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Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
P.O. Box 970
Trenton, New Jersey 08625

**Re: A-64-24 *State of New Jersey v. Nirav Patel* (090380)
Appellate Division Docket No. A-002381-23**

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule 2:6-2(b)*, kindly accept this letter brief on behalf of
amicus curiae the American Civil Liberties Union of New Jersey (“ACLU-
NJ”) in the above-captioned matter.

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PRELIMINARY STATEMENT

The ability to obtain a new trial based on newly discovered evidence is an essential tool to guard against unjust convictions. To that end, so long as it is clear that the defendant is not gaming the system – such as by having withheld exculpatory evidence for strategic reasons – the diligence of the defendant in having discovered such evidence in time to use it at trial should usually be subordinated to the court’s assessment of the evidence as having the potential to reverse an unjust conviction.

Amicus ACLU-NJ therefore urges this Court to decline the State’s invitation to clarify the standards applicable to such motions so as to usually lead to the denial of such motions where the alleged newly discovered exculpatory evidence was in the possession of the defendant, even if the defendant did not realize it. Rather, common sense dictates that one accused of a crime is unlikely to voluntarily withhold exculpatory evidence. Thus, if a defendant mistakenly fails to search everywhere for such evidence and the evidence is otherwise material and would likely have changed the jury’s verdict, a new trial should ordinarily be ordered.

This is not to say that the defendant’s diligence – or lack thereof – should be written out of the equation. Certainly, it may be relevant to any credibility assessments by the trial court pertinent to the authenticity of the

proffered evidence and to the robustness of the evidence for purposes of materiality purposes and the potential for the evidence changing the jury's verdict from guilty to not guilty. However, a defendant's inadvertence, standing alone, should not be the basis for a defendant's conviction, let alone imprisonment. This Court's precedent stands firmly against such a result.

The State also raises the issue of whether the trial court is required to decide not only the authenticity, materiality, and potential impact on the jury of newly discovered evidence, but also its ultimate "truthfulness." There, also, a more nuanced approach seems preferable. The trial court's gatekeeper function on new trial motions based on newly discovered evidence is limited to a determination of whether the proffered evidence has been properly authenticated, and is material and otherwise admissible. The trial court's fact-finding function on such motions is limited to an assessment of the defendant's diligence in discovering the evidence and a determination of whether the proffered evidence is likely to lead a jury to acquit.

The trial court's view as to the relative credibility of the evidence may certainly affect its determination as to whether it is sufficiently robust so as to likely change the jury's verdict. But that is not the same thing as the trial court's assessing the ultimate truthfulness of the evidence. In accordance with this Court's precedent, only a jury can do that.

Amicus therefore urges this Court to reject the State's request that the Court use this case to adopt standards attendant to the adjudication of motions for new trial based on proffers of newly discovered evidence that are at odds with this Court's controlling law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on the statement of facts and procedural history as set forth by the Appellate Division in its opinion, *State v. Patel*, No. A-2381-23 (App. Div. Feb. 3, 2025).

ARGUMENT

I. Assessment of a defendant's diligence in producing newly discovered evidence should be guided primarily by the aim of avoiding conviction of innocent people.

This Court has repeatedly stressed that the purpose of allowing those convicted of crimes to seek redress on the basis of newly discovered evidence "is to provide a safeguard in the system for those who are unjustly convicted" *State v. Ways*, 180 N.J. 171, 188 (2004). Such relief, be it by way of motion for new trial or post-conviction relief ("PCR"), is "the last line of defense against a miscarriage of justice." *State v. Nash*, 212 N.J. 518, 526 (2013).

To that end, this Court has relaxed rules governing motions for new trial based on newly discovered evidence when necessary to ensure that justice is not miscarried. Those rules typically require a defendant seeking a new trial on

the basis of newly-discovered evidence to show that “the evidence is 1) material, and not ‘merely’ cumulative, impeaching, or contradictory; 2) that the evidence was discovered after completion of the trial and was ‘not discoverable by reasonable diligence beforehand’; and 3) that the evidence ‘would probably change the jury’s verdict if a new trial were granted.’” *Ways*, 180 N.J. at 187 (quoting *State v. Carter*, 85 N.J. 300, 314 (1981)).

