NOTICE TO THE BAR

PROPOSED AMENDMENTS TO COURT RULE 3:11 ("RECORD OF AN OUT-OF-COURT IDENTIFICATION PROCEDURE") – PUBLICATION FOR COMMENT

By this notice the Supreme Court invites written comments on proposed amendments to Court Rule 3:11 ("Record of an Out-of-Court Identification Procedure").

The Court in State v. Anthony, 237 N.J. 213 (2019), and State v. Green, 239 N.J. 88 (2019), had asked the Criminal Practice Committee to review and make recommendations for refinements to Rule 3:11. The Court in Anthony requested specific revisions to Rule 3:11 to provide greater clarity concerning the preference for electronic recordation of identification procedures and its requirement for law enforcement to explain why such recordation was not feasible. 237 N.J. at 231-232. In Green, the Court requested revisions to Rule 3:11 to provide clearer guidance about the type of evidence law enforcement should preserve when a witness identifies a suspect from a digital or electronic database. 239 N.J. at 107-108. The Court asked the Committee to conduct its review on an expedited basis, delaying implementation of its ruling in Green until thirty days after adoption of the requisite amendments to the rule.

The Practice Committee completed its expedited review and provided the Court with a report setting out numerous revisions to paragraphs (a) ("Recordation"), (b) ("Method and Nature of Recording"), and (c) ("Contents"). The Practice Committee discussed but did not recommend revisions to paragraph (d) ("Remedy"). The Court reviewed the Practice Committee's report and recommendations and determined to make certain revisions to the proposed amendments to be published for comment based on that initial review.

Accordingly, appended to this notice are (1) the proposed amendments to Rule 3:11, representing the Practice Committee's suggestions as supplemented by the Supreme Court, and (2) the Practice Committee's report as provided to the Court, but with a general notation that the amendments proposed here vary from the committee's initial proposed language and without the committee's initial full-text proposal. The Court requests comments on the appended proposed amendments. To the extent that commenters may wish to express views on the Practice Committee's report and analysis, those comments may be submitted as well.

Please send any comments in writing by February 7, 2020 to:

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Proposed Amendments to Rule 3:11 ("Record of an Out-of-Court Identification Procedure")
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Comments may also be submitted by email to: Comments.Mailbox@njcourts.gov.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address and those submitting comments by email should include their name and email address. Comments submitted in response to this notice are subject to public disclosure.

Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: December 31, 2019

[PROPOSED AMENDMENTS TO RULE 3:11 ON WHICH THE SUPREME COURT REQUESTS COMMENTS]

RULE 3:11. RECORD OF AN OUT-OF-COURT IDENTIFICATION PROCEDURE

(a) Recordation. [An out-of-court identification resulting from a photo array, live lineup, or showup identification procedure conducted by a] A law enforcement officer shall [not be admissible unless a record of the identification procedure is made.] make a record of an out-of-court identification based upon a visual depiction or physical display of an individual. The visual depiction may consist of photographs or images fixed in any medium now known or later developed.

(b) Method [and Nature] of Recording. A law enforcement officer shall [contemporaneously] electronically record the out-of-court identification procedure in [writing, or, if feasible, electronically] video or audio format, preferably in an audio-visual format. [If a contemporaneous record cannot be made, the officer shall prepare a record of the identification procedure as soon as practicable and without undue delay. Whenever a written record is prepared, it shall include, if feasible, a verbatim account of any exchange between the law enforcement officer involved in the identification procedure and the witness. When a written verbatim account cannot be made, a detailed summary of the identification should be prepared.] If it is not feasible to make an electronic recording, a law enforcement officer shall contemporaneously record the identification procedure in writing and include a verbatim account of all relevant verbal

and non-verbal exchanges between the officer and the witness; in such instances, the officer shall explain in writing why an electronic recording was not feasible. If it is not feasible to prepare a contemporaneous, verbatim written record, the officer shall prepare a detailed written summary of the identification procedure as soon as practicable and without undue delay, and explain in writing why an electronic recording and a contemporaneous, verbatim written account were not feasible.

