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By: AMY R. GILBERT 0100887

Confirmation Nbr. 3834647

STATE OF OHIO

vs.

QEYEON TOLBERT

CA 26 116018

Judge:

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IN THE COURT OF APPEALS
EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY

STATE OF OHIO,

Plaintiff–Appellant,

v.

QEYEON TOLBERT,

Defendant–Appellee.

No. CA-26-116018

On appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-24-689572-A

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND INNOCENCE PROJECT IN SUPPORT OF DEFENDANT–APPELLEE

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles embodied in the United States Constitution and our nation's civil rights laws. The American Civil Liberties Union of Ohio is a state affiliate of the ACLU. The ACLU has appeared before courts throughout the country in cases involving the dangers posed by unfettered police use of emerging technologies, including face recognition technology ("FRT"). Attorneys associated with the ACLU represented Robert Williams in *Williams v. City of Detroit*, No. 2:21-cv-10827-LJM-DRG (E.D. Mich.), alleging that the misuse of face recognition technology by the Detroit Police Department led to Mr. Williams's wrongful arrest, and have filed amicus briefs in other cases involving violation of constitutional rights in connection with police reliance on FRT. *See, e.g.*, *Woodruff v. Oliver*, No. 5:23-cv-11886, 2025 WL 2231045 (E.D. Mich Aug. 5, 2025) (wrongful arrest); *Parks v. McCormac*, No. 2:21-cv-04021 (D.N.J.) (same); *State v. Arteaga*, 296 A.3d 542, 555 (N.J. Super. Ct. App. Div. 2023) (*Brady* disclosure of details of FRT use); *State v. Miles*, No. A-41-24 (N.J.) (same).

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper,

efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in cases that involve surveillance technologies and programs that pose new challenges to personal privacy. The NACDL Fourth Amendment Center offers training and direct assistance to defense lawyers handling such cases in order to help safeguard privacy rights in the digital age. NACDL has also filed numerous amicus briefs in the Supreme Court on issues involving digital privacy rights, including: *Carpenter v. United States*, 585 U.S. 296 (2018); *Riley v. California*, 573 U.S. 373 (2014); *United States v. Jones*, 565 U.S. 400 (2012).

The Innocence Project ("IP") is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. In addition to representing innocent individuals challenging wrongful convictions, the IP advocates for changes in laws and procedures to reduce the risk of future wrongful convictions. This includes advocating to ensure that forensic and investigative tools (1) do not create an improper risk of sweeping innocent people into the criminal legal system and (2) undergo sufficient empirical validation and judicial scrutiny before they are used in investigation or as a basis for prosecution.

Many emerging surveillance technologies, including FRT, replicate risk factors that, in more traditional forensic disciplines, have produced hundreds of wrongful convictions: over-reliance on methods that are empirically unproven or not designed to produce definitive matches, unconscious cognitive bias, and inadequate disclosures to

courts and defendants. These technologies also pose new risks, automating the generation of suspicion and creating dragnets that expose innocent people en masse to law enforcement scrutiny. The IP has filed amicus briefs on the wrongful conviction risks posed by various digital surveillance technologies, including FRT, in the Supreme Court and several other appellate courts. *See, e.g.*, *United States v. Chatrie*, No. 25-112 (U.S.) (geofence warrants); *Schmidt v. City of Norfolk*, No. 26-1227 (4th Cir.) (automated license plate readers); *Commonwealth v. Rios*, 258 N.E.3d 303 (Mass. 2025) (ShotSpotter); *State v. Arteaga*, 296 A.3d 542, 555 (N.J. Super. Ct. App. Div. 2023) (*Brady* disclosure of details of FRT use); *State v. Miles*, No. A-41-24 (N.J.) (same).

Amici file this brief with consent of the parties. Ohio R. App. P. 17.

INTRODUCTION AND SUMMARY OF ARGUMENT

The detective in this case applied for a search warrant in reliance on a purported "identification" of Defendant from a face recognition technology ("FRT") search. The detective had been warned that the FRT search result was only an investigative lead. But far from disclosing the role of FRT and its lack of reliability for providing an identification, the detective scrubbed his affidavit of any mention of the technology. Instead, he misleadingly vouched only that police "received an identification" of Defendant from the "Fusion center." Had the judge known that the basis for the purported identification was an unreliable FRT search that supplied "multiple photos of multiple people," Tr. at 69, it would have been clear that the warrant lacked probable cause.