Thus, in *State v. Ways*, this Court ruled that “the passage of time must not be a bar to assessing the validity of a verdict that is cast in doubt by evidence suggesting that a defendant may be innocent.” 180 N.J. at 188. In *State v. Nash*, this Court ruled that it could not allow the rules prohibiting a defendant generally from presenting a claim on PCR that could have been raised below to require this Court “to acquiesce to a miscarriage of justice.” 212 N.J. at 546. Such rules are not “inflexible command[s],” 212 N.J. at 547, “and must yield to a fundamental injustice.” *State v. Hannah*, 248 N.J. 148, 178 (2021).

To be sure, this Court has also emphasized that “[a]lthough we may relax procedural roadblocks to avoid fundamental injustice . . . doing so requires balancing the competing interests of finality and fundamental fairness.” *State v. Szemple*, 247 N.J. 82, 98 (2021). But of particular bearing on the issue in this case, this Court “would not require a person who is probably innocent to

languish in prison because the exculpatory evidence was discoverable and overlooked” *State v. Ways*, 180 N.J. at 192.

Contrary to this fundamental precept, the State repeatedly urges that this Court use this case as the vehicle to adopt an even more stringent standard and rule that “evidence in defendant’s possession is not, absent extraordinary extenuating circumstances, an appropriate basis for a new trial motion based on newly discovered evidence.” St.’s Br. 18¹. The State would require proof of an “external obstacle,” “not likely” to be present when the evidence was in the defendant’s possession. St.’s Br. 14-15.

The cases relied upon by the State provide ample reason to reject the State’s approach, and, indeed, provide support for this Court to err on the side of finding diligence even when the evidence was within a defendant’s control. For starters, as this Court explained in *State v. Ways*, it is highly unlikely that a defendant would knowingly fail to produce exculpatory evidence. “Surely, there is no advantage to a defendant when his attorney fails to discover or overlooks exculpatory evidence. 180 N.J. at 192; accord *State v. Nash*, 212 N.J. at 550.”²

¹ St.’s Br. refers to the State’s New Jersey Supreme Court brief.

² Amicus emphasizes that it is not implying that defense counsel at trial in this case was less than diligent, and further that no claim of ineffective assistance of counsel has been asserted in this case. Rather, amicus’ argument against the new standard that the State asks this Court to apply is premised on a

The other authorities cited by the State do not posit the standard pressed by the State. *State v. Szemple* has nothing to do with newly discovered evidence possessed by the defendant at the time of trial. There, 25 years after his conviction, the defendant sought discovery from the State of alleged Brady evidence, i.e., any statements memorializing interviews of law enforcement officers with his wife after her father's production of a letter believed to be written by the defendant, in which defendant admitted to the murder with which he was charged, and which letter was introduced into evidence at his trial. 247 N.J. at 87. In denying the post-conviction discovery request, this Court found that granting discovery now would be futile in connection with any PCR, because the defendant "failed to take any action to secure the now-requested discovery before his re-trial, during his re-trial, or in the decades since," and therefore did not act with reasonable diligence. *Id.* at 105. Further, the defendant failed to offer any proof other than "a mere supposition that investigators interviewed" his wife. *Id.* at 103. Thus, *Szemple* provides no support for the State's plea for an almost per se rule that the Court find lack of due diligence where the defendant possessed the newly discovered evidence at the time of trial, no matter when the defendant produces the evidence (for

defendant's inadvertence leading to a delay in finding the exculpatory evidence whether or not accompanied by an attorney's negligence.

example, comparing the couple of weeks after trial situation in the instant case with the 25 years in *Szemple*), and no matter what the probable impact on the jury's verdict, if the jury deems the new evidence credible.