(c) Contents. The record of an out-of-court identification procedure is to include the relevant details of what occurred at the out-of-court identification, including but not limited to the following:

(1) the place where the procedure was conducted;

(2) the relevant dialogue between the witness and the officer(s) who administered the procedure;

(3) the results of the identification procedure, including any identifications that the witness made or was unable [attempted] to make;

(4) if a live lineup, then a picture of the lineup;

[(5) if a photo lineup, the photographic array, mug books or digital photographs used;]

(5) if a photographic array or sequential photo display, then the photos displayed;

(6) if a digital database, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same screen;

(7) if a paper mug book, then any photos the witness selected as the suspect, or as someone who resembled or looked similar to the suspect, along with all other photos on the same page;

(8) [(6)] the identity of persons who were present at the out-of-court identification procedure [witnessed the live lineup, photo lineup, or showup];

(9) [(7)] a witness' statement of confidence, in the witness' own words, once an identification has been made; and

(10) [(8)] the identity of any individuals with whom the witness has spoken about the identification procedure, at any time before, during, or after the official identification procedure, and a detailed summary of what was said. This includes the identification of both law enforcement officials and private actors who are not associated with law enforcement.

(d) Remedy. ... no change

Note: Adopted July 19, 2012 to be effective September 4, 2012; paragraph (a) amended, paragraph (b) caption and text amended, and paragraph (c) amended ___ to be effective ____.

REPORT AND RECOMMENDATION TO THE SUPREME COURT FROM THE CRIMINAL PRACTICE COMMITTEE REGARDING RULE 3:11 ("RECORD OF AN OUT-OF-COURT IDENTIFICATION PROCEDURE")

The Committee is proposing amendments to R. 3:11 in accordance with the Supreme Court's request in State v. Anthony, 237 N.J. 213, 231-232 (2019), and State v. Green, 239 N.J. 88, 107-108 (2019). The Court further requested the revisions on an expedited basis, and delayed implementation of its ruling in Green until thirty days from the date it approves rule revisions.

Specifically, the Anthony decision requested revisions to R. 3:11 to provide greater clarity concerning the Court's preference for electronic recordation of identification procedures and its requirement for law enforcement to explain why such recordation was not feasible. 237 N.J. at 231-32. In Green, the Supreme Court requested revisions to R. 3:11 to offer clearer guidance about the type of evidence law enforcement should preserve when a witness identifies a suspect from a digital or electronic database. 239 N.J. at 107-108.

> **[Note: The Supreme Court supplemented the proposed amendments to the rule being published for comment. Thus, the proposed amendments do not in all instances track the language in this Practice Committee report.]**

1. Proposed Amendments to R. 3:11

Paragraph (a) – "Recordation"

The Committee recommends modifications to the first sentence of paragraph (a) to remove the language addressing compliance with the rule's documentation procedures as

a condition precedent to admissibility. This language appears to directly conflict with the Supreme Court's decision not to adopt a per se rule excluding the evidence any time a full record of an identification is not preserved. See Green, slip op. at 30 (citing to Anthony, 237 N.J at 239 and State v. Henderson, 208 N.J. 208, 303 (2011)). The Court further noted that the equivalent suppression remedy is one of "last resort," and instructed judges to "explain why other (lesser) remedies in R. 3:11(d) are not adequate before barring identification evidence." Green, ibid.

Additional proposed amendments require law enforcement to make a record of an out-of-court identification procedure based upon a "visual depiction or physical display of an individual." A visual depiction is distinguished from a verbal description of an individual in terms of gender, race, ethnicity, height, weight, complexion, tattoos and other distinguishing characteristics. A "physical display" would encompass show-ups and line-ups. The term "individual" is used to avoid the distinction, drawn by the Green Court, between the viewing of previously identified suspects and randomly listed individuals. Slip op. at 9-10, 21-22.