Amici write to aid the Court in rendering a decision based on an accurate understanding of face recognition technology and why the investigating officer's lack of candor in the warrant application requires suppression. This brief makes two main points. First, FRT results are fundamentally unreliable because of well-known technical limitations, racially disparate false-match rates, and human operator errors. And second, the detective's concealment of the use of FRT and representation that there had been an "identification" were materially false and misleading and thus should require suppression because the remaining facts in the affidavit cannot establish probable cause.

The importance of this issue reaches far beyond this case. Here, although police concealed their use of FRT from the judge, the prosecutor eventually disclosed it to the defendant, allowing the court below to hear the suppression motion. But police and prosecutors across the country systematically fail to disclose their use of face recognition technology to criminal defendants, meaning that people searched or arrested due to police

reliance on FRT results—which are often erroneous[1]—may never know how they came to law enforcement's notice, and therefore may not be in a position to mount a legal challenge.[2] This Court can and should provide guidance to ensure that police abide by their duty of candor to courts when submitting warrant applications in such cases.

ARGUMENT

I. Face recognition technology is inherently unreliable and cannot be relied on as a positive identification of a suspect.

As the trial court put it, the purported identification of the suspect based on face recognition technology search results in this case was "admittedly unreliable." Tr. at 92. The disclaimer appearing prominently at the bottom of each page of the Clearview AI FRT results provided to the investigating officer warned that "[f]acial recognition search results are to be treated as investigative leads" only and must be "independently verified" through "thorough investigation[]." Def's Ex. B. As Clearview further warns on its public

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[1] Police reliance on erroneous FRT results has been responsible for at least 14 known wrongful arrests. *See* Lauren Yu & Nathan Freed Wessler, *More than a Dozen Wrongful Arrests Due to Police Reliance on Facial Recognition Technology*, ACLU (Apr. 14, 2026), https://www.aclu.org/news/privacy-technology/more-than-a-dozen-wrongful-arrests-due-to-police-reliance-on-facial-recognition-technology; *see also* Douglas MacMillan, David Ovalle & Aaron Schaffer, *Arrested by AI: Police Ignore Standards After Facial Recognition Matches*, Wash. Post (Jan. 13, 2025), https://www.washingtonpost.com/business/interactive/2025/police-artificial-intelligence-facial-recognition/.

[2] Douglas MacMillan et al., *Police Seldom Disclose Use of Facial Recognition Despite False Arrests*, Wash. Post (Oct 6, 2024), https://www.washingtonpost.com/business/2024/10/06/police-facial-recognition-secret-false-arrest/ ("Police departments in 15 states provided The Post with rarely seen records documenting their use of facial recognition in more than 1,000 criminal investigations over the past four years. According to the arrest reports in those cases and interviews with people who were arrested, authorities routinely failed to inform defendants about their use of the software . . . .").

website, its FRT system is "neither designed, nor intended . . . to be used as a sole source system for conclusively establishing or determining an individual's identity." Def's Ex. C. That is because "real world conditions" can "reduce the accuracy of Clearview search results," and in all conditions the system is designed only to be "indicative and should not be considered definitive." *Id.* The Ohio Attorney General's Office agrees, stating publicly that Clearview searches produce "mixed results," and that those "results are merely an investigative lead that must then be followed up on by the investigator."[3]

There is good reason for these warnings: "searches conducted through today's facial recognition technology may be fundamentally unreliable due to serious flaws in the technology itself and human operator errors." *Woodruff v. Oliver*, No. 23-11886, 2025 WL 2231045, at *12 (E.D. Mich. Aug. 5, 2025). Indeed, face recognition algorithms are not even *designed* to generate matches. Instead, they produce *possible* leads, which are often incorrect, especially in "real world conditions" where low photo quality and other variables are at play. An accurate understanding of why FRT systems are unreliable is instructive in explaining why police lacked probable cause for the search of Defendant–Appellee's home in this case.

When police personnel run an FRT search, the algorithm extracts a "faceprint" or "template"[4] from the image of an unknown suspect (the "probe image" or "search image")

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[3] Jeremy Pelzer, *Ohio Continues Facial-Recognition Searches Using Controversial Photo-Collection Firm Clearview AI*, cleveland.com (Feb. 21, 2024), https://www.cleveland.com/news/2024/02/ohio-continues-facial-recognition-searches-using-controversial-photo-collection-firm-clearview-ai.html.

