
 2. How are the photos obtained;
 3. How long the photos are stored;
 4. How often the database is purged;
 5. What the process is for getting removed from the database;
 6. Who has access to the database;
 7. How the database is maintained;
 8. The Privacy Policy for the database;
 12. The report produced by the analyst or technician who ran the facial recognition software, including any notes made about the possible match relative to any other individuals on the candidate list; and

13. The name and training, certifications, or qualifications of the analyst who ran [the] facial recognition search query.

In arriving at this conclusion, the Arteaga held that:

“The State has a duty to disclose evidence potentially favorable to the defense. Brady, 373 U.S. at 87, 83 S. Ct. 1194. This sort of evidence need not be directly exculpatory **so long as it has value for impeachment purposes**. State v. Nash, 212 N.J. 518, 544, 58 A.3d 705 (2013) (emphasis added). Exculpatory evidence is not limited to evidence within the State’s possession, custody, or control. Washington, 453 N.J. Super. at 184, 180 A.3d 1143. “The Brady disclosure rule applies only to information of which the prosecution is actually or constructively aware.” Nelson, 155 N.J. at 498, 715 A.2d 281. “This . . . means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.” Kyles, 514 U.S. at 437, 115 S. Ct. 1555; see Nelson, 155 N.J. at 499, 715 A.2d 281 (citing Smith v. Sec’y of N.M. Dep’t of Corr., 50 F.3d 801, 824 (1995)) (“[T]he ‘prosecution’ for Brady purposes . . . extends to . . . law enforcement personnel and **other arms of the state involved in investigative aspects** of a particular criminal venture.”)(emphasis added); State v. Robertson, 438 N.J. Super. 47, 69, 102 A.3d 381 (App. Div. 2014) (“A prosecutor's obligation under Brady 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.”).” Id. at 53-54.

The Arteaga court made clear that more was at stake than the relationship between identification procedure and the FRT because “[t]he 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.” 476 N.J. Super. at 61. 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. “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)). The State’s instant position appears to undermine these well settled principles.

In support of his motion to compel discovery, the defendant in Arteaga presented to both the trial court and the Appellate Court an expert report that explained why every piece of discovery was necessary to assess the reliability of an FRT match. Id. at 63 (“Like Pickett, defendant here has demonstrated a ‘particularized need for [the] discovery.’ 466 N.J. Super. at 279, 289, 246 A.3d 279. He has produced a list of specific items sought, aided by an expert, which is neither broad, unduly burdensome, or untethered to the evidence necessary to mount a defense.”). Neither in Arteaga nor in this case has the State ever produced an expert report to challenge whether any of these items are not necessary to assess the

reliability of a facial recognition hit from the perspective of how the systems themselves work. Instead, the State continues to rely on bold unsupported self-serving conclusions.

The Attorney General’s Office boldly asserts that the discovery sought is unduly burdensome. Apart from the source code and related materials, every single item sought, and which the court in Arteaga ordered, should be easily accessible to the prosecuting agencies—the picture used, the report generated, and information about who is in the database, for instance, are extremely commonplace whenever any database is searched or investigation is undertaken. Just because the State has failed to keep – or even worse destroyed - appropriate records does not make their production overly burdensome.

The State is now seeking to relegate Arteaga when nothing has changed. This Court has made clear the issues related to the reliability of a technology should not be “relitigated over and over again in the criminal trial courts.” State v. Olenowski, 255 N.J. 529, 629 (2023) (Olenowski II). “Absent materially new or different evidence, there is no need, nor the realistic ability, to repeat such a colossal undertaking in the courtrooms of individual trial judges.” Ibid. The State has demonstrated no need to revisit Arteaga. Moreover, under the facts of this case, the discovery is relevant and discoverable, as explained above.

Lastly, and most importantly, the State's position, should this Court not adopt Arteaga, puts defendants in a precarious position. To fend off the State's specious attacks in the instant case Miles felt obligated to show this Court the potential errors, pitfalls and deficiencies in the State's case and the identification procedure which indicate third-party guilt. Should this Court alter Arteaga and not mandate the State produce FRT related discovery when FRT is utilized, a defendant, like Miles in this case, will be confronted with having to choose between divulging trial strategy and seeking discovery he lawfully entitled to. Defendants should not be put in such a quagmire. Defendants should not, and have never been, restricted in their ability to put on a zealous unimpeded defense. Arteaga maintained the sanctity of that right. Altering Arteaga in any way will serve to undermine the bedrock of the discovery rights criminal defendants have always been entitled to.

CONCLUSION

For the foregoing reasons, this Court should adopt the holding contained in Arteaga requiring the State to produce FRT related discovery when FRT is used and the trial court's Order requiring the State to produce the specifically delineated FRT discovery, and the Appellate Division's affirmation, should be affirmed by this Court.

Respectfully yours,

s/ Joel Silberman

Joel Silberman, Esq.