The last sentence was added to broadly define a "visual depiction" to include media such as single photographs, sequential photo displays, photo arrays, paper mug books, and digital and/or electronic databases. Green, slip op. at 26-27. To provide flexibility for technological advancements, the proposed language includes visual depictions "fixed in any medium now known or later developed." Cf. 17 U.S.C. § 101 (Federal copyright law).

Paragraph (b) – "Method of Recording"

The caption for this paragraph was simplified in accordance with the description in Anthony that this paragraph "speaks to the method of recording." Id. at 229 [emphasis added]. To conform with the Court's request that this paragraph "more clearly state the order of preference for preserving an identification procedure," this paragraph was revised to set forth the hierarchy for preservation of this information. Anthony, 237 N.J. at 231.

Specifically, the Court stated:

> *Rule* 3:11(b) should be revised along the following lines: Officers are to record all identification procedures electronically in video or audio format. Preferably, an audio-visual record should be created. If it is not feasible to make an electronic recording, officers are to contemporaneously record the identification procedure in writing and include a verbatim account of all exchanges between an officer and a witness. If a contemporaneous, verbatim written account cannot be made, officers are to prepare a detailed summary of the identification as soon as practicable.
> [Id.]

Accordingly, the first sentence of paragraph (b) was revised to require law enforcement to "electronically" record the "out-of-court identification in audio-visual electronic format." When an audio-visual electronic recording is not feasible, law enforcement is then directed to "electronically record the identification procedure in audio format, document all relevant non-verbal exchanges between the officer and the witness, and document the reasons why an audio-visual electronic recording was not feasible." [Emphasis added.] See Anthony, 237 N.J. at 232.

A determination of whether information is "relevant" for purposes of this rule would be made through reference to State v. Delgado, 188 N.J. 48 (2006), and its progeny in order

to document the identification procedure so that defense counsel could effectively challenge the suggestiveness of the underlying identification procedure and, ultimately, the reliability of any resulting identification. See Delgado, 188 N.J. at 64; State v. Earle, 60 N.J. 550, 552 (1972). Thus, "relevant" information would be information that is probative of suggestiveness or the reliability of the identification.

Consistent with Anthony, the proposed language addresses instances where no form of electronic audio-visual or audio recording is feasible by requiring the officer to "contemporaneously record the identification procedure in writing, including a verbatim account of all relevant verbal and non-verbal exchanges between the officer and the witness." The officer is also required to document the reasons why an audio-visual or audio electronic recording was not feasible. See Anthony, 237 N.J. at 231.

The last sentence in this paragraph addresses instances where it is not feasible to prepare a contemporaneous, verbatim written record. In that case, the proposed language requires the officer to prepare a "detailed written summary of the identification procedure as soon as practicable and without undue delay." Ibid. Additionally, the officer is to document the reasons why none of the three preferred methods for making a record of the out-of-court identification was feasible. See Anthony, 237 N.J. at 232.

Paragraph (c) – "Contents"

This paragraph addresses the information that law enforcement is to include in the record of an out-of-court identification. The Committee is proposing revisions in accord with the Court's direction that this rule be updated to address what administrators should

preserve when a witness views a database of digital photos or a paper mug book to allow for appropriate review of an out-of-court identification. Green, slip op. at 26-27.

The first sentence was amended to specify that the record should include the "relevant" details of what occurred at the out-of-court identification. The phrase "but not limited to" was added after the word "including" to acknowledge that there could be other information that law enforcement should include in the record beyond the types of information specified in subparagraphs (c)(1) through (c)(11).

Subparagraph (c)(2) was revised to note that the record should include "relevant" dialogue with the witness and also recognizes that more than one officer may have administered the procedure.

Subparagraph (c)(3) was amended to clarify that the record should include any identifications that the witness made or "was unable" to make.

Current subparagraph (c)(5) includes a broad spectrum of medium, such as a photo lineup, photographic array, mug books or digital photographs. However, for ease of reference, separate subparagraphs are proposed for the various formats.

For example, proposed subparagraph (c)(5) now addresses "show-ups," instead of being grouped with other formats in current subparagraph (c)(6). If there is a live show-up, the proposed language also requires a "picture of the show-up."