[4] A faceprint is a "map written in code that measures the distance between features, lines, and facial elements." *State v. Arteaga*, 476 296 A.3d 542, 555 (N.J. Super. Ct. App. Div.

and compares it to a database of faceprints taken from images of known individuals (for example, arrest photos, driver's license photos or, in this case, photos scraped from the internet). The system generates similarity scores for each comparison and then outputs a "candidate list" of possible matches, generally organized in order of similarity score. Although higher scores indicate the algorithm's calculation that the candidate appears more similar to the probe image than candidates with lower scores further down the list, a true match may appear anywhere in the candidate list, if it appears at all. Accordingly, face recognition algorithms used by police are not designed to (and do not) return a single definitive match. Rather, they are probabilistic systems that return a number of *potential* candidates based on an "algorithmic best guess."[5] As one court put it, "[i]nstead of being designed to produce accurate results, [the FRT algorithm] is designed to produce possibilities." *State v. Archambault*, No. 62-CR-20-5866, slip op. at 14 (Minn. 2d Dist. Ct. Sept. 13, 2024), attached as Ex. A.

FRT searches usually return multiple results. In this case, the search returned at least eight possible-match candidate photos. Def's Ex. B; *see also* Tr. at 69 ("multiple photos of multiple people"). The number can often be higher, depending on the algorithm used and its settings. As a Detroit Police Department ("DPD") employee testified in another case, for example, FRT searches run by the DPD can return "anywhere up to 10 to 100 or 500" potential matches. Dep. of Joseph Dablitz 18:17–18, *Oliver v. Bussa*, No.

2023) (quoting Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 Minn. L. Rev. 1105, 1111 (2021)).

[5] Eyal Press, *Does A.I. Lead Police to Ignore Contradictory Evidence*, The New Yorker (Nov. 20, 2023), https://www.newyorker.com/magazine/2023/11/20/does-a-i-lead-police-to-ignore-contradictory-evidence/.

2:20-cv-12711 (E.D. Mich.), ECF No. 51-3. Naturally, only one of the many candidates can be an accurate identity match. The rest will be innocent "false positives."

Furthermore, a true match to the suspect photo often will not appear in the results at all, either because the quality of the probe image is low, or because the database of images being searched does not include the true match, or for other reasons. *See* Def's Ex. C ("The quality of a submitted probe image, the lack of online images of a depicted individual in Clearview's Database, and other factors can impact and potentially reduce the accuracy of the Clearview search results.").[6]

Moreover, because many people share similar-looking facial characteristics, "[a]s more individuals are enrolled into a database, the possibility of a mismatch increases."[7] Clearview AI searches against a database comprised of "70+ billion facial images" scraped from the internet—an average of eight photos for every person on earth.[8] A database in the tens of billions means there is a high chance that any search will produce false

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[6] *See also* Patrick Grother et al., *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects* 5, Nat'l Inst. of Standards & Tech. (2019), https://perma.cc/7L99-A2QJ.

[7] Nat'l Acads. of Scis., Eng'g, & Med., *Facial Recognition Technology: Current Capabilities, Future Prospects, and Governance* 53 (2024) [hereinafter "National Academies Report"], https://nap.nationalacademies.org/catalog/27397/facial-recognition-technology-current-capabilities-future-prospects-and-governance.

[8] Clearview AI, *Company Overview*, https://www.clearview.ai/overview; *World Population 2025*, United Nations Population Fund, https://www.unfpa.org/data/world-population/WORLD.

positives. At least two known wrongful arrests have involved police reliance on incorrect Clearview AI results.[9]

These features of FRT systems mean that "[a]t best, any one of th[e] results is potentially a false positive. At worst, all results are undeniably false positives." *Archambault*, slip op. at 18. As the former Detroit Police Chief put it, "[i]f [police] were just to use the technology by itself, to identify someone, I would say 96 percent of the time it would misidentify."[10]

Although FRT algorithms generate false positives even in controlled test conditions, they are especially prone to error when probe image quality is low (as is often the case in real-world conditions), or when there are differences between the probe image and the database images it is being compared against. As the Ohio Attorney General Facial Recognition Task Force explained in a 2020 report, "the performance of a facial recognition system depends on the quality of the image. Image quality is dependent on several factors including background, lighting, angle, facial expression and pose."[11] Other sources agree that lighting, shadow, angle, facial expression, and partial occlusion of the

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[9] Michael Levenson, *Woman Spent Five Months in Jail After A.I. Linked Her to Bank Fraud Case*, N.Y. Times (Mar. 30, 2026), https://www.nytimes.com/2026/03/30/us/north-dakota-facial-recognition-ai-errors-bank-fraud.html; Kashmir Hill & Ryan Mac, *'Thousands of Dollars for Something I Didn't Do'*, N.Y. Times (Mar. 31, 2023), https://www.nytimes.com/2023/03/31/technology/facial-recognition-false-arrests.html.

