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February 6, 2023

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-23-22 State v. Quintin D. Watson (087251)

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter-reply brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ).

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Preliminary Statement

In a lengthy opinion, the Appellate Division found that the State violated Mr. Watson's rights under the Confrontation Clause by creating an inescapable inference that police possessed inculpatory information from another law enforcement agency. The court also considered whether a police officer could properly narrate a surveillance video as a lay witness and whether witnesses who could not make out-of-court identifications should be allowed to make highly suggestive in-court identifications, without specially tailored jury instructions. In addition to its holdings, the panel's opinion provided suggestions for how courts should address both narration issues and in-court identifications going forward.

Amicus American Civil Liberties Union of New Jersey has previously addressed several of the issues implicated in this case. We briefed and argued questions regarding lay witness narration in *State v. Allen* (A-55-21). In that case the ACLU-NJ took the position that witnesses without firsthand knowledge of that which is depicted on a video could not, consistent with *N.J.R.E.* 701, provide lay opinion testimony. *Amicus* does not repeat that argument here, instead adopting the same position and adding that although the Appellate Division here misapplied the firsthand-knowledge requirement, the Court should adopt the prophylactic safeguards it proposed.

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In *State v. Burney* (A-14-22), the ACLU-NJ's brief addresses the suggestiveness of in-court identifications and contends that the standard for examining in-court identifications requires updating based on both caselaw and social science. Again, *amicus* does not repeat those arguments here, and instead adopts the positions briefed in *Burney*.

That leaves the Confrontation Clause issue. The Appellate Division correctly held that the admission of testimony about consultation with another law enforcement agency unfairly conveyed to the jury that the testifying officer possessed some unknown but inculpatory information about Mr. Watson. Acknowledging that the case against Mr. Watson was "not overwhelming[,]" the court nonetheless found the constitutional error to be harmless. To reach that conclusion the court applied a waiver principle that is foreign in our harmless error jurisprudence and would convert even the simplest appeals into lengthy, complex cases. In a single footnote addressing the testimony of Mr. Watson's ex-girlfriend, the court imposed a "waiver" requirement, which overly credited the ex-girlfriend's identification as dispositive in the case. Despite the panel's suggestion to the contrary, defendants on appeal need not – and, indeed, should not – brief every weakness in the State's case in order to rebut a suggestion of harmlessness.

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Statement of Facts and Procedural History

For the purposes of this brief, *amicus* accepts the statement of facts and procedural history contained in Mr. Watson's Appellate Division brief, adding the following: In a published decision, the Appellate Division affirmed the conviction. *State v. Watson*, 472 N.J. Super. 381, 514 (App. Div. 2022). The court held that the State violated Mr. Watson's Confrontation Clause rights, but that the error was harmless. *Id.* at 445. On November 18, 2022, the Court granted Mr. Watson's Petition for Certification, limited to three issues. Dsa1.[1] The State did not file a cross-petition regarding the Confrontation Clause issue. On January 6, 2023, the Court issued a peremptory briefing schedule. This brief follows.

Argument

Mr. Watson had no obligation to brief every weakness in the State's case to rebut a suggestion of harmlessness.

In assessing the strength of the State's case, the Appellate Division acknowledged some of the key weaknesses in the proofs: there was "no physical or forensic evidence linking defendant to the robbery, such as fingerprints, geo-location data extracted from defendant's cellphone, proceeds

[1] DSA refers to Mr. Watson's Supplemental Appendix;
DSBr refers to Mr. Watson's Supplemental Brief;
5T refers to the trial transcript dated November 13, 2018;
6T refers to the trial transcript dated November 14, 2018.

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of the robbery, i.e., 'bait money' found in defendant's possession, or the note the robber displayed to the bank teller." *Watson*, 472 N.J. Super. at 443. The panel also conceded that teller's identification was shaky, insofar as he had been "unable to identify defendant in an out-of-court identification procedure, and in fact selected a filler photo of someone other than defendant." *Id.* at 444. Still, the court determined that this "was by no means a 'weak case'" (*id.* at 443) because "the State presented surveillance video capturing the bank robber *in flagrante delicto*." *Id.* at 444. But, although the surveillance video captured *someone* in the act of robbing the bank, the critical question jurors had to answer was whether the recording depicted Mr. Watson. *See* 6T 27:4-10 (defense summation beginning by reminding jurors that "this case is a case of mistaken identity" and explaining that "Quintin Watson is not the man that went to the Garden State Community Bank that day.").

