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State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
P.O. Box 850
Trenton, NJ 08625-0850
TheDefenders@opd.nj.gov

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

JOSEPH E. KRAKORA
Public Defender

Tel: (609) 984-3804
Fax: (609) 292-1831

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Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments on Proposed Amendments to Rule 3:11
("Record of an Out-of-Court Identification Procedure")

Dear Judge Grant:

Please accept these comments on behalf of the Office of the Public Defender.

The OPD objects to the proposed amendments to subsection (c) of Rule 3:11, which fall short of guaranteeing the important protections enunciated in State v. Green, 239 N.J. 88 (2019). Additionally, the OPD joins a minority of the members of the Criminal Practice Committee in recommending that subsection (d) of the Rule be amended to incorporate the Court's holding in State v.

Anthony, 237 N.J. 213 (2019), which entitles defendants to a pretrial hearing to challenge the admissibility of identification evidence in cases where the Rule's recordation requirement was not followed.

First, the proposed subsection (c)(6), addressing the procedure when a police officer shows a witness photos from a digital database, limits the preservation requirement to photos "on the same screen" as the photo chosen by the witness. This proposed amendment should be modified to require preservation of all photos that the witness views in a digital database. The principle is the same as with a photo array: without being able to view all the photos, the litigants and court will not be able to detect if a photo chosen suggestively stood out because of clothing, features, hair, or myriad other reasons. For example, assume ten photos are retrieved from the digital database, and the witness chooses the only one that portrays a person with a beard. Such an identification would seem to be the product of unfair suggestion, yet this would not be apparent unless all ten photos were preserved. The typical digital system, however, presents photos one at a time, thereby not triggering the Rule's requirement that photos "on the same screen" as the chosen photo be preserved.

The limited preservation requirement in proposed subsection (c)(6) also fails to guard against the well-recognized risk of mugshot exposure in situations where no photo was initially chosen.

Assume that before the police have targeted a suspect, a person's photo is among those viewed in a digital database, but the witness does not identify anyone on that occasion. If that person happens to be included again as the target in a subsequent photo array or lineup, the prior exposure could cause the witness to conclude that the person "looks familiar"; the witness could then mistakenly identify the person as the perpetrator. See State v. Henderson, 208 N.J. 208, 255-56 (2011) (discussing mugshot exposure). This issue of mugshot exposure will never be detected if the police are not required to preserve the photos previously viewed in the digital database.

Just as the proposed (c)(6) requires preservation only of photos "on the same screen" as the one chosen, the proposed (c)(7) requires preservation only of photos "on the same page" as the one chosen. Like proposed (c)(6), proposed (c)(7) therefore fails to require preservation of photos that may be necessary for recognizing possible suggestiveness.

The burden and benefit of a comprehensive preservation requirement must be viewed in the context of the general unreliability of target-absent identification procedures. The prevailing view is that these procedures are conducive to mistaken identification because witnesses are prone to make relative judgments -- i.e., the witness chooses the "closest" match out of the choices presented, whether that choice was the perpetrator or

not. The problem is especially acute because no safeguard exists: unlike a photo array -- where the police know when a filler is chosen -- whoever is chosen from a mug book or database will become the suspect. See Joseph Goldstein, Jailing the Wrong Man: Mug Shot Searches Persist in New York, Despite Serious Risks, The New York Times, January 5, 2019; see also Henderson, 208 N.J. at 234-36 (discussing relative judgment).

More than two-thirds of New Jersey police departments appear to recognize the unreliability of target-absent procedures and follow the national trend and avoid any sort of target-absent identification procedure: neither mug books nor digital databases are used. See Green, 239 N.J. at 104-05. If a minority of police departments persist nonetheless, they should be required to preserve the entire photo trail to provide reasonable protection against unfair suggestiveness. Subsections (c)(6) and (c)(7) should require preservation of all photos that a witness views in a digital database or paper mug book.

Finally, the OPD joins the minority opinion expressed in the Criminal Practice Committee's report that Rule 3:11(d) should be amended to incorporate the entirety of the Court's holding in Anthony. In Anthony, the Court created an additional remedy to supplement the remedies already set forth in Rule 3:11(d) for violation of the recordation requirement, holding that:

> ...a defendant will be entitled to a pretrial hearing on the admissibility of identification evidence if Delgado and Rule 3:11 are not followed and no electronic or contemporaneous, verbatim written recording of the identification procedure is prepared. In such cases, defendants will not need to offer proof of suggestive behavior tied to a system variable to get a pretrial hearing. This approach supplements the other remedies listed in Rule 3:11(d).

Anthony, 237 N.J. at 233-234 (emphasis supplied). Following Anthony, therefore, the possible remedies for a violation of the Rule 3:11 recordation requirement include the three remedies already set forth in subsection (d) (suppression of the identification, redaction of the identification testimony or creation of a jury charge) and the new, fourth remedy articulated by the Court in Anthony (automatic right to a pretrial hearing).

Consistent with Anthony, a minority of the members of the Criminal Practice Committee urged that the following language be added to the list of remedies already delineated in Rule 3:11(d):

> When no electronic recording or contemporaneous, verbatim written account of the identification procedure has been made, the defendant shall be entitled to a pretrial hearing concerning the admissibility of any identification by the witness involved regardless of a lack of evidence of suggestive behavior by the officers involved in the procedure. At the hearing, counsel shall be free to explore the full range of identification variables.

Report and Recommendation to the Supreme Court from the Criminal Practice Committee Regarding Rule 3:11 ("Recordation of an Out-

of-Court Identification Procedure"). The committee majority declined to include this language in its proposed amendments to Rule 3:11 absent a specific instruction from the Court to do so.

Amending the Rule to include this remedy is not only consistent with Anthony, it is necessary to effectuate the Court's holding. Quite simply, Rule 3:11 identifies the possible remedies for a violation of the Rule and, following Anthony, that list of remedies is no longer comprehensive. Omission of the fourth remedy, creating the right to a pretrial hearing on admissibility, would create an inconsistency between Anthony and Rule 3:11.

In sum, it is the OPD's position that proposed subsections (c)(6) and (c)(7) of the Rule are insufficient to protect against suggestive identification procedures and that subsection (d) should be amended to incorporate the remedy pronounced by the Court in Anthony.

Thank you for your consideration of these comments.

Respectfully submitted,

s/ *Joseph E. Krakora*

JOSEPH E. KRAKORA
PUBLIC DEFENDER