[10] Jason Koebler, *Detroit Police Chief: Facial Recognition Software Misidentifies 96% of the Time*, Vice News (June 29, 2020), https://perma.cc/5YVX-PTET.

[11] Ohio Att'y Gen. Facial Recognition Task Force, *Report & Recommendations* 10 (Jan. 26, 2020), https://perma.cc/H4NF-ANNU.

face all affect accuracy.[12] The resolution of an image (i.e., its blurriness or pixel density) can also have a huge effect on the ability of an FRT algorithm to produce an accurate match.[13] Each of these issues is well known to affect accuracy of a search.[14] And "[w]hen a face image simultaneously contains multiple confounding factors," the accuracy of the FRT search can be even further degraded.[15]

In this case, the probe image appears to have at least several features that render it likely to produce an inaccurate search result.[16] The probe image is a still from a store's surveillance camera video, in which the suspect is far away from the camera (and therefore the face is relatively small) and appears to be looking away at an angle. Images captured from business security cameras typically have relatively low image resolution, which impedes the accuracy of results, especially when combined with small image size, off-center angle, and poor lighting conditions.

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[12] *See, e.g.*, Patrick Grother et al., *Face Recognition Vendor Test (FRVT) Part 2: Identification* 9–10, Nat'l Inst. Standards & Tech. (2019), https://perma.cc/BR6Y-6X6D; U.S. Dep't of Homeland Sec., DHS/ICE/PIA-054, *Privacy Impact Assessment for the ICE Use of Facial Recognition Services* 26 (2020), https://perma.cc/2TMV-JMGH.

[13] *See, e.g.*, Aman Bhatta et al., *Impact of Blur and Resolution on Demographic Disparities in 1-to-Many Facial Identification*, Proc. of the IEEE/CVF Winter Conf. on Applications of Comput. Vision (WACV) Workshops 412–20 (2024), https://perma.cc/MCQ3-QV5V.

[14] *See, e.g.*, National Academies Report, *supra* note 7, at 43 ("Typical problems include blur owing to motion; the subject not facing the camera; part of the face not visible owing to the subject wearing a cap, scarf, sunglasses, or the like; or the subject presenting a non-neutral expression."); *id.* at 46 (discussing effects of low "face quality" and "face aging").

[15] *Id.* at 47.

[16] The version of the FRT images in the record is an extremely low-quality photocopy, which makes assessing the quality of the original images difficult. *See* Def's Ex. B.

Even where probe image quality is ideal, face recognition systems exhibit race, gender, and age bias, with higher rates of false matches when used on people of color, women, and young adults than on white people, men, and older people.[17] According to National Institute of Standards and Technology testing several years ago, "even the best algorithms can be wrong more than 20 percent of the time" in test conditions,[18] and "Asian and African American people were up to 100 times more likely to be misidentified than white men, depending on the particular algorithm and type of search."[19] These disparities are a result of FRT algorithms being "trained mostly on White faces," on lighting and color contrast issues with digital photography that result in images of darker skinned people being underexposed, and other factors.[20] In a majority of the known U.S. cases of wrongful arrests due to police reliance on an incorrect FRT result, the person falsely identified and wrongly arrested is Black.[21] Defendant–Appellee in this case is Black.

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[17] *See, e.g.*, National Academies Report, *supra* note 7, at 55–57; Grother, *supra* note 8, at 7–8; K.S. Krishnapriya et al., *Issues Related to Face Recognition Accuracy Varying Based on Race and Skin Tone*, 1 IEEE Transactions on Tech. & Soc'y 8, 8–20 (2020), https://ieeexplore.ieee.org/document/9001031.

[18] Khari Johnson, *The Hidden Role of Facial Recognition Tech in Many Arrests*, Wired (Mar. 7, 2022), https://perma.cc/ECB6-LM22.

[19] Drew Harwell, *Federal Study Confirms Racial Bias of Many Facial-Recognition Systems, Casts Doubt on Their Expanding Use*, Wash. Post (Dec. 19, 2019), https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/.

[20] U.S. Comm'n on Civil Rights, *The Civil Rights Implications of the Federal Use of Facial Recognition Technology* 24–29 (2024), https://perma.cc/D4VS-5866.

[21] *See* MacMillan et al., *supra* note 1.