In support of its conclusion that Mr. Watson was the person on the surveillance recording, the appellate panel noted that his ex-girlfriend has "provided a reliable identification of the man depicted in the security video." *Id.*[2] Troublingly, the court concluded that the arguments that Mr. Watson had

[2] The panel overstated the reliability of the identification. As Mr. Watson's supplemental brief explained, familiarity does not exempt an identification from the same factors that impair the reliability of all identifications. DSBr 42 (collecting studies).

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raised at trial undermining the reliability of her identification had been waived, because he failed to advance them on appeal:

> During summation, defense counsel suggested that Hill had “an axe to grind” with defendant based on their breakup and called into question her motive for identifying defendant in and out-of-court. On appeal, defendant does not challenge the reliability of Hill's identifications. However, we note in the interest of completeness that during oral arguments on appeal, defense counsel briefly mentioned defendant’s argument from summation in the context of harmless error. We reject this argument. At trial, it was for the jury to determine whether Hill’s identifications were reliable. Indeed, the trial court instructed the jury that “[i]t is your function to determine whether the witness’s identification of defendant is reliable and believable . . . .” Furthermore, because defendant has failed to brief this argument, we deem it waived.).
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> [*Id.* at 444, n. 22 (citing *New Jersey Dep’t of Env’t Prot. v. Alloway Twp.*, 438 N.J. Super. 501, 504 n.2 (App. Div. 2015) and *Fantis Foods v. N. River Ins. Co.*, 332 N.J. Super. 250, 266–67 (App.Div.2000)).]

But, of course, on appeal, defendants only raise issues that can serve as a basis for the reversal of a conviction (or sentence) and are instructed not to focus on issues where the judge properly ruled. *See, e.g.*, *Price v. Hudson Heights Develop.*, 417 N.J. Super. 462, 466-467 (App. Div. 2011) (a party “who obtains the judgment sought, may not be heard to complain on appeal about the reasons or rationales cited for the action”) (citing treatise); *State v. Rose*, 206 N.J. 141, 189 (2011) (Rivera-Soto, J., concurring in part, dissenting

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in part) ("The notion that a court of appeals willy-nilly can decide issues unnecessary to the outcome of the case results in the wholesale issuance of advisory opinions, a practice our judicial decision-making system categorically rejects.") Simply put, there exists no vehicle for a defendant to identify weaknesses in the State's case where the defendant does not allege any error. Moreover, appellate courts should not encourage a practice that would require lawyers to include the proverbial kitchen sink in their briefs. *See* John C. Godbold, "Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal," 30 SW LJ 801 (1976) (Circuit Court judge noting as an example of poor appellate advocacy "a fifty-eight-page brief, of which nineteen pages, one-third of the brief, are devoted to complaints about rulings and events before trial and at trial, followed by a statement that none of these matters is claimed to be reversible error.").

At trial, Mr. Watson challenged Ms. Hill's testimony by suggesting that she was biased against him.[3] On cross-examination, defense counsel sought to undermine the State's suggestion that Ms. Hill and Mr. Watson's relationship

[3] He also challenged her ability to identify him based on the photograph she was shown, in which she acknowledged she could not see "the top portion of his face," because "a hat [wa]s pulled down over the eyes" and obscured "20 to 25 percent of his face[.]" 5T99:24-100:12. She also agreed that she could not see whether the person in the photograph had hair nor could she see the color of his eyes. *Id.* at 100:14-19.

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was "always friendly" (5T 92:17), even after they had broken up. Counsel elicited from Ms. Hill that Mr. Watson left her in 2012 and their "relationship did not end under the best circumstances[.]" *Id.* at 101:6-8. Specifically, Mr. Watson left Ms. Hill after telling her that he met another women and that the other woman had become pregnant with his child. *Id.* at 101:9-14. He left Ms. Hill for that woman, to whom he got married and with whom he had children. *Id.* at 101:15-102:3. In summation, defense counsel returned to this theme: he told the jury that it would be instructed it could consider a witness's motivation for testifying. 6T 31:23-32:1. And then he reminded the jury about the circumstances of their breakup and suggested that her presence as a witness came about because she "ha[d] somewhat of an axe to grind." *Id.* at 32:11-17.

Neither defense counsel's focus on the witness's bias nor his questioning regarding the limitations of the photograph she was shown suggest that he believed that the trial court made any errors in *admitting* the identification. Instead, he asked the jury to assign it minimal weight. The jury's failure to do so, to the extent it did, cannot serve as a basis for appeal and, as a result, should not have been raised in the defendant's brief.