The State's out-of-state support is similarly unavailing. Three of these cases are civil cases and therefore do not implicate the fundamental injustice issue inherent in new trial motions in criminal cases. *Harrington v. Atlantic Sounding Co.*, 602 F.3d 113 (2d Cir. 2010); *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208 (9th Cir. 1987); *Taylor v. TexGas Corp.*, 831 F.2d 255 (11th Cir. 1987). In the remaining cases, the evidence was rejected because it was produced or discussed at trial, *United States v. Cimera*, 459 F.3d 452, 461-62 (3d Cir. 2006) ("Because Cimera has not identified any evidence which was not admitted at trial, however, his motion should have been denied."); *United States v. Jaramillo*, 42 F.3d 920, 925 (5th Cir. 1995), *abrogated by United States v. Vargas-Ocampo*, 747 F.3d 299 (5th Cir. 2014) (new evidence pertained to videotape used at trial); *United States v. Pappas*, 602 F.2d 131, 134 (7th Cir. 1979) (new evidence was something that defendant and counsel were expressly told by Government before trial); *United States v. Castillo*, 171 F.3d 1163, 1167 (8th Cir. 1999) (new evidence was on side of tape actually provided to defendant pretrial and examined by his expert); *People v. Wong*, 784 N.Y.S.2d 158, 160 (N.Y. App. Div. 2004) (testimony that

the defendant had not committed the murder, which had been “produced by the defense at trial”); *State v. Perez*, 457 N.W.2d 448 (Neb. 1990) (defendant’s attempt to change his testimony after conviction, based on his listening to a tape recording of the drug purchase, which he had before trial); *State v. Daymus*, 380 P.2d 996 (Ariz. 1963) (newly discovered evidence was a document from defendant’s records from among those held in bankruptcy court, some of which were produced at trial and neither defendant nor his counsel made any showing of any attempt to secure those records before trial); or because trial counsel made a “tactical” and “conscious decision to go to trial using the evidence they had available,” *United States v. Garcia-Alvarez*, 541 F.3d 8, 18 (1st Cir. 2008); or because it was testimonial evidence that defense counsel had not gathered, *Gutierrez v. State*, 602 S.W.3d 17, 21 (Tex. App. 2020) (purported new evidence were 18 affidavits from family and friends of the defendant).

Indeed, in several of these cases, the newly discovered evidence not only failed to meet the due diligence standard, but also failed to meet the materiality and likelihood of affecting the jury’s verdict standards, thus avoiding the need for the court to weigh the defendant’s diligence against the possibility of allowing a wrongful conviction to stand. *See, e.g., United States v. Jaramillo*, 42 F.3d at 925 (“[T]he introduction of such evidence would not probably

produce an acquittal.”); *United States v. Castillo*, 171 F.3d at 1167 (“Even assuming due diligence, however, we conclude that Castillo has not established that the [new evidence] would probably result in acquittal on retrial.”); *Gutierrez v. State*, 602 S.W.3d at 23 (defendant was able to make same points via State witnesses as would have been made via new affidavits). In the other cases, the Court did not reach the issue of the effect of the evidence on the jury’s verdict.

In sum, not one of these cases coupled the proffer of newly discovered admissible evidence which defendant had not realized was within his possession or control with a finding that such evidence was likely to change a jury’s verdict of guilt. And that is the crux of the standard – and the crux of the counter to the State’s proposed standard – that amicus presses here: even where defendant had access to the evidence at the time of trial and failed to produce it – not for any strategic or tactical reasons but because of inadvertence on defendant’s or defense counsel’s part – a new trial should ordinarily be ordered if the evidence meets the other prongs of the *Carter* test. That standard, predicated on this Court’s oft-repeated aim not to allow innocent people to “languish in prison,” is more in line with this Court’s jurisprudence than the draconian standard urged by the State.

There are, of course, limits to any such rule. Our courts, the State, those accused of crimes, and those victimized by crimes, have an interest in the finality of cases. Certainly, the length of the delay after trial in presenting new evidence may be factored into the court's assessment of the legitimacy of the evidence for the purposes of meeting the standards for the granting of a new trial. "[T]he belated introduction of evidence may be relevant to the PCR court's evaluation of the evidence's credibility." *State v. Ways*, 180 N.J. at 192. However, "[t]he power of the newly discovered evidence to alter the verdict is the central issue, not the label to be placed on that evidence." *Id.* at 191-92. In this context, the greater the degree of materiality of the evidence to the defense and therefore the greater the likelihood that the evidence, if believed by the jury, would have altered the jury's verdict, the more the importance of the diligence factor must fade in the court's analysis.