On top of these technical problems, additional risk of error is introduced by human review of the FRT search results. Research has consistently shown that it is difficult for people to accurately identify people from other racial and ethnic groups.[22] When a human analyst does an initial review of a list of FRT-generated candidates, the analyst's own cognitive biases can compound racial biases in the FRT-generated candidate list.

Even further, people reflexively over-rely on computer outputs because of "automation bias," "a heuristic replacement for vigilant information seeking and processing" that can "lead to decisions that are not based on a thorough analysis of all available information but that are strongly biased by the automatically generated advice."[23] Automation bias lulls human users of automated technologies, such as FRT, into an over-reliance on seemingly foolproof computers, leading the analysts to uncritically accept the computer's returns.[24] Automation bias means analysts will be less critical and discerning when selecting a possible match, including by deferring to the ranking of similarity scores generated by the algorithm in place of the analyst's own judgment. Human analysts may also assume there is an accurate match in a computer's returns even when there is not.

For these and additional reasons, research shows that human operators make errors on average 50 percent of the time "when deciding which faces in candidate lists

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[22] *See The Handbook of Eyewitness Psychology, Volume 1: Memory for Events* 257–81 (Michael P. Toglia et al. eds., 2007) (detailing dozens of studies); Kate Crookes & Gillian Rhodes, *Poor Recognition of Other-Race Faces Cannot Always Be Explained by a Lack of Effort*, 25 Visual Cognition 430 (2017).

[23] Raja Parasuraman & Dietrich Manzey, *Complacency and Bias in Human Use of Automation: An Attentional Integration*, 52 Hum. Factors 381, 391 (2010).

[24] *Id.* at 391–97.

match the search image. This is consistent with research on eye-witness identification—which is known to be unreliable, with well-meaning witnesses often mistakenly identifying innocent suspects."[25]

Because of these and other sources of unreliability and error in the FRT search process, it is commonly agreed that the results of a face recognition search do not constitute a positive identification of a suspect, and that additional reliable investigation is needed to develop probable cause.[26] FRT's combination of unreliable underlying methods and susceptibility to cognitive bias in fact mirror the very risk factors that, in other forensic disciplines, have led to hundreds of wrongful convictions.[27] But far from

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[25] David White et al., *Human Oversight of Facial Recognition Technology in Forensic Applications* ¶ 5 (U.K. Parliament 2021), https://committees.parliament.uk/writtenevidence/38555/html/. *Accord* David White et al., *Error Rates in Users of Automatic Face Recognition Software*, 10 PLoS ONE e0139827 1, 1 (2015) (the selection process "potentially reduc[es] benchmark estimates [of FRT accuracy] by 50% in operational settings").

[26] Law enforcement policies on FRT use have long specified that FRT results do not constitute probable cause. *See, e.g.*, Lucas Daprile, *Northeast Ohio Police Have Access to AI-Powered Facial Recognition. Here's One of the Area's First Policies in Using it*, cleveland.com (Jan. 29, 2025), https://www.cleveland.com/news/2025/01/northeast-ohio-police-have-access-to-ai-powered-facial-recognition-heres-one-of-the-areas-first-policies-in-using-it.html (Northeast Ohio Regional Fusion Center's FRT policy "says its facial recognition reports are meant only to generate leads and cannot be used as probable cause"); Bureau of Just. Assistance, U.S. Dep't of Just., *Face Recognition Policy Development Template* 22 (2017), https://perma.cc/CWM7-2E88 (similar).

[27] *See, e.g.*, Nat'l Registry of Exonerations, *Explore Exonerations*, https://exonerationregistry.org/cases?f%5B0%5D=n_pre_1989%3A0 (recognizing false or misleading forensic science as a contributing factor to wrongful conviction in 1,1104 out of 3,801 exonerations since 1989, or fully 29%); President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 31, 122 (2016), https://perma.cc/5UFK-3EZH (noting that "many forensic feature-comparison methods have historically been *assumed* rather than *established* to be foundationally valid" and that "[s]tudies have demonstrated that cognitive bias may be a serious issue in forensic science" in a wide range of disciplines).

detailing a reliable confirmatory investigation, the warrant affidavit in this case provided no independent confirmatory evidence for probable cause. As explained below, had police revealed accurate information about the FRT search to the judge when applying for the search warrant, the judge would have understood probable cause to be lacking, and could not have approved the warrant.

II. Suppression was proper because the issuance of a search warrant without probable cause was attributable to the detective's intentionally or reckless false statements in the warrant application.