Proposed subparagraph (c)(6) addresses instances where a "photographic array or sequential photo display" is used, and if so requires inclusion of the "photos displayed."

Proposed new subsections (c)(7) and (c)(8) conform with the Court's requirements for out-of-court identifications that used a digital database or paper mug book.

Specifically, the Court directed administrators to preserve: (1) the photo of the suspect the witness selected, along with all other photos on the same screen or page, and (2) any photo that a witness says depicts a person who looks similar to the suspect, along with all other photos on that screen or page. Green, slip op. at 27.

For stylistic reasons, current subparagraph (c)(6) has been moved to subparagraph (c)(9). The proposed language for subparagraph (c)(9) clarifies that the record should include all persons who "were present at the out-of-court identification procedure," i.e., the administrators or persons in the room assisting with the identification process. The use of "out-of-court identification procedure" is intended to encompass all types of procedures, regardless of the media used for the identification.

Current subparagraphs (c)(7) and (c)(8) have been renumbered to subparagraphs (c)(10) and (c)(11) respectively. For consistency with the terminology in this rule, subparagraph (c)(11) was revised to state identification "procedure."

2. Language Considered and Not Recommended

Paragraph (d) – "Remedy"

The Committee is not proposing any amendments in paragraph (d) because the Anthony referral was limited to the Court's request for this rule to state its preference for electronically preserving an identification procedure and requirements for law enforcement to document its reasons for not having done so. See Anthony, 337 N.J. at 232. This preference was expressed in Part IV of the Anthony opinion and is addressed in paragraphs (a) through (c) of this Rule. In the last sentence of Part IV, the Anthony Court "ask[ed] the

Criminal Practice Committee to review Rule 3:11 consistent with the above principles." Id. (emphasis added). The impact of a failure to record the identification procedure upon a defendant's entitlement to an evidentiary hearing that would address the admissibility of the underlying identification was addressed in Part V of the Anthony opinion, after the referral. Id. at 232.

Notwithstanding the express language of the Anthony opinion, members in the minority propose adding the following two sentences at the end of paragraph (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.

These members believe that this language would also be more readily available for counsel to cite if included in the rule, rather than citing to the Supreme Court decision. Since the Court's Anthony decision is published and readily available to counsel, the majority found this "availability" argument unpersuasive.

In addition to the limited scope of the Supreme Court's referral, the majority rejected this proposal because in Part V of its opinion, the Anthony Court expanded the grounds upon which the defendant may obtain a full Henderson hearing. Id. at 233. In its landmark Henderson decision, the Court required defendant to "present some evidence of suggestiveness tied to a system variable which could lead to a mistaken identification." 208 N.J. at 288-89. The Anthony Court expanded these grounds to include law enforcement's failure to document an "important" or "significant" detail of the underlying identification

procedure. 237 N.J. at 233-234. The Anthony Court emphasized that this failure to document was sufficient to trigger a full Henderson hearing, regardless of any independent evidence of suggestiveness. Id. at 233.

The majority viewed this is as a significant expansion of the Henderson methodology. By characterizing a failure to document as an "important detail" and linking that documentation deficiency to the remedy of a full Henderson hearing, the Anthony Court significantly expanded the range of remedies available for failure to document such "important details." In dictum, the Anthony Court distinguished such "important details" from "technical violations," "technical omissions," and "insignificant errors" in documenting out-of-court identification procedures as required by R. 3:11. See id. at 238-39. Anticipating that the contours of these distinctions will be developed through subsequent judicial decisions, the majority chose to allow this case law to further develop before seeking to address through rulemaking the significant interrelated issues of documentation deficiencies and appropriate remedies.

Therefore, the Committee is not recommending any revisions to paragraph (d).

* * *

[**Note:** While the complete text of the Practice Committee's report to the Court is included with this notice, the proposed amendments as submitted to the Court by the Practice Committee are not. Rather, the proposed amendments included represent the language from the Practice Committee as refined and supplemented by the Court after its initial review.]