Ultimately, our courts must prevent manifest injustice. Firmly grounding the weighing of the factors relevant to a motion for a new trial based on newly discovered evidence on achieving that goal best comports with this Court's historic perspective.

II. A jury, and not the trial judge, makes the ultimate decision as to the “truthfulness” of newly discovered evidence that meets the *Carter* standards.

The State asks this Court to require trial courts to assess the “truthfulness” of proffered newly discovered evidence, lest courts “always grant new trials notwithstanding severe doubts as to the new evidence.” St.’s Br. 19. If the State were merely positing that the trial court may evaluate the proffered evidence’s credibility in determining its authenticity and probable effect on the jury verdict, amicus would have no quarrel with it. *See State v. Ways*, 180 N.J. at 187-88. Amicus senses, however, that the State seeks something more: an ultimate determination by the trial court as to whether the proffered evidence is absolutely true. That would be contrary to this Court’s precedent.

Nowhere in *State v. Tormasi*, 443 N.J. Super. 146 (App. Div. 2015), on which the State relies for this argument, or in *Carter* or *Ways*, on which *Tormasi* relies, is there a discussion of the trial court’s undertaking an ultimate assessment of the actual “truthfulness” of the evidence. *Tormasi* never talks in terms of “truthfulness.” It discusses the court’s dual gatekeeping and fact-

finding roles, but without defining the latter, using the term “credibility” only in the context of assessing authentication witness’ testimony.³

Carter talks in terms of a determination as to whether the proffered evidence was “of the sort” that was likely to affect the jury, not that it has to be absolutely truthful. *State v. Carter*, 85 N.J. at 314. *Ways* poses the issue as whether “if credible,” the evidence would be of that sort. *State v. Ways*, 180 N.J. at 188. Evidence may be deemed “credible” by a judge, i.e., “offering reasonable grounds for being believed or trusted,”⁴ but not deemed truthful by a jury after being subject to cross-examination or collateral attack in the crucible of a trial.

Indeed, the *Ways* Court explained this precisely, belying any notion that the credibility findings by the judge assessing newly discovered evidence must rise to a conclusive determination of “truthfulness”: “We do not decide where the truth ultimately lies, because that function falls within the exclusive purview of the jury after reviewing all the evidence.” 180 N.J. at 197.

A fair reading of these cases is that, in adjudicating a motion for a new trial based on newly discovered evidence, the trial court may certainly assess

³ *But see State v. Marrocelli*, 448 N.J. Super. 349, 369 n.7 (App. Div. 2017) (questioning the *Tormasi* court’s support for the proposition that a credibility assessment is part of the authentication determination).

⁴ *Credible*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/credible> (last visited July 23, 2025).

the credibility of the proffered evidence to determine the likely effect of the evidence on the jury. But that is not the same thing as determining whether what is being said in the new evidence – be it testimony as in *Ways* or documents as in this case – is truthful or not.

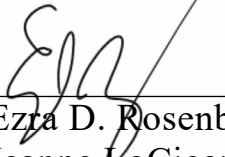
In short, there is an enormous difference between a trial court’s making threshold determinations as to the likely effect of evidence on the jury, and a jury’s making the ultimate determination as to the truthfulness of what that evidence conveys. This Court, in *Ways*, placed that ultimate determination firmly in the jury’s hands.

CONCLUSION

For the reasons stated above, amicus curiae the American Civil Liberties Union of New Jersey requests that this Court reject the State’s suggestions that (1) exculpatory evidence in the possession of the defendant at the time of trial – even if the defendant is unaware, and even if the defendant is not withholding the evidence for strategic reasons – will almost never meet the test for newly discovered evidence sufficient to support the ordering of a new trial and (2) the trial court, in adjudicating a motion for a new trial, should assess the ultimate “truthfulness” of the newly discovered evidence. Instead, consistent with this Court’s historical concern that innocent persons not be convicted of crimes, this Court should (1) subordinate *State v. Carter*’s

diligence prong to the materiality and likely effect on the jury's verdict prongs in situations where a defendant unintentionally neglected to find and offer clearly exculpatory evidence until after conviction, and (2) rule that the ultimate "truthfulness" of newly discovered evidence is a jury question, not that for the trial judge.

Respectfully submitted,



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