A. The warrant application contained material omissions and misstatements.

"[A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." *Franks v. Delaware*, 438 U.S. 154, 165 (1978). A magistrate cannot carry out their independent evaluation, however, when the affiant makes a "deliberately or reckless false statement." *Id.* In that circumstance, the magistrate "cannot be viewed as neutral and detached," because their evaluation is reliant on the officer's falsehoods rather than on an accurate recital of the facts. *State v. Castagnola*, 2015-Ohio-1565, ¶ 41.

"To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either intentionally, or with reckless disregard for the truth." *State v. McKnight*, 2005-Ohio-6046, ¶ 31 (citation & quotation marks omitted). "'Reckless disregard' means that the affiant had serious doubts about the truth of an allegation." *Id.* Both misstatements and omissions may constitute false statements; "Omissions count as

a false statement if designed to mislead, or made in reckless disregard of whether they would mislead, the magistrate." *Id.* (citation & quotation marks omitted).

Once a defendant demonstrates "by a preponderance of the evidence that the affidavit contains deliberately or recklessly false statements," the warrant must be suppressed if "the affidavit, without the false statements . . . [no longer] provides the requisite probable cause to sustain the warrant." *State v. Weimer*, 2009-Ohio-4983, ¶ 32 (8th Dist.) (quoting *United States v. Charles*, 138 F.3d 257, 263 (6th Cir. 1998)); *see also Franks*, 438 U.S. at 156.

Amici focus here on Paragraph 20 of the Affidavit:

> Affiant avers that utilizing the Fusion center they received an identification of the, as of yet, unidentified male suspect, based on the recovered surveillance video, and it was learned this male was currently paroled to the address 403 E 52nd Street, Apartment #1.

Aff. ¶ 20.

The claim that the officer "received an identification of the . . . suspect" contains both material omissions and an affirmative false representation.

The affidavit omits at least the following facts, which were known to Detective Legg, and the omission of which misled the judge by leaving the impression that the Fusion Center somehow made a reliable, definitive identification:

- The purported "identification" was derived from a face recognition technology search. S*ee* Def's Ex. B (Clearview AI FRT results); Tr. at 15–16 (Det. Legg acknowledging receipt of the FRT search results);
- The FRT search returned multiple photos of multiple people as investigative leads. *See* Def's Ex. B (Clearview AI FRT results showing at least eight possible-match

candidate photos); Tr. at 60 (Det. Legg acknowledging that he "received multiple images" from the FRT search);

- FRT results are to be considered "investigative leads" only, and must be followed by "thorough investigations" to "independently verify" that an individual flagged by FRT is in fact a correct match, *See* Def's Ex. B (disclaimer on Clearview AI FRT search results); Tr. at 17 (Det. Legg acknowledging receipt of disclaimer).

Moreover, the claim that Detective Legg "received an *identification*" (emphasis added) is false, because FRT cannot provide positive identifications. *See supra* Part I. Instead, as the Clearview AI search results explained, the technology can only provide "investigative leads." *See* Def's Ex. B. Similarly, the email from the Northeast Ohio Regional Fusion Center that was forwarded to Detective Legg (but not described in the warrant affidavit) explained that the FRT search process produced only a "*likely* match for Qeyeon Tolbert" based on "*similar* facial features between the individual in the photo you provided and the booking photo." Tr. at 15 (emphases added). These descriptions reflect a tentative lead, not a positive identification. This is material to the probable cause showing because, "[w]hile an unequivocal identification is generally sufficient to establish probable cause, an identification that is tentative or uncertain may, on its own, be insufficient." *Williams v. City of New York*, No. 10-cv-2676, 2012 WL 511533, at *3–4 (E.D.N.Y. Feb. 15, 2012) (citing cases).

The detective's falsehoods here are analogous to an officer falsely averring that a witness has positively identified a suspect, where actually the witness made only a tentative or uncertain identification. In *Pinkney v. Meadville*, for example, the officer stated in the warrant affidavit that a witnesses "recognized" the suspect when presented

with his photo. 648 F. Supp. 3d 615, 631 (W.D. Pa. 2023), aff'd, 95 F.4th 743 (3d Cir. 2024). In fact, the witness had said only that the suspect "*look[ed] an awful lot like* who [he] saw throw the punch at the bar." *Id.* at 635 (emphasis in original; first alteration added). The court held that because the witness's "statement was tentative rather than positive or certain," the representation in the affidavit of the witness's "identification of [the suspect] as positive and definitive" was misleading. *Id.* at 635, 642. Likewise here.