Although it is true that "it was for the jury to determine whether Hill's identifications were reliable" (*Watson*, 472 N.J. Super. at 444, n. 22), the jury's return of a guilty verdict does not, on its own, indicate that it found the

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identification was reliable. The jury was asked whether *all* the evidence it received, including the improper testimony that suggested that a non-testifying law enforcement witness had inculpatory information about Mr. Watson, amounted to proof beyond a reasonable doubt. That they determined that all the proofs were sufficient to convict does not mean that without the improper evidence there was no real possibility of acquittal, which is the critical inquiry in harmless error analysis. *State v. Macon*, 57 N.J. 325, 336 (1971); *see also State v. Pillar*, 359 N.J. Super. 249, 276–77 (App. Div. 2003) (describing two acceptable, but different approaches to harmless error analysis: the contribution test, which asks whether the evidence was likely to have been considered by the jury in arriving at its verdict and a second test that asks whether the "untainted evidence" "is so overwhelming that in the judgment of the reviewing court conviction was inevitable" but noting that under either test the State must demonstrate that the jury would have "arrived at the same collective decision regardless of the error.")

Not only does the Appellate Division overstate what the jury's verdict indicated about the weight to be assigned to the identification,[4] it also imposes

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[4] In considering the reliability of the identification, compare the strength of the State's case here to the situation in *State v. Sterling*, 215 N.J. 65 (2013). There, despite improper joinder, the Court upheld one of the convictions, concluding that in light of "nuclear DNA evidence tying defendant to the crime, coupled with the victim's strong identification of defendant" the error was harmless

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unnecessary and inefficient requirements on litigants. A simple example illustrates the folly in the Appellate Division's requirement: Imagine a defendant challenged an identification under *State v. Henderson*, 208 N.J. 208 (2011), contending that the witness was too far away to see the event in question. Further suppose that the trial court held a hearing as required by *Henderson*, and determined that the identification, despite its flaws, was sufficiently reliable to be admissible. Under the Appellate Division's waiver rule, a defendant who wanted to challenge the admission of other crimes evidence in that case would have to brief the identification issue as a means to rebut a suggestion of harmlessness. This would be true even if the defendant concluded that the trial judge *correctly* applied the facts to the law in deciding the identification issue. The onerous obligation would not exclusively apply to identification issues: among other issues, defendants would need to brief the limitations of all sorts of forensic evidence, even when they did not challenge its admissibility, they would need to document every challenge to a witness's credibility, and they would need to brief every inconsistent statement.

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beyond a reasonable doubt. *Id.* at 102. That decision, in a case with both DNA and a far-stronger identification than here, drew a strong dissent from Justice Albin who contended that it had "completely compromise[ed] our harmless-error jurisprudence." *Id.* at 109 (Albin, J., dissenting). Ms. Hill's identification of Mr. Watson not "immediate and strong" (*id.* at 104) as was the identification in *Stirling* and, as discussed above, was infected with bias from an acrimonious breakup.

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That requirement has no basis in our jurisprudence and would be wildly inefficient, transforming even the simplest brief into a tome. Not every weakness in the State's case reflects an issue that can, or should, be raised on appeal. Insofar as one of the purposes of the harmless error rule is "to conserve judicial resources," *State v. G.V.*, 162 N.J. 252, 261 (2000) (internal citations omitted), it would be particularly bizarre to require the inefficient elongation of all defendants' appellate briefs to prevent harmless error findings.[5]

[5] Indeed, because even those issues *mentioned* in a brief may be deemed waived if inadequately briefed, *see Ramapo Brae Condo v. Bergen County Hous. Auth.*, 328 N.J. Super. 561, 582 (App. Div. 2000), *aff'd o.b.*, 167 N.J. 155 (2001), the Appellate Division's requirement appears to demand significant discussion, not a mere mention, of every perceived weakness in the State's case.

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Conclusion

Because Mr. Watson's did not waive his effort to undermine Ms. Hill's identification and because the proofs against Mr. Watson were far from overwhelming, the error in admitting testimony that created the inescapable inference that a non-testifying law enforcement witness had information about Mr. Watson cannot be deemed harmless. As a result, and because a witness without firsthand knowledge was allowed to narrate the surveillance video and another witness was permitted to make a first-time, in-court identification, the Court should reverse Mr. Watson's conviction.

Respectfully submitted,

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DATED: February 6, 2023