This misrepresentation of a low-reliability lead as a positive identification provides sufficient ground to strike Paragraph 20 from the affidavit. This is so independent of the significance of the detective's omission of the portion of the Clearview disclaimer warning that "[t]hese search results are not intended or permitted to be used as admissible evidence in a court of law or any court filing." Def's Ex. B; *see also* Judgment & Order 7. Whether or not a warrant application is a "court filing" that requires "admissible evidence," *compare* Judgment & Order 7 (holding that it is), *with* Appellant's Br. 18–19 (arguing that it is not), omission of the fact that face recognition technology was used and of the disclaimer that accompanied the Clearview results deprived the judge of crucial information that would have undermined the reliability of the purported "identification."

B. The warrant application misrepresented the detective's undisclosed inference as fact.

In addition to being factually false, the representation that the Fusion Center provided an "identification" also usurped the magistrate's role by presenting the detective's inference (that Defendant–Appellee was a match to the suspect) as fact. The Fusion Center did not purport to provide an "identification" when it passed along the FRT search results. Rather, it provided an "investigative lead." Detective Legg inferred that the

FRT result plus other information meant that Defendant–Appellee was a match to the suspect. But rather than explain the basis of that inference, he passed it off as fact. "[T]he detective, by not disclosing that he had drawn an inference but instead presenting the inference as an empirical fact, usurped the inference-drawing function of the magistrate in determining probable cause." *Castagnola*, 2015-Ohio-1565, ¶ 42.

Faced with this scenario, the Ohio Supreme Court has explained that courts must "[d]etermine whether the hidden inference was so significant as to cross the line between permissible interpretation and usurpation." *Id.* ¶ 49. "A hidden inference should be deemed significant if it can be fairly concluded that it had a substantial bearing on the magistrate's determination of probable cause in each of two respects:" its "[r]elevance . . . to the magistrate's inquiry," and its "[c]omplexity," meaning that "[t]he more complex and attenuated the logical process by which a relevant conclusion is reached, the more important it is that the magistrate receive an opportunity to test the inference for validity." *Id.* ¶ 49–50. If a hidden inference is deemed "significant," courts must determine whether the affiant "acted intentionally or with conscious indifference, [in which case] the warrant should be invalidated and the evidence suppressed." *Id.* ¶ 50.

Here, the "identification" inference was highly relevant because it was "required to provide the nexus," *id.* ¶ 58, between the alleged crime and the place to be searched, Defendant–Appellee's home. *See infra.* Moreover, the inference was complex, in that it required weighing the reliability of the FRT search results, the Fusion Center's interpretation of those results, and other purportedly confirmatory information. "This determination is so profoundly significant that the issuing magistrate should have been given the opportunity to test the validity of the undisclosed inference." *Id.*

As explained above, *supra* Part I, FRT systems are not designed to provide "identifications." Detective Legg knew as much, since he received an express disclaimer to that effect. Def's Ex. B. His false statements and misrepresentation were therefore at least reckless. He knew that FRT was the source of the purported identification, and the FRT results in his possession expressly warned that they were only "investigative leads." *Id.* And yet he concealed the source of the purported "identification" and vouched a level of certainty that the FRT search process could not sustain.[28]

Paragraph 20 was the lynchpin of the State's assertion of probable cause. Contrary to the State's claim that Paragraph 20 had "no bearing on probable cause to search" Defendant's apartment, Appellant's Br. 15, it in fact provided the key nexus between Defendant and the premises to be searched. At most, the remaining paragraphs of the affidavit show only that the unidentified suspect came and went from 403 E 152nd Street six days after the incident. Aff. ¶¶ 18, 21. But that building is a "three story, multiple unit residential dwelling." *Id.* at 1. Identifying a connection with a multi-unit apartment building *in general* does not establish probable cause to search a *specific* apartment within—here, Apartment 1. *State v. Smith*, 2002-Ohio-1069, at *4 (8th Dist.) ("search warrants generally are void if they describe a multiunit building when probable cause to search attaches to less than all units"). The misleading assertion of an "identification" by

[28] Under *Castagnola*, if a significant inference was represented as fact "intentionally" or with "conscious indifference," the warrant must be suppressed without assessing whether there would have been probable cause in the absence of the misrepresentation. *Castagnola* at ¶¶ 50, 60. If "the affiant negligently usurped the magistrate's inference-drawing authority," the court must "excise the inference, insert the omitted underlying facts, and reassess the affidavit for probable cause." *Id.* ¶ 51.

the Fusion Center was the only basis in the affidavit for a nexus between the suspect and Apartment 1. Aff. ¶ 21.[29] Consequently, the trial court's suppression order was proper.

CONCLUSION

For the forgoing reasons, amici urge the Court to affirm the suppression order.

Dated: April 27, 2026

Respectfully submitted,

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[29] The State argues that Paragraph 21 of the affidavit independently establishes probable cause by specifying that the unknown suspect had been "observed in real time entering and exiting the front door of 403 E. 152nd St. on February 20, 2024." Appellant's Br. 21 (citing Aff. ¶ 21). Although the State now argues that the door through which the suspect was seen entering and exiting "has direct and exclusive access to Apt. #1," *id.*, such claim was not presented in the affidavit. Therefore, without Paragraph 20, the affidavit failed to demonstrate to the judge the nexus between the suspect and Apartment 1.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on April 27, 2026 via this court's electronic filing system. Notice of this filing will be sent to counsel for all parties by function of that system, and it may be accessed through that system.

/s/ Amy R. Gilbert
Amy R. Gilbert (0100887)

Exhibit A

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF RAMSEY	SECOND JUDICIAL DISTRICT

State of Minnesota, Plaintiff vs. Gerald Paul Archambault, Defendant	File No. 62-CR-20-5866 **ORDER**

The Ramsey County Attorney's Office alleged, via complaint, that on or about May 28, 2020, Gerald Paul Archambault did commit:

1. Burglary-3rd Degree-Steal/Commit Felony or Gross Misdemeanor in violation of Minn. Stat. § 609.582.3.

The Complaint was filed on September 15, 2020. On May 2, 2022, Mr. Archambault filed a motion seeking to prohibit the State from offering HCSO analyst Nicole Hughes's testimony and any facial recognition "match" under *Frye-Mack* and Minnesota Rules of Evidence 702. The Court heard part of the motion on November 8, 2022, but did not take up the *Frye-Mack* issue at that time. On March 15, 2024, Mr. Archambault filed a motion for an order seeking, in relevant part: (1) dismissal of the complaint due to lack of probable clause, (2) preclusion of IIT results as not generally accepted, (3) preclusion of IIT results as foundationally unreliable, and (4) preclusion or dismissal on due process grounds. The matter came before the Court for an all-day contested hearing on May 14, 2024. The issue was taken under advisement as of July 15, 2024. The Court has reviewed the submissions of the parties. Based on the following *Findings of Fact* and *Conclusions of Law*, the Court makes the following:

ORDER

1. FaceVACS Investigative Imaging Technology and the process employed here in determining an investigatory lead do not reliably and consistently produce accurate results. They fail the *Frye/Mack* test.

2. Mr. Archambault's motion to suppress evidence pertaining to the use of that facial recognition technology is **GRANTED**.

3. The due process concerns raised by Mr. Archambault are moot.

4. The Court takes no action on the discovery violations noted by Mr. Archambault because they relate to the use of facial recognition technology in this case.

5. The independent tip provided to law enforcement that identifies Mr. Archambault as the suspect in this case is enough for this matter to survive a challenge for probable cause.

6. Mr. Archambault's motion to dismiss for lack of probable cause is **DENIED**.

Dated: September 13, 2024

BY THE COURT:

Andrew S. Gordon
Judge of District Court

FINDINGS OF FACT

1. On May 28, 2020—amidst the period of civil unrest prompted by the murder of George Floyd—HealthEast Midway Clinic in Saint Paul, Ramsey County, was burglarized.
2. The Saint Paul Police Department's ("SPPD") Civil Unrest Task Force obtained and reviewed surveillance footage from the clinic. They observed footage of a man taking a large television from the clinic. Several other individuals were also observed on surveillance footage committing other independent acts.
3. Task Force members took screenshots of suspects seen on the surveillance footage. These images were disseminated to other law enforcement agencies, the public at large, and to the Criminal Information Sharing and Analysis ("CISA") Unit of the Hennepin County Sherriff's Office ("HCSO"). Analyst Nicole Hughes ("Analyst Hughes") received and reviewed these screenshots.
4. One of the screenshots provided to Analyst Hughes was of the aforementioned man seen on footage carrying the television out of the clinic.
5. On September 8, 2020, Analyst Hughes ran this image through the FaceVacs Investigative Imaging Technology ("IIT") program at the HCSO. She reviewed the FaceVacs results, which included 20 booking photos. Analyst Hughes ruled out several individuals from the photos based on physical dissimilarities. She then did a subjective visual comparison of Mr. Archambault's booking photos with the suspect photo and determined Mr. Archambault was possibly the person depicted in the HealthEast Midway Clinic footage. She did not retain the IIT run results but did provide Mr. Archambault as a potential lead to the taskforce.